No. 21-7335

(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

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## ARGUMENT IN REPLY

The State's Brief in Opposition (BIO) contains no cogent legal argument. It relies on a stream-of-consciousness jumble of "facts," cherry-picked largely from a trial record that is the product of prosecutorial misconduct and junk science. Presumably, the State's goal is to suggest that the case of an indigent individual on death row, who has been unable to present evidence of his innocence and of the rampant prosecutorial misconduct that enabled his wrongful conviction, is unworthy of this Court's attention because the matter is so fact-intensive. Yet the State's misleading presentation underscores the urgency of the legal issues presented. Actual facts, *i.e.*, the truth, should matter; and the State's frenetic effort to obscure the facts now known exemplifies the systemic denial of due process in state habeas proceedings in Texas death-penalty cases, a phenomenon that has resulted in overburdening federal courts to which habeas applicants have been forced to turn in search of a full and fair hearing. *See, e.g.*, *Reed v. Goertz*, Supreme Court No. 21-442 (granting petition in Texas death-penalty case challenging integrity of 1998 conviction); *but see Shinn v. Jones*, 596 U.S. __ (May 23, 2022) (curtailing federal courts' ability to assess constitutional failures accounting for wrongful state-court convictions).

### I. The State Makes No Defensible Legal Argument.

The State contends that the Texas Court of Criminal Appeals ("CCA") refused to consider the merits of any of the new claims in Flores's subsequent habeas application because the CCA correctly concluded that these claims were procedurally barred. BIO at 18. The State characterizes this result as an adequate and

independent state-law ground that precludes federal review. The State then devotes many pages to speculating about how the CCA may have reached that conclusion. The CCA itself did not explain how it had concluded that the basis for each of 10 distinct claims, supported by 826 pages of briefing and volumes of evidentiary proffers, could have been discovered sooner. *Compare* AppA *with* AppB. The CCA's entire analysis consists of two conclusory sentences: "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. Art. 11.071, § 5(c)." App004.

To satisfy the state procedural rule at issue, a death-sentenced habeas applicant in Texas must establish that "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 … because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a)(1). An antecedent state-law ground for denying review is "adequate" only if it is (1) not arbitrary, unforeseen, or otherwise deprives the litigant of a reasonable opportunity to be heard, *see Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958), and (2) does not impose an undue burden on the ability of litigants to protect their federal rights, *see Felder v. Casey*, 487 U.S. 131, 138 (1988). The application of the state procedural rule at issue here was arbitrary ***and*** imposes an undue burden on the litigant.[1]

[1] Ironically, the elected District Attorney whose name appears on the BIO's cover recently signed a statement issued by "Fair and Just Prosecution," acknowledging that the death penalty is

### A. The application of the operative state procedural rule was arbitrary.

The application of the state procedural rule in Article 11.071, section 5 was arbitrary because it could not have been based on a good-faith understanding of the factual basis of Flores's claims: information suppressed by the prosecution that, even after Flores started to uncover it, the State expressly insisted be kept from the court adjudicating his previous habeas application. App071-072. The State fails to acknowledge that it moved to strike virtually all of Flores' witnesses during the only post-conviction evidentiary hearing he ever received; and the State successfully argued that no issue other than the challenge to the reliability of a hypnosis session that a police officer had conducted on a witness should or could be considered during that hearing.[2] App0072.

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plagued by arbitrariness and is so "broken" the signatories have pledged "to work together toward systemic changes that will bring about the elimination of the death penalty nationwide." *Available at* https://fairandjustprosecution.org/wp-content/uploads/2022/02/FJP-Death-Penalty-Joint-Statement-2022.pdf (accessed May 13, 2022). Flores's case is an object lesson in brokenness.

[2] It is noteworthy that the State makes only a passing reference to the outlandish hypnosis session that was the subject of Flores's first subsequent state habeas proceeding. BIO at 12. Although the State has zealously defended the hypnosis performed on a key trial witness, the Texas Rangers who previously promoted the practice have since decided to abandon the practice. *See* L. McGaughy, *Texas Rangers stop using hypnosis after Dallas Morning News investigation reveals dubious science*, DALLAS MORNING NEWS (Mar. 11, 2021) *available at* https://www.dallasnews.com/news/investigations/2021/03/11/texas-rangers-stop-using-hypnosis-after-dallas-morning-news-investigation-reveals-dubious-science/ (accessed May 18, 2022). The hypnotized witness, the Blacks' next-door neighbor Jill Barganier, was the *only* person to identify either of the two men seen getting out of a strange Volkswagen Beetle the morning of the murder in front of the Blacks' house. No other neighbors made any identification. App394. The trial testimony of another neighbor, Michelle Babler, differed considerably from the description in an affidavit she signed the day of the murder, which included only a vague description of "two white males," including one wearing tan coveralls. At trial, thirteen months later, Babler purported to be able to describe the passenger's build and changed her description of the passenger's clothes. App428. Neither Babler nor Barganier were cross-examined about the notable differences between the initial descriptions they had provided police and their trial testimony—because it is unclear if the defense received any discovery regarding their initial descriptions before trial. It is certain, however, that the jury did not receive complete information because a great deal—such as Barganier's initial statement to police—has still never been produced.

Flores started to uncover evidence of rampant prosecutorial misconduct only *after* his execution was stayed in June 2016 and he was finally afforded a right to discovery. Then the State actively *prevented* development of any of the misconduct evidence in the 2016 habeas proceeding. Therefore, Flores marshaled the new evidence—of, for instance, the numerous undisclosed deals made with the State's trial witnesses, circumstantial evidence of mid-trial evidence-tampering, massive discovery failures, and post-conviction collusion between ineffective trial counsel and the State—in a second subsequent habeas application. *Now* the State argues that all of that new evidence was properly ignored below because he could have presented it in his 2016 habeas application. This dizzying "heads-we-win-tails-you-lose" argument is even more remarkable in light of how State actors, since the 2016 proceeding, have continued to resist disclosing material *Brady* information.[3]

### B. The application of the operative state procedural rule imposes an undue burden.

The application of the state procedural rule to the claims raised in Flores's second subsequent state habeas application has imposed an undue burden. The undue nature of the burden is apparent upon considering the State's notion that the factual and legal basis of his new claims should all be considered "available" when he filed his previous state habeas application in 2016. The concept of "availability" should not be based on assumptions that indigent individuals on death row possess (1) unlimited resources to investigate and litigate; (2) clairvoyance; and (3) the power

[3] In May 2022, the week its BIO was filed, the State produced, ***for the first time***, additional information relevant to undisclosed deals the prosecution had made with multiple trial witnesses.

to will dishonest actors into admitting to their own dishonest conduct.[4] Yet the State's arguments hinge on these absurd premises.

Texas does not even provide for death-sentenced individuals to have counsel or a right to discovery of any kind beyond an initial state habeas proceeding unless and until the CCA gives "the convicting court … notice that the requirements of Section 5(a) for consideration of a subsequent application have been met." TEX. CODE CRIM. PROC. art. 11.071, sec. 6(b-1). This means that a person on Texas's death row is not entitled to counsel for state court proceedings until counsel, on her own and generally without resources, manages to discover the factual and legal basis for claims and then convinces the CCA that the habeas applicant will "likely" be awarded relief. *See, e.g.*, *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) (interpreting section 5 as requiring that: "1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence."). Arguably, the CCA's interpretation of the relevant statutory text erects an impossible barrier, as almost no habeas applicant is ever awarded relief; thus, it is never "likely" relief will be awarded despite what the facts suggest about the merits of any given claim.

Meanwhile, the Fifth Circuit has held that counsel appointed under 18 U.S.C.

[4] The State, for instance, argues that Flores's vast evidence that the State relied on false testimony at trial should all be disregarded because Flores did not obtain affidavits from all of the witnesses who had lied at trial admitting to their lies. BIO at 35-36. Similarly, the State argues that, because one of the State's trial experts (Linch) has now recanted his testimony, his false testimony should be disregarded because he somehow could have been induced to recant sooner.

§ 3599 of the Criminal Justice Act to represent death-sentenced individuals in *federal* proceedings cannot ever expect to be paid or receive funding to investigate unexhausted claims to be presented in state habeas proceedings. *See Storey v. Lumpkin*, 8 F.4th 382 (5th Cir. 2021) (affirming denial of compensation for legal work for subsequent state habeas proceedings involving prosecutorial misconduct after finding the state proceedings "outside the scope of counsel's federal appointment pursuant to § 3599").[5]

That is, death-sentenced individuals cannot be assured legal representation to investigate and then establish the right to get back into state court to prove a wrongful conviction except as a matter of luck, largesse, and personal outrage. *See, e.g.*, the recent example of Melissa Lucio, whom Texas was poised to execute last month: her case attracted the attention of non-profit entities, including the national Innocence Project, which devoted considerable pro bono resources to developing, for the first time, evidence of Lucio's actual innocence, of prosecutorial misconduct, and of the unreliable science that had been used to convict her back in 2008.[6] But not every person on death row has the ability to attract international media attention—nor should that be a prerequisite for obtaining due process from the state that is endeavoring to execute people.[7]

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[5] To date, undersigned counsel has received no compensation for representing Mr. Flores since her appointment as substitute counsel in 2020.

[6] The Death Penalty Information Center provides a brief overview of the status of Lucio's case: *Texas Court of Criminal Appeals Stays Melissa Lucio's Execution and Orders Hearing on Her Innocence Claims* (April 25, 2022), *available at* https://deathpenaltyinfo.org/news/texas-court-of-criminal-appeals-stays-melissa-lucios-execution-and-orders-hearing-on-her-innocence-claims (accessed May 14, 2022).

[7] *See* K. Blakinger and M. Chammah, *Everyone on Death Row Gets a Lawyer. Not Everyone Gets a Kim Kardashian*, THE MARSHALL PROJECT (July 16, 2021), *available at*

Because the CCA dismissed Flores's subsequent state habeas application without considering the claims' merits,[8] Flores, like many on Texas's death row, must depend on whatever pro bono support he can muster from inside a 6x9 cell. Flores's efforts have been hampered from the outset—first by woefully ineffective counsel who did not even ask for a continuance when trial began before they had received *any* discovery. App333-340. Then, after Flores's conviction, during his initial, critical opportunity to investigate and bring extra-record habeas claims, Flores was abandoned by counsel. Letters that were long ago made part of the record (and to which the BIO alludes) show that initial state habeas counsel *admitted* doing no investigation of any kind and spent most of his limited time on the case trying to withdraw. For a brief moment, a disbarred attorney was retained to do some investigation, but that investigation never occurred. After Flores's initial state habeas counsel eventually convinced the trial judge to replace him, another lawyer who never even bothered to pick up the record and was threatened with contempt of court, became counsel in name only. That lawyer never did any work, never made any appearances, and never ensured that Flores even saw the State's response to the initial state habeas application.[9] No evidentiary hearing was held in that initial habeas proceeding. Ap063-065. The only thing that happened was that counsel for

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https://www.themarshallproject.org/2021/07/16/everyone-on-death-row-gets-a-lawyer-not-everyone-gets-a-kim-kardashian (accessed May 14, 2022).

[8] The treatment that Flores's subsequent habeas application received is a common occurrence in Texas death-penalty cases. *See, e.g.*, *Ex parte Rodney Reed*, No. WR-50,961-07, 2017 WL 2131826 at *1 (Tex. Crim. App. May 17, 2017) ("We find that applicant has failed to make a prima facie showing on any of his [federal] claims. . . . Accordingly, the application is dismissed as an abuse of the writ without reviewing the merits of the claims.").

[9] The initial state habeas application consisted primarily of non-cognizable claims and pages of block quotations lifted from caselaw.

the State coordinated with Flores's former trial counsel to prepare affidavits throwing Flores under the bus by claiming that he had "confessed" to being present at the crime scene, so as to excuse counsel's ineffectiveness in failing to put on his alibi witness who was present in the courthouse each day of trial waiting to be called. App186-203. To this day, the State continues to invoke those affidavits, which have never been subjected to adversarial testing and are, on their face, unworthy of credence. BIO at 28-29; *but see* App441-456 (delineating the inconsistencies and inaccuracies in the State's affidavits, signed by individuals whom Flores was expressly prevented from calling as witnesses and cross-examining during his previous habeas proceeding).

The same empty notion of process is evident in the State's discussion of one of the new expert declarations filed below in support of Flores's actual innocence claim. *Inter alia*, the actual innocence claim relies on a scientific consensus that emerged ***in 2020.*** Yet the State argues that this new science should be viewed as having been "available" when his previous habeas application was filed in 2016 because some authorities cited in the 2020 scientific paper by Dr. John Wixted, et al, date back to 2016 or before. BIO at 24. This argument is akin to suggesting that a 2022 Supreme Court decision announcing new law should not be considered new law if the Court's opinion cites any legal authorities that predate the 2022 decision.

Similarly nonsensical is the State's argument as to why evidence of rampant prosecutorial misconduct was previously "available." Simply because facts indicating prosecutorial misconduct *existed* does not mean that those facts were "discoverable

through the exercise of reasonable diligence" when State actors had zealously endeavored to conceal those facts. *See* App093-422.

The State's Kafkaesque arguments, ultimately, establish the urgency of the issues Flores presents to this Court.

## II. The State Relies on a Confusing and Fallacious Portrait of Decontextualized "Facts."

Because the State made no substantive legal argument, there is little law to rebut. By contrast, the factual misrepresentations to rebut are legion. Because of the limits of space and time, rebutting a few egregious examples must suffice.

The BIO paints a false portrait of the tenuous, jerry-rigged case the State tried over two decades ago. This strategy, while effective at demonizing Flores, is specious. Without acknowledging the source, the BIO relies primarily on trial testimony from co-defendant Richard Childs' accomplice, Jackie Roberts. BIO at 5-8. Jackie was the drug-addicted daughter-in-law of the murder victim, whom witnesses had described as "extremely irate" the day before the murder because the Blacks had cut her "allowance" from her estranged husband's drug money in half. App112. Jackie, who was sleeping with and dealing drugs for Childs, had provided Childs with a map to the Blacks' house, the Blacks' garage door opener, and information about the Blacks' morning schedules—and then lied about these details at trial; it was also kept from the jury (and the defense) that Jackie had admitted to the lead prosecutor, well before trial, that *she* had planned the burglary with Childs and that ***Childs had shot Mrs. Black***. App283-288. Yet the BIO recounts Jackie's self-serving testimony, during

which she was caught in multiple lies and is now known to have intentionally concealed considerably more, as if it were an accurate portrait of events. BIO at 5-6.

Likewise, the BIO glosses over the irreconcilable contradictions in testimony from various drug addicts with legal problems, including Jackie and one of Childs' other girlfriends, who both tried to put Childs and Flores together soon before the murder—but in two *different* places. The State treats this evidence as corroborating when, in fact, it was self-deconstructing. Moreover, the testimony of these two interested witnesses contradicted the timeline attested to by other trial witnesses, including Jackie's ex-husband who helped her destroy evidence after Mrs. Black's death. *Compare* BIO at 6 *with* App289-390.

Perhaps the most disturbing aspect of the BIO is the State's disingenuous recourse to a bogus "dog-was-killed-by-a-bigger-gun" hypothesis. *See, e.g.*, BIO at 3.

It is undisputed that two males entered the Blacks' garage and, soon thereafter, the bodies of Mrs. Black and her dog were found shot dead. A bullet and shell casing associated with a .380, some "potato splatter," and a freshly chewed wad of green gum were found near the bodies. Ballistics testing soon established that Mrs. Black had died from gunshot wounds from a .380 caliber gun, which was never found. A different .380 was introduced into evidence, even though it had been expressly *excluded* as the murder weapon. No evidence established the kind of bullet that had killed the Blacks' dog. But a "bigger gun," a .44 magnum pistol that had been found in a closet at Childs' grandmother's house after his arrest, was introduced into evidence. The State claimed in its Opening Statement that Childs had used this

"bigger gun" to shoot the dog. The problem was: no evidence supported that claim. The medical examiner expressly *rejected* the suggestion that the dog's wounds indicated that it had been shot by a gun bigger than the .380. App358-359. Also, during a bizarre custodial interview that the jury did not hear, Childs had admitted "my .44 [the bigger gun] was never used" at the Blacks' house.[10]

Nevertheless, at trial the lead prosecutor wanted to put the .44 magnum in Childs' hand (1) to decrease his culpability and thereby justify a sweetheart plea deal that was in the works for him even before Flores's trial;[11] and (2) to support the State's hypothesis that Flores had not only been present but had been the one to shoot Mrs. Black with a .380. The State's "solution" to its lack of evidence was Charles Linch.

Linch was a trace-evidence analyst with close ties to the trial prosecutors. He then worked for the Dallas crime lab aka "SWIFS."[12] In the middle of trial, Linch was enlisted to "check[] for Potatoes" in the barrel of the .44 magnum that had been lying around the DA's office after the chain of custody was broken; the prosecutors wanted a basis to support its "Childs-used-the-bigger-gun-to-shoot-the-dog" argument before

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[10] During that friendly custodial interview conducted several days after the murder, Childs also acknowledged "*You make me do this shit, man*" to the officers who were feeding him the story he was to tell. Additionally, Childs alluded to another, unnamed male, seemingly known to law enforcement, who had been with Childs and had Childs' "bag up till that night when" Childs was finally arrested, after law enforcement had allowed him to spend hours holed up with Jackie coordinating a story and destroying evidence. App253-262. The BIO's reliance on Childs' custodial interview, in which Childs was encouraged to implicate Flores in response to leading and racist questioning, is not just highly selective but unprincipled.

[11] Well before trial, Jackie had told the lead prosecutor that Childs had shot Mrs. Black, but this evidence was concealed. Meanwhile, both Jackie and Childs received undisclosed, exceptionally generous deals. Jackie was not prosecuted at all despite multiple probation violations after her arrest and Childs ended up serving only 15 years and has since been paroled. New evidence that his deal was in process even before Flores was tried was attached to the underlying habeas application but no court has ever considered it. App133-142.

[12] "SWIFS," aka the Southwest Institute of Forensic Sciences, was not an accredited lab until years after Linch's employment there. App563-569.

trial ended; the presence of potatoes would suggest that this particular "bigger gun" had been at the scene in light of potato splatter found there. App361. The State speculated that potato splatter showed that potatoes had been used as "silencers." At trial an investigator and a firearm examiner contradicted each other as to how a potato might work as a silencer, and both admitted that they had no experience on this front. Seemingly, this concept must be classified in the category of lamebrained ideas associated with mobster myths. App344-345. The BIO's multiple allusions to this aspect of the Flores case ignores what is now known about how the "potato" evidence was obtained and what it does and does not suggest. *See* App360-373 (documenting how the misleading "potato" evidence was obtained and presented at trial and why the false testimony was material). A post-conviction expert in crime lab standards identified these concerning facts (App573-575, 363):

- Linch was a disgruntled, recovering alcoholic who expressly defined his worth as someone who had "a direct role in putting people on death row";
- Linch was contacted by the lead prosecutor on the case during trial;
- the prosecutor gave Linch specific directives about what the prosecutor wanted Linch to find;
- Linch's "testing" was then performed that same day, memorialized in a short report that was not vetted by any other SWIFS employee; and
- the very next day, Linch testified, disclosing only his report, without the underlying notes that actually contradict his "potato starch" finding and expose the standardless nature of his approach.

The State's BIO acknowledges that Linch has recently disavowed the legitimacy of his testing and testimony. But the State ignores that Linch was unwilling to offer opinions about his role in this 1999 case until his file notes were

obtained—which only occurred *after* Flores's execution was stayed in 2016 and only because of a behind-the-scenes intervention by an employee with the local Conviction Integrity Unit. App0073, 550, 556-559, 569.

After reviewing his file in light of what he knows today, Linch made several salient points. For instance, the information he was provided at trial was inadequate: He was not told "why or how the DA's Office believed that there might have been potato starch inside the barrel of the .44 Magnum." App578. Also, the testimony was rushed: Linch was asked to go to court the day after his hasty examination and the drafting of his one-paragraph report. Moreover, looking back from the perspective of greater experience and education at a forensic lab with quality controls, Linch was struck by the absurdity of the State's trial argument in light of basic laws of physics and chemistry. He explains the problem in readily accessible terms (App580):

- "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. I would certainly expect potato residues to be found inside the barrel if the gun is *not* fired after the potato is jammed on and removed... Starch gelatinizes at about 60 degrees C (140 degrees F) and starch is soluble in boiling water, 100 degrees C (212 degrees F)."

- "Gunpowder ignites at temperatures higher than the decomposition temperatures of potato starch. A small explosion occurs in the barrel when the gun is fired. In addition, before the intense temperatures from that explosion travel the gun barrel, the tight-fitting bullet travels the barrel removing some foreign materials from the barrel."

- "Experimentation would be required to see if intact starch particles can be found in a gun barrel (.44 cal) after firing with a potato jammed on the barrel."

Putting these pieces together, Linch now recognizes that the inferences the prosecutors were attempting to make in 1999, which they did not share with Linch

before or after he testified, "***have not been***, to [his] knowledge, ***proven by science***. The ability of potato residues to persist in a gun barrel after it has been fired is not, seemingly, known." *Id.* (emphasis added). That is, there is no legitimate basis for believing that a gun fired with a potato jammed on the end of it on January 29, 1998, would still have potato residue inside the gun's barrel on March 23, 1999 when it was brought to Linch from the DA's office to "test." App573-574. More likely, if there was any potato starch, as Linch claimed at trial, it was placed there well *after* the date of Mrs. Black's death.

Twenty-three years later, having seen, *inter alia*, Linch's recantation, the State suggests to this Court that the laughable "potato starch" evidence is a basis for believing in the integrity of Flores's conviction. And this "potato starch" nonsense is just one example of the false and misleading evidence relied on at trial that the State continues to treat as competent evidence. Indeed, the State's BIO doubles-down on conduct that, with the benefit of hindsight, it should be eager to disavow.[13] Yet for some reason,[14] in its BIO, as at trial, the State relies, for instance, on wholly unreliable statements from State's witnesses Homero Garcia and Johnny Wait. BIO at 9-11. The BIO ignores copious evidence that Garcia was given an undisclosed deal

[13] The ongoing problem is illustrated by the decision to throw before this Court putative "evidence" that was obtained under such outrageous circumstances that the State did not even put it before the jury in 1999. *See* BIO at n.8 (purporting to describe events involving Flores's deceased father who, along with Flores's elderly and diabetic mother and girlfriend, were rounded up and thrown in jail for attempting to help him evade arrest; while in jail, his parents were terrorized with threats that they would lose their roofing business and his girlfriend was threatened with having her daughters taken away to induce to get them to sign statements inculpating Flores). *But see* App183-186.

[14] *See* L. Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 398 (2018) (describing the entrenched conflict between prosecutorial interest in getting and keeping convictions and ethical obligations to confess error and reverse course where credible evidence of innocence exists).

by the lead prosecutor in exchange for testifying about the contents of a statement he signed after being up "for days" and following an aggressive custodial interview during which Garcia was threatened and accused (falsely) of having been caught with the murder weapon. App312-321. Likewise, the BIO ignores the new evidence that professional snitch Wait, despite multiple attempts to help law enforcement locate Flores to claim reward money, had never purported to have received the outlandish "confession" about which Wait testified—until he was on the stand. App298-301.

The State asserts that Flores did no more than make "bare, conclusory allegations of suppression" by State actors in the proceeding below. BIO at 32. If one actually reads the 826-page subsequent habeas application, that assertion is readily falsified. In short, the BIO makes no defensible legal argument and relies instead on an extraordinary compendium of factual misrepresentations, a circumstance that illustrates precisely why this Court's intervention is warranted.

## CONCLUSION

The Court should grant the petition to take up the compelling issue of the meaning of "due process" in state habeas proceedings where substantial bases for doubting the integrity of a conviction have been raised and yet never considered due to the arbitrary and unduly burdensome application of a state procedural rule.

Respectfully submitted,

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May 24, 2022