NO. _____

In The Supreme Court of the United States

TRAVIS TREVINO RUNNELS,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

EXECUTION SCHEDULED DECEMBER 11, 2019

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED:

I. **WHETHER CERTIORARI SHOULD BE GRANTED TO RECOGNIZE (AS HAS BEEN DETERMINED BY TWO CIRCUITS) THAT IT IS A DUE PROCESS VIOLATION WHEN THE PROSECUTION USES FALSE EXPERT TESTIMONY TO OBTAIN A DEATH SENTENCE, REGARDLESS OF WHETHER THE PROSECUTION KNOWS OF THE FALSITY**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

- *Runnels v. State*, No. AP-75,318, Texas Court of Criminal Appeals, Judgment Entered Sept. 12, 2007.

- *Ex Parte Runnels*, No. 48-950-D, 320th District Court of Potter County Texas, Judgment Entered Oct. 18, 2010.

- *Ex Parte Runnels*, No. WR-46,226-01, Texas Court of Criminal Appeals, Judgment Entered June 8, 2011.

- *Ex Parte Runnels*, No. WR-46,226-01, Texas Court of Criminal Appeals, Mar. 7, 2012.

- *Runnels v. Stephens*, No. 2:12-CV-0074-J, U.S. District Court for the Northern District of Texas, Judgment Entered Mar. 31, 2016.

- *Runnels v. Davis*, No. 16-70012, U.S. Court of Appeals for the Fifth Circuit, Judgment Entered November 3, 2016.

- *Runnels v. Davis*, No. 2:12-CV-0074-J, U.S. District Court for the Northern District of Texas, Judgment Entered Oct. 31, 2017.

- *Runnels v. Davis*, No. 17-70031, U.S. Court of Appeals for the Fifth Circuit, Judgment Entered Aug. 14, 2018.

- *Ex Parte Runnels*, No. WR-46,226-03, Texas Court of Criminal Appeals, Judgment Entered December 2, 2019.

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IN THE
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No. _____

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LORIE DAVIS, Director,
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EXECUTION SCHEDULED DECEMBER 11, 2019

ON PETITION FOR WRIT OF CERTIORARI FROM THE
TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Travis Trevino Runnels, respectfully prays that a writ of certiorari issue to review the attached opinion of the Texas Court of Criminal Appeals.

OPINION AND ORDERS BELOW

The per curiam summary order of the Texas Court of Criminal Appeals is printed in the Appendix to this Petition ("App.") as Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Texas Court of Criminals Appeals dismissing Mr. Runnels' subsequent writ application was entered on December 2, 2019. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

This case involves a state court capital defendant's right to a trial free from materially false testimony. The Fifth Amendment to the United States Constitution provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

In addition, the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Introduction

Travis Trevino Runnels is scheduled to die on December 11, 2019 based on the false testimony of a prosecution witness who led the jury to believe that death row was the only place Mr. Runnels could be safely secured. Immediately prior to the commencement of trial, Mr. Runnels pled guilty to the capital murder of Stanley Wiley, a supervisor at a prison boot factory. During the penalty phase, defense counsel did not call any witnesses to offer any mitigating evidence. *Runnels v. State*, No. AP-75,318, 2007 WL 2655682, at 1-2, 4-5 (Tex. Crim. App. Sept. 12, 2007) (unpublished). Because no mitigating evidence was presented, the penalty phase turned on Mr. Runnels' future likelihood of committing "criminal acts of violence that would constitute a continuing threat to society." Tex. Penal Code § 37.071 sec. 2(b)(1). In order to make this showing, the State relied heavily on false testimony from one of its witnesses.

To establish proof of Mr. Runnels' future dangerousness, the State presented the testimony of Texas Special Prosecution Unit criminal investigator A.P. Merillat, who informed the jury as to how inmates are classified in the state prison system and what Mr. Runnels' life in prison might look like should he be sentenced to life in prison rather than death. As was the case in several other capital trials in which Merillat testified, the purpose of his testimony was to establish for the jury that the state prison system's security for non-death sentenced inmates was so lax that the defendant would be a danger to others in prison if he received a life sentence.[1] In two prior cases where the Texas Court of Criminal Appeals found that Merillat testified falsely, the defendants were granted new capital sentencing hearings. *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010); *Velez v. State*, AP-76051, 2012 WL 2130890 (Tex. Crim. App. June 23, 2012) (unpublished).

Merillat testified that Mr. Runnels would be classified "automatically" as a "G-3" (i.e. general population) mid-grade offender and would enjoy a variety of freedoms, such as the ability to move about the prison unrestricted; the option to participate in work, visitation, and worship; and the opportunity to have frequent and unconfined access to other inmates and staff. This testimony was false. As Mr. Runnels showed in his state court application, based on the Texas Department of Criminal Justice's own rules and procedures, he would instead have been placed in

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[1] *See* Craig Kapitan, *Former death row inmate agrees to life without parole*, San Antonio Express, April 22, 2011, http://www.mysanantonio.com/news/local_news/article/Former-death-row-inmate-agrees-to-life-without-1347539.php.

administrative segregation, a highly restrictive environment that would require him to be carefully restrained and supervised at all times while outside his cell.

Texas stands apart from most capital jurisdictions in that jurors must find "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before they can consider a death sentence. Tex. Penal Code § 37.071 sec. 2(b)(1). Thus, it is critical to the basic integrity of the state's death penalty scheme that jurors receive accurate information about prison classification, especially information pertaining to an inmate's freedom and the nature of an inmate's contact with others. Merillat's false testimony, bolstered by his authority as a Texas law enforcement officer, misled jurors into believing that Mr. Runnels would essentially be a free man within the confines of the prison if they sentenced him to life. Therefore, the only way to prevent Mr. Runnels from causing future violence would be by sending him to death row. Trial counsel failed to call a prison classification witness of their own (or any other witness for that matter), and so no evidence was presented to correct or contradict Merillat's prejudicial testimony.

This case presents an opportunity to resolve a circuit split on the question of whether *Napue v. Illinois*, 360 U.S. 264 (1959), should apply to certain instances in which a witness testified falsely for the State without the State's knowledge. Two circuits have held that it is not necessary to show that the prosecution knew it was using false testimony so long as the testimony was material or prejudicial. *Ortega v. Duncan*, 333 F.3d 102, 108 (2nd Cir. 2003); *Hall v. Dir. of Corr.*, 343 F.3d 976, 982

(9th Cir. 2003). Texas prosecutors have a history of relying on false and misleading expert testimony to prove the future dangerousness special issue in capital sentencing proceedings. Requiring a petitioner to prove that the State *knew* an expert testified falsely is a nearly impossible burden that will only ensure that more persons are sentenced to death and executed based on false testimony in the future.

The dismissal of Mr. Runnels' subsequent state court habeas petition raising a due process claim based on Merillat's false testimony demonstrates that the Texas Court of Criminal Appeals (TCCA) does not take the plain language of Texas state habeas procedure seriously. Texas statute provides that the TCCA's review of a subsequent habeas application at this stage is limited to the threshold question of whether the applicant's claim meets one of the statutory exceptions to the general rule prohibiting subsequent writs. Tex. Code Crim. Proc. Art. 11.071(5)(c). As Mr. Runnels argued in his state application, he clearly met the exception that permits subsequent applications when the "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." *See* Tex. Code Crim. Proc. Art. 11.071(5)(a)(1); App. C at 46-48. It was not until after Mr. Runnels' initial state habeas application was filed that Texas courts recognized due process claims based on the State's *unknowing* use of false testimony. *Ex Parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009); *Ex Parte Chavez*, 371 S.W. 3d 200, 204-205 (Tex. Crim. App. 2012). The TCCA ignored Texas state habeas procedure and its own precedent by failing to authorize Mr. Runnels' subsequent writ application for merits review. Thus, this Court should grant certiorari, because "[s]tate courts may not

avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to *all* similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (emphasis added).

II. Procedural Overview

On October 25, 2005, immediately before trial, Travis Trevino Runnels pled guilty to the capital murder of Stanley Wiley, a prison boot factory supervisor. At the conclusion of the penalty phase, the jury was instructed on two special issues: 1) whether they found from the evidence beyond a reasonable doubt that there was a probability Mr. Runnels would commit criminal acts of violence that would constitute a continuing threat to society; and 2) whether, considering all the evidence, including the circumstances of the offense, Mr. Runnels' character, background, and his personal moral culpability, the jury found there was a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than death. App. G at 4- 5. On October 28, 2005, the jury answered "yes" to special issue one, and "no" to special issue two. The trial court sentenced Mr. Runnels to death on that same date. App. G at 12.

On September 12, 2007, the Texas Court of Criminal Appeals (TCCA) affirmed Mr. Runnels' conviction and death sentence. *Runnels v. State*, 2007 WL 2655682, No. AP-75,318 (Tex. Crim. App. Sept. 12, 2007) (unpublished). On September 17, 2007, Mr. Runnels filed a state court petition for writ of habeas corpus. Following an evidentiary hearing in which no live witnesses were presented on Mr. Runnels' behalf, the Potter County District Court adopted the State's proposed findings of fact

and conclusions of law on October 8, 2010. *Ex Parte Runnels*, No. 48-950-D, 320th Dist. Ct., Potter Cnty., Tex. (Oct. 18, 2010).

On June 8, 2011, the TCCA remanded Mr. Runnels' case for an evidentiary hearing on his ineffective assistance of counsel (IAC) claim. *Ex Parte Runnels*, No. WR-46,226-01 (Tex. Crim. App. June 8, 2011). After an evidentiary hearing at which defense counsel called no witnesses, the state district court adopted the State's proposed findings and recommended Mr. Runnels' writ be denied. The TCCA denied Mr. Runnels' habeas petition on March 7, 2012. *Ex Parte Runnels*, No. WR-46,226-01 (Tex. Crim. App. Mar. 7, 2012) (unpublished).

On December 28, 2012, Mr. Runnels filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Texas, Amarillo Division. On March 31, 2016, the district court denied all claims and denied COA. *Runnels v. Stephens*, No. 2:12-CV-0074-J, 2016 WL 1275654 (N.D. Tex. Mar. 31, 2016).

Mr. Runnels filed an Application for COA in the Fifth Circuit on June 30, 2016. On November 3, 2016, a Fifth Circuit panel denied his COA request. *Runnels v. Davis*, 664 Fed. App'x 371 (5th Cir. 2016) (unpublished). The Fifth Circuit denied rehearing and rehearing en banc on December 11, 2017, and this Court denied certiorari on June 18, 2018. *Runnels v. Davis*, 138 S. Ct. 2653 (2018).

Meanwhile, on June 1, 2017, Mr. Runnels filed a motion for relief from judgment under Rule 60(b) in the United States District Court for Northern District of Texas, based on previous habeas counsel's abandonment of his client. The district

court adopted the magistrate's report and denied COA on October 31, 2017. The Fifth Circuit denied COA on August 14, 2018 and denied rehearing on September 18, 2018. This Court denied certiorari on June 24, 2019. *Runnels v. Davis*, 139 S. Ct. 2747 (2019).

On August 5, 2019, the Potter County District Court ordered that Mr. Runnels' execution be scheduled for December 11, 2019. On August 7, 2019, the Potter County District Clerk signed a Warrant of Execution commanding the Texas Department of Criminal Justice to execute Mr. Runnels at 6 p.m. CDT on December 11, 2019. App. B.

On September 13, 2019, Mr. Runnels' filed his First Subsequent Application for Post-Conviction Writ of Habeas Corpus contemporaneously in the Potter County District Court and the TCCA. App B. Mr. Runnels filed a motion for stay of execution on the same date. The subsequent application alleged, for the first time in any pleading, that Mr. Runnels' due process rights were violated when the State presented the false testimony of A.P. Merillat at Mr. Runnels' sentencing hearing. The State filed a motion to dismiss the application on October 24, 2019. Mr. Runnels filed a response to the State's motion on October 28, 2019. On December 2, 2019, the TCCA entered a summary order denying Mr. Runnels' application on procedural grounds as an "abuse of the writ." App. A. His execution remains scheduled for December 11, 2019.

III. Relevant Facts

A. Background

The relevant facts related to the crime for which Mr. Runnels was sentenced to death are described in the TCCA's direct appeal opinion. *Runnels*, No. AP-75,318, 2007 WL 2655682. According to the Court, "[o]n January 29, 2003, while [Mr. Runnels] was serving time in prison for an aggravated robbery, he killed Stanley Wiley, a supervisor at the prison boot factory." *Id.* at 1. Mr. Runnels, who was twenty-six years old, worked at the boot factory as a janitor at the time. *Id.* Mr. Runnels had three prior felony convictions at the time of the offense. *Id.* at 2.

Had counsel presented mitigating evidence at trial, the jurors would have heard significant evidence about Mr. Runnels' life and background. Mr. Runnels, who grew up in Dallas, Texas, suffered from frequent head injuries as a child, had difficulty in school, and problems with reading comprehension. *Runnels v. Stephens*, No. 2:12-CV-0074-J-BB, 2016 WL 1274132, at 7 (N.D. Tex. Mar. 15, 2016), *report and recommendation adopted,* No. 2:12-CV-0074-J, 2016 WL 1275654 (N.D. Tex. Mar. 31, 2016). When Mr. Runnels was a child, he and his mother Nancy lived with his mother's abusive boyfriend Keith, who repeatedly assaulted Mr. Runnels and his mother. In one particularly violent incident, Keith strangled Mr. Runnels and Nancy until Mr. Runnels was able to escape and call police. *Id.*

Nancy herself "liked to party all the time and drank a lot," leaving Mr. Runnels and his brother Darmonica without any stable presence in their lives. *Id.* at 8. As a result, they were exposed to the violence of Dallas at a young age without

an adult to guide or protect them. Other family members only made the environment worse. Nancy's brother James, who was also an alcoholic, once threatened Mr. Runnels with a loaded rifle. *Id.* Another time, James took Mr. Runnels and Darmonica to a drug house where they witnessed a shooting. *Id.*

B. Merillat's Trial Testimony

The State called A.P. Merillat to testify during its case-in-chief at the penalty phase of trial. After describing his history in law enforcement, personal and professional accolades (including authoring five books and presenting seminars to students, prosecutors, and law enforcement), and experience testifying as an expert witness,[2] Merillat testified that, as a criminal investigator with the Texas Special Prosecution Unit, he specializes in the prosecution of prison crimes and the "situation in prison as far as preparing cases for trial." App. F at 5-6. Merillat asserted that he was familiar with how inmates are housed in the Texas Prison system and was also familiar with the classification process in the Texas system. (*Id.*) According to Merillat, there are "S" classifications and "G" classifications. "S" stands for "State Approved Trusty" but "[Merillat had] no idea what the letter G stands for. It's just a letter the prison issued for that classification."[3] App. F at 6.

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[2] Merillat asserted that he previously testified as an expert witness in Texas and Florida on the "various types of criminal investigations, bloodstain interpretation, fingerprints, and violence, particularly in the penitentiary." App. F at 5. In Mr. Runnels' trial, the State laid the foundation to qualify Merillat as an expert, but never formally sought to tender him as such. In reviewing the transcript, it appears likely that this was an oversight. The defense never objected to the State's failure to tender Merillat as an expert at trial. App. F at 5-6.

[3] "G" stands for "General." App. C at 77, TDCJ Classification Plan, dated October 2003 (hereinafter "C.P.")

Merillat continued by explaining the five levels of G-classified inmates. He described a G-1 as a "minimal-custody type inmate," a G-2 as someone "to be watched a little closer," a G-3 as "what we call minimum/medium custody," a G-4 as a "closed custody inmate," and a G-5 as a "closed custody or an Ad Segregated type inmate." App. F at 5-6. Merillat went on to testify that an inmate convicted of capital murder and sentenced to life would come into prison with an "automatic classification" as a G-3 and would have to stay at that classification for at least 10 years. App. F at 7. Merillat reiterated several times that an inmate convicted of capital murder and sentenced to life is *automatically* classified as a G-3 App. F at 7, and could potentially be housed with a lower classified G-1 or G-2 inmate, including a "DWI offender." App. F at 7.

Merillat testified that G-3 inmates are "free to come and go from their cells. They're not handcuffed when they're leaving their cells. They can go to work, visitation, church, medical, chow, unescorted" and are not isolated from others. App. F at 7. Merillat went on to describe the comparatively harsher restrictions a death-sentenced inmate would face, including being handcuffed anytime he is outside of a cell; being escorted by two officers at all times; no recreation with other inmates; no eating outside of a cell; and "very restrictive housing and custody." App. F at 8. Merillat also testified regarding the history of assaultive conduct by Texas prisoners, and claimed that there were 138 prosecutable murders inside Texas prisons between 1984 and the date of his 2005 testimony. App. F at 10.

On cross-examination, Merillat reiterated that an inmate convicted of capital murder and sentenced to life would come into prison as a G-3, regardless of previous behaviors or convictions. He stated that, "[The prison is] going to start him with his capital case at G-3, and then his behavior will determine what happens after that situation." App. F at 10-11. Trial counsel did not object to any of Merillat's testimony regarding how inmates are classified, and the defense presented no witnesses of any kind, rebuttal or otherwise. The State made no efforts to correct Merillat's inaccurate testimony. Rather, the State explicitly referenced Merillat's testimony in its final closing arguments to argue that Mr. Runnels could not be safely imprisoned under a life sentence. App. G at 11.

C. Merillat's Falsehoods Revealed

A review of Texas's own inmate classification rules and procedures reveals that Merillat's testimony was plainly and patently false. Classification of inmates within the Texas Department of Criminal Justice (TDCJ) System is governed by a specific set of rules and regulations set forth within the department's "Classification Plan." App. C at 55, C.P. Contrary to Merillat's proffered testimony during Mr. Runnels' trial, there is nothing "automatic" about the classification of inmates. There is simply no provision in the Classification Plan that automatically classifies an inmate convicted of a capital crime and sentenced to life as a G-3. *See id.*; App. C at

161, Declaration of Frank Aubuchon, dated September 9, 2019 (hereinafter "Aubuchon Declaration").[4]

TDCJ does not now and did not at the time of Mr. Runnels' trial automatically classify inmates at *any* security level. App. C at 161, Aubuchon Declaration. Rather, there are multiple factors that go into making an initial custody determination. A classification committee determines an "offender's appropriate custody designation on the basis of the offender's total record and the professional judgment of the committee." App. C at 127, C.P.; *see also* App. C at 117, 118, C.P. Factors such as "prior criminal record, prior institutional adjustment, current offense of record and sentence length shall be considered in making initial classification decisions relative to custody." App. C at 131, C.P. Additionally, the classification committee can also take into consideration an offender's age, physical and mental health factors, disciplinary history on prior incarcerations, and gang affiliation. App. C at 161, Aubuchon Declaration.

However, there *are* provisions in the directive that establish that an inmate convicted of killing a correctional officer or prison staff member could absolutely *not* be classified as a G-3. Beyond the numbered general or "G" classifications, TDCJ also provides specific designations for offenders with a "security precaution

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[4] Frank Aubuchon is a prison classifications expert retained by Mr. Runnels in order to evaluate Merillat's testimony from the penalty phase of Mr. Runnels' 2005 capital murder trial. Mr. Aubuchon worked in the Texas criminal justice system for 37 years, including 26 years as an employee of TDCJ. Mr. Aubuchon currently serves as a consultant and expert on prison classification issues, and regularly testifies and presents continuing education on these topics.

designator" or "SPD." An SPD includes offenders with a history of escape (ES), staff assault (SA), or taking of a hostage (HS). Custody designations for inmates with an SPD are mandatory and cannot be overridden by the classification committee. An offender with a designation of SA "will not be assigned to a custody less restrictive than G-4." App. C at 165, Supplement to Classification Plan, dated July 2005 (hereinafter "Supp. C.P."). That means an inmate, such as Mr. Runnels, with a conviction for capital murder of a prison employee would never have been eligible for G-3 status. State and federal courts have upheld SPD designations for inmates who have engaged in far less serious conduct than capital murder of a prison officer.[5]

If Mr. Runnels had been sentenced to life in prison, he would not have been eligible for general population at all. Instead, he would have been assigned to the strictest level of administrative segregation and would remain there for many years. App. C at 162, Aubuchon Declaration. Under the TDCJ plan in place at the time of Mr. Runnels' trial, an inmate "shall be assigned to administrative segregation-security detention" if the inmate meets one or more of the following characteristics:

> (a) constitutes a threat to the physical safety of other offenders or staff;

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[5] *See, e.g.*, *Vaughn v. Zeller*, No. 07-06-0366-CV, 2009 WL 484238 (Tex. App. Feb. 26, 2009) (unpublished) (upholding summary judgment against Texas inmate who sought to remove SPD designation despite fact that the assault did not result in the officer's death or life threatening injuries, the inmate was never criminally charged for the assault, and two other inmates who participated in the assault said this inmate was innocent); *Gonzales v. Gross*, No. CV H-17-3190, 2018 WL 3146721, at 4 (S.D. Tex. June 26, 2018) (unpublished) (denying injunctive relief to Texas inmate who received an SPD and was transferred to administrative segregation for ten years for participating in an assault of a corrections officer that resulted in "an injury that required more than first aid").

> (b) constitutes a threat to the order and security of the institution, as evidenced by repeated, serious disciplinary violations;
>
> (c) constitutes a threat to the physical safety of other offenders or staff due to having been identified as a security threat group member;
>
> (d) is a current escape risk.

App. C at 142, C.P.; App. C at 162, Aubuchon Declaration.

The Administrative Segregation Plan in effect at the time of Mr. Runnels' trial similarly *required* administrative segregation-security detention for inmates who are a "[t]hreat to the physical safety of other offenders or staff." App. C at 173, TDCJ Administrative Segregation Plan, Feb. 2005, (hereinafter "Ad. Seg."); App. C at 162, Aubuchon Declaration. "Mr. Runnels would have certainly been designated as a maximum custody/administrative segregation security level by the Administrative Segregation Committee (ASC) based on these criteria" because of the nature of the offense for which he was convicted. App. C at 162-163, Aubuchon Declaration. This offense "would have [been] taken very seriously in assessing his security level, and as such [ASC] would have found that Mr. Runnels 'constitutes a threat to the physical safety of other offenders or staff.'" *Id.*

Mr. Runnels also would have remained in administrative segregation for many years after his initial placement. An inmate held in administrative segregation is entitled to regular review of his status by the ASC and the State Classification Committee. However, similar to the initial determination to place an inmate in administrative segregation, that inmate's transfer to general population is

conditioned on a finding that he is no longer a "physical threat to staff or other offenders." App. C at 200, Ad. Seg. Given the extreme nature of Mr. Runnels' crime of conviction, no committee would have found that he met this criteria for a minimum of many years. App. C at 163, Aubuchon Declaration. Even then, any change in status would depend on many factors, including his disciplinary infractions, medical evaluations, relationships with other inmates and staff, participation in inmate programs, and his own statements to the reviewing committee. App. C at 200-201 Ad. Seg.; App. C at 163, Aubuchon Declaration.

The difference between a G-3 and administrative segregation classification is far from negligible. Unlike the G-3 inmates described by Merillat, an administratively segregated inmate is highly restricted within the prison environment. He is housed in a single cell specifically designated for housing security detention offenders. As such, he would be ineligible to be housed with a "DWI offender" in the way Merillat claimed was possible. Among other things, the administratively segregated inmate is ineligible for contact visits; requires constant and direct armed supervision outside the security perimeter; and an escort to and from activities outside his assigned cell. App. C at 142, C.P.; App. C at 163, Aubuchon Declaration. "In short, Mr. Runnels would have spent the vast majority of time alone in his cell, and when outside his cell, he would have been closely supervised by corrections officers." App. C at 163, Aubuchon Declaration.

There can be no dispute that Merillat's testimony at Mr. Runnels' punishment phase trial was false. His assertion that all inmates are automatically classified with

the status of G-3 is clearly contradicted by TDCJ's own classification materials that were in place at that time. *Compare* App. F at 7 *with* App. C at 54, C.P.; App C at 160-164, Aubuchon Declaration; App. C at 165, C.P. Supp,; App. C at 173, Ad. Seg. Furthermore, the specific classification requirements set forth in the TDCJ regulations establish that Mr. Runnels, based on the circumstances of the instant crime alone, would only be eligible for classification as an administratively segregated inmate—the highest and most severely restricted classification level. He also could never be housed with any general population inmate while at that level.[6] *See id*.

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[6] Even if, after many years, Mr. Runnels became eligible to be transferred to general population, he would still not be eligible for G-3 classification as Merillat claimed. As discussed above, a prisoner with a history of staff assault such as Mr. Runnels is never eligible for G-3 status, and this rule cannot even be overridden by a prison committee. App. C at 165, Supp. C.P. Instead, he would only be eligible for G-4 or G-5 status, classifications that require significantly higher security. Among other things, inmates classified as G-4 or G-5 are ineligible for contact visits; require direct armed supervision on jobs and assignments outside the security perimeter (and supervision inside of it); receive only limited recreation time; and are severely restricted as to eligibility for jobs. App. C at 171-172, Supp. C.P. Additionally, a G-4 or G-5 inmate may only be housed with another G-4 or G-5 inmate, respectively. *Id.*

REASON FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RECOGNIZE (AS HAS BEEN DETERMINED BY TWO CIRCUITS) THAT IT IS A DUE PROCESS VIOLATION WHEN THE PROSECUTION USES FALSE EXPERT TESTIMONY TO OBTAIN A DEATH SENTENCE, REGARDLESS OF WHETHER THE PROSECUTION KNOWS OF THE FALSITY.

A. This Court Should Grant Certiorari to Resolve a Split of Authority in Petitioner's Favor so that Persons Cannot Be Sentenced to Death Based on False Testimony

This Court should grant certiorari to resolve a conflict among the circuit courts and state courts of last resort on the question of whether the prosecution's unknowing use of material false testimony presents a cognizable claim of a due process violation under the Fifth and Fourteenth Amendments. *See* Supreme Court Rule 10(a). Adoption of a rule prohibiting the State from relying on such testimony, at least in some circumstances, is especially necessary in Texas, where prosecutors have repeatedly relied on the false testimony of purported "experts" to prove to the jury that capital defendants have a likelihood of committing "criminal acts of violence that would constitute a continuing threat to society." Tex. Penal Code § 37.071 sec. 2(b)(1).

1. Texas's Long History of Relying on False and Discredited Expert Testimony to Secure Death Sentences

Texas prosecutors have a long history of relying on false, misleading, and discredited expert testimony to prove to the jury that the defendant committed "criminal acts of violence that would constitute a continuing threat to society." Tex. Penal Code § 37.071 sec. 2(b)(1). This is often referred to as the future dangerousness

special question. This pattern of false testimony demonstrates that a narrow interpretation of *Napue* limited to the prosecution's *knowing* use of false testimony is inadequate to ensure death sentences are free from false testimony.

Merillat, the expert who is the subject of Mr. Runnels' claim, testified in at least fifteen cases that resulted in death sentences. Maurice Chammah, *Prison-Crime Witness Now on the Defensive*, N.Y. Times, Sept. 17, 2012, https://www.nytimes.com/2012/09/28/us/in-texas-a-p-merillat-deals-with-false-testimony-ruling.html. Two Texas defendants eventually received sentencing relief based on Merillat's false testimony, but others did not. *Compare Estrada v. State*, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010) and *Velez v. State*, AP-76051, 2012 WL 2130890 (Tex. Crim. App. June 23, 2012) with *Coble v. Davis,* 728 F. App'x 297, 302 (5th Cir.), *cert. denied*, 139 S. Ct. 338 (2018); *Sparks v. Davis,* 756 F. App'x 397, 400 (5th Cir. 2018).

In other Texas capital cases, discredited mental health experts have testified for the State, often giving the false impression that the fundamentally subjective and unknowable question of whether the defendant will harm people in prison can actually be determined with scientific certainty. One notable expert, psychiatrist Dr. James Grigson, nicknamed "Dr. Death," testified for the State in hundreds of capital cases, including many in Texas on the future dangerousness issue. Mike Tolson, *Doctor's Effect on Justice Lingers*, Hous. Chron., June 17, 2004, https://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php. Falsehoods and quackery were a staple of Dr. Grigson's

testimony. In one case, he claimed "100 percent accuracy in predicting how dangerous a defendant he had never examined would be in future years." *Id.* Dr. Grigson was twice reprimanded by the American Psychiatric Association for offering this false testimony, before the organization eventually expelled him entirely. *Id.* The Texas Society of Psychiatric Physicians later expelled him as well. *Id.*

The insidiousness of Dr. Grigson's falsehoods is highlighted in two cases where Dr. Grigson testified that the defendant would kill again, only for it to be later revealed that the defendant had never killed anyone in the first place. In the sentencing hearing of Texas capital murder defendant Randall Dale Adams, Dr. Grigson testified that Adams was "at the very extreme, worse or severe end of the scale." Am. Bar Ass'n, The Texas Capital Punishment Assessment Report 312 (Sept. 2013) *available at* https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments/texas/ (quoting Brief of Pet'r-Appellant at 1410, *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979) (No. 60037)). Adams' only past criminal record consisted of a driving while intoxicated conviction, but he was sentenced to death. *Adams v. State*, 577 S.W.2d 717, 731 (Tex. Crim. App. 1979), *rev'd Adams v. Texas*, 448 U.S. 38, 51 (1980). After the TCCA identified numerous constitutional errors in Adams' case, however, he was freed from prison. *See Ex parte* Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989). *See also* Richard L. Fricker, *Crime and Punishment in Dallas*, 75 A.B.A. J. 52, 53 (July 1989). In the case of Kerry Max Cook, Dr. Grigson testified that the defendant "would present a real threat to people that found themselves in that same setting with him,

whether it is prisoner guards or rather free people." *Cook v. State*, 821 S.W.2d 600, 602 (Tex. Crim. App. 1991). Twenty years later, Cook was vindicated after compelling evidence of his innocence was uncovered and DNA evidence implicating someone else was revealed. *Cook v. State*, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996).

Other mental health experts have offered similar false and misleading testimony. Another psychiatrist, Dr. Richard Coons, testified on the future dangerousness issue in approximately fifty Texas capital cases. *Coble v. State*, 330 S.W.3d 253, 299 (Tex. Crim. App. 2010) (Keller, P.J., concurring). As with Dr. Grigson, Dr. Coons had a habit of testifying with near certainty that a defendant would pose a future danger based on a completely untested methodology and without even interviewing the defendant. *Id.* at 271-72; *see also Ramey v. State*, No. AP-75678, 2009 WL 335276, at *14 (Tex. Crim. App. Feb. 11, 2009) (unpublished). Psychologist Dr. Walter Quijano helped secure death sentences for six Texas men by testifying for the State that blacks and Latinos are more likely to be dangerous in prison.[7] *Buck v. Davis*, 137 S. Ct. 759, 769-70 (2017). The State eventually confessed error in these cases, but that admission was based on the racist nature of Dr. Quijano's testimony, rather than on the broader problem of false expert testimony generally. *See id.*

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[7] Dr. Quijano offered similar testimony in a seventh case where he testified for the defense. *Buck*, 137 S. Ct. at 770.

To be sure, some death row petitioners in Texas who were sentenced based on false and misleading expert testimony have received some form of relief in appellate and post-conviction proceedings. But these cases appear to be the exception. Indeed, as Mr. Runnels' case demonstrates, even after the TCCA adopted the rule that the State's unknowing use of false testimony violates due process, *Ex Parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009), Texas petitioners who have been sentenced to death based on false testimony are *still* unable to consistently have their rights vindicated. This Court should grant certiorari so that a clear federal rule can be announced that prohibits such testimony.

2. A Circuit Split Exists that Should Be Resolved in Petitioner's Favor

Two federal circuit courts have held that prosecutor knowledge is not necessary to support a claim that a petitioner's due process rights were violated by material, false testimony. This Court should adopt these circuits' interpretation of federal law, as it is the only way to ensure that capital trials are free from false expert testimony.

The Court of Appeals for the Second Circuit has held that "when false testimony is provided by a government witness without the prosecution's knowledge, due process is violated only if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Ortega v. Duncan*, 333 F.3d 102, 108 (2nd Cir. 2003) (internal quotation marks and brackets omitted). *Sanders v. Sullivan*, 863 F.2d 218,

222 (2nd Cir. 1988), offers a lengthy rationale for the court's decision.[8] The court noted that while other jurisdictions have adopted a rule that prosecutor knowledge is a required element, they have often done so with little or no analysis. *Id.* To the extent that a rationale for the limitation exists, it is based on a "concern for the maintenance of finality in criminal proceedings." *Id.*

The Second Circuit held, however, that a better standard should instead focus on whether the discovery of the false testimony "undermines confidence in the outcome of the trial." *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 109–10 (1976)). The court traced several prior cases from various circuits that lead to the inescapable conclusion that "the fundamental conceptions of justice which lie at the base of our civil and political institutions must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered . . . ." *Id.* at 224 (quoting *Jones v. Kentucky*, 97 F.2d 335 (6th Cir.1938)). In the Second Circuit's view, "[t]here is no logical reason to limit a due process violation to state action," as such a rule "elevates form over substance." *Id.*

The Ninth Circuit has held similarly, noting that allowing due process claims based on the prosecution's unknowing use of false testimony is consistent with this Court's holding in *Brady v. Maryland*, 373 U.S. 83 (1963), which requires disclosure

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[8] *Sanders* appears to imply that subsequent recantation by the falsely testifying witness is necessary element in place of prosecutor knowledge. *Id.* at 224. However, later Second Circuit jurisprudence appears to have abandoned that as a strict requirement, and treated it only as a factor in determining whether the testimony was actually false. *See, e.g.*, *Ortega*, 333 F.3d at 106-108.

of exculpatory information to the defense "regardless of whether there is good faith on the part of the prosecution." *Hall v. Dir. of Corr.*, 343 F.3d 976, 982 (9th Cir. 2003). The court further endorsed the rationale of the Second Circuit that "[i]t is simply intolerable . . . if a state allows an innocent person to remain incarcerated on the basis of lies." *Maxwell v. Roe*, 628 F.3d 486, 507 (9th Cir. 2010) (quoting *Sanders,* 863 F.2d at 224).

The rationale for applying the rule adopted by these circuits is especially relevant to cases in which an expert testified falsely in a capital sentencing hearing. Proving prosecutor knowledge or intent in the case of a falsely testifying expert is extraordinarily difficult in most cases. Most *Napue* due process violations based on the prosecution's *knowing* use of false testimony are discovered in a prosecutor or police officer's witness interview notes, or in a plea agreement in another case that was never disclosed pre-trial.[9] While it is possible that such a smoking gun might exist in the case of an expert, most expert testimony is not procured through plea agreements, and most prosecutors lack the expertise to have affirmative knowledge that a purported expert is testifying untruthfully. The better rule, at least in the

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[9] *See, e.g., United States v. Dvorin*, 817 F.3d 438, 450-52 (5th Cir. 2016) (finding *Napue* violation where prosecution failed to disclose sealed plea agreement supplement); *Jackson v.* Brown, 513 F.3d 1057, 1074-75 (9th Cir. 2008) (finding *Napue* violation where prosecutor failed to disclose evidence of multiple inducements offered by law enforcement in exchange for key witness testimony, even though the prosecutor was unaware of the inducements); *Hernandez v. Lewis*, Case No. 1:12-cv-01661, 2018 WL 1870449, at *41 (E.D. Cal. Apr. 18, 2018) (finding *Napue* violation where the prosecution's files contained undisclosed memos documenting payments from the district attorney's office to a witness); *Bragg v. Norris*, 128 F. Supp. 2d 587, 605 (E.D. Ark. 2000) (finding *Napue* violation based on law enforcement officer's notes).

case of death row petitioners convicted on false expert testimony, is simply to consider the materiality of the false testimony. Much as it is "simply intolerable" for a person to remain in prison based on false testimony, it is intolerable for an execution to rest on an expert's falsehoods. *See Sanders,* 863 F.2d at 224.

3. *Petitioner's Individual Claim Demands Review*

This Court should grant certiorari in this case because the false testimony used to secure Mr. Runnels' death sentence was extremely prejudicial and expansive. If this Court does not act, Mr. Runnels will in all likelihood be executed on December 11, 2019 without so much as a hearing on this claim. The Constitution should not tolerate an execution that was procured on the basis of false expert testimony.

During penalty deliberations in Mr. Runnels' trial, the jury was asked to determine, as required by Texas statute, whether it found from the evidence beyond a reasonable doubt that there was a probability Mr. Runnels would commit criminal acts of violence that would constitute a continuing threat to society. *See* Tex. Penal Code § 37.071 sec. 2(b)(1). Since Mr. Runnels pleaded guilty to capital murder and his lawyers presented no mitigating evidence on his behalf, the future dangerousness question became *the* central issue in Mr. Runnels' case. *See Runnels*, No. AP-75,318, 2007 WL 2655682, at 4 (noting that trial counsel did not call mitigating witnesses to testify). Merillat was called to testify by the State for the sole purpose of "educating" the jury as to what Mr. Runnels' level of freedom in prison would be should he not be sentenced to death, and the potential risk he posed to others in prison.

Merillat's false testimony "proved" to the jury that Mr. Runnels, who had pleaded guilty to killing a correctional officer, would re-enter the prison system classified as a "minimum/medium" security risk unless the jury sentenced him to death. The jury was led to believe he would be able to mix freely with inmates and staff, be free to move about the prison unconfined, and go "to work, visitation, church, medical, chow, unescorted." App. F at 7. Merillat provided examples of the supposed danger Mr. Runnels would pose to non-violent, low level offenders, telling the jury that Mr. Runnels could potentially be housed with someone classified even lower than a G-3, like a DWI offender. App. F at 7.

Additionally, Merillat falsely told the jury that the only way for a capital murder convict to be imprisoned in a high security environment would be to sentence him to death. Merillat described death row to the jury as starkly different from a G-3 status by describing how such a death row inmate would

> spend 23 hours a day inside that cell. He can only come out when he's handcuffed and escorted by two officers. He has to single recreate – recreate by himself. He has to be escorted to a shower once a day, if he choses to. Then he's back in his cell, he eats inside his cell. Very restrictive custody.

App. F at 8.

However, this actually describes what Mr. Runnels' life would look like if he was sentenced to life in prison, not just death. *See* App. C at 162, Aubuchon Declaration.

Merillat's message to the jury was clear: the only way to ensure that Mr. Runnels would be imprisoned in a secure environment would be to impose the death

penalty. This false and uncontroverted testimony stands in stark contrast to the truth: Mr. Runnels would have been placed in a highly secure and restrictive prison environment regardless of which sentence the jury decided to impose. *See* App. C at 165, Supp. C.P. These were blatant falsehoods regarding matters that were squarely relevant to the question before the jury.

Merillat testified based on his experience as a Texas Peace Officer since 1977, extensive law enforcement training, authorship of five books on law enforcement issues, and specific expertise on Texas prison crimes. App. F at 5-6. He told the jury that, as part of this expertise, he was "familiar with the classification process in the Texas system." App. F at 6. "Such extensive credentials increased [Merillat's] credibility as a person knowledgeable about violence in prisons and future dangerousness." *Velez v. State*, AP-76051, 2012 WL 2130890, at 32 (Tex. Crim. App. June 23, 2012). Moreover, this is not a case where a witness made an isolated false statement amidst otherwise helpful testimony. Nearly everything Merillat testified to at Mr. Runnels' trial was false, and it led the jury to believe that Mr. Runnels would be free to do as he pleased, posing significant risk to others, within the confines of a prison unless he was sentenced to death.

There is a reasonable likelihood that this highly prejudicial false testimony led the jury to find that Mr. Runnels would be a future danger if housed in the conditions Merillat described, and thus deserving of a death sentence to ensure he was placed in a high security environment. Classification in prison is a fundamental element of the future dangerousness argument—one of only two questions the jury

is asked to decide before determining if a defendant is allowed to live or condemned to death. Given that Mr. Runnels was facing sentencing for the murder of a prison factory supervisor, it is especially likely that the prison system's ability to ensure that Mr. Runnels was being held in a secure environment weighed heavily on jurors' minds. The false evidence presented by the State against Mr. Runnels was that he posed an extreme risk of future danger if given a sentence less than death because of the relative freedom he would enjoy in prison, given that he would be "automatically" classified as a G-3 and potentially housed with low-level DWI offenders with even lower security classifications.

The State's closing arguments in Mr. Runnels' trial further underscore the material nature of Merillat's false testimony. Closing arguments in Mr. Runnels' penalty trial were extraordinarily short: an assistant district attorney addressed the jury for about five transcript pages, then defense counsel spoke for roughly 10 pages, and finally the elected District Attorney spoke for approximately nine pages. App. G at 5 – 11. Thus, the State's strategy in closing arguments was not to offer an exhaustive review of the law and alleged facts, but rather to remind the jury of the most important points that showed Mr. Runnels deserved a death sentence.

Near the end of his final argument, the District Attorney called the jury's attention to Merillat as an authority on prison security: "You heard A.P. [Merillat] testify." App. G at 11. The District Attorney then summarized Merillat's conclusion quite aptly: "There are no safe places in prison, nowhere." App. G at 11. This conclusion, however, was based on Merillat's false testimony that Mr. Runnels would

be placed in an unsecure environment, where he would have unsupervised access to inmates and staff, if sentenced to life. It was one of the last things the jury heard before deliberating.

In short, Merillat's testimony was as damning as it was false. Virtually no capital defendant would be able to avoid a death sentence if the jury were led to believe that the prison system would be unwilling and unable to secure him under a life sentence. Jurors who ordinarily might favor life would vote for death to avoid sending the defendant to the environment that Merillat falsely described. This Court should grant certiorari to right this grievous injustice.

B. This State Court's Purported Procedural Decision Does Not Impede this Court's Jurisdiction Because It Is Not Adequate and Independent

The TCCA's summary order denying Mr. Runnels' state habeas application as an "abuse of the writ" purports to dismiss the claim on purely state procedural grounds. The court, without offering any additional explanation or analysis, held, "We have reviewed the application and find that the allegation does not satisfy the requirements of [Texas Code of Criminal Procedure] Article 11.071 § 5." App. A at 2. Indeed, Texas statutory law states that the TCCA's only role in reviewing a subsequent habeas application at this stage is to determine whether the petitioner's state habeas application meets the requirements of one of the exceptions to the general rule prohibiting successive habeas claims. Once a subsequent habeas application is filed, the TCCA's responsibility is to either "issue[] an order finding that the [procedural subsequent application] requirements have been satisfied,"

which empowers the trial court to review the claim on the merits, or to find that the procedural requirements have not been satisfied, in which case the application is dismissed as an abuse of the writ.

This Court lacks jurisdiction to consider a state court judgment based on state law grounds only if those grounds were "both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). For a state law ground to be adequate, the procedure in question must be regularly followed. "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to *all* similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (emphasis added). This Court has held similarly in several other cases. *See, e.g., Beard v. Kindler,* 558 U.S. 53, 60 (2009) ("We have framed the adequacy inquiry by asking whether the state rule in question was firmly established and regularly followed.") (internal quotation marks omitted); *Ford v. Georgia*, 498 U.S. 411, 423–24 (1991) ("[W]e held that only a firmly established and regularly followed state practice may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim."); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (accord).

Here, the state law procedure has been applied so inconsistently to the point that it is nonsensical, and left Mr. Runnels with no ability to predict whether the TCCA would follow or ignore its own precedent. Mr. Runnels' argument for authorization of his subsequent writ application was based on Tex. Code Crim. Proc. Art. 11.071(5)(a)(1), which allows subsequent applications to proceed upon a finding

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 filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." App. C at at 46 – 48.

Mr. Runnels' claim not only met this standard, but the specific legal basis he relied on had been used by the TCCA itself to authorize subsequent writs in the past. As described in his application, Mr. Runnels' initial habeas application was filed in 2007. It was not until 2009 that TCCA expanded its *Napue* jurisprudence to encompass claims based on the prosecution's *unknowing* use of false testimony in *Ex Parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009). Mr. Runnels' claim plainly falls under the *Chabot* expansion. There is simply no evidence that the State had any knowledge that Merillat was testifying falsely.

Following *Chabot*, the TCCA permitted subsequent writ applications to proceed under Article 11.071(5)(a)(1) based on this change in its interpretation of federal law. In the subsequent writ case, *Ex Parte Chavez*, 371 S.W. 3d 200, 204-05 (Tex. Crim. App. 2012), the court expressly acknowledged that "*Chabot* was the first case in which we explicitly recognized an unknowing-use due process claim; therefore, that legal basis was unavailable at the time applicant filed his previous application." As such, the court authorized the petitioner's claim that two eyewitnesses had testified falsely against him without the State's knowledge based on Article 11.071(5)(a)(1), since *Chabot* was not yet decided when the petitioner's

initial application was filed. The court reached a similar conclusion in at least one other case as recently as 2017. *Ex parte Castillo*, No. WR-70,510-04, 2017 WL 5783355, at *1 (Tex. Crim. App. Nov. 28, 2017) (unpublished) ("Because applicant filed his initial (and only other) habeas application in the trial court prior to this Court's decision in *Chabot*, this decision provides a new legal basis which was not available at the time applicant filed his last habeas application.")

The TCCA's application of *Chabot* to *Chavez* and *Castillo* but not the instant case cannot be described as anything but arbitrary. The court's reliance on a summary order, which states only that the "the allegation does not satisfy the requirements of Article 11.071 § 5" without further explanation belies its intent to simply sweep Mr. Runnels' cognizable claim under the rug at the eleventh hour. App. A at 2. This Court has clearly announced that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to *all* similar claims." *Hathorn*, 457 U.S. at 263. The TCCA should not be permitted to evade federal scrutiny by invoking a procedural rule that does not apply to Mr. Runnels' case without so much as explaining how this decision is consistent with its prior decisions. The fact that this procedural end run is being used to avoid review of a death row petitioner's claim of false testimony on the eve of his execution makes this Court's review all the more necessary.

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari. At a minimum, his claim that his death sentence was procured on the basis of false testimony merits further review.

Respectfully submitted, this the 6th day of December 2019.

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