

No. 20-5923
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

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

JACLYN O'CONNOR LAMBERT
Assistant District Attorney
Counsel of Record

Frank Crowley Courts Bldg.
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207
(214) 653-3625
Jaclyn.OConnor@dallascounty.org

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Flores filed a subsequent habeas application in the Texas Court of Criminal Appeals (“TCCA”) seeking relief from his death sentence pursuant to Article 11.073 of the Texas Code of Criminal Procedure. Article 11.073 provides, in part, that the TCCA may grant relief if a petitioner files a subsequent application demonstrating that previously unavailable, relevant, and admissible scientific evidence would contradict scientific evidence relied upon by the State at trial, and the court determines that “had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.” In his application, Flores argued that new scientific knowledge about hypnosis discredits the trial testimony of Jill Barganier and, without the State’s use of Barganier’s “hypnotically induced testimony,” Flores would not have been convicted. The TCCA disagreed, denying Flores’s claim. *Ex parte Flores*, No. WR-64,654-02, 2020 WL 2188757 (Tex. Crim. App. May 6, 2020) (not designated for publication). The following question is presented:

Is there a compelling reason for this Court to consider a claim challenging the admission of testimony by a witness who was previously hypnotized where the lower court decided the claim on an adequate and independent state-law ground and, in any event, where the claim is meritless?

LIST OF RELATED PROCEEDINGS

(in chronological order)

State of Texas v. Charles Don Flores, No. F98-02133-N (195th Judicial District Court of Dallas County April 1, 1999)

Flores v. State, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001)

Flores v. Texas, 535 U.S. 1039 (2002)

Ex parte Flores, WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. Sept. 20, 2006)

Flores v. Texas, 552 U.S. 884 (2007)

Flores v. Thaler, 3-07-CV-0413-M-BD, 2011 WL 11902115 (N.D. Tex. Mar. 3, 2011)

Flores v. Stephens, 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. July 17, 2014)

Flores v. Stephens, 3:07-CV-0413-M, 2014 WL 4661974 (N.D. Tex. Sept. 19, 2014)

Flores v. Stephens, 794 F.3d 494 (5th Cir. 2015)

Flores v. Stephens, 136 S. Ct. 981 (2016)

Ex Parte Flores, WR-64,654-02, 2016 WL 3141662 (Tex. Crim. App. May 27, 2016)

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BRIEF IN OPPOSITION

In January 1998, Petitioner Charles Don Flores and his cohort, Richard Childs, murdered 64-year-old Betty Black and the Blacks' Doberman pinscher, Santana, during the course of a home-invasion robbery. Flores and Childs tore apart the Blacks' home looking for a large sum of cash that the Blacks' incarcerated son, Gary, had left with his parents before going to prison. In April 1999, a Dallas County jury convicted Flores of capital murder and, via Texas's statutory special issues, sentenced him to death.

Jill Barganier, the Blacks' neighbor who identified Flores at trial as one of the perpetrators, underwent hypnosis thirteen months prior to her trial testimony. Because she had been hypnotized, Flores challenged the admission of her testimony at trial, as well as during every one his state and federal postconviction proceedings, to no avail. Most recently, he filed a subsequent state writ of habeas corpus under a new state statute claiming that newly available scientific evidence about hypnosis discredits Barganier's testimony. The lower court disagreed. Flores now petitions this Court for a writ of certiorari from the TCCA's order denying his subsequent writ application. But this Court lacks jurisdiction to grant review because the TCCA's decision rests exclusively on an adequate and independent state-law ground. In any event, Flores's claim wholly lacks merit.

Accordingly, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Trial Evidence

A. The capital murder of Betty Black

Elizabeth (“Betty”) Black, the deceased, resided with her husband, William (“Bill”) Francis Black, in Farmers Branch, a suburb of Dallas. (34 RR 47-51)¹. At approximately 6:30 a.m. on January 29, 1998, Mr. Black left for work. (34 RR 61-62). He returned home three hours later to discover blood all over the carpet and Mrs. Black’s body lying beneath the den table. (34 RR 63-65). Mr. Black immediately called the police, who arrived at the scene within a few minutes. (34 RR 65, 67). An autopsy established that Mrs. Black died as the result of a single gunshot. (34 RR 73, 164, 167).

In the living room, officers discovered the Blacks’ Doberman pinscher, Santana, shot through the back. (34 RR 73, 247; 35 RR 199, 205, 216; 36 RR 145-46). The size of Santana’s wound suggested a large-bore weapon, such as a .44 caliber, was used. (36 RR 147-50). Fragments of potato littered the floor, table, walls, and ceiling in the vicinity of the victim, indicating that the shooter placed a potato on the barrel of the murder weapon as a silencer. (35 RR 199, 206-07, 243-44). On the floor near Mrs. Black’s body, police officers found a .380 caliber bullet. (35 RR 222, 235-37). Officers located a shell casing of the same caliber and a piece of potato on the garage floor. (35 RR 226-27, 235-37). A police detective testified that a

¹ The State will refer to the volumes of the reporter’s record from trial as “RR” and to the volumes of the reporter’s record from the subsequent state writ proceeding as “WRR.” The State will refer to the clerk’s record from trial as “CR.”

second round from a different gun struck the dog. (35 RR 237-38, 242). Although officers did not find another bullet or shell casing, they did find a hole in the carpet, and the size of Santana's wound and patterns of blood and potato spatter tended to corroborate this hypothesis. (35 RR 238-45, 253, 277).

In the rest of the house, police observed that portions of the home were in disarray, and fixtures had been pulled out of bathrooms, as if someone were searching inside the walls. (35 RR 199-202). Specifically, police discovered a hole in the wall above the toilet in the hall bathroom. (35 RR 201, 209). In the master bathroom, someone had punched a hole in the wall near the laundry hamper, opened the commode top, and tore the sink and medicine cabinet from the wall. (35 RR 201-02, 209-10). Police found a large potato in the bathroom sink. (35 RR 202, 210). A ladder extending to the attic-access door stood in a rear room. (35 RR 200, 207-08). There were no signs of forced entry or struggle. (35 RR 211).

B. Events precipitating the murder

The murder of Mrs. Black did not occur in a vacuum. It had inception in a "drug deal gone bad," and transpired because a large amount of cash was known to be secreted in the Blacks' home. (34 RR 68, 150-51, 253-55; 38 RR 61, 118, 136, 178, 191). The Blacks' son, Gary, was known as a substantial drug user and dealer. (34 RR 252). At the time of the murder, Gary was in prison on drug-related charges. (34 RR 52). Gary had a common-law wife, Jackie Roberts, who was the mother of his two daughters. (34 RR 53, 100). Jackie and the girls lived a short distance from the Blacks' home, and Mrs. Black frequently cared for her granddaughters. (34 RR 54-55, 105, 111).

The Blacks had approximately \$39,000 in cash from Gary's illegal drug trade stored behind a suitcase in their master bedroom closet. (34 RR 68-70, 253; 38 RR 137, 191). The Blacks gave Jackie \$500 a month from this money while their son was incarcerated. (34 RR 70-71, 116, 259). The existence and general whereabouts of the money was common gossip among Gary's associates. (34 RR 253, 255). Indeed, this money had been a source of dispute between Gary and Jackie for some time, and Gary was threatening to cut Jackie's allowance. (34 RR 117, 254, 256; 38 RR 138-39, 160).

Jackie, who was on probation for possessing methamphetamine, became romantically involved with Richard Childs about three weeks before the murder. (34 RR 82, 103, 106-08, 110-11, 114, 171-72, 249; 38 RR 115). Childs, a drug dealer, habitually carried a .380 semiautomatic pistol in the back of his waistband. (34 RR 232; 35 RR 63, 66; 38 RR 141, 174). Childs drove a "junkie old Volkswagen," described as a "hippie bug," with dark tinted windows that was haphazardly painted with multiple colors, including pink and purple. (34 RR 79-81, 230-32; 35 RR 64, 92; 36 RR 247). Jackie admitted that she talked to Childs about Gary's money. (38 RR 136). Childs and Flores were associates; like Childs, Flores used and sold drugs. (36 RR 247; 37 RR 80-81; 39 RR 46-48). Flores was also known to own and carry many different types of firearms. (36 RR 250; 37 RR 77).

Flores lived in Irving, Texas with his girlfriend, Myra Wait, and her three children. (34 RR 78-79; 36 RR 249). Flores and Childs spent the early morning hours of the day of the murder at Flores's home using methamphetamine and

marijuana with Myra's brother, Jonathan Wait, and his cousin, Jamie Dodge. (34 RR 98-99; 36 RR 250-52, 257). Childs and Flores left together in Childs's multi-colored Volkswagen at approximately 3:00 a.m., arriving at Jackie's home later that morning.² (34 RR 85, 118-20; 36 RR 258). Jackie had arranged for her friend, Terry Plunk, to sell Childs and Flores a quarter-pound of methamphetamine for \$3,900. (34 RR 115, 117-18). She had not expected Flores, dressed in a long black duster, to accompany her and Childs to purchase the methamphetamine, but Flores refused to hand over his money without attending the drug transaction. (34 RR 123-24, 183).

The trio rode in Jackie's El Camino to an apartment near Love Field Airport in Dallas, where they met Plunk. (34 RR 121-23). During the transaction, Flores weighed the drugs on a portable digital scale and declared that the quantity was a quarter-ounce short. (34 RR 127-28, 176-77, 214). Plunk made up the alleged shortage to avoid a confrontation. (34 RR 128-29, 214). Jackie, Childs, and Flores then drove to Flores's home with the drugs. (34 RR 134-35). Flores re-weighed the methamphetamine and again accused Plunk of shortchanging him, insisting that the deal was for a half-pound instead of a quarter-pound. (34 RR 137-38). While ranting and raving about the "short" drugs, Flores threatened Jackie at gunpoint with a two-barreled handgun. (34 RR 138, 140). Childs attempted to calm Flores down, and Jackie telephoned Plunk to ask if he would cover the claimed shortage. (34 RR 140-41, 217). Plunk refused. (34 RR 142, 217). Childs, Flores, and Jackie

² Prior to leaving, Flores had attempted to borrow Dodge's 1997 black Hyundai Elantra, explaining that they were going to go to Farmers Branch. (34 RR 84; 36 RR 253).

then drove to a nearby house, where Childs and Flores acquired three firearms. (34 RR 143-45). Flores was armed with a “long, blue gun” and a handgun. (34 RR 144; 38 RR 113). Childs carried a larger handgun. (34 RR 144; 38 RR 113). When Jackie asked the men what they were doing and attempted to remind them that she was on probation, they told her that it was none of her business. (34 RR 145).

To make up the alleged shortage, Jackie agreed to pay Flores \$3,900 from the cash that Gary Black had hidden at his parents’ home. (34 RR 150). Jackie told him that she needed a day to get the money from the Blacks’ house. (34 RR 150). She also offered them a check she had just received from Mrs. Black for \$500; this check had the Blacks’ address printed on it. (38 RR 155). Childs spoke to Flores on Jackie’s behalf and confirmed the existence of the money. (34 RR 150-51). The two men dropped Jackie off at home sometime between 6:35 and 7:15 a.m. and drove away in the Volkswagen. (34 RR 153, 238; 35 RR 14-15, 21, 52).

C. Childs and Flores are identified as suspects

Vanessa Stovall, another girlfriend of Childs, testified that Childs and Flores arrived at Childs’s grandmother’s home around 6:30 a.m. on the morning of the murder. (35 RR 69-71, 82, 89; 36 RR 175). Flores and Stovall smoked methamphetamine before the men left in the Volkswagen between 6:45 and 7:00 a.m. (35 RR 73-75, 90).

Jill Barganier, a neighbor of the Blacks, 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. (36 RR 279-81). Both walked toward the front door. (36 RR 283). The passenger, whom she positively identified in the courtroom as Flores, turned to

face her and made eye contact with her. (36 RR 283, 294). She reported this to her husband, who was just waking up. (36 RR 286). When she left to go to work, at about 7:25 a.m., she did not notice the Volkswagen. (36 RR 237). Ms. Barganier reported what she had seen to the police, and she subsequently identified Childs from a photographic lineup as the driver of the car. (36 RR 289, 290).

Neighbors Michelle Babler and her son, Nathan Taylor, saw the Volkswagen at the Blacks' home at around 7:30-7:35 a.m. (35 RR 104, 106, 135-39, 144, 149). Two men got out of the car. (35 RR 108, 139). While neither witness could positively identify either of these men, Babler testified that the men were similar in appearance. (35 RR 115-16). Nathan noticed that the men were dressed in black and wore gloves. (35 RR 140). According to Babler and her son, the Blacks' garage door was open at the bottom; this was unusual. (35 RR 103, 119-20). Mrs. Black's car was in front of the house but Mr. Black's truck was gone. (34 RR64; 35 RR 103-04). The Volkswagen driver "rolled" under the slightly open garage door. (35 RR 110, 141). The garage door was raised and the other man entered, and the garage door was shut. (35 RR 110, 141-42). While Babler was suspicious, she saw another neighbor, Robert Barganier, outside and assumed that he had also seen the men. (35 RR 110). Mr. Barganier originally started to walk towards the Volkswagen, then turned around and got in his truck, which was already running in front of his house. (35 RR 111, 124). Since he apparently "dismissed" these happenings, she thought everything was fine and proceeded to take her children to school. (35 RR 110-11).

When Babler returned home, at about 8:15 a.m., the Volkswagen was gone. (35 RR 126).

Robert Barganier, Jill Barganier's husband, confirmed that his wife left the house at about 7:22-7:25 a.m.; he left two to ten minutes later. (35 RR 169-70). As Mr. Barganier left the house, he heard a "thud," which sounded like a "two by four" falling. (35 RR 170, 188). He thought perhaps Mr. Black was working on his house and had fallen. (35 RR 170). He hollered for "Bill," then checked the side and back of the Blacks' home. (35 RR 170-73). Finding nothing amiss, he then walked toward the front of the house and was preparing to knock on the door when he noticed a multicolored Volkswagen in the driveway. (35 RR 174-75, 179, 191). He did not see any men and thought that the garage was shut. (35 RR 176). Mr. Barganier testified that he had seen the Volkswagen previously at Jackie's home. (35 RR 176, 189). He assumed that Jackie was bringing her daughters to Mrs. Black, who cared for the girls regularly. (35 RR 177-78). He returned to his vehicle and left for work. (35 RR 181-82).

When Childs and Flores dropped off Jackie at her home on the morning of the offense, she spoke briefly with her ex-husband Doug Roberts, who had arrived to take their son to school. (34 RR 239). Later that morning, Jackie left to visit Plunk. (34 RR 240). A short time after Jackie's departure, her mother told Doug about Mrs. Black's murder. (34 RR 240-41). That evening, Doug went to the home of the victim's daughter, Sheila Black, and learned that neighbors had observed a pink and purple Volkswagen at the house. (34 RR 242-43; 35 RR 21). Doug drove to

Plunk's house to inform Jackie not only about the murder but also that neighbors saw Childs's multi-colored Volkswagen at the scene. (34 RR 161-62, 244; 35 RR 23). He tried to convince Jackie to go with him to the police immediately, but Jackie feared possible retaliation or prosecution. (34 RR 162-63, 243-44, 283-84, 286; 35 RR 22, 32). Doug went to the police station, but Jackie went to a motel. (34 RR 244-46).

On his way to the police station, Doug disposed of a map, discovered by Plunk in Jackie's knapsack, that Jackie had drawn showing the area of her own home and the Blacks' house.³ (34 RR 245-46; 35 RR 24-25). Doug reported Childs's possible involvement in the murder to the police that night and submitted to another police interview the next day. (34 RR 164, 246; 35 RR 36-37, 43, 47). Law enforcement officers apprehended Jackie at Doug's apartment four days after the murder. (34 RR 165-66). By then, the police had arrested Childs. (34 RR 166-67; 36 RR 177-79).

When he was arrested, Childs possessed amphetamine and a partial box of the same brand of .380 ammunition found at the murder scene. (36 RR 179-83, 194-95). A search of his grandmother's residence uncovered a .44 Magnum revolver and shells, two boxes of .357 bullets, and a pair of gloves. (36 RR 197-98, 200-01). Polarized-light microscopy of granular material found inside the Magnum barrel identified starch grains consistent with those from a potato. (36 RR 211-13).

³ Jackie initially told the police that she had drawn this map for Childs. (34 RR 161; 38 RR 134). The evidence at trial, however, established that Jackie drew the map for her friend, Elaine Dixon, in an effort to guide her to the Blacks' house to babysit. (34 RR 159-61; 38 RR 132; 39 RR 17, 21).

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

The evening after the murder, Flores admitted to a friend, Homero Garcia, that he and Childs had gone to a house to get some money and the whole deal had gone bad. (36 RR 237). Flores claimed that he shot the dog, but blamed Childs for killing the "old lady." (36 RR 219, 224, 235). Homero and Flores then traded guns; Flores gave Homero a .380 in exchange for Homero's .357. (36 RR 220, 222; STE 64-65). Homero had seen Flores with a .380 on prior occasions. (36 RR 221).

Two days after the murder, Flores, his girlfriend Myra, and Myra's brother Jonathan towed Childs's Volkswagen to the parking lot behind the Grand Prairie roofing business owned by Flores's father. (36 RR 261, 262-64, 275). There, Flores removed the license plates and spray-painted the Volkswagen black. (36 RR 264). The group then towed the vehicle onto the shoulder of an Interstate-30 entrance ramp. (36 RR 266-67). Flores doused the Volkswagen with gasoline, lit a piece of paper, and threw it onto the Volkswagen, which burst into flames. (36 RR 268).

James Jordan, a motorist on Interstate-30, saw the vehicle on the side of the road. (37 RR 13-18). Jordan initially thought that another motorist might need assistance and was in the process of pulling off the road to offer help when Flores lit the Volkswagen on fire. (36 RR 268-69; 37 RR 19-20). As Flores sped away in Myra's Suzuki, Jordan followed, intending to get his license number and report the incident. (36 RR 269; 37 RR 22). Flores attempted to evade Jordan by driving at an excessive rate of speed, swerving in and out of traffic, running red lights, and, at one point, jumping the median into oncoming traffic. (36 RR 270-73; 37 RR 27-39). Flores also fired several gun shots at Jordan's car. (36 RR 269; 37 RR 28, 31, 52).

According to Jonathan, Flores was exhilarated during these events and later referred to it as “drama.” (36 RR 273). Authorities filed arson charges against Flores for this incident. (37 RR 69-70).

Shortly thereafter, Flores decided to flee the country to avoid apprehension. Before leaving, he stopped by the home of Jonathan Wait, Sr., Myra and Jonathan’s father. (37 RR 82). Flores was driving a black extended pick-up truck, license number 0820ZX, and had enough clothes and luggage in the truck for a vacation. (37 RR 82-83, 96). Flores told Wait that he had gotten himself into a little trouble and needed to leave the country. (37 RR 84, 86). Jonathan had previously called Wait’s attention to a newspaper article about Mrs. Black’s murder and told him that Flores was the suspect at-large that authorities were looking for. (37 RR 82). Wait showed Flores the newspaper article and said, “You call this a little bit of trouble, killing a 64-year-old woman,” to which Flores responded, “I only shot the dog.” (37 RR 84-85). Flores told Wait that he was not going to be “taken alive.” (37 RR 86). Flores left Wait’s home and fled to Mexico.

A truck registered to Carter C. Flores, license number 0820ZX, re-entered the United States from Mexico on March 16, 1998 at 4:13 p.m. at Pharr, Texas. (37 RR 138, 140-41). Flores was next seen in the United States about a month later when, on his way from Mexico to Dallas, he was arrested in Kyle, Texas, for driving while intoxicated (“DWT”) and assault on a police officer. (37 RR 126-27, 130; 37 RR 140, 143-44).

On April 18, 1998, Kyle police officers Slaughter and Oaks stopped a blue Volvo traveling north on Interstate-35 following a report of a possible intoxicated driver. (37 RR 97-104, 106). Flores, the vehicle's sole occupant, could not produce a driver's license, but identified himself as Juan Jojola and presented a social security card bearing that name.⁴ (37 RR 109-10). During the stop, an angry motorist notified the officers that the Volvo had almost run his automobile off the road. (37 RR 114-15). After Flores failed a series of field sobriety tests, Officer Slaughter initiated an arrest for DWI. (37 RR 112-13, 116). Flores became violent and, in the course of a struggle to break free, injured the officers and attempted to push them into oncoming traffic on the highway. (37 RR 117-27). By chance, Deputy Mike Davenport of the Hays County Sheriff's Department arrived on the scene and assisted the police officers in handcuffing Flores. (37 RR 123-34). The officers transported Flores to the Hays County jail, where they charged him with DWI and two counts of assault on a peace officer. (37 RR 125-27). Because of the alias, the officers did not discover that Flores had an outstanding federal warrant for his arrest, and authorities released Flores from jail before his true identity was discovered. (37 RR 111, 126-27, 134).

Agents with the Federal Bureau of Investigation ("FBI") finally arrested Flores for Mrs. Black's murder on May 1, 1998, in Irving, Texas. (37 RR 148-49, 168-69). Flores did not cooperate in this arrest, made every attempt to avoid apprehension, and led FBI agents on a dangerous high-speed chase, which ended

⁴ It was established at trial that Juan Jojola was Flores's brother. (40 RR 79).

with a head on collision and a foot race through a residential area. (37 RR 157-69). Then, Flores struggled violently with agents to avoid arrest and had to be subdued by physical force. (37 RR 168-69).

Flores suffered a broken knee cap as a result of the collision on the day of his arrest. (37 RR 174). While being treated for these injuries at Parkland Hospital several weeks later, Flores attempted to escape from custody by taking a deputy sheriff's gun and threatening to kill him. (37 RR 188-91,193-94, 201, 208, 220-29). In the ensuing struggle, Flores sprayed the officer with mace. (37 RR 194, 209, 217, 230-36). It took three to four people to eventually subdue Flores. (37 RR 195-198, 217-218, 232).

II. State and Federal Proceedings Related to Flores's Hypnosis Claim

A. Trial objection to Jill Barganier's testimony

Jill Barganier and her family were the Blacks' next-door neighbors at the time of the offense. (35 RR 163-64; 36 RR 88, 277). As outlined above, at approximately 6:45 a.m. on the morning of the murder, Barganier looked out a window of her home and saw the purple and pink Volkswagen pull into the Blacks' driveway. (36 RR 88, 278-79, 281-82). She saw two men exit the vehicle. (35 RR 154; 36 RR 281-82). The passenger turned and made eye contact with her. (36 RR 283, 285, 294). The men walked toward the front of the house, and Barganier, believing they belonged there, continued getting herself and her family ready for the day. (36 RR 285-86).

After learning about Mrs. Black's murder from one of her neighbors, Barganier went to the Farmers Branch Police Department to give her account of

what she had witnessed earlier that morning. (35 RR 154-55). She provided descriptions of the two men to the police and also assisted in creating a composite drawing of the driver. (35 RR 154–55). The following day, January 30, 1998, Barganier identified Richard Childs in a photo lineup as the driver of the Volkswagen. (35 RR 154–55). Authorities showed her another photo lineup on January 31, 1998, and she again identified Childs as the driver. (35 RR 154–55). Several days later, on February 4, 1998, she underwent hypnosis. (35 RR 155). During the session, she did not enlarge on her descriptions of the men. (35 RR 155-56). Immediately after the hypnosis session, officers showed her a photo lineup that included a photo of Flores, but she made no identification. (35 RR 155-56).

Over a year later, on March 23, 1999, Barganier entered the courtroom to testify as a witness for the State at Flores’s capital murder trial. (35 RR 153; 36 RR 91–92). Outside the presence of the jury, the State and the trial court questioned Barganier briefly concerning her identification of Childs and the subsequent hypnosis session she participated in; the court then excused her from the courtroom. (35 RR 153-56). At that time, the defense objected to Barganier’s testimony, arguing that the State had not demonstrated the trustworthiness of her hypnotically refreshed testimony as required by *Zani v. State*.⁵ (35 RR 157-61). In response, the State suggested the court conduct a “*Zani* hearing” the following morning and

⁵ In *Zani*, the TCCA held that the proponent of hypnotically refreshed testimony must demonstrate, by clear and convincing evidence, that the testimony is trustworthy. *Zani v. State*, 758 S.W.2d 233, 243 (Tex. Crim. App. 1988). To admit the evidence, the court must find, from a totality of circumstances, that hypnosis neither rendered the witness’s posthypnotic memory untrustworthy nor substantially impaired the ability of the opponent fairly to test the witness’s recall by cross-examination. *Id.* at 244.

agreed to postpone calling Barganier as a witness pending the resolution of the hearing. (35 RR 157-61).

After exiting the courtroom, Barganier asked to speak to one of the prosecutors; she informed him that Flores was the passenger of the Volkswagen she saw outside the Blacks' residence on the day of the offense. (36 RR 13-15, 85-86, 92-93). The State informed the defense and the court. (36 RR 15-16). Flores objected to Barganier making an in-court identification, arguing that it was tainted by the previous hypnosis session. (36 RR 16).

The trial court conducted the *Zani* hearing the following morning. (36 RR 12-118). Jill Barganier, Farmers Branch Police Detective Jerry Baker, Farmers Branch Police Officer and certified forensic hypnotist Alfredo Serna, and Dr. George R. Mount, Ph.D., testified at the hearing. (36 RR 18-109). Testimony at the hearing revealed that Barganier, not the police or the prosecution, requested the hypnosis session. (36 RR 31, 89, 100). Barganier testified that she assisted the police in creating a composite drawing of the driver of the Volkswagen and positively identified him in two photo lineups as Richard Childs. (36 RR 88-90). Authorities later asked Barganier to assist in creating a composite drawing of the passenger. (36 RR 90). Barganier testified that she thought hypnosis might help her to relax and be more precise. (36 RR 90). Barganier explained that she was nervous and afraid because the passenger scared her. (36 RR 89). Barganier stated: “[The passenger] looked at me when I was looking through the window. I thought we had made eye contact. I was just real nervous.” (36 RR 89). Barganier also found the

composite drawing procedure difficult and noted that it was computerized, which was different from what she had expected. (36 RR 90).

The hypnosis session was held at the Farmers Branch Police Station on February 4, 1998. Officer Serna, a certified investigative hypnotist, conducted the session. (36 RR 34). Investigator Baker was present and operated the camera but otherwise said nothing. (36 RR 18-19). Neither officer knew that Flores was a potential suspect in the murder.⁶ (36 RR 20, 30-31, 38, 57). Officer Serna testified at the *Zani* hearing that Barganier appeared to be in good physical and mental condition and was not fatigued, depressed, intoxicated or on drugs, and was a suitable subject for hypnosis. (36 RR 48). During the course of the hypnosis session, Officer Serna suggested nothing to Barganier, provided no feedback, and avoided reinforcing any aspect of her recollection. (36 RR 37, 40, 41, 49).

The State called Dr. George Mount, a psychologist with extensive experience in forensic hypnosis, as an expert witness at the *Zani* hearing. (36 RR 60). Dr. Mount testified that he had evaluated several hundred hypnosis sessions, taught hypnosis for twenty years, and was on the board that developed the exam for the Texas Commission on Law Enforcement Officers Standards and Education (“TCLEOSE”) that peace officers are required to take in order to be certified as an

⁶ The record reflects that another Farmers Branch police officer had spoken with the Irving Police Department and knew that they were looking for someone who went by the name “Fat Charlie.” (36 RR 28). Investigator Baker testified, however, that neither he nor Officer Serna knew any of the details regarding Flores’s potential involvement until after the hypnosis session. (36 RR 30–31).

investigative hypnotist. (36 RR3 62–63, 72). Having viewed the videotape of Barganier’s hypnosis session, Dr. Mount’s expert opinion was that the hypnosis session had been conducted in such a way as to guard against the “four possible dangers” of hypnosis and had satisfied the factors set out by the TCCA in *Zani*. (36 RR 60–62, 65-71, 72). He saw no evidence on the recording of any incorrect procedures. (36 RR 63-65).

Barganier further testified during the *Zani* hearing that while the hypnosis session had made her feel more relaxed, it did not “firm up” an impression of the Volkswagen passenger. (36 RR 101). Barganier also testified that while she may have seen a photograph of Flores on the news at the time of his arrest, she had not looked at the newspaper during trial nor had she seen a picture of Flores during the trial. (36 RR 108). She testified that she understood the seriousness of the situation and was positive in her identification. (36 RR 108–109).

At the conclusion of the hearing, the lead prosecutor summarized the evidence corroborating Barganier’s testimony as follows:

Jaime Dodge saw the Defendant and Rick Childs in that Volkswagen a few hours before saying that they were going to go to Farmers Branch.

That Jackie Roberts saw the Defendant and Rick Childs in that Volkswagen within hours of the – within an hour of the murder. The Defendant wanted money, that she had discussed being at the victim’s house.

That Judy Haney saw the Defendant and Rick Childs a few hours prior to the killing.

That Terry Plunk saw the Defendant and Rick Childs a few hours prior to the killing together.

That Doug Roberts saw the Volkswagen and Rick Childs as the driver at 6:30 in the morning.

That Jill [Barganier], in fact, does pick out Rick Childs as the driver of that vehicle prior to hypnosis.

That Vanessa Stovall sees the Defendant and Rick Childs in that Volkswagen literally minutes prior to going over to the Bergen address that morning.

That Michelle Babler sees two men, and the passenger is consistent with the build and physical description of this Defendant that she pointed out in court.

That Nathan Taylor saw two men with gloves in that Volkswagen, again bolstering the credibility of Jill [Barganier].

We have two witnesses that are going to testify that the Defendant admitted to being present at the scene.

We also have a witness that is going to testify that he sees the Defendant, identifies the Defendant burning the Volkswagen two days after this offense out on I-30.

(36 RR 111–13). In addition to hearing testimony and argument, the trial judge also viewed the videotape of the hypnosis session. (36 RR 117-18).

At the conclusion of the hearing, the trial court denied the defense's motion to suppress Barganier's in-court identification of Flores. (36 RR 117-18). The Court made specific findings of fact and conclusions of law, which were dictated to the court reporter:

Well, the Court finds that Officer Alfredo Serna was a qualified forensic hypnotist; that Farmers Branch investigators that were involved in the case and in the hypnotic – or hypnosis session had no photograph of Mr. Flores and no description of Mr. Flores at that time which they could impart to Ms. [Barganier].

The Court has viewed the video and saw nothing that it believed was subjective, either verbal or nonverbal, nor any cues to Ms. [Barganier] about her identification.

The hypnotist merely inquired whether she could describe the two persons who had gotten out of the Volkswagen, and she had very little. In fact, although it's obvious that there was a hypnosis session, whether you could call her hypnotically refreshed – her testimony hypnotically refreshed is a question.

I noticed no refreshment beyond perhaps the eye color, and I believe she had previously stated that they were dark eyes, and it was compatible even with that.

The real issue here is whether her in-court identification is trustworthy or not. And if it is not trustworthy by reason of the hypnosis, then obviously it could not be admissible.

There is ample corroboration of the fact that the Defendant was the passenger in the Volkswagen, all which was just enumerated by the Prosecutor. The Court finds that under the totality of the circumstances, that there is clear and convincing evidence that the hypnosis undergone by Ms. [Barganier] did not render her eyewitness – in-Court eyewitness identification of the Defendant untrustworthy; therefore, the motion of the Defendant to disallow her testimony is denied.

(36 RR 117-18). The trial court also granted the defense a “running objection” to Barganier’s identification testimony. (36 RR 277-78).

In the presence of the jury, Barganier described what she saw on the morning of the murder and identified Flores as the passenger in the Volkswagen. (36 RR 283-85).

The defense reserved its cross-examination of Barganier, and called her back to the stand during its case-in-chief, challenging her ability to adequately see the men due to the fact that sunrise was not until 7:25 a.m. on the morning of the murder. (38 RR 12-19). Barganier was adamant that there had been enough light for her to see the men. (38 RR 22). Defense counsel did not question Barganier about having undergone hypnosis. (38 RR 12–19); see *Zani*, 758 S.W.2d at 240 n.7 (“Once admitted by the trial court, credibility of the hypnotically enhanced testimony may be attacked before the jury.”).

Finally, in an abundance of caution, the trial court included the following instruction in its charge to the jury:

During the trial there was testimony that on February 4, 1998, State’s witness Jill [Barganier] was hypnotized by Farmers Branch Police Officer Serna in an effort to refresh, restore, or improve her memory regarding a

description of the passenger of a multi-colored Volkswagen automobile she told officers she had seen at the residence of Elizabeth Black on the morning of January 29, 1998. If you find and believe from the evidence, or if you have a reasonable doubt, that her in-court identification of the defendant, Charles Don Flores, as such passenger was a false memory or the result of suggestion or any improper influence, whether intentional or unintentional, arising from her having been hypnotized, if she was hypnotized, which rendered her in-court identification of the defendant untrustworthy, you will disregard her in-court identification of the defendant and not consider it for any purpose whatsoever. However, if you find and believe from the evidence beyond a reasonable doubt that her in-court identification of the defendant was not a false memory or the result of suggestion or improper influence while she was hypnotized, if she was, you may consider her credibility and the weight to be given her testimony regarding her in-court identification of the defendant as you would the testimony of any other witness.

(1 CR 134–35).

B. Direct Appeal

Flores was convicted of capital murder and sentenced to death on April 1, 1999. The TCCA affirmed his conviction and sentence on direct appeal. *Flores v. State*, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (not designated for publication). In his ninth point of error on direct appeal, Flores alleged that the trial court erred by admitting Barganier’s identification testimony because the State failed to prove that the hypnosis had not tainted her testimony. *See Flores*, No. AP-73,463, slip op. at 22. The TCCA denied this complaint on the basis that the trial court’s procedures substantially complied with *Zani*, that it was aware of the dangers inherent in hypnosis, that it did not abuse its discretion in allowing the testimony, and that the jurors were free to attach whatever weight they deemed appropriate to Barganier’s testimony. *Id.* at 22–23. Flores filed a petition for a writ of certiorari in this Court, which was denied on April 29, 2002. *Flores v. Texas*, 535 U.S. 1039 (2002).

C. Initial state habeas proceeding

On September 13, 2000, while his direct appeal was pending, Flores filed his initial application for a writ of habeas corpus in state court alleging twelve grounds for relief, including the claim that the trial court erred by admitting Barganier's identification testimony. On December 14, 2000, Flores filed a *pro se* amendment to his state habeas application raising nineteen additional grounds for relief. On April 12, 2006, the state habeas court issued findings of fact and conclusions of law recommending that relief be denied on all thirty-one grounds. With respect to the claim regarding the admission of Barganier's identification testimony, the state habeas court concluded that the claim was barred from consideration because it had been raised and rejected on direct appeal. In the alternative, the state habeas court held that Flores failed to show that Barganier's identification of him was the result of hypnosis or unconstitutionally tainted, and that, even if improperly admitted, any harm was prevented by the trial court's curative instruction. On September 20, 2006, the TCCA expressly adopted the trial court's findings and denied relief. *Ex parte Flores*, No. WR-64,654-01, 2006 WL 2706773 (Tex. Crim. App. Sept. 20, 2006) (not designated for publication). Flores's petition for a writ of certiorari to this Court was denied on October 1, 2007. *Flores v. Texas*, 552 U.S. 884 (2007).

D. Federal habeas proceedings

Flores filed his initial federal habeas petition on September 18, 2007, and an amended petition on March 24, 2008, alleging four grounds for relief. In his third ground, he claimed that the trial court improperly admitted Barganier's "hypnotically-enhanced identification testimony" in violation of his Fourteenth

Amendment right to due process and his Sixth Amendment right to confrontation. *Flores v. Thaler*, No. 3-07-CV-0413-M-BD, 2011 WL 11902115, at *6 (N.D. Tex. Mar. 3, 2011). In support of his claim, Flores included the affidavit of Dr. R. Edward Geiselman, an expert in eyewitness psychology. *Id.* at *7. In his affidavit, Geiselman “conclude[d] that ‘the forensic interview session might have caused and otherwise affected the in-court identification of Charles Flores by eyewitness Jill Barganier.’” *Id.* “According to Dr. Geiselman, Barganier’s identification testimony was untrustworthy and unduly suggestive because the interviewer told her, while under hypnosis, that ‘[y]ou might find yourself able to recall other things as time goes by.’” *Id.* The federal magistrate recommended that relief be denied, noting that “[e]ven if the court considers the Geiselman affidavit, which was never presented to the state habeas court, it does not overcome the presumption of correctness attached to the state court findings.” *Id.*

On July 17, 2014, the federal district court adopted the magistrate’s recommendation, as modified in its order, and denied relief. *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. July 17, 2014). The district court also rejected Flores’s request to amend his federal petition, in light of this Court’s decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), to include a claim that trial counsel was ineffective for failing to adequately contest Barganier’s testimony. *Id.* at *13. The district court determined that the claim would be procedurally barred and time barred, but also noted that Flores had not shown that an objection to Barganier’s testimony would reasonably have

prevailed even if it had included the new evidence presented in these proceedings, i.e., Geiselman's affidavit. *Id.*

The Fifth Circuit Court of Appeals denied Flores's request for a certificate of appealability to appeal the district court's denial of leave to amend his federal habeas petition to raise three ineffective assistance of counsel claims, including the one described above. *Flores v. Stephens*, 794 F.3d 494, 502 (5th Cir. 2015). In specifically addressing Applicant's claim concerning trial counsel's failure to properly challenge Barganier's testimony, the Fifth Circuit explained:

Reasonable jurists also could not debate the district court's conclusion that amendment would be futile because Flores failed to present a substantial [ineffective assistance of trial counsel] claim based on the failure to properly challenge Barganier's identification testimony, and therefore failed to show cause to excuse the procedural default of that claim. The record reflects that trial counsel vigorously challenged the admission of [Barganier's] testimony. Fearing that [Barganier] might identify Flores in the courtroom, defense counsel requested and obtained a hearing at which the State had the burden of producing clear and convincing evidence that the hypnosis session did not affect [Barganier's] identification of Flores. When the trial court denied their motion to suppress her testimony, defense counsel requested and received a running objection to her testimony. Further, defense counsel cross-examined [Barganier] about her ability to see the passenger in the Volkswagen, in an effort to discredit her identification. **Even assuming that trial counsel performed deficiently by failing to present expert testimony such as that in the affidavit of Dr. Geiselman, and assuming further that the trial court would have excluded Barganier's in-court identification of Flores had such expert testimony been presented, there is not a reasonable probability that the outcome of the trial would have been different, because there was ample other evidence that placed Flores at the scene of the murder, including his own admissions that he was there and shot the dog.**

Id. at 505–06 (emphasis added). Flores filed a petition for a writ of certiorari, which this Court denied on January 25, 2016. *Flores v. Stephens*, 136 S. Ct. 981 (2016).

E. Subsequent state habeas proceeding

The state trial court signed an order setting Flores's execution for June 2, 2016. Two weeks prior to his scheduled execution, on May 19, 2016, Flores filed a motion for stay of execution and a subsequent state writ application alleging four grounds for relief. In ground one, he alleged pursuant to a previously-unavailable "new science" statutory provision of Article 11.073 of the Texas Code of Criminal Procedure that new scientific knowledge discredits the testimony of Jill Barganier, the only eyewitness to the crime. On May 27, 2016, the TCCA found that this claim satisfied the requirements of Article 11.071, § 5 of the Texas Code of Criminal Procedure, so it stayed Flores's execution and remanded the case to the state trial court for consideration of this claim. *Ex parte Flores*, No. WR-64,654-02, 2016 WL 3141662 (Tex. Crim. App. May 27, 2016) (not designated for publication).

On remand, the trial court held a live evidentiary hearing. Flores presented testimony from Jill Barganier, Alfredo Serna, Jerry Baker, Dr. Margaret Kovera, Ph.D., and Dr. Steven Lynn, Ph.D. The State presented testimony from Dr. George Mount, Ph.D. and Dr. David Spiegel, M.D. The testimony from Barganier, Serna, Baker, and Dr. Mount was consistent with the testimony they previously provided at the *Zani* hearing held during Flores's trial. Dr. Lynn and Dr. Spiegel provided conflicting testimony regarding the scientific community's perspective on hypnosis, the appropriateness of the procedures followed in this case, and the reliability of Barganier's identification. After hearing all the evidence and arguments of counsel, the trial court signed findings of fact and conclusions of law on October 3, 2018 recommending that relief be denied. The trial court specifically found that (1) the

scientific evidence on hypnosis and memory that Flores presented in the subsequent habeas proceeding was not new because it was readily ascertainable through the exercise of reasonable diligence at the time of Flores’s trial; (2) even if Flores had presented the testimony of Dr. Lynn or a similar expert at the *Zani* hearing at his trial, the result of the proceeding would not have been different; and (3) Flores failed to prove, by a preponderance of the evidence, that he would not have been convicted if Jill Barganier’s identification testimony had been excluded. The TCCA adopted the trial court’s findings and denied relief on May 6, 2020. *Ex parte Flores*, No. WR-64,654-02, 2020 WL 2188757 (Tex. Crim. App. May 6, 2020) (not designated for publication). Flores then filed this petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

The question Flores presents for review is unworthy of this Court’s attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for “compelling reasons.” Sup. Ct. R. 10. Where a petitioner asserts only factual errors or misapplication of a properly stated rule of law, certiorari review is “rarely granted.” *Id.*

Here, Flores advances no compelling reason to review his case, and none exists. The crux of Flores’s complaint stems from the lower court’s application of Article 11.073 of the Texas Code of Criminal Procedure—which provides a purely statutory, non-constitutional pathway to habeas relief in cases involving newly available scientific evidence. To that end, this Court lacks jurisdiction to hear it. Moreover, Flores previously asserted a federal due process claim on the hypnosis-

associated testimony in his original federal writ proceeding. The federal courts rejected that due process claim, and this Court denied a petition for writ of certiorari. Beyond that, Flores’s current claim is unsupported by the record below. Accordingly, Flores’s claim has no merit, and this Court should deny certiorari review.

I. This Court Lacks Jurisdiction Over a Claim the Lower Court Decided on an Adequate and Independent State-Law Basis

Because Flores’s current complaint is predicated on a purely state law avenue for relief—Article 11.073 of the Texas Code of Criminal Procedure—jurisdiction is lacking in this Court.

Enacted in 2013, Article 11.073 provides a *statutory, non-constitutional* pathway to habeas relief in cases in which “relevant scientific evidence” was not available to be offered at a convicted person’s trial or contradicts scientific evidence the state relied on at trial. *Ex parte Kussmaul*, 548 S.W.3d 606, 633 (Tex. Crim. App. 2018) (emphasis added) (citing Tex. Code Crim. Proc. Ann. art. 11.073, § (a)). Relief can be granted under Article 11.073 upon a threefold showing that:

1. “relevant scientific evidence is currently available and was not available at the time of the convicted person’s trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person’s trial; and”
2. “the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and”
3. “had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.”

Id. at 634 (citing Tex. Code Crim. Proc. Ann. art. 11.073, § (b)(1)–(2)).

In his subsequent state habeas application, Flores asserted that he is entitled to relief under Article 11.073 because “newly available scientific evidence” on hypnosis and memory discredited the testimony of Jill Barganier, the only eyewitness to the crime, and without the State’s use of Barganier’s testimony, he would not have been convicted. After holding a live evidentiary hearing, the trial court found that Flores failed to meet the dictates of Article 11.073, § (b) and recommended that relief be denied. The TCCA agreed and denied relief. *See Ex parte Flores*, 2020 WL 2188757 at *1.

Because the TCCA denied Flores’s arguments predicated on Article 11.073 on the merits, such a substantive state law ruling precludes this Court from entertaining these claims. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (“[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts.”); *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) (“Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.”). Accordingly, this Court should deny Flores’s petition.

II. The Federal Courts Previously Rejected Flores’s Claim of a Due Process Violation Arising from the Hypnosis Session

Flores urges this Court to disregard the state-law basis of the lower court’s ruling and consider the constitutional ramifications of his hypnosis issue, *i.e.* whether the admission of Barganier’s testimony violated his Fourteenth

Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment.

Flores's due process claim was previously raised in the federal courts and rejected. In his initial federal habeas petition, Flores argued that the trial court improperly admitted Barganier's "hypnotically-enhanced identification testimony" in violation of his Fourteenth Amendment right to due process and his Sixth Amendment right to confrontation. *Flores v. Thaler*, 2011 WL 11902115, at *6. Flores's claim was supported by an affidavit from an expert in eyewitness psychology, similar to what was presented here in the lower court. The federal magistrate recommended that relief be denied, noting that "[e]ven if the court considers the...affidavit [provided by Flores's expert], which was never presented to the state habeas court, it does not overcome the presumption of correctness attached to the state court findings." *Id.*

The federal district court adopted the magistrate's recommendation and denied relief. *Flores v. Stephens*, 2014 WL 3534989 at *9-10. The district court also rejected Flores's request to amend his federal petition to include a claim that trial counsel was ineffective for failing to adequately contest Barganier's testimony. *Id.* at *13. The district court determined that the claim would be procedurally barred and time barred, but also noted that Flores failed to show that an objection to Barganier's testimony would reasonably have prevailed if it had included the new evidence, *i.e.* the expert affidavit, presented by Flores in his federal proceedings. *Id.*

Next, the Fifth Circuit Court of Appeals denied Flores’s request for a certificate of appealability. *Flores v. Stephens*, 794 F.3d at 502. The Fifth Circuit found that Flores failed to present a substantial ineffective assistance of trial counsel claim based on the failure to properly challenge Barganier’s identification testimony, and therefore failed to show cause to excuse the procedural default of that claim. *Id.* at 505. The Fifth Circuit noted that trial counsel vigorously challenged the admission of Barganier’s testimony, requested and received a running objection to the testimony after it was admitted, and made every attempt to discredit Barganier’s identification of Flores in front of the jury on cross-examination. *Id.* at 505-06. The Fifth Circuit found that, even if trial counsel performed deficiently by failing to present expert testimony about hypnosis, and assuming further that the trial court would have excluded Barganier’s in-court identification of Flores had such expert testimony been presented, “there is not a reasonable probability that the outcome of the trial would have been different, because there was ample other evidence that placed Flores at the scene of the murder, including his own admissions that he was there and shot the dog.” *Id.* Flores then filed a petition for a writ of certiorari in this Court, which was denied. *Flores v. Stephens*, 136 S. Ct. 981 (2016).

Because Flores’s due process claim was raised and rejected in his federal writ proceedings and certiorari review of that decision was previously denied, this Court should deny Flores’s instant petition. Flores did not raise the constitutional cruel and unusual punishment claim in his prior federal proceedings, but briefly raises it

here. As previously discussed herein, this Court should reject that argument as a basis for granting certiorari review because the decision by the lower court was based entirely on state law.

III. Flores's Claim Has No Merit

A. Barganier's identification of Flores was not induced by hypnosis

Flores contends that his conviction and death sentence hinges on unreliable, hypnotically induced testimony. Flores fails, however, to make any casual connection between Barganier's hypnosis session and her identification of him *thirteen months later* at trial. This is a fact question the lower court received conflicting evidence on, analyzed, and decided against Flores. His complaint now is merely that the lower court reached the wrong decision.

As an initial matter, the evidence is not clear that Barganier was actually placed under hypnosis. During trial, when asked by the trial judge whether she had been placed under hypnosis and whether she had "actually go[ne] under," Barganier testified that she did not "know enough about it." (35 RR 155). Barganier further stated that she had "never studied it or been under before." (35 RR 155). At the *Zani* hearing, Dr. Mount explained that "[h]ypnosis is a subjective phenomenon. No one can one hundred percent guarantee they were or were not hypnotized. If they weren't hypnotized, it's just an interview." (36 RR 72). Officer Serna, the certified forensic hypnotist that conducted Barganier's hypnosis session in 1998, acknowledged during his testimony in the subsequent habeas proceeding that some people are not hypnotizable and he could not be certain that Barganier was actually hypnotized. (4 WRR 244-45). Serna testified that it occurred to him at the time of

the hypnosis session that Barganier was not hypnotized. (4 WRR 245). Serna testified that if she was not hypnotized, the session was simply a witness interview. (4 WRR 245). Likewise, the State's expert Dr. Spiegel testified that not everyone is hypnotizable and it is conceivable that Barganier was not hypnotized, but there is no way to tell because her hypnotizability was not tested. (6 WRR 178-79, 196). Dr. Spiegel noted that the session did not seem "like such a profound experience to her," there was no dramatic increase in her production. (6 WRR 196). Indeed, the hypnosis session yielded no additional information about the suspects. Barganier did not enlarge on her descriptions of the perpetrators during or after the hypnosis. (35 RR 155-56). When shown a photo lineup containing Flores's photograph after the session, she did not make an identification. (35 RR 155-56).

In any event, even if Barganier was successfully placed under hypnosis, there is no evidence that her identification of Flores over a year later was induced by the previous hypnosis session. The fact that Barganier's identification was unexpected and happened in the midst of trial suggested that it was a product of seeing Flores in person—as opposed to a product of some alleged influence arising from the hypnosis session. Indeed, the State argued at trial that Barganier's testimony was of independent origin from the hypnosis and was not the product of the hypnosis session. Testimony elicited by the State during the subsequent habeas proceeding supported these conclusions. Dr. Spiegel testified that the retrieval of a memory can be triggered by many things, such as sight, sound, touch, and smell. (6 WRR 200). Dr. Spiegel testified that it was certainly possible that seeing Flores in person

triggered the retrieval of Barganier’s memory from the day of the murder. (6 WRR 201). It was Dr. Spiegel’s opinion that Barganier’s identification of Flores was unrelated to the hypnosis session that occurred thirteen months prior to the identification, but rather arose because it was “the first time that she had had a face-to-face confrontation with him since [the offense] 13 months [prior], and the -- the totality of her experience of him is what led to her identification.” (6 WRR 201). That Barganier did not make an identification when she was shown a photo lineup after the hypnosis session bolsters this theory. (6 WRR 201-02).

Flores has failed to demonstrate, in the record below or in the instant petition, that Barganier was actually hypnotized or that the hypnosis session held more than a year prior to trial induced her in-court identification. *See, e.g., Millage v. State*, 05-12-00636-CR, 2014 WL 1407331, at *5 (Tex. App.—Dallas Apr. 8, 2014, pet. ref’d) (not designated for publication) (concluding that the victim’s identification testimony was not hypnotically enhanced because she failed to identify anyone from a photographic lineup showed to her following the hypnosis session and it was not until several years later that she identified the defendant as the assailant). As such, Flores’s claim that his conviction hinges on unreliable, hypnotically induced testimony is meritless.

B. The record supports the lower court’s rejection of Flores’s claim

Even if this Court believes that Barganier’s testimony was hypnotically enhanced, Flores’s claim still fails.

Texas law is consistent with this Court's precedent and provides a mechanism for evaluating the reliability of hypnotically enhanced testimony

Consistent with this Court's decision in *Rock v. Arkansas*, 483 U.S. 44 (1987), Texas has declined to adopt a *per se* exclusionary rule prohibiting the admission of hypnotically enhanced testimony. Rather, in *Zani v. State*, the TCCA provided a mechanism to allow for the admission of hypnotically enhanced testimony and at the same time to ensure that this admitted testimony was reliable. *See State v. Medrano*, 127 S.W.3d 781, 783 (Tex. Crim. App. 2004); *Zani*, 758 S.W.2d at 244. In *Zani*, the TCCA instituted procedural safeguards to protect against the four-prong dangers of hypnosis: hypersuggestibility, loss of critical judgment, confabulation, and memory cementing. *Zani*, 758 S.W.2d at 244. The court adopted a non-exclusive list of factors from *People v. Romero*, 745 P.2d 1003, 1017 (Colo. 1987), which a trial court is to consider in deciding whether hypnotically enhanced testimony is admissible in a particular case. *Id.* at 244. The *Zani* standard permits admission of hypnotically enhanced testimony if, after consideration of the totality of the circumstances, the trial court finds by clear and convincing evidence that hypnosis neither rendered the witness's posthypnotic memory untrustworthy nor substantially impaired the ability of the opponent fairly to test the witness's recall by cross-examination. *Id.* By requiring clear and convincing evidence of the trustworthiness and the lack of impairment of a witness's hypnotically enhanced testimony, the aim of the TCCA was to ensure the reliability of the evidence

admitted. See *Medrano*, 127 S.W.3d at 783. The TCCA reconsidered and reaffirmed the use of the *Zani* test in 2004. *Id.*

The trial court properly followed the procedures set forth in *Zani* prior to admitting Barganier's testimony in this case. The evidence presented at the *Zani* hearing and the recording of the hypnosis session showed that Officer Serna had the requisite training and certification to perform the hypnosis session in this case; prior to the hypnosis session, neither officer involved in the hypnosis session had any knowledge about Flores as a potential suspect and therefore could not impart information about Flores to Barganier during the session; none of the participants made any subtle cuing or suggestions of answers during the hypnotic session; Barganier's description of the perpetrators during the hypnosis session was consistent with the previous descriptions she had given to the police; and there was ample corroborating evidence, enumerated by the prosecutor at the *Zani* hearing, supporting Barganier's identification of Flores as the passenger in the Volkswagen. The trial court found that under the totality of the circumstances, there was clear and convincing evidence that the hypnosis undergone by Barganier did not render her in-court identification of Flores untrustworthy. Flores challenged the trial court's ruling in each of his state and federal postconviction proceedings, but lost.

After years of unsuccessful challenges to the admission of Barganier's testimony, Flores now urges this Court to revisit its holding in *Rock v. Arkansas*, 483 U.S. 44 (1987), focusing much of his argument on the practices and procedures followed by other jurisdictions regarding the admission of hypnotically enhanced

testimony. However, this was not Flores's argument in his subsequent habeas application and therefore was not the issue before the lower court.

The “new” scientific evidence Flores cites is not, in fact, new

In an effort to re-litigate his challenge to the admission of Barganier's testimony, Flores framed his claim in his subsequent state habeas proceeding under a new state statute as a claim grounded in new scientific knowledge about hypnosis and memory. *See* Tex. Code Crim. Proc. Ann. art. 11.073, §§ (a),(b)(1). However, the record below demonstrates that Flores's alleged “new” scientific evidence was previously available and could have been presented at the time of his trial. Therefore, it is not new. This is a fact question the lower court received conflicting evidence on, analyzed, and decided against Flores. His complaint now is merely that the lower court reached the wrong decision.

Dr. Spiegel, the State's hypnosis expert in the subsequent writ proceedings, attested that myths regarding memory and hypnosis and the risks associated with using hypnosis to assist with memory recall have been well known in the scientific field since at least the mid-1980's. (6 WRR 187–88). Dr. Spiegel testified that there have been new scientific studies on hypnosis and memory since the time of Flores's trial, but the new studies have been consistent with what was already known prior to the trial. (6 WRR 190). According to Dr. Spiegel, many of the new studies are “replications” of earlier studies, and there has not been anything dramatically new or different from what was previously known. (6 WRR 190–91).

Flores's own expert, Dr. Lynn, conceded the same. He testified that the debate over the reliability of hypnotically refreshed testimony is not a new debate, and existed prior to Flores's trial, which is one of the reasons the *Zani* hearing was held in this case. (6 WRR 144). A substantial portion of the studies Dr. Lynn cites in the affidavit he prepared in this case pre-date Flores's trial. (AWX 5 at pp. 8–9, 11–13). Additionally, the evidence adduced at the subsequent state habeas hearing showed that Dr. Lynn was available to offer his current opinion at the time of Flores's trial. Prior to 1999, Dr. Lynn had conducted research, published articles, edited books, and provided similar expert opinions and testimony concerning the use of hypnosis to recover or refresh memory. (6 WRR 122-26). Dr. Lynn acknowledged that if he had been contacted in 1999, he could have evaluated Flores's case and provided similar testimony on his behalf. (6 WRR 144).

Thus, contrary to Flores's assertions, the field of scientific knowledge related to the use of hypnosis in facilitating memory recall has not changed significantly since Flores's trial. The risks and concerns associated with using hypnosis to enhance memory have been well-known and documented since at least the mid-1980's. Although new research and studies have been conducted in the field since Flores's trial, their results simply confirm the risks and concerns first identified by experts in the field in the 1980's. This renders Flores's claim meritless.

Flores would have been convicted even without Barganier's in-court identification of him as the passenger in the Volkswagen

Even if Flores had presented this scientific evidence at the time of his trial and successfully excluded Barganier's in-court identification of him as the

passenger of the Volkswagen, he cannot show that the result of his trial would have been different. *See* Tex. Code Crim. Proc. Ann. art. 11.073, § (b)(2). Barganier would still have been permitted to testify about the events that occurred prior to her hypnosis, including her positive identification of Richard Childs as the driver of the Volkswagen. And contrary to Flores's assertions, Barganier's in-court identification was far from the only evidence connecting him to the crime. Indeed, the State was prepared to proceed with Flores's capital murder trial without Barganier's identification, as no one knew Barganier was able to identify Flores as the Volkswagen passenger until she saw him in court in the midst of trial. Whether the result of Flores's trial would have been different without Barganier's in-court identification is a fact question the lower court decided against Flores; he now merely disagrees with that result.

The record is replete with both direct and circumstantial evidence linking Childs and Flores to the offense. Jackie Roberts, Terry Plunk, and Judy Haney all testified about a drug deal that occurred in the early morning hours of January 29, 1998, leading up to Mrs. Black's murder. (34 RR 99-153, 170-79, 202-18). Their testimony placed Childs and Flores together in the Volkswagen shortly before the murder. Their testimony also provided the context for why Childs and Flores decided to invade the Blacks' home, armed with guns and potatoes as silencers, to steal the large sum of cash believed to be secreted in the home.

Vanessa Stovall, one of Childs's girlfriends, placed Flores in the Volkswagen with Childs just moments before the men were seen getting out of the same car at

the Blacks' home. (35 RR 69, 71, 73-75, 82, 89-90, 95). Testimony from Michelle Babler and Nathan Taylor placed the Volkswagen in front of the Blacks' home at around 7:30-7:35 a.m. (35 RR 104, 106, 108, 135-39, 144, 149). These witnesses testified that they saw two men, similar in appearance, get out of the car; they were dressed in black clothing and wore gloves. (RR35: 108, 115-16, 139-40). Robert Barganier, Jill's husband, also saw the Volkswagen at around 7:30 a.m. (35 RR 174-75). Unquestionably, the Volkswagen was in front of the Blacks' home in the relevant time frame with Childs as the driver, and Flores can be placed in the car with Childs immediately prior to the murder.

The investigation revealed that a large-bore weapon, such as a .44 caliber, was used to shoot Santana, the Blacks' dog. (36 RR 147-50). On the floor near Mrs. Black's body, police officers found a .380 caliber bullet. (35 RR 222, 235-37). Investigators found potato fragments on various surfaces near the victim. (35 RR 199, 206-07, 243-44). Officers also located a .380 shell casing and a piece of potato on the garage floor. (35 RR 226-27, 235-37). When Childs was arrested, he possessed a partial box of the same brand of .380 ammunition found at the murder scene. (36 RR 179-83, 194-95). A search of his home uncovered a .44 Magnum revolver which was found to have residue on the inside of the barrel consistent with potato starch. (36 RR 197-98, 200-01, 211-13).

Flores admitted to those close to him that he was at the Blacks' home and participated in the offense. Flores's friend Homero Garcia testified that he saw Flores the evening after the murder. (36 RR 237). Flores told Garcia that he and

Childs went to a house to get some money and the whole deal went bad. (36 RR 237). Flores claimed that he shot a dog and that Childs shot an old lady. (36 RR 219, 224, 235). Flores made a similar admission to Jonathan Wait, Sr. before fleeing to Mexico to avoid apprehension. Flores told Wait that he had gotten himself into a little trouble and needed to get out of the country. (37 RR 84, 86). When Wait confronted him with a newspaper article about Mrs. Black's murder, Flores responded, "I only shot the dog." (37 RR 82–86).

A strong inference of guilt may also be drawn from Flores's actions following the murder. Flores destroyed the Volkswagen used during the murder by towing it to an entrance ramp on Interstate-30 and setting it on fire. (36 RR 266-73). When a passing motorist stopped to offer assistance, Flores fled the scene, inducing a high-speed chase, and fired shots at the motorist. (37 RR 13-39). Flores also made extreme efforts to avoid apprehension and later to escape from custody. A few days after the murder, Flores fled to Mexico, telling Wait that he had to leave the country and would not be "taken alive." (37 RR 85–86, 138, 140, 141). On his return from Mexico, Flores struggled to avoid arrest in Kyle, Texas and gave a false name and false identification. (37 RR 109, 117–27). Although Flores was booked into the Hays County Jail for DWI and assault on a peace officer, he gained release before authorities learned his true identity. (37 RR 134). Just prior to his arrest on May 1, 1998, Flores led FBI agents on a dangerous high speed chase, which ended with a head on collision, a foot race through a residential area, and a violent physical struggle. (37 RR 148–49, 157–69). Then, while being treated at Parkland hospital

for a broken kneecap suffered in the May 1st collision, Flores attempted to escape from custody by taking a deputy sheriff's gun and threatening to kill him. (37 RR 188–91, 193, 194, 201, 208, 220–29). It took three to four people to eventually subdue him. (37 RR 195–98, 217–18, 232).

In light of all of the foregoing evidence, Flores cannot show that he would not have been convicted if Barganier's identification of him as the Volkswagen passenger had been excluded. As such, his claim is meritless and therefore unworthy of this Court's attention. The petition for certiorari review should be denied.

CONCLUSION

Respondent respectfully asks this Court to deny Flores's petition for a writ of certiorari.

Respectfully submitted,

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

/s/ Jaclyn O'Connor Lambert
JACLYN O'CONNOR LAMBERT
Assistant District Attorney
Counsel of Record

Frank Crowley Courts Bldg.
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207
(214) 653-3625
Jaclyn.OConnor@dallascounty.org

Counsel for Respondent