

No. 25-6774

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In The  
**Supreme Court of the United States**

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CHARLES DON FLORES,  
*Petitioner,*

v.

THE STATE OF TEXAS,  
*Respondent.*

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

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**BRIEF OF PENN & TELLER AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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**TABLE OF CONTENTS**

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	7
I. RATHER THAN ACCESSING RELIABLE MEMORIES, “INVESTIGATIVE” HYPNOSIS EMPLOYS THE SAME TECHNIQUES MAGICIANS USE TO MANIPULATE AUDIENCE PERCEPTION .....	7
II. CHARLES DON FLORES SHOULD HAVE AN OPPORTUNITY TO MEANINGFULLY CHALLENGE THE JUNK-SCIENCE, INVESTIGATIVE HYPNOSIS USED IN HIS PROSECUTION.....	15
CONCLUSION .....	16

## TABLE OF AUTHORITIES

	Page
STATUTES	
TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(2) .....	15
TEX. CODE CRIM. PROC. art. 11.073 .....	15
TEX. CODE CRIM. PROC. art. 38.24 .....	15
OTHER AUTHORITIES	
Bryan Greene, <i>For Harry Houdini, Séances and Spiritualism Were Just an Illusion</i> , SMITHSONIAN MAG. (Oct. 28, 2021), <a href="https://www.smithsonianmag.com/history/for-harry-houdini-seances-and-spiritualism-were-just-an-illusion-180978944/">https://www.smithsonianmag.com/history/for-harry-houdini-seances-and-spiritualism-were-just-an-illusion-180978944/</a> .....	2, 3
HARRY HOUDINI, A MAGICIAN AMONG THE SPIRITS (Fredonia Books ed. 2002) (1924) .....	3
Jonathan L.C. Lee et al., <i>An Update on Memory Reconsolidation Updating</i> , 21 TRENDS COGNITIVE SCIS. 531 (2017) .....	12
Jonah Lehrer, <i>Magic and the Brain: Teller Reveals the Neuroscience of Illusion</i> , WIRED (Apr. 20, 2009), <a href="https://www.wired.com/2009/04/ff-neuroscienceofmagic/">https://www.wired.com/2009/04/ff-neuroscienceofmagic/</a> .....	9, 10
DANIEL LOXTON, WHY IS THERE A SKEPTICAL MOVEMENT? (2013), <a href="https://www.skeptic.com/content/files/2025/03/Why-Is-There-a-Skeptical-Movement.pdf">https://www.skeptic.com/content/files/2025/03/Why-Is-There-a-Skeptical-Movement.pdf</a> [ <a href="https://perma.cc/HU4J-NK58">https://perma.cc/HU4J-NK58</a> ] .....	3

Steven Jay Lynn et al., <i>Creating the “Stuff of Experience”: Spontaneous Thoughts, Memory, and Hypnosis in Clinical and Forensic Contexts</i> , in CREATIVITY AND THE WANDERING MIND: SPONTANEOUS AND CONTROLLED COGNITION 159 (David D. Preiss et al. eds., 2020) .....	7, 8
Stephen L. Macknik, Mac King, James Randi, Apollo Robbins, Teller, John Thompson & Susana Martinez-Conde, <i>Attention and Awareness in Stage Magic: Turning Tricks into Research</i> , 9 NATURE REV. NEUROSCIENCE 871 (2008), <a href="https://www.nature.com/articles/nrn2473">https://www.nature.com/articles/nrn2473</a> .....	4, 9, 10, 12
STEPHEN MACKNIK & SUSANA MARTINEZ-CONDE WITH SANDRA BLAKESLEE, SLEIGHTS OF MIND: WHAT THE NEUROSCIENCE OF MAGIC REVEALS ABOUT OUR BRAINS (2011) .....	9
Jeffrey S. Neuschatz, Scott D. Gronlund & Stacy A. Wetmore, <i>Memory Gaps and Memory Errors</i> , in EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES 1 (Robert Scott & Stephen Kosslyn eds., 2015) .....	10-12
N.Y. TIMES OPINION, <i>Debunked Science Put This Man on Death Row. He’s Going to Be Executed Anyway</i> . (YouTube, Aug. 13, 2024), <a href="https://www.youtube.com/watch?v=JsC5XWMEkII">https://www.youtube.com/watch?v=JsC5XWMEkII</a> .....	15
PENN & TELLER: BULLSHIT!: <i>Hypnosis</i> (Showtime television broadcast, aired Sep. 2, 2004).....	2, 7
PENN & TELLER, MASTERCLASS: THE ART OF MAGIC (2019).....	2, 4-6, 11-14
JAMES RANDI, FLIM-FLAM! (Prometheus Books 2022) (1982).....	3, 4

Hector Rieiro, Susana Martinez-Conde & Stephen L. Macknik, *Perceptual Elements in Penn & Teller’s “Cups and Balls” Magic Trick*, 1 PEERJ 19 (2013)  
..... 5, 9

Daniel L. Schacter & Elizabeth F. Loftus, *Memory and Law: What Can Cognitive Neuroscience Contribute?*, 16 NATURE NEUROSCIENCE 119 (2013)  
..... 7

Teller, *Teller Reveals His Secrets*, SMITHSONIAN MAG. (Mar. 2012), <https://www.smithsonianmag.com/arts-culture/teller-reveals-his-secrets-100744801/>  
..... 5, 9, 13

**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* Penn Jillette and Teller perform together as the legendary duo Penn & Teller. For more than fifty years, they have created a genre-breaking blend of magic, comedy, and social commentary. Their work has garnered an Emmy, a Writers Guild Award, a star on the Hollywood Walk of Fame, Obie and Lucille Lortel Awards for stage work in New York, and nominations for Critics Choice, British Academy of Film and Television Arts (BAFTA), and Olivier awards. Twice named “Magicians of the Year” by the Academy of Magical Arts—the equivalent of winning an Oscar in magic—they received the Academy’s highest honor, the Masters Fellowship, in 2024. Their current hit television series, *Penn & Teller: Fool Us!*, has been renewed for a twelfth season by The CW Network. In it, magicians get a chance to perform in Penn & Teller’s record-breaking Las Vegas residency if the duo cannot figure out how a trick is done.

Penn & Teller’s interest in figuring out how a seemingly logic-defying act is done extends beyond magic. As master manipulators of perception who deploy deceptive techniques to entertain audiences, Penn & Teller are ardent skeptics offstage. They received thirteen Emmy nominations for their provocative, investigative Showtime series, *Penn &*

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2, counsel for *amici* provided notice to all parties of *amici*’s intention to file this brief and did so at least ten days before its due date. Pursuant to this Court’s Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

*Teller: BS!*, which ran for eight seasons and targeted a wide range of fraudulent theories and practices—including exploitative uses of hypnosis. In particular, the hypnosis episode exposed the lack of any logical or scientific grounding for claims that hypnosis is a tool for traveling back in time to extract picture-perfect memories. See PENN & TELLER: BULLSHIT!: *Hypnosis* (Showtime television broadcast, aired Sep. 2, 2004) [hereinafter *The Hypnosis Episode*].<sup>2</sup>

Penn & Teller are not the first magician-skeptics to use their skills as manipulators of perception to expose offstage practices that defy logic and reason. To the contrary, they come from a long tradition of magicians who feel duty-bound to debunk perception-altering techniques used to achieve harmful ends, such as preying on the vulnerable for profit or promoting dangerous junk science like the “investigative” hypnosis at issue in Charles Don Flores’s case.

“Over the centuries, many magicians have been interested in science and rationality and have felt a need to crusade for the truth.” PENN & TELLER, *Class Guide: Penn & Teller Teach the Art of Magic*, at 32, in MASTERCLASS: THE ART OF MAGIC (2019).<sup>3</sup> As Harry Houdini put it, “It takes a flim-flammer to catch a flim-flammer.” Bryan Greene, *For Harry Houdini, Séances*

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<sup>2</sup> *The Hypnosis Episode*, along with all eight seasons of the series, now streams on Paramount+ and is also available through on-demand platforms.

<sup>3</sup> Penn & Teller’s instructional course, *The Art of Magic*, is available through MasterClass’s online, subscription-based platform, <https://www.masterclass.com/classes/penn-and-teller-teach-the-art-of-magic>.

*and Spiritualism Were Just an Illusion*, SMITHSONIAN MAG. (Oct. 28, 2021), <https://www.smithsonianmag.com/history/for-harry-houdini-seances-and-spiritualism-were-just-an-illusion-180978944/>. Houdini’s work as a “mystifier of mystifiers” enabled him to examine logic-defying phenomena “from a different angle than the ordinary layman or even the expert investigator.” DANIEL LOXTON, WHY IS THERE A SKEPTICAL MOVEMENT? 10 (2013), <https://www.skeptic.com/content/files/2025/03/Why-Is-There-a-Skeptical-Movement.pdf> [https://perma.cc/HU4J-NK58] (quoting HARRY HOUDINI, A MAGICIAN AMONG THE SPIRITS, at xiv (Fredonia Books ed. 2002) (1924)); see *id.* at 3-4, 9-10 (discussing Houdini’s efforts to expose psychics preying on grieving relatives of soldiers killed during World War I). Penn & Teller similarly aim to use their skill set to offer this Court “a different angle” on the dangers of investigative hypnosis, especially when used by law enforcement as a purported witness-memory-retrieval tool.

Penn & Teller’s philosophical approach to both magic and skepticism draws heavily from the work of magician and truth-crusader James Randi. Randi combined knowledge of science with “his skills as a world-class conjuror” to expose fantastical claims, especially as paranormal-activity fads took hold in the 1980s. See Kendrick Frazier, *Foreword* to JAMES RANDI, FLIM-FLAM!, at xiii, xiv (Prometheus Books ed. 2022) (1982). For Randi, logic was the key both to performing magic and to pursuing offstage truth: “All my efforts as a professional magician are based on the assumption that my audience thinks logically and can therefore be fooled by me if I work on that

assumption.” RANDI, *supra*, at 7. Randi believed it would be “a major failure of integrity” not to use his “specific and specialized” insights into human behavior as a magician to prevent the public from being fooled offstage by those promoting pseudoscience. *Id.* at 10.

Like Randi, Penn & Teller’s brand of magic taps into and manipulates audience members’ logical thinking, “playing with perceptions” and getting audience members to question what they accept as truth. *Lesson 4: What is Magic?*, at 2:21-2:50, in *MASTERCLASS*, *supra*. Penn & Teller do not perform mere “illusions” that may be stunning but offer only a mirror-and-light dependent “visual effect.” *Id.* at 1:33-2:06. Instead, “even the[ir] simplest tricks involve intellectual engagement by the audience” and “include references to physics, political theory, and epistemology.” *Class Guide: Penn & Teller Teach the Art of Magic*, at 17, in *MASTERCLASS*, *supra*. The audience appreciates “being deceived but is also questioning, examining, and resisting all the while.” *Id.*

Teller even co-authored a peer-reviewed scientific paper examining the relationship between magic techniques and cognitive behavior, including memory formation. See Stephen L. Macknik, Mac King, James Randi, Apollo Robbins, Teller, John Thompson & Susana Martinez-Conde, *Attention and Awareness in Stage Magic: Turning Tricks into Research*, 9 NATURE REV. NEUROSCIENCE 871, 871-79 (2008), <https://www.nature.com/articles/nrn2473> [hereinafter *Turning Tricks into Research*]; see also *infra* Part I. And scientists have used Penn & Teller’s tricks to study the

effects of sleight-of-hand on perceptual accuracy. See Hector Rieiro, Susana Martinez-Conde & Stephen L. Macknik, *Perceptual Elements in Penn & Teller's "Cups and Balls" Magic Trick*, 1 PEERJ 19, 19-30 (2013). As Teller sees it, “[n]euroscientists are novices at deception,” whereas “[m]agicians have done controlled testing in human perception for thousands of years.” Teller, *Teller Reveals His Secrets*, SMITHSONIAN MAG. (Mar. 2012), <https://www.smithsonianmag.com/arts-culture/teller-reveals-his-secrets-100744801/>.

For Penn & Teller, their job as magicians who manipulate perception comes with ethical responsibilities both onstage and off. They call themselves “honest liars” because they “do not want anyone to leave the theater after their show having acquired a belief that Penn & Teller do not believe is true.” *Class Guide: Penn & Teller Teach the Art of Magic*, at 17, in *MASTERCLASS*, *supra* (describing what they call the “Sawing a Person in Half Rule”); see *Lesson 7: Magic vs. Lying*, at 3:56-3:58, in *MASTERCLASS*, *supra*. In fact, they hope audience members confer with each other after a show and try to figure out how Penn & Teller got them to see something they know was not actually true. See *Lesson 5: Misdirection*, at 1:39-2:20, in *MASTERCLASS*, *supra*.

Penn & Teller acknowledge that a practitioner of magic is “someone who experiments with what the truth is,” but they believe that “if you do it right, you can be known as someone more concerned with truth and honesty.” *Lesson 7: Magic vs. Lying*, at 3:57-04:10, in *MASTERCLASS*, *supra*. For them, onstage magic

“playfully asks the question: How do we know what is true?” *Class Guide: Penn & Teller Teach the Art of Magic*, at 17, in *MASTERCLASS*, *supra*. In a magic show, “you can answer that question wrong at every turn and there will be no harm done.” *Id.* But offstage, there is no “delight of being deceived,” and serious harm can occur. *See Lesson 5: Misdirection*, at 1:47, in *MASTERCLASS*, *supra*.

Like Houdini and James Randi before them, Penn & Teller believe it would be a “failure of integrity” not to speak up and use their skills as manipulators of perception to expose flim-flam when they see it. And they see it in the case of petitioner Charles Don Flores, in which law enforcement conducted an investigative hypnosis session that was junk science of the worst sort.

### **SUMMARY OF ARGUMENT**

Penn & Teller manipulate audience perception to pull off tricks that both entertain and boggle the mind. They rely on the audience’s intellectual engagement to make that happen, employing techniques that draw on cognitive science and insights into human behavior to get audiences to suspend disbelief and see tricks as truth when Penn & Teller perform.

As “honest liars” onstage, Penn & Teller view deception very differently when practiced offstage, especially when used to exploit the vulnerable or perpetrate injustices. Use of investigative hypnosis as a purported memory-retrieval tool is precisely the type of deceptive practice that Penn & Teller feel duty-bound to expose. They submit this brief to explain how

many of the cognitive manipulations they use to trick audiences' perception of truth are on full display in the investigative hypnosis session that a parole officer conducted at a police station—reconfiguring the gap-laden memory of the prosecution's key witness in Mr. Flores's case.

### ARGUMENT

#### I. RATHER THAN ACCESSING RELIABLE MEMORIES, “INVESTIGATIVE” HYPNOSIS EMPLOYS THE SAME TECHNIQUES MAGICIANS USE TO MANIPULATE AUDIENCE PERCEPTION.

Penn & Teller's tricks rely on knowing how memory works. And—contrary to what an officer-hypnotist told the prosecution's key witness in Mr. Flores's case—it does not work like a video recorder. The brain “just can't go back and try again.” *The Hypnosis Episode*, at 24:17-24:37. Suggesting otherwise is not only bunk but dangerous.

The myth that memory is a video recording playing in a private theater in your brain is one of the biggest lies about hypnosis. See Daniel L. Schacter & Elizabeth F. Loftus, *Memory and Law: What Can Cognitive Neuroscience Contribute?*, 16 NATURE NEUROSCIENCE 119, 119-20 (2013) (Memory is “not at all like a video recording that a witness need only replay to remember what happened.”). And reliance on that falsehood can inflict serious harm—particularly when hypnosis is presented as a memory-recovery tool or an investigative technique for law enforcement, as it was to key witness Mrs. Barganier in Mr. Flores's case. See Steven Jay Lynn et al.,

*Creating the “Stuff of Experience”: Spontaneous Thoughts, Memory, and Hypnosis in Clinical and Forensic Contexts*, in *CREATIVITY AND THE WANDERING MIND: SPONTANEOUS AND CONTROLLED COGNITION* 159, 169-72 (David D. Preiss et al. eds., 2020). “If participants believe that hypnosis provides the key to open the lock of the storage vault of memories, then it is understandable that they would not only be highly motivated to recall information under these circumstances but also mistakenly conclude that hypnotically elicited false memories were accurate.” *Id.* at 172.

Despite the fact that Mrs. Barganier described the passenger in the car she saw at the scene of the crime as a white man with long hair, she was fed repeated suggestions by law enforcement that the passenger had “neatly trimmed” or “short, shaved” hair; she was told by the officer-hypnotist that she would remember more after the hypnosis session; and months later—after photos of Mr. Flores appeared in the press and she saw him seated at the defense table at trial—suddenly she identified him as the passenger. It is of little surprise that she was confident in her in-court identification when she saw this now-familiar face and believed she had produced it from her memory: That is exactly what the officer told her would happen. But it was not real. Some of the same cognitive techniques Penn & Teller use on stage to trick audience members’ memory and alter their perception explain how the investigative hypnosis session induced Mrs. Barganier to abandon all previous descriptions of the suspect and instead point to Mr. Flores.

Indeed, scientists have recognized and begun to study the clear link between stage magic and the manipulation of perception and memory. As two such scientists have explained, “Our original intention had been simply to poach their best techniques so that we could design better experiments, but now we realized that magicians might actually know things about mind and behavior that neuroscientists do not.” STEPHEN L. MACKNIK & SUSANA MARTINEZ-CONDE WITH SANDRA BLAKESLEE, *SLEIGHTS OF MIND: WHAT THE NEUROSCIENCE OF MAGIC REVEALS ABOUT OUR BRAINS* 79 (2011); *see also, e.g.*, Rieiro, *supra*, at 2 (studying perceptual manipulation in several variations of the classic “Cups and Balls” trick through the lens of cognitive science).

“Magicians have manipulated audiences’ perception and cognition for much longer than cognitive scientists have” because magicians’ tricks, in large part, depend on this manipulation. Rieiro, *supra*, at 1; *see also* Teller, SMITHSONIAN, *supra* (“Magic’s about understanding—and then manipulating—how viewers digest the sensory information.”). To make an audience believe that something impossible has happened, like a ball appearing under a cup or a coin vanishing in a hand, a magician has to alter how the audience either sees or remembers the trick. Thus, “[m]agic shows are a manifestation of accomplished magic performers’ deep intuition for and understanding of human attention and awareness.” *Turning Tricks into Research, supra*, at 871. As Teller explains, “[e]very time you perform a magic trick, you’re engaging in experimental psychology.” Jonah Lehrer, *Magic and the Brain:*

*Teller Reveals the Neuroscience of Illusion*, WIRED (Apr. 20, 2009), <https://www.wired.com/2009/04/ff-neuroscienceofmagic/>. “If the audience asks, ‘How the hell did he do that?’ then the experiment was successful. I’ve exploited the efficiencies of your mind.” *Id.*

Magic’s “long legacy of informal experimentation” has led magicians to understand not only perception (what the audience thinks it sees) but also recall (what the audience remembers). *Turning Tricks into Research, supra*, at 871, 875. The fact that memory does *not* work like a video recorder allows Penn & Teller to trick an audience. They know that the brain captures only fragments of observation and then fills in gaps using logic and what the brain expects to see in certain contexts. When performing, Penn & Teller manipulate that expectation to get the audience to see what Penn & Teller need the audience to see for a trick to work. They rely on the fact that “our brains don’t see everything—the world is too big, too full of stimuli.” Lehrer, *supra*. Instead, “the brain takes shortcuts, constructing a picture of reality with relatively simple algorithms for what things are supposed to look like.” *Id.* Indeed, research confirms that the brain stores only “bits and pieces” of our experiences. *E.g.*, Jeffrey S. Neuschatz, Scott D. Gronlund & Stacy A. Wetmore, *Memory Gaps and Memory Errors*, in EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES 1, 1-2 (Robert Scott & Stephen Kosslyn eds., 2015). Because those fragments rarely form a complete scene, the recall process requires the mind to fill in gaps—often by drawing on past experience, peppering in expectations based on

what “must have happened,” and even incorporating *new* information, such as suggestions encountered after the event. *See id.*

For example, a foundational trick in stage magic is the “French drop”: A magician pretends to place a ball, coin, or other object in an empty hand while actually “palming” the object—hiding it behind his fingers in the original hand. *See Lesson 6: Coin Magic*, at 14:28-14:48, *in* MASTERCLASS, *supra*. Audience members think they remember seeing the object go into the empty hand because their brains filled in what they expected to see. When the magician opens his empty hand, the object has “magically” disappeared. In reality, the audience is remembering a transfer that never happened.

Rather than acknowledging the basic fact that memory forms incompletely and involves gap-filling through expectations, investigative hypnosis relies on the unscientific, erroneous assertion that a person’s brain makes a visual record of everything that has passed in front of that person’s eyes. In Mr. Flores’s case, the officer-hypnotist told Mrs. Barganier this explicitly: He began the session by explaining, “You’re going to be seeing a documentary, you’re going to be seeing a film of the events that occurred on that day, on that morning.” Pet. 7; Pet. App. 158-64. And, near the end of the hypnosis session, the officer assured Mrs. Barganier that she would “be able to recall more of these events as time goes on.” Pet. App. 175. He reiterated this sentiment again immediately after the session by stating, “[i]t’s almost a phenomenon the way that it happens, so it’s not uncommon to just remember something after the fact, after the session.”

Pet. App. 175-76. But magicians and scientists both know that these “somethings” remembered after the fact are likely to be gap-fillings based on whatever makes sense to the brain—not “somethings” that actually happened. *See, e.g., Neuschatz, supra*, at 2, 4.

Moreover, research confirms that the memory-retrieval process itself can fundamentally alter a memory. *See* Jonathan L.C. Lee et al., *An Update on Memory Reconsolidation Updating*, 21 *TRENDS COGNITIVE SCIS.* 531, 531 (2017). The constant refreshing and updating of memory invites inaccuracies and the creation of false memories. *See Turning Tricks into Research, supra*, at 875-76. As Penn & Teller explain, “When you think about an event in your life, you are not remembering the event, you are remembering the last time you remembered it. All of your memories are copies of copies of copies.” *Class Guide: Penn & Teller Teach the Art of Magic*, at 41, *in MASTERCLASS, supra*. And these blurred “copies” create opportunities for a magician to make suggestions.

Penn & Teller rely on the fact that the memory-retrieval process creates distortions, nudging an audience to recall actions onstage in a way that makes a trick work. They use subtle methods to lull spectators “into eagerly accepting suggestions and unspoken information,” rather than making “direct assertions” that would be easier to spot. *Turning Tricks into Research, supra*, at 875. And once the audience thinks it independently remembers something a certain way, that memory tends to stick:

As Teller often says, “Nothing fools you better than the lie you tell yourself.” Teller, SMITHSONIAN, *supra*.

Take the following card trick that Penn & Teller describe in their MasterClass, *The Art of Magic*. The trick uses a stacked deck, but Penn & Teller explain how subtle verbal cues can prevent onstage participants from catching on to that reality. For example, a magician can pretend to shuffle a deck of cards and then hand it around, asking onstage participants to cut the deck. After participants have handled the deck, the magician may say, “We all shuffled the cards, you cut them,” as if a casual reminder. *See Class Guide: Penn & Teller Teach the Art of Magic*, at 41-42, in MASTERCLASS, *supra*. But did they *all* do that? Participants definitely cut the deck—but they did not also shuffle the cards. Yet this slight shading of the facts can be suggestion enough to cause participants to “remember” that everyone shuffled the cards—or at least not to question that the deck was shuffled. In reality, the deck remains “stacked” in an order that ensures the success of the trick. *Id.* at 41-42. The shuffling suggestion is subtle but effective at limiting participants’ recall of what transpired.

By manipulating an audience’s memory—both in its formation and its recall—Penn & Teller get the audience to convince themselves that things have happened when, in reality, those things never occurred. That is all well and good for purposes of entertainment. But the same suggestion-based memory manipulation was also on display in the investigative hypnosis of Mrs. Barganier. And the officer-hypnotist left her believing that new things

that came to mind later were true “memories” she could testify about, not merely things her brain subsequently filled in.

The suggestion inherent in the investigative hypnosis of Mrs. Barganier is obvious: The officer-hypnotist asked her multiple questions about whether either suspect had short, shaved, neatly cut, or trimmed hair—even as Mrs. Barganier reiterated that both had long, wavy hair. Pet. 7; Pet. App. 168-71. The officer then showed Mrs. Barganier a photo lineup in which *every* photo was of a Hispanic male with short hair. Pet. 8. Mrs. Barganier again did not identify Mr. Flores from that photo lineup. But she then also saw his photo in news coverage of the case prior to trial. Pet. 8, 10-11. Combined with the assurances of the officer-hypnotist that she would remember more as time went on, she was primed to “remember” Mr. Flores at trial. And she was particularly primed to do so because she was understandably motivated to assist police in finding the person who had committed a violent murder next door to her home. Pet. 6. Moreover, Mrs. Barganier’s certainty that her belated, in-court identification of Mr. Flores was correct (“over 100%” positive, as she testified), Pet. 11, is not surprising. As Penn & Teller have observed, it is “very difficult for the audience to contradict the ideas that they themselves have constructed.” *Class Guide: Penn & Teller Teach the Art of Magic*, at 28, in *MASTERCLASS, supra*.

**II. CHARLES DON FLORES SHOULD HAVE AN OPPORTUNITY TO MEANINGFULLY CHALLENGE THE JUNK-SCIENCE, INVESTIGATIVE HYPNOSIS USED IN HIS PROSECUTION.**

Penn & Teller acknowledge that they are experts in magic, not law. But they believe there is something fundamentally amiss in the justice system if flim-flam like investigative hypnosis can be used by law enforcement to reconfigure the gap-laden memory of a key witness in a capital prosecution.

In Penn & Teller's view, it is not just ironic but illogical and unjust that the use of investigative hypnosis in Mr. Flores's case was egregious enough to help inspire Texas legislation that now prohibits introduction of such evidence, *see* TEX. CODE CRIM. PROC. art. 38.24, yet Mr. Flores remains on death row cut off from judicial review. *See, e.g.,* N.Y. TIMES OPINION, *Debunked Science Put This Man on Death Row. He's Going to Be Executed Anyway.*, at 4:38-4:48 (YouTube, Aug. 13, 2024), <https://www.youtube.com/watch?v=JsC5XWMEkII> ("The scientifically flawed testimony, the lack of physical evidence or DNA linking him to the crime with even one iota of doubt—it's an injustice."). And that reality persists despite a statutory mechanism that could authorize a court to examine how unscientific assumptions and techniques impacted Mr. Flores's case, as the petition explains. *See* Pet. 2-3 (discussing TEX. CODE CRIM. PROC. arts. 11.071, § 5(a)(2), 11.073, 38.24). Flim-flam should have no place in the criminal-justice system.

**CONCLUSION**

This Court should grant the petition and reverse the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

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