No. 25-6774
CAPITAL CASE

IN THE
Supreme Court of the United States

CHARLES DON FLORES,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Charles Flores was convicted of capital murder and sentenced to death in 1999 for the shooting death of 64-year-old Elizabeth Black in the course of committing or attempting to commit robbery or burglary. Flores has filed multiple habeas applications in the Texas Court of Criminal Appeals (TCCA) seeking relief from his capital murder conviction.

In 2016, weeks prior to his scheduled execution, Flores filed a second habeas application alleging that newly discovered scientific evidence regarding hypnosis and its effects on memory recall discredited the testimony of a key eyewitness, Jill Barganier. Flores utilized a then newly-enacted statute—Article 11.073 of the Texas Code of Criminal Procedure—to overcome the procedural bar and litigate his "new science" claim. His execution was stayed, and he was afforded the opportunity to fully develop his evidence and fairly litigate his claim. Ultimately, the TCCA concluded that Flores failed to show he was entitled to relief under Article 11.073 and denied relief. A petition for writ of certiorari was filed and rejected in this Court.

Since that time, Flores has filed two additional habeas applications attempting to re-litigate this claim and others. His third state habeas application was dismissed by the TCCA, and a petition for certiorari was filed and rejected by this Court. His fourth state habeas application, filed in 2025, was again dismissed by the TCCA for failing to satisfy the procedural requirements of Article 11.071, Section 5 of the Texas Code of Criminal Procedure. In his current petition for certiorari review of the TCCA's dismissal order, the following issue is presented:

> In dismissing Flores's fourth state habeas application, did the TCCA's application of an independent and adequate state-law procedural bar violate Flores's right to due process?

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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. In April 1999, a Dallas County jury convicted Flores of capital murder and, via Texas's statutory special issues, sentenced him to death. In his fourth state habeas application, Flores raised four claims, specifically alleging: he is entitled to relief under Article 11.073 of the Texas Code of Criminal Procedure based on new scientific evidence regarding eyewitness identification reliability; actual innocence; official misconduct; and he was deprived of a state-created liberty interest embodied in Article 11.073 in violation of due process. The TCCA determined Flores's claims did not satisfy the statutory framework to excuse procedural default under Texas's abuse-of-the-writ bar. Flores now seeks certiorari review of the TCCA's dismissal, but his petition implicates nothing more than the state court's application of state procedural rules for collateral review of death sentences. Flores couches his question presented as a due process violation, but he is effectively complaining that the TCCA misapplied the state procedural rule to his facts. Misapplication of a state procedural rule is not a matter for this Court. The state court's disposition, which relied upon an adequate and independent state-law ground, forecloses certiorari review. Nothing Flores presents warrants this Court's attention.

STATEMENT OF THE CASE

I. The Capital Murder Trial

A. The capital murder of Betty Black

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

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

Potato fragments littered the dining room floor, table, walls, and ceiling; a hallway wall; a door; and the garage floor—indicating the shooters had placed potatoes on the barrels of their guns as "silencers." (RR35: 199, 206-07, 220-21,

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

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

226-27, 230-32, 242-44; SX 47-48). Patterns of blood and potato spatter along with the location of the body, bullet, shell casing, and carpet defect revealed different gunshots killed Mrs. Black and the dog. (RR35: 237-45, 253-54, 275-77; SX 52B). The dog's injuries and the size of her entrance wound suggested she was killed with a higher caliber weapon than the .380 gun used to kill Mrs. Black. (RR36: 147-50).

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

B. Events precipitating the murder

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

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

a source of dispute between Gary and Jackie, and Gary was threatening to reduce Jackie's allowance. (RR34: 117; RR38: 137-39, 160).

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

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

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

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

The trio left the Volkswagen at Jackie's house and drove Jackie's El Camino to an apartment in Dallas, where they met Plunk. (RR34: 121-23). During the transaction, Flores weighed the drugs on a portable digital scale and declared the quantity was a quarter-ounce short. (RR34: 127-28, 176-77, 214). Plunk made up the alleged shortage. (RR34: 128-29, 214). Jackie, Childs, and Flores drove to Flores's home with the drugs. (RR34: 134-35). Flores re-weighed the methamphetamine and again accused Plunk of shortchanging him, insisting the deal was for a half pound instead of a quarter pound. (RR34: 137-39). Flores ranted about being shorted, threatened Jackie at gunpoint with a two-barreled handgun, and asked how much Plunk would pay for her head. (RR34: 138-40). Childs attempted to calm Flores down, and Jackie telephoned Plunk to ask if he would cover the claimed shortage. (RR34: 140-41, 216-18). Plunk refused. (RR34: 216-17). Flores continued demanding reimbursement in the form of additional drugs or money. (RR34: 150, 152). Jackie agreed to pay Flores $3,900 from the money at the Blacks' home, but she told Flores she needed a day to get it. (RR34: 150; RR38: 153). Childs told Flores he knew the money existed. (RR34: 150-51).

Childs, Flores, and Jackie drove to a nearby house where Childs and Flores acquired three firearms. (RR34: 143-45). Flores was armed with a "long, blue gun" and a handgun. (RR34: 144; RR38: 113). Childs also carried a handgun; of the two handguns, Childs's handgun was larger. (RR34: 144; RR38: 113). The trio made two other stops, at an apartment complex and gas station. (RR34: 145-49). Flores continued to threaten Jackie. (RR34: 145-49). The men dropped Jackie (and the El

Camino) off at her home between approximately 6:35 and 7:15 a.m. and drove away in the Volkswagen. (RR34: 153, 238; RR35: 14-15, 21, 52). Doug Roberts was at Jackie's house to take their son to school, and glimpsed Childs getting into the Volkswagen. (RR34: 233, 237-39). He was unable to see in the passenger side of the vehicle due to the dark tinted windows. (RR34: 232, 238).

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

C. Flores and Childs are identified as suspects

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

Neighbors Michelle Babler and her son, Nathan Taylor, who lived across the street, testified they saw the Volkswagen at the Blacks' home at around 7:30 to 7:35

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

a.m. (RR35: 102-04, 138-39, 144, 149). Two men got out of the car. (RR35: 108, 139). While neither witness could positively identify either of the men, Babler testified at trial that Flores and the passenger were similar in appearance. (RR35: 115-16). The driver of the Volkswagen "rolled" under the slightly open garage door. (RR35: 110, 141). The passenger entered, and the garage door was shut. (RR35: 110, 141-43). Babler was suspicious, but she saw another neighbor, Robert Barganier, and assumed he had also seen the men. (RR35: 110-11, 125). Mr. Barganier started to walk toward the Volkswagen, and then turned and got in his truck. (RR35: 111, 124). Since her neighbor seemed to dismiss these happenings, Babler thought everything was fine and drove away. (RR35: 110-11, 125-26).

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

Later that morning, Jackie's mother told Doug Roberts that Mrs. Black had been murdered. (RR34: 240-41). That evening, Doug learned neighbors had seen a pink and purple Volkswagen in the Blacks' driveway. (RR34: 242-43; RR35: 21). Doug

told Jackie her mother-in-law had been murdered and neighbors saw Childs's Volkswagen at the scene. (RR34: 162, 244; RR35: 23). When she learned Mrs. Black was dead, Jackie became hysterical and collapsed. (RR34: 221, 244). Doug tried to convince Jackie to go immediately with him to the police, but Jackie feared possible retaliation or prosecution. (RR34: 163, 244, 284, 286-89; RR35: 22, 32). Doug dropped Jackie off at a motel and went to the police station. (RR34: 245-46). He reported Childs's possible involvement in the murder, and he had a second interview with police the next day. (RR34: 246; RR35: 36-37, 42-43; DX 2-3).[5]

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

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

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

Linch removed granular grey-black material from the grooves inside the .44 revolver barrel that microscopic examination indicated was raw plant material containing starch grains consistent with potato starch. (RR36: 211-13). Officers apprehended Jackie at Doug's apartment approximately four days after the murder. (RR34: 165-66, 246-47; RR35: 48-49). Jackie participated in police interviews in which she described the events of the early morning hours before Mrs. Black's murder. (RR34: 160-61, 167-68; RR38: 121-22, 153).

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

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

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

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

Passing motorist James Jordan saw the vehicles on the side of the road and planned to pull over to assist when he saw Flores light the Volkswagen on fire, get in the driver's seat of Myra's vehicle, and speed away. (RR36: 268-69; RR37: 13-22). Jordan followed, intending to obtain a license plate number and report the incident. (RR36: 269; RR37: 22). Flores evaded Jordan by speeding, running red lights, and driving aggressively. (RR36: 270-73; RR37: 27-39). Flores fired several gunshots out his driver's window at Jordan's car. (RR36: 269; RR37: 28, 30-31, 52). Authorities filed arson charges against Flores for burning the Volkswagen. (RR37: 69-70).

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

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

Although police did not know his true identity at the time, Flores was arrested on April 18, 1998 in Kyle, Texas while traveling from Mexico to Dallas. (RR37: 127, 130, 143-44). Following a report of a possible intoxicated driver, two Kyle police officers stopped a blue Volvo. (RR37: 97-106). Flores, the vehicle's sole occupant, presented a social security card and identified himself as Juan Jojola.[9] (RR37: 109-10). After Flores failed a series of field sobriety tests, the officers initiated an arrest for Driving While Intoxicated (DWI). (RR37: 112-13, 116). Flores became violent, attempted to push the officers into highway traffic, and injured them. (RR37: 117-27). Flores bit a female officer in the arm. (RR37: 127). A sheriff's deputy stopped and helped handcuff Flores. (RR37: 123-24). Flores was transported to jail and charged with DWI and two counts of assault on a peace officer. (RR37: 125-27). Officers did not discover Flores's outstanding federal arrest warrant, and they released him on bond. (RR37: 111, 126-27, 134).

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

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

Flores sprayed the officer with mace and bit him on the wrist. (RR37: 194, 216-17, 230-31). Three or four people eventually subdued Flores. (RR37: 195, 217-19, 232).

E. Flores's trial theories and strategies

Flores moved to exclude Jill Barganier's in-court identification of him on the basis that she underwent hypnosis in early February 1998, about 14 months before trial (but after a hearing, the court held the identification was admissible). (RR36: 12-118). Flores further challenged Barganier's identification with evidence that the sunrise on January 29, 1998 was at 7:25 a.m., and thus the light was not sufficient at 6:45 a.m. for her to see the passenger in the neighbor's driveway. (RR38: 13, 15-19). The charge instructed the jurors that if they believed, based on the hypnosis session, that Barganier's in-court identification was a false memory, resulted from improper influence, or was untrustworthy, they must disregard it. (RR39: 32-33).

Throughout trial, Flores worked to discredit Jackie Roberts. (RR34: 180, 249, 253, 255-56, 258-63, 286-91, 294; RR35: 15-16, 30-31, 33-34; RR36: 185-86; RR38: 24-28, 51-52, 55, 112-13, 117-18, 121-22, 131-37, 148-51, 166-72, 194-96, 205). He elicited testimony from Jackie that she believed half the money at the Blacks' house was rightfully hers, and Mrs. Black told her immediately before the murder that Gary wanted to reduce Jackie's monthly allowance by half. (RR38: 137-40). Flores's counsel elicited testimony indicating Jackie was angry with Childs on the morning of January 29th because Childs had not returned (presumably from a burglary Jackie spearheaded), and that Jackie was not frightened of Charles Flores. (RR34: 279-80, 290; RR38: 45-46). The jury charge included an accomplice instruction as to Jackie,

advising that the jury could not use Jackie's testimony to convict Flores unless it found her testimony was true, the testimony showed Flores was guilty, and other evidence specifically connected Flores to the murder. (RR39: 33-34). Flores also attacked Doug Roberts's credibility. (RR34: 249, 253, 291-94; RR35: 32-34, 37-38, 43-47, 56-57; RR38: 28, 31-32, 38-51, 53-55, 64-65, 192). He sought to emphasize the inconsistencies in Doug's and Jackie's testimony. (RR38: 24-55, 111-23, 131-51, 166-71).

Flores established that: forensic evidence proved the .380 weapon he gave Homero Garcia was *not* the weapon used to kill Mrs. Black; the murder weapon was never recovered; and Childs always carried a .380 firearm. (RR34: 265-67; RR36: 231-37; RR38: 51, 88-90, 95, 174; DX 10). Flores also presented evidence Childs talked to his girlfriend Deborah Howard in January 1998 about $100,000 in hidden drug money, implying Childs was interested in the money.[10] (RR38: 176-81).

F. The jury charge

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

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

directed, aided, or attempted to aid Childs in the murder); or (c) a co-conspirator (wherein Flores and Childs entered into a conspiracy to commit robbery or burglary and, in carrying out the conspiracy, Childs intentionally killed Black, and Flores should have anticipated Black's death would occur). (RR39: 35-37, 44-45). The jury also received instructions on the lesser-included offenses of murder and burglary. (RR39: 37-40, 46). Flores declined, as a matter of strategy, to include lesser-included-offense instructions on aggravated robbery or robbery. (RR39: 13).

G. The defense team's closing arguments

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

II. Respondent Objects to the Facts Flores Presents in his Petition.

Flores asks this Court to accept as true facts that have never been established or recognized by any court, state or federal. His efforts in the lower court in his third and fourth habeas applications to re-write the events of this capital murder by chipping away at the credibility of his conviction on an event-by-event, witness-by-witness basis is really a challenge to the sufficiency of the evidence supporting his judgment and sentence. His description of the offense and events leading to it (Pet. at 3-12) conflicts with trial and post-conviction evidence. No evidence he presents, considered individually or collectively, proves he is innocent. Respondent asks the Court to reject Flores's unsupported "facts" and consider its record-bound statement of the case instead.

III. Flores's Post-Conviction Proceedings

The TCCA affirmed Flores's conviction and sentence on direct appeal, and this Court denied his petition for a writ of certiorari. *Flores v. State*, No. AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (not designated for publication); *Flores v. Texas*, 535 U.S. 1039 (2002). Flores filed original, supplemental, and pro se applications for writ of habeas corpus in the convicting court. In his original and supplemental applications, he raised complaints regarding the punishment-phase jury instructions, deprivation of qualified and certified trial counsel, ineffective assistance of trial counsel, witness Jill Barganier's in-court identification, *Brady* violations, and prosecutorial misconduct. In his pro se pleadings, Flores raised 17 allegations of ineffective assistance of appellate and state habeas counsel. The convicting court

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

Flores timely filed a skeletal federal habeas petition raising 45 potential claims, with the promise to file a final amended petition raising no new claims. *See Flores v. Stephens*, 794 F.3d 494, 500-01 (5th Cir. 2015). He filed his amended petition on March 24, 2008, alleging the mitigation jury instructions were constitutionally defective, the prosecutor failed to disclose impeachment evidence for trace-evidence expert Charles Linch, the trial court improperly admitted the hypnotically-enhanced eyewitness testimony of witness Jill Barganier, and appellate and state habeas counsel rendered ineffective assistance by not raising several *Batson*-related claims. *Id.* The federal magistrate judge recommended relief be denied. *Flores v. Thaler*, No. 3-07-CV-0413-M-BD, 2011 WL 11902115 (N.D. Tex. Mar. 3, 2011). The federal district court denied relief and declined to grant Flores a certificate of appealability. *Flores v. Stephens*, No. 3:07-CV-0413-M, 2014 WL 3534989 (N.D. Tex. July 17, 2014). The Fifth Circuit followed suit, and this Court denied Flores's petition for a writ of certiorari. *Flores v. Stephens*, 794 F.3d 494, 496, 506 (5th Cir. 2015); *Flores v. Stephens*, 577 U.S. 1121 (2016).

In 2015, the 195th Judicial District Court of Dallas County scheduled Flores's execution for June 2, 2016. Two weeks prior to his scheduled execution, on May 19,

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

On February 3, 2021, Flores filed his third state habeas application raising ten claims. Specifically, the application alleged the following: (1) witness Jill Barganier's initial inability to identify him in a photo lineup was exculpatory, and a new scientific consensus in the field of eyewitness identification rendered her in-court identification unreliable; (2) the State's trace-evidence expert, Charles Linch, had disavowed his own testing and trial testimony as unreliable, and contemporary forensic lab standards showed his methodology and test results lacked basic scientific competency; (3) newly available evidence established Flores is actually innocent; (4) and (5) the State suppressed *Brady* evidence material to his conviction and death

sentence; (6), (7), and (8) the State presented false testimony at trial; (9) his trial counsel violated his Sixth Amendment right to maintain his innocence pursuant to *McCoy v. Louisiana*, 584 U.S. 414 (2018); and (10) the State violated his due process rights by presenting the alleged false scientific testimony described in claims one and two. The TCCA dismissed the third state habeas application without reviewing the merits of the claims raised, concluding Flores did not satisfy the requirements of Article 11.071, Section 5. *Ex parte Flores*, No. WR-64,654-03, 2021 WL 4566355, at *2 (Tex. Crim. App. Oct. 6, 2021) (per curiam) (not designated for publication); *see* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c). This Court denied Flores's petition for a writ of certiorari. *Flores v. Texas*, 142 S. Ct. 2818 (2022).

On June 10, 2025, Flores filed his fourth state habeas application raising the following four claims: he is entitled to relief under Article 11.073 of the Texas Code of Criminal Procedure based on a new scientific consensus regarding eyewitness identification reliability; actual innocence; official misconduct; and he has been deprived of a state-created liberty interest embodied in Article 11.073 in violation of federal constitutional due process. The TCCA dismissed this fourth state habeas application without reviewing the merits of the claims raised, again concluding Flores did not satisfy the requirements of Article 11.071, Section 5. *Ex parte Flores*, WR-64,654-04, 2025 WL 2860250 (Tex. Crim. App. Oct. 9, 2025) (per curiam) (not designated for publication); *see* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c). The present petition followed. It is Flores's sixth petition for a writ of certiorari in his case.

REASONS FOR DENYING THE PETITION

The court below dismissed the claims for which Flores seeks review on an adequate and independent state-law ground without reaching the merits of the claims, which deprives this Court of jurisdiction to consider them. Flores's petition seeks review of the TCCA's order dismissing his fourth state habeas application as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. Because the TCCA's decision applied Texas's procedural rules governing subsequent habeas applications in death-penalty cases, it is unassailable on certiorari, and the Court lacks jurisdiction to grant review. Even assuming jurisdiction, Flores has not furnished a compelling reason for this Court to review his case, and none exists. The question Flores presents for review is unworthy of the Court's attention.

ARGUMENT

I. An Adequate and Independent State Procedural Bar Forecloses Certiorari Review.

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

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

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

Thus, Article 11.071, Section 5 makes it clear applicants are restricted to one habeas review, and subsequent writ applications are prohibited except in the delineated circumstances. *See id.* § 5(a). This statute, like the federal habeas "second or successive" writ prohibition, works to limit the number of attempts an inmate may seek to collaterally attack a conviction, subject to the exceptions. *Compare* Tex. Code Crim. Proc. Ann. art. 11.071, § 5 *with* 28 U.S.C. § 2244(b); *see also Beard v. Kindler*, 558 U.S. 53, 62 (2009) (noting that federal courts should not "disregard state

procedural rules that are substantially similar to those to which we give full force in our own courts").

The Texas statute requires proof of unavailability in all prior state habeas applications. *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). A factual basis for a claim was unavailable within the meaning of Section 5(a) if it "was not ascertainable through the exercise of reasonable diligence on or before" the date the prior application was filed. *Id.* § 5(e).

After setting out a brief procedural history of the case and reciting the claims presented, the TCCA's order dismissing Flores's application states: "Having reviewed [Flores's] application, we conclude that it does not satisfy the requirements of Article 11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised." *Ex parte Flores*, 2025 WL 2860250, at *1 (citing Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c)). The TCCA's dismissal order reflects its regular and strict application of the Section 5 bar, which constitutes an independent and adequate state-law ground for the court's disposition of Flores's claims. *See Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.").

This Court has consistently held it will not review a federal claim decided by a state court if the state court's decision rests on a state-law ground that is independent of the merits of the federal claim and an adequate basis for the court's decision. *Foster*

v. Chatman, 578 U.S. 488, 497 (2016); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state-law ground is a substantive rule dispositive of the case or a procedural barrier to adjudication on the merits. *Walker v. Martin*, 562 U.S. 307, 315 (2011). In the context of direct review of a state-court judgment, the rule is jurisdictional. *Coleman*, 501 U.S. at 729.

Because the TCCA dismissed Flores's subsequent writ application after determining none of his claims met the requirements of Article 11.071, Section 5, the state court's disposition of the claims rested on a state procedural ground that was independent of any federal issues raised and adequate to support the judgment. *See Hughes*, 530 F.3d at 342. By explicitly stating it had not considered the merits of the claims, the TCCA left no doubt as to the independent, state-law character of its dismissal. Although Flores characterizes the TCCA's denial in his case as a due process violation, he presents no valid justification to depart from the Court's long-standing rule against reviewing state-court dismissals resting on purely state-law grounds.

II. Flores's Current Petition for Writ of Certiorari Rehashes Claims this Court Rejected in 2022.

In his third habeas application filed in 2021, Flores alleged, among other things, that a new scientific consensus in the field of eyewitness identification rendered Jill Barganier's in-court identification unreliable; newly available evidence established that he is actually innocent; and the State's misconduct in suppressing *Brady* evidence was material to his conviction and death sentence. The TCCA dismissed the application, concluding Flores did not satisfy the requirements of

Article 11.071, Section 5, and this Court denied Flores's petition for writ of certiorari. *Ex parte Flores*, 2021 WL 4566355, at *2; *Flores v. Texas*, 142 S. Ct. 2818 (2022).

In his fourth habeas application, Flores essentially repackaged and reasserted the same claims: a new scientific consensus regarding eyewitness identification reliability entitles him to relief under Article 11.073 of the Texas Code of Criminal Procedure; new evidence, specifically a new scientific consensus regarding eyewitness reliability, establishes that he is actually innocent; and his right to a fair trial and due process were violated by official misconduct, specifically the suppression of *Brady* evidence. The TCCA dismissed this fourth state habeas application without reviewing the merits of the claims raised, again concluding Flores did not satisfy the requirements of Article 11.071, Section 5. *Ex parte Flores*, 2025 WL 2860250, at *1.

In the current petition, Flores seeks to re-litigate the same claims previously rejected by this Court. No compelling reason exists to do so, and this Court should again deny his petition.

III. Flores Does Not Show that His State Habeas Proceeding Failed to Comport with Due Process.

Flores spends very little time in his petition arguing the merits of his claims raised in the lower court. Instead, he focuses his complaints on the procedure employed by the TCCA, specifically challenging the adequacy of the state court's review of his application and the adequacy of its order explaining the dismissal. But because state habeas proceedings are not required under the Constitution, federal courts may upset the State's postconviction procedure only if it was fundamentally

inadequate. The record here shows that the state habeas proceedings adequately complied with due process.

The Constitution does not require state habeas proceedings at all or that such proceedings follow any particular model. Justice O'Connor described the role of state habeas corpus proceedings as follows:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings … nor does it seem to me that the Constitution requires the States to follow any particular federal role model in these proceedings.

Murray v. Girratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1989) (holding states have no obligation to provide collateral review of convictions). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano*, 492 U.S. at 10. This Court has explained that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id*.

Where a state allows for post-conviction proceedings, the Federal Constitution does not dictate the exact form such assistance must assume. *Finley*, 481 U.S. at 555. A state habeas applicant's "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009). "Federal courts may upset

a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Id*.

The fundamental requisite of due process of law is the opportunity to be heard. *Ford v. Wainwright*, 477 U.S. 399, 413 (1986); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (noting that "states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims" and "'[d]ue process does not require a full trial on the merits'; instead, petitioners are guaranteed only the 'opportunity to be heard.'") (footnotes and citations omitted). Flores was afforded the opportunity to be heard.

The Texas habeas system gave Flores the means and opportunity to make claims and offer evidence in support of those claims. His argument that he has been barred from even presenting his evidence to a court is simply untrue. Filing a habeas application with exhibits attached *is* presenting the evidence to a court, namely the TCCA. In its order, the TCCA specifically stated that it had reviewed Flores's application. Flores disregards the obvious: in its review of his fourth habeas application, the TCCA simply found the facts were previously available when he filed his third state habeas application in 2021, his second state habeas application in 2016, and/or his original application; the law was previously available; and he did not present any new evidence substantiating his current claims. Simply because Flores did not prevail does not mean he was not given the opportunity to be heard.

While Article 11.073 is intended to provide a vehicle for prisoners to obtain judicial review of a "new science" claim, it is not without limitation. As Flores

acknowledges, an applicant must still comply with the procedural requirements codified in Article 11.071, Section 5, to have their claim considered. *See* Pet. at 23; see *also, e.g., Ex parte Escobar*, 676 S.W.3d 664, 667 (Tex. Crim. App. 2023) (noting that, in a subsequent habeas proceeding, the applicant's Article 11.073 and other claims must satisfy a statutory exception to the subsequent-application bar before consideration of the merits is permitted). Thus, it was not that the TCCA arbitrarily barred access to Flores's Article 11.073 claim, it was that he failed to meet the statutory procedural requirements to have his claims considered.

Contrary to Flores's assertions that the TCCA's arbitrary application of the statute bars access to applicants' new science clams, several Texas habeas applicants have successfully used Article 11.073 as a pathway to relief in their cases. *See Ex parte Roark*, 707 S.W.3d 157 (Tex. Crim. App. 2024) (habeas relief granted in injury to a child case under Article 11.073 based on new scientific evidence regarding the cause of the infant victim's injuries); *Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim. App. 2018) (habeas relief granted in murder case under Article 11.073 based on new scientific evidence regarding bitemark evidence); *Ex parte Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018) (habeas relief granted to four defendants under Article 11.073 based on new DNA evidence); *Ex parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016) (habeas relief granted in four cases under Article 11.073 based on new scientific evidence regarding hymenal injuries); *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (habeas relief granted in capital murder case under Article 11.073 based on medical examiner's revised opinion on the cause and manner of the child victim's

cause of death); *see also, e.g., Ex parte Lewis*, No. WR-57,648-13, 2026 WL 388685 (Tex. Crim. App. Feb. 12, 2026) (per curiam) (not designated for publication) (habeas relief granted in aggravated sexual assault of a child case under Article 11.073 based on new scientific evidence regarding sexual assault examination findings); *Ex parte Clark*, No. WR-13,739-06, 2023 WL 8613823 (Tex. Crim. App. Dec. 13, 2023) (per curiam) (not designated for publication) (habeas relief granted in capital murder case under Article 11.073 based on results of new DNA testing); *Ex parte Faircloth*, No. WR-81,450-02, 2023 WL 2669803 (Tex. Crim. App. Mar. 29, 2023) (per curiam) (not designated for publication) (habeas relief granted in aggravated assault case under Article 11.073 based on unreliable DNA evidence that was used to secure the conviction); *Ex parte Santillan*, No. WR-49,763-02, 2023 WL 2150874 (Tex. Crim. App. Feb. 22, 2023) (per curiam) (not designated for publication) (habeas relief granted in capital murder case on basis of Article 11.073 and actual innocence based on new DNA evidence); *Ex parte Leadon*, No. WR-93,690-01, 2022 WL 2965701 (Tex. Crim. App. July 27, 2022) (per curiam) (not designated for publication) (habeas relief granted in aggravated robbery case under Article 11.073 based on new scientific evidence); *Ex parte Turner*, No. WR-92,964-01, 2021 WL 5917206 (Tex. Crim. App. Dec. 15, 2021) (per curiam) (not designated for publication) (habeas relief granted in drug possession case on basis of Article 11.073 and involuntary plea); *Ex parte Fischer*, No. WR-79,039-02, 2021 WL 900679 (Tex. Crim. App. Mar. 10, 2021) (per curiam) (not designated for publication) (habeas relief granted in murder case under Article 11.073 based on new scientific evidence concerning cell tower location data

that contradicted evidence presented at trial); *Ex parte Gandy*, No. WR-22,074-10, 2019 WL 2017291 (Tex. Crim. App. May 8, 2019) (per curiam) (not designated for publication) (habeas relief granted in aggravated robbery case under Article 11.073 based on new scientific evidence showing that the trial testimony of the F.B.I. examiner was false and misleading); *Ex parte Nolley*, No. WR-46,177-03, 2018 WL 2126318 (Tex. Crim. App. May 9, 2018) (per curiam) (not designated for publication) (habeas relief granted under *Brady* and Article 11.073 based on newly available DNA and scientific evidence); *Ex parte Sonnier*, No. WR-85,161-02, 2017 WL 4410272 (Tex. Crim. App. Oct. 4, 2017) (per curiam) (not designated for publication) (habeas relief granted under Article 11.073 based on new mitochondrial DNA evidence); *Ex parte Adams*, No. WR-29,889-04, 2016 WL 1161091 (Tex. Crim. App. Mar. 23, 2016) (per curiam) (not designated for publication) (habeas relief granted in aggravated sexual assault case under Article 11.073 based on newly available DNA evidence). These cases demonstrate that the TCCA's application of Article 11.073 does not bar access to relief for applicants who meet their procedural and evidentiary burdens.

Flores also argues that the complete absence of analysis or explanation for the dismissal in his case is proof of arbitrariness. Flores seems to suggest that he was entitled to elucidation from the TCCA regarding their consideration of his claims and the basis for their decision rather than a standardized order dismissing his subsequent habeas application for failing to satisfy Texas's procedural requirements in habeas cases. However, the TCCA is not required to write an opinion explaining the basis of its ruling. *See Ex parte Graves*, 70 S.W.3d 103, 120 n.3 (Tex. Crim. App.

2002) (Price, J., dissenting) ("we are not required to write an opinion explaining the reason or reasons we deny relief on applications of habeas corpus"). And this Court has stated "that it has no power to tell state courts how they must write their opinions." *Roberson v. Texas*, 604 U.S. __, 145 S. Ct. 3, 7, 220 L. Ed. 2d 162 (2024) (citing *Coleman*, 501 U.S. at 739). Flores fails to establish that a state court violates due process when it issues a summary order based on a state procedural rule.

The TCCA's dismissal of Flores's claims was not arbitrary and raised no due process concerns. Flores's assertion of a due process violation is merely an attempt to repackage his state-law procedural complaint into a federal question. Because he fails to allege a claim that would implicate due process, his complaint is not worthy of certiorari review.

CONCLUSION

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

Respectfully submitted,

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