

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 Texas Court of Criminal Appeals

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ARGUMENTS IN REPLY..... 1

 I. The State Rewrites the Question Presented to Dodge the Compelling Federal
 Due Process Issue That Flores Presents..... 1

 II. The Legal Issue Presented Arises from the Arbitrary Bar to a Review of
 Suppressed Facts and New Evidence of Innocence that the State’s Brief
 Entirely Ignores..... 4

 III. The State’s Jurisdictional Argument Misses the Mark. 7

 IV. Due Process Requires More Than a Chance to Plead and Launch Proffers into
 a Void..... 11

CONCLUSION..... 15

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma,
470 U.S. 68 (1985)..... 7

Armstrong v. Manzo,
380 U.S. 545 (1965)..... 11

Beck v. Alabama,
447 U.S. 625 (1980)..... 3

Brady v. Maryland,
373 U.S. 83 (1963)..... 13

Busby v. Davis,
925 F.3d 699 (5th Cir. 2019) 10

Payne v. Tennessee,
501 U.S. 808 (1991)..... 3

Ex parte Brown,
360 S.W.3d 446 (Tex. Crim. App. 2011) 9

Ex Parte Cook,
691 S.W.3d 532 (Tex. Crim. App. 2024) 13

Ex parte Graves,
70 S.W.3d 103 (Tex. Crim. App. 2002) 12

Ford v. Wainright,
477 U.S. 399 (1986)..... 4

Glossip v. Oklahoma,
604 U.S. 226 (2025)..... *passim*

Goldberg v. Kelly,
397 U.S. 254 (1970)..... 11

Grannis v. Ordean,
234 U.S. 385 (1914)..... 11

Graves v. Dretke,
442 F.3d 334 (5th Cir. 2006) 12

Herrera v. Collins,

506 U.S. 390 (1993).....	9
<i>Hughes v. Quarterman</i> ,	
530 F.3d 336 (5th Cir. 2008)	10
<i>Jurek v. Texas</i> ,	
428 U.S. 262 (1976).....	4
<i>Logan v. Zimmerman Brush Co.</i> ,	
455 U.S. 422 (1982)	2
<i>Martinez v. Ryan</i> ,	
566 U.S. 1 (2012).....	12
<i>Maynard v. Cartwright</i> ,	
486 U.S. 356 (1988).....	3
<i>Michigan v. Long</i> ,	
463 U.S. 1032 (1983).....	7
<i>Napue v. Illinois</i> ,	
366 U.S. 264 (1959).....	10, 13
<i>Ruiz v. Quarterman</i> ,	
504 F.3d 523 (5th Cir. 2007)	10
<i>Schlup v. Delo</i> ,	
513 U.S. 298 (1995).....	9
<i>Smith v. Phillips</i> ,	
455 U.S. 209 (1982).....	14
<i>Trevino v. Thaler</i> ,	
569 U.S. 413 (2013).....	12
 <u>Statutes</u>	
TEX. CODE CRIM. PROC. art. 11.071, § 11.....	11
TEX. CODE CRIM. PROC. art. 11.071, § 5.....	<i>passim</i>
TEX. CODE CRIM. PROC. art. 11.071, § 6(b-1).....	11
TEX. CODE CRIM. PROC. art. 11.071, § 6(b-2).....	11
TEX. CODE CRIM. PROC. art. 11.071, § 9.....	11
TEX. CODE CRIM. PROC. art. 11.073.....	3, 4, 8, 9

Constitutional Provisions

U.S. CONST. amend. XIV 1

Rules

Sup. Ct. R. 10..... 1

Other Authorities

B. Rogers & C. George, *Texas sets man free from death row*, HOUSTON CHRON. (Oct. 27, 2010),
<https://www.chron.com/news/houston-texas/article/texas-sets-man-free-from-death-row-1619337.php> 12

<https://deathpenaltyinfo.org/facts-and-research/data/innocence>..... 13

A state’s effort to “deprive any person of life ... without due process of law” is a compelling concern. U.S. CONST. amend. XIV; Sup. Ct. R. 10. The State’s Brief in Opposition (BIO) seeks to leverage the very due process violation about which Flores complains into a bar to this Court’s review of that violation. This Court has jurisdiction over Flores’s due process claim just as it had jurisdiction to decide *Glossip*, another death-penalty case involving a credible claim of innocence, prosecutorial misconduct, and a state court’s application of procedural bars that are not clearly independent of federal law. *Glossip v. Oklahoma*, 604 U.S. 226 (2025). The Court can and should grant certiorari.

ARGUMENTS IN REPLY

I. The State Rewrites the Question Presented to Dodge the Compelling Federal Due Process Issue That Flores Presents.

The State invents a new Question Presented to have a straw man to knock down. The State mistakenly suggests that Flores seeks merits review of his dismissed changed science, actual innocence, and official misconduct claims. BIO at 19. As his petition indicates, Flores seeks review of a threshold constitutional issue: whether the TCCA denied him due process, in violation of the federal constitution, by arbitrarily barring *access* to state vehicles intended to allow the putatively innocent a chance to prove their right to relief. More specifically, Flores’s due process claim arises from the Texas Legislature’s enactment of legal processes specifically intended to enable prisoners who are out of mandatory appeals a chance to challenge wrongful convictions, recognizing that executing the potentially innocent is not a legitimate exercise of state power.

The TCCA has repeatedly denied Flores the right to get beyond the pleading stage when he undeniably satisfied the pleading burden under applicable state law. *See, e.g.*, App.3-778. “[T]he Fourteenth Amendment’s Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action

would be ‘the equivalent of denying them an opportunity to be heard upon their claimed right[s].’” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)).

The State argues, incorrectly, that all of Flores’s claims were properly dismissed because they were merely “repackaged” claims unsupported by new facts. The face of the claims and his voluminous evidentiary proffers show that there is no claim that could have been brought previously or that is untethered to new facts. *See id.* Additionally, the State pointedly avoids the procedural history that exposes its unclean hands. Seventeen years after Flores’s trial, when he was facing execution, a facially incomplete, “permanently” and heavily redacted set of materials from the police file was produced to Flores for the first time. App.29. This production, while still fragmentary, showed that only a small fraction of the materials gathered during the murder investigation had been produced during trial. The new disclosures included materials favorable to the defense. Before this belated disclosure could be assessed, the TCCA remanded a single claim related to the use of hypnosis in Flores’s first legitimate habeas application and stayed his then-pending execution. During the proceeding that followed, Flores’s counsel tried to bring to the trial court’s attention some of the vast evidence of official misconduct they were starting to unearth, which undermined every aspect of the State’s case against Flores. But State’s counsel expressly objected to the consideration of any evidence that was “not relevant” to the hypnosis issue. State’s counsel successfully moved to strike most of Flores’s witness list, including members of the narcotics unit who had been involved in the murder investigation and the lead trial prosecutor. Flores was prevented from developing or presenting any of the *Brady* evidence discovered while that proceeding was underway. 3EHRR7-44. Thereafter, Flores filed an 826-page subsequent habeas application raising ten new claims under both Texas law and the U.S. Constitution. The

application was supported by eleven volumes of evidentiary proffers including previously unavailable evidence. But the TCCA summarily dismissed all claims (including his official misconduct and actual innocence claims based on the new evidence he had been prevented from developing) “without reviewing the merits of the claims raised.” App.784-786. State’s counsel then pushed for an execution date—seemingly to prevent further discovery of the underlying rot. Yet the investigation continued. Flores is still alive. But he has yet to get a toe inside a courthouse since raising claims of official misconduct and actual innocence. *See* App.29-31.

Of course, a federal court might well be barred from reviewing the merits of a claim if a state court’s dismissal rested on an adequate and independent state-law ground. But a state court cannot shield its judicial process from constitutional scrutiny by simply refusing to allow a litigant to move forward and summarily proclaiming “abuse of the writ.” The jurisdictional issue is addressed further in Section III, below.

In claiming that the TCCA did not act arbitrarily to bar Flores’s access to state-created vehicles, the State offers little more than a string cite of Article 11.073 cases, which does not include a single death-penalty case; yet in such cases, due process concerns are supposed to be heightened. *See, e.g., Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (emphasizing the “fundamental constitutional requirement” of “sufficiently minimizing the risk of wholly arbitrary and capricious action” in death-penalty cases). When the issue is potential innocence, those concerns should be even more pronounced. *See Beck v. Alabama*, 447 U.S. 625 (1980) (holding that, because of the need to ensure the death penalty is imposed “on the basis of ‘reason rather than caprice or emotion,’ [the Court has] invalidated procedural rules that tended to diminish the reliability of the sentencing determination” and applying the “same reasoning” to ensure against an unreliable “guilt determination”); *Cf Payne v. Tennessee*, 501 U.S. 808 (1991) (applying

heightened-reliability mandate to a due process claim, based on the injection of victim-impact evidence into the guilt-phase of a death-penalty trial).

The cases in the State’s string cite involved grants of relief *after* the applicant had been afforded a chance to present evidence to a court. Further, most of these cases involved grants of relief based on new DNA evidence for which Article 11.073 should have been unnecessary, as Texas already had a statute to enable litigating DNA issues after all initial appeals have been exhausted, more evidence that Article 11.073 is being arbitrarily narrowed.¹ *See* Brief of the Texas Defender Service as Amicus Curiae at 13-16. But the due process violation Flores presents does not arise from the fact that the TCCA has never granted relief in a death-penalty case under Article 11.073 but instead from the TCCA’s arbitrary refusal to allow Flores the *chance* to prove he merits relief under Article 11.073—or through an innocence claim in tandem with his federal official misconduct and due process claims.

II. The Legal Issue Presented Arises from the Arbitrary Bar to a Review of Suppressed Facts and New Evidence of Innocence that the State’s Brief Entirely Ignores.

The State ignores the facts relevant to the Question Presented while misrepresenting the strength of the State’s case against Flores. The State’s core fallacy is that the sheer number of times Flores has *tried* to be heard is synonymous with being afforded due process. *But see Ford v. Wainright*, 477 U.S. 399 (1986) (reminding that due process in advance of execution requires a factfinder to “have before it all possible relevant information about the individual defendant whose fate it must determine.”) (quoting *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality)).

Most notably, the State conceals—as it did at trial—the initial descriptions provided by the only witness who, 13 months later, placed Flores at the crime scene. Evidence of *some* of this

¹Official misconduct is a far greater contributor to wrongful convictions than faulty DNA analysis. *See* Brief of *Amicus Curiae* Christopher Scott at 15-19.

witness's initial reports to law enforcement was only adduced in an evidentiary hearing in 2017, after Flores was nearly executed and 20 years after his trial; this witness's written statement provided to police the day of the murder has been permanently "lost." App.129.

Long-suppressed records show that next-door neighbor Jill Barganier had described seeing two "white males" with "long hair" who looked "similar" the morning of the murder. App.239-240. She then picked a tall, thin, white male with long hair out of a photo array, identifying him as the driver of the distinctive Volkswagen Bug out of which she had seen two men emerge. App.242. After Richard Childs was apprehended, Barganier picked Childs's latest mugshot out of a second photo array. App.243. Days later, after events not captured in a purged police file, narcotics investigators directed the murder investigators to shift their focus to Charles Flores. Flores, a heavy-set, Hispanic male, with short hair, shaved on the sides, looked nothing like Childs and did not match Barganier's description. Flores's recent mugshot was placed in the file without explanation, then Barganier was summoned back to the police station. App.247-251.

Barganier was subjected to numerous suggestive interview tactics, including an outrageous² "investigative hypnosis" session conducted by a police officer involved in the underlying investigation. App.157-177. Even under hypnosis, Barganier continued to describe two white males with long hair who looked similar. She was, however, encouraged to consider whether either men had "short, shaved hair" that was "neatly trimmed." *Id.* She was also told she might "remember more later." *Id.* Then the police presented her with a photo array with six Hispanic males with short hair, including a recent photo of Flores. App.250. ***She did not pick Flores out of the array.*** Meanwhile, she made a composite sketch of the car's passenger—depicting a white male with long hair who looked nothing like Flores. App.17, App.21.

²See Brief of Penn & Teller as *Amici Curiae*.

None of this information was before Flores’s jury. Nor was the new scientific consensus that solidified in 2024 showing that these facts strongly suggest Flores’s *innocence*. App.409-506.³ The sole allusions to the pressures brought to bear on Barganier, which ultimately led to her dramatic, in-court identification midtrial, came from the lead prosecutor injecting *misinformation* into the proceeding. *See, e.g.*, 36RR15 (representing to the court that the hypnosis session, which the jury never saw, was irrelevant and stating that the photo of Flores used in the array, which the jury never saw, included “an old picture of the Defendant”).

The State omits this critical context. Instead, the State presents a manufactured narrative to suggest a straightforward timeline, much of which is unsupported by the trial record and has been completely destabilized by the post-conviction evidence. *See* App.753-754. The State sanitizes the facially incredible testimony of witnesses who have since *recanted* their trial testimony. *See, e.g.*, App.755-757. The State treats the fanciful tale of a disreputable paid informant, who barely knew Flores, as worthy of credence.⁴ The State mentions a custodial interview with Childs, suggesting he was the first to implicate Flores, when the audio recording (even with its stops and starts and gaps) shows that *law enforcement told Childs* to implicate Flores and otherwise fed him a story to try to minimize Childs’s own role—an unprincipled exercise that permeated Flores’s trial while Childs himself, known to be the shooter, was kept away from the jury.⁵

³*See also* Brief for the American Psychological Association as *Amicus Curiae*.

⁴Jonathan Wait Sr. spent months trying to come up with something to help law enforcement so he could obtain a reward. He never said anything about Flores’s alleged “confession” to him until he was on the stand; the story is facially ludicrous. 37RR79-96; App.756-757. Similarly unprincipled is the State’s reliance on the coerced statement from Flores’s elderly father, which he disavowed and which was never admitted into evidence.

⁵The recording was not played to Flores’s jury. It is unclear if the audio was disclosed to the defense before trial, but it raises more questions than it answers about how law enforcement decided to press the idea that Flores was the man who accompanied Childs in Childs’s distinctive Volkswagen to the Blacks’ house where Mrs. Black was shot with the exact brand of .380

The State ignores all facts relevant to the eyewitness identification at the heart of Flores’s changed-science and innocence claims to defend the summary dismissal of his attempt to employ state-law vehicles created to prevent executing the innocent. The Due Process Clause cannot permit such arbitrary barriers to being heard.

III. The State’s Jurisdictional Argument Misses the Mark.

The State’s jurisdictional argument is based on the TCCA’s boilerplate language dismissing Flores’s application as “an abuse of the writ without reviewing the merits of the claims raised.” BIO at 21; App.2. A jurisdictional bar to federal review arises only when it is clear from the face of a ruling that the state court decision was in no way intertwined with the merits of the claim and is not intertwined with questions of federal law. *Glossip v. Oklahoma*, 604 U.S. 226, 242 (2025); *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). That is plainly not the case here, where the nature of the dismissal, purportedly divorced from a merits review, itself creates the federal constitutional violation.

The State’s argument also requires ignoring the statutory text of Article 11.071, section 5(a), which the TCCA could not have followed and reached the result that it did and could not have followed without interpreting federal law. The TCCA’s boilerplate language just cites “Section 5.” App.2. Deciding whether to dismiss Flores’s claims would have *depended on* engaging with federal constitutional law per the plain text of both section 5(a)(1) (governing his federal official misconduct and due process claims, as well as the state-law “changed science” claim) and section 5(a)(2) (governing the Actual Innocence claim). *See Ake v. Oklahoma*, 470 U.S.

ammunition later found in Childs’s bag when he was arrested after being allowed to spend two days destroying evidence while under police surveillance. The State’s only redemption is that it finally corrects, without acknowledgment, a long-standing misrepresentation of fact that has been repeated numerous times in summaries of the evidence reputedly inculcating Flores. *See* BIO at 8 (admitting “a partial box of the same brand of .380 ammunition found at the murder scene” was found on Childs, *not Flores*). *See also* App.757-759.

68, 75 (1985).

Obviously, any record-based claims that could have or were raised in a direct appeal would be procedurally barred. And certain claims based entirely on facts that were available to raise in a previous habeas application could be fairly deemed barred. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a)(1) (requiring that claims in a subsequent habeas posture “have not been and could not have been presented previously in a timely initial application or in a previously considered application because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.”). But Flores did not plead any claims of that nature. He pled these four claims:

- Claim 1: “changed-science” claim under state law based primarily on a new consensus in the scientific study of eyewitness memory that had not yet coalesced when his previous application was filed but is now reflected in a **2024** survey of memory experts. *See* App.31-75; *see also* Declaration of John Wixted, Ph.D. (explaining evolution of the science that has resulted in a new consensus and its direct applicability to the Flores case), App.408-529.
- Claim 2: Actual Innocence claim based on both the new scientific consensus and the mountain of evidence he has amassed, which no court has yet considered, that undermines every aspect of the State’s guilt-phase case against him. *See* App.75-90.
- Claim 3: *Brady* claim that Flores’s conviction was obtained through official misconduct based on suppressed evidence favorable to the defense; a 2025 affidavit from Flores’s trial counsel with explosive revelations about the State’s misconduct during and after trial (App.398-407); and a 2025 affidavit from an expert in police investigative practices (App.530-575) identifying numerous factors in the Black murder investigation long associated with wrongful convictions and concluding, *inter alia*, that one of the only witnesses who was not facing the possibility of legal jeopardy because of their own criminal activity was Barganier and “almost everything investigators did with her was contrary to what would be expected if police wanted to obtain accurate information.” App.558.
- Claim 4: claim that Flores was deprived of a state-created liberty interest in violation of federal constitutional law due to the TCCA’s arbitrary application of the changed-science writ in a death-penalty case where substantive, previously unavailable evidence has been amassed but inexplicably disregarded.

Furthermore, under Texas law, innocence claims are to be treated differently. State law—

as embodied in both Article 11.071, section (5)(a)(2) and in Article 11.073—reflects the Texas Legislature’s decision to *lower* the “Herculean” burden of (1) having a chance to prove innocence and (2) proving innocence on the merits, respectively. *See Ex parte Brown*, 360 S.W.3d 446, 464 (Tex. Crim. App. 2011). Section 5(a)(2) requires only a threshold determination that, “by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt[.]” TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a)(2). That is, the Texas “innocence gateway” is a codification of *Schlup v. Delo*, 513 U.S. 298 (1995) and does not require that the claim has “not been and could not have been presented previously in a timely initial application or in a previously considered application”—the text of section 5(a)(1).⁶ And Article 11.073 only requires evidence of a material change in science, broadly conceived, employed to obtain the conviction. App.799-801.

The State presumes that the TCCA analyzed all of Flores’s claims under section 5(a)(1), which would have been improper. That the State cannot even explain what it thinks the TCCA did in dismissing Flores’s claims without any merits review belies the argument that the TCCA’s resolution of the claims was “adequate.”

Finally, the State’s jurisdiction-bar argument, if it applied, would be inconsistent with this Court’s decision in *Glossip*, concluding that it had jurisdiction to review the state court’s judgment although Oklahoma’s CCA had invoked Oklahoma’s post-conviction procedures as a basis for

⁶ In *Schlup*, this Court took up the issue of how a habeas applicant could present evidence of innocence where such a prospect had seemingly been rejected in *Herrera v. Collins*. “In *Herrera*, the petitioner’s claim was evaluated on the assumption that the trial that resulted in his conviction had been error free.” *Schlup*, 513 U.S. at 315. This Court concluded that, because *Schlup* also raised claims under *Strickland* and *Brady*, his burden to present evidence of innocence should be lower. *Id.* at 316. Flores’s application includes both a *Brady* claim and another due process claim. Even so, Flores also relied on a new factual basis for his Actual Innocence claim, including expert opinion based on a newly coalesced scientific consensus. App.31-58, App.75-90.

dismissing *Glossip*'s subsequent habeas claims. This Court held that the state court decision did not rest on an independent state-law ground because the procedural ruling was contingent upon Oklahoma's CCA's antecedent rejection of the attorney general's confession of *Napue* error, which presented a question of federal constitutional law. *Glossip*, 604 U.S. at 244-45.

Glossip also stands for the proposition that a procedural bar arises only when it is *clear* from the language of the order, from the state court's authoritative construction of the state rule, and from the state court's practice when applying its rule that the state court's decision was in no way intertwined with the merits of the claim. *Id.* The Fifth Circuit has concluded that the kind of boilerplate language in the TCCA order below is not dispositive of the grounds for dismissal. *See e.g., Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007) (noting that "boilerplate dismissal by the [TCCA] of an application for abuse of the writ" is frequently "uncertain" and "unclear" about "whether the [TCCA] decision was based on ... a question of federal constitutional law" and concluding that a nuanced analysis of the claims is often required).⁷

The TCCA has a documented history of dismissing claims "without consideration of the merits," citing Article 11.071, section 5(a), regardless of whether an underlying decision is based on a procedural or substantive ground. *See, e.g., Busby v. Davis*, 925 F.3d 699, 707 (5th Cir. 2019). But again, Flores does not seek merits review of the dismissed claims. He asks the Court to look at the due process violation that prevented him from having those claims, particularly his innocence claim, heard at all. That analysis would focus on (1) the Texas statutory vehicles that permit a habeas applicant in a subsequent application to seek leave to prove innocence and (2) what Flores pled, with this Court affirming the role of due process in prohibiting arbitrary barriers

⁷The State relies on *Hughs v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), which is inapposite, as it involves a claim about jury instructions that was indisputably defaulted and thus appropriately dismissed when raised for the first time in a subsequent habeas application.

to being heard, a question of federal constitutional law.

IV. Due Process Requires More Than a Chance to Plead and Launch Proffers into a Void.

At a bare minimum, due process means an opportunity to be “heard.” *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”)). The “right” to file things does not satisfy the right to be heard. *See id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (defining a “hearing” as an event “at a meaningful time and in a meaningful manner”)). Flores’s case demonstrates that the TCCA has been abusing its role as gatekeeper, preventing death-sentenced habeas applicants with credible innocence claims from being heard.

Unless the TCCA authorizes a claim in a subsequent habeas application, a death-sentenced prisoner has no chance to present the claim to a trial court and no right to counsel. He also has no chance of further factual development in a public forum, no chance of obtaining resources for investigation and experts, no chance for adversarial testing of his evidence in an evidentiary hearing, no chance that the trial court might consider the evidence sufficient to recommend a new trial, and no chance that the TCCA will ultimately grant a new trial. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a) & (b), sec. 6(b-1) & (b-2), sec. 9, & sec. 11. The TCCA has been arbitrarily parsimonious about allowing Flores (and others similarly situated) any fighting chance by refusing to authorize *access* to the starting gate.

Again, Flores’s petition does not ask this Court to resolve the substantive questions of his innocence and the State’s misconduct. The petition concerns the TCCA’s arbitrary bar to presenting the evidence of innocence and official misconduct he has amassed cumulatively, against great resistance, since his execution was stayed in 2016 (after he spent years with no meaningful representation or access to judicial review). *See* App.12-90. Overwhelming evidence, starting with the truth about how Barganier came to make her midtrial identification, shows that his trial was

fraught with constitutional error, including rampant official misconduct. *See, e.g.*, App.9-58. But he has never been allowed to pursue his official misconduct or innocence claims, a deprivation implicating federal constitutional law.

To support its position that boilerplate dismissals are always acceptable, the State cites a footnote in a dissent in *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002) (reh'g denied) (hereafter *Ex parte Graves III*). *See* BIO at 28-29. The footnote from which the State lifts a partial sentence is hardly an endorsement of the TCCA's practice of issuing summary, boilerplate dismissals in the most serious cases. The sentence fragment comes from a dissent *criticizing* the TCCA's practices, not justifying them. 70 S.W.3d at 120 n.3. Moreover, both *Ex parte Graves III*'s holding and rationale are inconsistent with this Court's more recent precedent. *See Martinez v. Ryan*, 566 U.S. 1 (2012) (applying equitable principles to defaulted claim of ineffective-assistance claim); *Trevino v. Thaler*, 569 U.S. 413, 425 (2013) (applying *Martinez* to the Texas procedural system to avoid "significant unfairness"). *Martinez/Trevino* destabilized the federal precedents that the TCCA had relied on to create a jurisdictional bar to Graves's claim in a subsequent habeas posture. And, quite notably, after the TCCA dismissed Graves's third state habeas application as "an abuse of the writ," Anthony Graves was found *actually innocent*.

During 18 years of wrongful incarceration, Graves was nearly executed multiple times and, like Flores, pursued state habeas relief multiple times. But it took intervention from the federal judiciary to change the trajectory of Graves' efforts to obtain justice. *See Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006). After the Fifth Circuit granted habeas relief, Graves was eventually exonerated when the State finally decided to dismiss the charges against him.⁸ Unfortunately,

⁸*See* B. Rogers & C. George, *Texas sets man free from death row*, HOUSTON CHRON. (Oct. 27, 2010), <https://www.chron.com/news/houston-texas/article/texas-sets-man-free-from-death-row-1619337.php>.

Graves' experience is no aberration. Over 200 people once confined to death row have been exonerated,⁹ the most recent of which was in Dallas County, where Flores was wrongfully convicted, a county with an exceptional number of wrongful convictions, many dating back to the era when Flores was tried. *See* Brief of *Amicus Curiae* Christopher Scott at 3-5.

Most exonerations in Texas death-penalty and other capital murder cases have come well *after* multiple applications for a writ of habeas corpus. *See, e.g., Ex Parte Cook*, 691 S.W.3d 532 (Tex. Crim. App. 2024) (exonerating Cook, convicted in 1978, after multiple trials and multiple denied and dismissed state habeas applications). One recurrent factor causing both wrongful convictions and inordinate delay in unwinding them is misconduct by state actors, particularly during the era when amicus Scott, Graves, Glossip, and Flores were prosecuted, enabled by contemporary agents of the State resisting disclosure of their predecessors' misconduct—and then the TCCA arbitrarily dismissing attempts to expose the obstruction.

Flores and Glossip were prosecuted in 1999 and 1997, respectively, when their jurisdictions' approach to *Brady* obligations was to treat them as optional. Despite well-settled constitutional due process requirements,¹⁰ prosecutors in Glossip's case failed to disclose crucial information to the defense about their star witness in two different trials. *Glossip*, 604 U.S. at 227. Similarly, prosecutors in Flores's case withheld almost all discovery until jury selection began and *never* disclosed material information—including about the original descriptions of the perpetrators provided by Barganier *before* she was subjected to hypnosis. App.257-253. When trial began, the State had no DNA, fibers, fingerprints, or ballistics evidence linking Flores to the crime scene. This considerable evidentiary shortfall was “solved” using a host of contortions, some of which is

⁹*See* <https://deathpenaltyinfo.org/facts-and-research/data/innocence>.

¹⁰*See, e.g., Napue v. Illinois*, 366 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

evident from the face of the trial record. But the State experienced a windfall midtrial, just as their weak circumstantial case was coming apart; the hypnotized witness came through with an identification reflecting consummate confidence, *because of* the suggestive procedures used to get her there. *See* Brief of Jennifer Thompson as *Amicus Curiae* (describing toll on crime survivors and the legal system caused by improper police practices producing unreliable eyewitness identifications).

Glossip was convicted largely based on the testimony of the man who actually committed the murder and secured a plea deal to avoid the death penalty. *Glossip*, 604 U.S. at 232-33. Flores was convicted based on a hypnotized witness and the female accomplice/sexual partner of the man who actually committed the murder, with the latter two receiving undisclosed promises of leniency before Flores's trial. App.11-31. In Flores's case, the State determined that the man who actually committed the murder (Childs) was more valuable to the State by remaining silent and out of sight. But after Flores was confined to death row, Childs's judicial confession to the shooting was secured in exchange for a strikingly light sentence; Childs then served less than half of his sentence before being paroled in 2016. App.99. This thoroughly corrupted process has never been aired out in a courtroom in violation of Flores's right to due process. *See Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial."). Although Texas now implicitly recognizes that Flores's trial was tainted by testimony from a hypnotized witness, he has been denied the benefit of that legal reform. *See* TEX. CODE CRIM. PROC. art. 38.24 (barring use of testimony tainted by investigative hypnosis in criminal proceedings). Flores has never had a fair trial or a fair post-conviction attempt to obtain a fair trial.

CONCLUSION

There is a Texas-sized due process problem burdening death-sentenced individuals like Flores with credible claims of innocence. Flores’s claims could not have been dismissed in good faith without a notable misapprehension of this Court’s due process jurisprudence. This Court can and should request the record and grant certiorari in this important case free of the ticking timebomb of a looming execution date.

Respectfully submitted,

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