No. _____

(CAPITAL CASE)

IN THE

# Supreme Court of the United States

CHARLES DON FLORES,
*Petitioner*,

vs.

TEXAS,
*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI

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**Capital Case**

## QUESTION PRESENTED

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court found that, although "hypnotically refreshed" testimony was "controversial," the dangers associated with it could be reduced by "procedural safeguards" that this Court left to the states to adopt. Contemporary scientific understanding of human memory and of the inherently intrusive nature of hypnosis has established that there are no procedural safeguards that reduce the dangers associated with investigative hypnosis. Yet Charles Flores is on Texas's death row for a conviction that hinges on an eyewitness identification obtained from an individual for the first time in the courtroom—after she had submitted to a hypnosis session conducted by a police officer in conjunction with other suggestive procedures.

The Question Presented is:

> Is the Constitution's guarantee of a fundamentally fair trial compromised when a conviction hinges on an in-court eyewitness identification obtained after an investigative hypnosis session conducted by law enforcement—especially in a death-penalty case that requires heightened reliability in factfinding?

## PARTIES TO THE PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is a corporation, a corporate disclosure statement is not required.

## LIST OF RELATED PROCEEDINGS

(in chronological order)

*State v. Flores*, Cause No. F98-02133 in the 195th Judicial District Court, Dallas County (1999) (trial).

*Flores v. State*, AP-73,463 (Tex. Crim. App. Nov. 7, 2001) (direct appeal, not available on Westlaw or Lexis).

*Flores v. Texas*, 2002 U.S. LEXIS 3119 (2002) (certiorari denied in direct appeal).

*Ex parte Flores*, WR-64,654-01, 2006 Tex. Crim. App. Unpub. LEXIS 744 (Tex. Crim. App. Sept. 20, 2006) (initial state habeas proceeding).

*Flores v. Texas*, 552 U.S. 884 (2007) (pro se) (certiorari denied in initial state habeas proceeding).

*Flores v. Stephens*, Case 3:07-cv-00413-M, 2014 U.S. Dist. LEXIS 97028 (N.D. Tex. July 17, 2014) (denying certificate of appealability).

*Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2015) (affirming denial of certificate of appealability).

*Flores v. Stephens*, 2016 U.S. LEXIS 913 (2016) (certiorari denied in initial federal habeas proceeding).

*Ex parte Flores*, WR-64,654-02, 2016 Tex. Crim. App. Unpub. LEXIS 1151 (Tex. Crim. App. May 27, 2016) (granting stay of execution and remanding hypnosis claim in subsequent state habeas proceeding); 2020 Tex. Crim. App. Unpub. LEXIS 215 (Tex. Crim. App. May 6, 2020) (denying relief).

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## PETITION FOR A WRIT OF CERTIORARI

Charles Don Flores respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals (TCCA).

## OPINIONS BELOW

The TCCA's unpublished opinion, *Ex parte Flores*, WR-64,654-02 (Tex. Crim. App. May 6, 2020), is in Appendix A. The TCCA's opinion adopted *in toto* the trial court's Findings of Fact and Conclusions of Law (FFCL), found in Appendix B.

## JURISDICTION

The TCCA's opinion issued on May 6, 2020. On that date, this Court's Miscellaneous Order, dated March 19, 2020, was in effect, extending the deadline to file a petition for a writ of certiorari to 150 days, thus to October 2, 2020, for this case. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's Fourteenth Amendment provides in relevant part: "No state shall … deprive any person of life, liberty, or property, without due process of law[.]" The U.S. Constitution's Eighth Amendment prohibits the infliction of "cruel and unusual punishments." The state statutes that govern the quest for habeas relief in this case are found in Texas Code of Criminal Procedure, articles 11.071 and 11.073; due to their length, they are reproduced in Appendix D.

## INTRODUCTION

Before sunrise on January 29, 1998, two men were seen exiting a distinctive Volkswagen Beetle outside of a suburban home where Elizabeth Black was later

found shot dead. Thirteen months later, while his death-penalty trial was underway, Charles Flores was identified for the first time as one of these two men by one witness, Jill Barganier, the victim's next-door neighbor. Mrs. Barganier only claimed to be able to make this identification *after* she saw Flores, the only Hispanic person in the courtroom, sitting at the defense table. Pre-trial, Mrs. Barganier had failed to pick Flores out of a photographic lineup—likely because, the day of the crime, she had told police that she had seen two white males with long, wavy hair and Flores is a Hispanic male with very short, shaved hair. But between the day of the crime and her appearance in court, Mrs. Barganier had submitted to an "investigative hypnosis" session conducted by a police officer at the police station—an event preceded and followed by other suggestive procedures. Mrs. Barganier was the only non-drug-addict to testify about Flores's whereabouts and the ***only*** witness to place Flores near the crime scene. Therefore, her testimony was essential to the conviction.

In this habeas proceeding, Flores used contemporary science to demonstrate that the hypnosis session had corrupted whatever memory Mrs. Barganier may have had of her fleeting observation that morning. He also demonstrated how the highly suggestive hypnosis session accounted for Mrs. Barganier's claim to be "more than 100 percent" sure at trial that Flores, an Hispanic male with very short, shaved hair, was one of the two men she had glimpsed from a distance getting out of a strange car—not the white male with long, wavy hair she had described the day of the crime. Yet Flores was denied habeas relief. The state courts' adjudication of his habeas claim ignored its constitutional dimensions and all of the relevant science supporting it.

Since this Court decided *Rock v. Arkansas*, 483 U.S. 44 (1987), laboratory studies have debunked the notion that memories are stored in the brain like videotapes and can be retrieved using investigative hypnosis. Scientists have also shown how hypnosis can engender uncanny confidence in false memories—thus making hypnotized witnesses peculiarly resistant to cross-examination. These scientific advances explain why, today, most U.S. jurisdictions have *per se* bans on testimony induced by investigative hypnosis. Texas, however, is not among them.

Texas has not only failed to disavow this practice, the State, in this habeas proceeding, adamantly opposed a new trial for Flores by arguing a series of arguments-in-the-alternative, simultaneously minimizing the significance of the hypnosis session while affirming the legitimacy of the practice. The trial court ignored the relevant science and recommended denying relief by adopting *all* of the State's arguments as "facts;" then the reviewing court adopted these findings wholesale, rejecting Flores's habeas claim without explanation. *See* AppB & AppA.

This Court should grant review to decide if convicting someone and sentencing him to death based on testimony induced by hypnosis violates the Fourteenth and Eighth Amendments.

## STATEMENT OF THE CASE

### I. THE CONTEXT OF THE HYPNOSIS SESSION AND SUBSEQUENT IDENTIFICATION

Jill Barganier lived next door to the Black family in Farmers Branch, a Dallas suburb. At 6:45 a.m., on January 29, 1998, Mrs. Barganier heard a noise, looked through the mini-blinds in a window on the right side of her house and saw an unfamiliar car in the Blacks' driveway on the left side of her house. She made this

observation while getting her kids ready for school and preparing to wake up her husband. Her attention was arrested by one of the men drinking out of a beer bottle.

Sunrise was recorded that day as 7:25 a.m. per the *Dallas Morning News*. The lights were on inside Mrs. Barganier's house but not outside; and a photograph of Bergen Lane, where the Barganiers and Blacks lived, shows there were no streetlights on the block. 38RR13-19.[1] At 9:15 a.m., police responded to a 911 call from Mr. Black, who had come home and found his wife and the family dog shot dead. As Farmers Branch police began to canvass the neighborhood, they found some witnesses who had seen "two white males, 25 years of age or older" getting out of a Volkswagen at the Blacks' house. Shortly after 10:00 a.m., Mrs. Barganier arrived at the scene and, according to police records, described seeing "a yellow Volkswagen bug" whose driver was "big, with long brown hair," "a white male, about 30 years old and with a large build" with "a quart beer bottle in his hand when he got out of the car and that he stopped and put the bottle back into the VW before he walked up to the house." She described the passenger as "also a white male with darker hair than the driver," and she "and thought it was 'longer.'" AppC095.

That same day, Mrs. Barganier went to the Farmers Branch police station and was shown a photographic lineup of some sort. No record was kept of what she was shown, although law enforcement must have already had a suspect or suspects in mind to create an array. In any event, Mrs. Barganier could not make an

[1] "RR" refers to the Reporter's Record of the trial with the volume number first followed by the page number. "App" refers to a component of the Appendix.

identification. Other neighbors were also shown unidentified photographic lineups that day; none were able to make an identification either. AppC096.

Later that same afternoon, several neighbors provided handwritten "Affidavits" on police forms. Some described having seen a car pull into the Blacks' driveway and two white males of about the same age get out. One affidavit noted that the passenger had been wearing tan coveralls; another suggested that both men had been wearing black. Police records also refer to an affidavit purportedly provided by Mrs. Barganier. Although the handwritten affidavits from other neighbors are in the police file, the one from Mrs. Barganier is not. AppC096-97.

The next day (January 30, 1998), the *Dallas Morning News* ran a front-page story about Mrs. Black's murder. *Id.* The article described the purple and pink Volkswagen Beetle that the police were searching for. 38RR21. That morning, Mrs. Barganier returned to the Farmers Branch police station to create a composite sketch of the driver. By this time, Farmers Branch investigators had already identified Richard Childs as the Volkswagen's owner, had obtained his mug shot, and had him under surveillance. After Mrs. Barganier created a composite sketch, Farmers Branch police showed her a photographic lineup that included Childs' picture. Mrs. Barganier reportedly picked out Childs from the six-picture lineup. *See* AppE001:

The next day, back at the Farmers Branch police station, Mrs. Barganier was shown another photographic lineup that included a more recent picture of Childs who was, by then, under arrest. She again picked out Childs. *See* AppE002:

After she identified Childs this second time, Mrs. Barganier was shown yet another photographic lineup, but no record of its contents has ever been produced.

A few nights later, Officer Callaway and another unidentified officer went to Mrs. Barganier's home. The officers wanted her to create a second composite sketch, this time of the passenger—whom law enforcement had already decided, absent any physical evidence, was Charles Flores.[2] Mrs. Barganier would later testify that she

[2] Flores had, by then, attempted to destroy Childs' Volkswagen, which the latter had abandoned near Flores' trailer. Flores never denied this conduct or that he sought to evade arrest; but he has consistently denied any role in Mrs. Black's death.

was "just a wreck," "very nervous," and scared for "the safety of [her] children." She "couldn't stop shaking" and "felt responsible" for Mrs. Black's death because she "knew these men were there, and [she] dismissed it." 36RR290-291. She was highly motivated to help.

At trial, Mrs. Barganier claimed that she had asked the police to put her under hypnosis to help her "do a good composite." 36RR289-91. It is unclear how she knew that hypnosis was something police officers did. No records were kept of conversations between Mrs. Barganier and the officers about setting up the hypnosis session. But that same night, Officer Callaway contacted a patrol officer, Alfredo Serna, about hypnotizing Mrs. Barganier the next morning. Officer Serna had collected evidence at the crime scene and thus was involved in the Black murder investigation. He had never hypnotized anyone before, but he had received a certificate after taking a law enforcement hypnosis course two years earlier. AppC100-01.

Some time on the morning of February 4, 1998, Mrs. Barganier met Officer Callaway at the police station for the hypnosis session. 36RR27, 31. The hypnosis session was videotaped, but no documentation reflects when Mrs. Barganier arrived, when she entered the investigator's office, or when the camera was turned on. The camera had been set up by Officer Jerry Baker, who then joined the hypnosis session, mostly off camera. The camera focused on Mrs. Barganier and captured only a small part of Officer Serna's body, not including his face. AppC101-02.

The videotape shows that Officer Serna conducted a very brief pre-hypnotic interview. He did not ask Mrs. Barganier about her mental state, health history, or

other questions relevant to assessing her receptivity to hypnosis. She merely described how she had looked out a window, seen a Volkswagen Beetle then two men get out, noticed the driver's hair, noticed one man drinking out of a beer bottle, and remembered the passenger's hair as "basically like the driver's." She also mentioned seeing the men walk off, after which she closed her blinds. At one point, she confused the driver and the passenger, referring to both men as the "passenger," including the person she had seen drinking out of a beer bottle, an action she had previously attributed to the driver. Officer Serna asked no follow-up questions. *Id.*

During the hypnosis session itself, Officer Serna invited Mrs. Barganier to imagine many things, such as: glue on her fingers, her "very own special theater … decorated in any way [she] like[d]," a "special leather chair," an elevator ride, a "yellow button" to push on an imaginary remote control, "magical letters" floating over the two men's heads, and a time-travel door she could walk through. He instructed her that, when he reached the number zero, she "could just press the [imaginary] play button, this play button will take us to Thursday, January 29. It's a very important day of significance." He also instructed her to imagine "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." And while she was imagining this documentary, he invited her to "pan" in on each man's face and then "[t]ry and imagine, if you will, the shape of his face, if it's round or oval or square." AppC102-04.

As Mrs. Barganier described what she remembered in the present tense, she kept returning to the beer bottle. Officer Serna eventually asked her to use her

imaginary remote control to "fast forward" past that scene. Mrs. Barganier again said of the passenger's hair that it "looked a lot like his friend's"—the driver's—which she described as "dirty, long and wavy." *Id*. Throughout the hypnosis session, Officer Serna repeatedly said "you're doing good" and "you're doing fine." Additionally, Officer Serna made numerous suggestive statements, during and immediately afterwards. *See* AppC104:

- "Is his hair short, is it shaved, is it neatly cut?" [asked about the *driver* whose hair she had already described as "dirty, long, and wavy"]
- "Does he have it neatly cut or is it trimmed?" [asked about the *passenger* whose hair she had already described as "A lot like his friend's" and "Dark, long."]
- "You will also remember everything that you've said in this session and you might find yourself being able to recall other things as time moves on."
- "You'll remember everything that was said in this interview. And as I said, you'll be able to recall more of these events as time goes on."
- "Ok, oftentimes, like I told you before I brought you out, that hypnosis, uh, you might find yourself recalling things, things that might not have to do with the accident itself. You might be at home doing an everyday chore and something might come to you about that incident or anything else. It's almost a phenomenon the way that it happens, so it's not uncommon to just remember something after the fact, after the session."

The hypnosis session yielded many details that Mrs. Barganier had not mentioned in previous interviews, including a modified description of the Volkswagen. She had previously described it as "yellow," but while under hypnosis she claimed to see a "pink top" and "waves" that looked "a bit purple"—which matched the description recently published in the newspaper. She also described the driver in more detail as having "dark blonde …. [l]ong, wavy" hair, "Blue eyes. Pretty eyes," "Kinda young"—details consistent with Childs' recent mug shot that she had picked

out of an array. As for the passenger, she described only his hair ("a lot like his friend's. . . . I see it to his shoulders") and that "[h]e has brown eyes." At the conclusion, Mrs. Barganier repeatedly asked "Did I do ok? . . . . Did I help in any way?" AppC103-04.

Right after the hour-long hypnosis session, Officer Serna created a form. He noted the purpose for the hypnosis session: to obtain "[a]ny additional information pertaining to the suspect's identity and any other information pertinent to the case." He summarized his memory of the session, noting that Mrs. Barganier had described "two dirty men had exited the vehicle" and "Man B" (the passenger) "as having dark brown or blonde shoulder length hair." Officer Serna also claimed that she had "said that he had turned and looked at her and she saw that he had brown eyes"—yet the videotape shows that she had ***not*** said anything about the passenger looking at her.

After the hypnosis session, Officer Callaway asked Mrs. Barganier to do additional tasks to assist in the investigation. First, she was asked to use a computer to create a composite sketch of the passenger, which she did, *see* AppC105:

Despite Mrs. Barganier's previous descriptions to police and the contents of this latest sketch, right afterwards, law enforcement showed her a photographic lineup

featuring Hispanic males, some with short, shaved hair, including a recent picture of Charles Flores, *see* AppE003:

Even with the suggestive nature of Flores's photo—with his image in the center of the top line and being the only one featuring bright clothing, a distinct background, and no white bar blocking part of the picture—Mrs. Barganier could not pick anyone out. AppC020-21.

Neither Mrs. Barganier nor any other neighbor had described either of the men seen exiting the Volkswagen Beetle as Hispanic or as having short, shaved hair. But after Mrs. Barganier was asked, under hypnosis, if the passenger had "neatly cut" hair and after she had created a composite sketch of a man with long, messy hair, Officer Callaway presented her with a photographic lineup, featuring Hispanic males, including Flores with "neatly cut" hair. 36RR105-06. Since most of the previous photographic lineup forms were not paired with corresponding arrays of photos, it is unclear if this was the first time she was shown Flores's picture.

Over the next several months, photographs of Flores, all depicting him as a large Hispanic male with short, shaved hair, appeared in the news. The exact picture that had been used in the photographic lineup presented to Mrs. Barganier was

reproduced in several *Dallas Morning News* articles before Mrs. Barganier would eventually claim at the eleventh hour in court that she could identify him, *e.g.*:

Student, doctor thwart murder suspect's escape

One grabbed gun, while the other handcuffed man after he overpowered deputy

By Kendall Anderson
Staff Writer of The Dallas Morning News

Charles Don Flores might be a big, tough capital murder suspect who managed to elude the law for months, but he messed with the wrong med student and anesthesiologist Friday.



Charles Don Flores

Mr. Flores, arrested in May and charged with killing a Farmers Branch woman, tried to escape custody by complaining of a leg injury. He then overpowered the deputy who took him to Parkland Hospital.

To the rescue came fourth-year medical student Perhan Asghar and Dr. Andy Konen. Mr. Asghar relieved the suspect of the deputy's gun, and Dr. Konen and two other hospital workers wrestled him into handcuffs.

Mr. Asghar, a 28-year-old University of Houston medical student, may have saved Deputy Bryan Sher-

man's life, officials said.

"We believe the suspect had planned this and was intent on fleeing and was attempting to shoot the deputy," said Ed Spencer, a Sheriff's Department spokesman.

"So the indications are that Mr. Asghar was instrumental in helping to bring the situation to a conclusion. We are grateful and appreciative to him and all those who came to the officer's assistance."

Mr. Asghar and Dr. Konen could

Please see MURDER on Page 33A.

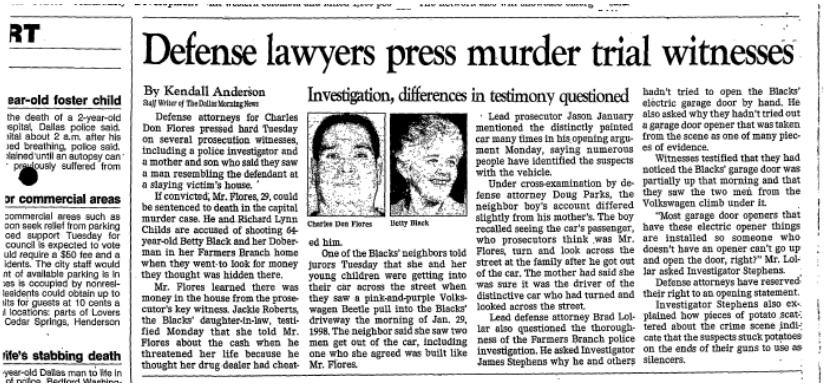
No records capture further pre-trial interactions between Mrs. Barganier and law enforcement or the Dallas County DA's Office after the busy day when she was hypnotized, created a second composite sketch, and then failed to pick Flores out of a photographic lineup. But the prosecutors likely interviewed her at some point, as she was subpoenaed to appear. Thirteen months after her fleeting glimpse of two men getting out of a Volkswagen Beetle before sunrise, Mrs. Barganier came to the courthouse. Before she was called to the stand, but after seeing Flores in the courtroom, she told the prosecutors that she could *now* identify him as the passenger. 36RR85-86, 92. Defense counsel informed the court that they intended "to object to her testimony on the grounds that her in-Court identification is tainted by the hypnotic episode that she had undergone." 36RR15-16.

Later that day, after Mrs. Barganier started to testify, defense counsel asked for the jury to be excused then formally objected to her testifying about the identification. The prosecution argued that the hypnosis had made no difference but agreed to move on to another witness until they could have a "Zani hearing" in the morning. A "Zani hearing" was necessary because that is what Texas law required: that the trial court assess whether "procedural safeguards" outlined in a 1988 case,

*Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), had been complied with such that testimony from a hypnotized witness could be deemed admissible.

## II. TRIAL EXPERT'S ENDORSEMENT OF THE INVESTIGATIVE HYPNOSIS SESSION

The "Zani hearing" was held on the third day of trial, outside the presence of the jury. That morning, the *Dallas Morning News* had run another story about the trial—again featuring Flores's photo. The article emphasized that cross-examination was exposing inconsistencies in the State's witnesses' testimony:



RT

ear-old foster child

the death of a 2-year-old spital, Dallas police said. ital about 2 a.m. after his ed breathing, police said. ained until an autopsy can · previously suffered from

or commercial areas

commercial areas such as son seek relief from parking ed support Tuesday for council is expected to vote uld require a $50 fee and a idents. The city staff would nt of available parking is in as is occupied by nonresi- residents could obtain up to its for guests at 10 cents a locations: parts of Lovers Cedar Springs, Henderson

ife's stabbing death

year-old Dallas man to life in

Defense lawyers press murder trial witnesses

By Kendall Anderson
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Investigation, differences in testimony questioned

Defense attorneys for Charles Don Flores pressed hard Tuesday on several prosecution witnesses, including a police investigator and a mother and son who said they saw a man resembling the defendant at a slaying victim's house.

If convicted, Mr. Flores, 29, could be sentenced to death in the capital murder case. He and Richard Lynn Childs are accused of shooting 64-year-old Betty Black and her Doberman in her Farmers Branch home when they went to look for money they thought was hidden there.

Mr. Flores learned there was money in the house from the prosecutor's key witness, Jackie Roberts, the Blacks' daughter-in-law, testified Monday that she told Mr. Flores about the cash when he threatened her life because he thought her drug dealer had cheated him.



Charles Don Flores



Betty Black

One of the Blacks' neighbors told jurors Tuesday that she and her young children were getting into their car across the street when they saw a pink-and-purple Volkswagen Beetle pull into the Blacks' driveway the morning of Jan. 29, 1998. The neighbor said she saw two men get out of the car, including one who she agreed was built like Mr. Flores.

Lead prosecutor Jason January mentioned the distinctly painted car many times in his opening argument Monday, saying numerous people have identified the suspects with the vehicle.

Under cross-examination by defense attorney Doug Parks, the neighbor boy's account differed slightly from his mother's. The boy recalled seeing the car's passenger, who prosecutors think was Mr. Flores, turn and look across the street at the family after he got out of the car. The mother had said she was sure it was the driver of the distinctive car who had turned and looked across the street.

Lead defense attorney Brad Lollar also questioned the thoroughness of the Farmers Branch police investigation. He asked Investigator James Stephens why he and others hadn't tried to open the Blacks' electric garage door by hand. He also asked why they hadn't tried out a garage door opener that was taken from the scene as one of many pieces of evidence.

Witnesses testified that they had noticed the Blacks' garage door was partially up that morning and that they saw the two men from the Volkswagen climb under it.

"Most garage door openers that have these electric opener things are installed so someone who doesn't have an opener can't go up and open the door, right?" Mr. Lollar asked Investigator Stephens.

Defense attorneys have reserved their right to an opening statement.

Investigator Stephens also explained how pieces of potato scattered about the crime scene indicate that the suspects stuck potatoes on the ends of their guns to use as silencers.

In the Zani hearing, the State had the burden and presented four witnesses: Officer Baker (a lead investigator who was present for the hypnosis session), Officer Serna (the police officer hypnotist), Dr. George Mount (the State's hypnosis expert), and Mrs. Barganier. Dr. Mount, who had been contacted the night before, opined that he saw no problems with the hypnosis session that Officer Serna had conducted and endorsed Officer Serna's use of the "movie theater technique" with Mrs. Barganier as common, permissible, and appropriate for memory-retrieval. 36RR69-84.

The defense presented no witnesses during the Zani hearing but argued that the State had not carried its burden and thus Mrs. Barganier should be barred from testifying regarding her identification of Flores. The defense emphasized that "419

days" had passed since Mrs. Barganier's observation, and yet now she was "saying she's 100 percent positive that the Defendant who sits here today is the person that she saw." 36RR111. The trial judge expressed some skepticism since Mrs. Barganier had known the defendant's name: "honestly you don't have to be a rocket scientist to pick out who is the Hispanic individual in the Courtroom. You agree with that, do you not?" 36RR108. But she insisted that she was now "over 100 percent" sure about the identification. 36RR109. The State argued that (1) "the hypnosis had little or nothing to do with her in-Court identification at all" and (2) "if it had any effect, it certainly was proper under any of the *Zani* guidelines." The State also argued that there was evidence to corroborate her identification. 36RR111-13. The trial judge denied the defense's motion to suppress the identification testimony. 36RR117.

## III. THE MATERIALITY OF MRS. BARGANIER'S POST-HYPNOTIC IDENTIFICATION

Most of the State's guilt-phase case relied on extraneous offenses that Flores had committed after he found out he was a suspect. There was no physical evidence linking Flores to the crime scene: no fingerprints, no DNA, no firearm. And although Childs, the Volkswagen's owner/driver, had been in custody since soon after the murder, he did not testify.[3] Most of the other witnesses who testified about Flores's involvement in events before and after the murder were themselves drug dealers and addicts with extensive criminal records whose stories did not add up to a coherent narrative or consistent timeline. Among the neighbors who had seen two men emerge

[3] After Flores was sentenced, Childs was reindicted for non-capital murder, pled guilty to shooting Mrs. Black, and was sentenced to 35 years; he served 15 years of his sentence and is now out on parole.

from a Volkswagen that morning, no one had been able to identify the passenger—until a hypnotized witness came to the courthouse to testify for the State.

When Mrs. Barganier was called to the stand in front of the jury, she testified that Flores was the passenger she had seen get out of the Volkswagen and pointed him out in court. 36RR283. She testified "I thought we made eye contact. They knew someone was there watching them," which made her "real nervous." 36RR285. She repeated "I saw him look at me, and I thought he was watching me."[4] 36RR286. Her testimony concluded with an assurance "I'm positive" when asked again if Flores was the man she had seen and added that her certainty was "[o]ver 100 percent. He's the man I saw that morning." 36RR294.

The defense re-called Mrs. Barganier during Flores's case-in-chief but established only that: the sun had not yet come up because the sunrise was recorded at 7:25 a.m. the day of the murder; the lights were on inside her house but not outside; and she was positive she had looked out her window at 6:45 a.m., a timeline that contradicted that of the State's other witnesses. 38RR13-19.

In its closing, the State made clear that Mrs. Barganier's testimony was the linchpin of its case. The State downplayed its other witnesses who had been caught in lies, instead highlighting the seemingly credible, unbiased testimony of Mrs. Barganier. 39RR54, 55, 93, 106. Defense counsel, perhaps believing that Mrs. Barganier's identification left no option, conceded during closing argument, without

[4] Years later, in this habeas proceeding, Mrs. Barganier admitted that she may just have "imagined" making eye contact with this man. AppC027.

Flores's consent, that he had been present at the scene. 39RR68-85. This concession amounted to a concession of guilt to capital murder under the law of parties, one of the State's theories in the charge.[5] The jury returned a guilty verdict. 39RR113.

In the punishment phase, the defense put on no witnesses. Instead, counsel placed on the record that they had intended to call Flores's father, mother, and wife but would not be doing so because the prosecutor in the case had pursued indictments against them for having assisted Flores in evading arrest. 40RR140-42. The jury quickly returned a verdict answering Texas's "special issues" so as to support a death sentence, and the court sentenced Flores to death. 41RR100-03.

## IV. How the Question Presented Was Raised and Decided Below

After years of poor representation, in 2016 Flores learned that the State had set a date for his execution. Relying on a state statute enacted in 2013, Flores filed a subsequent application for a writ of habeas corpus. The new statute provided a vehicle to bring claims, without being procedurally barred, challenging the reliability of science that the State had used to obtain a conviction. *See* TEX. CODE CRIM. PROC. art. 11.073 (AppD). Flores claimed that he was entitled to a new trial because the State had relied on discredited "science" to put an unreliable, hypnotically induced identification before the jury, which violated his constitutional rights to due process and to be free from cruel-and-unusual punishment. AppF0060-63.

[5] This "strategy" is inexplicable as the defense had no witnesses planned for the punishment phase.

The State moved to dismiss the habeas application, but the TCCA concluded that the hypnosis claim satisfied the state-law procedural requirements and remanded it for resolution on the merits.[6]

A multi-day evidentiary hearing was held in the trial court. Flores introduced scholarship demonstrating a contemporary consensus among scientists in the field of memory and eyewitness identification that investigative hypnosis is an inherently suggestive procedure associated with manufacturing, not recovering, memory. Flores also presented evidence showing what his jury had not heard: the context in which the hypnosis session was undertaken and how Mrs. Barganier had gone from an initial, vague description that bore no resemblance to Flores to a proclamation of apodictic certainty on the stand that he was the person she had observed.

The evidentiary hearing featured a critical analysis of both the hypnosis session and its endorsement by the State's hypnosis expert, Dr. Mount, who testified at trial and in the habeas proceeding. In the habeas proceeding, Dr. Mount initially testified that he stood by all of his 1999 testimony. But on cross-examination he disavowed several aspects of his trial testimony: that confabulation is something one can "see;" that inviting someone to imagine things during hypnosis is not problematic; and that Officer Serna had not asked leading questions. But Dr. Mount also testified that, while memory does not work like a videorecorder, he still believed that the movie

[6] In a concurrence, one judge noted: "I cannot imagine that the concerns regarding suggestive eyewitness identification evaporate when eyewitness testimony is enhanced through hypnotism.... [G]iven the subject matter, by granting a stay this Court acknowledges that whatever we do, we owe a clear explanation for our decision to the citizens of Texas." *Ex Parte Charles Don Flores*, No. WR-64,654-02, 2016 Tex. Crim. App. Unpub. LEXIS 1151 (Tex. Crim. App. May 27, 2016), *1 (Newell, J., concurring). Unfortunately, that explanation was never provided.

theater technique (used by Officer Serna) is a legitimate memory-retrieval device and thus is still taught to law enforcement. Dr. Mount admitted, however, that his view of the technique was not based on empirical research and that he had not done any empirical research since the 1980s. AppC057.

Dr. Steven Lynn, a leading scientist in the fields of hypnosis and forensic psychology, also testified. He disagreed with Dr. Mount's assessment that "procedural safeguards" had been adhered to during the 1998 hypnosis session on several bases:

- Officer Serna was not sufficiently trained to perform forensic hypnosis. His hypnosis of Mrs. Barganier was his first; and the only training he had received was through a police organization.

- Officer Serna was insufficiently independent from law enforcement; he was a police officer on the team investigating the crime.

- The record-keeping associated with the hypnosis was insufficient as there was no record of all information the hypnotist knew before the session; the only records the police made were the videotape of the hypnosis and the short form Officer Serna created afterwards.

- The videotape did not capture all contacts between hypnotist and subject as *Zani* recommends; nor did the videotape capture the full body of the hypnotist or any of the observer (Officer Baker).

- Conducting the hypnosis in a police station was unacceptable. This setting could only have increased the pressure on Mrs. Barganier to identify a perpetrator.

- Having a second police officer in the room was unacceptable. Officer Baker's presence added subtle pressure to come forward with information helpful to the police. Moreover, the quality of the video is so poor that one cannot tell if there was any cueing from Officer Baker, who (as established during this habeas proceeding) had concealed from the trial court that he knew Flores was a suspect.

- The movie theater technique was inappropriate as it *increases* the dangers associated with hypnosis. The technique implied that Mrs. Barganier could visualize a documentary film of her experiences and memories. Studies

> identifying problems with this technique existed at the time of the hypnosis session, but Dr. Mount was either unaware or failed to apprise the court of that controversy.

AppC061-66.

Dr. Lynn opined that Dr. Mount's 1999 testimony wrongly suggested that the *Zani* "safeguards" had been complied with. Dr. Lynn also explained how numerous statements made during the hypnosis session reflected risks now associated with inducing false memories. Dr. Lynn further noted Mrs. Barganier's eagerness to please the hypnotist and to be helpful, a circumstance that further increased the risk of confabulation. Additionally, Dr. Lynn observed that, although the witnesses had told the court during the *Zani* hearing that nothing new had come from the hypnosis session, much of the information she provided under hypnosis was new relative to the pre-hypnotic interview. And contrary to Dr. Mount's trial testimony that he had heard no leading statements, Dr. Lynn identified multiple leading statements made during the hypnosis session, including repeated suggestions that Mrs. Barganier would "remember more later," all of which, consciously or not, had invited confabulation. Most importantly, Dr. Lynn explained the evolution of the scientific perspective on hypnosis, the data supporting that evolution, and the contemporary consensus that investigative hypnosis produces unreliable results. AppC068-79.

Flores also presented on expert an eyewitness identification, Dr. Margaret Kovera. She explained the scientific advances that supported having grave doubts that Ms. Barganier had encoded *any* memory of the passenger's face that could be recovered—through hypnosis or otherwise. Her fleeting observation was made under

circumstances now known to adversely affect memory formation, such as: low illumination; considerable distance; divided attention; unusual object (a beer bottle) diverting her focus from the men's faces; limited duration of observation; no reason at the time to pay careful attention to her observation; and the difficulties people have generally with recalling strangers' faces with any accuracy. AppC080-93.

After the evidentiary hearing record was prepared, both parties submitted proposed findings of fact and conclusions of law (FFCL). Over ten months after the evidentiary hearing, Flores's counsel was sent, via email, the trial court's signed FFCL and Order recommending that he be denied a new trial. The FFCL were identical to the State's proposed FFCL except that, in executing the cut-and-paste function, someone accidentally left out numbered paragraphs (53)-(62) of the State's proposal. That error was corrected a few days later. The corrected FFCL, however, still ignored most of the evidence Flores had adduced during the habeas proceeding, adopted all six of the State's alternative advocacy positions as "facts," cited materials that had never been admitted into evidence in any proceeding, and failed to discuss anything about the content or larger context of the investigative hypnosis session at the center of the case. *See* AppC.

Under Texas law, the TCCA is the final arbiter in the state system of all habeas claims in death-penalty cases. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 11. Therefore, Flores filed objections to, and a motion for withdrawal of, the trial court's FFCL with the TCCA. *See* AppC. Those objections and motion were never ruled upon.

On May 6, 2020, the TCCA issued a two-page decision denying relief. AppA. The decision is devoid of explanation. There is no mention of the constitutional components of Flores's claim challenging the State's reliance on a wholly unreliable, hypnotically induced identification. The opinion merely recites the elements of a "new science" claim and asserts that the elements were not satisfied. *See id.*

## REASONS TO GRANT THE WRIT

### I. THE CONSTITUTION CANNOT TOLERATE CONVICTIONS THAT HINGE ON WHOLLY UNRELIABLE TESTIMONY FROM A WITNESS WHO WAS, QUITE LITERALLY, HYPNOTIZED BY LAW ENFORCEMENT.

#### A. This Court's One Pronouncement about the Admissibility of Hypnotically Induced Testimony Dates Back to an Era When the Scientific Understanding of Hypnosis Was in Its Infancy.

This Court's one foray into the murky area of investigative hypnosis was in *Rock v. Arkansas*, 483 U.S. 44 (1987).[7] The 5-4 decision in *Rock* notes that, at that time, "hypnotically enhanced testimony was controversial" and the "medical and legal view of its appropriate role unsettled." *Id.* at 59; *see also id.* at 61 (acknowledging that "scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy"). The majority also acknowledged significant problems with hypnosis that experts in the burgeoning field had observed. *Id.* at 59-60 (citing authorities). However, the *Rock* majority allowed these concerns to take a backseat in light of a sui generis fact-pattern: Arkansas's evidentiary rule banning admission of all hypnotically refreshed testimony had prevented *the defendant* from

[7] A few other cases mention the practice of hypnotizing witnesses but do not examine the practice. *See Burns v. Reed*, 500 U.S. 478 (1991); *Felker v. Turpin*, 518 U.S. 651 (1996).

testifying—"one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* at 45, 49, 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). That is, the *Rock* majority balked at the evidentiary rule's reach, which had prevented the defendant from describing to her jury "any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses." *Id.* at 57.

Significantly, the *Rock* majority concluded that, despite the lack of empirical data supporting the reliability of investigative hypnosis, some jurisdictions had at least adopted "procedural safeguards" to minimize the risks associated with the practice. *Id.* at 58 n.16, 60. The majority left it to the states to establish guidelines "to aid trial courts in the evaluation of posthypnosis testimony." *Id.* at 61.

The four dissenters (Chief Justice Rehnquist and Justices White, O'Connor, and Scalia) did not agree that *Rock*'s majority had struck the right balance—precisely because of the "inherently unreliable" nature of testimony shaped by a hypnosis session. *Id.* at 62. The dissenters explained that precluding hypnotically refreshed testimony could not offend the Constitution because such testimony did not advance "the truth-seeking function of a criminal trial." *Id.* The dissenters noted the absence of a consensus about procedures that "can insure against the inherently unreliable nature" of testimony from hypnotized witnesses *Id.* at 62. The dissenters also reminded that a defendant's right to present evidence is "always" subject to "reasonable restrictions." *Id.* at 64. Keeping out hypnotically enhanced testimony was, in the dissenters' view, always reasonable because of the judicial system's

fundamental commitment to "both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 64; *accord with United States v. Scheffer*, 410 U.S. 303, 309 (1998) (holding that *per se* rule excluding polygraph evidence did not abridge right to present a defense because the rule "serve[d] several legitimate interests in the criminal trial process," was "neither arbitrary nor disproportionate in promoting these ends," and did not "implicate a sufficiently weighty interest of the defendant.").

Now, after several decades of scientific progress, the hypnosis session at the center of *Rock* looks bad enough. Yet it seems quite benign compared to the one at issue in Flores's case. For example, the hypnosis session in *Rock* was performed by a trained psychologist ***not*** by a novice police officer; the hypnotist in *Rock* did ***not*** suggest to the subject that she would be able to "remember more" as time passed; the hypnotically induced "memory" at issue in *Rock* was at least corroborated by objective physical evidence from a ballistics expert instead of by self-serving and contradictory testimony from implicated drug addicts/dealers; the objection to the testimony proffered in *Rock* came from the State, which does not have constitutional rights and cannot be subjected to the death penalty; and most importantly, the *Rock* hypnosis session was ***not*** one of many suggestive actions exerting an influence over a witness whose fleeting observation transmogrified over time from a vague description of a white male with long, wavy hair into "more than 100 percent" certainty regarding a midtrial, in-court identification of an Hispanic male with short, shaved hair.

### B. *Rock* Inadvertently Blessed a Practice That Has Proven to Be Contra-Scientific and Unreliable.

*Rock*'s holding did not preclude states from adopting *per se* bans on the use of hypnotically refreshed testimony to *obtain* convictions. To date, 27 jurisdictions have done just that. *See* S.J. Lynn, et al., *Hypnosis and Memory in the Forensic Context* in WILEY ENCYCLOPEDIA OF FORENSIC SCIENCE (New York: Wiley 2013 ed.). But other jurisdictions continue to permit reliance on the fruits of investigative hypnosis despite overwhelming evidence that the practice is unreliable. Unfortunately, by keeping the door open, *Rock* created a set of troubling incentives that only serve to make judicial proceedings *less* fair and reliable, as Flores's case demonstrates.

Soon after *Rock*, Texas was asked to consider the extent to which hypnosis could be used "as a means for 'refreshing' memory reliable enough to be vetted in the criminal adversarial process;" and Texas decided that it could be. *Zani v. State*, 758 S.W.2d 233, 237 (Tex. Crim. App. 1988). In *Zani*, the TCCA acknowledged "the four-prong dangers of hypnosis:" hyper-suggestibility, loss of critical judgment, confabulation, and memory cementing. *Id.* at 243. The TCCA also acknowledged a debate among psychologists as to whether there were safeguards that could prevent the loss of critical judgment and confabulation associated with hypnosis. *Id.* at 242 (quoting Belasic, *Trial by Trance: The Admissibility of Hypnotically Enhanced Testimony*, 20 COLUM. J.L. SOC. PROB. 237, 272 (1986)). Ultimately, however, the TCCA adopted a set of non-exclusive "procedural safeguards" that trial courts were directed to consider in deciding whether to admit hypnotically induced testimony. *Id.* at 243-44.

One TCCA judge remained skeptical: "this Court should hold that trial courts of this State may not allow juries of this State to convict accused persons on what many, including myself, consider at this time to be nothing less than irrelevant 'gypsy-voodoo' evidence." *Id.* at 249 (Teague, J., dissenting). But Texas's case-specific approach was similar to one already adopted by other jurisdictions. *See Zani*, 758 S.W.2d at 243-44 (citing *People v. Romero*, 745 P.2d 1003, 1017 (Colo. 1987) (citing *State v. Hurd*, 432 A.2d 86 (N.J. 1981)). New Jersey's highest court had led the way in *Hurd*, holding that "testimony enhanced through hypnosis is admissible in a criminal trial if the trial court finds that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory." *Id.* at 95-96; *see also* Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 37 n.186 (1991) (explaining that *Zani* had "adopted a version of *Hurd* for all hypnotically enhanced recall"). Although *Hurd* acknowledged that "hypnosis . . . is also prone to yield sheer fantasy, willful lies, or a mixture of fact with gaps filled in by fantasy[,]" *id.* at 92, the court concluded that, if "carefully controlled," hypnosis could be "generally accepted as a reliable means of obtaining accurate recall." *Id.* at 93.

In short, *Zani*, which remains the law in Texas,[8] is premised on the proposition announced in *Rock*: that "procedural safeguards" can be utilized during a forensic hypnosis session to prevent the "four-prong dangers of hypnosis." *Zani*, 758 S.W.2d

[8] In *State v. Medrano*, 127 S.W.3d 781 (Tex. Crim. App. 2004), the TCCA refused to revisit the scientific validity of hypnotically induced testimony and reaffirmed the *Zani* standard as "the appropriate framework to protect against the four-prong dangers of hypnosis[.]" *Id.* at 787.

at 243. Additionally, *Zani* assumes that, if a trial court finds that the totality of the circumstances suggests that the procedural safeguards were followed, then a witness's post-hypnosis testimony can be admitted. *Id.* at 244.

After *Rock* and *Zani*, a cottage industry of "forensic hypnosis training" flourished for a while. For instance, an unregulated entity called the "Texas Association of Investigative Hypnosis" has, for decades, trained law enforcement to engage in this practice, offering one-day courses through the Texas Commission on Law Enforcement.[9] Dr. Mount, the hypnosis expert whom the State relied on in Flores's 1999 trial and in this habeas proceeding, taught hypnosis for these entities for decades. Officer Serna, the police hypnotist who performed the investigative hypnosis session on Mrs. Bargainer, took that entity's one-day course.[10]

Below, Flores provided overwhelming evidence that *no* procedural safeguards can effectively protect against the dangers of investigative hypnosis. Yet the State embraced Officer Serna's amateur hypnosis session, clung to the decidedly self-interested expertise provided by Texas investigative hypnotist Dr. Mount, and insisted that the current state of Texas law and use of the movie theater technique by law enforcement to hypnotize witnesses is sound. AppB044.[11]

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[9] Information available at http://taih.org/index.html (last visited Sept. 26, 2020).

[10] According to a recent investigative report, the Texas Association of Investigative Hypnosis may be the only remaining organization in the country actively training police to employ hypnosis in criminal investigations. D. Boucher & L. McGaughy, *The Memory Room: Texas courts allow hypnosis despite science and overturned convictions*, DALLAS MORNING NEWS (April 9, 2020).

[11] The State also argued, and the FFCL reflect, the position that scientific studies of hypnosis undertaken since Flores's trial have not produced "anything dramatically new or different from what was known before." AppB042. This position implies that, since hypnosis was always problematic, using it to obtain convictions is somehow compatible with due process.

### C. The Foundation Upon Which Current Texas Law Rests Has Collapsed and a Majority of Jurisdictions Now Bar Hypnotically Enhanced Testimony as Inherently Unreliable.

The presumptions underlying the TCCA's 1988 *Zani* decision have not withstood scrutiny. In 2006, the New Jersey Supreme Court revisited its *Hurd* decision upon which *Zani* is based. *See State v. Moore*, 902 A.2d 1212 (N.J. 2006). *Moore* expressly overruled *Hurd* because of intervening advances in scientific understanding. The New Jersey Supreme Court held that it was "no longer of the view that the *Hurd* guidelines can serve as an effective control for the harmful effects of hypnosis on the truth-seeking function that lies at the heart of our system of justice." *Id.* at 1213. Citing expert testimony and the "substantial body of case law" on the issue of hypnotically enhanced testimony that had developed since *Hurd*, New Jersey's highest court acknowledged that the *Hurd* approach had, in the interim, been "rejected by the majority of courts considering the issue" due to concerns about the "inherent unreliability of hypnotically refreshed memory" and about the "efficacy of the [*Hurd*] guidelines in controlling the adverse impacts of hypnosis." *Id.* at 1227.

When *Hurd* was decided, its guidelines had been supported, and in fact recommended, by a leading expert in the field: Dr. Martin Orne.[12] *Hurd*, 432 A.2d at 96; and back then, "only a few courts had held such testimony *per se* inadmissible in a criminal trial[.]" *Moore*, 902 A.2d at 1218. *Moore* noted that "[t]he difference between the testimony of the experts at the time *Hurd* was decided" was "largely a difference in degree, not substance[,]" but the court found that difference "telling." *Id.*

[12] Dr. Orne's work was also cited in *Rock*, 483 U.S. at 60.

at 1227. That "telling" difference was enough to make New Jersey's highest court unequivocally reject hypnotically induced testimony as a reliable source of evidence because the purported memory-retrieval device was "not generally accepted in the scientific community." *Id.* at 1227-29.

New Jersey's highest court found that "more recent studies reaffirm[ed] and strengthen[ed] earlier understandings about how hypnosis affects both memory and attitude." *Id.* at 1227. Specifically, *Moore* noted that "the testifying experts and the scientific literature are consistent in their description of the effects of hypnosis—suggestibility, confabulation or 'gap filling,' pseudomemory or 'false memory,' memory hardening or 'false confidence' in one's recollections, source amnesia, and loss of critical judgment[,]" and that the public erroneously believes that "hypnosis [is] a powerful tool to recover accurate memories." *Id.* at 1228.

In sum, the New Jersey Supreme Court's *Moore* decision responded to the fact that "scientific understanding of the phenomenon and of the means to control the effects of hypnosis" was no longer "in its infancy." *Rock*, 483 U.S. at 61. A substantial body of scientific studies and literature had developed since *Hurd* was decided in 1981 and *Zani* in 1988 indicating that hypnosis is not conducive to producing accurate recall—under <u>*any*</u> circumstances.

In deciding *Zani*, the TCCA had followed other jurisdictions that had accepted the view of experts like Dr. Orne, who believed that procedural safeguards could be used to reduce the risks associated with hypnosis. *Zani*, 758 S.W.2d at 243. But Flores showed the Texas courts that, since *Rock*, *Hurd*, and *Zani* were decided, not only had

Dr. Orne and New Jersey's highest court changed their positions, but numerous studies have advanced the understanding of how hypnosis increases the risk of inducing false memories and inflated confidence in such "memories." AppC068-72.

A preeminent expert on hypnosis, Dr. Lynn, explained during Flores's evidentiary hearing that many psychologists in the 1970s and 1980s had believed that hypnosis could be used effectively as a memory-retrieval tool. But that belief was later undermined by laboratory studies conducted by scientists like Dr. Lynn,[13] who was a trailblazer in demonstrating that no safeguards could improve the tool's efficacy. *See* AppC073-74. By now, no cognitive psychologist opines that procedural safeguards reliably reduce the risk associated with hypnotically enhanced memory. *See* S. Kassin, *On the 'General Acceptance' of Eyewitness Testimony Research*, AMERICAN PSYCHOLOGIST (May 2001). Likewise, many courts are skeptical. *See, e.g.*, *Sims v. Hyatte*, 914 F.3d 1078, 1089-91 (7th Cir. 2019) (recognizing "the well-known problems that hypnosis poses for witnesses' memories," citing, *inter alia*, Steven Jay Lynn, et al., *Forensic Hypnosis: The State of the Science*, in PSYCHOLOGICAL SCIENCE IN THE COURTROOM: CONSENSUS AND CONTROVERSY 85 (2009) as documenting "23 studies" showing "that hypnosis either increases confidence relative to a nonhypnotic group, or participants confidently report inaccurate memories of events they earlier denied occurred when they were not hypnotized"). To date, 27 jurisdictions have adopted *per se* bans on admitting hypnotically induced testimony as untrustworthy.

[13] In the evidentiary hearing, the State argued, as reflected in the FFCL, that, back in 1999, because Dr. Lynn was alive and working in the field, Flores, an indigent, could somehow have retained Dr. Lynn and brought him to testify in the Zani hearing that was held on the fly in the middle of trial the morning after Mrs. Barganier suddenly claimed to be able to identify Flores. AppB042-43.

Flores also demonstrated to the Texas courts that qualified experts believe that hypnosis is especially "problematic in terms of negatively affecting the accuracy of eyewitness memory." AppC074 (quoting testimony of eyewitness identification expert Dr. Kovera).[14] Hypnosis is problematic in three specific ways. First, hypnosis implies that memory works like a videorecorder that can be played back. Second, the witness is repeatedly asked to imagine things, which makes it difficult to distinguish between things that are imagined and things actually experienced. Third, telling a hypnosis subject that more memory can "come later" is highly suggestive, implying that memory will improve after hypnosis. Since the 1990s, law enforcement in most jurisdictions have shifted away from using hypnosis as a forensic tool precisely because of a growing awareness that hypnosis increases the probability of unreliable results in eyewitness identification. From the perspective of experts who study eyewitness identifications and eyewitness memory, it is now a settled issue that hypnosis is highly unreliable. AppC074-75.

The opinion below does not indicate that a serious issue was taken seriously. None of the evidence about significant changes in the science of memory, hypnosis, and its implications for eyewitness identifications is in the trial court's FFCL, which were drafted by the State and later adopted by the TCCA *in toto* in its unpublished decision. *Compare* AppA & AppB *with* AppC. Counsel for the State actively sought to prevent the trial court from even knowing that New Jersey's highest court, in *Moore*,

[14] The FFCL reflect the State's position that Dr. Kovera's testimony concerning eyewitness identification procedures was "not relevant" although the court had overruled the State's relevance objections and its attempt to prevent her from testifying during the evidentiary hearing. AppC038-39.

had rejected the premise upon which the TCCA's *Zani* decision rests: that procedural safeguards can be used to limit the dangers associated with hypnotically induced memories. AppC054 (explaining State objected to Flores providing court with a copy of *Moore*). Also, in this habeas proceeding, the State clung to evidence that gives an unfair advantage to the State by recourse to an expert who had testified for the losing side in *Moore*. *See Moore*, 902 A.2d at 124 (identifying Dr. David Spiegel as testifying for the state against a *per se* ban on hypnotically induced testimony). By contrast, Dr. Lynn, upon whom Flores relied, is cited in *Moore* as reflecting contemporary, empirically based science—which, in *Moore*, was relied on in announcing a *per se* ban on post-hypnotic testimony:

> Dr. Lynn testified that hypnotically induced testimony is not reliable[,] …. that the Hurd guidelines do not reduce the effects of hypnosis in respect of false confidence, confabulation, uncued errors, recall problems, and response to pseudomemory[,] … that the guidelines simply do not obviate problems [such as] the fact that the hypnotized subject enters with expectations that the procedure will be very helpful, expectations that the memories elicited will be accurate, and any problems in memory that may be present prior even to the implementation of hypnosis and the Hurd guidelines.

*Id.* at 1224-1225.

Dr. Spiegel had admitted in *Moore* "that memory is 'reconstructive' and thus cannot be 'played back' like a videotape" and that forensic hypnosis in particular is associated with numerous "identifiable problems." *Id.* at 1224. Yet in this proceeding, Dr. Spiegel, who has not conducted research on hypnosis and false memory, opined that hypnosis is no different from any other police interview and thus the reliance on Mrs. Barganier's post-hypnotic testimony was inconsequential. It was established

that Dr. Spiegel's testimony in this proceeding was at odds with his earlier writings, in which he had acknowledged that "hypnotized individuals may be led to confabulate far more elaborately than is typical of the literature on misguided memory… and that in the most extreme situations … may become what have been called 'honest liars,' believing strongly in implanted or imagined 'recollections[.]'" D. Spiegel, *Hypnosis and Suggestion* in MEMORY DISTORTION 139 (Harvard UP 1995). But although Flores proved that the consilience of scientific evidence since 1995 has only substantiated Spiegel's former views, the State convinced the Texas courts to reject empiricism, common sense, and the constitutional right to a fair trial.

The dispute in this habeas proceeding is not, however, a mere redux of the *Moore* "battle of the experts," this time debating whether Mrs. Barganier's hypnosis was conducted pursuant to legitimate "procedural safeguards." The debate was over whether, based on current scientific understanding of how memory works, there are *any* procedural safeguards that can protect against what is, in essence, witness-tampering. Those defending investigative hypnosis below were: (1) Dr. Mount, the expert who had endorsed the practice at Flores's trial and has made a living conducting and teaching hypnosis techniques to law enforcement; and (2) Dr. Spiegel, whose broad definition of hypnosis supports his belief that people spontaneously "self-hypnotize" all the time—while playing football and watching movies. AppC136-37. By contrast, those who opined below that science has demonstrated that investigative hypnosis is highly unreliable were: (1) Dr. Lynn, a professor of psychology who has spent decades studying the effects of hypnosis on memory through laboratory studies;

and (2) Dr. Kovera, who specializes in the study of memory formation and eyewitness identification and uses the results of laboratory studies to advise law enforcement on how to improve the reliability of eyewitness identifications.

Tellingly, *all* of the experts agreed that memory does not work like a videorecorder and that memory is reconstructive. And yet investigative hypnosis is *premised* on the notion that a hypnotist can unlock memories that are somehow stored in the witness's mind just waiting to be retrieved and played back like a documentary film or videotape. Investigative hypnosis cannot produce reliable results when those who utilize it, like Officer Serna, wrongly treat memory as analogous to videotapes that can be replayed, paused, and otherwise manipulated.[15]

### D. A Conviction and Death Sentence Based on Hypnotically Induced Testimony Offends Basic Rights Guaranteed by the Constitution.

Flores asked for habeas relief, not simply because a new state law provided a vehicle for getting back into court to show that the scientific understanding of investigative hypnosis has changed; he also claimed that the State's reliance at trial on the wholly unreliable, hypnotically induced eyewitness testimony violated his right to due process. He further urged that an execution hinging on such a conviction would be cruel and unusual. These aspects of his habeas claim were entirely ignored.

The Fifth Circuit has correctly noted that "errors of state law, including evidentiary errors, are not cognizable in habeas corpus as such." *Derden v. McNeel*,

[15] The trial court's FFCL, which the TCCA adopted wholesale, do not discuss the content of the hypnosis session during which Mrs. Barganier was asked to imagine herself in a movie theater armed with an imaginary remote control she could use to play, rewind, and pause her memories. *See* AppB.

978 F.2d 1453, 1458 (5th Cir. 1992). But this Court has held that such errors amount to a due process violation if the result was "so prejudicial that it rendered[ed] the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Further, this Court has long recognized that due process "is not a technical conception with a fixed content unrelated to time, place and circumstance;" it is a "flexible" concept meant to respond "as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotations omitted).

Some circuits have expressly recognized a due process right, and thus a basis for habeas relief, where the trial involved "scientific" testimony that was subsequently discredited. *See Geminez v. Ochoa*, No. 14-55681, 2016 U.S. App. LEXIS 8511, *18 (9th Cir. May 9, 2016) (citing *Estelle v. McGuire*, 502 U.S. 62, 68-70 (1991); *Dowling v. United States*, 492 U.S. 342, 352-53 (1990); *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993); *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465-66 (9th Cir. 1986) and holding "habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'"). *See also Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015) (holding habeas petitioner, convicted of murder based primarily on subsequently discredited scientific evidence, was properly granted relief based on a denial of due process).

Flores's due process claim was established in part by showing the disjuncture between contemporary scientific understanding of hypnosis and the general public's belief that memory works like a videorecorder. The jury hearing Mrs. Barganier's

inflated confidence in her "memory" was fundamentally unfair because that confidence was a product of a harmful, unreliable practice that empirical science has demonstrated engenders false memories and renders the subject particularly resistant to cross-examination; yet her false belief that hypnosis could enable her to "remember more later" actually aligned with what most jurors would have believed—then and now. *See, e.g.*, Simons, D.J., & Chabris, C.F., *What People Believe About How Memory Works: A Representative Survey of the US Population*, PLoS One 6(8) (2011). The fundamental unfairness of Flores's trial was compounded by the fact that the "memory" about which Mrs. Barganier was allowed to testify was an *identification*—a phenomenon that, even when not the product of a highly suggestive hypnosis session, is now known to be *the* leading cause of wrongful convictions. *See, e.g.*, Gary L. Wells & Elizabeth F. Loftus, eds., EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (1984); Richard A. Wise, et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. AND CRIMINOLOGY 807 (2007); *see also* The Innocence Project, *In Focus: Eyewitness Misidentification* (identifying mistaken identifications as the leading factor in wrongful convictions).[16]

The National Academy of Sciences has raised significant questions about the scientific reliability of a number of forensic disciplines. *See* Nat'l Research Council, Nat'l Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (documenting rampant problems with the reliability of

[16] *Available at* https://www.innocenceproject.org/in-focus-eyewitness-misidentification/ (last visited Sept. 26, 2020).

numerous forensic science disciplines warranting systematic change); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) (recognizing "[s]erious deficiencies" in forensic evidence in criminal trials). Ceasing to treat investigative hypnosis as a scientifically valid discipline and barring its highly unreliable results from courtrooms would be a modest step toward advancing the course of reason and fundamental fairness—as most jurisdictions have already recognized. Refusing Flores a new trial when there is no longer any principled basis for the court's decision to permit Mrs. Barganier to testify about her post-hypnotic identification contravenes the basic truth-seeking function that is supposed to animate criminal justice. *See, e.g., Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (rejecting the state's argument that due process permits the "pretense of a trial" through perjured testimony). It was not enough for Texas to create a vehicle for revisiting convictions based on junk science; that procedural right is hollow if the substance of such claims can be wantonly ignored, as occurred below. *Compare* AppA *to* AppC; *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (finding "an arbitrary disregard" of right created by state law amounted to a denial of due process of law).

In considering the constitutional ramifications of the hypnosis issue, one must consider that this is a death-penalty case. In its multi-decade effort to constitutionalize the death penalty, this Court has generally required heightened reliability in the decisions that factfinders make during a capital trial. This heightened-reliability requirement is a corollary of the truism that "death is different." *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finding "[d]eath,

in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."). Initially, this Court's concerns about the need for heightened reliability arose in the sentencing context due to evidence of rampant arbitrariness. *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (noting that, since *Furman v. Georgia*, 408 U.S. 238 (1972), "minimizing the risk of wholly arbitrary and capricious" death sentences has been "a fundamental constitutional requirement"). But this Court has subsequently emphasized the need for heightened reliability in many aspects of death-penalty cases, for instance in: pretrial procedures,[17] jury selection,[18] guilt-phase rulings;[19] and even post-conviction proceedings.[20] In short, this Court's vast death-penalty jurisprudence has insisted on heightened reliability in *every* aspect of death-penalty cases so as to reduce the risk of executing someone based on serious error and thus perpetrating a cruel and unusual punishment. *But see Coble v. Davis*, 728 F. App'x 297, 301 (5th Cir. 2018) (citing *United States v. Fields*, 483 F.3d 313, 336 (5th Cir. 2007) instead of Supreme Court precedent to support interpreting the heightened-reliability requirement narrowly as only relevant to channeling sentencing discretion).

To ensure heightened reliability—and even basic reliability—the Constitution must require that the law, in some circumstances, account for advances in scientific understanding. *See* Jennifer Laurin, *Criminal Law's Science Lag: How Criminal*

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[17] *See, e.g.*, *Estelle v. Smith*, 451 U.S. 454 (1981); *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[18] *See Lockhart v McCree*, 476 U.S. 162 (1986); *Morgan v. Illinois*, 504 U.S. 719 (1992).

[19] *See Beck v. Alabama*, 447 U.S. 625 (1980); *Payne v. Tennessee*, 501 U.S. 808 (1991).

[20] *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399 (1986).

*Justice Meets Changed Scientific Understanding*, 93 TEX. L. REV. 1751 (2015) (explaining the challenge and necessity of accommodating changed science in criminal law context). As this Court recognized recently in another Texas death-penalty case, states are not free to employ idiosyncratic, contra-scientific criteria in implementing constitutional mandates. *See Bobby Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017) (*Bobby Moore I*) (rejecting unscientific procedures TCCA had employed to assess whether someone has intellectual disability and thus is exempt from the death penalty). The Court reminded that "adjudication of intellectual disability should be 'informed by the views of medical experts'" and courts did not have "leave to diminish the force of the medical community's consensus." *Id.* (quoting *Hall v. Florida*, 572 U.S. 701 (2014)). That is, *Bobby Moore I* supports the proposition that, when a scientific consensus has coalesced regarding an issue, the relevant science should inform the law—especially in deciding matters of life and death.

The current consensus regarding investigative hypnosis among scientists who rely on empirical research is now no less monolithic than the medical consensus regarding the appropriate way to diagnose intellectual disability. No valid science supports the hypothesis that investigative hypnosis is a reliable means to recover accurate memories. Instead, the consensus is that the practice increases the likelihood of inducing false memories in the hypnotized subject and instills unwarranted confidence in those false memories regardless of procedural safeguards. In *Scheffer*, this Court held that a defendant's right to present a defense is constrained by "legitimate interests" in the integrity of the criminal trial process—

such as "the exclusion of unreliable evidence." 523 U.S. at 308, 309. Surely, the State's right to present evidence must be similarly constrained—especially in capital cases where the Constitution demands heightened reliability. Convictions that hinge on inherently unreliable pseudo-memories, the product of an unreliable memory-retrieval technique, are an illegitimate basis for a death sentence because these circumstances offend the Eighth Amendment.

### E. This Case Is a Worthy Vehicle.

Multiple sound reasons warrant granting certiorari to take a hard look at investigative hypnosis and whether the Constitution prohibits exploiting this practice to obtain convictions. First, the issue presented is of national significance. Seventeen states still allow hypnotically induced testimony in the courtroom. *See* Lynn, et al., *Hypnosis and Memory in the Forensic Context*, *supra*. Second, the issue has arisen in a post-conviction proceeding where the factual record is very well-developed. In a multi-day evidentiary hearing, four experts provided testimony about the investigative hypnosis session, about the practice generally, about the way the scientific understanding of hypnosis and memory has and has not evolved, and how experts studying the efficacy of eyewitness identifications view hypnosis. Third, this case comes directly to this Court from the state habeas proceeding following a state court's ruling, not under the highly deferential standard of 28 U.S.C. § 2254(d).

Allowing the hypnotically induced eyewitness testimony in Flores's trial was a fundamentally prejudicial error that cannot be squared with contemporary scientific understanding about the corrupting effect of hypnosis on memory. Nor can reliance

on testimony induced by this practice be squared with the Fourteenth Amendment's guarantee of due process and a fundamentally fair trial or with the Eighth Amendment's requirements of heightened reliability in death-penalty cases. This Court can significantly advance the cause of reliable factfinding by drawing a fairly basic bright line: since no legitimate science supports the use of investigative hypnosis to obtain reliable information, let alone a trustworthy identification, testimony so induced should not be allowed in courts of law—a common-sense result most states have already embraced.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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