No. 18-369

In The
Supreme Court of the United States

FIDENCIO VALDEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

THE STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

STATE'S REPLIES TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

Question One: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to review his false-testimony error-preservation issue and the Texas Court of Criminal Appeals' decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; (2) Valdez has failed to cite any conflict with any other state court of last resort or United States Court of Appeals that is relevant to the facts of his case; and (3) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

Question Two: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider his false-testimony due-process claim and the CCA's decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; and (2) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

STATE'S REPLIES TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW
– Continued

Question Three: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider his false-testimony due-process claim and the CCA's decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; and (2) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

Question Four: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider his *Giglio* claim and the CCA's decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; and (2) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

Question Five: Because Valdez did not raise his void-for-vagueness issue in the CCA, that issue is not properly before this Court.

LIST OF PARTIES

PETITIONER: Fidencio Valdez

RESPONDENT: The State of Texas, 34th Judicial District Attorney's Office

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

CITATION TO OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

Valdez v. State, No. AP-77,042, 2018 WL 3046403 (Tex.Crim.App., June 20, 2018) (not designated for publication)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, statutes, and rules involved in this case, in pertinent part:

U.S. CONST. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV:

> SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

28 U.S.C. § 1257(a)

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in

question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

TEX. PENAL CODE § 1.07:

(a) In this code:

* * *

(35) "Owner" means a person who:

(A) has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor; . . .

TEX. PENAL CODE ANN. § 19.03:

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

* * *

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6); . . .

TEX. R. APP. P. 33.1:

> (a) *In General*. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> > (1) the complaint was made to the trial court by a timely request, objection, or motion that:
> >
> > > (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and . . .
> >
> > * * *
> >
> > (2) the trial court:
> >
> > > (A) ruled on the request, objection, or motion, either expressly or implicitly; . . .

TEX. R. EVID. 613:

> (a) Witness's Prior Inconsistent Statement.
>
> * * *
>
> (3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the prior inconsistent statement.
>
> * * *
>
> (b) Witness's Bias or Interest.

* * *

> (3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

STATEMENT OF THE CASE

Procedural history

Petitioner, Fidencio Valdez (hereinafter Valdez), was indicted for the capital murder of Julio Barrios (hereinafter Barrios). (CR1 at 6).[1] The jury found Valdez guilty of capital murder as alleged in the indictment. (CR7 at 2531, 2570-71); (RR52 at 77). After hearing the punishment evidence, that same jury then answered "yes" to the first death-penalty special issue (an affirmative finding of future dangerousness) and "no" to the second death-penalty special issue (no sufficient mitigating circumstances). (CR7 at 2558-59, 2561-62, 2570-71); (RR56 at 156). Based on these answers, the trial court sentenced Valdez to death. (RR57 at 4-5).

[1] Throughout this brief, references to the state appellate record will be made as follows: references to the clerk's record on direct appeal will be made as "CR" and volume and page number; references to the reporter's record of trial will be made as "RR" and volume and page number; and references to trial exhibits will be made as "SX" or "DX" and exhibit number.

Valdez raised 13 points of error in the direct appeal of his conviction and death sentence. Included in these points of error were complaints that: (1) his due-process rights were violated when the State knowingly used allegedly false statements and testimony by Veronica Cera as substantive evidence (issue one); (2) his due-process rights were violated by the State's alleged failure to correct Cera's false statements and testimony (issue two); (3) the evidence was insufficient to support the robbery element of his capital-murder conviction (issue four); and (4) his due-process rights were violated by the State's failure to disclose the existence of a tacit leniency agreement with Cera in exchange for her testimony (issue six). On June 20, 2018, the Texas Court of Criminal Appeals (hereinafter "CCA") overruled these and Valdez's other points of error and affirmed his conviction and death sentence. *See Valdez v. State*, No. AP-77,042, 2018 WL 3046403 (Tex.Crim.App., June 20, 2018) (not designated for publication). Valdez timely filed in this Court his Petition for Writ of Certiorari on September 18, 2018.

Summary of the offense

The CCA set out the basic facts of the offense in its opinion. *See Valdez*, 2018 WL 3046403 at *1-3. In summary, Valdez, who had recently moved into his girlfriend Veronica Cera's apartment, was unemployed and routinely drove Cera's white SUV. *See id*. at *1. On December 10, 2010, Valdez spoke with Barrios on the phone and negotiated the purchase of $300 worth of ecstasy pills (30 or 40 pills) for which he had no money.

See id. at *1. Cera, who had not heard this conversation, accompanied Valdez, who was driving her SUV, to northeast El Paso and brought $40, believing that they were going to purchase four ecstasy pills for her birthday party that evening. *See id*. Valdez stopped briefly at a friend's house, where he had hidden a bag of guns, before continuing to the location of the exchange. *See id*.

After arriving at the location for the exchange and exiting his uncle's car, Barrios approached the SUV that Valdez was driving, and Cera heard Valdez tell Barrios to get into the SUV and saw Barrios climb into the driver-side back seat. *See id*. Valdez drove to a darker location, while Barrios's uncle followed, and then told Barrios to give him the pills. *See id*. at *2. When Barrios handed Valdez the bag of pills, Valdez gave them to Cera and told her to count them, which, despite being confused about why Valdez asked her to count them when they were only buying four pills, she began doing so. *See id*. Cera heard Barrios ask Valdez for the money, and Valdez told him that " . . . he ain't going to pay him shit." *See id*. When Barrios angrily demanded his pills back, Valdez responded that he was " . . . not going to give him shit." *See id*. Cera then heard two gunshots and looked up to see that Valdez had shot Barrios in the head. *See id*.

Valdez got out of the SUV and pulled Barrios out of the vehicle. *See id*. Panicked, Cera threw the pills up in the air, got out of the SUV, and went around to the back of the vehicle. *See id*. Valdez ordered Cera to " . . . get back in the fucking truck," and she complied. *See*

id. From inside the SUV, Cera saw Valdez shoot Barrios again while Barrios was on the ground and then shoot twice at Barrios's uncle's car. *See id*. As Valdez drove away, he yelled at Cera for getting out of the SUV before stopping at a stop sign and asking her if she was " . . . down to go with him . . . " or if she was " . . . going to stay." *See id*. at *3. Interpreting this question as a threat, Cera stayed. *See id*. After leaving Cera at her sister's house, Valdez took Cera's SUV, and she did not know where her vehicle was until Valdez left a message with her babysitter on December 12, 2010, to give her the location of her vehicle. *See id*.; *see also* (RR50 at 121-23). When Cera picked up her SUV, she discovered blood spatter, Valdez's black shirt and glove, and Barrios's shoe in the vehicle. *See Valdez*, 2018 WL 3046403 at *3. She cleaned up the blood with Clorox, burned the shoe and clothing, and hid the SUV near her sister's house. *See id*.

In a pretrial lineup and again at trial, Barrios's uncle positively identified Valdez as the driver of the SUV and the man who shot his nephew. *See id*. When Cera later saw Valdez at her apartment, he told a friend to get rid of the gun. *See id*. Cell-phone records identified Valdez as the individual who repeatedly called Barrios until the time of the murder and placed him approximately three-tenths of a mile from the location of the murder. *See id*. at *2-3. Subsequent forensic testing revealed blood inside Cera's SUV and its tire well that yielded DNA profiles consistent with Barrios's DNA. *See id*. at *3.

The medical examiner testified that Barrios died as a result of two gunshot wounds to his head. *See id*. Both wounds exhibited stippling, which indicated that the assailant fired the gun in close proximity to Barrios. *See id*.

Cera's 2010 and 2012 statements to police and trial testimony

At trial, defense counsel cross-examined Cera at length about the alleged inconsistencies between her prior statements to police, specifically, a video-recorded interview she gave police on December 17, 2010 (hereinafter 2010 statement), and a follow-up statement given on August 29, 2012 (hereinafter 2012 statement). *See Valdez*, 2018 WL 3046403 at *6; (RR50 at 138-42, 145-50). When the State, prior to its re-direct examination, offered Cera's 2010 and 2012 statements into evidence, and the trial court asked defense counsel if they had any objections to those exhibits, counsel requested only that the statements be redacted, rather than excluded from evidence:

> [Court]: Do you have an objection?
>
> [Defense]: Yes, we do.
>
> [Court]: What's the objection?
>
> * * *
>
> [Defense]: With regards to the interview, I would like to ask if we could redact anything that has reference to any other crimes, which I think she does talk about –

* * *

> [Court]: You have no objections to this coming in other than that?
>
> [Defense]: Other than that.
>
> [Court]: You like what's in there?
>
> [Defense]: Yes, sir. Other than –
>
> [Court]: It's all hearsay. That's all hearsay, but you're going to let it in?
>
> [Defense]: Yeah.
>
> [Court]: . . . Okay. They're admitted with that caveat. *See Valdez*, 2018 WL 3046403 at *6; (RR50:155-57); (SX81-83).

On re-direct, the prosecutor elicited Cera's testimony that she had made inconsistent statements, omitted facts, and did not give the "full truth" to police in 2010. *See Valdez*, 2018 WL 3046403 at *7; (RR50 at 159-61, 166). Cera explained that at the time of the offense, she was the kind of person who did drugs, associated with bad people, and did not cooperate with law enforcement, whereas she was now a different person. (RR50 at 157-62). She further explained that she had changed her ways after her husband had been killed and that she had not been entirely forthcoming with police because she was trying to protect her sister, did not want to get in trouble, and was afraid and did not want to be labeled a snitch. (RR50 at 160-62). But she had never deviated on the key facts, that is, Valdez had been driving her SUV that day; she and Valdez met Barrios in northeast El Paso; Barrios got into the SUV

behind the driver's seat and handed Valdez a bag of pills; Valdez refused to pay for them; and Valdez shot Barrios. (RR50 at 163-64).

At trial, defense counsel did not ask Cera whether she received any consideration, express or implied, in exchange for her testimony, and she never otherwise testified about any such consideration. *See generally* (RR50 at 78-166). To the extent there was ever any mention of whether Cera had been promised anything for her cooperation with law enforcement, she agreed in her 2010 statement to police that the detective interviewing her had not promised or threatened to do anything in exchange for her statement. (SX82 at 2).

ARGUMENT AND AUTHORITIES

Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to review the Texas Court of Criminal Appeals' decision in this case.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Included within the non-exhaustive list of factors this Court considers in determining whether to exercise such discretion are that: "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"; SUP. CT. R. 10(b); or "a state court . . . has

decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). Contrary to Valdez's assertions, none of these factors are present in this case.

I. *Question One*: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to review his false-testimony error-preservation issue and the CCA's decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; (2) Valdez has failed to cite any conflict with any other state court of last resort or United States Court of Appeals that is relevant to the facts of his case; and (3) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

A. The CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment.

This Court has held that it will not review a question of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. *See Coleman v. Thompson*, 501

U.S. 722, 729 (1991). This rule applies whether the state-law ground is substantive or procedural. *See id*. In the context of direct review of a state-court judgment, the independent and adequate state ground is jurisdictional. *See id*.

When this Court reviews a state-court decision on direct review pursuant to 28 U.S.C. § 1257(a), it is reviewing the *judgment*, and if resolution of the federal question cannot affect the judgment, there is nothing for this Court to do. *See Coleman*, 501 U.S. at 730. Because this Court has no power to review a state-law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See id*. at 729. In *Sochor v. Florida*, this Court held that it was without authority to address one of the petitioner's jury-charge-error claims where the Florida Supreme Court " . . . indicate[d] with requisite clarity that the rejection of [petitioner's] claim was based on the alternative state ground that the claim was not 'preserved for appeal,' " and the petitioner failed to persuade the Court that that state ground was not adequate or not independent. *See Sochor v. Florida*, 504 U.S. 527, 534 (1992).

In Texas, Rule 33.1(a) of the Rules of Appellate Procedure requires a defendant to object at trial to preserve an error for review on appeal. *See* TEX. R. APP. P. 33.1(a). In *Marin v. State*, Texas' watershed case on the law of error preservation, the CCA explained that the rules requiring a timely and specific objection, motion, or complaint do not apply to two relatively small

categories of errors: violations of "rights which are waivable only" and denials of "absolute systemic requirements." *See Saldano v. State*, 70 S.W.3d 873, 888 (Tex.Crim.App. 2002), *quoting Marin v. State*, 851 S.W.2d 275, 280 (Tex.Crim.App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex.Crim.App. 1997).

Examples of rights that are waivable-only include the rights to assistance of counsel and to trial by jury. *See Saldano*, 70 S.W.3d at 888. Absolute, systemic requirements include jurisdiction of the person, jurisdiction of the subject matter, and a penal statute's being in compliance with the Separation of Powers Section of the state constitution. *See id*. The CCA has consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence, even where the error concerns a constitutional right of the defendant. *See id.* at 889. In the context of false-testimony due-process claims, the CCA has excused a defendant's failure to object only when " . . . he could not reasonably be expected to have known that the testimony was false at the time that it was made." *See Estrada v. State*, 313 S.W.3d 274, 288 (Tex.Crim.App. 2010).

Contrary to Valdez's assertion, the CCA in this case did not hold " . . . that no due process violation occurs when a defendant's trial counsel is aware or should be aware that the prosecutor has used or introduced false or perjured evidence, but fails to timely object to such evidence." *See* (Valdez's petition at 15). Rather, the CCA held that, under Texas'

error-preservation rules and the specific facts of this case, Valdez forfeited his right to complain about any alleged false-testimony due-process violation because the record showed that his counsel fully understood that the complained-of exhibits contained Cera's inconsistent statements, had already revealed many of those inconsistent statements to the jury, and affirmatively indicated to the trial court that the defense did not object to the State's admission of the exhibits on these grounds. *See Valdez*, 2018 WL 3046403 at *7.[2] In other words, the CCA did not hold that no due-process violation occurs if defense counsel is aware or should be aware of the existence of false evidence. It simply held that, under Texas' error-preservation rules, a defendant forfeits the right to complain about any such violation on appeal if he knew about the alleged violation and failed to object at a time when the issue could be timely resolved. *See id*. at *6-7. This is consistent with Texas' policy of ensuring that the parties have a lawful trial and that they, and the judicial system, are not burdened by appeal and retrial from a party's

[2] Valdez notes, in his statement of the case, that the CCA also held that if he desired to raise on appeal the complaint that Cera made inconsistent, implausible, or conflicting statements in her testimony in violation of his due-process rights, he had a duty to raise a timely and specific objection on due-process grounds because, basing his complaint entirely on evidence presented at trial, rather than some after-trial discovery, he could reasonably be expected to have known that her testimony was false at the time that it was made. *See* (Valdez's petition at 21); *see also Valdez*, 2018 WL 3046403 at *8. He does not, however, offer this Court any argument as to why this Court should grant certiorari on that particular holding.

inexcusable failure to object at a time when the issue may be timely resolved. *See Saldano*, 70 S.W.3d at 887. In this case, not only did Valdez's counsel not object, they advised the trial court that they only wanted the statement redacted to exclude extraneous-offense evidence and agreed that they "like[d] what's in there. . . ." (RR50 at 156).

Because the CCA's decision as to whether Valdez preserved his false-testimony due-process complaint for appellate review rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment, this Court should refuse to consider question one raised in Valdez's petition. *See Coleman*, 501 U.S. at 729; *Sochor*, 504 U.S. at 534.

B. Valdez has failed to cite any conflict with any other state court of last resort or United States Court of Appeals that is relevant to the facts of his case because the cases upon which he relies are factually and legally distinguishable.

The Due Process Clause of the Fourteenth Amendment is implicated when a defendant can show that his conviction was obtained based on evidence the State knew to be false. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see also* U.S. CONST. amends. V, XIV. A due-process violation may occur not only when the State elicits the false evidence, but also when the State fails to correct evidence it knows to be false. *See id*. And this principle – that a conviction obtained on the basis of

false evidence knowingly elicited or allowed by the State violates due process – applies when the alleged false evidence goes only to the credibility of the witness, as such false evidence may interfere with the jury's ability to fairly assess the truthfulness and reliability of the witness's testimony. *See id*.

In this case, even if the CCA's decision does not rest on independent and adequate state grounds, as discussed above, Valdez has failed to cite any conflict with any other state court of last resort or United States Court of Appeals that is relevant to the facts of his case. The cases cited in Valdez's petition for the proposition that a defendant should not be required to object to a prosecutor's use of false evidence, even if the defendant knows about it, are factually and legally distinguishable because they are all predicated on the complaint that the State's use of, or failure to correct, false evidence allowed the jury to believe as true, and convict the defendant upon, that false evidence. *See* (Valdez's petition at 16-21); *see also United States v. LaPage*, 231 F.3d 488, 490-92 (9th Cir. 2000) (addressing a situation where the prosecutor's failure to correct false testimony left the jury with the impression that the witness's false testimony was actually true); *United States v. Wallach*, 935 F.2d 445, 455-57 (2d Cir. 1991) (observing that the prosecutor's failure to correct the witness's perjured testimony left the jury with the false impression that the witness had purportedly undergone a moral transformation, where other evidence affirmatively demonstrated otherwise, and thus prevented the jury from fairly assessing that witness's credibility); *United States v. Foster*, 874 F.2d 491,

494-95 (8th Cir. 1988) (addressing the misrepresentation left with the jury, which the prosecutor did not correct, that the witnesses had not received consideration for their testimony, when they in fact had all received various forms of immunity).[3]

But unlike these cases, Valdez did not, and does not, argue that the State in any way represented to the jury that it should accept as true the portions of her prior statements that Cera acknowledged, both on cross-examination by the defense and re-direct examination by the State, were not true. *See* (Valdez's petition at 15-21). In its analysis, the CCA, which nevertheless alternatively addressed the merits of Valdez's false-testimony claim despite his procedural default, observed that, after the State introduced Cera's 2010 and 2012 statements, " . . . the prosecutor referred to defense counsel's cross-examination and elicited Cera's testimony that she had made inconsistent statements, omitted facts, and did not give the 'full truth' to police in 2010." *See Valdez*, 2018 WL 3046403 at *7. That is, the prosecutor informed the jury of those portions of Cera's 2010 and 2012 statements that could *not* be relied upon by the jury as being true, thus fulfilling her constitutional duty to correct known false

[3] *DeMarco v. United States* did not hold, as Valdez contends, that there was no due-process violation in that case. *See* (Valdez's petition at 16). The Eleventh Circuit Court of Appeals vacated the defendant's conviction on the State's use of false evidence, even though defense counsel knew about it, because it was compounded by the prosecutor's capitalizing on the false evidence during closing argument. *See DeMarco v. United States*, 928 F.2d 1074, 1076-77 (11th Cir. 1991).

evidence in those statements, as the CCA held. *Valdez*, 2018 WL 3046403 at *8; *see also Napue*, 360 U.S. at 269-70.

Valdez nevertheless asserts that the State "used" the "falsehoods" contained in Cera's prior 2010 and 2012 statements " . . . to make the jury believe that Cera was now a changed person who no longer lied to the police or obstructed justice. . . ." *See* (Valdez's petition at 20). But the State did not "use" the alleged "falsehoods" contained in her 2010 and 2012 statements to rehabilitate Cera because "falsehoods" generally do not serve to bolster a witness's credibility or rehabilitate a witness, and would not have done so here. Merely referring to a witness's prior inconsistent statements, already acknowledged to be untrue, and asking a witness to explain why she made those untrue statements, as part of the witness's rehabilitation, does not constitute the "use" of false testimony contemplated by *Napue*. Rather, it is a rehabilitation procedure that is expressly permitted by rule 613(a)(3) of the Texas Rules of Evidence, which provides that a witness must be given the opportunity to explain or deny a prior inconsistent statement, and by subsection (b)(3) of that same rule, which provides that a witness must be allowed to explain statements that tend to show a witness's bias or interest and further provides that the witness's proponent may present evidence to rebut the charge of bias or interest. *See* TEX. R. EVID. 613(a)(3), (b)(3). Implicit in the requirement that the witness be afforded an opportunity to explain a prior inconsistent

statement is making reference to that prior inconsistent statement.

Valdez's complaint, then, is not actually a false-testimony due-process claim because he does not allege that the jury was left with, and convicted him on, the false impression that Cera's previous inconsistent statements were in fact true, but a challenge to the application of rule 613, a state rule of evidence:

> [Defense counsel's use of Cera's prior inconsistent statements] was not false evidence, as defense counsel's impeachment of Cera's testimony with prior inconsistent falsehoods and lies she had previously made does not constitute substantive evidence. It is mere impeachment. If the prosecutor in Valdez' case truly intended to correct false testimony or false impression with the jury, all the prosecutor had to do was inform the jury of any false testimony before the jury that needed to be corrected – no more. *See* (Valdez's petition at 26); *see also* TEX. R. EVID. 613(a)(3), (b)(3).

The proper application of a state evidentiary rule in these circumstances is purely a question of state law; therefore, Valdez's claim as asserted in this petition does not implicate the false-testimony due-process concerns of *Napue*. *See Webb v. Webb*, 451 U.S. 493, 494 n.1 (1981) (noting that an issue that is purely a question of state law is not properly subject to review by this Court); *see also* 28 U.S.C. § 1257(a). Consequently, the cases upon which Valdez now seeks to rely as raising a federal question for this Court to review

are inapplicable, and he has thus failed to cite any conflict with any other state court of last resort or United States Court of Appeals that is relevant to the facts of this case, such that this Court should refuse to consider question one for this reason as well. *See* SUP. CT. R. 10(b).

C. Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

In arguing that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court, Valdez appears to argue that, by holding that he waived his false-testimony due-process claim, the CCA " . . . treat[ed] . . . this due process violation as normal trial error . . . " that failed to recognize the importance of prosecutors refraining from using false evidence to obtain a defendant's conviction. *See* (Valdez's petition at 21-25).

But the CCA did not in any way hold that a false-testimony due-process violation is "normal trial error." Rather, the CCA, recognizing that the State's use of false testimony implicates a defendant's federal constitutional right to due process, held that, under Texas' error-preservation rules that require an objection, even when the alleged error concerns a constitutional right, and the specific facts of this case, Valdez forfeited his right to complain about any federal constitutional violation because he knew about the alleged violation

and failed to object at a time when the issue could be timely resolved. *See Valdez*, 2018 WL 3046403 at *7.

The CCA has not decided an important question of federal law that has not been, but should be, settled by this Court, as the issue of whether he forfeited his right to complain about a false-testimony due-process violation is not a question of federal law, but rather, is a matter for the state court to resolve under its error-preservation rules. *See Coleman*, 501 U.S. at 729; *Sochor*, 504 U.S. at 534. This Court should thus deny Valdez's petition for writ of certiorari on this basis. *See* SUP. CT. R. 10(c).

II. *Question Two*: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider his false-testimony due-process claim and the CCA's decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; and (2) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

A. The CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment.

Again, this Court has held that it will not review a question of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. *See Coleman*, 501 U.S. at 729. In this case, although the CCA ultimately addressed Valdez's false-testimony due-process claims, Valdez still forfeited his right to complain about the admission of Cera's prior inconsistent statements under Texas' error-preservation rules because the record shows that defense counsel was well aware of the contents of the complained-of statements, questioned Cera extensively before the jury about the statements he now complains should not have been placed before the jury,

and affirmatively indicated to the trial court his preference that the statements (upon redaction) be admitted into evidence. That is, Valdez did not object at a time when the trial court could have acted upon the complaint he now raises, and he affirmatively indicated that he found the admission of the statements agreeable. That was certainly an understandable strategy by defense counsel to attempt to undermine Cera's credibility by repeatedly placing before the jury evidence that Cera had previously given inconsistent statements.

The CCA's judgment, in rejecting Valdez's claim in this regard, can thus be sustained on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment, such that this Court should refuse to consider question two raised in Valdez's petition. *See Coleman*, 501 U.S. at 729; *Sochor*, 504 U.S. at 534.

B. The CCA did not hold that a prosecutor is permitted to present and use as substantive evidence false statements for the purpose of explaining the reasons why a witness was previously untruthful.

The CCA did not hold, as Valdez contends, that a prosecutor is permitted to present and use as substantive evidence false evidence for the purpose of " . . . explain[ing] the reason or reason(s) why the witness lied or failed to tell the truth. . . ." *See* (Valdez's petition at

i). Rather, the CCA held that the State complied with its "constitutional duty to correct known false evidence" in Cera's 2010 statement when it elicited her testimony that she had made inconsistent statements, omitted facts, and did not give the "full truth" to police in 2010. *See Valdez*, 2018 WL 3046403 at *7. The State's additional examination of Cera, for purposes of rehabilitation, about the reasons why she had previously made untruthful statements to police, which was set out in the CCA's opinion, only served to make it abundantly clear to the jury that it should not accept any of those statements as true. Because Valdez is challenging a holding that was not made by the CCA, this Court should refuse to consider question two raised in Valdez's petition.

C. Valdez's argument does not raise an actual false-testimony due-process claim, but merely challenges the application of a state rule of evidence, which does not raise a federal question for this Court to review.

In this portion of his petition, Valdez again does not argue that the State in any way represented to the jury that it should accept as true, and convict Valdez upon, those portions of her prior statements to police that Cera acknowledged, both on cross-examination by the defense and re-direct examination by the State, were not true. *See* (Valdez's petition at 23-26). Rather, Valdez asserts that the State violated his due-process rights because it "used" the alleged "falsehoods" in

Cera's prior statements to police to " . . . convince the jury that these lies and falsehoods (many of which defense counsel used to impeach Cera) were not important because Cera was now a changed person." *See* (Valdez's petition at 23). Again, the State did not "use" Cera's prior inconsistent statements as a means to rehabilitate her, nor did the State in any way represent to the jury that any false statements made by Cera should nevertheless be accepted as true. After defense counsel impeached Cera on the inconsistencies in her prior statements to police, the State merely asked Cera, as permitted by rule 613, to explain why she made those inconsistent statements.

Because Valdez does not assert that the State in any way represented to the jury that it should accept as true, and convict Valdez upon, those portions of her prior statements to police that Cera acknowledged, both on cross-examination by the defense and re-direct examination by the State, were not true, Valdez's complaint is not actually a false-testimony due-process claim, but rather a challenge to the application of a state rule of evidence, which does not raise a federal question for this Court to review. *See Webb*, 451 U.S. at 494 n.1; 28 U.S.C. § 1257(a). Valdez has thus failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court, as the issue of whether the State's rehabilitation measures were proper under rule 613 of the rules of evidence concerns only a matter of state law. This Court should thus refuse to consider question two on this basis. *See* SUP. CT. R. 10(c).

III. *Question Three*: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider his false-testimony due-process claim and the CCA's decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; and (2) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

A. The CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment.

As previously discussed in the State's reply to Valdez's questions for review, Valdez forfeited his false-testimony due-process claims under Texas' error-preservation rules because he not only failed to object to Cera's prior inconsistent statements, but also advised the trial court that he was amenable to that evidence being placed before the jury. Because the CCA's judgment, in rejecting Valdez's claims in this regard, can be sustained on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment, this Court should refuse to consider question three raised in Valdez's petition. *See Coleman*, 501 U.S. at 729; *Sochor*, 504 U.S. at 534.

B. The CCA did not hold that a prosecutor complies with her constitutional duty to correct false evidence or testimony by " . . . introducing as substantive evidence before the trier-of-fact extrinsic evidence of these lies by the witness, along with self-serving explanations from the witness to explain these lies."

At the outset, the CCA did not hold, as Valdez asserts, that a prosecutor complies with her constitutional duty to correct false evidence or testimony by " . . . introducing as substantive evidence before the trier-of-fact extrinsic evidence of these lies by the witness, along with self-serving explanations from the witness to explain these lies." *See* (Valdez's petition at i). As discussed above, the CCA held that the State complied with its "constitutional duty to correct known false evidence" in Cera's 2010 statement when it elicited her testimony that Cera had made inconsistent statements, omitted facts, and did not give the "full truth" to police in 2010. *See Valdez*, 2018 WL 3046403 at *7. The State's additional examination of Cera, for purposes of rehabilitation, about the reasons why she previously made those untruthful statements to police, which was set out in the CCA's opinion, only served to make it abundantly clear to the jury that it should not accept any of those statements as true. Because Valdez is challenging a holding that was not made by the CCA, this Court should refuse to consider question three raised in Valdez's petition.

C. Valdez's argument does not raise an actual false-testimony due-process claim, but merely challenges the application of a state rule of evidence, which does not raise a federal question for this Court to review.

Again, Valdez does not argue that the State in any way represented to the jury that it should accept as true, and convict Valdez upon, those portions of her prior statements to police that Cera acknowledged, both on cross-examination by the defense and re-direct examination by the State, were not true. *See* (Valdez's petition at 23-26). Rather, Valdez asserts that the State violated his due-process rights because it "used" the alleged "falsehoods" in Cera's prior statements to police to " . . . convince the jury that these lies and falsehoods (many of which defense counsel used to impeach Cera) were not important because Cera was now a changed person." *See* (Valdez's petition at 23). As previously discussed, the State did not "use" Cera's prior inconsistent statements as a means to rehabilitate her, nor did the State in any way represent to the jury that any false statements made by Cera should nevertheless be accepted as true. After defense counsel impeached Cera on the inconsistencies in her prior statements to police, the State merely asked Cera, as permitted by rule 613, to explain why she made those inconsistent statements, and such examination necessarily requires the State to identify the inconsistent statement about which it is specifically inquiring.

Because Valdez does not assert that the State in any way represented to the jury that it should accept as true, and convict Valdez upon, those portions of her prior statements to police that Cera acknowledged, both on cross-examination by the defense and re-direct examination by the State, were not true, Valdez's complaint is not actually a false-testimony due-process claim, but a challenge to the application of a state rule of evidence, which does not raise a federal question for this Court to review. *See Webb*, 451 U.S. at 494 n.1; 28 U.S.C. § 1257(a). Valdez has thus failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court, as the issue of whether the State's rehabilitation measures were proper under rule 613 of the rules of evidence concerns only a matter of state law. This Court should thus refuse to consider question three on this basis. *See* SUP. CT. R. 10(c).

IV. *Question Four*: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider his *Giglio* claim and the CCA's decision in this regard, in that: (1) the CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment; and (2) Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

A. The CCA's decision rests on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment.

In its opinion, the CCA pointed out that all of the evidence upon which Valdez relied to demonstrate the existence of an alleged "tacit agreement or implied understanding" between Cera and the State was evidence that had been admitted before the jury and that Valdez never objected that the State failed to disclose a leniency agreement or requested a continuance on that basis. *See Valdez*, 2018 WL 3046403 at *15. The CCA held that if the trial record contained such overwhelming evidence that a tacit or implied immunity agreement had been reached between the State and Cera which was never disclosed, then Valdez " . . . was obliged to object to this failure to disclose as soon as the 'ground of objection' became apparent, and to obtain a ruling on that objection." *Valdez*, 2018 WL 3046403 at *16.

Despite acknowledging that the CCA so held, Valdez has presented this Court with no argument in his petition as to why he should not be bound by Texas' error-preservation rules. *See* (Valdez's petition at 14). Even though Valdez alleges that the record clearly demonstrated the existence of an agreement, he never objected to any alleged failure to disclose this agreement, requested a continuance on that basis, or even asked Cera whether there had been *any* kind of agreement or informal understanding that the State would not prosecute her in exchange for her cooperation. Valdez's failure to object at all, much less in a timely manner, forfeited his right to complain about any such error on appeal. *See* TEX. R. APP. P. 33.1(a).

Because the CCA's judgment can be sustained on state-law error-preservation grounds that are independent of the federal question and adequate to support the CCA's judgment, this Court should refuse to consider question four raised in Valdez's petition. *See Coleman*, 501 U.S. at 729; *Sochor*, 504 U.S. at 534.

B. The CCA did not hold that " . . . circumstantial evidence cannot be relied on to prove a tacit or implied agreement between the Government and a witness in exchange for that witness's testimony. . . ."

The CCA did not hold, as Valdez asserts, that " . . . circumstantial evidence cannot be relied on to prove a tacit or implied agreement between the Government

and a witness in exchange for that witness's testimony. . . ." *See* (Valdez's petition at 27). Rather, the CCA held that Valdez failed to present any *affirmative* evidence demonstrating the existence of an express or tacit agreement. *See Valdez*, 2018 WL 3046403 at *16. Because Valdez is challenging a holding that was not made by the CCA, this Court should refuse to consider question four raised in Valdez's petition.

C. Valdez has failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court.

Under *Giglio v. United States*, the failure to disclose the existence of an agreement between the State and a witness that provides leniency in exchange for that witness's testimony violates due process. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972). A necessary factual predicate to demonstrating the failure to disclose an agreement is demonstrating the existence of an agreement.

Contrary to Valdez's assertion, the cases upon which he relies in his petition do not conflict with the CCA's decision because they are legally and factually distinguishable. *See* (Valdez's petition at 28-29). In *Douglas v. Workman*, the defendant produced an affidavit in which the complained-of witness recanted his identification of the defendant as one of the gunmen and asserted that he had received the prosecutor's assistance in other cases in exchange for his trial testimony implicating the defendant. *See Douglas v.*

Workman, 560 F.3d 1156, 1165-69, 1174 (10th Cir. 2009). Although the complained-of witness later recanted his affidavit, and the prosecutor denied the existence of any agreement, there were documents in the district attorney's files on the witness's cases that lent support to the factual allegations contained in the complained-of witness's recantation affidavit. *See id*. at 1168. In this case, Cera was never asked whether she had received consideration in exchange for her testimony, Cera has never since asserted that she received consideration, and the record is otherwise wholly devoid of any evidence that the State entered into any kind of mutual understanding with Cera that she would receive favorable treatment in exchange for her testimony.

In his petition, Valdez asserts that the Ninth Circuit Court of Appeals in *United States v. Chen* rejected the State's argument that it was only required to disclose explicit agreements and held that facts that imply an agreement that bear on a witness's credibility must also be disclosed. *See* (Valdez's petition at 27). Nowhere in *Chen* does such a discussion even occur, such that *Chen* is wholly inapplicable. *See United States v. Chen*, 754 F.2d 817 (9th Cir. 1985).

Additionally, although Valdez quotes an excerpt from a decision by the Eighth Circuit Court of Appeals, he provided no citation for this excerpt in his petition. *See* (Valdez's petition at 27-28). Specifically, Valdez asserted:

> Even in the absence of an agreement, the Eighth Circuit has held that "[t]he fact that there was no agreement . . . is not determinative of

> whether the prosecution's actions constituted a *Brady*[4] violation requiring reversal . . . " [and that] " . . . viewed in the context of petitioner's trial, the fact of [the witness'] [sic] impending commutation hearing was material . . . and that petitioner therefore is entitled to relief."

See id. The Eighth Circuit case upon which Valdez relies appears to be *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989), which is also inapplicable because it addressed the State's failure to disclose the fact that a witness unilaterally requested favorable treatment in exchange for his testimony – potential impeachment evidence – and not whether the State failed to disclose the existence of an agreement it had reached. *See Reutter*, 888 F.2d at 582 ("Our conclusion does not depend on a finding of either an express or an implied agreement between [the witness] and the prosecution regarding the prosecution's favorable recommendation to the parole board. The District Court found there was no agreement and this finding is not clearly erroneous."). Nothing in *Reutter* stands for the proposition that a defendant may claim a due-process violation based on the State's alleged failure to disclose the existence of an agreement without being required to show the existence of that agreement.[5]

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[4] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 119, 10 L.Ed.2d 215 (1963).

[5] To the extent that Valdez now attempts to argue that the State violated his due-process rights by failing to disclose a unilateral request by Cera for favorable treatment, such a claim, aside from being unsupported by anything in the record, was not properly raised in the CCA, such that that issue is not properly

Moreover, although the Sixth Circuit Court of Appeals in *Bell v. Bell* recognized the general proposition that express and implied agreements must be disclosed under *Brady* and *Giglio*, it ultimately held that the mere fact that the complained-of witness desired favorable treatment did not demonstrate the existence of an implied agreement in the absence of evidence of a corresponding assurance or promise from the prosecutor. *See Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008). The Sixth Circuit held that the defendant failed to demonstrate the existence of an understanding between the witness and the prosecutor regarding the witness's testimony, like Valdez's failure in this case, and that "[w]ithout an agreement, no evidence was suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation." *See Bell*, 512 F.3d at 234, *quoting Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir. 2002).

Further, *Wisehart v. Davis* does not support Valdez's arguments. In his petition, the "circumstantial evidence" Valdez relies on to show the existence of a tacit agreement is the evidence he believes demonstrates that Cera could have been charged with a criminal offense, but was not. *See* (Valdez's petition at 29-30). But the Seventh Circuit Court of Appeals in *Wisehart* declined to disturb the lower court's finding that there had been no agreement, express or implied, between the complained-of witness and the State, even though evidence presented in the

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before this Court. *See Howell v. Mississippi*, 543 U.S. 440, 443 (2005); *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

defendant's post-conviction proceedings, which had not been disclosed to the defense at trial, demonstrated that the State had not prosecuted the complained-of witness for two burglaries they suspected him of having committed because they did not want to dissuade him from testifying against the defendant. *See Wisehart v. Davis*, 408 F.3d 321, 324-35 (7th Cir. 2005).

All the evidence demonstrated in this case was that Cera was not charged with any offense. The record did not demonstrate any of the reasons why she was not charged, assuming there was an offense with which to charge her. The record contained no evidence that the prosecutor made any assurances or promises to Cera or that there was a mutual understanding, informal or otherwise, that Cera would receive some kind of consideration in exchange for her testimony. Valdez could have simply asked Cera or the prosecutor if there had been an agreement, but he chose not to. Instead, Valdez said nothing and waited until appeal to ask the CCA to sustain the serious charge of prosecutorial misconduct, specifically, a *Giglio* violation, based on nothing more than sheer speculation, which the CCA properly declined to do in the absence of any affirmative evidence of any kind of mutual understanding between the State and Cera.

Valdez has thus failed to show that the CCA has decided an important question of federal law that has not been, but should be, settled by this Court, as none of the authorities he cites support his position that a tacit agreement can be implied solely from the fact that a witness the defendant believes could have been

charged with a criminal offense was not. This Court should thus refuse to consider question four on this basis as well. *See* SUP. CT. R. 10(c).

V. *Question Five*: Because Valdez did not properly raise his void-for-vagueness issue in the CCA, that issue is not properly before this Court.

This Court has held that it will generally refuse to consider a federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review." *See Howell*, 543 U.S. at 443; *Adams*, 520 U.S. at 86. This Court has further explained that when the state-court decision is silent on the federal question raised in the petitioner's petition for writ of certiorari, the Court will assume that the issue was not properly presented to the state court. *See Adams*, 520 U.S. at 86-87. And the burden is on the petitioner to then rebut this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented" in this Court. *See id*.

In his petition, Valdez asserts that, as applied to him by the CCA, Texas Penal Code section 19.03(a)(2), which, as it relates to this case, provides that a person commits capital murder if he intentionally murders another in the course of committing, or attempting to commit, a robbery, is void for vagueness and violated his due-process rights because it failed to give him

adequate notice that murdering a drug dealer in order to steal the drug dealer's contraband constitutes capital murder. *See* (Valdez's petition at 31-36); *see also* TEX. PENAL CODE § 19.03(a)(2). In the CCA, however, Valdez asserted only that the evidence supporting his conviction for capital murder was insufficient because he could not have committed robbery if the property he stole was contraband that Barrios was prohibited by Texas law from possessing or owning. *See* (Appendix A attached hereto – portion of Valdez's appellant's brief in the CCA where his sufficiency-of-evidence challenge was raised); (Appendix B – portion of Valdez's reply brief in the CCA where his sufficiency-of-evidence challenge was again discussed).[6]

Valdez did not properly raise in the CCA any void-for-vagueness claim, and the CCA did not address any such claim. *See Valdez*, 2018 WL 3046403 at *12-13. Because this void-for-vagueness issue was neither properly raised in, nor addressed by, the CCA, this

[6] Criticizing the CCA's holding that the ecstasy pills were Barrios's personal property because personal property generally " . . . includes everything that is the subject of ownership . . . ," excluding real estate, and Barrios had the greater right to possess the ecstasy pills, Valdez argues that the CCA failed to consider that ownership of personal property must be lawful. *See* (Valdez's petition at 32-33). Valdez omitted, however, the CCA's explanation that the Texas Penal Code defines "owner" as "a person who: (A) has title to the property, possession of the property, *whether lawful or not*, or *a greater right to possession of the property* than the actor[.]" *See Valdez*, 2018 WL 3046403 at *13 (emphasis in original), *citing* TEX. PENAL CODE § 1.07(35).

Court should refuse to consider question five in Valdez's petition.

CONCLUSION

For all of these reasons, this Court should deny Valdez's Petition for Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

Respectfully submitted,

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