CAPITAL CASE
No. 19-411

IN THE

Supreme Court of the United States

RODNEY REED,

Petitioner,

—v.—

TEXAS,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT AT THE PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF PETITIONER

SARAH TURBERVILLE
THE CONSTITUTION PROJECT
AT THE PROJECT ON
GOVERNMENT OVERSIGHT
1100 G Street, NW, Suite 500
Washington, DC 20005

JUSTIN S. WEDDLE
Counsel of Record
JULIA I. CATANIA
WEDDLE LAW PLLC
250 West 55th Street,
30th Floor
New York, New York 10019
(212) 997-5518
jweddle@weddlelaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF THE CASE 4

ARGUMENT 7

I. REED'S CASE IS SIMPLY ABOUT PROCEDURAL FAIRNESS 7

II. THE *BRADY* MATERIALITY ANALYSIS CONTEMPLATES A DEFENDANT'S *USE* OF SUPPRESSED EVIDENCE IN A HYPOTHETICAL TRIAL 11

III. REED'S CONFRONTATION CLAUSE RIGHT REQUIRES THAT FENNELL'S TRIAL TESTIMONY BE DISREGARDED IN DECIDING *BRADY* MATERIALITY 14

IV. A PROPER *BRADY* ANALYSIS THAT INCORPORATES THE CONFRONTATION CLAUSE RESULT COMPELS A FINDING OF MATERIALITY 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Bagby v. Kuhlman,
932 F.2d 131 (2d Cir. 1991) 15
Brady v. Maryland,
373 U.S. 83 (1963) 3
Brown v. United States,
356 U.S. 148 (1958) 16
Cone v. Bell,
556 U.S. 449 (2009) 11-12
Crawford v. Washington,
541 U.S. 36 (2004) 8-10, 14
Klein v. Harris,
667 F.2d 274 (2d Cir. 1981) 14
Kyles v. Whitley,
514 U.S. 419 (1995) 10, 12
Mitchell v. United States,
526 U.S. 314 (1999) 16
Pointer v. Texas,
380 U.S. 400 (1965) 14
Rodriguez v. State,
513 S.W.2d 594 (Tex. Crim. App. 1974) 6
Rogers v. United States,
340 U.S. 367 (1951) 16
Strickler v. Greene,
527 U.S. 263 (1999) 12
Turner v. United States,
137 S. Ct. 1885 (2017) 11-12

United States v. Agurs,
427 U.S. 97 (1976) 11
United States v. Bagley,
473 U.S. 667 (1985) 7, 10
United States v. St. Pierre,
132 F.2d 837 (2d Cir. 1942), *dismissed as moot*,
319 U.S. 41 (1943) 6
Williams v. State,
800 S.W.2d 364 (Tex. App. 1990) 6
Wood v. Bartholomew,
516 U.S. 1 (1995) 11-12

Other Authorities

The Constitution Project, *Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment* (2014) 2

INTEREST OF THE *AMICUS CURIAE* [1]

The Constitution Project at the Project On Government Oversight works to ensure due process and fairness in the criminal justice system as a key part of its mission to seek consensus-based solutions to contemporary constitutional issues. The Constitution Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its nonpartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues.

The Project takes no position on the abolition or maintenance of the death penalty. Rather, it focuses on forging consensus-based recommendations aimed at achieving the common objectives of justice for both victims of crimes and for those accused of committing crimes. In May 2001, the Project's Death Penalty Initiative convened a blue-ribbon committee including

---

[1] Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party and no person or entity other than the amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), both parties received timely notice of the intent to file this brief and have consented to its filing.

supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others, to examine issues related to the administration of the death penalty.[2] The committee issued reports in 2001, 2005, and 2014, the most recent of which makes 39 recommendations that the committee believes are essential to reducing the risk of wrongful capital convictions and executions. A common underpinning of many of those recommendations is the importance of cross-examination to ensure the accuracy and integrity of evidence presented in capital trials. *See* The Constitution Project, *Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment* (2014).

SUMMARY OF THE ARGUMENT

The Texas Court decided an important federal question—Rodney Reed's *Brady* arguments relating to a suppressed prior inconsistent statement of Jimmy Fennell, the State's chief witness and a prime suspect in the murder of Fennell's fiancée—in a manner that not only conflicts with relevant decisions of this Court, but that compounded Reed's *Brady* injury with a violation of his Confrontation Clause rights. The error

[2] A complete list of the members of the Project's Death Penalty Committee, which included a former Governor of Texas at the time its most recent report was published, is reproduced in the appendix to this brief.

could not be more significant: Rodney Reed faces death without being afforded the fair process that undergirds both the *Brady* rule and the Confrontation Clause.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), lower courts reviewing the materiality of suppressed evidence are required to hypothesize how a trial would have looked if the exculpatory evidence had been disclosed in a timely manner and not suppressed. Because what is hypothesized is a *trial* (meaning, the *process* by which American courts determine innocence or guilt), the *Brady* analysis depends on how the evidence would have been *used* in the context of the case.

The primary use to be made of the evidence at issue here was to confront Fennell through cross-examination. Fennell refused to be confronted, however; he invoked his Fifth Amendment right to refuse to answer questions on all topics relevant to his trial testimony and the facts of the case. Therefore, in a hypothetical trial free of *Brady* violations, it is clear that Fennell either would never have testified, or, having testified, would have refused to be confronted. Under established Confrontation Clause principles, the result is equally clear: Fennell's testimony (if any) would have been stricken upon his refusal to be cross-examined about it. In other words, the exculpatory evidence (Fennell's prior inconsistent statement), if used at a trial, would eliminate Fennell's testimony from that

trial record. There is far more than the requisite "reasonable probability" that the outcome of a trial without Fennell (and without faulty scientific and forensic evidence) would be different.

The Texas Court did not engage in this analysis. Instead, it took the evidence presented at trial as fixed, added to it any additional evidence developed at the evidentiary hearing, and decided materiality based on its own implicit reliability assessment of Fennell's trial testimony. The Texas Court ignored Fennell's refusal to be confronted by his prior inconsistent statement, and the Texas Court permitted Fennell's trial testimony to stand, un-cross-examined, due to the State's suppression of exculpatory evidence. The Texas Court's actions added insult to injury, or, more precisely, added a Confrontation Clause violation to a *Brady* violation, a Sixth Amendment violation to a Fifth. The Court should grant the petition and remedy this miscarriage of justice.

STATEMENT OF THE CASE

Eighteen years after Reed's conviction and sentence to death for the murder of Stacey Stites, he discovered that the State's chief witness (and a prime suspect in the murder), Fennell, told his friend, Bastrop County Sheriff's Officer Curtis Davis, on April 23, 1996—*before* Stites's body was discovered, but *after* she had been reported missing—that he had been out late drinking with other officers the night of

her disappearance. (Pet. at 11.) This statement contradicted Fennell's trial testimony that he was home with Stites until she left for work at approximately 3 a.m. *Id*. at 12-13. The State used Fennell's testimony to establish the timeline from which all other conclusions about Stites's murder were built. *Id*. Fennell testified that Stites was alive and at home until about 3 a.m. and that they did not have sex and took a shower on the evening of August 22, 1996. *Id*. From those assertions (and faulty scientific and forensic testimony), the State claimed that Stites must have been murdered sometime after 3 a.m. and that the murder had to have coincided with sex because of the presence of spermatozoa (faulty science claimed that spermatozoa do not last for more than approximately 24 hours), and that therefore, the sex was not consensual, and that therefore, the participant in the sex was the murderer. *Id*. According to this logic, by identifying Reed's DNA on Stites, the State claimed to have identified her killer. *Id*.

Although Officer Davis—a member of the lead investigative agency conducting the investigation into Stites's disappearance and eventually, her murder—did not choose to write a report about Fennell's April 23, 1996 statements, in 2016 he conducted a videotaped interview with CNN in which he disclosed what Fennell had told him. *Id*. at 11. Through this interview, Reed discovered that the Bastrop County Sheriff's Office had suppressed relevant impeachment material related to Fennell's trial testimony years

earlier. *Id.* at 11-12. The significance of the suppression did not go unnoticed by the Texas Criminal Court of Appeals, which found that Mr. Reed had made the requisite showing to obtain a hearing on his *Brady* claim and remanded the case to the District Court for an evidentiary hearing. *Id.* at 12.

At the evidentiary hearing, Fennell refused to be confronted through cross-examination and asserted his Fifth Amendment privilege against self-incrimination. *Id.* at 13-14. The District Court drew no adverse inference[3] from Fennell's refusal, and ultimately

---

[3] The State's request that "no adverse inference be taken" is perplexing in the context of Reed's evidentiary hearing. First, Texas State court practice prohibits drawing an adverse inference against a witness when the witness pleads the Fifth in the context of a jury trial. *See Williams v. State*, 800 S.W.2d 364, 367 (Tex. App. 1990) (finding that a court does not commit reversible error when denying defendant the right to have the jury watch a witness invoke his Fifth amendment privilege); *Rodriguez v. State*, 513 S.W.2d 594, 595 (Tex. Crim. App. 1974) (affirming the lower court's decision to deny defendant's motion seeking "to have the jury view the witnesses' invoking of the Fifth Amendment"). This was not a jury trial, but a court hearing to determine whether to conduct a new jury trial. Second, once a witness, such as Fennell, has already testified on direct, regardless of any inferences to be drawn or not, the Confrontation Clause provides a separate analysis and a specific remedy for a witness's refusal to be cross-examined about his direct testimony—the testimony is stricken. *See infra* Part III; *see also United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942), *dismissed as moot*, 319 U.S. 41 (1943) ("It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it;

found no *Brady* violation in an opinion in which it accepted the State's Findings of Facts and Conclusions of Law that *did not mention* that the State's chief trial witness invoked his Fifth Amendment right in refusing to testify at the hearing. *Id.* at 14. In other words, Fennell's trial testimony was left unchanged and uncross-examined regarding this prior inconsistent statement.

ARGUMENT

I. REED'S CASE IS SIMPLY ABOUT PROCEDURAL FAIRNESS

The Fifth and Sixth Amendments (made applicable to this case through the Fourteenth) are cornerstones of American criminal law that were established to guard against precisely what happened to Reed. *See United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur"); *Crawford v. Washington*, 541 U.S. 36, 42

---

although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition. *The time for a witness to protect himself is when the decision is first presented to him*; he needs nothing more, and anything more puts a mischievous instrument at his disposal." (emphasis added)).

(2004) (clarifying that the Sixth Amendment's guarantee of a defendant's right to confront witnesses against him or her is a "bedrock procedural guarantee"). The intersection of the two Amendments in this case reveals their common foundation: that defendants in American courts should not be subjected to an unfair process; the Constitution is silent on outcomes. In this way, Reed's case requires this Court to reaffirm its commitment to fair process for defendants (in particular, those sentenced to death) by means of applying the *Brady* rule *in addition to* the right to confrontation.

In *Crawford*, Justice Scalia expounded the long history of a defendant's right to confrontation, which dates back to Roman times, but more importantly, is a steadfast Founding principle. *Crawford*, 541 U.S. at 43. As part of the exposition, Justice Scalia discussed the "most notorious instance[] of civil-law examination[s]" that befell Sir Walter Raleigh when he was on trial for treason during "the great political trials of the 16th and 17th centuries." *Id*. at 44. Sir Walter Raleigh demanded that the chief witness against him be called to appear in person, stating that "'[t]he proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face.'" *Id*. (quoting *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603)). Nevertheless, Sir Walter Raleigh was convicted and sentenced to death without having the opportunity to personally confront his accuser. *Id.* Justice Scalia noted: "One of Raleigh's trial judges later

lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" *Id.* (quoting 1 D. Jardine, Criminal Trials 520 (1832)). This same fear of the degradation of the criminal process inspired the Framers to protect a defendant's right to test the truth of his accusers' statements against him, in-person. *Id.* at 43 ("The founding generation's immediate source of the concept, however, was the [English] common law. . . . [that] at times adopted elements of the civil-law practice [in which] . . . examinations were sometimes read in court in lieu of live testimony." (citing 3 W. Blackstone, Commentaries on the Laws of England 373-74 (1768), and 1 J. Stephen, History of the Criminal Law of England 326 (1883))).

Crawford traced this history to demonstrate that the Framers chose cross-examination and confrontation, not judicial assessments of reliability, as the measure of fairness. As Justice Scalia explained: "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. The Court continued: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62.

Similarly, the *Brady* inquiry is most concerned with whether the way a trial was conducted was fair. In *Bagley*, Justice Blackmun explained that *Brady*'s purpose is to facilitate a process by which "truth is uncovered" and "to ensure that a miscarriage of justice does not occur." 473 U.S. at 675. Thus, a crucial element of the procedural fairness of trials, Justice Blackmun noted, is the prosecutor's duty "to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id.* In *Kyles v. Whitley*, 514 U.S. 419 (1995), Justice Souter reiterated this constitutional guarantee to a fair trial, stating that *Brady* disclosures "serve to justify trust in the prosecutor as the representative . . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 439-40 (internal quotation marks omitted).

In this way, the *Brady* rule and the Confrontation Clause reflect a single choice—to select the trial process as the means of ensuring reliability of the criminal justice system. The *Brady* inquiry does this by measuring materiality against a hypothetical trial using the exculpatory evidence, and the Confrontation Clause does this by requiring in-person testing of the truth through cross-examination. To do otherwise—as the State of Texas did in Reed's case—is to subject a defendant to "the most flagrant inquisitorial practice[]." *Crawford*, 541 U.S. at 51.

II. THE *BRADY* MATERIALITY ANALYSIS CONTEMPLATES A DEFENDANT'S *USE* OF SUPPRESSED EVIDENCE IN A HYPOTHETICAL TRIAL

This Court has consistently held that the *Brady* materiality standard requires courts to "examine the trial record, 'evaluat[e]' the withheld evidence 'in the context of the entire record' and determine in light of that examination whether 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (alteration in original) (quoting first *United States v. Agurs*, 427 U.S. 97, 112 (1976), and then *Cone v. Bell*, 556 U.S. 449, 470 (2009)). In other words, when faced with the discovery of suppressed exculpatory evidence, this Court considers how that evidence would have been used at a hypothetical, suppression-free trial.

For example, in *Wood v. Bartholomew*, 516 U.S. 1 (1995), this Court reviewed the Ninth Circuit's reversal of "the District Court's denial of habeas relief based on its speculation that the prosecution's failure to turn over the results of a polygraph examination of a key witness, might have had an adverse effect on pretrial preparation by the defense." *Id.* at 2. This Court reasoned that results of the polygraph were "not 'evidence' at all" because they would have been inadmissible under state law at trial, and therefore, were not reviewable for *Brady* materiality purposes. *Id.* at

6. This Court explained: "Disclosure of the polygraph results, then, *could have had no direct effect on the outcome of trial*, because respondent could have made no mention of them either during argument or while questioning witnesses." *Id*. (emphasis added). *See also Turner*, 137 S. Ct. at 1893 ("[E]vidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (quoting *Cone*, 556 U.S. at 469-70 (2009)) (internal quotation marks omitted, alteration in original)); *Strickler v. Greene*, 527 U.S. 263, 281 (1999) ("[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."); *Kyles*, 514 U.S. at 434 (reaffirming that *Brady* materiality "is not [based on] whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence" (internal quotation marks omitted)).

Here, in such a hypothetical trial, the primary use to be made of the suppressed evidence at issue would be to confront, through cross-examination, Fennell, one of the chief witnesses at the trial and also a prime

suspect in the murder of his fiancée.[4] The *Brady* hearing demonstrates what would have happened in such a trial: Fennell would refuse to be confronted on all topics relevant to his trial testimony and the facts of the case.

---

[4] To be sure, the primary use to be made of Fennell's prior statement to Officer Davis is confrontation of Fennell, but the statement is also admissible for other purposes. For example, Fennell's statement to Officer Davis could be elicited from Officer Davis because it is probative of Fennell's guilt of the murder and his guilty knowledge. Fennell made the statement to Officer Davis before Stites's body was found. He did not then know that bogus science would fix the time of death at approximately 3 a.m. Therefore, Fennell's statement appears to be a false attempt to create an alibi for a murder he committed earlier in the night (such as before midnight, as the true science demonstrates). Both the District Court and the State appeared to believe (incorrectly) that the defense sought, through that statement, to prove its truth regarding the time that Fennell returned home or the time that Stites went to bed. Thus, the State questioned other witnesses in a manner designed to show that Fennell returned home early or was not drinking. (App. to Pet. at 11a, 24a). These efforts to discredit Fennell's statement to Officer Davis only provide further confirmation that (1) Fennell is the likely killer who was (2) concocting an alibi for the true time of death (an alibi abandoned when the State adopted his false timeline). After all, the true killer knows the true time of death, and if he was inclined to concoct an alibi in the 24 hours following that death, would concoct one that related to the true time of death, not the State's incorrect 3 a.m. time of death.

III. REED'S CONFRONTATION CLAUSE RIGHT REQUIRES THAT FENNELL'S TRIAL TESTIMONY BE DISREGARDED IN DECIDING *BRADY* MATERIALITY

Fennell was a key witness who refused to be cross-examined on the subject matter of his trial testimony, and therefore, in a hypothetical trial free from suppression of exculpatory evidence, the Confrontation Clause would require that his testimony be disregarded.

It is a fundamental principle that "[t]he failure of the trial judge to take . . . corrective action" against a witness, who having testified on direct examination, then invokes his or her Fifth Amendment privilege and refuses to be cross-examined, "deprives the defendant of his sixth amendment right of confrontation." *Klein v. Harris*, 667 F.2d 274, 289 (2d Cir. 1981); *see also Crawford*, 541 U.S. at 42 (stating that the Sixth Amendment's confrontation right is a "bedrock procedural guarantee [that] applies to both federal and state prosecutions." (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965))). Thus, when confronted with a witness's invocation of his or her Fifth Amendment privilege against self-incrimination at a proceeding, courts must inquire whether the invocation gives rise to a confrontation clause violation because "the sixth amendment is violated *only when assertion of the privilege undermines the defendant's opportunity to test the truth of the witness' direct testimony*." *Bagby v.*

Kuhlman, 932 F.2d 131, 135 (2d Cir. 1991) (emphasis added).

Courts "reconcile a defendant's rights under the confrontation clause with a witness' assertion of the fifth amendment privilege" by considering the following two questions: "(1) whether the matter about which the witness refuses to testify is collateral to his or her direct testimony, *and* (2) whether the assertion of the privilege precludes inquiry into the details of his or her direct testimony." *Id*. (emphasis in original). Therefore, "the sixth amendment is violated when a witness asserts the privilege with respect to a non-collateral matter and the defendant is deprived of a meaningful opportunity to test the truth of the witness' direct testimony." *Id*. This is precisely what transpired when Fennell, the State's chief witness who established the State's timeline for the murder, refused to be cross-examined by Reed with the suppressed impeachment material.

The remedy for a Confrontation Clause violation is also clear—the court must deem the privilege against self-incrimination to be waived and "should compel the witness to respond to the defense's cross-examination. . . . or if the witness simply refuses to testify, the witness' direct testimony should be stricken in whole or in part." *Id*. Significantly, the extent of the "waiver is determined by the scope of relevant cross-examination. . . . The witness himself, certainly if he is a party, determines the area of

disclosure and therefore of inquiry." *Brown v. United States*, 356 U.S. 148, 154-55 (1958). What this means is that "[a] witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry" because this "'would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony.'" *Mitchell v. United States*, 526 U.S. 314, 322 (1999) (quoting *Rogers v. United States*, 340 U.S. 367, 371 (1951)). Said another way, it would, "as [this Court] said in *Brown*, 'make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.'" *Id.* (quoting *Brown*, 356 U.S. at 156).

Here, the Texas Court has permitted the truth of who murdered Stites to be mutilated. The only permissible way, under the Constitution and this Court's precedent, to seek and find truth in the criminal process is to conduct the Confrontation Clause analysis whenever a defendant's right to cross-examine is at stake; in particular, when those situations overlap with *Brady* violations. Had this analysis been conducted by the Texas Court, Fennell's prior inconsistent statement would not simply have been added to the trial record, but it would have caused Fennell's testimony to be *subtracted* from the trial record, because, as he did when he was called upon to testify at the *Brady* hearing, Fennell would have refused to

testify rather than face confrontation with this prior inconsistent statement.[5]

IV. A PROPER *BRADY* ANALYSIS THAT INCORPORATES THE CONFRONTATION CLAUSE RESULT COMPELS A FINDING OF MATERIALITY

If the exculpatory evidence had not been suppressed and had instead been disclosed to the defense before trial, Fennell's testimony, in one way or another, would not have been part of the case that went to the jury.[6] The proper *Brady* materiality analysis asks whether there is a reasonable probability that the outcome of a trial free from *Brady* suppression, and thus free of Fennell's testimony, would be different. The Texas Court did not conduct this analysis, it instead allowed Fennell to mutilate the truth by

---

[5] Although application of this Confrontation Clause analysis in the *Brady* materiality context may often mean that no trial testimony need be disregarded, in this case it is clear that the test requires Fennell's trial testimony to be stricken—there is nothing collateral about his whereabouts in the overnight hours of April 22, and his broad refusal to testify blocked any inquiry into the details of his direct testimony using the formerly-suppressed prior inconsistent statement.

[6] If the State desires to use Fennell's testimony against Reed at a retrial, it has the option of immunizing Fennell and compelling him to submit to cross-examination, including cross-examination about his statements to Officer Davis. If Fennell complies with such a compulsion order, Reed's Confrontation Clause rights would be protected, and the *Brady* violation relating to the suppression of Fennell's statements to Officer Davis would be remedied.

giving trial testimony that could not be confronted by a proper cross-examination. In so doing, the Texas Court's decision conflicts with settled *Brady* and Confrontation Clause decisions of this Court.

CONCLUSION

For the reasons stated above, the Court should grant the petition and vacate the conviction so that Reed can receive a trial free from *Brady* and Confrontation Clause violations.

Dated: October 28, 2019

JUSTIN S. WEDDLE
Counsel of Record
JULIA I. CATANIA
Weddle Law PLLC
250 West 55th Street
30th Floor
New York, NY 10019
212-997-5518
jweddle@weddlelaw.com

SARAH TURBERVILLE
The Constitution Project at
the Project On Government
Oversight
1100 G Street, NW
Suite 500
Washington, DC 20005

Counsel for Amicus Curiae

APPENDIX

Co-Chairs of the Project's Death Penalty Committee:

Gerald Kogan

Chief Justice, Florida Supreme Court, 1987-1998; Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida, 1960-1967

Mark White*

Governor, Texas, 1983-1987; Attorney General, Texas, 1979-1983; Secretary of State, Texas, 1973-1977; Assistant Attorney General, Texas, 1965-1969

Beth A. Wilkinson

Special Attorney to the U.S. Attorney General, Oklahoma City bombing case, 1995-2001; Assistant U.S. Attorney, Eastern District of New York, 1991-1995

Members:

David I. Bruck

Clinical Professor of Law and Director, Virginia Capital Case Clearinghouse, Washington and Lee University School of Law; Federal Death Penalty Resource Counsel

William G. Broaddus

Attorney General, Virginia, 1985-1986

W.J. Michael Cody

Attorney General, Tennessee, 1998-2001

Mark Earley, Sr.

Attorney General, Virginia, 1998-2001; Senator, Virginia State Senate 1988-1998

O.H. Eaton, Jr.

Judge, Florida 18th Judicial Circuit, 1986-2010

John J. Gibbons*

Director and Founder, John J. Gibbons Fellowship in Public Interest and Constitutional Law; Chief Judge, United States Court of Appeals, Third Circuit, 1987-1990

Charles A. Gruber

Chief of Police, South Barrington Police Department, 1999-2008; President, International Association of Chiefs of Police, 1990; President, Illinois Association of Chiefs of Police, 1982

Dr. David P. Gushee

Distinguished University Professor of Christian Ethics and Director, Center for Theology and Public Life, Mercer University

Sam D. Millsap, Jr.

District Attorney, Bexar County, Texas, 1983-1987

Sheila M. Murphy

President, Board of Directors, Illinois Death Penalty Education Project; Presiding Judge, Illinois Sixth District, 1992-1999

Chase Riveland

Secretary, Department of Corrections, Washington, 1986-1997; Executive Director, Colorado Department of Corrections, 1983-1986; Deputy Director, Wisconsin Division of Corrections, 1980-1982; Superintendent, Portage Correctional Institution, Wisconsin, 1980-1982

David A. Schwartz

President & CEO, DS Baseball LLC

William S. Sessions

Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court, Western District of Texas, 1974-1987; Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974

Darrel Stephens

Executive Director, Major Cities Chiefs Association; Chief of Police, Charlotte-Mecklenburg Police Department, 1999-2008; Executive Director, Police Executive Research Forum, 1986-1992

B. Frank Stokes, Jr.

Private Investigator; Special Agent, Federal Bureau of Investigation, 1971-2001

Jennifer Thompson-Cannino

Author, activist; Member, North Carolina Innocence Commission; Member, Advisory Committee for Active Voices

Scott Turow

Author; Member, Illinois' Executive Ethics Commission; Assistant U.S. Attorney, Northern District of Illinois, 1979-1986; Chair, Illinois State Appellate Defender's Commission, 2002-2004

John W. Whitehead

President, The Rutherford Institute

Dr. Reginald Wilkinson

Director, Ohio Department of Rehabilitation and Correction (DRC), 1991-2006; DRC employee, 1973; President, American Correctional Association; Vice Chair for North America, International Corrections and Prison Association; President, Ohio Correctional and Court Services Association; Founder, Ohio chapter, National Association of Blacks in Criminal Justice

Michael Wolff

Dean, Saint Louis University School of Law; Judge, Supreme Court of Missouri, 1998-2011; Chief Justice, 2005-2007

Rev. Dr. Aidsand F. Wright-Riggins III

Executive Director, American Baptist Home Mission Societies, American Baptist Churches, USA

*since deceased