No. 19-411

IN THE

Supreme Court of the United States

RODNEY REED,
Petitioner,
vs.

STATE OF TEXAS
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Court should grant certiorari review of a hybrid, unrecognized claim regarding a supposed intersection of the Fifth Amendment's right to not self-incriminate and the Sixth Amendment's right to confront witnesses that was not pressed or passed upon in state court, has been forfeited through improper evidentiary presentation, and has no merit in any event.

2. Whether the Court has jurisdiction to consider Reed's false scientific testimony claim, barred by an adequate and independent state law ground, and, if the Court does, whether it should hear an unrecognized constitutional claim that is not supported by the record below.

3. Whether jurisdiction lies to hear an actual innocence claim barred by an adequate and independent state law ground and, if such jurisdiction exists, whether the Court should expend time on a fact-bound claim neither recognized by this Court nor with merit.

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BRIEF IN OPPOSITION

More than twenty years ago, Petitioner Rodney Reed was convicted of murder and sentenced to death for the abduction, rape, and strangulation of Stacey Stites. Reed has vigorously challenged his conviction since its imposition. The present litigation involves his eighth and ninth state habeas corpus applications.

In his eighth application, Reed raised actual innocence, suppression of evidence, and false testimony claims. The Texas Court of Criminal Appeals (CCA) found that Reed's assertion of actual innocence did not satisfy the statutory framework to excuse procedural default under Texas's abuse-of-the-writ bar, but it remanded the other two claims to the habeas trial court for further review.

After full evidentiary development, the habeas trial court recommended denial of relief. Based on the district court's findings and conclusions, and its own review of the case, the CCA denied the remanded claims. In that same opinion, the CCA dismissed Reed's ninth application, which included his due process claim that prosecutors unknowingly presented false scientific testimony, as an abuse of the writ.

Reed now seeks a writ of certiorari from those state court decisions. However, his questions presented suffer from jurisdictional flaws, justiciability concerns, or both. As such, they present exceedingly poor vehicles for resolution, and Reed fails to demonstrate a federal constitutional deprivation in any event. The Court should deny his petition.

STATEMENT

I. The Capital Murder Trial

Stacey Stites was a happily-engaged nineteen-year-old just eighteen days shy of her wedding. 43.RR.81–82, 85.[1] She lived in an apartment complex with her police-officer fiancé, Jimmy Fennell, and her mother, Carol, who lived in the apartment below, and with whom Stites spent her last days planning her upcoming nuptials. 43.RR.81; 44.RR.51.

Stites worked at a Bastrop, Texas grocery store, about thirty miles from her residence, and was scheduled for a 3:30 a.m. shift. 43.RR.95; 44.RR.48. When she did not show, a fellow employee became worried and called Carol around 6:30 a.m. 43.RR.96, 101–02. Carol then called Fennell, who went to look for Stites while Carol notified authorities. 44.RR.70–71.

Before Carol was alerted to Stites's disappearance, a Bastrop police officer had, at 5:23 a.m., discovered the pickup truck Stites took to work seemingly abandoned in a local high school parking lot. 43.RR.117. Because the truck was not reported stolen, the officer took no further action, but, before he left, he noticed a piece of a belt lying outside the truck. 43.RR.118–122.

Later that day, Stites's body was found off a rural road. 44.RR.18, 21. Texas Department of Public Safety Crime Laboratory (DPS) personnel processed the scene. 44.RR.108. They observed a partially clothed Stites—her shirt removed, bra exposed, and missing a shoe and

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[1] "RR" refers to the transcribed statement of facts of from Reed's capital murder trial, or reporter's record, preceded by volume and followed by page numbers.

an earring. 44.RR.113. Stites's pants were undone, the zipper was broken, and her panties were bunched at her hips. 44.RR.113–14, 122. She was discovered with her work apparel—work pants, a nametag, and a large knee brace. 44.RR.128, 151. On the side of the road was another piece of belt. 44.RR.115.

Because of obvious signs of rape, a DPS criminalist, Karen Blakely, took vaginal and breast swabs from Stites's body. 44.RR.123; 45.RR.51. On-site chemical testing signaled the presence of semen. 44.RR.124–27. Around 11:00 p.m. that night, microscopic analysis showed the presence of intact sperm, which indicated recent seminal deposit—based on published scientific articles, sperm remains whole within the vaginal cavity for usually no longer than twenty-six hours. 44.RR.131; 45.RR.15–16.

Later forensic testing matched the belt fragments to each other, and it appeared that the belt was torn apart, not cut, 47.RR.83–85, and it was identified as Stites's, 45.RR.102. A search of the truck yielded Stites's missing shoe and earring, and the remnants of a smashed, plastic drinking glass. 47.RR.44–45; 49.RR.34, 38. Additionally, the driver's-side seatbelt was still engaged and the seat was angled in a way that a 6'2" person could properly utilize the rearview mirror. 46.RR.101; 49.RR.43.

Stites's body was autopsied the next day by Dr. Roberto Bayardo. 48.RR.111. He observed a large mark across Stites's neck that matched the pattern of her belt. 48.RR.119–20, 136–37. There were bruises on Stites's arms consistent with forcible restraint, bruises on her head consistent with the knuckles of a fist, and bruises

on her left shoulder and abdomen consistent with an over-the-shoulder seat belt. 48.RR.115–18. Based on physical changes in the body, Dr. Bayardo estimated time of death at 3:00 a.m., give or take four hours. 48.RR.113–14.

Dr. Bayardo took vaginal, oral, and rectal swabs. 48.RR.121–23. He, too, observed intact sperm from a vaginal swab, which he stated indicated "quite recent[]" seminal deposit. 48.RR.121–22. There were also injuries to Stites's anus, including dilation and lacerations, which were consistent with penile penetration inflicted at or near the time of death. 48.RR.126–27. And, Dr. Bayardo, via microscopic analysis, thought he saw sperm heads from a rectal-swab slide, though he acknowledged that chemical testing was negative for semen. 48.RR.123–24. Nonetheless, he noted that sperm break down quicker in the rectal cavity than in the vagina, so the fragmented sperm also indicated recent seminal deposit. 48.RR.125.

Thereafter, DPS personnel conducted DNA testing on the vaginal, rectal, and breast swabs, and the results indicated that the foreign DNA came from a single source. 49.RR.95–113. They also "mapped" Stites's panties, which showed little movement after seminal deposit. 44.RR.190–91; 55.RR.40. This too connected the timing of the seminal deposit with the murder. 55.RR.41.

For approximately a year, multiple agencies searched for Stites's killer. They interviewed hundreds and obtained biological samples from twenty-eight males, but none matched the foreign DNA in and on

Stites. 46.RR.111–12; 49.RR.114–19. And none mentioned that Reed associated with Stites. 46.RR.112.

Reed became a suspect in Stites's murder after he was arrested for kidnapping, beating, and attempting to rape and murder another nineteen-year-old woman, Linda Schlueter.[2] 46.RR.122. Schlueter was abducted by Reed approximately six months after Stites's murder, near both the route Stites typically took to work and the time she disappeared—3:00 a.m. 61.RR.10, 37–47. Moreover, Reed was regularly seen in this area by Bastrop police officers in the early morning hours, and his home was close to where both Stites's and Schlueter's vehicles were abandoned. 50.RR.70–73, 80, 95–96. Further, Reed's height—6'2"—aligned with the angle of the driver's seat. 49.RR.43.

Given the similarities between these crimes, law enforcement inquired with DPS if they had Reed's DNA profile on file, and they did because Reed had raped his intellectually disabled girlfriend, Caroline Rivas.[3] 46.RR.122–23. Reed's DNA profile was compared to the foreign DNA inside and on Stites's body—the two were consistent. 50.RR.104. Reed was then questioned and he denied knowing Stites. 48.RR.82–83. Additional biological samples were obtained from Reed via search warrant. 48.RR.18, 86–92.

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[2] The details of the Schlueter offense were not introduced at the guilt-innocence phase. The jury only knew that law enforcement had "information that led [them] to look at [Reed] as a suspect." 46.RR.122.

[3] The jury, at the guilt-innocence phase, only knew that "there was a known sample [of Reed] on file," but not the details of Rivas's rape. 46.RR.123.

More DNA testing was performed by DPS and by Meghan Clement, an expert at a private laboratory retained by the State. 49.RR.118–19; 50.RR.120–36, 140; 49.RR.127; 51.RR.33–34. The results were conclusive—Reed could not be excluded as the foreign DNA contributor but 99% of the world's population could be, and only one person in 24 to 130 billion people would have the same foreign DNA profile. 49.RR.118, 122; 50.RR.144–45; 51.RR.80. But, to be sure, samples were taken from Reed's father and three of his brothers, and they were ruled out as contributors too. 49.RR.123–25

Reed's two trial counsel, assisted by three investigators and a DNA expert, attempted to counter this damning evidence with a two-pronged attack—they tried to blame someone else for the murder, and they argued that Reed and Stites were engaged in a clandestine but consensual sexual relationship.

To prove the former, Reed's DNA expert, Dr. Elizabeth Johnson, testified that a hair found on Stites's back did not match any of the samples gathered by law enforcement, and a couple of witnesses testified they saw three men in a white truck near the area where Stites's body was recovered. 51.RR.107–08, 124–25; 54.RR.50–52.

Trial counsel also suggested that Fennell was the murderer, and that law enforcement did not thoroughly investigate him—law enforcement interviewed Fennell several times and they collected biological samples from him, but never searched his apartment. 45.RR.110–12; 46.RR.62.

Further, trial counsel cast suspicion on David Lawhon, a Bastrop resident who murdered another

woman, Mary Ann Arldt, two weeks after Stites's death. 46.RR.158. They called several witnesses that testified about a connection between Stites and Lawhon, including one who said Lawhon had confessed to killing Stites. 52.RR.29–31, 89.

As to the secret-relationship defense, one witness testified that she saw Stites and Reed talking at the grocery store, and another said Stites came by Reed's house looking for him. 51.RR.136; 53.RR.92. The jury did not believe Reed's defenses and found him guilty of two counts of capital murder.

II. The State's Punishment Case

The rape and murder of Stites was hardly Reed's first or last foray against women. First was Connie York, a nineteen-year-old who had come home late one evening after swimming with friends. 57.RR.34–35. York was grabbed from behind and told, "don't scream or I'll hurt you." 57.RR.35–36. When York did not listen, she was repeatedly struck, dragged to her bedroom, and raped multiple times. 57.RR.37–42. Reed was interviewed, and, while he admitted that he knew York from high school, he denied raping her. 57.RR.123–24. When confronted with a search warrant for biological samples, Reed had an about-face, "Yeah, I had sex with her, she wanted it." 57.RR.138. The case went to trial four years later, 57.RR.30, 60, and Reed was acquitted, 57.RR.61.

Next was A.W., a twelve-year-old girl, who was home alone, having fallen asleep on a couch after watching TV. 58.RR.36–42. A.W. awoke when someone began pushing her face into the couch and had blindfolded and gagged her. 58.RR.42–43. She was repeatedly hit in the head, called vulgar names, and orally, vaginally, and anally

raped. 58.RR.43–49. The foreign DNA from A.W.'s rape kit was compared to Reed, and he was not excluded and only one in 5.5 billion people would have the same foreign DNA profile from A.W.'s rape kit. 58.RR.51, 92; 61.RR.26.

Then came Lucy Eipper, whom Reed had met in high school, and whom Reed began to date after her graduation. 59.RR.10–12. Eipper had two children with Reed. 59.RR.13–14, 19–20 Throughout their relationship, Reed physically abused Eipper, including while she was pregnant, and raped her "all the time," including one time in front of their two children. 59.RR.14–17, 21, 25–32.

Afterwards, Reed began dating Caroline Rivas, an intellectually disabled woman. 60.RR.39–41. Rivas's caseworker noticed bruises on Rivas's body and, when asked about them, Rivas admitted that Reed would hurt her if she would not have sex with him. 60.RR.41, 61. Later, Rivas's caseworker noticed that Rivas was walking oddly and sat down gingerly. 60.RR.43. Rivas admitted that Reed had, the prior evening, hit her, called her vulgar names, and anally raped her. 60.RR.44, 63–65. The samples from Rivas's rape kit provided the link to Stites's murder. 60.RR.89–90.

Shortly thereafter, and about six months before Stites's murder, Reed raped Vivian Harbottle underneath a train trestle as she was walking home. 59.RR.87–92. When she pleaded for her life for the sake of her children, Reed laughed at her. 59.RR.94. The foreign DNA from Harbottle's rape kit was compared to Reed, and he could not be excluded and only one person

in 5.5 billion would be expected to have the same foreign DNA profile. 59.RR.95, 113–14; 61.RR.26.

Finally, and about six months after Stites's murder, Reed convinced nineteen-year-old Linda Schlueter to give him a ride home at about 3:30 a.m. 61.RR.10, 37–47. Reed led her to a remote area and then attacked her. 61.RR.47–58. After a prolonged struggle, Schlueter asked Reed what he wanted and Reed responded, "I want a blow job." 61.RR.60. When Schlueter told Reed that "you will have to kill me before you get anything," Reed stated, "I guess I'll have to kill you then." 61.RR.60. Before Schlueter could be raped, a car drove by and Reed fled. 61.RR.62–64.

After Reed's trial counsel, assisted by his three investigators, a forensic psychologist and a neuropsychologist, presented a case in an attempt to mitigate punishment, the jury answered the special issues in such a way that Reed was sentenced to death. 1.CR.489–493.[4]

III. Reed's Postconviction Proceedings

Reed's conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals (CCA), Pet.Cert.App.56a–83a; *Reed v. State*, No. 73,135 (Tex. Crim. App. Dec. 6, 2000) (*Reed I*), and this Court denied Reed a writ of certiorari, *Reed v. Texas*, 534 U.S. 955 (2001).

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[4] "CR" refers to the clerk's record for Reed's capital murder trial. The references are preceded by volume number and followed by page numbers.

With direct appeal pending, Reed filed an application for state habeas relief. 2.SHCR-01/02, at 2–251.[5] A little more than a year later, Reed filed a "supplemental claim." 3.SHCR-01/02, at 391–402. The CCA denied Reed's initial application and found the "supplemental claim" to be a subsequent application and dismissed it as abusive. *Ex parte Reed*, Nos. 50,961-01, 50,961-02 (Tex. Crim. App. Feb. 13, 2002) (*Reed II*).

Reed turned to federal court, filing a habeas petition in the Western District of Texas, Austin Division. Petition for a Writ of Habeas Corpus, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012). The case was stayed and placed in abeyance so that Reed could return to state court. Order, Mar. 1, 2004, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012).

Reed then filed his third state habeas application. 1.SHCR-03, at 2–343. The CCA dismissed all of Reed's claims as abusive, save two claims that were remanded to the trial court for factual development. *Ex parte Reed*, No. WR-50961-03, 2005 WL 2659440, at *1 (Oct. 19, 2005) (*Reed III*). After a live hearing and findings from the trial court, the CCA issued an exhaustive opinion denying relief and finding that Reed's actual innocence "claim" was not persuasive enough to overcome the untimeliness of his procedurally defaulted claims.

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[5] "SHCR-01/02" refers to the clerk's record for Reed's first and second state habeas proceedings. Similarly, "SHCR-03," "SHCR-04," "SHCR-05," "SHCR-06," "SHCR-07," "SHCR-08," and "SHCR-09" refer to the third, fourth, fifth, sixth, seventh, eighth, and ninth state-habeas-proceeding clerk's records, respectively. The references are preceded by volume number and followed by page numbers.

Pet.Cert.App.84a–195a; *Ex parte Reed*, 271 S.W.3d 698 (Tex. Crim. App. 2008) (*Reed IV*).

With his third state habeas application pending, Reed filed his fourth and fifth state habeas applications. SHCR-04, at 2–15; SHCR-05, at 2–89. Both applications were dismissed as abusive by the CCA. *Ex parte Reed*, Nos. WR-50,961-04, WR-50,961-05, 2009 WL 97260, at *1–6 (Tex. Crim. App. Jan. 14, 2009) (*Reed V*).

After those proceedings terminated, Reed filed his sixth state habeas application. SHCR-06, at 2–59. This, too, was dismissed as abusive by the CCA. *Ex parte Reed*, No. WR-50961-06, 2009 WL 1900364, at *1–2 (Tex. Crim. App. July 1, 2009) (*Reed VI*).

The stay in federal district court was lifted. Order, Aug. 20, 2009, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012). A federal magistrate judge recommended denial of relief, *Reed v. Thaler*, No. A-02-CV-142-LY, 2012 WL 2254217 (W.D. Tex. June 15, 2012) (*Reed VII*), which the federal district judge largely adopted, and who independently denied relief, Order on Report and Recommendation, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012). The federal district judge also denied all of Reed's post-judgment filings. Order, Feb. 4, 2013, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012).

Reed then appealed the denial of federal habeas relief, but the Fifth Circuit affirmed by denying a certificate of appealability (COA). *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014) (*Reed VIII*). This Court denied Reed's petition for writ of certiorari from this proceeding. *Reed v. Stephens*, 135 S. Ct. 435 (2014).

Reed's execution was then set for January 14, 2015. 2.CR(DNA).149–50.[6] About three weeks before his then-pending execution date, Reed filed his seventh state habeas application. 1.SHCR-07, at 8–84. This application caused the CCA to stay Reed's execution, *Ex parte Reed*, No. WR-50,961, 2015 WL 831673, at *1 (Tex. Crim. App. Feb. 23, 2015), but it was later dismissed as abusive, Pet.Cert.App.43a–46a; *Ex parte Reed*, Nos. WR-50,961-07 & WR-50,961-08, 2017 WL 2131826, at *1 (Tex. Crim. App. May 17, 2017) (*Reed IX*).

During the pendency of Reed's seventh state habeas application, he filed his eighth. 1.SHCR-08, at 5–23. This application was "based on statements made to a CNN interview by Curtis Davis, a law enforcement officer and close friend of . . . Stites's fiancé, . . . Fennell. Davis told the interviewer about statements that Fennell allegedly made to him in 1996 on the morning after the murder about Fennell's activities and whereabouts the previous evening. These statements appeared to be inconsistent with Fennell's trial testimony." Pet.Cert.App.4a; *Ex parte Reed*, No. WR-50,961-08 & WR-50,961-09, 2019 WL 2607452, at *2 (Tex. Crim. App. June 26, 2019) (*Reed X*). This supposed conversation between Fennell and Davis founded three claims: (1) actual innocence; (2) suppression of evidence; (3) unknowing-use-of-false-evidence. 1.SHCR.10–18. The CCA remanded the latter two claims for factual development, finding that Reed had not made a

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[6] "CR(DNA)" refers to the clerk's record for the Chapter 64 proceeding. The references are preceded by volume number and followed by page numbers.

sufficient showing on the first to justify remand. Pet.Cert.App.45a–46a.

An evidentiary hearing was then held. Reed "called five witnesses to the stand, including Davis. The State called five witnesses, including Stites's mother. At the hearing, Davis conceded that many of his answers to the interviewer's questions had been based on assumptions and he had trouble remembering some of Fennell's statements. Stites's mother also gave testimony inconsistent with [Reed's] claims. The trial judge signed findings of fact and conclusions of law . . . recommending that [Reed's claims] be denied." Pet.Cert.App.4a. After reviewing the record, the CCA denied relief on the remanded claims and dismissed all others as abusive. Pet.Cert.App.4a–5a.

While the eighth application was pending, Reed's ninth followed, wherein he alleged the unknowing use of false scientific evidence. Pet.Cert.App.235a–90a. The CCA dismissed this application as abusive because the factual and legal bases could have been presented in an earlier application, and because Reed did not prove by a preponderance of the evidence that he was actually innocent. Pet.Cert.App.4a–5a. This proceeding follows.

REASONS TO DENY THE PETITION

I. REED'S SUPPRESSION-OF-EVIDENCE VIS-À-VIS THE CONFRONTATION CLAUSE CLAIM IS NOT PROPERLY BEFORE THE COURT.

Reed argues that the CCA violated the Confrontation Clause when it found Davis's testimony immaterial under *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he complains that—in considering whether

Davis's testimony was material—the CCA failed to adequately consider Fennell's invocation of his Fifth Amendment right in a state habeas hearing, nearly twenty years after the trial. Pet.Cert.24–29. But Reed failed to raise this claim in any state court and, in fact, readily accepted Fennell's proposed blanket invocation without question. Not only that, but Reed also appears to misunderstand the law. This Court should deny certiorari.

A. BECAUSE REED DID NOT PRESENT HIS CLAIM TO THE STATE COURTS, THE COURT LACKS JURISDICTION OVER IT OR, ALTERNATIVELY, IT COUNSELS AGAINST GRANTING CERTIORARI.

Reed faults the CCA for "refus[ing] to consider" his hybrid Confrontation-Clause-*Brady* claim. Pet.Cert.24–29. But the CCA did not consider Reed's claim for a different reason: Reed did not raise it.

The failure to present an argument in a state case, which then comes to this Court off direct review, implicates jurisdiction. This is because it was "'not pressed or passed upon' in state court." *Illinois v. Gates*, 462 U.S. 213, 219 (1983). Thus, it was not part of the "[f]inal judgment[] or decree[] rendered by the highest court of" Texas necessary to give the Court jurisdiction over the issue. 28 U.S.C. § 1257(a). And even if the failure to present a claim is not jurisdictional, *see Gates*, 462 U.S. at 219, "the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below," *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

Reed summarizes his Confrontation-Clause-*Brady* claim as follows:

> The Texas courts' refusal to consider the implications of Fennell's blanket invocation of the Fifth Amendment privilege against self-incrimination at the habeas hearing as part of the *Brady* materiality analysis was error this Court should address. Once Fennell invoked the Fifth Amendment privilege . . . and refused to testify [in state habeas proceedings nearly twenty years after the conviction], the [state] court could not continue to rely on Fennell's trial testimony consistent with the Sixth and Fourteenth Amendments when assessing Reed's *Brady* claims. Fennell's invocation at the [state habeas] evidentiary hearing demonstrates that, had his prior inconsistent statements to Davis been disclosed, Fennell either would have not waived the privilege in the first place, or he would have invoked the privilege when confronted with the statements upon cross-examination, resulting in his testimony being stricken. Instead, the Texas courts did not even acknowledge that Reed called Fennell to testify at the hearing at all.

Pet.Cert.24–25 (footnote omitted). But Reed never raised this argument in the state habeas trial court or the CCA, but he had ample opportunity. At the hearing, after Fennell's attorney filed an affidavit memorializing

Fennell's proposed Fifth Amendment invocation, Reed said it was "acceptable" and read it into the record. Pet.Cert.App.324a–26a. Then, after the State asked that there be no adverse inference drawn, Reed said he thought "an adverse inference would be *permissible*," but not required, and never followed up explaining why that was so or how it would affect *Brady* materiality. *Id.* at 326a (emphasis added).

After the hearing completed, Reed advanced his arguments through proposed findings and supplemental briefing, but he still did not raise this claim. Rather, he took a more traditional approach to *Brady* and argued that Davis's statements about his supposed conversation with Fennell were material. 2.SHCR-08, at 150. There was no argument that the state court had to consider Fennell's post-trial invocation in a particular way, and he certainly said nothing about the Confrontation Clause. 2.SHCR-08, at 125 ("[T]he Court *may* presume that Fennell would likewise have declined to testify at Mr. Reed's trial in 1998." (emphasis added)).

After the state habeas trial court found no materiality, Reed complained that it erred because it failed to consider the trial evidence "in light of the undisclosed evidence." Applicant's Mem. & Objections to Findings of Fact and Conclusions of Law 21. Fennell's post-trial invocation was not "undisclosed evidence," and more importantly, Reed never asserted that it was. Neither the state trial court nor the CCA ever heard Reed's theory regarding the intersection of the Fifth and

Sixth Amendment in the context of a *Brady* claim. *Compare* Pet.Cert.27, *with* 2.SHCR-08, at 150.[7]

Reed now asks this Court to reverse the CCA for "refusing" to consider the issue that he never put before it. Because the issue was not fairly presented to the state courts, this Court cannot, or at the very least should not, consider this as a ground for certiorari.

B. REED FORFEITED ANY NEGATIVE INFERENCE THAT MIGHT HAVE BEEN DRAWN FROM FENNELL'S PROPOSED INVOCATION WHEN HE FAILED TO INQUIRE INTO THE REASONS FOR IT.

While "[t]he Fifth Amendment does not forbid adverse inferences [in] . . . civil actions," it also does not require them. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Evans v. City of Chicago*, 513 F.3d 735, 741 (7th Cir. 2008); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990). Trial courts have discretion to draw such inferences after a party refuses "to testify in response to probative evidence." *Baxter*, 425 U.S. at 318; *Fed. Deposit Ins. Corp. v. Fidelity & Deposit Co. of Md.*, 45 F3d 969, 978 (5th Cir. 1995). For an invocation to be proper—and an adverse inference drawn—the right should be invoked on a question-by-question basis. *See e.g., United States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir. 1995); *United States v. Davis*, 636 F.2d 1028, 1038 n.20 (5th Cir. 1981).

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[7] Reed's objections about the implications of Fennell's invocation of the Fifth Amendment were confined entirely to his false-evidence and actual-innocence claims. Objections 36, 39.

Reed called Fennell to testify at the state habeas evidentiary hearing and then eagerly accepted Fennell's attorney's blanket proposed invocation of Fennell's Fifth Amendment right. Pet.Cert.App.324a. ("[I]f its's as represented, we would go on his affidavit that's presented today. You know, obviously we can't make him talk."). But Reed did not confront Fennell with any probative evidence against him—he did not even call him to the stand. Nor did Reed ask any questions to ensure that the scope of Fennell's invocation was proper. Instead, he accepted Fennell's blanket proposed invocation in the hopes that a blanket inference might follow. Pet.Cert.25–29.

The inference Reed now seeks is both far-reaching and unlikely. Fennell's circumstances had changed between the trial and state habeas proceedings. When called to testify at the state habeas hearing, Fennell was incarcerated. Pet.Cert.App.325a. He was released to parole only a few months later. Brittany Glas, *Stacey Stites' Fiancé Released from Prison after Serving 10-Year Sentence*, KXAN (Mar. 10, 2018, 5:58 AM CST), https://www.kxan.com/news/crime/stacey-stites-fiance-released-from-prison-after-serving-10-year-sentence/. It is quite possible that he invoked his right against self-incrimination for fear of prosecution for perjury based on concerns that his twenty-year-old memory might have differed from that of the time of trial. It is also quite possible that he may have had concerns that his testimony might somehow affect his ability to obtain parole for the sentence he was serving. And it is further possible that he invoked his right to silence regarding the facts and circumstances surrounding the crime that sent him to prison ten years after Stites's murder.

Because Reed did not inquire to rule out other possible reasons for Fennell's invocation, he cannot now claim the inference that best fits his legal argument. The trial court found that an adverse inference was inappropriate here. Pet.Cert.App.327a; *Baxter*, 425 U.S. at 318 (allowing trial courts discretion to draw adverse inference only *after* invoking witness refuses to respond to probative evidence against him). It was correct. Reed was not entitled to an adverse inference then, and he is not now.

C. THERE IS NO INTERSECTION BETWEEN THE CONFRONTATION CLAUSE AND *BRADY*.

Reed is correct in his assertion that "[t]his Court has never considered the intersection of the Fifth and Sixth Amendments in the context of a *Brady* claim." Pet.Cert.27. In fact, it appears that no court has considered the "intersection" in this context.[8] Likely because there is none.

The Confrontation Clause gives the accused the right "to be confronted with the witnesses against him" at trial. It is generally satisfied when the defense is given a full and fair opportunity to cross-examine adversary witnesses. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). *Brady*, on the other hand, deals with evidence necessarily unknown to the defense at the time of trial. To establish a *Brady* violation, an applicant must demonstrate (1) the suppression (2) of favorable evidence (3) that is material, meaning that there is a

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[8] None of the cases that Reed relies upon consider or even mention an intersection of the Fifth and Sixth Amendments in the context of a *Brady* claim.

reasonable probability of a different result had the suppressed evidence been disclosed. *Brady*, 373 U.S. at 89.

Fennell testified at trial, and Reed's counsel cross-examined him. Counsel elicited from him and other various witnesses that Fennell was a suspect in Stites's murder, had been interviewed several times by law enforcement, immediately sold his truck after it was returned by law enforcement, invoked his Fifth Amendment rights during questioning by law enforcement, and that a friend of Stites thought Fennell was possessive and may have slashed Stites's tires. 4.SHRR-08, at 36–40.[9] The Confrontation Clause was satisfied. That Reed might ask different questions of Fennell twenty years later makes sense, but it does not violate the Confrontation Clause. *See United States v. Owens*, 484 U.S. 554, 558 (1988).

Reed nonetheless maintains that his inability to re-cross Fennell nearly twenty years post-trial *does* violate the Confrontation Clause. Because he has discovered "new evidence" for the eighth time,[10] and alleges that it was suppressed, favorable, and material, he asserts that the Confrontation Clause entitles him to re-cross Fennell in his third post-trial evidentiary hearing. The Confrontation Clause, however, does not guarantee a "cross-examination that is effective in whatever way,

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[9] Reed's trial counsel also attempted to introduce Fennell's polygraph sessions from the investigation, but the trial judge ruled them inadmissible. 4.SHRR-08, at 42.

[10] *See, e.g.*, 1.SHCR-07, at 11–18; SHCR-06, at 6–10; SHCR-05, at 6–11; SHCR-04, at 5–7; 1.SHCR-03, at 11–15; 3.SHCR-01/02, at 391–92; 1.SHCR-01/02, at 7–9.

and to whatever extent the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)). And it certainly does not guarantee an indefinite right to re-confront witnesses in subsequent proceedings. In fact, this Court has explicitly limited the right of confrontation to those witnesses testifying in a single proceeding. *See Mitchell v. United States*, 526 U.S. 314, 321 (1999) ("It is well established that a witness, *in a single proceeding*, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.") (emphasis added)).

There is no intersection between the Confrontation Clause and *Brady*. As noted above, *Brady* allegations necessarily raise evidence that the defense had no opportunity to confront at trial. Yet the analysis remains a postconviction one, where judges review allegations of impeaching evidence alongside the trial record. The analysis is self-contained. It does not require (or allow) an applicant to reopen trial proceedings so that he may re-cross witnesses on the subject matter of the allegedly suppressed evidence.

Reed disagrees. He directs the Court to a Pennsylvania district court's recitation of the procedural history of a case to suggest that the materiality question is not self-contained. Pet.Cert.27–28 (citing *Harshman v. Superintendent, State Corr. Inst. at Rockview*, 368 F.

Supp. 3d 776, 784 (M.D. Pa. 2019)).[11] But even in the middle district of Pennsylvania, it still is.

In *Harshman*, the State's case was circumstantial[12] and, in large part, hinged on the testimony of jailhouse informants who averred that they were not testifying pursuant to any deal or favorable treatment from the State and then testified that Harshman had confessed his guilt to them. *Harshman,* 368 F. Supp. 3d at 781–82. But after the trial, two of the three informants revealed to Harshman's counsel that they had perjured themselves in exchange for favorable treatment. *Id.* at 782. Based on the informants' statements—which were themselves the evidence of suppressed material evidence—the trial court held an evidentiary hearing to allow further development. *Id.* When called to testify at a hearing, both informants blanketly invoked their right

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[11] Reed also cites a Florida Supreme Court case as support for his Confrontation-Clause-*Brady* theory. *See* Pet.Cert.28 (citing *Duckett v. State*, 918 So. 2d 224, 232–33 (Fla. 2005)). Specifically, he proffers that "the Florida Supreme Court explained that the assertion of the privilege indicated the witness would not have testified at all." *Id*. (citing *Duckett*, 918 So. 2d at 233). But Reed omits context. In assessing the applicant's false-testimony claim, the court noted a witness's post-trial invocation of her Fifth Amendment right indicated that she would not testify at all in *a new trial*. *Duckett*, 918 So. 2d at 233. So the court did not grant one. Contrary to Reed's suggestion, the court did not speculate as to whether the witness would have testified at the initial trial, nor did it reweigh her trial testimony based on her later invocation.

[12] "Police never found a body, blood, DNA evidence, or the purported murder weapon. There were no eye witnesses. And the only physical evidence connecting Harshman to the murder was the two shell casings found in separate locations many years apart." *Harshman*, 368 F. Supp. 3d at 797.

against self-incrimination. *Id.* at 783. No adverse inference was drawn from their refusal to testify, but they testified at subsequent hearings that the State had promised to help them obtain early release (among other things) in exchange for their testimony. *Id.* at 784, 792–94.[13] Contemporaneous written records, a court order, and testimony from independent witnesses corroborated the agreement between the State and the informants. *Id.* at 783–85, 792. Jail records showed that one informant was released, and his pending fines remitted, within hours of testifying against Harshman, *id.* at 785, 792, while the district attorney continued to write letters to the board of parole to encourage early release of the other, *id.* at 783, 790–91, 794. The court found the suppressed evidence material and granted relief.

Harshman does not stand for the proposition that Reed needs it to stand for. The court never mentioned the Confrontation Clause. Nor did it draw any adverse inferences based on the informants' blanket invocation of their Fifth Amendment right. *Harshman* is also factually distinct from this case, to say the least. Here, the allegedly suppressed evidence came from Davis, not Fennell. Nothing Fennell said or did supported Reed's allegations of the suppression of material evidence. Reed called Fennell at the state habeas hearing to undermine the credibility of his trial testimony, not to prove the elements of his *Brady* claim. Harshman, on the other hand, called the informants to prove the suppression of material evidence. In any event, the court did not draw

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[13] One informant testified that he testified falsely at trial in exchange for favorable treatment by the State, *id.* at 792, whereas the other testified that his trial testimony was uninfluenced by the deal with the State, *id.* at 787.

any adverse inferences regarding the informants' blanket invocation of their right.

Another key distinction between this case and *Harshman* is that the evidence of Reed's guilt was strong—and physical. His semen and saliva were found on Stites's dead body, which bore the appearance of abduction and sexual assault. He presented no credible evidence of a consensual relationship between he and Stites. And over significant evidence that the relationship between Stites and Fennell was happy and healthy, Reed forcefully pointed his finger at Fennell. 45.RR.110–12; 46.RR.62. The impeaching evidence Reed presents today is that Davis's twenty-years-later speculations about Fennell's whereabouts and activities did not align with Fennell's trial testimony. Any suspicion that Davis's speculations may raise does not give rise to a reasonable probability of a different result. In other words, Davis's speculations are not material. The CCA was correct,[14] and this Court should deny certiorari.

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[14] Reed also asserts in a footnote that Davis's testimony was "obviously" suppressed and favorable. Pet.Cert.24 n.4. But it is not so obvious. Fennell never told Davis what time he arrived home on the evening of April 22, 1996, 2.SHRR-08, at 104–06, 110. And Reed presented only hearsay evidence that Fennell consumed alcohol that evening. 2.SHRR-08, at 122–23. Further, Davis's knowledge cannot be imputed to the State because he took no part in the investigation and was not acting under color of state law when he spoke with Fennell on April 23, 1996. 2.SHRR-08, at 101–03. Even assuming Fennell told Davis he consumed alcohol on April 22, 1996, and that such knowledge could be imputed to the State, the statement is not favorable because it does not "justify, excuse, or clear [Applicant] from fault, nor does it "dispute or contradict other

II. THE COURT LACKS JURISDICTION TO CONSIDER REED'S FALSE SCIENTIFIC TESTIMONY CLAIM BUT EVEN IF THE COURT POSSESSED JURISDICTION, THERE ARE SIGNIFICANT JUSTICIABILITY CONCERNS AND NO MERIT TO THE CLAIM IN ANY EVENT.

Reed next asserts that due process was violated when the State unknowingly presented false evidence at his trial—expert testimony which he now claims is scientifically invalid. Pet.Cert.29–34. He asks this Court to resolve a claimed circuit split on the question of whether the standard under *Napue v. Illinois*, 360 U.S. 264 (1959), should apply to these facts. However, this case presents a poor vehicle because Reed failed to properly present this claim to the state courts, there are significant justiciability concerns, and ultimately, Reed cannot show a deprivation of due process.

A. AN ADEQUATE AND INDEPENDENT STATE LAW GROUND BARRED THE CLAIM IN STATE COURT AND DIVESTS JURISDICTION IN THIS COURT.

Reed functionally presented this claim twice—in his seventh and ninth state habeas applications. Pet.Cert.App.45a, 5a. The CCA dismissed both pursuant to Texas's abuse-of-the-writ bar. *Id.*; *see* Tex. Code Crim. Proc. art. 11.071 § 5. Although Reed references this, he points to the CCA's language in dismissing his seventh application where it noted that Reed "failed to make a prima facie showing" of this claim. Pet.Cert.33, *see*

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evidence." *See Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006).

Pet.Cert.App.45a. He observes that this language is absent from the CCA's opinion dismissing his ninth application. Pet.Cert.33–34; *see* Pet.Cert.App.5a. Thus, he argues the state procedural bar should not prevent review because it was not consistently applied, particularly in his case. Pet.Cert.33–34.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). Here, Reed does not argue that the state bar is not well-established. Rather, he asserts that because of the exclusion of the "prima facie" language in the dismissal of his ninth application, the CCA did not consistently apply the abuse-of-the-writ bar. Pet.Cert.33–34.

However, this difference is precisely the reason that dismissal of the ninth application *is* a regular application of the state bar. Reed himself cites to *In re Davila*, 888 F.3d 179 (5th Cir. 2018), a Fifth Circuit case taking issue with the "prima facie" language utilized by the CCA when it dismissed a *Brady* claim. Pet.Cert.33. In dismissing his ninth application, not only is the "prima facie" language absent, but the CCA clearly stated that Reed failed to prove that his claim was either factually or legally unavailable. Pet.Cert.App.5a; *see* Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). And the CCA was clearly right—it noted that Reed relied on some of the same evidence in his seventh application when presenting a "substantially similar false evidence"

claim. Pet.Cert.App.5a. Determining whether a claim could have been presented earlier presents no issue of inconsistent application of a state law ground and it is independent and adequate of the federal law issue. Thus, the court lacks jurisdiction. *See Foster*, 136 S. Ct. at 1745.

B. BEYOND THE PROCEDURAL BAR, THIS QUESTION PRESENTS SIGNIFICANT JUSTICIABILITY CONCERNS.

Assuming state court merits review and thus jurisdiction, such a decision did not involve a recognized constitutional claim. Reed raised this claim in state court just as he does here: an allegation of due process deprivation when the State unknowingly presented false scientific evidence. Pet.Cert.App.5a. Such a claim exists under the CCA's interpretation of the Constitution. *See Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009); Pet.Cert.App.48a (Alcala, J., concurring and dissenting).

However, as Justice Scalia stressed, this Court has "never held" that the unknowing use of false testimony violates the Due Process Clause and it is "unlikely ever to do so." *Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting from denial of certiorari). "All we have held is that 'a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.'" *Id*. (quoting *Napue*, 360 U.S. at 269). Here, the Texas courts have recognized a due process protection in excess of that recognized by this Court.

Thus, the particular procedural framework of this appeal raises serious concerns with its justiciability. It

is of note that Reed does not ask this Court to grant certiorari to review or consider the CCA's reliance on the expanded constitutional rule recognized in *Chabot*. Indeed, assuming merits review of Reed's claim, he, like all Texas defendants, benefitted from the expansive rule. Important too, the State is not presently challenging *Chabot* or the CCA's decision to recognize the existence of a due process claim for the State's unknowing presentation of false evidence.

Assuming merits review, the CCA necessarily applied the rule from *Chabot*, the very rule that Reed now implicitly asks this Court to create. Truly then, what Reed asks is for this Court to review the CCA's application of its own expansive constitutional rule. This Court, however, ordinarily does not grant certiorari review based upon mere misapplication of a properly stated rule of law. Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). The Court should not accept Reed's invitation to deviate from normal practice.

C. THE STATE DID NOT PRESENT FALSE EVIDENCE IN THE FORM OF EXPERT TESTIMONY.

Finally, Reed fails to show that the State used false evidence. Reed specifically takes issue with the expert testimony regarding the timing inferences to be drawn from intact spermatozoa found on vaginal swabs and the State's use of this testimony to create a timeline for the rape and murder Reed perpetrated. And yet this claim has been hashed and rehashed by state and federal

courts alike, all coming to the same conclusion: Reed cannot demonstrate that any of the expert testimony from trial was actually false.

To prove his false-evidence claim, Reed relied on three "new" pieces of evidence—a letter from Bode Cellmark (Bode), a letter from the Texas Department of Public Safety (DPS), and the affidavit of Purnima Bokka. Pet.Cert.App.257a–59a. It should be noted that Reed continues to be dilatory in bringing "new" evidence and claims to the courts. The Bode and DPS letters were both triggered by review requests from Reed on July 11, 2017. Pet.Cert.App.228a, 232a. Reed's inquiries come almost twenty years after his conviction. This is more extreme than the "extraordinary delay" in presenting Dr. Bayardo's affidavit, a delay that neither the federal district, Order on Report and Recommendation 12–13, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012), nor circuit court excused, *Reed VIII*, 739 F.3d at 768 n.5 ("[Reed] has provided no persuasive reason for waiting well over a decade to revisit Dr. Bayardo's testimony."). Reed's near twenty-year delay is per se dilatoriness. *Cf. Ex parte Smith*, 444 S.W.3d 661, 670 (Tex. Crim. App. 2014) ("A ten-and-a-half-year delay is extraordinary.").

Even so, these letters do not reflect changes in opinion or recantations. The DPS letter specifically rejects it: "I do not believe that Ms. Blakely's testimony constitutes professional negligence or professional misconduct[.]" Pet.Cert.App.232a. Although the letter recognized some "potential limitations" in the study Blakely referenced at trial, that is hardly a retraction, repudiation, or even noteworthy. Indeed, Reed's trial

counsel used that very study to cross-examine Blakely, noting that semen could be found in the vagina up to "120 hours later." 45.RR.17. And the letter is, in fact, the opinion of its author, not a determination of objective truth.

The Bode letter is even less helpful. It finds that Clement made "[u]nsatisfactory [s]tatements" by "otherwise testif[ying] beyond the scope of his/her expertise," but it in no way explains that determination. Pet.Cert.App.228a–29a. Rather, it is a form letter devoid of elucidation. This, again, is not a disavowal, disagreement, or unusual. Indeed, the letter does not even say that Clement's testimony is debatable, let alone wrong. And, like the DPS letter, it reflects the opinion of the author, not an unassailable certainty.

The Bokka affidavit is also unavailing. Her opinion, at bottom, is that sperm remains intact within the vagina for about 26 hours, and in some instances as long as 72 to 144 hours. SHCR-09, at 63. Reed has advanced this very same argument for more than a decade. In his third application, Reed relied on scientific articles to argue that "Blakely's testimony regarding the length of time morphologically intact sperm survives in the cervix or vagina is patently false." 1.SHCR-03, at 15–16 (citing William M. Green, *Rape: The Evidential Examination and Management of the Adult Female Victim* 106–08 (1988)). The CCA expressly considered and rejected this contention—almost ten years ago. Pet.Cert.App.192a–93a.

Then, in the seventh application, Reed made the same argument: "[t]he State's [e]vidence that [Reed's] [s]perm was [a]ssociated with a [s]exual [a]ssault is

[f]alse." 1.SHCR-07, at 55. Amongst the evidence to support this assertion, Reed proffered the affidavit of Dr. Joseph Warren who opined that "a period of twenty-four to seventy-two hours post coitus is a good rule of thumb for how long a forensic biologist can expect to identify intact sperm after intercourse." 3.SHCR-07, at 379. The CCA again rejected Reed's false evidence claim, partially premised on the timing inference to be drawn by morphologically intact sperm, finding that Reed failed to make even a prima facie showing—more than a two years ago. Pet.Cert.App.45a.

As to the proper-timing inference to be drawn from morphologically intact sperm, Pet.Cert.App.254a–62a, Reed has argued this point ad nauseum, providing studies showing that morphologically intact sperm can remain in a vaginal cavity for up to ten days, calling the State's evidence on this topic "patently false." Pet.Cert.App.182a. But the CCA held that, "even if we assume that [Blakely] and Dr. Bayardo underestimated the length of time that sperm will remain intact, we conclude that, given the other evidence in this case, [Reed] has failed to meet his burden." Pet.Cert.App.193a. Again, Reed provides the Court with more of the same—that sperm can possibly last longer than 26 hours in the vaginal cavity. But even that is questionable as Bokka's affidavit seems to support the State's case more than detract from it.

First, Bokka says that "recovery of intact sperm cells (head and tail) is typically low due to the nature of the sperm tails being fragile and susceptible to degradation, unlike the sperm heads." SHCR-09, at 63. This makes it appear that the State was lucky to even find any of

Reed's sperm morphologically intact, implying that quantity and recency account for the State's discovery of the any such sperm.

Second, Bokka essentially parrots Blakely's trial testimony: "The time frames for intact spermatozoa (with tail attached), that have been observed in living individuals, are up to 26 hours after intercourse in the vaginal cavity[.]" SHCR-09, at 63. Blakely testified that she had "published documentation that says that 26 hours is about the outside length of time that tails will remain on a sperm head inside the vaginal tract of the female." 45.RR.16. Bokka's affidavit is bolstering the State's case, not impugning it.

Third, Bokka states that "[s]ome studies have shown that intact sperm are *less commonly seen* as late as 72 to 144 hours in the vaginal cavity." SHCR-09, at 63 (emphasis added). Thus, Bokka is proving that it is less likely that the presence of Reed's intact sperm implicates a deposit greater than 26 hours earlier. Again, the Bokka's affidavit is in support of the State's case, not contrary to it.

Setting aside Bokka's support for the State's case, Reed's description of the trial testimony—in order to prove falsity—is myopic. When Blakely testified, she stated that intact sperm within Stites's vaginal cavity indicated "recent" deposit. 45.RR.13–14. When asked about the deposit timeframe, Blakely stated she had "published documentation that says that 26 hours is about the outside length of time that tails will remain on a sperm head inside the vaginal tract of the female." 45.RR.16. Trial counsel questioned Blakely about the "published documentation" by "Mr. Willot and Allard"

and she conceded that "components of semen" could be found up to 120 hours within the vaginal cavity. 45.RR.16–17. On recall, Blakely also conceded that she had found studies "where sperm was found in a body after 16 days." 55.RR.35–36.

Clement testified that, "[g]enerally, the longer spermatozoa is—the longer amount of time of it being deposited to it being detected[,] the more likely it's not going to be intact." 51.RR.55. Because sperm "tails are very fragile and tend to break off," that "can be an indicator of how long the spermatozoa has been in a particular place before it is actually collected and detected." 51.RR.55. Clement then said that, in her experience, she did not recall "finding intact sperm more than . . . 20 to 24 hours . . . from the time of the sexual assault [to] the time the collection was made." 51.RR.56.

Further, Dr. Bayardo testified that intact sperm meant "quite recent[]" deposit, saying that deposit could have been two days before the autopsy. 48.RR.121–22, 144. Considering all of the trial evidence, the possibility that sperm could remain morphologically intact longer than 26 hours was before the jury and they still found Reed guilty (most likely because Reed's evidence of a consensual relationship was weak—and has always been weak—so there was no reason why Reed's sperm should have been anywhere in Stites's body at any time). *See* Pet.Cert.App.192a–93a. Reed is attempting to take expert dispute and turn it into falsity, but this fails to show that the State presented false scientific testimony and this Court should deny any further review of this claim.

III. REED'S THIRD QUESTION FAILS FOR THE SAME THREE REASONS AS HIS SECOND.

Reed presented his assertion of actual innocence (as he poses the question here to this Court) in his eighth application. Pet.Cert.34–37; Pet.Cert.App.45a–46a. Reed claims that because the CCA included language regarding a "prima facie showing," it engaged in merits review. Pet.Cert.36. He cites *Davila* for this proposition. However, there the CCA was considering a *Brady* claim. Here, the CCA evaluated Reed's assertion of actual innocence as part of its analysis under the statutory framework of Article 11.071, Section 5. Pet.Cert.App.4a, 45a–46a; *see* Tex. Code. Crim. Proc. art. 11.071 § 5(a)(2). As such, it was not a merits determination but a state court's analysis of a state procedural bar exception. Thus, it suffers from the same jurisdictional infirmities as his second question. *See supra* Argument II(A); *see also Foster*, 136 S. Ct. at 1745.

Assuming arguendo the CCA's decision as to Reed's actual innocence claim involved merits review, such a decision did not involve a cognizable federal constitutional issue. Reed is correct that the CCA has recognized a freestanding actual innocence claim. *See Ex parte Elizondo*, 947 S.W.2d 202, 205–10 (Tex. Crim. App. 1996). However, this Court has steadfastly refused to do so. *See Herrera v. Collins*, 506 U.S. 390, 400–401, 416–417 (1993). So here again, the Texas courts have recognized a due process protection in excess of that recognized by this Court.

And again, Reed does not truly ask this Court to grant certiorari to review or consider the CCA's reliance on the expanded constitutional rule in *Elizondo* (other

than to ask the Court to "articulate the correct standard" without explaining how the CCA's standard is erroneous, essentially a request for declaratory judgment). Indeed, presuming merits review of Reed's actual innocence claim, he benefitted, like all Texas postconviction applicants, from the expansive constitutional rule. Importantly, the State is not currently challenging *Elizondo* or the CCA's decision to recognize the existence of a due process violation flowing from a demonstration of actual innocence.

Again, assuming merits review of Reed's actual innocence claim, it must have applied the expanded due process rule from *Elizondo*, the very rule that Reed asks this Court to recognize without justification. Thus, what Reed really asks is for this Court to review the CCA's application of its own interpretation of the Constitution, one this Court has repeatedly not recognized. But mere misapplication of a properly stated rule of law is hardly certiorari worthy. Sup. Ct. R. 10; *Ross*, 417 U.S. at 616–17. As with his second question, the Court should not accept Reed's invitation.

Finally, Reed cannot show his innocence for the same reasons that were above fully briefed. *See supra* Argument II(C). In other words, Reed has not proven the timing component of having found his sperm in Stites's vaginal and rectal cavities. And he has not proven a clandestine relationship either—his friends and family are not credible, and neither are decades delayed and unreliable "disclosures." And if Reed persists in a consent defense, then his history becomes relevant—he is a serial rapist who does not seek consent. And every court—state and federal—to consider Reed's assertions

of actual innocence have flatly rejected them without dissent. *See, e.g.*, *Reed VIII*, 739 F.3d at 766–74. This Court should not exhaust any further judicial resources on this wholly vacant and fact-bound assertion.

CONCLUSION

The petition for writ of certiorari should be denied.

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