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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Rodney Reed's conviction was based on expert testimony that the presence of his DNA on and in Stacey Stites's body was dispositive evidence that he murdered her. Today, none of the State's key trial witnesses, including the medical examiner, stand by that conclusion; and three distinguished pathologists agree (without contradiction by an expert from the State) that the State's case against Reed is "medically and scientifically impossible." But in opposing Reed's *Brady*, Due Process, and actual innocence claims, the State ignores two decades of factual development and relies only on the scientifically invalid and recanted trial record as conclusive proof of Reed's guilt. Only through this willful blindness can the State defend the terse, cursory orders of the Texas Court of Criminal Appeals (the "CCA") denying habeas relief.[1] The Court should decline the State's invitation to bury its head in the sand.

The unique facts of this case make it an ideal vehicle to address three key unresolved constitutional standards: (i) *Brady* materiality when

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[1] In another diversionary tactic, the State focuses on its punishment-phase case, even though it is irrelevant to the issues before the Court. Reed was never convicted of any crime relating to these allegations, and the State concedes he was acquitted of in the only case in which he was prosecuted.

The State's unsupported assertion that this inflammatory evidence would be admissible in response to a consent defense (Opp.-36) is contradicted by the trial record because Reed did present evidence of his and Stites's relationship and the State did not seek to introduce these allegations.

a key trial witness invokes the Fifth Amendment privilege during a postconviction hearing to avoid confronting his suppressed prior statements that discredit his trial testimony and implicate him in the murder; (ii) whether the State's use of scientifically invalid testimony violates Due Process; and (iii) a constitutional violation based on a claim of actual innocence.

I. THE COURT SHOULD CLARIFY THE CONSTITUTIONAL IMPLICATIONS OF A WITNESS'S POST-TRIAL INVOCATION OF THE FIFTH AMENDMENT PRIVILEGE IN THE *BRADY* CONTEXT.

The Petition asks the Court to clarify the standard for assessing *Brady* materiality when a key trial witness invokes the Fifth Amendment privilege during a postconviction hearing when confronted with his suppressed prior statements. This case presents the right framework for resolving this issue because: (i) the CCA correctly found that evidence of the witness's suppressed statements stated a *prima facie Brady* claim; (ii) the suppressed evidence is the witness's own statements with which defense counsel could have both impeached and implicated the witness in the murder; (iii) the witness, who had affirmatively waived the Fifth Amendment privilege at trial after invoking it before trial, invoked it again at the 2017 evidentiary hearing and refused to testify about his suppressed statements, which statements provided the basis for the hearing; and (iv) the Texas courts refused to consider the implications of the witness's invocation when assessing the materiality

of the evidence under *Brady* and, instead, pretended that he had not been called to testify at the hearing.

The State opposes review, arguing: (i) lack of jurisdiction, (ii) Reed's request to consider Jimmy Fennell's invocation is "forfeited" because Reed did not ask Fennell why he invoked the privilege, and (iii) Reed's inability to confront Fennell with his suppressed statements is irrelevant to Reed's *Brady* claim. (Opp.-14-24) The State's first argument ignores the record, its second ignores Fennell's invocation, and its third demonstrates why this case cries out for review.

A. The Question Presented Was Raised And Considered Below.[2]

The State's contention that Reed did not raise the question presented here for review is not accurate. The Petition presents the following question:

> When assessing under the *Brady* materiality standard whether disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable, how should a court consider the impact of a key trial witness's assertion of the privilege against self-incrimination and refusal to testify when confronted with the suppressed exculpatory evidence?

[2] This is not a jurisdictional issue. (*Compare* Opp.-14 *with Illinois v. Gates*, 462 U.S. 213, 219, 223-24 (1983) (declining to decide issue not passed upon below for prudential reasons)); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (same)).

(Pet.-i.) The Texas courts considered the *Brady* claim on the merits and, over Reed's objection, declined to consider Fennell's invocation when conducting the *Brady* analysis. The mere fact that the Texas courts' erroneous application of *Brady* also implicated Reed's confrontation rights does not constitute waiver.

Moreover, after Reed called Fennell to testify, the trial court accepted Fennell's sworn declaration invoking the Fifth Amendment privilege and granted the State's request that no adverse inference be drawn. Reed objected, arguing that the matter presented "a more complicated issue" in the context of the *Brady* hearing. (App.-323-27a.) In closing, Reed argued that the Court must evaluate the materiality of the evidence under *Brady* through the lens of Fennell's invoking the privilege to avoid confronting the suppressed evidence. Counsel explicitly identified Fennell's pattern of invoking the privilege: "Every time Jimmy Fennell is confronted, he hides behind the Constitution." (5 SHRR-08 at 39.)

Reed objected to the State-drafted findings and conclusions that the trial judge entered, which omitted that Fennell was called as a witness or had invoked the Fifth Amendment privilege. Reed's objections included Fennell's manipulation of the Fifth Amendment, his improper invocation at the evidentiary hearing, and the trial court's failure to consider those facts. (Applicant's Mem. & Objs. To Findings of Fact at 36-39.)

The State's efforts to preclude Fennell from testifying about his suppressed statements, while simultaneously arguing that Fennell's statements were "the only thing we are here on" (App.-321-22a),

show that the significance of Fennell's Fifth Amendment invocation in the context of a *Brady* hearing was lost on no one. When the State failed to preclude Reed from calling Fennell (App.-321-22a), the State objected again to Fennell's testimony and sworn invocation. (App.-324a.) Realizing that Fennell's invocation would deny Reed his right to confront Fennell with his suppressed statements, the State requested that the trial court order Fennell to remain at the hearing "in case he decides to change his mind" about testifying. (App.-326a.) During closing arguments, the State argued that, because Fennell refused to testify, Reed's *Brady* claim should be rejected as mere "hearsay of Jimmy Fennell." (5 SHRR-08 at 33) Finally, the state-sponsored findings omitted that Fennell appeared and refused to testify. (App.-4a, 9a-10a,26a-27a.)

B. The State's "Forfeiture" Argument Overlooks The Record.

The State contends that Reed "forfeited" his request that Fennell's invocation be considered when evaluating *Brady* because it was made via a sworn declaration. (Opp.-18) The State's argument lacks legal support, mischaracterizes Fennell's invocation, and disregards Reed's request that the trial court consider Fennell's invocation when assessing Reed's *Brady* claims.

The State argues, without authority, that a forfeiture resulted because Reed's counsel did not specifically inquire *why* Fennell invoked the Fifth Amendment, and then offers its own speculative reasons. (Opp.-17-19) The State's suppositions are irrelevant. Fennell's declaration provided his testimony:

> If I am called to testify and asked any questions regarding ... (B), any statements I may have made regarding my activities and whereabouts on April 22nd-23rd, 1996 … I will not answer the questions. Instead, I will respond to each question regarding the subjects by stating that, 'On the advice of counsel, I am declining to answer the question based on my Fifth Amendment right not to testify.'

(App.-325a.)

The State cites *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (Opp.-19), but that case says nothing about "forfeiture." *Baxter* concluded that the refusal to permit inferences postconviction in a disciplinary proceeding based on a prisoner's invocation of the Fifth Amendment was error. *Baxter*, 425 U.S. at 316. *Baxter* offers no support for the State's nonsensical forfeiture argument, and instead shows that the effect of a witness's invocation in habeas proceedings under *Brady* is a matter worthy of the Court's attention, regardless of why the witness invoked the privilege.

C. The Opposition Shows The Need For Clarification On How Postconviction Invocations Impact *Brady*.

The State eschews any analysis of *Brady* other than an oblique statement that materiality is "self-contained." (Opp.-21.) But the State neither supports this comment nor explains its meaning vis-à-vis a live evidentiary hearing. Instead, the State distorts the Petition as seeking a Sixth Amendment guarantee to an "indefinite right to re-confront

witnesses in subsequent proceedings," and then argues that the Sixth Amendment is irrelevant since Reed cross-examined Fennell at trial. (Opp.-19-21.) As the Petition and *amici* make clear, a witness's invocation during a *Brady* hearing critically impairs the retrospective assessment of the effects that the suppressed evidence, if disclosed, would have had on the trial. (Pet.-27-29; Brief For *Amicus Curiae* The Constitution Project At The Project On Government Oversight In Support Of Petition-Amicus.)

First, Reed's mere opportunity to cross-examine Fennell at trial does not satisfy his rights under the Confrontation Clause, as the State claims. (*See* Opp.-20.) The Confrontation Clause guarantees more than the "literal right to confront the witnesses at the time of trial"; it requires "a *full and fair opportunity* to probe and expose [] infirmities through cross-examination[.]" *Delaware v. Fensterer*, 474 U.S. 15, 18, 21-22 (1985) (emphasis added) (Opp.-19); *see also United States v. Owens*, 484 U.S. 554, 557 (1988) (Confrontation Clause "secur[es] an adequate opportunity to cross-examine adverse witnesses") (Opp.-20). The suppression of Fennell's inconsistent statements rendered Reed's trial examination of Fennell anything but a constitutionally meaningful exercise in confrontation.

Moreover, the State's contention that *Mitchell v. United States*, 526 U.S. 314, 321 (1999) "explicitly limited the right of confrontation to those witnesses testifying in a single proceeding" (Opp.-21) is false. *Mitchell* held that the defendant's guilty plea did not waive the Fifth Amendment privilege for her sentencing hearing. *Mitchell,* 526 U.S. at 321.

Mitchell did not “explicitly limit” confrontation rights—quite the opposite.

The State fails to meaningfully distinguish *Harshman v. Superintendent, State Corr. Inst. At Rockview*, 368 F. Supp. 3d 776, 784 (M.D. Pa. 2019). (Opp.-21-24.) *Harshman* demonstrates that, unlike in Texas, courts recognize the significant *Brady* implications that arise when prosecution witnesses invoke the Fifth Amendment postconviction to avoid confronting suppressed impeachment evidence that conflicts with their trial testimony. 868 F. Supp. 3d at 784-86.

In fact, the State’s authorities show that the Court frequently addresses the implication of restrictions on the scope of cross-examinations that “effectively … emasculate the right of cross-examination itself,” *Delaware*, 474 U.S. at 19, and Fifth Amendment invocations that amount to “‘a positive invitation to mutilate the truth[.]’” *Mitchell*, 526 U.S. at 322. Both constitutionally significant concerns are present here.

Finally, the Opposition is entirely silent regarding powerful forensic evidence of materiality. While the State’s forensic pathologist, Dr. Roberto Bayardo, has retracted his estimated time of death, the habeas court admitted unrebutted testimony from Dr. Michael Baden (supported by two other renowned forensic pathologists, Drs. Werner Spitz and Leroy Riddick) that Stites was not murdered between 3:00 and 5:00 a.m., as the State asserted at trial, but instead before midnight, which was when Fennell testified he and Stites were at home together. (*See* App.-202a, 210a-211a, 220a, 293a-294a.) The fact that Fennell gave an inconsistent statement to his

best friend about where he was and what he was doing when Stites was murdered is itself powerful evidence of Fennell's guilt. *See Lozano v. State*, 359 S.W.3d 790, 814 (Tex. App.—Fort Worth 2012, pet. ref'd) (police officer's inconsistent statements were evidence of consciousness of guilt for his wife's murder).

II. THE COURT SHOULD RESOLVE THE SPLIT IN AUTHORITY REGARDING RECANTED SCIENTIFIC EXPERT OPINIONS.

The State does not take a position on the proper Due Process standard for cases involving discredited scientific evidence, and instead argues a lack of jurisdiction and justiciability and attempts to muddy the record whether the State's experts' opinions were actually false. (Opp.-25-33.) These arguments fail.

A. Jurisdiction And Justiciability.

"Adequacy" is not met here because the CCA inconsistently and arbitrarily applied Texas's statutory procedural default provision, applying a *prima facie* evidence standard in one order but not the other. (Pet.-33-4; App.-5a, -45a.) *See, e.g.*, *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958) (state procedures deny Due Process when they are arbitrary or otherwise deprive litigant of reasonable opportunity to be heard). Moreover, the CCA presumptively decided Reed's federal Due Process claim.

The State's justiciability argument also mischaracterizes the CCA's order. The CCA expressly acknowledged that Reed presented federal

constitutional claims, and did not state that it declined to address them. (App.-5a.) Accordingly, the CCA presumptively relied upon federal law, and the order is appropriate for review. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

B. Invalid Expert Testimony.

No one except the State’s lawyers contends today that the opinions offered by the State’s experts at trial—that spermatozoa can remain intact for no more than 24-26 hours—were valid. (Opp.-28-33.)

The Opposition attempts to massage the new evidence and the trial record to pretend that there is some ambiguity in what the jury was told the science was and what the actual science is. But the Court cannot ignore that Dr. Bayardo, the medical examiner the State used at trial: (i) retracted his own testimony linking Reed’s DNA to the murder; (ii) affirmed that Blakely’s and Clement’s testimony on this topic was “incorrect” and not “medically or scientifically supported”; (iii) noted “medical literature finding that spermatozoa can remain intact in the vaginal cavity for days after death”; and (iv) concluded that the “‘very few’” spermatozoa he found on autopsy could have been deposited “days before” Stites’s death and were likely *not* deposited within the 24-hour time frame upon which the State built its case. (Pet.-19-21, App.-197a-199a.)[3] The

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[33] Dr. Bayardo’s recantation is supported by the opinions of three eminent pathologists. (*See* Pet.-21; App.-204a-206a (Werner Spitz, M.D.); Pet.-21; App.-211a (Michael Baden, M.D.); App.-224a (LeRoy Riddick, M.D.).)

Opposition ignores this inconvenient new evidence, and, incredibly, faults Reed for not persuading the State's experts to acknowledge their errors sooner. (Opp.-29.)

In addition to ignoring the pathologists, the State dismisses the DPS Crime Lab Director's and Bode's letters acknowledging the limitations and unsatisfactory nature of their employees' trial testimony as mere "opinion[s] of its author," rather than an "objective truth" or "unassailable certainty." (Opp.-30.)

Finally, the affidavit of Purnima Bokka does not suggest that Blakely's and Clement's testimony that 26 hours is the outside length of time sperm can remain intact was correct. To the contrary, Bokka states that intact spermatozoa has been observed as late as 144 hours in the vaginal cavity. The Opposition is simply trying to dissuade the Court from accepting review based on a factual dispute that does not exist.

III. THE STATE'S OPPOSITION SHOWS WHY THE COURT MUST CLARIFY THAT THE CONSTITUTION DOES NOT PERMIT THE EXECUTION OF A PERSON WHO IS INNOCENT.

A. The Court Has Jurisdiction.

This actual innocence claim is properly before the Court pursuant to Section 1257(a) because the CCA improperly denied the claim on its merits. (Pet.-36 (citing *In re Davila*, 888 F.3d 179, 188-89 (5th Cir. 2018).) The State contends that *Davila* is distinguishable because it involved a *Brady* claim

(Opp.-34), but that distinction fails because the Petition asserts *Brady* and actual innocence claims, and Davila's *Brady* claim necessarily entailed an actual innocence inquiry under Section 2244(b)(2)(B). *See Davila*, 888 F.3d at 186-87.

The State further asserts that the CCA's cursory order was merely "a state court's analysis of a state procedural bar exception." (Opp.-34.) This argument disregards *Davila*: the CCA's "'boilerplate dismissal'" for failure to make a *prima facie* showing simply does not constitute a dismissal "on the basis of an independent and adequate state procedural ground." *Davila*, 888 F.3d at 187-89. The State's citation to *Foster v. Chatman* is puzzling since it sustained jurisdiction and rejected the "adequate and independent state ground" argument. *See* 136 S. Ct. 1737 (2016). Reed's actual innocence claim is properly presented here.

B. The Court Should Articulate The Standard For A Federal Constitutional Claim Of Actual Innocence.

The Petition asks the Court to identify the legal standard for an actual innocence claim under the federal constitution. (Pet.-36-37.) Reed has made a comprehensive showing of his actual innocence and requests that the Court find that he has met the requisite standard. (Pet.-35.)

The CCA said nothing about what standard it applied in dismissing Reed's actual innocence claim.(App.-5a.) In his habeas petition, Reed argued that he satisfied the standards for actual innocence under both state and federal law. (App.-238a, 273a-274a (citing *Schlup v. Delo*, 513 U.S. 298 (1995) and

Ex parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996).) Accordingly, the State's misdirection should be rejected. The CCA's order lacks a clear statement of reliance upon state law and, is presumptively federal in nature, and, therefore, suitable for the Court's review. *See Michigan*, 463 U.S. at 1040.

C. Reed's Comprehensive Showing Of Innocence Has Not Been Rebutted.

Devoid from the Opposition is any: (1) scientific evidence that would revive the State's discredited theory of Reed's guilt; (2) expert opinion rebutting the evidence that Stites was murdered at a time Fennell testified he and Stites were at home together; and (3) meaningful response to the many witnesses spanning over a decade who have confirmed the relationship between Reed and Stites and implicated Fennell in the murder. The postconviction evidence that Reed has amassed, and which the State refuses to confront, clearly and conclusively shows that Rodney Reed is, in fact, innocent of the murder of Stacey Stites. This case presents the perfect vehicle to definitively recognize and define the contours of an actual innocence claim under the federal constitution.

CONCLUSION

Petitioner respectfully requests that the Court grant the Petition for a writ of certiorari.

Respectfully submitted,

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