CAPITAL CASE NO. 23-5916

In The
Supreme Court of the United States

STEVEN RICHARD TAYLOR,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET. AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Steven Taylor raped, stabbed, and choked Alice Vest to death over thirty-three years ago in September 1990. His 1991 first-degree murder conviction and death sentence have withstood over three decades of scrutiny in state and federal courts, with the Eleventh Circuit recently affirming the denial of 28 U.S.C. § 2254 relief on five COA-granted issues. Taylor now asks this Court to grant certiorari on three questions presented related to the Eleventh Circuit's decision and deprive his victims any hope of long-awaited justice in their lifetimes. This Court should decline his invitation and deny certiorari review of the following questions presented:

I. Was Taylor prejudiced by his trial counsel's failure to challenge the admissibility of Dr. Pollock's RFLP DNA testing at a state-law *Frye* hearing when the State presented evidence Taylor confessed and tried to escape from prison, the victim's jewelry was buried in the backyard of Taylor's residence at the time of the murder, Taylor was later seen digging in that area looking for something, Taylor tacitly admitted he expected his DNA to match the crime scene, and Taylor was the same secretor type as semen from the crime scene while his co-perpetrator (Gerald Murray) was not?

II. Are States required to explicitly provide the full name of an analyst who generated a redundant, second computer readout of DNA band lengths when both the readout and analyst's initials were provided to defense counsel?

III. Under AEDPA and this Court's pre-1994 interrogation and reinitiation decisions, did the State violate Taylor's invoked, Fifth Amendment right to counsel by asking "why?" in response to his question about when the DNA results would come back?

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The Eleventh Circuit's decision petitioned for review appears as *Taylor v. Sec'y, Fla. Dep't of Corr.*, 64 F.4th 1264, 1268 (11th Cir. 2023) (*Taylor VI*).

JURISDICTION

This Court has certiorari jurisdiction over the Eleventh Circuit's decision affirming the denial of 28 U.S.C. § 2254 relief. 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment's self-incrimination and due process clauses: "No persons . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment's counsel provision: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment's section one, due process clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of the process issued by a State court . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254 provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE AND FACTS

Steven Taylor raped, stabbed, and choked Alice Vest to death over thirty-three years ago in September 1990. He seeks certiorari review to further delay his already long-delayed death sentence. This Court should decline.

A. Capital Trial and Penalty Phase

A grand jury indicted Taylor on first-degree murder, burglary, and sexual battery. *Taylor v. State*, 630 So. 2d 1038, 1040 (Fla. 1993) (*Taylor I*). At trial, the State introduced the following overwhelming evidence of Taylor's guilt: (1) Dr. Pollock's testimony that Taylor matched semen recovered from a blouse at the crime scene at a probability of "one in six million" or "one in 23 million" if the semen came from a Caucasian; (2) testimony that the victim's unique jewelry was recovered from the backyard of Taylor's former residence; (3) testimony that Taylor, twice, went digging in the backyard of his former residence looking for something "he had left" in the area where the victim's jewelry was found; (4) Taylor's tacit admission to Detective Bogers that his DNA would match DNA at the crime scene; and (5) Tayor's statement to cellmate Timothy Cowart that he had been involved in a "messy" burglary where he stabbed, choked, and strangled a woman; (6) Taylor's admission to Cowart that the State "could place him, but not his accomplice, at the scene of the crime"; and (7) Taylor's prison escape attempt. *Taylor I*, 630 So. 2d at 1039-40; *Taylor v. State*, 260 So. 3d 151, 161 (Fla. 2018) (*Taylor IV*); (DA19:593-94.)

The State also introduced evidence that Taylor was near the murder scene around the time the victim was murdered and that he was a type A secretor, the same

secretor-type as semen found at the scene. *Taylor v. Sec'y, Fla. Dept. of Corr.*, No. 3:12-CV-444-BJD-MCR, 2021 WL 2003122, at *8 (M.D. Fla. May 19, 2021) (*Taylor V*). Gerald Murray (his co-perpetrator) on the other hand, was a type B secretor. (DA3:466, 469, 472 (deposition of Diane Henson)); *Murray v. State*, 692 So. 2d 157, 160 (Fla. 1997) ("Murray was eliminated as the donor of all" the "seminal and blood stains found at the crime scene"); *Murray v. State*, 3 So. 3d 1108, 1113 (Fla. 2009) ("Semen was also discovered on a blouse and on a comforter and was found to be the same blood type as Taylor but not Murray.").

The jury found Taylor guilty as charged and recommended death by a 10-2 vote.[1] *Taylor I*, 630 So. 2d at 1040-41. The court sentenced Taylor to death after finding three aggravators: (1) murder committed during a "burglary and/or sexual battery"; (2) murder committed for financial gain; and (3) murder committed in an especially heinous, atrocious, or cruel manner. *Id.* at 1041.

B. Direct Appeal Right-to-Counsel Issue (Question Presented III)

Before trial, in response to police questioning, Taylor invoked his Fifth Amendment right to counsel. (DA19:499-500.) Sometime later, Detective Bogers served a search warrant for Taylor's blood, saliva, and hair, and took Taylor to the jail nurse's station. (DA19:496-97, 498.) Taylor was not free to leave "before" the samples were taken. (DA19:502.). *After* the nurse took samples, Detective Bogers

[1] The Florida Supreme Court later rejected Taylor's claim under *Hurst v. Florida*, 577 U.S. 92 (2016). *Taylor v. State*, 234 So. 3d 649 (Fla. 2018) (*Taylor III*).

drove Taylor back home, Taylor asked how long it would take to get the results back, Bogers responded with, "Why?" and Taylor answered he was "just wondering when" police "would be back out to pick him up." (DA19:489, 501, 504.) Bogers' deposition indicates this conversation took place during the drive back home "five or ten minutes after" they "left the police station." (DA5:755-56.)

At trial, Taylor's counsel orally moved to suppress his statements as a violation of his asserted Fifth Amendment counsel right. (DA19:502.) Counsel argued Taylor "was in custody" and invoked his counsel right. (DA19:502.) The trial court overruled the objection, and the State admitted Taylor's tacit admission his DNA would be at the crime scene into evidence. (DA19:503-05.)

On appeal, Taylor argued the State violated his Fifth Amendment rights. (IB:8-12.) The State explicitly argued that there was no interrogation under *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980), that Taylor was not in custody, and that he reinitiated with police. (AB:17, 19-22.) In reply, Taylor argued *Innis* had "no relevance to" his case because the "issue *is not whether the police questioned Taylor* but if the Defendant's simple question initiated further contact with the detective as required by *Edwards v. Arizona*, 451 U.S. 477, 485 (1981), to justify a belief that he wanted to talk with police. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983)." (RB:2) (emphasis added).

The Florida Supreme Court (FSC) noted Taylor's concession that "he was not being interrogated." *Taylor I*, 630 So. 2d at 1041. It then rejected Taylor's suppression claim on three alternative grounds: (1) Taylor made the statement "after the samples

were taken" when "he was free to leave" and not in custody; (2) "Taylor was not being interrogated" when "he made the statements"; and (3) Taylor reinitiated and waived his asserted right. *Taylor I*, 630 So. 2d at 1041.

C. State Postconviction Proceedings

Taylor next moved for state postconviction relief raising the following relevant claims: (1) a *Strickland*[2] claim for failure to request a state-law *Frye*[3] hearing to challenge Dr. Pollock's DNA evidence; (2) a *Brady*[4] claim for failure to disclose the full name of analyst Shirley Zeigler; (3) a *Strickland* claim for failure to request a state-law *Richardson*[5] hearing when Zeigler's name came out at trial. *Taylor v. State*, 62 So. 3d 1101, 1110, 1115-17 (Fla. 2011) (*Taylor II*); (PCR5:789-92.) The state court held an evidentiary hearing on these claims. (PCRVols.7-9.) Witnesses testified trial counsel's file was destroyed in a fire. (PCR7:1174; PCR8:1407.)

1. IAC[6]-Failure to Request State-Law *Frye* Hearing (Question Presented I)

Taylor argued lead trial counsel Frank Tassone ineffectively failed to request a state-law *Frye* hearing to challenge Dr. Pollock's RFLP[7] DNA testing testimony. *Taylor II*, 62 So. 3d at 1110.

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

[3] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

[5] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

[6] Ineffective Assistance of Counsel.

[7] Restriction fragment length polymorphism. *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 58 (2009).

Prior to trial, Dr. Pollock analyzed DNA from a blouse as #28I, the victim's known standard as #67A, and Taylor's known standard as #VIII-4A. (PCREx.Vol.1:49, 110.) He used a nine-step, RFLP method to determine the base pair band lengths at different loci and compare them with Taylor's known standard band lengths at those loci. (DA19:573-93.) On the final step, he computer-generated calculated fragment length readouts that objectively measured the base pairs of DNA at different loci. (DA19:580-81, 590-92.) Analyst Shirley Zeigler did a second computer readout. (PCR7:1259-60.) Her computer readout did not significantly deviate from Dr. Pollock's and was in fact redundant to his. (PCR7:1274, 1279-81, 1284-85; PCREx.Vol.1:57-64.)

Taylor's lead trial counsel and DNA expert received a copy of the entire DNA casefile in Taylor's case before trial. (PCREx.Vol.1:16; PCREx.Vol.1:17; PCREx.Vol.2:221-22.) The casefile included the computer readouts from both Dr. Pollock and Zeigler. *Taylor II*, 62 So. 3d at 1116. Dr. Pollock's readouts were identified as "analyst:jmp" and Zeigler's were identified as "analyst:sfz." (PCREx.Vol.1:57-64.) Taylor's expert reviewed the casefile and determined the "DNA testing was done properly" or that he "didn't have any major complaints." (PCR9:1387; DA17:60, 63-64.) Counsel also had "some discussion" with his expert about the differences in protocol between the FBI, FDLE, and Cellmark. (PCR8:1389.)

In postconviction, lead trial counsel testified he did not recall his level of awareness and research into *Frye* **(not that he was unaware of it and did no research)**. (PCR8:1393-98.) He did not discuss *Frye* with his expert and believed he

should have requested a *Frye* hearing. (PCR8:1395-97.) Second-chair counsel Refik Eler testified that lead counsel spent "many hours" on the DNA analysis in preparation for Taylor's trial. (PCR8:1501.)

Dr. Pollock testified that the procedures he utilized were accepted in the scientific community and thoroughly explained the basis for his conclusions on what techniques were generally accepted in his field. (PCR9:1685-87, 1722, 1738-39.)

The FSC determined trial counsel could not be deemed deficient for failing to predict changes in Florida law regarding *Frye* that may have indicated he could lodge a *Frye* objection to Pollock's testimony. *Taylor II*, 62 So. 3d at 1110-11. In 1995, years after Taylor's trial, "as an issue of first impression," the FSC had clarified that (under Florida law) DNA-related *Frye* analysis requires inquiry into both whether: (1) the type of DNA testing used is generally accepted, and (2) whether the particular procedures employed to arrive at the results are also generally accepted. *Hayes v. State*, 660 So. 2d 257, 262-65 (Fla. 1995). *See also Murray v. State*, 692 So. 2d 157, 161 (Fla. 1997) (noting the FSC later "clarified that each stage of the DNA process" is "subject to the *Frye* test" in the late/mid-1990s). But the "only authority presented by Taylor during postconviction that both challenged the use of DNA evidence" and "existed at the time of the trial" were "academic articles and isolated, nonbinding decisions." *Taylor II*, 62 So. 3d at 1111. The FSC held counsel was not deficient without analyzing prejudice. *Id.*

2. Zeigler *Brady* Claim (Argued Under Question Presented II)

Taylor raised a claim that the State's failure to disclose Zeigler's name until during trial was a violation of *Brady*. *Taylor II*, 62 So. 3d at 1116-17. Taylor conceded Zeigler's initials were disclosed in the calculated fragment readouts provided to the defense at least three days before trial. *Id.* at 1115-17. Zeigler's full name was revealed at trial during cross-examination. *Id.* at 1116.

The FSC initially found this *Brady* claim procedurally barred under state law because it could have been raised on direct appeal. *Taylor II*, 62 So. 3d at 1116-17. The FSC also determined there was no suppression because counsel had Zeigler's initials from the computer readouts prior to trial and that Zeigler's name was not material because she did not disagree with Dr. Pollock's findings. *Id.* at 1116-17.

3. IAC Failure to Request a State-Law *Richardson* Hearing (Argued Under Question Presented II)

Taylor argued counsel ineffectively failed to request a state-law *Richardson*, discovery-violation hearing once Zeigler's name was revealed at trial. *Taylor II*, 62 So. 3d at 1112-13. Her initials had previously been disclosed in her computer-generated readouts. The FSC held, under state law, that a *Richardson* hearing "was not appropriate under the circumstances" counsel faced and, therefore, there was no deficient performance. *Id.* at 1112. Alternatively, the FSC held Taylor was not prejudiced. *Id.*

D. 28 U.S.C. § 2254 Litigation

In 2012, Taylor petitioned for section 2254 relief on four relevant grounds: (1) a *Brady* claim pertaining to the State's alleged failure to disclose Zeigler; (2) a *Strickland* claim challenging counsel's failure to pursue a state-law *Frye* objection to the DNA evidence; (3) a *Strickland* claim counsel ineffectively failed to raise a *Richardson* objection when Zeigler's name came out at trial; (4) a claim that the admission of his statements violated his asserted Fifth Amendment right to counsel. (Doc.1:31-78, Doc.2:7-49.)

Neither Taylor's petition nor his memorandum of law referenced *Innis* or argued the FSC's decision contravened or unreasonably applied it. (Doc.1:74-76, Doc.2:43-49.). Taylor solely contested the FSC's no-custody and reinitiation decisions. (Doc.1:74-76; 2:43-49.) He *did not contest* the FSC's determination that no interrogation occurred or even cite *Innis,* in his petition, memorandum of law, or reply despite the State's explicit no-interrogation arguments. (Docs.1:74-76; Doc.2:43-49; Doc.13:101-02, 105; Doc.18:27-32.)

The district court denied relief **nine years** after Taylor filed his petition. (Doc. 58.) Taylor's rehearing motion recognized the district court found there was no interrogation and did not dispute that ruling. (Doc. 60:20-22.)

E. Eleventh Circuit Affirmance

Taylor appealed to the Eleventh Circuit, which granted a certificate of appealability (COA) on five issues. Those issues included: (1) whether counsel ineffectively failed to raise a state-law *Frye* objection to Dr. Pollock's DNA testimony; (2) whether counsel ineffectively failed to request a *Richardson* hearing on the failure to disclose Zeigler's full name until trial; (3) whether Taylor's tacit admission his DNA would be found at the crime scene should have been suppressed as a violation of his invoked right to counsel. *Taylor VI*, 64 F.4th at 1268. The Eleventh Circuit did not grant COA on Taylor's claim (which the FSC found procedurally barred) that the failure to disclose Zeigler's full name was a *Brady* violation.

On the IAC-*Frye* issue, the Eleventh Circuit held there was no prejudice on de novo review without analyzing whether the FSC's no-deficiency holding was unreasonable under AEDPA.[8] *Id.* at 1270-72.

On the IAC-*Richardson* issue, the Eleventh Circuit held there was no prejudice on de novo review without reaching the reasonableness of FSC's no-deficiency holding under AEDPA. *Id.* at 1272-73. Without explanation, the Eleventh Circuit employed de novo review even though the FSC had explicitly held there was no prejudice.

On the Fifth-Amendment-counsel-violation issue, the Eleventh Circuit held the FSC's no-interrogation holding was reasonable under AEDPA without analyzing: (1) preservation; (2) Taylor's concession before the FSC that he was not being

[8] Antiterrorism and Effective Death Penalty Act of 1996.

interrogated; (3) the FSC's no-custody holding; or (4) the FSC's reinitiation/waiver holding. *Id.* at 1273.

F. Certiorari Petition

Taylor timely petitioned for certiorari review of the Eleventh Circuit's decision on October 24, 2023. He seeks review of "three" questions presented:

> 1. Was Petitioner prejudiced by trial counsel's failure to move for adversarial testing of the State's novel DNA testing and statistics under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)?
>
> 2. Does a State's obligation to disclose exculpatory DNA analysis from one of its own experts depend on whether the State analyst "d[id] any tests or wr[o]te a report"?
>
> 3. Did an officer's question to Petitioner without counsel present, after Petitioner invoked his right to counsel, constitute an illegal interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980), and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983)?

Petition at i (alterations in original).

This is the State's[9] Brief in Opposition. The State opposes Taylor's request to further delay proceedings on his capital sentence imposed over three decades ago by certiorari review. *Cf. Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

[9] The Secretary of the Florida Department of Corrections will be referred to as the State in this brief.

REASONS FOR DENYING THE WRIT

Steven Taylor would rather die in prison than give his victims long-deserved justice for the heinous rape and murder he committed in 1990. The following three questions presented in his petition are nothing more than his latest attempt at extending the over-eleven-year delay he has achieved in federal court so far: (1) Was he prejudiced by trial counsel's failure to request a state-law *Frye* hearing to challenge the admissibility of Dr. Pollock's RFLP DNA testing? (2) Was the State required to provide the full name of an analyst who merely generated a second, redundant, computer readout of the DNA band lengths when the State provided both the readout and her initials to defense counsel? And (3) Did the State violate Taylor's invoked right to counsel by asking "why?" in response to his question about when the DNA results would come back.

But before analyzing Taylor's questions presented individually, there are two reasons to deny certiorari applicable to all three. The first is Taylor makes no attempt to meet the normal certiorari standard. *See* Sup. Ct. R. 10. He points to no real lower-court conflict, or conflict between the lower court's decision and this Court, and barely suggests the questions he presents are important and unsettled. Certiorari is rarely warranted on questions like these. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari is primarily used to resolve lower-court conflicts on federal law); *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987) (recognizing issues that have "divided neither the federal courts of appeals nor the state courts" rarely merit this Court's review). *See also California v. Carney*, 471 U.S.

386, 400-01 & n.11 (1985) (Stevens, J., dissenting with Brennan and Marshall, JJs.) (explaining conflict aids this Court in identifying "rules that will endure" on difficult questions of law)

The second reason is simply the delay that Taylor has achieved so far. He was indicted, convicted, and sentenced to death in 1991. (DA1:78-80; DA2:286-309; DA21:690, 797-98, 801, 879). The FSC affirmed his judgment and death sentence in December 1993 and the denial of postconviction relief in February 2011. *Taylor I*, 630 So. 2d at 1039, *cert. denied*, 513 U.S. 832; *Taylor II*, 62 So. 3d at 1106, *cert. not filed.* Federal-court delay tacked on over eleven years from the filing of Taylor's 28 U.S.C. § 2254 petition to the Eleventh Circuit's denial of his rehearing motion. (See Doc.1 (petition filed April 2012); *Taylor v. Secretary*, 21-12883 Docket No. 70 (11th Cir.) (denying rehearing May 2023).

This Court has bemoaned delays shorter than this one between sentence imposition and *execution*, much less the mere completion of section 2254 litigation. *Bucklew*, 139 S. Ct. at 1133 (two-decade delay). It has recognized capital defendants have a special incentive to drag out their court proceedings. *Rhines v. Weber*, 544 U.S. 269, 276-78 (2005). And it has also recognized the difficulties attendant to retrials after such lengthy delays. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (unavailable/stale evidence, faulty memory, missing witnesses, and the pain of retrial on the victims). The eleven-year, federal-court delay in this case can hardly be squared with Congress's intent to expedite capital section 2254 litigation. *See Rhines*, 544 U.S. at 276-78 (recognizing one of AEDPA's chief purposes was to reduce delays

in capital cases); 28 U.S.C. § 1657(a) (requiring expedited section 2254 litigation). It is time for that delay to end.

This Court should deny certiorari and protect Taylor's over-three-decade-long-settled judgment from further review. *Cf. Bucklew*, 139 S. Ct. at 1133-34 (encouraging federal courts to protect long-settled state judgments); *Brown v. Davenport*, 596 U.S. 118, 134 (2022) (even a petitioner "who prevails under AEDPA must still today persuade a federal habeas court that 'law and justice require' relief") (quoting 28 U.S.C. § 2243). Since none of Taylor's questions presented would preclude either his first-degree murder conviction or death sentence, the long delay in this case alone is an independent reason to deny certiorari. *Cf. Coleman v. Balkcom*, 451 U.S. 949, 958-59 (1981) (Rehnquist, J., dissenting from certiorari denial) (arguing that imposition of a capital sentence followed by "endlessly drawn out legal proceedings" makes a "mockery of our criminal justice system" and that when "society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system"). This Court should deny certiorari simply because this capital case has dragged on so long.

All that said, the State will deal with each of Taylor's questions presented in turn. None of them warrant this Court's review. The decision below properly applied federal law, does not implicate an important or unsettled federal question, and there is no conflict between it and this Court, another United States Court of Appeals, or

any state court of last resort. This Court should deny certiorari and bring this case one step closer to true finality: Taylor's execution.

I.

Was Taylor Prejudiced by His Trial Counsel's Failure to Challenge the Admissibility of Dr. Pollock's RFLP DNA Testing at a State-Law *Frye* Hearing?

Taylor's first question presented asks this Court to review the Eleventh Circuit's de-novo-review holding Taylor was not prejudiced by his counsel's failure to seek a state-law *Frye* hearing to challenge Dr. Pollock's RFLP DNA evidence. *See Taylor VI*, 64 F.4th at 1270-72. The FSC held counsel was not deficient without analyzing the prejudice prong while the Eleventh Circuit did the opposite. *Compare Taylor VI*, 64 F.4th at 1270-72, *with Taylor II*, 62 So. 3d at 1110-1111.

This Court should deny certiorari review over this question presented for five reasons. First, the answer to this question in Taylor's case is of extremely limited precedential value. Second, the Eleventh Circuit's prejudice-prong decision was highly factbound. Third, this case is a poor vehicle to refine *Strickland*'s prejudice prong because it is intertwined with thorny questions of state law and retroactivity issues. Fourth, Taylor would not likely obtain relief under 28 U.S.C. § 2254 in light of the FSC's reasonable, no-deficiency holding. Finally, Taylor's prejudice claim fails on the merits, rendering any prejudice-prong refinements academic in his case.

But before addressing those reasons, the State is obligated to point out a repeated factual misstatement in Taylor's arguments. He continually asserts counsel failed to perform any research into *Frye* and was ignorant of *Frye* law. But at the 2007 postconviction evidentiary hearing, lead trial counsel repeatedly testified he could not recall his level of awareness and research into *Frye* back in the early 1990s. (E.g.,

PCR8:1393 ("It's very difficult for me to go back and tell you what I did or did not know a number of years before. I would say probably not."); PCR8:1398 ("I do not recall doing any research or having any knowledge about the *Frye* test at the time of Mr. Taylor's case."). He did not testify he was in fact unaware of *Frye* and did no research on it.

A. The *Strickland* Prejudice Question in Taylor's Case Has Limited Precedential Value Because RFLP DNA Testing has Long Been "Obsolete" and Florida no Longer Uses *Frye*.

This Court should initially decline to grant certiorari on this question because it requires evaluating the prejudicial impact of long-obsolete technology and an admissibility standard no longer used in Florida. *Cf. Illinois v. Fisher*, 540 U.S. 544, 549 (2004) (Stevens, J., concurring) (agreeing with the decision to reverse while arguing the case did not merit this Court's review because of its limited precedential value).

RFLP DNA testing (the testing used in Taylor's case) has been obsolete for about twenty-five years. *Phillips v. State*, 226 Md. App. 1, 13 (2015) (recognizing that by "1997" the "RFLP method for DNA analysis had been superseded by a new technique, the polymerase chain reaction method"), *aff'd on other grounds*, 451 Md. 180 (2017); *People v. Nelson*, 43 Cal. 4th 1242, 1258 (2008) (recognizing "RFLP testing is obsolete" and was replaced by "polymerase chain reaction" testing that used "short tandem repeats," or "PCR-STR" for short). Florida was utilizing PCR testing by 1997. *Murray v. State*, 692 So. 2d 157, 163-64 (Fla. 1997) (noting the State utilized PCR DNA testing).

Taylor's question presented thus asks this Court to assess the prejudicial impact of an "obsolete" DNA technology that has been long surpassed. *See Nelson*, 43 Cal. 4th at 1258 (explaining PCR testing "has many advantages over RFLP testing," including the ability to test a "far smaller sample," decreased susceptibility to "sample degradation," being "simpler and less time consuming," and greater power to discriminate between samples). But since RFLP DNA testing is no longer utilized, there is little, if any, precedential value in analyzing the prejudice flowing from its admission. That conclusion is underscored by the fact that Florida no longer even uses *Frye* to decide admissibility. *See In re Amends. to Fla. Evidence Code*, 278 So. 3d 551, 551-54 (Fla. 2019) (adopting *Daubert*[10] instead of *Frye* to govern Florida admissibility law). This Court should not grant certiorari to review the prejudicial impact of an obsolete DNA technology assumed inadmissible based on a standard Florida no longer uses. Taylor's question presented is of far too limited precedential value to merit review by this Court. *See Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting from denial of certiorari) (recognizing the questions presented by a capital defendant were "of importance only to petitioner himself and therefore" were "not suitable candidates for the exercise of our discretionary jurisdiction" but arguing this Court should grant certiorari to head-off more federal delays).

[10] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

B. The *Strickland* Prejudice Question in this Case Is Highly Factbound.

Certiorari review is also not warranted due to the highly factbound nature of the prejudice inquiry here. *See Cash v. Maxwell*, 565 U.S. 1138 (2012) (statement of Sotomayor, J., respecting the denial of certiorari) ("Mere disagreement with" a "highly factbound conclusion is, in my opinion, an insufficient basis for granting certiorari.").

The Eleventh Circuit found there was no prejudice under *Strickland* based on two alternative holdings. The first holding was that Taylor likely would not have prevailed on a state-law *Frye* hearing at trial. *Taylor VI*, 64 F.4th at 1271. The second was the lack of a reasonable probability of a different outcome even if Taylor prevailed at the *Frye* hearing due to the strength of the State's evidence. *Taylor VI*, 64 F.4th at 1271-72 (finding no prejudice because the State "presented evidence of Taylor's location at the time of the murder; the jewelry found buried at his former residence; that he was seen digging near the jewelry's location; his tacit confession" to law enforcement; his "jailhouse confession to cellmate Timothy Cowart; and testimony that Taylor—but not his co-defendant—matched the secretor type of the semen found at the crime scene").

The Eleventh Circuit's second no-prejudice holding independently supports its affirmance and is incredibly factbound. The Eleventh Circuit performed a context-dependent inquiry of the non-RFLP-DNA evidence supporting the State's case (on de novo review no less) and determined there was no reasonable probability of a different verdict under *Strickland* even if Taylor prevailed at a

state-law *Frye* hearing because of that evidence. Even if the result of that prejudice analysis was wrong (a conclusion the State of course disputes), the factbound nature of it is reason enough to deny certiorari. This Court should not review the Eleventh Circuit's highly factbound no-prejudice conclusion in this over-thirty-year-old death case.

C. This Case is a Poor Vehicle to Refine *Strickland*'s Prejudice Prong Because it Is Intertwined with Thorny Questions of State Law and Federal Retroactivity

Federal issues wrapped in difficult, unresolved questions of state law are rarely appropriate subjects for certiorari review. *See N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. 1145, 1578 (2009) (statement of Kennedy, J., respecting the denial of certiorari). Resolving Taylor's question presented is impossible without answering the now-obsolete questions of whether Florida law under *Frye* would have required the exclusion of Dr. Pollock's RFLP testing or calculations.

Taylor wants this Court to guess what the FSC would have done on direct appeal if Taylor preserved his state-law *Frye* issue below based on *Frye* decisions issued years after his trial. But the fact remains that no Florida court has ever actually applied the *Frye* test to Taylor's case and held Dr. Pollock's results would have been excluded. Without that definitive statement of state *Frye* law applied in Taylor's case, his case is a poor vehicle to discuss *Strickland*'s prejudice prong. *Cf. Babcock v. Kijakazi*, 595 U.S. 77, 82 n.3 (2022) (repeating the well-worn admonition that this is a Court of final review, not first view).

Taylor's focus on direct-appeal-reversal also raises a retroactivity problem, namely: would a rule that reversal on appeal is relevant to *Strickland* prejudice for a trial-counsel-IAC claim apply to Taylor's case at all? *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must" determine retroactivity "before considering the merits of the claim."); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (refusing to reach the merits when the petitioner asked for a new rule to be applied to his case on habeas review because any decision would not have been retroactive). *Cf. Chaidez v. United States*, 568 U.S. 342, 347 (2013) (holding a *Strickland* rule requiring counsel to advise his client of certain matters was new and therefore not retroactive).

Retroactivity requires this Court to answer three questions: (1) When did Taylor's conviction become final? (2) Is the rule this Court announces actually new when viewed from the legal landscape existing at finality? And (3) Is the new rule substantive? *See Beard v. Banks*, 542 U.S. 406, 411 & n.3 (2004); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1555–62 & n.3 (2021) (eliminating the watershed procedural rule exception to non-retroactivity and recognizing substantive rules are automatically retroactive).

Taylor's conviction became final in 1994 and a rule that an appellate reversal is relevant to his trial-counsel-IAC claim is certainly new when viewed from 1994's legal landscape. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("When a defendant challenges a conviction, the question is whether there is a reasonable

probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."); *Purvis v. Crosby*, 451 F.3d 734, 739 (11th Cir. 2006) (recognizing that viewing the prejudice on appeal is "arguably" "pushing things given what the Supreme Court said in *Strickland* about measuring the effect of counsel's errors at the guilt stage of a trial against the result of the trial instead of the appeal"). And a rule that appellate reversal is relevant to assessing prejudice from a trial counsel's deficiency is not substantive and therefore not retroactive. *Edwards*, 141 S. Ct. at 1555-62 & n.3. So Taylor could not receive the benefit of the appellate prejudice rule he seeks to impose on his IAC-trial-counsel claim anyway.

In short, the state-law and retroactivity issues are sufficient reasons to decline certiorari on Taylor's first question.

D. Taylor Would Not Likely Obtain Relief Because the FSC's No-Deficiency Holding Was Reasonable.

This Court should also deny review of the Eleventh Circuit's no-prejudice holding because Taylor could not legally obtain 28 U.S.C. §2254 relief even if that issue was resolved in his favor. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (stating certiorari is the power "to correct wrong judgments, not to revise opinions"). The FSC reasonably rejected Taylor's IAC-*Frye* claim on no-deficiency grounds that no federal court has license to second-guess under AEDPA.

Taylor's arguments require this Court to adopt the unsupportable assumption that he knows Florida law better than the FSC. He does not. The FSC had not applied *Frye* to DNA before 1995 and had not clarified that a DNA-*Frye* analysis required showing **both** the general technique (in this case RFLP testing) and specific methodology (in this case the protocols and statistical analyses) were generally accepted. That conclusion was certainly not a foregone one because *Frye* does not indisputably require showing the *way* the general technique was applied in a specific case was generally accepted. *See People v. Venegas*, 18 Cal. 4th 47, 78 (Cal. 1998) (noting, in an RFLP DNA case, that California's test added a "third prong" to *Frye*: "whether the procedures actually utilized in the case were in compliance with that methodology and technique, as generally accepted by the scientific community."); *State v. Kalakosky*, 121 Wash. 2d 525, 540 (Wash. 1993) (Once "a *Frye* determination is made, a defendant's objection to the particular testing procedures utilized in a given case should be analyzed under the usual standards for admission of evidence."). The only Florida court that had engaged with Taylor's *Frye* issue before his trial, rejected *Frye* as the wrong test. *Andrews v. State*, 533 So. 2d 841, 847 n.6 (Fla. 5th DCA 1988).

The FSC's holding that counsel was not deficient for failing to predict refinements in *Frye* that would have allowed him to challenge the specific methodology used in this case (rather than just RFLP testing generally) was reasonable under AEDPA. That reasonable ruling is another reason to decline certiorari.

E. The Eleventh Circuit's No-Prejudice Holding Is Correct.

Finally, this Court should not prolong this over-three-decade-old death case because the Eleventh Circuit correctly denied section 2254 relief on no-prejudice grounds. Taylor's jury had a wealth of evidence to convict Taylor, and the secretor type implicated him but not his co-perpetrator (Murray). The State's RFLP DNA testimony, while certainly useful, was not critical to Taylor's conviction, particularly since the probability calculations the State introduced (one in six million or one in twenty-three million if the perpetrator was Caucasian) were not overwhelming. There is no reasonable probability, even if counsel could have excluded the RFLP evidence entirely, that the jury "would have had a reasonable doubt respecting" Taylor's "guilt." *See Strickland*, 466 U.S. at 695.

II.

Are States Required to Explicitly Provide the Full Name of an Analyst Who Simply Generated a Redundant, Second Computer Readout of DNA Band Lengths When Both the Readout and Analyst's Initials Were Provided to Defense Counsel?

Taylor's second question (on first blush) appears to raise a rather straightforward question about a state's due-process obligation under *Brady*. But his straightforward question obscures the decisional context in which the question arises: (1) a decision not to issue COA on his Zeigler/*Brady* claim; and (2) a holding that counsel's failure to request a ***state-law*** *Richardson* hearing when he learned Zeigler's name at trial did not prejudice Taylor.

That means addressing Taylor's second question in this case would require analyzing antecedent issues about the propriety of failing to issue COA, ineffectiveness, and state law. Whatever abstract merits this question has, the non-*Brady* issues it is wrapped in make this case a poor vehicle to answer it. *See N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. 1145, 1578 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (cases with even certiorari-worthy questions not worthy of review when tied to difficult antecedent questions). It would be far better and easier to await a straight *Brady* claim to address Taylor's question presented without having to deal with either the COA or ineffectiveness/state-law wrapping.

Taylor's question presented also relies on several disputed issues of fact, including a dispute about whether Zeigler had any exculpatory material. *See Saye v.*

Williams, 452 U.S. 926, 930 (1981) (Rehnquist, J., dissenting from certiorari denial) (recognizing cases involving factual disputes are not "particularly attractive" candidates for review but arguing disputed facts were not integral to the legal issues); *Harry Needelman v. United States*, 362 U.S. 600, 601 (1960) (Frankfurter, J., dissenting from dismissal of certiorari as improvidently granted) (arguing, in part, the issues did not raise disputed issues of fact and the Court should have retained the case). The State disputes that Zeigler would have testified that two of Dr. Pollock's probes were inconclusive, that Zeigler would have confirmed DNA from the female fraction could not be matched to Taylor, and that Zeigler could have testified to FDLE's procedures deviating from the FBI protocols. See PCR7:1260 (Zeigler stating that if two analysts ran the DNA-loci bands through the same computer and the lengths fell within an acceptable range then the analysts agreed on the results). The bottom line is that, in postconviction, Zeigler was asked about different band lanes than the ones Dr. Pollock actually used, an override procedure Dr. Pollock never used, and was never asked about the male fraction/female fraction identification issue. (See PCR7:1274-75, PCR9:1690-91,1701-02, 1714-25.) Ziegler herself testified that the second readout she generated was nothing more than "redundant piece of material" because it corresponded with Dr. Pollock's results. (PCR7:1278.) The nuanced, obsolete, and disputed issues of fact in this question warrant the denial of certiorari.

In any event, the State will analyze the review-worthiness of the decisions undergirding Taylor's second question as they should have been presented: separately. But, as explained in greater detail below, it is not even clear that Taylor's

second question relates to either the Eleventh Circuit's COA denial or holding Taylor suffered no prejudice from his counsel's failure to invoke a state-law, discovery-violation procedure. Taylor's lack of clarity and the context-driven ambiguity in this question presented are independent reasons to deny review. *See* Sup. Ct. R. 14.1 (only questions set out or those fairly included therein will be considered), 14.4 (failure of clarity a reason to deny certiorari). *See also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535-36 (1992) (explaining questions presented both provide respondents with the specific ground petitioner urges and assist this Court in efficiently channeling its unfettered discretion and resources).

A. Did the Eleventh Circuit Correctly Deny COA on Taylor's *Brady* Claim Related to Shirley Zeigler?

Taylor's Petition spends several pages arguing this Court should grant review of the Eleventh Circuit's unexplained denial of COA on Taylor's *Brady* claim that the State suppressed Zeigler's name. But the Zeigler/*Brady*-COA denial is not worthy of this Court's review for several reasons.

For starters, this subsidiary COA question is not fairly included in Taylor's second question presented. *See* Sup. Ct. R. 14.1. Taylor's second question asks this Court to resolve a substantive issue about the State's disclosure obligations. His question includes nothing about the procedural decision to grant/deny COA. That failure is particularly fatal because COA can be (and probably was in this case) denied on grounds entirely unrelated to the merits. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (COA on procedurally barred claims requires showing reasonable jurists would

disagree about both the procedural *and* substantive aspects of the claim's denial). Since COA can be denied exclusively on procedural grounds, the Eleventh Circuit's COA-denial is unexplained, and Taylor's question presented only relates to a merits-related reason to deny COA, no COA issue is fairly included in his second question.

Relatedly, this question is not worthy of this Court's review because the FSC explicitly held Taylor's Zeigler/*Brady* claim procedurally barred. Zeigler's full name came out at trial and Taylor's *Brady* claim was thus procedurally barred because it could have been raised on direct appeal. *Taylor II*, 62 So. 3d at 1116. That explicitly imposed state-law bar almost certainly accounts for the COA denial in this case. *See Riechmann v. Fla. Dep't of Corr.*, 940 F.3d 559, 577-80 (11th Cir. 2019) (rejecting a *Brady* claim based on the FSC's determination it was procedurally barred because it could have been raised on direct appeal), *cert. denied*, 141 S. Ct. 1088 (2021). Reviewing the Eleventh Circuit's COA-denial would thus entail review of an antecedent, procedural-bar question well-beyond Taylor's substantive question presented. That makes this case a poor vehicle for review. *N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. 1145 (2009) (statement of Kennedy, J., respecting the denial of certiorari).

This case is also a poor vehicle to address Taylor's second question because it does not involve a complete failure to disclose and implicates a separate question about the interplay between *Brady* and diligence. Taylor conceded that his counsel had Zeigler's calculated fragment readouts containing her initials as "analyst:sfz" before trial. Dr. Pollock was identified the same way in his readouts. So this case does

not involve a complete failure to disclose and, based on what the State gave counsel, implicates a separate question about whether counsel's inaction defeats a *Brady* claim. *E.g.*, *United States v. Laines*, 69 F.4th 1221, 1231 (11th Cir. 2023) (rejecting a *Brady* claim because the defendant failed to establish "he could not have obtained the evidence with reasonable diligence"); *United States v. Blankenship*, 19 F.4th 685, 694 (4th Cir. 2021) (holding a defendant may not "turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial"), *cert. denied*, 143 S. Ct. 90 (2022). Those facts and separate question make this case a poor one to address whether "a State's obligation to disclose" DNA "analysis from one of its" "experts" depends on the expert's level of involvement in the case. See Pet. at i. A case where there was no disclosure at all would be a far better vehicle to address Taylor's proposed question.

Finally, this Court should decline review because Taylor cannot win on the merits under AEDPA's constraints. The State provided Zeigler's initials and the readout she generated from the computer analyzing the DNA loci. The FSC held that was enough to satisfy the State's *Brady* obligation and Taylor has not presented any inconsistency between this Court's pre-2012 decisions and the FSC's *Brady* holding that would warrant relief under AEDPA's rigorous standards. *E.g.*, *Laines*, 69 F.4th at 1231; *Blankenship*, 19 F.4th at 693-95. Since Taylor would not ultimately obtain relief, the COA-issue here is not worthy of this Court's review because it is in fact academic in Taylor's case. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not be granted on academic issues); *Herb v. Pitcairn*, 324

U.S. 117, 125-26 (1945) (certiorari is the power "to correct wrong judgments, not to revise opinions").

For all these reasons, this Court should decline review of the Eleventh Circuit's COA denial, which Taylor improperly inserts into his second question. Taylor received more than his fair share of COA grants. There are rarely six issues warranting review in a normal appeal, much less one under AEDPA's constraints. *Cf. Jones v. Barnes*, 463 U.S. 745, 750-54 (1983). Taylor's appeal was no exception.

B. Did the Eleventh Circuit Correctly Conclude (on De Novo Review) that Taylor Suffered No Prejudice from Counsel's Failure to Raise a State-Law *Richardson* Discovery Violation at Trial?

This Court should likewise refuse to review the Eleventh Circuit's holding that Taylor suffered no prejudice from his counsel's failure to argue the State committed a state-law discovery violation by failing to disclose Zeigler's full name pretrial. Taylor continually argues this question like a *Brady* claim, but it is emphatically not. It was presented below as a claim of ineffective assistance for failing to request a ***state-law***, discovery-violation hearing. The Eleventh Circuit held Taylor was not prejudiced under *Strickland* both because he would not likely have won the discovery issue under ***Florida Law*** and the outcome at trial would likely have been the same anyway. *Taylor VI*, 64 F.4th at 1272 ("Taylor likely wouldn't have won a *Richardson* motion because, as a matter of state law, the state's discovery violation—if there was one—didn't harm or prejudice him.").

The Eleventh Circuit's determination that counsel's failure to raise a ***state-law*** issue did not prejudice Taylor under *Strickland* because the ***state-law*** issue

would have failed under ***Florida law*** does not warrant review by this Court. Initially, this issue is not fairly included in Taylor's second question. Taylor's second question asks this Court to determine a State's substantive duty to disclose. But the Eleventh Circuit's decision hinges on its determination that no *prejudice* resulted from the alleged failure to disclose. The actual issues this Court would need to grapple with in this case to reverse the Eleventh Circuit have little, if anything, to do with Taylor's second question and are not fairly included therein.

Second, this question is wrapped in state law, making this case a poor one to address it. The Eleventh Circuit's prejudice holdings were based primarily on ***Florida law*** analysis, including finding the violation was not likely willful, substantial, or prejudicial to Taylor's trial preparation under ***Florida law***. The only federal-law aspect of this issue was the determination of *Strickland* prejudice, which was primarily decided by the failure to prevail under state-law. As a result, in this case, this Court's analysis of Taylor's second question would be constrained by determinations of state-law rather than federal due process under *Brady*. A case actually raising a free-standing (and not procedurally barred) *Brady* claim would be a far better vehicle to address Taylor's question than this one. That is especially true since the FSC explicitly held (as a matter of Florida Law) that the state-law procedure Taylor sought to invoke was "not appropriate under the circumstances" faced by counsel. *Taylor II*, 62 So. 3d at 1112.

Third, the FSC's no-prejudice holding on this issue receives AEDPA deference. While the Eleventh Circuit utilized de novo review, the FSC issued explicit no-

prejudice holdings on this issue. *Taylor II*, 62 So. 3d at 1112 (holding Taylor failed "to meet his burden under the prejudice prong of *Strickland*" on the *Richardson* issue). The FSC's explicit, no-prejudice holding receives AEDPA deference. That means this Court's review would be constrained by AEDPA and limited to merely determining whether the FSC's no-prejudice decision was reasonable rather than merely wrong. That remains true even if a federal *Brady* issue could be teased out of Taylor's claim of ineffectiveness for failing to argue a state-law issue.

Fourth, Taylor would not obtain relief regardless of the no-prejudice holdings. The FSC held that the state-law procedure counsel did not invoke was inappropriate and there can be no ineffectiveness for failing to invoke a state-law procedure held inappropriate by Florida's highest court. Since the Eleventh Circuit would be required to reject Taylor's claim regardless of this question presented, it does not warrant this Court's review. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Finally, Taylor's second question—to the extent it is even applicable here—does not benefit him. The State disclosed Zeigler's readouts and the fact that the readouts were generated by "analyst:sfz." That is enough to satisfy the due-process obligation to disclose. More to the point, a reasonable judge could have reached that conclusion in 2011 when the FSC rejected Taylor's claims tangentially related to his second question.

III.

Under AEDPA and this Court's Pre-1994 Interrogation and Reinitiation Decisions, Did the State Violate Taylor's Invoked Fifth Amendment Right to Counsel asking "why?" in response to his question about when the DNA results would come back?

Taylor's final question presented asks this Court to determine two interrelated questions undergirding his Fifth-Amendment-right-to-counsel-violation claim: (1) Was the FSC's no-interrogation holding reasonable under AEDPA? and (2) Was the FSC's holding that Taylor reinitiated and waived his asserted counsel right reasonable under AEDPA?

As a recap, in 1993 the FSC held Taylor's right-to-counsel claim meritless for three separate reasons: (1) Taylor was not in custody; (2) Taylor was not being interrogated; and (3) Taylor reinitiated with law enforcement. *Taylor I*, 630 So. 2d at 1041. The Eleventh Circuit held the FSC's no-interrogation holding reasonable under AEDPA while also noting the dissonance between Taylor's reinitiation and no-interrogation arguments. *Taylor VI*, 64 F.4th at 1273-74.

Neither the interrogation nor reinitiation questions Taylor amalgamates into his "third" question presented warrant this Court's review. The State will analyze both separately for clarity.

A. Taylor's Interrogation Arguments Do Not Warrant this Court's Review.

Taylor primarily urges this Court to review the Eleventh Circuit's holding that the FSC's no-interrogation holding was reasonable under AEDPA. But this question is entirely inappropriate for resolution by this Court.

To start, this case is a poor vehicle because Taylor did not properly raise any interrogation issue in either state or federal court. To the contrary, before the FSC, Taylor conceded he was not being interrogated and the FSC accepted his concession. (RB:2 (arguing *Innis* and interrogation had "no relevance" to this case); *Taylor I*, 630 So. 2d at 1041 (noting Taylor's concession that "he was not being interrogated"). Taylor's subsequent section 2254 petition entirely failed to attack that no-interrogation holding under AEDPA. (Docs.1:74-76; 2:43-49). It was not until the Eleventh Circuit litigation that it dawned on Taylor to argue the FSC's no-interrogation holding was unreasonable under AEDPA. The antecedent questions of forfeiture, exhaustion, and preservation, make this case a poor one to opine on the contours of interrogation. *See Brown v. Davenport*, 142 S. Ct. 1510, 1530 (2022) (holding the petitioner "never presented" his "theory" to the state appellate court and thereby "forfeited" it); *Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1247 n.19 (11th Cir. 2015) (refusing to consider section 2254 arguments raised for the first time on appeal).

This case is also a poor one to "clarify" the contours of interrogation because it comes to this Court under AEDPA deference. Granting review on Taylor's case limits this Court to merely analyzing the reasonableness of the FSC's decision under this Court's pre-1994 precedent. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) (section 2254 relief requires showing the state court's ruling was "beyond any possibility for fairminded disagreement"). This Court would thus be unable to fully weigh in and "clarify" what constitutes interrogation, particularly since the existence

of several later federal appellate cases holding there was no interrogation on similar facts to Taylor's case de facto proves he cannot show the FSC's 1993 no-interrogation holding unreasonable. *E.g., United States v. Jones,* 600 F.3d 847, 854 (7th Cir. 2010) (no interrogation where defendant in custody requested to speak to detective and detective asked the defendant "why he wanted to see him, but asked no leading questions of any sort"); *United States v. Cash,* 733 F.3d 1264, 1278 (10th Cir. 2013) (holding officer's question "what was going on?" after defendant asked to see him was not interrogation because it was an "innocuous attempt to understand why Mr. Cash wanted to speak with him" and recognizing substantial authority for an "innocuous question" exception to interrogation). A direct-appeal case raising an interrogation issue based on an innocuous response to a defendant's question would be a far better vehicle than this one.

AEDPA deference also dispenses with Taylor's apparent attempt to establish conflict via a direct-appeal circuit case he asserts the Eleventh Circuit's decision is inconsistent with. *See United States v. Hunter*, 708 F.3d 938, 947-48 (7th Cir. 2013) (holding an officer's question, after being asked to call the defendant's lawyer and parents, "What do you want me to tell these people?" was interrogation). *Hunter* is irrelevant to conflict because it was not an AEDPA case. The Eleventh Circuit's review below was circumscribed by AEDPA, which meant Taylor could not obtain relief unless the FSC's no-interrogation decision was more than "merely wrong" or even clearly erroneous. *E.g., White v. Woodall*, 572 U.S. 415 (2014). Any difference between the Seventh Circuit's plenary, direct-appeal decision, and the Eleventh

Circuit's AEDPA-constrained decision below, is therefore immaterial for conflict. *See Lopez v. Smith*, 574 U.S. 1, 6 (2014) (circuit precedent irrelevant to granting relief under AEDPA).

Finally, this Court should not grant certiorari because Taylor's claim fails on the AEDPA-constrained merits. A reasonable jurist in 1993 could conclude that responding to a defendant's inquiry about when the DNA results would come back with "Why?" was not interrogation. *See Innis*, 446 U.S. at 302 (interrogation definition extends only to "words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.") (emphasis in original). A reasonable officer responding to Taylor's question could hardly have predicted his response would effectively confess the results would match. At minimum, a reasonable jurist in 1993 could have viewed it this way, which ends the AEDPA analysis.

For these reasons, this Court should not grant review of the Eleventh Circuit's holding that the FSC's no-interrogation decision was reasonable under AEDPA.

B. Taylor's Reinitiation Arguments Do not Warrant this Court's Review.

It appears Taylor also wants this Court to review the FSC's separate, alternative holding (which the Eleventh Circuit did not address) that his reinitiation defeated his Fifth-Amendment-right-to-counsel-violation claim. This Court should not do so for several reasons.

For one, the reinitiation question is entirely academic in Taylor's case because section 2254 requires federal courts to deny relief if any of the FSC's holdings

supporting the denial of Taylor's Fifth-Amendment-counsel-violation claim were reasonable. The fact that the no-interrogation holding (which independently supports the denial of relief) does not merit this Court's review necessarily means this one does not either. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

For another, no federal court has ever truly evaluated the merits of Taylor's reinitiation question under AEDPA. *See Taylor V*, 2021 WL 2003122, at *24-25 (resolving Taylor's Fifth Amendment claim exclusively on no-interrogation grounds); *Taylor VI*, 64 F.4th at 1273-74 (same). This Court should not be the first. *E.g.*, *Babcock v. Kijakazi*, 595 U.S. 77, 82 n.3 (2022) (repeating the well-worn admonition that this is a Court of final review, not first view).

Finally, AEDPA deference is another reason to decline review. While Taylor wants to impose mandatory opinion writing standards on state courts to use particular language when denying claims, something this Court has long declined to do, the thrust of FSC's opinion rejected Taylor's claim on reinitiation and waiver grounds. A reasonable jurist in 1993 could have determined Taylor's question asking when the DNA results would come back opened up a generalized conversation about his case sufficient for reinitiation and waiver. That disposes of Taylor's claim under AEDPA.

Like every other question in Taylor's petition, the reinitiation question is entirely unworthy of this Court's review.

CONCLUSION

This Court should deny certiorari and bring an end to the proper federal challenges to Taylor's over three-decade-old conviction and death sentence.

Respectfully submitted,

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