No. 25-5183

IN THE

SUPREME COURT OF THE UNITED STATES

MANUEL JAVIER PEREZ — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF CRIMINAL APPEALS OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Manuel Javier Perez
(Your Name)

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QUESTION PRESENTED

IS DNA DIFFERENT FOR BRADY CLAIMS?

The State prosecutors suppressed DNA evidence of a third-party contributor which their own expert had labeled "important" to the defense in spite of her acknowledgement that this DNA had only minor peaks and was insufficient for comparison. Indeed, the presence of a third-party would have substantiated the defense theory that the DNA was planted on the complaintant's body from a recently used condom and called into question the value of the DNA the prosecutors relied on to corroborate the complaintant's testimony. DUE TO THE POWERFUL NATURE OF DNA AS OBJECTIVE SCIENTIFIC EVIDENCE THAT CARRIES GREAT WEIGHT WITH JURIES, WAS THE SUPPRESSED DNA "FAVORABLE" AND "MATERIAL" IN THIS CASE EVEN THOUGH IT DID NOT CONCLUSIVELY EXCULPATE? The State Habeas Trial Court below concluded, Yes, because the jury did not believe the complaintant on the counts unsupported by DNA evidence and the other supposedly corroborating evidence had also been challenged.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State v. Manuel Jaiver Perez, No. CR37715, 385th District Court of Midland County, Texas. Judgment entered

Manuel Jaiver Perez v. State, No. 11-11-00247-CR, (Tex. App-Eastland September 30, 2013)

In Re Manuel Jaiver Perez, No. PD-1496-13 (Tex. Crim. App. March 19, 2014)

Ex Parte Manuel Jaiver Perez, No. WR-84, 267-01 (Tex. Crim. App. Jan. 20, 2016)

Manuel Jaiver Perez v. Lorie Davis, No. 7:16-cv-00035-RAJ, U.S. District Court For The Western District Of Texas (Midland-Odessa Division), Judgment entered August 24, 2017

Manuel Jaiver Perex v. Lorie Davis, No. 17-50872, 5th Circuit, U.S. Court Of Appeals (_____2018) (COA Denied)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Manuel Javier Perez, respectfully PRAYS that a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the 385th District Court of Midland County, Texas appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was March 12, 2025. A copy of that decision appears at Appendix A.

A timely petition for rehearing (or suggestion for reconsideration) was thereafter denied on April 11, 2025 and a copy of the order (or notice) denying rehearing appears at Appendix C.

An extension of time to file the petition for writ of certiorari was granted to and including July 10, 2025 on June 6, 2025 in Application No. 24A1190.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitutiton provides, in relevant part,: "No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Introduction

Below the State Habeas Trial Court ("SHTC") recommended granting a new trial on Petitioner, Manuel Jaiver Perez's ("Perez"), Brady claim. The suppressed evidence in this case was that there were at least three contributors to the DNA recovered from the complaintant, M.M. APP. B-p. 11-12 (#39 & 40), p. 13 (#42), p. 14-15 (#45), p.16-17 (#47, 48 & 49). Yet, "with full awareness of how such a nondisclosure would harm the defense in its preparation for trial and trial presentation" the State prosecutors intentionally suppressed this DNA evidence and allowed their expert to "misleadingly testify" about DNA evidence at trial. App. B-p.15-16 (#45 & 46). Thus, the SHTC concluded that the suppression of third-party contributor DNA evidence prevented the defense from defending "based upon the true facts." Id. p.39 (#101).

The problem was that the State's DNA expert's report did not include results of all the analysis conducted in this case," App. G-p.5 (#1). And, the DNA test results that were not included were plainly discussed prior to trial between the prosecutors and their DNA expert, to the point that DNA expert explained:

> "...given the scenario presented by this defense, we'd be looking for a second female so the epithelial cell fraction [-- part of the suppressed results --] would then be important."

App. F-p.1

Yet, at trial during direct examination of their DNA expert,

the State prosecutors "did not ask about the analysis of the epithelial fractions" and the expert just read the results from her report which she had never updated to include the third-party contributors. App. G-p.6 (#3 & 5), (#12). Thus, her testimony was misleading to the jury and may have given the jury a false impression that there were only two contributors to the trial DNA evidence instead of the three or more there actually were. App. B-p.15 (#45), App. G-p.8 (#12).

The jury needed to know the true facts about the entire DNA test results in order to properly evaluate the complaintant's credibility and the weight to give the trial DNA evidence. In short, the jury had two options: (1) believe M.M., the complaintant, that Perez caused his DNA to be on her body, or (2) believe Perez that M.M. planted his DNA on her body from a used condom. At trial, without the suppressed DNA evidence of a third-party contributor, the jury chose to believe M.M.. But, had the DNA test results which showed a possible third- party contributor been presented to the jury, Perez would have had powerful DNA evidence to demonstrate that the third-party could have been Perez's female sexual partner when the condom was used. That suppressed DNA evidence would have put the whole case in a different light. Especially considering that, as the U.S District Court concluded (for a different claim) on original federal habeas review, when there was no DNA evidence appearing to corroborate M.M.'s story, "the jury found M.M.'s statements alone insufficient to find [Perez] guilty... " App. E-p.37.

Perez presented the suppressed DNA test results about third-party contributors in a subsequent State habeas writ application by way of a Brady claim. Perez relied on the e-mail chain between the State prosecutors and their DNA expert, where in spite of third- party contributors being "insufficient for comparrison" and minor peaks, the expert still considered the suppressed results as "important" to the defense theory. Perez also presented his own DNA expert, who the SHTC found "credible and compelling." App. B-p.18 (#52). Which expert, after reviewing the evidence, went further and determined, in part, that the suppressed, "DNA evidence could have called into question and, perhaps, contradicted M.M.'s testimony." App. G-p.11 (#20). The State did not present a DNA expert of their own in response to the Brady claim during the subsequent habeas proceedings. Thus, the State did not contradict any of the facts, findings, or conclusions reached by Perez's post-conviction DNA expert.

Additionally, the SHTC considered evidence from a SANE expert who had concluded that, considering scientific studies contrasted to the SANE testimony at trial, in reality " ... the defense's evidence-planting theory [was] more probable." App. B-p.19 (#53), App. H - p.2. Again, the SHTC found that conclusion "credible" and the State did not even attempt to refute those facts, findings, or conclusions with a SANE expert of their own. App. B - p.20 (#53 & 54)

Nevertheless, without rejecting any of the SHTC's factual findings[1], the Texas Court of Criminal Appeals ("TCCA"),

without further explanation, held that the suppressed DNA evidence was not material (nor favorable) because,:

> "... the exculpatory value of an unidentified third-party's non-spern DNA is insignificant compared with the inculpatory value of [Perez's] sperm DNA recovered from the victim's thigh and anus."

App. A - p.2-3.

At the least, that holding assumed the jury would have continued to believe M.M. over Perez no matter what and discounted entirely the effect the suppressed DNA evidence might have had on the jury. The TCCA's fixation on the "Value" of the trial DNA evidence came at the cost of not actually analyzing the suppressed DNA evidence in the context of the entire record.

The TCCA did that without ever requiring the SHTC to gather additional facts and there was no live hearing. For instance, Perez never had an opportunity to SUBPOENA Roman Urquidi whom the motel records reflected rented the upstairs room where Perez left the used condom. App. D - p.14. Thus, Perez was unable to confirm for the court whether that was indeed who communicated with Perez's daughter that Mr. Uruidi did not actually stay in that room on the night of the alleged offenses. App. B. - p. 6(#13-17), App. I. With such testimony Perez's materiality argument would have been even stronger than the suppressed DNA evidence made it.

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1. In post conviction habeas review in Texas the SHTC is the "original factfinder" and the TCCA is the "ultimate factfinder." Ex parte Weinstein, 421 S.W.3d 656, 664 (Tex.Crim.App.2014) Meaning, when the SHTC's factual findings are not "supported by the record" the TCCA may "make contrary or alternative findings ..." Id. Then the TCCA reviews the ultimate legal conclusion of whether the suppressed evidence was "material" de novo, because it is a mixed question of law and fact. Id. at 664 n.17 (citing Brady cases), See also, Ex parte Hawthorne, No. WR-91,276-01, 2020 Tex. Crim. App. Unpub. LEXIS 322 * 1-2 (Tex. Crim.App. - July 22, 2020)(not designated for publication). In Peerez's case the TCCA did not say the TCCA was rejecting any factual findings made by the SHTC, thus the TCCA must have made a purely legal determination that the facts as found by the SHTC did not add up to the suppressed DNA evidence being material (or favorable).

II. Hickey/Body Shop Allegation[2]

> "And, [M.M.'s] mother noticed this hickey and she asked [M.M.] what happened.
>
> When [M.M.] told her mother, it nearly knocked her down.
>
> And, quite frankly, what she told her mother is the basis for the vast majority and is the very essence of this case."

4 RR 195.[3]

After trial it was discovered that, "M.M. told Priscilla [her half-sister] that, on August 14, M.M.'s mother, Melissa, saw the hickey on her neck and got mad at her. According to Jurado, M.M. also told Priscilla that M.M.'s boyfriend gave her the hickey and that M.M. made up the story that [Perez] gave her the hickey because she wanted to continue to see her boyfriend. M.M. also told Priscilla that she was sorry she blamed [Perez] for giving her the hickey." App. D-p.19.

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2. The trial court ORDERED the 5 year sentence in Count III to be served consecutively to the 25 year sentences in Count I and II. 9 RR 9. The prosecutor had asked for Counts I and II -- which allegedly happened at the motel room -- to be consecutive to each other asserting that they "occurred at different times." 8 RR 43. The trial court rejected that argument and likely determined it was Count III that happened at the body shop which was a separate event that occurred at a different time and place from Counts I and II. 7 RR 15. ("starts kissing her on the neck, enough to leave a bruise and significant amounts of DNA, and starts groping her breasts."), 32-33 (" ... the first crime -- or the touching her breasts over her clothing, and giving her a hickey ... [Ubaldo Gonzalez] told you he was drinking in the very building and at the very same time [M.M.] said her father was giving her a hickey on the neck."); See also, Tex. Penal Code §21.11(c)(1) (includes "touching through clothing")

3. The Reporter's Record from trial is available on the PACER system, See, Perez v. Davis, No. 7:16-cv-00035-RAJ, Dkt. No(s). 11, (Tex. W.D. May 26 2016).

On direct appeal the 11th Court of Appeals of Texas accurately described how M.M. testified that, while she and Perez were inside a body shop, he gave her a hickey on her neck and touched her breasts over her clothes. App. D-p.3.

On August 14, 2010 later in the day, after the motel room allegations, "M.M. went to the grocery store with her mother, Melissa. M.M. testified that, at the grocery store, Melissa asked her about the hickey that was on her neck. M.M. told Melissa that she would explain the hickey to her when they got home. Melissa testified that, when they arrived home, M.M. told her that [Perez] gave her the hickey ... " App. D-p.4. In contrast to M.M., Melissa testified that the reason she confronted M.M. at the grocery store was her sullen attitude. 5 RR 26-27; See also, 5 RR 144.

M.M. did confirm she did not like to stay in the trailer at Perez's mother's place. 6 RR 20-21. Nor, she admitted, was she welcome at Amy's (who was Perez's wife and shared a house with Perez). 6 RR 32. M.M. said she did not know what time Perez picked her up on the 13th, but that it was still daylight out and summertime. 6 RR 22. (Apparently originally M.M. had told the police that both allegations of abuse happened in the early morning hours of the 14th. 5 RR 147.) However, Perez testified he did not pick up M.M. until around 11:00pm and even then only after M.M. called him, asking him to come get her. 6 RR 163-164. And, M.M. did admit that her and her mom did not always get along. 4 RR 270, 6 RR 170.

"Rachel Torres testified that she and [Perez] had had a sexual relationship for three years. Torres said that she met [Perez] in room 208, which was an upstairs room, at the Scotish Delight Motal at about 9:30pm on Friday August 13, 2010. Torres said that she and [Perez] had sex on that occasion. Torres later went into the bathroom. She testified that the condom was in the trash can in the bathroom. She said it was 'were everybody could see it'. Torres said that she left the motel about 11:00pm." App. D-p.6.

"[Perez's] and Ms. Torres' testimony, that they were at the motel during the time M.M. testified [Perez] was giving her a hickey, was discredited by the motel registration records." App. E-p.23. The motel records indicated Perez rented room 116 -- a downstairs room -- (as M.M. claimed) while he and Ms. Torres said it was an upstairs room. Id at p.15. Perez had explained that the motel clerk didn't have a key for room 116 and had to "put [him] in another room" which happened to be upstairs. 6 RR 159. The motel clerk denied that they ever had a problem like Perez described. 6 RR 252-254, 263-264. Yet, it was a rather cheap motel that didn't require an identification card to rent a room and had problems with their paperwork and the IRS. 6 RR 261-264. It was that type of motel that charged $40 a night in 2010 and even that "depend[ed] on the time" the room was rented. 6 RR 261, 266.

Even though the motel's records were disorganized, 5 RR 132- 133, the prosecution came up with a registration card for room 208 which reflected that a Roman Urquidi was staying in the room on

August 13, 2010. 6 RR 256-260. Yet, after trial Perez obtained "an affidavit from [one of] his [other] daughter[s], Kristen Mendez, detailing text messages she exchanged with a person she believed to be Roman Urquidi. Mendez averred that this person purporting to be Urquidi admitted to not staying in room 208 at the Scotish Delight Motel on the night of the underlying offense." App. B-p.6 (#13); See also, App. I-p.1-5. Nevertheless, the SHTC determined that the testimony from the motel managers and M.M., "along with the motel records, [were] more credible than the hearsay statements from Mendez's affidavit." Id. at 6 (#17).[4]

In any event, Perez's uncle, who stayed in the trailer at Perez's mother's place, remembered Perez and M.M. being there on Friday the 13th after dark, maybe from 10:00pm to 11:00pm. 6 RR 143-144. And, the leasee of the body shop, Perez's friend Ubaldo Gonzalez, testified that Mr. Gonzalez was at the shop on both August 12th and Friday the 13th. On the 12th Perez was there with Mr. Gonzalez and Ms. Torres drinking. 6 RR 48-49, 6 RR 77-78, 6 RR 154-156. During Mr. Gonzalez's testimony the clear inference was that Mr. Gonzalez was in the shop on Friday the 13th, would

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4. For a Strickland prejudice analysis, which is often considered the same as a Brady materiality analysis, this Court has said there was no need to resolve a State law evidentiary issue about hearsay because in evaluating the "totality of the evidence" it would include "both that adduced at trial, and the evidence adduced in habeas proceedings." Wiggins v. Smith, 539 U.S. 510, 536 (2003) (emphasis added by Wiggins Court) (quoting Williams v. Taylor, 529 U.S. 362, 397-398 (2000)).

have seen if Perez drove his truck into the shop, and did not see Perez that night. 6 RR 60-62. Moreover, both Perez and Mr. Gonzalez clarified that Perez never had a key to the body shop. 6 RR 50, 158.

Finally, "[Perez] presented testimony from a number of his sexual partners about his sexual habits. The witnesses said that [Perez] had never given them hickeys ... " App. D-p.7. Perez simply did not like hickeys. 6 RR 75-76, 113.

III. Hickey DNA Evidence

> "M.M. testified that she showered after [Perez] gave her the hickey and before [Perez] had sexual intercourse with her."

App. E-p.14.

Upon initial federal habeas review, the State admitted that Perez's trial counsel "could have argued that the shower would have washed away any of Perez's secretions from M.M.'s neck area ..." Perez v. Davis, No. 7:16-cv-00035-RAJ, Dkt No. 9 at 16, 17 (W.D. Tex. _____). Indeed, Perez's post conviction DNA expert has explained that in such a situation "generally, the DNA would be diluted perhaps to the point of undetectability." App. G-p.10 (#17). And, Perez's trial counsel stated that, while at trial he missed the importance of the timing of the shower, it would have created a 'win/win' argument for Perez." Perez v. Davis, No. 7:16-cv-00035-RAJ, Dkt No. 11-20 at 84. (W.D. Tex. _____). Indeed, such an argument would have severly undercut the State's position at trial that,:

"And miraculously, where is the defendant's DNA? Right there. Right there on the left side of her neck where he gave her a hickey. Amazing. ... it just didn't magically leap from somewhere, ladies and gentlemen."

7 RR 58.

"Paula Brookings, a sexual assault nurse examiner, testified that she performed an examination of M.M. on August 14, 2010. ... Brookings saw a purplish bruise on the left side of M.M.'s neck. M.M. told Brookings that [Perez] kissed her and gave her the hickey ... Brookings also observed dried body secretions on M.M.'s neck ... ... Brookings swabbed each side of M.M.'s neck ... so that DNA testing could be performed on the substances swabbed.

Angela Rodriguez Garcia, a forensic scientist at the Texas Department of Public Safety Crime Lab in Lubbock, performed a forensic DNA analysis of the samples that were taken from M.M.'s body and compared those to samples to a sample buccal swab that was taken of [Perez's] saliva ... Testing of the left neck swab revealed a DNA profile that was consistent with a mixture of [Perez's] DNA and M.M.'s DNA." App. D-p.5-6.

What Ms. Garcia actually said at trial was:

"The DNA profile from the neck swab, as I mentioned, was consistent with a mixture. Both [M.M.] and perez could not be excluded.

On the DNA profile from the neck, there is DNA from more than one person. The victim and the suspect appear to be present on that swab from the neck. And so because we are talking about a mixture I cannot call either one of them the source.

...

The DNA profile that came from the neck swab was consistent with a mixture. Sometimes we will have what's called a major component, where it is mostly the victim and just a little bit of the foreign person, the suspect.

In this case it appeared to be an almost equal mixture.

...

Casual contact can deposit foreign DNA on the surface. But because this mixture was so balanced, so even, what that was telling me, there was just as much DNA there on her neck from the suspect as there was from her."

5 RR 211-212, 220-221. The State's DNA expert also confirmed that she did not test the neck swab to see if it was saliva or just skin cells. 5 RR 220.

According to Perez's post conviction DNA expert, George Schiro, this testimony was misleading and Garcia's reports were incomplete. Mr. Schiro concluded that Garcia's testimony "may have given the jury the false impression that there were only two contributors to this mixed profile instead of the three or more contributors there actually were." App. G-p.8 (#12). Then to be complete, Garcia's reports should have included that,:

> "A mixed DNA profile consisting of at least three individuals, most likely two major DNA contributors and one minor DNA contributor was obtained from the left swab."

Id. at 7 (#9). Moreover, Mr. Schiro stated that, "Ms. Garcia wrongly implied that the DNA on the neck could not have gotten there due to indirect or casual contact ... In this case, it cannot be determined if the mixed DNA profile on the neck swab is the result of direct DNA transfer, indirect DNA transfer, or a combination of both." Id. at 8-9 (#13).

Upon subsequent habeas review, the SHTC found Mr. Schiro to be "credible and compelling." App. B-p.18 (#51 & 52). In addition to agreeing that the State's DNA expert mislead the jury, the court found that,:

> "The fact that there were at least three individuals DNA on the neck swab supported the defense's theory that M.M. fabricated the allegations, as the thrird-party found on the neck swab could have been the person who [actually] gave M.M. the hickey."

App. B-p.14-15 (#45), p.23 (#60). For instance, it could have been M.M.'s boyfriend that gave her the hickey or Ms. Torres' DNA from indirect transfer. Id. at p.16-17 (#47 & #48). Additionally, Perez's DNA "could have innocently transferred from bed sheets, a towel, or a toilet to M.M.'s skin; and, a third-party's DNA could have transferred to M.M. in this manner, as suggested by the undisclosed e-mails." Id. at 17 (#50). The overall determination of the SHTC was that,:

> " ... the fact that there was a third-party's DNA would have raised some doubt about [Perez] guilt -- especially in light of the ramifications of the evidence of potential third-party contributors."

Id at 17 (#49).

IV. Motel Room Allegations - (Counts I & II)

The 11th COA accurately described M.M.'s and Perez's testimony about the motel room allegations. App. D-p.3-4, 7-8.

When M.M. testified on direct examination she volunteered it was room 116 at the motel and she later admitted that when she first talked to the police she did not know the room number. 4 RR 243, 6 RR 36. Then it was Melissa, M.M.'s mom, who attempted to verify the motel room registration card, yet Perez's date of birth was wrong on the card. 10 RR State Exhibit "1", contra. 1 CR 159 (08/31/1968).[5]

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5. Apparently the State prosecutor was aware of the discrepancy with Perez's date of birth, for when asking about it the prosecutor began to say, "Do you recognize any date of birth on that -- " and changed it up to "or birthday on that card?" and, throughout just asked about Perez's "Birthday." 5 RR 23, cf 5 RR 21, 22, 23, 24.

Importantly, when asked to explain why if it was true what she told the jury about being "shocked" by what she accused Perez of doing to her, why she took her own pants off claiming it was because she knew what was coming, all M.M. could do was agree that she was not really shocked. 4 RR 247, 6 RR 38-39. Nevertheless, M.M. had originally told the SANE nurse that Perez had "pulled off [her] pants." SR. R. 36, 63. Similarly, M.M. had originally told the SANE nurse, not that Perez did not ejaculate, bu that she didn't know whether he did or not. 5 RR 67, 4 RR 253.

It wasn't just that Perez had already been in the motel room that upset M.M., it was that Perez lied to her about being able to rent a motel room. 6 RR 147. After all, Perez's plan was to stay with M.M. at his parent's place, but M.M. did not like to stay in the trailer with Perez's uncle (and could not stay at Amy's). 6 RR 165, 167. So Perez tried to convince M.M. that he couldn't rent a motel room -- which turned out to be a lie when he had already rented one. 6 RR 167. Perez had also explained to M.M. when she called on Friday the 13th for him to pick her up that he had to work the next morning on the 14th. 6 RR 178.

And, that is just what Perez did, he got up early on Saturday the 14th, around 7:30am, and took M.M. to her apartment about 8:00am. 6 RR 176-180. Perez had to work that Saturday in order to finish a project for CJ Stone that had to be completed by Monday and Manuel Najera went with him. 6 RR 177, 180, 229.

A number of Perez's sexual partners testified about his sexual habits "and that Perez never expressed an interest in anal

sex. The witnesses also said that they had never had sex with [Perez] in the morning following a night in which they had sex with him." App. D-p.7.

V. SANE Evidence

> "The anomaly of there being no DNA attributed to [Perez] from the vaginal swabs (yet his DNA being detected on the accuser's anal and thigh swabs), despite an allegation of vaginal penetration, implies potential and clear problems with Nurse Brookings' testimony. According to [Perez's post conviction] SANE expert, Victoria Morton, if semen had leaked from M.M.'s vagina to her anus, semen should still be detectable on vaginal swabs; thus, the absence of DNA on the vaginal swabs makes the defense's evidence-planting theory more probable ... If present at trial [a SANE expert] would have been able ... to help elicit testimony from Ms. Brookings favorable to [Perez], for instance alternative explanations for abrasions to the fossa navicularis."

App. B-p.19-21 (#53 & #54).

The 11th COA described the SANE testimony at trial concerning the findings of vaginal injury and collection of apparent DNA samples. App. D-p.5.

In actuality, the swab was not from the anal cavity, but from "around the actual anus, outer. We don't do any penetration on the inside." 5 RR 60, 64. As for the swab taken from M.M.'s thigh, it was only taken because the area highlighted under a black light; yet, Nurse Brookings had no idea or recollection of how big the area was or if the substance was smeared. 5 RR 58-59. Ms. Brookings did confirm that M.M.'s hymen was intact or not injured -- which was to be expected, even with the alleged penetration. 5 RR 49, 66, 68. When it came to the "multiple abrassions" to M.M.'s fossa

navicularis, which indicated some-type of penetration, while Ms. Brookings began by saying they indicated M.M. had "penetration within three days of the exam," under cross-examination she had to clarify that she had "no idea" of a "time frame of how long" they had been there. 5 RR 39, 50, 63.

After discovery of the undisclosed third-party contributors, Perez obtained an affidavit from a SANE expert, Victoria Morton. The SHTC found Ms. Morton's affidavit to be "credible and relevant." App. B-p.20 (#53 & 54). Specifically, the SHTC found that nurse Brookings "provided misleading testimony about the injury to M.M.'s vaginal cavity, as this could have been self-inflicted instead of being caused by sexual intercourse." Id at 20 (#54). Likewise, it was improper for Ms. Brookings to have testified to her opinion that M.M. "had been sexually assaulted." Rather, she should have only testified about the consistency between her exam findings and M.M.'s self reported history, which would have allowed the jury to consider that the exam findings "could also have been consistent with other sources." Id. p.3. Not to mention Brookings "could have potentially mislead the jury" about whether she collected a sample from inside the vagina, "when her documentation of the examination reflects that she did ... " Id. p.2.

Perhaps most importantly, Ms. Morton explained that because M.M. "had both defecated and wiped after the reported event" and "semen was present on the anal swabs, "the defense theory of semen planted on the body from an external source (used condom) is possible." Id. p.2. Similarly, Perez's post conviction DNA expert

explained that because M.M. had defecated and wiped/washed her anal area, the expectation generally would be that any DNA deposited in that area "would be diluted, absorbed, or reduced by mechanical action, perhaps to the point of undetectability." App. G-p.10 (#8).

VI. DNA Evidence (Counts I & II)

> "Ms Garcia's testimony was potentially misleading to the jury. She was unconsciously or consciously biased in her report and testimony because she never brought up the potential foreign DNA that was discussed with Mr. McCarthy [,the State prosecutor], on April 15, 2011 and May 20, 2011."

App. G-p.8 (#12).

AND

> "The jury found [Perez] guilty on the charges substantiated by the DNA evidence and not guilty on the charges not substantiated by DNA evidence. Accordingly, it is reasonable to assume that the jury relied primarily on the DNA evidence in finding [Perez] guilty of these charges."

App. E-p.36.

The State's DNA expert, Ms. Garcia's "testing of the samples showed the presence of spermatoza on the anal and thigh swabs. Further testing of those swabs revealed that the sperm cell fraction on the swabs was consistent with [Perez's] DNA profile ... Garcia testified that, to a reasonable degree of scientific certainty, [Perez] was the source of the DNA profile on the anal and thigh swabs." App. D-p.6. Additionally, only M.M.'s DNA was detected on the vaginal swab -- NOT Perez's. 5 RR 209.

After the resolution of his initial post conviction habeas writ (in both State and Federal courts), Perez "received a letter

from the Texas DNA Mixture Review Project" which (falsely) claimed CPI "was not used in the prosecution and conviction in [his] case." App. B-p.11 (#36). In response to that letter (and reports of other unrelated prosecutorial misconduct), Perez requested his DNA case file from the Texas DPS (under the PIA). Id. at 11 (#37). Included in the DNA case file released to Perez was a copy of an e-mail chain between the State's DNA expert, Ms. Garcia, and the State prosecutors. Id. at 11 (#39).

The e-mail chain previewed Ms. Garcia's eventual trial testimony. She revealed to the State prosecutors that on the neck swab she found "an indication of a third person at 4 of the 16 [LOCI]." App. F-p.1 She cautioned that they were "very small peaks and are insufficient for comparison," as well, as it is not "uncommon for another person to have contacted the victim's neck." Id. Then she explained that if asked whether there was any indication of a person other than M.M. or Perez on the anal or thigh swabs she would answer that the epithelial cell fraction for each included a third-party contributor, although both were insufficient for comparison. Id. Ms. Garcia concluded by explaining to the prosecutors "given the scenario presented by the defense, we'd be looking for a second female so the epithelial cell fraction would then be important." Id.

In spite of Ms. Garcia obviously being "aware of these results and their possible implications," she never supplemented her reports to include the third-party contributor information. App. G- 5-7 (#1-#8). Perez's post conviction DNA expert, whom the

SHTC found "credible and compelling," concluded that Ms. Garcia's reports should have included that,

1) "A minor, unattribuatable allele was also detected at the D195433 Locus" on the anal swab,

2) "An additional minor peak was detected at the D195433 Locus" on the thigh swab and "no conclusion can be drawn regarding the source or origin of this minor peak," and

3) "A mixed DNA profile consisting of at least three individuals, most likely two major DNA contributors and one minor DNA contributor, was obtained from the left neck swab."

Id. at 7 (#9). Mr. Schiro also "concluded that Ms. Garcia and the prosecution did not disclose favorable and material exculpatory evidence to the defense in this case". Id. at 3 (#24). Additionally, he faulted the prosecutor, Mr. McCarthy, for not asking at trial "about the analysis of the epithelial fractions of the anal and thigh swabs, even though he was aware of this information." Id. at 7 (#12).

The SHTC found that in spite of the prosecution's open file policy, the information within the e-mail chain about third-party contributors, "w[as] not made available or produced to [Perez] at the time of trial" or during the initial post conviction habeas writ proceedings. App. B-p.12-13 (#40-43). Moreover, according to the SHTC, this suppressed DNA evidence was favorable to the defense because as Ms. Garcia warned in her e-mail to the prosecutors, "the[] epithelial fractions [were] important in terms of identifying a potential second female contributor." Id. at 15 (#45). Then, without the third-party DNA results, the defense had nothing

substantial to back up the theory that M.M. planted the DNA on herself from a used condom. Thus, the "defense theory ... was less compelling ... " Id. at 16 (#47).

The third-party contributor DNA evidence would have been, according to the SHTC, "objective scientific evidence corroborating the defense theory ... " Id. at 38 (#95). For example, the third-party contributor to the epithelial cell fractions could have been from Perez's only intimate partner on August 13th, Ms. Torres, whose DNA would have been on the condom. Id. at 16 (#47). In any event, the SHTC found that,:

> "even without evidence that the third-party DNA matched either M.M.'s boyfriend or Rachell Torres, the fact that there was a third-party's DNA would have raised some doubts about [Perez's] guilt ... "

Id. at 17 (#49). Finally, with the aide of a DNA expert, Perez could have explained to the jury that his "DNA could have innocently transferred from bed sheets, a towel, or a toilet to M.M.'s skin." Id. at 17 (#50).

VII. Closing Arguments/Procedural History

In response to the defense argument that they didn't know how the DNA got on M.M., the State relied heavily on the trial DNA evidence in their closing arguments. App. 5 passim. They described the trial DNA evidence as: "iron clad," "absolute scientific proof," "cold, hard, facts," and that "DNA doesn't lie." Id. passim. At least the prosecutors explained to the jury what question the jurors had to resolve,:

> "I'm going to get to the bottom line here. If you believe [M.M.], and all the evidence we have put on to corroborate her testimony, this defendant is guilty.
>
> If you believe the Defendant, and the cascade of witnesses he has put on, he is not guilty. It's real simple."

7 RR 52.

"The jury deliberated for approxamately three hours. Before returning a verdict ... ." App. E-p.7. "The jury found [Perez] guilty on the charges substantiated by DNA evidence and not guilty on the charges not substantiated by DNA evidence." Id. at 36.

On direct appeal the 11th Court of Appeals of Texas "determined that the trial court erred in prohibiting the defense from presenting evidence to prove M.M.' motive for fabricating the sexual assault allegations." App. B-p.13-14 (#43). However, "the Court of Appeals determined that the trial court's error was harmless because of the strength of the strong scientific and physical evidence that corroborated M.M.' testimony. Id. at 14 (#44). The SHTC, in recommending granting relief to Perez, found that "the Court of Appelas conclusion no longer holds water in light of the undisclosed and suppressed DNA evidence of a third-party contributor." Id. at 14 (#44).

Finally, in 2024 Perez filed the instant subsequent State Habeas writ application. In two relevant grounds Perez raised two different types of prosecutorial misconduct. Both the SHTC and the TCCA agreed due process was violated because of "Ralph Petty's dual employment as both an assistant district attorney and a law clerk for the trial court judge" during the initial

State habeas proceedings. App. A-p.2, App. B-p.26 (#68 & #69). Thus, the TCCA reopened Perez's initial State habeas proceedings and without the original Findings and Conclusions authored by Petty, "independently reviewd the claims [Perez] raised in his initial habeas application" and held they "lack[ed] merit." App.A-p.2 (citing Ex Parte Benavides, No. Wr-81, 593-01, 2022 Tex. Crim. App. Unpub. LEXIS 435 (Tex. Crim. App. Sept 21, 2022) (not designated for publication); App. B-p.26 (#68 & 69) (same).

Secondly, Perez raised the instant Brady claim:

> "The State commited a Brady-violation when it failed to disclose material evidence that the DNA profile obtained from M.M.'s (the alleged victim's) neck swab consisted of at least three individuals, along with failing to disclose the epithelial cell fractions from the anal and thigh swabs,"

App. B-p.3-4 (#13). In other words Perez,:

> "allege[d] that suppressed evidence reveals that DNA from at least three contributors was present on the victim. He further argues that this evidence contradicted the prosecution's narrative and supported [his] defense that the victim fabricated the allegations against him."

App. A-p.2. The SHTC concluded this claim was "unavailable to Perez when the initial State habeas writ application was filed." App. B-p.4 (#14), p.12 (#40), p.22 (#58). In short, this Brady claim was properly raised in a subsequent State habeas writ application because Perez was entitled to rely on State's representation that all available discovery was included in its "open file." Id. at 12 (#41-#42) (following Strickler v. Greene, 527 U.S. 264, 283-84 (1999)).

The SHTC concluded that the State's DNA expert's reports did not include the "new DNA opinions" discussed in the e-mail between the expert and the prosecutors about third-party contributors;

therefore, the State suppressed that evidence. App. B-p.10 (#35), p.11 (#39), p.12 (#40), p.13 (#42), p.22-23 (#58 & #59), p.38 (#99). "[T]wo important facts that were never disclosed to [Perez's] attorneys prior to trial" were:

> "(1) The DNA profile obtained from M.M.'s neck swab consisted of a mixture of at least three individuals, and
>
> (2) The epithelial cell fractions from the anal and thigh swabs ... "which included DNA that could not be attributed to the victim or [Perez]."

App. B-p.13 (#42), p.22 (#59); See also, Id. at p.13 (#42). The SHTC also "found that this evidence was favorable and material." App. A-p.2; App. B-p.14-24 (#45-#62, p.37-38 (#96-99). The suppressed DNA evidence of third-party contributors was favorable because it "supported the defense's theory that M.M. fabricated the allegations" and, as the State's own DNA expert determined it was "important" to the defense "scenario" of "looking for a second female." App. B-p.15 (#45), App. B-p.17 (#50).

Thus, the SHTC recommended granting Perez relief. Id. at 39. The TCCA,:

> "disagree[d] because, among other things, the exculpatory value of an unidentified third-party's non-sperm DNA is insignificant compared with the inculpatory value of [Perez's] sperm DNA recovered from the victim's thigh and anus.

App. A-p.2-3.

REASONS FOR GRANTING THE PETITION

I. Introduction

The Petitioner, Manuel Jaiver Perez's, defense to the

allegations that he abused his daughter, M.M., was that M.M. lied and planted his DNA on her body from a used condom. "[Perez's] explanation for the essential fact presented at [] trial, that his semen was deposited on M.M., was not believed by the jury, despite [] extensive presentation of witnesses who testified that [Perez's] sexual habits were unlike those described by M.M. and that M.M.'s 'timeline' of the events was not plausible." App. E-p.32. Moreover, the woman -- not his wife -- whom Perez used the condom with, testified at trial, but there was a conflict over whether the used condom was left in an upstairs room or the abuse happened in a downstairs room. In sum, "[Perez's] story how his DNA was found on M.M. lacked credibility ... ," Id. at 26, and Perez needed something more to substantiate his defense.

Yet, all the while there was "objective scientific evidence" which tended to substantiate Perez's defense and "enhance his and the woman's credibility in the eyes of the jury." App. B-p.38 (#98). However, the State prosecutors, suppressed evidence that there were third-party contributors to the DNA evidence they relied on at trial to corroborate M.M.'s testimony -- which third-party DNA could have belonged to the woman the condom was used with or M.M.'s boyfriend (who gave M.M. the hickey). Id. at 16-17 (#47-#49). Additionally, had this favorable third-party DNA test results been disclosed, it would have lead the defense to obtain evidence from a SANE expert explaining that:

> "this anomaly of there being no DNA attributed to [Perez] from the vaginal swabs (yet his DNA

> being detected on the accuser's anal and thigh swabs), despite an allegation of vaginal penetration ... makes the defense evidence-planting theory more probable."

Id. at 19 (#53).

In the jury's eyes, without the undisclosed DNA evidence of third-party contributors, the DNA match to Perez eclipsed all other evidence -- from both the State and defense. Indeed, that is exactly what continued to influence the TCCA's rejection of the SHTC's recommendation to grant relief on the Brady claim.

The SHTC focused on the nature of the suppressed DNA evidence and its potential impact on the jury's evaluation of the credibility of M.M. and Perez. Whereas, the TCCA discounted entirely the effect th e third-party contributor DNA evidence might have had on the jury. See, Porter v. McCollum, 558 U.S. 30, 43 (2009) (per curiam) (In a Strickland prejudice analysis it was not reasonable to "discount entirely the effect" new evidence "might have had on a jury"). In short, the TCCA simply determined that the suppressed DNA evidence was "insignificant" compared only to the trial DNA evidence. App. A-p.2-3.

That determination overlooked that just as the DNA evidence prsented at trial was extremely persuasive, so would the "new" DNA evidence of third-party contributors be strongly powerful in the eyes of a jury, even when the evidence did not conclusively exonerate Perez and only served to provide substantial objective scientific evidence in support of Perez's defense. Not to mention, the jury's simultaneous acquittals on the counts not supported by DNA evidence was an indication that the actual jury in Perez case

(not just a hypothetical jury) did not believe M.M. without the trial DNA evidence to corroborate her testimony. App. B-p.37-38 (#97), App. E-p.18, 37. That fact, along with the State's closing arguments about the trial DNA evidence, demostrates just how "vital" the trial DNA evidence was to the prosecution's case. So that, it would follow, if this evidence had been revealed to the jury showing that the very DNA evidence the State depended on to corroborate M.M.'s testimony had third-party contributors supporting the defense theory, the value of the trial DNA evidence itself would have diminished in the eyes of the jury.

As this Court has had occasion to say:

> " ... DNA testing can provide powerful new evidence unlike anything known before. Given the persuasiveness of such evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner."

McDaniel v. Brown, 558 U.S. 120, 136 (2010) (quoting DA's Office v. Osborne, 557 U.S. 52, 62 (2009)). That applies to DNA testing whether presented as evidence at trial or upon post conviction habeas review. Then, in different circumstances, this Court has also acknowledged the importance of evidence of a third-party, Holmes v. South Carolina, 547 U.S. 319 (2006), and the importance of DNA evidence even when it is not a case of conclusive exoneration. House v. Bell, 547 U.S. 518, 554 (2006).

The problem is that Nationwide, "because courts do not understand how the uniquely probative nature of DNA can alter the Brady analysis, they fail to properly apply the Brady rule." Claiming Innocence, 92 Minn. L. Rev. 1629, 1663 (June 2008) (By: Brandon Garrett). And, there has been "dismay [] by the ways in

which evidence of a DNA match tends to eclipse any rule for adversarial engagement ... " The Rule of Probabilities, 67 Stan. L. Rev. 1447, 1451 (2015) (By: Ian Ayres). Specifically, "Texas State courts still evade the materiality analysis mandated by the Supreme Court ... [and] do not engage in holistic analysis [or] inquire whether evidence changes the narrative at trial." A Material Change to Brady, 110 J. Crim. L. & Criminology 307, 308 (2020) (By: Riley E. Clafton).

Therefore, Perez asks this Court to GRANT review herein and hold that DNA is different for **Brady** claims. Due to the undisputed probative nature of powerful and persuasive new AND trial DNA evidence -- when viewed through the lens of a reasonable juror -- even seemingly inconsequential new DNA evidence can cause the whole case to be viewed in a different light. Kyles v. Whitley, 514 U.S. 419, 435 (1995).

What is important is a holistic review of the entire record that takes into account that an omitted piece of evidence could change how the rest of the evidence is processed and fit together by the jury, as jurors do not think about each piece of evidence in isolation. Review by this Court is the only solution to the miscarriage of justice of the TCCA allowing the trial DNA evidence to eclipse any consideration of the impact the suppressed DNA evidence could have had on Perez's jury.

II. Historical Brady Standards

This Court's efforts to define "materiality" in the Brady

context has not always been clear. To begin, the Court did not even define materiality in Brady itself. But, this Court did favorably quote the lower court's view that:

> "We cannot put ourselves in the place of the jury and assume what their views would have been ... [or] for us to say that the jury would not have attached any significance to this evidence ..."

Brady v. Maryland, 373 U.S. 83, 88 (1963). In as much as that was the original "materiality" standard it focused on protecting the Constitutional imperative to allow the JURY, not appellate judges, to weigh the evidence and evaluate the credibility of witnesses. See i.e., The Jury's Brady Right, 98 B.U.L. Rev. 345, 367 (March 2018) (By: Jason Kreag).

The Court's first attempt to actually define materiality resulted in a three-tiered definition that quickly proved unworkable. See, U.S. v. Agurs, 427 U.S. 97, 112 (1976). Thus, this Court adopted the **Strickland** prejudice analysis for **Brady** materiality:

> "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

U.S. v. Bagley, 473 U.S. 667, 682 (1985) (adopting Strickland v. Washington, 466 U.S. 668 (1984)). Yet, that definition was based on the principle that, "[t]he government is not responsible for and hence not able to prevent, attorney errors ... [and] [r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in

another." Id. at 693. That is simply not so when a prosecutor suppresses evidence favorable to the accused -- the government is clearly at fault and it is always unprofessional to suppress favorable evidence. At least this Court in Bagley, acknowledged that in a materiality analysis "the reviewing court may consider directly any adverse effect the prosecutor's failure to [disclose] might have had on the preparation or presentation of the defenfant's case." Bagley, 473 U.S. at 683.

Apparently, the lower courts were having dificulty applying the Bagley materiality standard, thus this Court again sought to clarify the materiality standard in Kyles,:

1) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial ... " Id. at 434,

2) "it is not a sufficiency of the evidence test ... but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 434-435,

3) once found "material" there is no need for another harmless error analysis, Id. at 435-436, and

4) the "suppressed evidence [must be] considered collectively, not item by item." Id. at 436-437.

In short, this Court in Kyles tried to stress that a proper "materiality" standard should address the nature of the suppressed evidence and it is not simply a matter of weighing the suppressed evidence to calculate whether or not it would have been sufficient to acquit the defendant. See, Constitutional Law-Due Process, 26 Seton Hall L. Rev. 832, 854 and n. 127 (1996) (By: Cynthia L. Corcoran).

Apparently that was still not clear, for in Smith v. Cain, 565 U.S. 73 (2012) this Court created a new wrinkle in the quest to define "materiality." Now, it is not enough for the State to "advance[] various reasons why the jury might have discounted" the suppressed evidence; rather, the State must give a court "confidence that [the jury] would have done so." Id. at 76. Next, this Court in Weary, followed the definition from Smith and added that it is not reasonable for a court to "emphasize[] reasons a juror might disregard new evidence while ignoring reasons she might not" as that is similar to discounting entirely the effect the new evidence might have had on the jury. Weary v. Cain, 577 U.S. 385, 394 (2016) (citing Porter v. McCollum, 558 U.S. 30, 43 (2009) (per curiam)).

Then, according to **Glosip**, **Weary** also stands for the proposition that a reviewing court should not simply assume a jury would have believed a key witness no matter what type of evidence further impeaches them, because the correct "materiality" standard "asks what a reasonable decision maker would have done with the new evidence." Glossip v. Oklahoma, 145 S.Ct. 612, 629 (2025). Therefore, the focus is back on the jury's duty to weigh the evidence and evaluate the credibility of witnesses. It is just now, as opposed to the lower court in Brady, a reviewing court must put themselves in the shoes of the jurors and hypothesize what the jury would have done in an individual case. The Jury's Brady Right, 98 B.U.L. Rev. 345, 367 (March 2018) (By: Jason Kreag).

As former Justice Scalia had ocassion to lamant, such

probability standards are not easy for appellate judges to apply "especially[] when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not fact finding, but closer to divination." U.S. v. Dominguez-Benitez, 542 U.S. 74, 86-87 (2004) (Scalia, J. concurring). They are difficult enough to apply that perhaps not infrequently they lead to "very close question[s]." Banks v. Dretke, 540 U.S. 668, 706 (2004) (Thomas, J. dissenting). And, if they are difficult for appellate judges to apply, scholars have cryed out about how it is much worse for trial prosecutors, particularly in the Brady context. See i.e., The Brady Database, 114 J. Crim. L. & Criminology, 185, 197-198 & n. 66 (and cites therein), A Material Change to Brady, 110 J. Crim. L. Criminology 307, 324, Revisiting Prosecutorial Disclosure, 84 Ind L. J. 481, 429 (Spring 2009) (By: Alafair S. Burke) ("The standard is considerably less helpful to prosecutors trying to decide whether to disclose evidence prior to trial.").

As such, it comes at little surprise that the TCCA has had difficulty applying the Brady materiality standard. Most recently, the 5th Circuit U,S, Court of Appeals determined that the TCCA's decision in Holberg was an "unreasonable application" of Brady and its progeny. Holberg v. Guerrero, 130 4th 493, 502, 503 (5th Cir. 2025). For instance, the TCCA appears to rely strongly on its own principle from Hampton v. STate, 86 S.W.3d 606, 613 (Tex. Crim. App. 2002) that, "usually, a determination concerning the materiality prong of Brady involves balancing the strength of the exculpatory evidence against the evidence supporting conviction."

See, i.e. Ex Parte Miles, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). Not only has this Court never used the "balance" language in the Brady context, but it appears at odds with this Court's declaration that:

> "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."

Kyles, 514 U.S. 434-435

III. TCCA's Decision

In Perez's case the TCCA did not issue a full opinion, making it hard to discern exactly what standards the court actually applied. In fact, the TCCA's only explicitly cited Brady itself which, as mentioned, failed to define materiality. One may gleam at least two principles applied by the TCCA in its truncated Order disagreeing with the SHTC's 40 page Findings recommending that relief be granted.

1) The TCCA only "compared" the priorly suppressed DNA evidence with the trial DNA evidence, and,
2) The TCCA determined the "value" of the new DNA evidence was "insignificant" compared to the trial DNA evidence.

App. A-p.2-3.

What the TCCA certainly did not do was "'evaluate' the withheld evidence in the context of the entire record[.]" Turner v. U.S., 582 U.S. 313, 325 (2017). Rather, the TCCA appears to have applied a type of sufficiency of the evidence weighing of the new DNA evidence against the trial DNA evidence and determining whether the DNA evidence would still have been enough

to convict. See contra. Kyles, 514 U.S. at 434-435. The end result of the TCCA's decision was that the court entirely discounted the effect the suppressed DNA evidence of third-party contributors might have had on the jury. Weary, 577 U.S. at 394 (citing Porter, 558 U.S. at 43).

In other words, the TCCA "emphasized" that a juror might disregard the new DNA evidence because it came from the "non-sperm" fraction and the third-party contributor was "unidentified' while ignoring that a juror might not disregard it because they already had problems with M.M.'s credibility and it was still objective scientific evidence supporting the defense theory. See, Weary, 577 U.S. at 394.

In contrast to the TCCA, the SHTC followed Weary in concluding that:

> " ... there is a reasonable probability that any juror who found M.M. more credible in light of the trial DNA evidence would have thought differently had the juror learned about the undisclosed third-party contributor DNA evidence."

App. B-p.37 (#96).

The TCCA did not answer the question of whether the suppressed third-party contributor DNA evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the outcome." Kyles, 514 U.S. at 434-435. Rather, the TCCA relied in the sperm DNA from trial as if identity of the suspect was an issue. Yet, Perez was M.M.'s father, whom she knew. The actual essential question for the jury was how Perez's sperm DNA ended up on M.M.'s body. App. E-p.32-36. So everything boiled down to whether the jury believed M.M. or Perez.

And, "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence" and that estimate often depends on "subtle factors" which is beyond the ability of appellate judges to "know just which piece of information might make, or might have made a difference," Napue v. Illinois, 360 U.S. 264,269 (1959), U.S. v. Bagley, 473 U.S. 667, 693 (1985) (Marshall, J., dissenting).

Because DNA is different, the suppressed third-party contributor evidence -- no matter how "insignificant" it appeared -- would "have had a persuasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture ... " Strickland, 466 U.S. at 695-696. It is simply a given that DNA evidence is very persuading and powerful. Thus, in a way the TCCA was correct that the jury would have, and did, place great "value" on the sperm DNA evidence. Yet, it is just as true that the jury would have been affected by the suppressed third-party contributor DNA evidence. Whether it was Perez's and Torres' testimony or M.M.'s testimony, or the motel records, or the SANE evidence, there were always multiple inferences the jury could have drawn. Without the suppressed DNA evidence, the jury chose those inferences supporting M.M.'s testimony. Had the third-party contributor DNA evidence been presented it is reasonably likely the jury would have drawn the inferences supporting Perez's testimony. That is especially true considering the other new evidence considered by the SHTC.

And, the jury could have inferred that M.M.'s timeline of events for the convicted counts did not add up. Importantly, the jury could have had concerns about the time period between M.M.

being dropped back off at her Mom's and M.M. telling her Mom Perez abused her. 5 RR 84. Therefore, even without the new DNA evidence, the jury could have inferred that M.M. had put Perez's DNA on her body from a used condom.

And, the State's case only goes down hill from there as one considers the remaining evidence:

A) Perez's non-sperm DNA on the nexk swab could have gotten there by indirect transfer methods, App. B-p.17 (#50)

B) Because M.M. took a shower after it was alleged Perez left his DNA on her neck, the shower would likely have washed away Perez's DNA, App. G-p.10

C) The third-party contributor DNA on M.M.'s neck could have come from her boyfriend, App. B-p.16 (#48)

D) Because Perez's DNA was not found on the vaginal swabs and M.M. wiped/washed after defecating before the collection of the anal swabs, Perez's evidence planting theory was probable. App. B-p.19 (#53),

E) The injuries to M.M.'s vagina could have been caused by reasons other than penial penetration, such as self-inflicted digital penetration, App. B-p.20 (#54),

F) M.M. was upset at Perez because he would not let M.M. come live at Amy's house even after M.M. revealed that her step-dad had tried touching her, App. B-p.14.

G) The motel records were inaccurate.

III. Other Brady Concerns

The point is that, as this Court recognized in Kyles by requiring cumulative review of all the suppressed evidence, jurors do not think about each piece of evidence in isolation. Rather,

even a single omitted piece of evidence could change how the rest of the evidence is processed and fit together by the jury. As the Court explained in Old Chief v. U.S., 519 U.S. 172 (1997).

> "Evidence[] has force beyond any linear scheme of reasoning, and as pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."

Id. at 187. When the State prosecutors suppress favorable evidence from not just the defendant, but from the jury, an "honest verdict" can not be reached. As one commentator has explained, in Bagley

> "The Court implicitly recognized that a defendant's explanation at trial, to be complete, needed more details of the story, and that the loss of such details could be the difference between guilt and acquittal. Material evidence did not need to be exonerating evidence, but instead had to include important story-telling context. A small difference could change the entire outcome of a case."

A Material Change to Brady, 110 J. Crim. L. & Crimonology 307, 322 (2020).

That is where the TCCA went wrong in Perez's case. If in Bagley impeaching statements could be material, then here impeaching DNA evidence, even if inconclusive, was a detail the jury was entitled to hear to render an honest verdict. That is all the more so considering the power of DNA evidence to sway a reasonable juror. Rightfully so, because of its nature as objective scientific evidence. See Osborne, 557 U.S. at 55, 62 ("unparalleled ability," "powerful new evidence unlike anything known before," and "no technology comparable to DNA testing").

The SHTC embraced this understanding of "materiality" when that court concluded:

> "[T]he undisclosed third-party contributor DNA evidence's status as objective scientific evidence corroborating the defense theory ... along with its tendency to enhance [Perez's] and Rachel Torres' credibility in eyes of the jury, leads this Court to conclude that the undisclosed evidence was material under Brady. That favorable evidence puts the whole case -- from the discovery phrase through the actual trial -- in such a different light as to undermine this Court's confidence in the verdict.

App. B-p.38 (#98). The SHTC understood the impact the suppressed evidence would have had on the entire narrative of Perez's defense.

In doing so, the SHTC also took into account the "adverse affect the prosecutor's failure to [disclose] might have had on the preparation or presentation of the defendant's case." Bagley, 473 U.S. at 683. Which is exactly what this Court did in Kyles, this Court emphasized what the defense **could** have done differently and how these changes in strategy **could** have undermined the jury's verdict. Kyles, 514 U.S. at 445-449. In sum, in analyzing a materiality claim under Brady, reviewing courts should, like the SHTC did, conduct a fact-intensive examination that analyzes all the ways in which the withheld evidence could have changed the path of the trial. After conducting this analysis, the evidence should be considered material unless the reviewing court is confident that the jury **would** have convicted the accused despite the altered presentation of the case precipated by the withheld evidence. See, Smith, 132 S.Ct. at 627.

Such an approach is also in line with this Court's view of a

Strickland prejudice review which considers all the evidence adduced in the habeas proceedings. William v. Taylor, 529 U.S. 362, 397-398 (2000). Thus, the SHTC was correct to include in the Brady materiality review:

1) Perez's post conviction DNA expert's entire affidavit and report, App. G

2) Perez's SANE expert's entire affidavit, App. H

3) Mendez's entire affidavit, App. I

4) Jurado's entire affidavit, App. D-p.19, and

5) all the motive testimony excluded in error at trial. App. D-p.11.

In spite of all that evidence adduced in the habeas proceeding below, the TCCA chose not to view the suppressed third-party contributor DNA evidence in context of the entire record and only compared it to the sperm DNA evidence.

At the very least, that decision overlooked the results from M.M.'s neck swab -- which both at trial and suppressed, was non-sperm DNA. The conviction in Count III, which was ordered to be served consecutively, depended on the hickey DNA evidence. Then, unlike the motel room allegations, there were no motel records appearing to corroborate M.M.'s story, and there was testimony contradicting that Perez had access to or was in the body shop on that night (Friday the 13th). 6 RR 47-50, 6 RR 77-78. Importantly, the suppressed third-party contributor DNA test results from the neck swab had more foreign DNA material. App. F-p.1. Because, the suppressed DNA evidence was material as it related to Count III, the TCCA should have at least granted relief as to Count III.

Yet, in reality, as demonstrated by the prosecutors arguments at trial, their entire case of down playing Perez's defense depended on the neck swab being non-sperm DNA,:

> "What did she tell you? He gave me a hickey. And miraculously, where is the defendant's DNA? Right there on the left side of her neck where he gave her the hickey. Amazing."

App. J - 7 RR 57-59. And, to imply the supposed hickey DNA could not have come from a used condom the prosecutor emphasized,:

> "... And that gentlement's DNA is on her neck via an unknown substance.
> I want you to keep this in mind when you are listening to the [defense]. The DNA sample from her neck was not semen. It wasn't."

APP. J. - 7 RR 22-23. The State's "own admission" during arguments at trial is perhaps the best indicator of just how "essential" the DNA evidence was to their case. Kyles, 514 U.S. at 445, 451.

V. Conclusion

Maybe this is a closer case than Perez wants it to be. Well, then again, it is the closing aruments that make it to close for comfort. See, Banks v. Dretke, 540 U.S. 668, 708 n.2 (2004)(THOMAS, J., dissenting). The prosecutors wanted the jury to believe that "DNA doesn't lie," that it wasn't "just proof beyond a reasonable doubt" but was "proof beyond all doubt," that it was "absolute scientific proof," and "[j]ust simple, cold, hard facts." App. J - 7 RR 22-23, 57-59, 71. All that may be true -- AND WHY DNA SHOULD BE TREATED DIFFERENTLY IN BRADY CASES. Yet, while DNA may not lie, a prosecutor can lie (by omission) about DNA so that the jury does not know the truth about the DNA evidence. The Jury's Brady Right, 98 B.U.L. Rev. 345, 365 (March 2018)("compund the harm to a jury in closing arguments that the defense would have easily refuted had the prosecution met

its constitutional disclosure obligations.").

This Court's Brady materiality standard should strive to recognize that it is the jury's role to weigh the evidence and seek not to permit that duty to be usurped by appellate judges. In that regard it may indeed be time for a complete overhall of the Brady materiality standard. Id.at 385 (advocating to adopt a Powers v. Ohio, 499 U.S. 400, 402 (1991) scheme in the Brady context).

Nevertheless, that is not necessary in Perez's case. It would be sufficient for this Court to hold that DNA is different for the Brady materiality context. In other words, DNA evidence should be an exception to the normal materiality anaysis. However that would look, it would recognize the value that a reasonable juror places on DNA evidence, even when it is inclusive. Perhaps this Court should adopt a prophylactic rule that, because DNA evidence is different there should be a presumption that suppressed favorable DNA evidence is material. See, Revisiting Prosecutorial Disclosure, 84 Ind. L. J. 481, 511 (Spring 2009)(explaining benfits of a prophylactic rule in the overall Brady context).

In any event, considering the totality of the habeas record (including the trial record), it was a miscarriage of justice for the TCCA to disagree with the SHTC's recommendation to grant relief.

CONCLUSION

The Petition for Writ of Certiorari should be GRANTED.

Respectfully Submitted,

x _____

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