No. 25-5183

IN THE

Supreme Court of the United States

MANUEL JAVIER PEREZ,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Manuel Javier Perez was convicted for two counts of aggravated sexual assault of a child and one count of indecency with a child in Midland County, Texas. He was sentenced to two, concurrent twenty-five-year sentences and one, consecutive five-year sentence. The Texas Court of Criminal Appeals (TCCA) denied Perez habeas relief for his claim raised under *Brady v. Maryland*, 373 U.S. 83 (1963).

Respondent objects to Perez's Questions Presented. Instead, Respondent suggests the following:

1. Should the Court grant certiorari to review a *Brady* claim before Perez pursues federal habeas relief when that avenue is still available to him?

2. Should the Court grant certiorari to determine whether the TCCA's denial of this claim was contrary to *Brady* when the issue decided below involved no circuit split, was fact bound, and was correctly decided?

RELATED CASES

State v. Perez, No. CR37715 (385th Dist. Ct. Midland County, Tex.) (convicted and sentenced to twenty-five and five-year sentences)

Perez v. State, No. 11-11-00247-CR, 2013 WL 5512834 (Tex. App.—Eastland, Sept. 30, 2018, pet. ref'd).

Ex parte Manuel Javier Perez, No. WR-84,267-02, 2025 WL 783521 (Tex. Crim. App. Mar. 12, 2025).

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BRIEF IN OPPOSITION

The Respondent ("State") respectfully submits this brief in opposition to the petition for a writ of certiorari ("Petition") filed by Manuel Javier Perez.

OPINIONS BELOW

The TCCA's opinion denying Perez's state habeas application (located at Pet. App. 1a–3a) is not reported. *Ex parte Perez*, No. WR-84,267-02, 2025 WL 783521 (Tex. Crim. App. Mar. 12, 2025). Finally, the lower state habeas court's recommended findings and conclusions (located at Pet. App. 1b–40b) are also unreported.

JURISDICTION

The Court has jurisdiction to review the TCCA's judgment denying Perez habeas relief under 28 U.S.C. § 1257(a). As relevant here, the TCCA denied Perez's state habeas application on March 12, 2025. *Ex parte Perez*, 2025 WL 783521. Seventy-nine days later, on May 30, 2025, Perez filed an Application for an Extension of Time to File a Petition for Writ of Certiorari with the Court requesting a sixty-day extension of time, until August 11, 2025, within which to file his petition for certiorari. *See* Appl. Ext. No. 24A1190 (U.S. Mar. 30, 2025). Justice Alito partially granted the extension application, extending the deadline to file until July 10, 2025. Perez timely filed his petition for writ of certiorari on July 10, 2025. *See* Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISION INVOLVED

The Questions Presented concern the Fourteenth Amendment right to due process as described in *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT OF THE CASE

I. Facts from Perez's Sexual-Assault-of-a-Child Trial

At the time of the offenses, Perez's thirteen-year-old daughter, M.M., lived with her mother and other family. *Perez v. State*, No. 11-11-00247-CR, 2013 WL 5512834, at *1 (Tex. App.—Eastland, Sept. 30, 2013, pet. ref'd). On the evening of August 13, 2010, when exercising his parental rights, Perez drove M.M. around to various places where he would drink beer. *Id*. Perez admitted that he also ingested cocaine that night. *Id.* at 4. M.M. testified that at one point, Perez took her to an auto body shop, drank more beer, then began kissing her neck, leaving a hickey. *Id*. He also "touched her breasts over her clothes." *Id*.

After leaving the body shop, Perez took M.M. to the Scottish Delight Motel. *Id*. at *2. M.M. testified Perez rented a room downstairs, Room 116, as corroborated by the motel's registration record bearing Perez's signature. *Id*. After showering, Perez had sexual intercourse with her that night and again the following morning. *Id*. Perez then drove M.M. back to her mother's house. *Id*.

M.M. also described two prior sexual assaults by Perez, occurring when she lived with him in the summer of 2009. *Id*.

Melissa, M.M.'s mother, testified that the day Perez dropped their daughter off, she noticed a hickey on the girl's neck. *Id*. When Melissa questioned M.M., the girl admitted Perez had sexually abused her. *Id*. They then met with the police, who took M.M. to the hospital where a sexual assault examination was conducted by Nurse Paula Brookings. *Id*. at *2–3.

Brookings testified that the day after the sexual assaults, she noted a purplish bruise on the left side of M.M.'s neck and multiple abrasions to M.M.'s vaginal area, "an injury that commonly results from sexual intercourse or sexual assault." *Id.* at *3. Brookings testified these "abrasions were 'fairly recent' and were consistent with" M.M.'s statements that Perez sexually assaulted her the night and morning before. *Id*. Brookings believed M.M. had been sexually assaulted, then swabbed "each side of M.M.'s neck, vagina, anal cavity, mouth and teeth," collecting the samples for DNA testing. *Id.*; Resp't App. 14–15.[1]

Angela Garcia, a forensic scientist at DPS, analyzed the swabs from M.M., comparing them with the known samples from Perez, and testified as a DNA expert for the State at trial. *Perez*, 2013 WL 5512834, at *3. Garcia testified that M.M.'s thigh and anal swabs "showed the presence of spermatozoa" that was "consistent with [Perez's] DNA profile." *Id*; Resp't App. 16.[2] M.M.'s left neck swab contained non-semen DNA revealed to be consistent with a mixture of [Perez's] and M.M.'s DNA. *Id.*; Resp't App. 17. The mixture was almost equal between Perez and the victim, indicating Perez's DNA would not have been deposited from mere "casual contact." Resp't App. 18–19. Garcia briefly mentioned the DNA mixture on the victim's neck having more than one contributor beyond the victim, indicating a potential third-party contributor. Resp't App. 16 ("On the DNA profile from the neck, there is DNA

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[1] "Resp't App." refers to the State's appendix, attached to this Brief in Opposition, followed by the relevant page numbers added to the appendix.

[2] Garcia testified that the probability of an unrelated person being the contributor of the DNA was "approximately 1 in 827.8 million for Caucasians, 1 in 618 million for Blacks, and 1 in 97.66 million for Hispanics."

from more than one person. The victim and suspect appear to be present on the swab from the neck. And so[,] because we are talking about a mixture, I cannot call either one of them the source."). She did not address any third-party contributors to the anal or thigh swab.

Along with some of his other former sexual partners, Perez presented the testimony of Rachel Torres, his girlfriend at the time. *Perez*, 2013 WL 5512834, at *3. She stated on the night of the sexual offenses, she met with Perez at the Scottish Delight in an upstairs room, had sex using a condom, and left when Perez needed to begin his visitation with M.M. *Id*. She claimed she saw the used condom in the bathroom's trash can before she left. *Id*.

Perez testified on his own behalf, denying M.M.'s allegations. *Perez*, 2013 WL 5512834, at *4. He claimed that, before picking up his daughter for visitation, he had sex with Torres in an upstairs room at the Scottish Delight Motel and left the condom in the bathroom's trash can. *Id*. In addition to admitting to consuming cocaine and alcohol, Perez acknowledged his six prior convictions for lying to the police. Resp't App. 24–31; *Perez*, 2013 WL 5512834, at *4. Finally, he agreed that, when the police interviewed him regarding M.M.'s allegations, he failed to inform them of having sex with Torres and leaving the used condom in the motel bathroom that night. *Id*.

To rebut the testimony by Torres and Perez, the State presented the testimony of Pritesh and Loaknath Maharaj, the managers at the Scottish Delight Motel. Resp't App. 32–33. Pritesh testified about the procedures for renting a room, including double checking when keys work, verifying identification, and receiving payment for

the room. Resp't App. 34–37. They also presented the records of the registration cards and list of rentals for each room. *Id*. at 36–38; *Perez*, 2013 WL 5512834, at *8. Based on Pritesh's testimony and the motel's records, the upstairs room—where Torres and Perez claimed they had sex—was rented to another person in weekly increments, including the night of the offenses. Resp't App. 39–40. Based on Loaknath's testimony and the motel's records, Perez rented room 116, a downstairs room. *Id*. at 6–10; *Perez*, 2013 WL 5512834, a *8. This evidence confirmed M.M.'s testimony and contradicted Torres and Perez.

The jury convicted Perez of the 2010 offenses—two counts of sexual assault of a child under fourteen and one count of sexual contact with a child's breasts—but acquitted him of the 2009 offenses. *Perez*, 2013 WL 5512834, a *1.

II. Procedural History of Perez's State Proceedings

A. Direct appeal proceedings

Perez appealed, raising several claims of trial court error. *Perez*, 2013 WL 5512834, at *1. The Eleventh Court of Appeals of Texas affirmed Perez's conviction, finding either no trial court error or that any error was harmless. *Id*. at *5–12. The appellate court noted the "strong scientific and physical evidence that corroborated M.M.'s testimony. . . ." *Id*. at *9. The TCCA then refused Perez's petition for discretionary review on March 19, 2014. *Id*. at *1.

B. State postconviction proceedings

In January 2016, the TCCA denied Perez's first state habeas application challenging his conviction. *Ex parte Perez*, 2025 WL 783521. On October 12, 2023, Perez filed a second state habeas application, raising his *Brady* claim. *Id*.; Resp't App.

48–51. Perez attached to his state habeas application several exhibits to support the claim, which included a letter from DPS responding to his public information request (Resp't App. 53–55), an e-mail exchanged before trial between Angela Garcia and the prosecutors (Pet. App. 1f–6f), and a forensic science report from George Schiro (Pet. App. 1g−12g). Perez also raised unrelated claims concerning a former prosecutor, Ralph Petty, who had "an ongoing conflict of interest." *Ex parte Perez*, 2025 WL 783521.

Perez claimed the State withheld an e-mail exchange between the prosecutors and the DPS forensic scientist who testified at trial, Angela Garcia. In the e-mail exchange made about three days before voir dire began, Garcia began by stating she had "finished re-reviewing the Perez case," and had "a chance to meticulously scrutinize all" profiles again. Pet. App. 1f. Garcia then discussed the presence of potential third-party DNA in the samples collected from the child victim's neck, thigh, and anus. *Id*. Garcia reiterated that both the anal and thigh swab had sperm fractions from a single source consistent with Perez. *Id*. She also confirmed that the neck swab had the victim "and Perez [] included at all loci." *Id*. However, for that neck swab, Garcia stated that she saw "an indication of a third person at 4 of the 16 locations," but that these were "very small peaks and [were] insufficient for comparison purposes." *Id*. She did note "it would not be uncommon for another person to have contacted the victim's neck." *Id*. For the anal swab, Garcia stated that the "epithelial cell fraction . . .[was] consistent with a mixture," and that the "major component [was] consistent with [the] victim," while "the minor component [was also] insufficient for

comparison." *Id.* Finally, for the thigh swab, "[t]here [was] one peak foreign to [the victim] and Perez, but it [was again] insufficient for comparison." *Id.* Garcia concluded her e-mail by stating that, based on the defense presented, a second "epithelial cell fraction would be more important." *Id.*

After several rounds of briefing, the state habeas trial court issued its suggested findings of fact and conclusions of law, recommending the TCCA grant habeas relief on the *Brady* claim alone. Pet. App. 1b–40b.

Disagreeing with the lower court's recommendation, the TCCA denied this *Brady* claim on its merits after finding the allegedly suppressed evidence was not "favorable and material," concluding, "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." *Ex parte Perez*, 2025 WL 783521.

Perez moved for reconsideration of the denial, but the TCCA denied the motion without written order on April 11, 2025. Pet. App. 1c.

SUMMARY OF ARGUMENT

Perez presents no issue worth certiorari review. He requests mere error correction of the TCCA's fact-bound analysis of his claim under *Brady*, 373 U.S. 83. The TCCA correctly identified the applicable standard and explicitly concluded that the record showed no favorability or materiality. *Ex parte Perez*, 2025 WL 783521. It also implicitly found other reasons to deny the *Brady* claim. *Id.* (the TCCA based its denial, "among other things," on a short list of stated reasons). Aside from proposing new law, Perez alleges only that the TCCA misapplied a properly stated rule, which

is an insufficient basis for this Court's review. *See* Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

To increase his chances, Perez asks the Court to fashion a new—and categorical—constitutional test under *Brady* requiring special treatment for DNA evidence, which, he argues, should weigh more than other evidence when examining favorability and materiality. Pet. Cert. 26–27. But no clearly established law supports this proposition. No precedent even implies such elevated treatment under *Brady*. To be clear, Perez does not dispute that his semen and non-semen DNA was found on his thirteen-ear-old daughter. Rather, his arguments all hinge on very small peaks found in the DNA that could not be attributed to either him or his daughter. Thus, this trace amount of foreign DNA found on the swabs would need to receive substantially more weight to tip the favorability and materiality scales in Perez's favor. But nothing obliges a state court, or any lower court, to measure criminal trials against nonexistent precedent. And no current precedent even suggests the conclusion that DNA evidence receives greater weight in a *Brady* analysis.

As to the merits of the claim under this Court's precedent, Perez points to nothing unreasonable or incorrect in the TCCA's decision outside of his disagreement with it. He never presented evidence withheld by the State that would have resulted in a different outcome with a reasonable probability great enough to undermine confidence in his trial. Perez's habeas expert admittedly never conducted his own

DNA analysis; thus, his opinion adds little to the favorability and materiality examination. The TCCA properly identified this Court's applicable precedent. It reasonably applied that precedent to the facts of this case. Its denial of habeas relief was correct. Thus, certiorari is unwarranted.

ARGUMENT

I. This Case Presents a Poor Vehicle for Reviewing the TCCA's Denial of Perez's *Brady* Claim.

Perez's petition fails for similar reasons that a federal habeas petition would fail; thus, certiorari review would be unwarranted. The TCCA rejected his claim with explicit reference to *Brady v. Maryland* as controlling legal precedent, declined to adopt the lower court's findings, and concluded the record did not support a *Brady* violation. *Ex parte Perez*, 2025 WL 783521. Perez disagrees with this conclusion but fails to identify any questions warranting this Court's review. *See* Sup. Ct. R. 10.

The *Brady* claim rejected below involved fact-bound resolutions of settled law. Perez argues no split of authority. Instead, he pursues basic error correction for its own sake, arguing the TCCA misapplied a properly stated rule, which is an insufficient basis for this Court's review. *See* Sup. Ct. R. 10; *Ross*, 417 U.S. at 616–17 ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). Perez asks the Court to review the entirety of a "cold" state court record, to re-weigh evidence, and to resolve record-based factual disputes because the TCCA did not conclude as he wishes. *See, e.g.*, Pet. Cert. 4–5 (the TCCA "without further explanation, held that the suppressed DNA evidence was not material (nor favorable) because" the foreign,

non-sperm DNA was insignificant compared to the great amounts of Perez's DNA recovered from the victim). But the Court normally does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *accord* Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings").

Where, as here, certiorari review is requested for a simple disagreement with a state court decision, consideration of state collateral review proceedings by this Court is particularly inapt. Justice Stevens explained:

> [T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of a stay). Justice Stevens's reasoning applies here.

Perez claims that the TCCA improperly disregarded the foreign DNA evidence, which he asserts supported his defense that his daughter took his used condom to plant his sperm on her body. Pet. Cert. 23. He further asserts the DPS expert, Garcia, even deemed the evidence "important." Pet. Cert. 2, 24. He concludes that the suppressed evidence would serve both as exculpatory evidence (because it substantiated his defense theory) and as impeachment evidence (particularly against his daughter). *Id*. But while the TCCA did not explicitly address the impeachment value of any suppressed evidence, it implicitly did when it acknowledged the existence of "other" reasons supporting the denial of habeas relief. *Ex parte Perez*,

2025 WL 783521. The TCCA did not misstate the law. It did not unreasonably apply that law. And, as explained below, it reasonably concluded nothing in the record showed the trace amounts of foreign DNA evidence would have undermined confidence in Perez's conviction.

Considering the above, there are prudential concerns raised by the procedural posture of Perez's case. A federal district court's consideration of his heavily fact-bound *Brady* claim in federal habeas pursuant to 28 U.S.C. § 2254 remains undoubtedly the better course. Conveniently, Perez excludes or fails to fully discuss sections of the record running contrary to his claims. And Perez unabashedly asks the Court to extend current precedent controlling review of his claim, rather than the historic preference of channeling his claims through federal habeas.

AEDPA[3] provides Perez a route to the federal district court. There, he must demonstrate the TCCA unreasonably or incorrectly applied this Court's law to his claim or unreasonably determined the facts. 28 U.S.C. § 2254(d). Granted, he could be barred by AEDPA's statute of limitations. *See* 28 U.S.C. § 2244(d). Perez attached to his habeas application the DPS letter responding to his public information request. Resp't App. 53–55. Garcia's e-mail exchange with the prosecutors was included in DPS's response to this public information request. Pet. App. 1f. DPS's responsive letter was dated October 18, 2021. Resp't App. 53. Using that factual predicate date, Perez would have one year to present his *Brady* claim in a federal habeas petition,

[3] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

absent any tolling. *See* 28 U.S.C. § 2244(d)(1). But it took Perez nearly two more years to present his claim to the state habeas court. Resp't App. 48 (Perez's second state habeas application filed on October 12, 2023), 51 (Perez's verification signature dated September 27, 2023). Therefore, a petition now filed with the federal district court would be time-barred by several years. 28 U.S.C. § 2244(d)(1).

AEDPA's limitations period was designed to ensure finality to state convictions. *Duncan v. Walker*, 533 U.S. 167, 179 (2001). Yet Perez's federal habeas claims are not completely foreclosed. Any arguments for equitable tolling, actual innocence, or the unreasonable application of this Court's precedent should be brought to the federal district court first. The Court should reject Perez's invitation to bypass AEDPA's process to review a garden variety *Brady* claim.

II. Perez Points to Precedent Which Does Not Support His Proposition that DNA Evidence Receives Heavier Weight in a *Brady* Analysis.

The precedent Perez relies on to present an issue worthy of certiorari review does not support his proposition that DNA evidence should be treated as more important under *Brady*. Pet. Cert. 27. The precedent also does not conflict with the TCCA's decision. The facts of this case are easily distinguishable. In each matter cited by Perez, the suppressed evidence (DNA or otherwise) held great importance because of the significant impact the evidence had on the outcome of each respective case. Thus, the Court, reviewing each matter under *Brady*, had no need to create a new, categorical standard. The evidence in those matters was strong enough to be favorable and material without requiring a special scale.

First, Perez suggests a conflict with *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025), because the TCCA "assume[d] a jury would have believed a key witness no matter what type of evidence further impeache[d] them." Pet. Cert. at 30. At the outset, this argument fails because the TCCA's unpublished order denying this claim makes no suggestion, implicit or otherwise, that M.M.'s inculpatory testimony could never be impeached. *See Perez*, 2025 WL 783521. Rather, the TCCA found that the *particular*, foreign DNA evidence was insufficient given the other evidence of Perez's guilt at trial. *Id.* (comparing hypothetical value of the presence of unknown, third-party DNA "with the inculpatory value of Applicant's sperm DNA recovered from the victim's thigh and anus."). Moreover, the facts of *Glossip* are easily distinguishable from this matter.

In *Glossip*, the State presented its witness, Sneed, who testified that Glossip paid him to kill the victim. 145 S. Ct. at 620. Very little other evidence, outside of weak corroboration, connected Glossip to this murder. *Id*. But Sneed, although admitting to using methamphetamine, denied receiving psychiatric treatment or being prescribed lithium. *Id*. at 614, 620. Later, the State admitted it failed to disclose eight boxes of documents, including various evidence showing Sneed was prescribed lithium, was being treated for his bipolar disorder, had asked about recanting his testimony, and was contacted by the State in violation of a sequestration order. *Id*. at 618, 621–23. Since Sneed's testimony was "the *only* direct evidence of Glossip's guilt of capital murder," his credibility was material in multiple ways. *Id*. (emphasis added). The Court found the suppressed evidence would have significantly damaged

Sneed's credibility and would reveal to the jury that he "was willing to lie to them under oath." *Id*. This evidence further undermined the prosecution's theory that Glossip was the root of Sneed's violence, as opposed to this undisclosed evidence of bipolar disorder, which could "trigger impulsive violence" when combined with Sneed's acknowledged methamphetamine use. *Id*.

In contrast, Perez's daughter was *not* the only source of evidence demonstrating his guilt. Her testimony was significantly buttressed not just by the presence of Perez's DNA on her body, but by other physical evidence and other testimony. *Perez*, 2013 WL 5512834, at *4–8. Moreover, the presence of foreign DNA—which remains unidentified and incomplete—cannot directly undermine M.M.'s credibility, or confidence in the outcome of this trial. *Kyles*, 514 U.S. at 434–35. Perez's semen was found on M.M.'s buttocks and thighs, and his non-semen DNA was found on the hickey on her neck. *Perez*, 2013 WL 5512834, at *3; Resp't App. 18–19. And even *if* the foreign DNA helps his defense theory, alleging that M.M. tried to trap him using a condom deposited in a different hotel room fails to explain the non-semen DNA found on her neck. It also fails to explain how *so much* of his non-semen DNA ended up on the hickey—in almost equal parts to M.M.'s own DNA. The State emphasized this fact in its closing. Resp't App. 44–45 ("[Perez's] DNA is on her neck via an unknown substance. I [want] you to keep this in mind when you are listening to the [used condom defense]. The DNA sample from her neck was not semen."). And again, M.M.'s testimony was further corroborated by the physical evidence found during Nurse Brookings's examination, by her mother's testimony, and by the

testimony and record evidence from the motel managers. *Perez*, 2013 WL 5512834, at *4–8. And conversely, the motel records further impeached the testimony by Perez and Torres that he rented an upstairs room where they had sex using a condom. *Id*. at 8.

Next, Perez points to *McDaniel v. Brown*, 558 U.S. 120 (2010), which analyzed the sufficiency of the evidence of sexual assault based on new DNA reports. But in *McDaniel*, the original DNA evidence contained significant errors regarding the probability of the defendant being the source of the semen. *Id*. at 129–30. New reports increased the chances that the defendant's brother could also have been the source of the DNA. *Id*. In Perez's case, nothing decreased the chances of his DNA being present. The foreign DNA, unidentified and minor, provided only small peaks of an impartial profile or profiles. Pet. App. 1f.

Perez also cites *House v. Bell*, 547 U.S. 518, 554 (2006), to argue that "the importance of DNA evidence," should not be negated, "even when it is not a case of conclusive exoneration." Pet. Cert. 26. But in *House*, the DNA found on the victim's clothes were attributed to her husband, and not the defendant. 547 U.S. at 541. Again, the suppressed e-mail by Garcia—and Perez's own expert (Schiro)—never identify the source of the minor, foreign DNA. Nothing in the evidence negates the presence of Perez's sperm DNA found on the victim's thigh and anus or the copious amount of his non-semen DNA on her neck. Thus, nothing in the DNA provides exculpatory or strong impeachment evidence that could be favorable or material to Perez's case.

Finally, Perez relies on *Wearry v. Cain*, 577 U.S. 385 (2016) and *Kyles*, 514 U.S. 419, for his argument that the TCCA should have considered how his defense may have changed with the new DNA evidence. Pet. Cert. 32–33; *Wearry*, 577 U.S. at 394 ("the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively"); *Kyles*, 514 U.S. at 441. First, nothing in the TCCA's order indicates it did *not* consider how Perez's defense may have changed with the new DNA evidence. *Ex parte Perez*, 2025 WL 783521. Second, Perez pushes the bounds of this principal well beyond its intended use. *Wearry* and *Kyles* only require the "'cumulative evaluation' of the materiality of *wrongfully withheld* evidence," not how other evidence readily known to a defendant could have been used. *Wearry*, 577 U.S. at 394 (quoting *Kyles*, 514 U.S. at 441) (emphasis added). In essence, Perez twists *Brady* and its progeny so he may overcome this Court's prohibition of using hindsight to criticize trial counsel's strategy. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); Pet. Cert. 35. He lists all the additional evidence he believes trial counsel could have pursued but did not. Pet. Cert. 38 (another expert to challenge Brookings's sexual-assault examination, a lay witness to challenge the motel mangers' testimony, and lay witnesses to prove the victim's alleged motive to lie). All this evidence was either known or available to Perez at trial. And none of it relates to Garcia's discussion of the foreign DNA evidence.

Additionally, any perceived parallel between *Wearry* and *Ex parte Perez* collapses due to the insignificance of the foreign DNA evidence in this case. In *Wearry*, there were "three categories of belatedly revealed information [that] would have

undermined the prosecution and materially aided [his] defense at trial." *Wearry*, 577 U.S. at 388–89. The first involved "undisclosed police reports . . . that cast doubt" on the credibility of one of the state's key witnesses. *Id.* at 389. The second category included information that another key witness had "twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry." *Id.* at 390. And third, the State "failed to turn over medical records" on the victim's prior knee surgery, which undermined the State's expert that "apprais[ed the victim's] physical fitness." *Id*. The Court determined that "[b]eyond doubt, the *newly revealed* evidence suffices to undermine confidence in Wearry's conviction," as the "State's trial evidence resembles a house of cards, built on the jury crediting [one witness's] account rather than Wearry's alibi." *Id.* at 392–93 (emphasis added). And Wearry's prosecution "presented no physical evidence at trial," but rather offered "additional circumstantial evidence linking Wearry to the victim." *Id.* at 387–88. The battery of *undisclosed* evidence caused the State's case against Wearry to crash.

Pointing to his direct appeal opinion, Perez argues his case, too, was a house of cards based solely on DNA evidence that the newly-discovered evidence undermines. Pet. Cert. 21–22 (referencing *Perez*, 2013 WL 5512834). But Perez ignores the portions of the Eleventh Court of Appeals's opinion that do not support his proposition. True, the opinion acknowledged the strong DNA evidence, but it also revealed the weakness in Perez's defense. The Texas appellate court pointed out that Perez's "case [wa]s not merely a 'he said, she said' trial." *Perez*, 2013 WL 5512834, at *8. Instead, "[t]he physical evidence *and* DNA evidence corroborated M.M.'s

testimony." *Id*. (emphasis added). Immediately after this point, the appellate court summarized the State's evidence and the problems with Perez's defense. *Perez v. State*, 2013 WL 5512834, at *8 (the court's brief review of M.M.'s testimony, the motel managers' testimonies, and Brookings's testimony and examination results).

Again, M.M.'s testimony was strongly corroborated by a broad array of evidence that cannot be undermined using only minor, foreign DNA evidence. This case is not like *Wearry*, *Glossip*, or any other matter on which Perez relies. And none of these cases support, or even imply, that DNA evidence should be categorically treated any differently under *Brady*. Because the DNA noise or static unattributable to a third-party remains unpersuasive, the TCCA's denial should stand.

III. The TCCA Reasonably Denied Perez's Claim, Concluding the Record Did Not Support a *Brady* Violation.

Perez's desire for an easier *Brady* standard for DNA evidence, Pet. Cert. 27, betrays the weakness in his argument. Without the scales tipped in Perez's favor, the evidence is not enough to be found favorable or material. Relying on the current precedent, the TCCA examined the facts of the case and found no constitutional violation. Perez must show the TCCA incorrectly or unreasonably applied this Court's law, as it existed at the time of the state habeas review, to the facts of his case, which he fails to do.

The well-known standard for a due process violation under *Brady* requires the State to have withheld evidence favorable to the defense and material to guilt or punishment. 373 U.S. at 87. This rule applies even to evidence which would undermine witness credibility. *Giglio v. United States*, 405 U.S. 150, 153–54 (1972).

"Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgement of the jury.'" *Wearry*, 577 U.S. at 392 (quoting *Giglio*, 405 U.S. at 154 and *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). Stated differently, to meet the materiality standard, there must be "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469–70 (2009). And a reasonable probability of a different result does not mean a defendant "'would more likely than not have received a different verdict with the evidence,'" but rather a reasonable probability means that "the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75–76 (2012) (quoting *Kyles*, 514 U.S. at 434).

The TCCA's unpublished opinion correctly recited the *Brady* standard. *Ex parte Perez*, 2025 WL 783521, at *1 ("Suppression by the prosecution of evidence favorable to an accused violates due process where evidence is material to either guilt or punishment, irrespective of the prosecution's good or bad faith."). It acknowledged that the lower state habeas court recommended that the suppressed DNA evidence "from at least three contributors," present on the victim be found "favorable and material." *Id*. But disagreeing with this recommendation, it concluded under the unique facts of Perez's trial, that "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." *Id*. (emphasis added). Thus, the TCCA explicitly concluded that the record demonstrated neither favorability nor materiality because the allegedly suppressed

DNA evidence held no exculpatory value. It further implicitly found that the record presented no suppressed evidence with any significant impeachment value compared with the inculpatory evidence. *Id*. ("among other things…"). Garcia's e-mail, which Perez alleges was suppressed, references only very small amounts of non-sperm DNA evidence of an unidentified—and most likely unidentifiable—third-party contributor(s).[4]

Nevertheless, Perez complains that the small peaks and noise indicated a third-party contributor and would have undermined the credibility of M.M. Pet. Cert. 3. He relies on the report by his DNA expert, George Schiro, presented at the state habeas proceeding. Pet. Cert. 18–19; Pet. App. 1g–12g. Schiro opined that Garcia should have supplemented her report by acknowledging that "[a] minor, unattributable allele was also detected at the D19S433 locus," for the anal swab, that "[a]n additional minor peak was detected at the Dl9S433 locus," for the thigh swab, and that the neck swab contained "[a] mixed DNA profile consisting of at least three individuals, most likely two major DNA contributors and one minor DNA contributor . . .." Pet. App. 7g. Schiro made no declarations that the minor unattributable allele, the additional minor peak, and the minor DNA contributor were—or could be—identified. *Id*. In fact, he admitted that "[n]o conclusion" could be drawn concerning the additional minor peak on the thigh swab. *Id*. And Garcia's e-mail made clear that

[4] Neither Garcia nor Schiro offered any conclusions as to whether the foreign DNA belonged to one or more person. Such a determination would be unlikely as none of the foreign DNA material was large enough for a complete profile, which Perez admits. Pet. Cert. 19 (minor allele detected at the D195433 Locus on the anal swab, one minor peak detected at the D195433 Locus on the thigh swab, and one minor DNA contributor on the neck swab).

the foreign DNA on all three swabs were too "insufficient for comparison." Pet. App. 1f. Schiro did not state whether he conducted any further tests to the foreign DNA. Pet. App. 1g–12g. Consequently, he provided no exculpatory or significant impeachment evidence.

Neither Garcia nor Schiro state the DNA evidence identified a specific third party (i.e. Perez's girlfriend, Torres). And nothing showed the DNA contained other substances indicating it contacted a condom. Pet. App. 1g–12g. Therefore, any counterargument by the State could be just as, if not more, likely as Perez's defense theory. The testimony of Torres and Perez (who admitted being under the influence of alcohol and cocaine) could be based on their recollection of a different night when they rented an upstairs room at the motel. The negligible amount of foreign DNA could be attributed to M.M.'s mother, Brookings, Garcia, or any other person during the police interview, swab collection, or lab analysis. Each of these arguments more easily explain any discrepancy created in the evidence, rather than Perez's wild conjecture. The TCCA reasonably concluded that the foreign DNA held no exculpatory value, and its ability to impeach was inconsequential.

Moreover, as explained above, the DNA was not the only corroboration of M.M.'s testimony. M.M.'s mother, Nurse Brookings's testimony, the physical evidence found from her examination, Pritesh and Loaknath Maharaj, and the motel records all confirmed many details M.M. provided, while rebutting the testimony of Perez and Torres. Perez was also fully impeached by his prior six convictions for lying to the police and his admission to being under the influence of alcohol and cocaine on the

night of the offenses. So, Perez is incorrect. The jury was not confronted with merely his testimony versus his daughter's.

The TCCA's conclusion was reasonable and correctly applied this Court's precedent. Based on a review of the entire record, the large amount of inculpatory evidence—which included Perez's semen and other DNA material—would not be impacted by the small amount of unidentified foreign DNA.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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