CAPITAL CASE

No. 24A242

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

PAUL DAVID STOREY,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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**** CAPITAL CASE ****

QUESTIONS PRESENTED

1. Whether, as the State concedes, the State's suppression of favorable evidence and presentation of false argument at the penalty phase of a death penalty case violates due process of law and the Eighth Amendment. *See Alcorta v. Texas*, 355 U.S. 28 (1957), *Brady v. Maryland*, 373 U.S. 83 (1963), *Miller v. Pate*, 386 U.S. 1 (1967), *Giglio v. United States*, 405 U.S. 150 (1972), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

2. Whether the Texas Court of Criminal Appeals' new rules for satisfaction of the due diligence requirement for consideration of subsequent writ applications is an adequate and independent state-law ground for the judgment.

RELATED PROCEEDINGS

Storey v. Stephens, No. 4:11-CV-433-O (N.D. Tex. 2014)

Storey v. Stephens, 606 F. App'x 192 (5th Cir. 2015), *cert. denied*, *Storey v. Stephens*, 136 S.Ct. 132 (2015)

Storey v. Lumpkin, 8 F.4th 382 (5th Cir. 2021), *cert. denied*, *Storey v. Lumpkin*, 142 S.Ct. 2576 (2022)

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Appendix C. Storey's *Suggestion for Reconsideration* on the TCCA's Own Initiative, filed October 16, 2019.

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Appendix E. *State's Motion for the Court to Reconsider the Denial of Applicant's Subsequent Writ on its Own Initiative* and *State's Brief in Support*, filed August 17, 2022.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner Paul David Storey respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals. The first Question Presented here is similar to, but even more compelling to the Question Presented in *Glossip v. Oklahoma*, No. 22-7466 (U.S.) (petition granted Jan. 22, 2024), which was argued October 9, 2024. It also reflects the question currently under this Court's consideration, specifically whether a person may be executed "based on a conviction secured by law enforcement officers who no longer defend it." *Escobar v. Texas*, *cert. pending*, No. 21A602 (February 24, 2024).

Alternatively, Petitioner respectfully requests that the Petition be held for this Court's resolution of *Glossip* and *Escobar*.

CITATION TO OPINIONS BELOW

The citations are ordered chronologically. The district court's findings of fact, conclusions of law and recommendations for relief are found in Appendix A. The Texas Court of Criminal Appeals' ("TCCA") rejection of the state district court's findings, conclusions and

recommendations is found in Appendix B. *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App 2019).

Applicant's counsel sought a reconsideration, which is included as Appendix C, but the TCCA denied reconsideration. Appendix D.

The State thereafter filed its *State's Motion for the Court to Reconsider the Denial of Applicant's Subsequent Writ on its Own Initiative* (*"State's Motion to Reconsider*") is attached to this petition as E. The Texas Court of Criminal Appeals' ("TCCA") order for briefing for specified issues is attached as Appendix F. *Applicant's Briefing On the Issues and Queries Identified in this Court's Order Of June 28, 2023* is attached as Appendix E. The TCCA's order denying the *State's Motion to Reconsider* is attached as Appendix H.

Justice Sotomayer's Statement is attached as Appendix I.

JURISDICTION

The TCCA entered its judgment on June 19, 2024. On September 7, 2024, Justice Alito extended the time to file this Petition until October 17, 2024. No. 24A242. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "No State shall ... deprive any person of life, liberty, or property, without due process of law [.]" U.S. CONST., amend XIV, Section 1. It also involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent part, "[C]ruel and unusual punishments [shall not be] inflicted." U.S. CONST., amend. VIII.

Texas' statute regulates subsequent death penalty writ applications:

> Sec. 5. SUBSEQUENT APPLICATION. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]
>
> (e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Tex. Code Crim. Proc. Ann. art. 11.071 §5.

STATEMENT OF THE CASE

I. Prior Proceedings

Petitioner has exhausted all state and federal avenues of relief. U.S. Supreme Court Rule 13.1.

II. Procedural History

A jury found Mr. Storey guilty of capital murder on September 2, 2008. The jury answered the special issues in such a way that required the state district court to enter a sentence of death on September 19, 2008. The TCCA affirmed the judgment on October 6, 2010. *Storey v. State*, AP-76,018 (Tex.Crim.App., delivered October 6, 2010)(not designated for publication). This Court denied his petition for writ of certiorari on April 3, 2011. *Storey v. Texas*, 563 U.S. 919 (2011).

Mr. Storey exhausted his direct appeal process. Mr. Storey then filed his initial state application for writ of habeas corpus on May 5, 2011. On June 15, 2011, the TCCA denied relief. *Ex Parte Storey*, Writ No. 75,828-01 (Tex.Crim.App., delivered June 15, 2011)(per curiam)(not designated for publication).

Having exhausted his pursuit of state court remedies, counsel for

Mr. Storey then sought review in federal court by filing a federal habeas petition. On June 9, 2014, the federal district court denied relief. *Storey v. Stephens*, No. 4:11-CV-433-O (N.D. Tex. 2014). The Fifth Circuit affirmed. *Storey v. Stephens*, 606 F. App'x 192 (5th Cir. 2015). This Court denied his petition for writ of certiorari on October 5, 2015. *Storey v. Stephens*, 136 S.Ct. 132 (2015).

On September 27, 2016, the state district court set an execution date for April 12, 2017. On March 31, 2017, twelve days before the scheduled execution, counsel for Mr. Storey filed a subsequent writ application in state court and, on April 6, 2017, filed a motion to stay the execution. The TCCA stayed the execution the next day, April 7, 2017, and remanded the case to the state district court for further proceedings. *Ex Parte Storey*, Writ No. 75,828-02 (Tex.Crim.App., delivered April 7, 2017)(not designated for publication).

The TCCA ordered the district court to resolve, among other issues, whether the prosecution violated the Due Process Clause of the Fourteenth Amendment and the Eighth and Fourteenth Amendments by suppressing evidence favorable to Mr. Storey and by intentionally

arguing a known falsehood to the jury at the penalty phase of this death penalty case, then concealing its falsity from petitioner, his trial and appellate attorneys, and all other prosecutors and judges associated with the case at all stages of litigation.

After three days of evidentiary hearings in 2017, the state district court recommended relief on May 8, 2018. Appendix A. Despite the district court's detailed findings of fact and recommendation for relief, the TCCA dismissed the subsequent writ application on October 2, 2019. *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App. 2019). Appendix B. Judge Yeary and Judge Walker filed separate dissenting opinions, both joined by Judge Slaughter. Appendix B.

On October 17, 2019, counsel for Mr. Storey filed a *Suggestion for Reconsideration on the Court's Own Initiative*. Appendix C. The TCCA denied the *Suggestion* on November 6, 2019 without written opinion. However, the number of judges in dissent grew, with Judge Newell joining the three dissenters from the original opinion, leaving the TCCA's ultimate opinion closely divided 5-4. Appendix D. This Court denied his petition for writ of certiorari on May 4, 2020. *Storey v. Texas*, 140 S.Ct.

2742 (2020).

Petitioner's counsel then sought authorization to file a second-in-time petition in federal district court. The Fifth Circuit Court of Appeals dismissed the petition. *Storey v. Lumpkin*, 8 F.4th 382 (5th Cir. 2021). On June 30, 2022, this Court denied his petition for writ of certiorari. *Storey v. Lumpkin*, 142 S.Ct. 2576 (2022). Justice Sotomayer wrote separately in the denial of the petition. *Storey v. Lumpkin*, 142 S.Ct. at 2578-79. Justice Sotomayer observed the Fifth Circuit's "illogical rule" precluding federal review:

> The Fifth Circuit got it wrong. Its illogical rule conflicts with this Court's precedent, and it rewards prosecutors who successfully conceal their *Brady* and *Napue* violations by creating a procedure *wherein prosecutors can run out the clock and escape any responsibility* for all but the most extreme violations.

Id. at 2578 (quoting her dissenting opinion in *Bernard v. United States*, 141 S.Ct. 504, 506 (2020)(internal quotations omitted)(emphasis added). Appendix I. Remarkably, the prosecuting District Attorney (2015-2022) and her successor, both conservative elected officials, today both seek an acceptance of responsibility, not escape, for the intentional constitutional violations committed by members of that office.

On August 17, 2022, the Tarrant County District Attorney – the same office that had prosecuted Mr. Storey – filed its *State's Motion for the Court to Reconsider Applicant's Subsequent Writ on its Own Initiative* (*"State's Motion to Reconsider"*). Appendix E. The matter remained under the TCCA's consideration for about ten months. On June 28, 2023, the TCCA ordered briefing on specified issues and invited both the parties and others to weigh in on the issues it designated. Appendix F.

The TCCA's order specifically addressed reconsideration of the merits of all of Mr. Storey's substantive claims in his subsequent writ petition, which the TCCA had dismissed on procedural grounds on October 2, 2019. The TCCA's order also included reconsideration of the issue of whether Mr. Storey's was procedurally barred. Appendix F. On June 19, 2024, the TCCA denied the *State's Motion to Reconsider* without opinion. *Ex parte Storey*, No. WR-75,828-02, Tex.Crim.App. *Order* (June 19, 2024)(denied without written order), *cert. pending*, *Storey v. Texas*, No. 24A242. (Appendix H).

III. Pertinent Facts and How the Issues Were Raised and Decided Below.

i. The parents of the murder victim strongly and consistently opposed the prosecution's pursuit of the death penalty against Mr. Storey, but the prosecutors falsely asserted to the jury that the family in fact *supported* his execution, a false claim that was intended to win and did win the death sentence for Mr. Storey.

After Mr. Storey was indicted for the capital murder of Jonas Cherry, Mr. Cherry's parents, Judy and Glenn Cherry, strongly opposed the prosecution's pursuit of the death penalty of Mr. Storey. In clear and resolute terms, they repeatedly implored the prosecutors to spare Mr. Storey from the threat of execution. (Vol. 2, p. 47; 70-72); (Vol. 3, pp. 85-99; 170; 185); (Vol. 4, pp. 95-99). They have never wavered:

> As a result of Jonas' death, we do not want to see another family having to suffer through losing a child and family member. It is very painful to us to consider the suffering of Paul Storey's mother, grandmother, and family if he is put to death. We have seen the effect on family from other losses in our lives. His family did not harm us and are innocent regarding our suffering.

(Written Statement of Glenn and Judith Cherry). Their wishes were not only suppressed, but intentionally misrepresented.

The prosecutors, Christy Jack and Robert Foran, ignored their pleas.

Instead, they sought and won a death sentence against the Cherrys' explicit wishes. And they did far worse.

Well aware of the Cherrys' deeply-held opposition, the prosecutors nevertheless argued to the jury at the punishment phase that Judy and Glenn Cherry *supported* a death sentence for Mr. Storey:

> So we get to the last question [mitigation] and that is, taking into consideration everything, Ladies and Gentleman, beginning with the circumstances of this crime – and you know what? His [Mr. Storey's] whole family got up here yesterday and pled for you to spare his life. **And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate.**

(Vol. 39; pp 11-12)(emphasis added).

ii. The prosecutors successfully hid their lie to the jury from the district court and all lawyers, including fellow prosecutors, both before the jury trial and throughout all subsequent proceedings.

Jack and Foran carefully kept the secret of the Cherrys' opposition strictly to themselves. No one knew that this assertion was a lie. They kept their secret even from their fellow prosecutors. Unsurprisingly, Mr. Storey's own attorneys were never told, and the lawyers for Mr. Storey's co-defendant were just as oblivious. No one but these two prosecutors knew the secret, one that remained buried throughout all state and

federal proceedings.

Their misconduct was discovered only by happenstance as Mr. Storey's April 12, 2017 execution date drew near. As Corey Sessions recounted in his affidavit:

> "On December 20, 2016 around 11:00 a.m. Mr. Glenn Cherry, whom I have known for a few years, came to my place of employment to have his personal vehicle serviced. While waiting for his vehicle to be serviced, Mr. Cherry told me that he had received a letter from the State of Texas which stated that the execution date had been set for April 12, 2017 for Paul Storey. I responded to Mr. Cherry by telling him that I had read about the execution date being set for Paul Storey in the Fort Worth Star-Telegram back in October 2016. Mr. Cherry said that 'they' (State of Texas) wanted to know if the Cherry's wanted to attend the execution. Mr. Cherry said, 'Judy and I don't want any part of that.'
>
> "Mr. Cherry then said 'Judy and I thought you might be able to help us.' I asked Mr. Cherry how is it that I could help them. Mr. Cherry said 'Judy and I don't want to see Paul Storey be executed and we don't want his mother to go through with what we went through with the loss of our son Jonas when he was killed. To be certain that I was understanding the wishes of Glenn and Judy Cherry I said to Mr. Cherry 'so as to be clear, you and your wife do not want Paul Storey to be executed?' Mr. Cherry replied 'yes, that's correct, now we don't want him to get out of prison, we feel he shouldn't ever get out, like the other guy Porter.'
>
> "I then asked Mr. Cherry if he had ever conveyed this to the Tarrant County District Attorney's office. Mr. Cherry said that long before trial, he and his wife had told the Tarrant County

> District Attorney Prosecutor Christy Jack that they did not want either Paul Storey or Mark Porter to receive the death penalty. In early January 2017, I contacted Mike Ware, Mr. Storey's attorney with this information."

(Affidavit of Corey Sessions, March 31, 2017).

iii. Subsequent writ proceedings culminated with the district court's clear and unequivocal recommendations for relief based on overwhelming evidence that the prosecutors suppressed evidence and falsely argued to the jury in violation of the 14th Amendment to the Constitution of the United States, and rendered the death sentence unreliable in violation of the 8th and 14th Amendments.

Shocked with this new information, counsel for Mr. Storey filed a subsequent writ application. The TCCA remanded to the district court for resolution of its factual allegations, specifically the following claims:

> The State of Texas denied Applicant his right to due process under the Fourteenth Amendment to the Constitution of the United States by arguing aggravating evidence the prosecution knew to be false.
>
> The prosecution introduced false evidence, thereby depriving Mr. Storey of a fair punishment trial.
>
> The State of Texas denied Applicant his right to Due Process under the Fourteenth Amendment to the Constitution of the United States by suppressing mitigating evidence.

> By arguing false aggravating evidence and suppressing mitigating evidence, the State of Texas has rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments to the Constitution of the United States.

Ex Parte Storey, Writ No. 75,828-02 (Tex.Crim.App., delivered April 7, 2017)(not designated for publication).

Because the writ application was subsequent to the initial writ application, the TCCA also ordered the trial court to determine whether the basis of the claims were "ascertainable through the exercise of reasonable diligence" by the initial writ attorney, Mr. Robert Ford, and if not, to determine the merits of the claims. *Id.* Mr. Ford, however, had since died some five years earlier and was unavailable for the subsequent writ proceedings.

The trial court found Mr. Ford to be diligent, a finding that agreed with all the witnesses over three days of hearings. Appendix A. His reputation for his diligence and zealous advocacy, as various witnesses attested, was uncontradicted. The secret, successfully withheld from all lawyers, both prosecutor and defense, was also unknown to him, as the district court found; Mr. Ford was no different from any of the other

attorneys involved in the case, none of whom were aware of the Cherry's opposition. In light of this uncontradicted evidence, the court concluded that "Mr. Ford did not know that the Cherrys opposed the death penalty for [Mr. Storey]" and "would not have discovered the factual basis of these claims through the exercise of reasonable diligence." (Appendix A, at 5).

The district court went further on the issue of Mr. Ford's due diligence. Having found that the evidence established his diligence, the court expressly precluded the State from arguing against Mr. Ford's diligence in light of its concealment from everyone, including Mr. Ford. *Id*. at 11-12. "Because the State concealed the evidence at issue in this subsequent writ application, it has forfeited its argument that Applicant's pleading is barred under the doctrine of forfeiture by wrongdoing. The long-standing equitable maxim is that 'no one shall be permitted to take advantage of his own wrong.' *Reynolds v. United States*, 98 U.S. 145, 160 (1878)." *Id*. at 11. The court explicitly found the State had entered the entire case with unclean hands. *Id*. at 12. In light of its twenty-one findings regarding Mr. Ford's diligence, the court reached the merits and recommended relief to the Court of Criminal Appeals. *Id*. at 16.

iv. In a 6-3 decision and later, a 5-4 decision, the TCCA rejected the district court's findings and recommendation for relief.

The TCCA dismissed the writ petition in a per curiam opinion on the grounds that Mr. Ford was negligent because he failed to discover the Cherrys' opposition to Mr. Storey's execution and the prosecution's lie to the jury. *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App. 2019). While TCCA agreed that the State did not inform trial counsel about the Cherrys' opposition, it found that the same prosecutor who told trial counsel that the Cherrys "preferred not to be contacted" had also said "'that they were certainly free to contact them' if they wished to do so." *Id*. at 439. The TCCA reasoned that the Cherrys' desire for a life sentence was available to Mr. Ford because Mr. Cherry had testified at the writ hearing "that he has disclosed his anti-death penalty views to "anybody that wants to know or has ever asked me." *Id*. The Court decided that the failure to present direct evidence "showing what Ford did or did not know regarding the victim's parents' anti-death penalty views," combined with this testimony, defeated the district court's findings of Mr. Ford's diligence. *Id*.

Judge Walker, joined by Judge Slaughter, dissented. *Ex parte Storey*, 584 S.W.3d at 447-462. The dissent found that Mr. Ford's lack of knowledge could be inferred from the circumstantial evidence adduced at the writ hearing. *Id*. Noting Mr. Ford's reputation for diligence, the dissent first observed a telling disparity. Mr. Ford, a zealous advocate, by all accounts, would have raised facts based on the winning issues before the TCCA because such a discovery "for a habeas attorney is like hitting the jackpot on the Texas Lottery," a win a lawyer like Mr. Ford would never miss. *Id*. at 455-456. Yet he did nothing about this "jackpot" evidence. A reasonable inference under the facts of this case is that Mr. Ford, like all who preceded him, was unaware of the prosecution's carefully and successfully guarded secret.

Judges Walker, Yeary, Slaughter (and ultimately Newell) dissented to the TCCA's new requirement that habeas counsel cold-call the survivors of a capital murder victim as a new-found duty "beyond what a reasonably competent habeas attorney would have done under the circumstances." *Id*. at 456. "'Reasonable' diligence would not go prying into the private feelings of a murder victim's family without a very good reason for doing

so. The trial court found that 'in most cases family members of murder victims do not wish to speak to lawyers representing the person found guilty of killing their loved one.'" *Id*. at 456-457.

Judge Yeary dissented as well. *Ex parte Storey*, 584 S.W.3d at 443-447. He did not believe that the defense should be required to disbelieve every prosecution argument and seek to build a case against those arguments. *Id*. Quoting this Court's analysis in *Banks v. Dretke*, 540 U.S. 668, 696 (2004), Judge Yeary concluded: "A rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Accordingly, he decided that Mr. Ford's failure to discover the prosecution's hidden lie did not reflect a lack of due diligence. *Id*. at 444.

Counsel for Mr. Storey filed his *Suggestion for Reconsideration on the Court's Own Initiative* on October 2, 2019. The *Suggestion* complained that the Court's per curiam opinion "imposes a burden unlike anything this Court has ever demanded of State or defense – proof directly from beyond the grave. Short of a seance, this new burden is one that can never be met." Appendix G. The Court of Criminal Appeals denied the

Suggestion on November 6, 2019, but Judge Newell joined Judges Walker, Yeary and Slaughter to reflect that they would have granted the *Suggestion* and reconsidered its decision. As discussed next, the TCCA *did* reconsider its decision after the State filed a confession of error, removed the procedural bar and moved the Court to grant relief.

v. Despite the State's confession that its prosecutors won a death sentence by secreting material evidence favorable to the defense and by lying to the jury, the TCCA gave the confession no weight and prevented the State from rectifying its own recognized misconduct.

On August 17, 2022, the State of Texas filed its *State's Motion to Reconsider*[1] Mr. Storey's subsequent writ application. In its *Motion*, the State renounced the misconduct, agreed to the facts that removed any procedural bar and concluded:

> In 2008, Ms. Jack and Mr. Foran failed to disclose favorable, material evidence to defense counsel. Ms. Jack compounded this action when she blatantly lied during her closing argument at trial. *Ten years later, Ms. Jack and Mr. Foran compounded that lie even further when they gave perjured testimony to cover up the fact that Ms. Jack had violated*

1 The Tarrant County District Attorney filed a pleading styled, State's *Motion for the Court to Reconsider the Denial of Applicant's Subsequent Writ on its Own Initiative.* The TCCA denied it under "State's Suggestion to Reconsider." TCCA, *Order*, June 28, 2023.

> *Storey's right to a fair trial-the trial, therefore, did not take place on an even playing field. Under these most extraordinary circumstances, Storey should, at the very least, be granted a new punishment trial. Justice demands it.*

Appendix E, State's *Motion to Reconsider*, pp. 9-10 (emphasis added).

On June 28, 2023, the TCCA ordered counsel for Mr. Storey and others[2] to brief specified questions, which included reconsideration of Mr. Storey's subsequent writ petition claims. Appendix F. Newly elected District Attorney, Phil Sorrells, filed a brief consistent with his predecessor's motion advocating the vacation of Mr. Storey's death sentence. Appendix E. On June 19, 2024, the TCCA denied without opinion the State's *Motion to Reconsider*. Appendix H. Judges Yeary, Walker, and Slaughter again dissented. Judge McClure did not participate. Appendix H.

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2 The Texas Attorney General ("AG") as attorney *pro tem* represented the State throughout all state proceedings beginning in 2018. Once the *pro tem* term ended, the case was returned to the Tarrant County District Attorney ("TCDA"). The AG had defended the misconduct, but the TCDA, Sharen Wilson, and her successor, Phil Sorrells, conceded the misconduct. The AG, who sponsored the perjured testimony of Jack and Foran at the writ hearing, continued to defend the malfeasance, in the role of amicus curiae.

REASONS FOR GRANTING THE WRIT

I. The State confessed that it won a death sentence by violating this Court's decisions in *Alcorta v. Texas*, 355 U.S. 28 (1957), *Brady v. Maryland*, 373 U.S. 83 (1963), *Miller v. Pate*, 386 U.S. 1 (1967), *Giglio v. United States*, 405 U.S. 150 (1972), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), but the TCCA ignored the State's justified and well supported confession of misconduct.

The prosecutorial misconduct in this case is not contested as a matter of fact or law. The district court detailed at length how prosecutors violated the Due Process Clause and the Eighth Amendment. The State has owned its misconduct and has affirmatively confessed its extensive violations of federal constitutional law.

The State agreed that the prosecutors suppressed material evidence favorable to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and knowingly introduced falsity into the trial in violation of *Alcorta v. Texas*, 355 U.S. 28 (1957). They brazenly lied to the jury like the prosecutors in *Miller v. Pate*, 386 U.S. 1 (1967) and *Giglio v. United States*, 405 U.S. 150 (1972), then committed perjury during the 2017 habeas proceedings to cover up their own misconduct, as the district court found. Appendix A. Because the falsity was introduced at the punishment phase of a death penalty trial, the misconduct bled into the Eighth Amendment

as well. *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (penalty argument implying falsity renders a death sentence unconstitutionally unreliable under the Eighth Amendment). In summary, the prosecutorial misconduct deprived Mr. Storey of both due process and a reliable judgment, establishing the array of federal constitutional violations.

The State, through two successively elected Tarrant County District Attorneys, moved the TCCA to grant relief. In its *Motion*, the State urged the TCCA to adopt the district court's findings of fact and conclusions of law: "Justice demands it." (Appendix E). The State's concession of its misconduct was explicit:

> The State concedes that Ms. Jack's closing argument included what she knew to be a false statement regarding the victim's family. The State concedes the evidence that the Cherrys vehemently opposed the death penalty was not disclosed in violation of *Brady*[.]

(Appendix E). The State of Texas accordingly urged that the TCCA reconsider its decision and grant Mr. Storey – and the Cherrys – relief. But the TCCA seems to have completely ignored the State's confession of the prosecutors' serious misconduct.

A State's strong interest in finality of judgments is well recognized

and established throughout state and federal law. When a State decides that its own misconduct overrides that interest, courts would be well taken to lend the highest level of deference. When a State relies on its own prosecutorial misconduct as a basis for confession and remedial action, it acts not only against its interest in finality, but against the self-interests of its own prosecutors.

As the State put it, "Under these most extraordinary circumstances, Storey should, at the very least, be granted a new punishment trial." (Appendix E). The circumstances are extraordinary because they involve the difference between mere error and intentional misconduct, and equally significant, the complete lack of accountability for serious and admitted misconduct. As for relief, it is all that is sought by both parties.

Confessions of this sort of error made under these circumstances should be afforded exceptional judicial deference. Here, the TCCA failed to impose even a modicum of accountability on prosecutors who abused their position of trust in order to secure a death sentence, violated federal constitutional law and compounded their misconduct by committing perjury in a futile attempt to cover it up. Judicial intervention about

prosecutorial discretion should be so informed and restrained.

"Confessions of error are … entitled to and given great weight" for good reason. *Sibron v. New York*, 392 U.S. 40, 58 (1968). Both law enforcement officers of the State and the judiciary share the same "public interest that a result be reached which promotes a well-ordered society [which is] is foremost in every criminal proceeding." *Young v. United States*, 315 U.S. 257, 258-59 (1942). When the State argues that it should forfeit its "win" due to the misconduct of its own officers, its confession bears the greatest degree of reliability and accuracy because the officer of the State is vindicating its highest aspiration –"not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011)("Prosecutors have a special duty to seek justice, not merely to convict."). Because a State's confession of misconduct necessarily includes the elevation of its duty over its finality interests, a conclusion especially deserving of judicial deference.

Capital cases are "qualitatively different" from other cases. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). One would never know this case is a death penalty case in light of the TCCA's perfunctory treatment

of the State's confession of egregious misconduct of its officers. After having ordered rebriefing, the TCCA then simply denied the motion without comment, ignoring and disregarding both the egregious misconduct and the State's confession of misconduct and agreement that no procedural bar prevented the TCCA from reaching the merits of the federal constitutional violations.

The TCCA's treatment is not surprising. This is the same court that ignored Texas' confession that it violated this Court's decision in *Napue v. Illinois*, 360 U.S. 264 (1959). *Escobar v. Texas*, 143 S.Ct. 557 (2023). This Court ultimately intervened by summarily vacating the judgment and remanding specifically "for further consideration in light of the confession of error," an order received as a suggestion to be declined. *Id.*

To be clear, this Court's clear directive – issued just last year to the same State court – had no effect. *Escobar v. Texas*, *supra*. This same death penalty case is back before this Court with the same State's confession of error. *Escobar v. Texas*, *cert. pending*, No. 21A602 (February 24, 2024). This Court should grant Mr. Storey's petition for certiorari and affirm that state courts give due weight to the special role that prosecutors

play in our justice system and their efforts to rectify the consequences of their own admitted misconduct.

II. The state procedural bar was rendered moot by the State's agreement that habeas counsel was in fact diligent and did not know the Cherrys' opposition to Mr. Storey's execution.

The state district court found that habeas counsel was diligent:

> Mr. Ford had a strong reputation for his diligence. He was described by various attorneys and judges as "extremely zealous," "tenacious," "very aggressive," "gifted," a "passionate lawyer," "fearless advocate," "extremely diligent," and invariably regarded as an exceptional and diligent attorney.

(Appendix A, p. 4). The court further found as a matter of fact that "[n]either Foran nor Jack nor anyone else from the State, ever informed Mr. Ford that Glenn and Judith Cherry opposed a death sentence for Applicant." (Appendix A, p. 4). Accordingly, the court also found that "Mr. Ford did not know that the Cherrys opposed the death penalty for the Applicant" and that "Mr. Ford would not have discovered the factual basis of these claims through the exercise of reasonable diligence." (Appendix A, p. 5).

The district court also determined that the State "is precluded from arguing that Applicant is barred under Section 5 of Article 11.071 of the

Code of Criminal Procedure in light of the findings of fact made herein." (Appendix A, p. 11). It found that the State "has forfeited its argument that Applicant's pleading is barred under the doctrine of forfeiture by wrongdoing" and under "[t]he long-standing equitable maxim is that 'no one shall be permitted to take advantage of his own wrong.'" Appendix A, pp. 11-12)(citing *Reynolds* v. *United States,* 98 U.S. 145, 160 (1878)). Separately, the court concluded "that equity precludes the State from asserting that Section 5 bars this Court from consideration of Applicant's claims." (Appendix A, p. 12)(relying on federal equitable jurisprudence).

The TCCA held that Mr. Storey "failed to satisfy the requirements of Article 11.071, §5. Accordingly, we dismiss all of Applicant's claims as an abuse of the writ without reviewing the merits." *Ex parte Storey*, 584 S.W.3d 437, 439-40 (Tex.Crim.App. 2019). At this point in the proceedings, the State had not confessed its misconduct and had argued, despite the state's court's determinations, that habeas counsel was *not* diligent.

On August 28, 2023, the State did more than acknowledge its misconduct, as the State of Oklahoma did in *Glossip*, a case under this Court's current consideration. The State of Texas expressly argued in its

brief that habeas counsel was diligent. (Appendix E, pp. 13-16). This posture is greater than a concession or agreement or the waiver of a procedural issue – it constitutes an express and affirmative position that habeas counsel was diligent. Thus, the procedural bar is no longer an issue, and this Court is free to review the TCCA's latest decision denying the State's *Motion for Reconsideration*.

It is clear that the TCCA applied the procedural bar in its 2019 decision. In contrast, the TCCA simply denied the State's *Motion for Reconsideration* without any analysis or explanation. But there is good reason to conclude that the denial was based on the merits.

The TCCA has never held that due diligence cannot be affirmatively waived by the State. On the contrary, it is ordinarily regarded as a procedural defense that a party may waive. *Connolly v. State*, 983 S.W.2d 738, 741 (Tex.Crim.App. 1999)("due diligence issue 'is really in the nature of a plea in bar or defense'")(quoting *Harris v. State*, 843 S.W.2d 34, 35-36, n.1 (Tex.Crim.App. 1992)). Even assuming that the issue is unwaivable without exception of any kind, the TCCA in its decision before this Court was faced with more than a State's *Glossip*-like affirmative waiver of an

issue. By advocating habeas counsel's diligence, the State effectively removed the only factual issue which could act as a procedural bar. When a justiciable controversy no longer exists between the parties, the issue becomes moot. *See, e.g., Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 634 (Tex. 2021). Without a factual controversy regarding the procedural bar, the TCCA had no choice but to consider the substantive issues of whether there were violations of federal constitutional law. *Petetan v. State*, 622 S.W.3d 321, 334 (Tex.Crim.App. 2021)("Texas courts are not empowered to give advisory opinions").

Even without the mootness of the procedural question, the TCCA clearly reconsidered its previous decision on the merits. It specifically ordered additional briefing on the merits of Mr. Storey's subsequent writ claims. Most of the issues under the TCCA's consideration concerned the merits of Mr. Storey's subsequent writ claims. The only relevant procedural consideration – whether habeas counsel was aware of the Cherrys' opposition to Mr. Storey's execution – was agreed upon by the State, thereby removing any bar to consideration of the merits.

Ultimately, the TCCA's cryptic decision favors this Court's jurisdiction. Unlike its 2019 holding, the TCCA issued an order of denial after reconsideration of the substantive federal constitutional claims but without any indication that it was "clearly and expressly" relying on the procedural bar as a "bona fide separate, adequate, and independent ground[]" for its decision to deny relief. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)("cryptic" state court decisions regarding federal constitutional rights disfavor preclusion of federal jurisdiction). Because the TCCA's order contained no clear or express indication that it was based on grounds separate, adequate, and independent of federal law, it did not defeat this Court's jurisdiction. *Id.*

III. The state-law grounds are neither adequate nor independent to support the TCCA's judgment.

The TCCA held that Mr. Storey's federal constitutional claims were barred from consideration under Article 11.071 of the Texas Code of Criminal Procedure, which requires due diligence by habeas counsel. Tex. Code Crim. Proc. Ann. art. 11.071, §5. Habeas counsel did not testify because he was long since deceased. In light of uncontradicted and near

unanimous testimony of the witnesses regarding habeas counsel's diligence, the district court found habeas counsel to be diligent, a finding overwhelmingly supported by the record.

In its per curiam opinion, the TCCA ignored this evidence and instead embarked on an unprecedented new standard of review. The well established standard of TCCA review is a determination of whether the evidence supports a district court's factual findings. *See*, *e.g.*, *Ex parte Watkins*, 770 S.W.2d 816, 818 (Tex.Crim.App. 1989)("Generally, if the trial court's findings are supported by the record, they should be accepted by this Court."). The TCCA reversed this standard and instead searched the record to find any evidence that "undermine[d]" the trial court's factual findings. *Ex parte Storey*, No. WR-75,828-02, p. 5 (per curiam).

It also created a new standard of diligence of habeas counsel. Seizing upon one noncontextualized remark by Mr. Cherry, the TCCA birthed a new rule for diligence: habeas counsel is diligent only if he seeks out and interrogates the survivors of a murder victim about whether they favor the death penalty for the killer. The TCCA's radical departure from its own settled law and its creation of a bizarre and unwelcome new rule cannot

preclude this Court's review of its judgment. Its decision hardly affirmed any bone fide, adequate or independent grounds that defeats this Court's jurisdiction for review.

A. The TCCA's judgment did not rest on an adequate state-law ground.

"[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Barr v. Columbia*, 378 U.S. 347, 354 (1964). Where a petitioner "could not fairly be deemed to have been apprised of" a state procedural rule barring review of claims of violations of federal constitutional rights, this Court may exercise its jurisdiction to review a state court's decision. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 457-58 (1958). "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.*

Under the long-standing standard of review of findings by habeas courts, Mr. Storey expected the state district court's determinations to be

considered by the TCCA deferentially. *See, e.g., Ex parte Garcia*, 353 S.W.3d 785, 787-88 (Tex.Crim.App. 2011)("this Court [TCCA] is the ultimate finder of fact; the trial court's findings are not automatically binding upon us, although we usually accept them if they are supported by the record."). In a stunning departure from settled state law, the TCCA instead adopted a new standard of review, one which searches for facts that undermine rather than support factual findings made by the district court. This new standard – applied exclusively to Mr. Storey – cannot prevent this Court from reaching the consideration of the federal constitutional rights violated in this case.

Even more novel is the TCCA's new requirement that habeas counsel interrogate the parents of a murder victim to ascertain their views on capital punishment. *Ford v. Georgia*, 498 U.S. 411, 425 (1991)(state procedural law not "firmly established at the time [of the] question ... cannot bar federal judicial review."); *Barr v. Columbia*, 378 U.S. 146, 149-50 (1964)("state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review"). No court, including the TCCA, has ever imposed a duty on attorneys representing

death-sentenced prisoners to contact and interview the survivors of murder victims to determine their views on capital punishment.

Due diligence is a sound standard. But even otherwise state procedural rules, generally expressed and sound on their face, do not bar this Court's review. *Lee v. Kemna*, 534 U.S. 362 (2002)(application of state rule for continuance held inadequate to bar review). This Court's authority of review remains in "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. at 376. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.)(quoted in *Lee v. Kemna*).

This case is the exceptional case in which the TCCA set the standard of due diligence outrageously too high. In this case, the State has conceded its constitutional error, confessed its misconduct, abandoned any interest in finality and agreed that habeas counsel's diligence was established.

There is no "no perceivable state interest" in this case. *Osborne v. Ohio*, 495 U.S. 103, 123 (1990). Under the facts of this case, there can be no bar to this Court's consideration of this case.

The TCCA's new rule is not only novel, draconian and exorbitant, but should be condemned. No one – not defense lawyers, not prosecutors, and most certainly not survivors of murder victims – wants this outrageous new rule. In any case, it does not bar this Court's review. On the contrary, it cries out for intervention. Only this Court can offer any legal remedy, and this petition is the only vehicle through which clear violations of federal constitutional law may be addressed.

B. The TCCA's judgment was not independent of federal law.

The district court explicitly relied on federal law in deciding that the federal constitutional issues were reviewable:

> Because the State concealed the evidence at issue in this subsequent writ application, it has forfeited its argument that Applicant's pleading is barred under the doctrine of forfeiture by wrongdoing. The long-standing equitable maxim is that "no one shall be permitted to take advantage of his own wrong." *Reynolds v. United States*, 98 U.S. 145, 160 (1878).
> ***

> For similar reasons, this Court concludes that equity precludes the State from asserting that Section 5 bars this Court from consideration of Applicant's claims. *Fay v. Noia*, 372 U.S. 391, 438 (1963)("[H]abeas corpus has traditionally been regarded as governed by equitable principles."). Because the State comes to this Court with unclean hands due to its suppression of *Brady* material and false use of the evidence, it is barred from reliance on Section 5. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.,* 324 U.S. 806, 814-15 (1945).

(Recommendations for Relief, p. 11). Significantly, the State agreed with the district court's rationale and in its *Motion to Reconsider*, explicitly asked that it *not* be the beneficiary of its misconduct. (Motion to Reconsider, p. 6).

The TCCA necessarily rejected the district court's reliance on its explicitly stated federal law. The district court concluded that the State's misconduct precluded application of the procedural bar; the TCCA expressly used it to render the misconduct unreviewable and the State's confession an irrelevant nullity. The TCCA's decision was thus grounded in a rejection of this Court's decisions in *Reynolds v. United States*, *Fay v. Noia* and *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, *supra*, and is therefore not independent of federal law.

"[W]hen ... a state court decision fairly appears to rest primarily on

federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court may exercise review of the state court decision. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The TCCA's employment of a procedural bar forfeited (and later affirmatively waived) by the State due to its own misconduct is repugnant to this Court's equitable jurisprudence relied upon by the district court.

By barring consideration, the TCCA necessarily held that the wrongdoing identified by the state district court was insufficient to follow this Court's equitable jurisprudence. Its decision is thus not independent of the federal constitutional claims. Accordingly, this Court is not foreclosed from review.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition for a writ of certiorari, reverse and remand with instructions to order a new punishment trial. Alternatively, the petition should be held for resolution in light of *Glossip v. Oklahoma* and *Escobar v. Texas*.

Respectfully submitted,

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