Appendix A. The state district court's findings of fact, conclusions of law and recommendations for relief, filed May 8, 2018.

NO. C-3-W011020-1042204-B
[WR-75,828-02]

EX PARTE	§	**IN CRIMINAL DISTRICT**
	§	
	§	**COURT NO. 3 OF**
	§	
PAUL DAVID STOREY	§	**TARRANT COUNTY, TEXAS**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

On this day came to be heard Applicant Paul David Storey's subsequent application for writ of habeas corpus filed pursuant to Article 11.071 of the Texas Code of Criminal Procedure and on remand from the Court of Criminal Appeals. Having considered the pleadings of the parties, the arguments of counsel, the law applicable to the case, and the parties proposed findings of fact and conclusions of law, the Court hereby makes the following findings of fact and conclusions of law with a recommendation that relief be granted.

I.
PROCEDURAL HISTORY

1. A jury found Mr. Storey guilty of capital murder on September 10, 2008. The jury returned punishment findings in favor of death and the District court entered a sentence of death on September 15, 2008. The Court of Criminal Appeals affirmed. *Storey v. State*, AP-76,018 (Tex. Crim. App. Oct. 6, 2010 (not designated for publication). The Supreme Court of the United States denied Storey's petition for writ of certiorari on April 3, 2011. *Storey v. Texas*, 563 U.S. 919 (2011).

2. Counsel for Mr. Storey, Mr. Robert Ford, filed his initial state application for writ of habeas corpus on May 26, 2010. On June 15, 2011, the Court of Criminal Appeals denied relief. *Ex parte Storey*, Writ No. 75,828-01 (Tex. Crim. App. June 15, 2011) (not designated for publication).

3. Storey then challenged his conviction and sentence through a federal petition for writ of habeas corpus, which the federal district court denied. *Storey v. Stephens*, No. 4:11-CV-433, 2014 WL 11498164, at *1 (W.D. Tex. June 9, 2014). The Fifth Circuit denied him a Certificate of Appealability. *Storey v. Stephens*, 606 Fed. App'x 192, 198 (5th Cir. Mar. 18, 2015). The Supreme Court again denied his petition for a writ of certiorari, thus concluding his federal habeas proceedings. *Storey v. Stephens*, 136 S. Ct. 132 (2015).

4. On September 27, 2016, the trial court set an execution date for April 12, 2017.

5. On March 31, 2017, Applicant filed a subsequent application for writ of habeas corpus pursuant to Article 11.071 §5 of the Code of Criminal Procedure alleging six grounds for relief: "(1) newly-discovered evidence 'compels relief'; (2) the State denied him his right to due process because it argued 'evidence' it knew to be false; (3) the State introduced false evidence which unconstitutionally deprived him of a fair punishment trial; (4) the State denied him his right to due process by suppressing mitigating evidence; (5) by arguing false aggravating evidence and suppressing mitigating evidence, the State rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments; and (6) the State violated the Fourteenth Amendment by seeking death in this case." *Ex parte Storey*, No. WR-75,828-02, 2017 WL 1316348, at *1 (Tex. Crim. App. Apr. 7, 2017) (not designated for publication).

6. On April 7, 2017, the Court of Criminal Appeals stayed Applicant's execution and remanded this case to the trial court to determine whether the factual basis of these claims was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed. If the claims were not so ascertainable, this Court was ordered to proceed to review the merits of four of the six claims. *Ex parte Storey*, No. WR-75,828-01 (Tex. Crim. App. April 7, 2017).

7. The Court of Criminal Appeals designated four issues for resolution:

   Issue Two: 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 to the jury at punishment that the prosecution knew to be false.

   Issue Three: The prosecution introduced false evidence, thereby depriving Mr. Storey of a fair punishment trial and in violation of the Fourteenth Amendment to the Constitution of the United States.

   Issue Four: 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.

Issue Five: By arguing false aggravating evidence at punishment 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.

8. On August 9, 2017, Applicant filed his *Request for Affirmative Finding That Robert Ford Exercised Due Diligence in His Representation of Applicant.*

9. On September 11 and 12, 2017, and October 20, 2017, this Court presided over habeas proceedings regarding the designated issues.

10. The following individuals testified during proceedings: Christy Jack, Robert "Bob" Gill, Robert Foran, Larry Moore, Ashlea Deener, Mark Daniel, William "Bill" Ray, Tim Moore, Cory Session, Glenn Cherry, Judith "Judy" Cherry, Leticia Martinez, Mollee Westfall, Jeffrey Cureton, Edward "Chip" Wilkinson, John Stickels, Fred Cummings, Terri Moore, and Suman Cherry.[1]

11. The Court also admitted the following exhibits: Applicant's Exhibits 1, 2, 3, and 5 (AX); and Respondent's Exhibit 1 (RX).[2]

12. Following the hearing, the Court ordered the parties to submit "additional brief[ing]" or "proposed findings of fact and conclusions of law." 4.SHRR.100.[3]

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[1] The Court refers only to Larry Moore as "Moore," and to Tim Moore and Terri Moore by their full names. The Court refers to Glenn, Judy, and Suman Cherry by their first names.
[2] The Court sustained Respondent's objection as to Applicant's Exhibit 4 and included it with the record upon Storey's request only to preserve the issue for appeal. 4.SHRR.10
[3] SHRR refers to the Reporter's Record from the evidentiary hearing held by this Court.

II.

FINDINGS OF FACT

A. Robert Ford exercised due diligence as habeas counsel

1. Robert Ford, now deceased, was state habeas counsel for Applicant in his initial state writ brought under art. 11.071.

2. Glenn and Judith Cherry, the parents of the victim, opposed Applicant receiving the death penalty. (3.SHRR.167-168; 174; 185).

3. Robert Foran and Christy Jack were the trial prosecutors for the State in both this case and in the co-defendant, Mark Porter's, case. Both Foran and Jack knew, prior to Applicant's trial, that Glenn and Judith Cherry opposed Applicant receiving the death penalty.

4. Neither Foran nor Jack nor anyone else from the State, ever informed Mr. Ford that Glenn and Judith Cherry opposed a death sentence for Applicant. (Vol. 2, p. 259-260). Likewise, neither Foran nor Jack, nor anyone else from the State ever informed Larry Moore, Bill Ray (Applicant's trial attorneys), or Mark Daniel or Tim Moore (the co-defendant's attorneys), that Glenn and Judith Cherry opposed the death penalty for both Applicant and his co-defendant, Mark Porter.

5. Tarrant County Assistant District Attorney Edward "Chip" Wilkinson, who represented the State on direct appeal and during the initial state habeas proceedings, was unaware of the Cherrys' opposition to Applicant receiving the death penalty. (4.SHRR.19-21).

6. 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. (2.SHRR.132; 203-204)(3.SHRR.29-30; 100; 203)(4.SHRR.28-31; 40; 53).

7. This Court finds 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. (3.SHRR.107); (4.SHRR.38).

8. This Court finds that it is highly unusual, in cases such as this one, for the parents of the murder victim to oppose the death penalty for their child's murderer.

9. Robert Foran told Bill Ray and Larry Moore, trial counsel for Applicant, that the Cherrys "preferred not to be contacted." (2.SHRR.252).

10. No witness to these proceedings faulted Mr. Ford or any other of Applicant's counsel, or any of the co-defendant's counsel for failing to contact the Cherrys to determine their views on their respective clients receiving the death penalty.

11. Christy Jack did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact. (2.SHRR.130-131).

12. Robert Foran did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact. (2.SHRR.259-260).

13. Mr. Ford did not know that the Cherrys opposed the death penalty for the Applicant, his client.

14. Mr. Ford would not have discovered the factual basis of these claims through the exercise of reasonable diligence.

15. The factual basis of the four claims before this Court, i.e., the Cherrys' opposition to Applicant receiving the death penalty and the corresponding false argument made by trial prosecutor Jack, was not ascertainable by Applicant or his counsel, through the exercise of reasonable diligence on May 26, 2011, the day the initial state writ was due and was filed.

16. This Court further finds that the failure of Mr. Ford to ascertain the Cherrys' opposition to the death penalty in general and specifically as to the Applicant, does not constitute a lack of reasonable diligence.

17. This Court finds that Mr. Ford acted with reasonable diligence.

B. Findings of Fact Regarding Claims Two, Three, and Five: whether the prosecution introduced known, false evidence, and made known false assertions during argument, that the Cherrys supported a death sentence for Applicant.

18. Glenn and Judith Cherry opposed Applicant receiving the death penalty and communicated their opposition to trial prosecutors Robert Foran and Christy Jack, the first time they met about the case, prior to trial. (3.SHRR.167-168; 186-187).

19. Both Christy Jack and Robert Foran knew the Cherrys opposed Applicant receiving the death penalty. (2.SHRR.47; 70-72; 146-147).

20. Neither Christy Jack, nor Robert Foran, nor anyone else from the State disclosed, or otherwise communicated to Applicant's trial counsel, Larry Moore or Bill Ray that Glenn and Judith Cherry opposed the death penalty for their client, Paul Storey.

21. At punishment, Christy Jack argued to the jury, in pertinent part, "And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate." (39.RR(Trial Record).11-12).

22. This argument was improper because it was outside the record.

23. Christy Jack's argument was prejudicial in as much as it purported to interject the wishes of the victim's family for the jury to return a verdict of death for Applicant, which is constitutionally impermissible.

24. Christy Jack conceded during the habeas proceeding that her argument was outside the record and improper but that she did not think it would result in a mistrial. (2.SHRR.119-120).

25. The Cherrys' opposition to the death penalty and their opposition to Applicant's execution is long-standing and deeply-felt. (3.SHRR.169-170)(4.SHRR.95-99).

26. Christy Jack testified Glenn Cherry approached her after Marilyn Shankle, Paul Storey's mother, testified at punishment and asked, "do you want me to or should I testify that we want the death penalty[.]" (2.SHRR.102-103).

27. This Court finds Jack's account regarding Glenn Cherry's question is not credible for the following reasons:
    a. Glenn Cherry is credible. This Court believes his testimony wherein he denies he or Judith Cherry ever supported the death penalty for Applicant during the trial.
    b. This Court further believes that Glenn Cherry never communicated to Jack or Foran during the trial, or at any other time, that either he or Judith Cherry supported the death penalty for Applicant. (3.SHRR.167-170).
    c. Judith Cherry is credible. This Court believes her testimony wherein she denies she or Glenn Cherry ever supported the death penalty for Applicant during the trial, and that she never communicated to Jack or Foran during the trial, or at any other time, that either she or Glenn Cherry supported the death penalty for Applicant. (3.SHRR.185-187; 4.SHRR.94-95).

d. Robert Foran testified inconsistently with Jack's version in that under her version, Glenn Cherry had approached Robert Foran and the conversation had already begun when she walked up. (2.SHRR.96-98). Under Foran's version, the comments were directed at Jack from the start, and Foran just overhead some of the conversation. (2.SHRR.241-243).
e. Glenn and Judith Cherry deny that this encounter with Jack and/or Foran, or anything like it, ever happened.
f. Robert Foran conceded that Christy Jack's argument was, in fact, untrue as to Glenn and Judith Cherry. (2.SHRR.247-248).
g. Christy Jack and Robert Foran testified that the two of them never had a conversation about Glenn Cherry's change in his views on capital punishment. (2.SHRR.107; 238).
h. It is not credible that prosecutors would have had no discussion about such a pivotal change in Glenn Cherry's views; and hence, this testimony creates an additional reasonable inference that the account is not true.
i. Christy Jack testified she did not question Mr. Cherry about his dramatic change in position. (2.SHRR.105). This inexplicable behavior further casts doubt on the believability of her testimony regarding a mid-trial conversation with Mr. Cherry in which he purportedly completely changed his position on the death penalty.
j. Christy Jack admitted that she, at the very least, intentionally and improperly argued outside the record in making her assertion, "And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate." Her admission of this prosecutorial misconduct further undermines her credibility. (2.SHRR.107; 109).
k. Assistant criminal district attorney Ashlea Deener testified that her opinion of Christy Jack's credibility is "not a favorable one." (3.SHRR.89).
l. The State introduced testimony of Letitia Martinez, Judge Mollee Westfall and Magistrate Jeffrey Cureton, all of whom had a favorable opinion of Christy Jack's character for truthfulness. (3.SHRR.197-210). However, Ms. Martinez is Jack's current partner in private practice. Judge Westfall had equally favorable opinions of Larry Moore, Mark Daniel and Tim Moore, all of whom contradict Christy Jack's accounts. Magistrate Cureton is Ms. Martinez' husband. Magistrate Cureton had never handled a death penalty case and had no opinion of any of the experienced death penalty attorneys involved in this case. In light of Judge Westfall's endorsement of the veracity of Larry Moore and the attorneys for Mr. Porter, this Court finds that the opinion evidence offered by the State does not alter state of the evidence or the other findings in this case.

m. No such opinion evidence was offered in support of Robert Foran.
n. Suman Cherry made an out of court admission that Jack's and Foran's contention that either Glenn or Judith Cherry ever deviated from their opposition to the death penalty for Paul Storey was "bullshit." (4.SHRR.95-97).
o. As the findings fact regarding the *Brady* issue detail *infra*, Christy Jack and Robert Foran are not credible and their testimony is not believable.

28. Even were Christy Jack's account of her mid trial exchange with Glenn Cherry true, it is vague and does not change the falsity of the prosecution argument that "it goes without saying that everyone" who loved the victim wanted Mr. Storey's death.

29. There is no evidence that Judith Cherry ever had any change of heart in her opposition to Applicant's execution.

30. This Court finds Jack's argument to be false, regardless of whether she had the conversation with Mr. Cherry as related by Jack.

C. Findings of Fact Regarding Claim Four: whether the prosecution suppressed Glenn and Judith Cherrys' opposition to Applicant receiving the death penalty.

31. On February 8, 2008, the trial court ordered the prosecutors to produce any and all such evidence "of material importance to the Defense even though it may not be offered as testimony or exhibits by the prosecution at the trial of this case on the merits," and that the State answer the Defense's request for such information in writing. (2.SHRR.77)(Applicant's exhibit 2).

32. It is uncontroverted that the disclosures required by the Order of February 8, 2008 would also include the Cherrys' opposition to Applicant receiving the death penalty. (2.SHRR.78).

33. Christy Jack and Robert Foran were aware of the Cherrys' opposition to Applicant receiving the death penalty. (2.SHRR.47; 70-72; 146-147).

34. Under the Order of February 8, 2008, the prosecution had a duty to disclose the Cherrys' opposition to Applicant receiving the death penalty to Larry Moore and Bill Ray. Applicant and his attorneys had every right to rely on the Court Order and that the state would adhere to it.

35. It is exceptional and unusual that the parents of a murdered son would seek to spare the life of their child's killer. (2.SHRR.53); (3.SHRR.14, 84, 121); (3.SHRR.14).

36. Christy Jack and Robert Foran regarded this evidence as out of the ordinary and material and led to a discussion with their supervisor Bob Gill about it. (2.SHRR.62; 83; 199; 202).

37. Larry Moore viewed the evidence as material. He testified in detail how it would have changed the course of his representation and the trial. (3.SHRR.10-11; 14; 21).

38. Bill Ray also regarded this evidence as material. (3.SHRR.123); (5.SHRR, Applicant's exhibit 4).

39. Tim Moore also regarded this evidence as material. (3.SHRR.136).

40. Mark Daniel's testimony further details the materiality of the Cherrys' opposition to the death penalty for Applicant and his own client, co-defendant Mark Porter. (3.SHRR.98-99; 106-107).

41. Based upon the unanimity of the testimony of witnesses for the State as well as Applicant, this Court finds the evidence of the Cherrys' opposition to Mr. Storey's execution to be both favorable and material. The State had the obligation to disclose the information under the United States Constitution and the Court's order.

42. The prosecution did not reveal the Cherrys' opposition to Mr. Storey's execution in the "State's First Amended Notice of *Brady* Material," filed July 10, 2008. (1.SHRR.78-79)(Applicant's exhibit 3) (3.SHRR.29).

43. This Court finds that Applicant's trial counsel, Larry Moore and Bill Ray, were not made aware of Glenn and Judith Cherrys' opposition to Applicant receiving the death penalty based on the following evidence:
    a. Larry Moore testified he was never informed about the Cherrys' position from the prosecution. (3.SHRR.9-10).
    b. Bill Ray was unaware of this evidence until 2017, after Larry Moore informed him. (3.SHRR.121-122); (4.SHRR.71).
    c. Neither Tim Moore nor Mark Daniel were ever made aware of the evidence by the prosecution. (3.SHRR.97-98; 99; 133).
    d. Neither John Stickels, Applicant's appellate attorney, nor Robert Ford, Applicant's habeas counsel, were informed about or otherwise knew about the evidence. (4.SHRR.19-31).
    e. Assistant Tarrant County Criminal District Attorney Chip Wilkinson, who handled the direct appeal and initial state writ for the state, did not know about

the Cherrys' opposition to Applicant receiving the death penalty. (4.SHRR.26-28).

f. This Court finds no evidence that is consistent with defense attorney knowledge of this evidence, i.e., no defense notes reflecting knowledge, no discussions of the evidence and no use or effort to use this evidence, and no objection when the State unequivocally argued the opposite to the jury.
g. Likewise, the Court finds that there is absolutely no written record or memoranda in the State's possession that would support Robert Foran's and Christy Jack's contention that the information was disclosed.
h. This Court finds the totality of the circumstantial evidence to be inconsistent with disclosure to defense counsel, based on the trial record and the records of all post-conviction proceedings.
i. This Court finds Larry Moore, Bill Ray, Tim Moore and Mark Daniel to be credible, experienced attorneys in death penalty cases; and this Court finds it implausible that any and/or all of these attorneys would have been the recipients of this evidence, yet left no record that they did receive it and all decided to do nothing at all with this information.

44. This Court finds Larry Moore and Bill Ray to be credible and their testimony trustworthy.

45. Christy Jack confirmed that she did not formally disclose the evidence to any defense attorney. (2.SHRR.62).

46. Robert Foran never testified he ever disclosed the evidence to Larry Moore.

47. Christy Jack testified that she did not make a formal disclosure before jury selection. (2.SHRR.62).

48. Robert Foran testified he disclosed the evidence to Bill Ray long before jury selection. (2.SHRR.217-220; 225).

49. Robert Foran's testimony that he ever disclosed the evidence to Bill Ray is not credible based on the following evidence:
    a. Robert Foran testified he made disclosure to Bill Ray in January or February, 2007. (2.SHRR.218; 225-226). This testimony is inconsistent with Foran's supervisor, Bob Gill, who testified that Foran discussed the issue of disclosure with him sometime after July 1st or 2nd, 2008. (2.SHRR.199; 202). This Court can discern no reason for prosecutors to discuss disclosure of material evidence in July 2008 had disclosure already been made long before, in early 2007. In the alternative, this Court can discern no reason for a prosecutor to seek supervisory affirmation for a disclosure that purportedly occurred more than a year prior.

b. Robert Foran testified that his disclosure was verbal only and that he made no written internal memo that he had disclosed it. (2.SHRR.225-226).
c. A disclosure of this evidence was not included in any written Brady notice.
d. Robert Foran testified he also disclosed the information to either Tim Moore or Mark Daniel who were originally scheduled to go to trial before Applicant. (2.SHRR.225). Like Applicant's trial counsel, both Mr. Tim Moore and Mr. Daniel denied they were ever made aware of the evidence.

50. This Court, therefore, finds Robert Foran's testimony not credible regarding the disclosure of material evidence. This Court further finds that his testimony that he disclosed that Judith and Glenn Cherry opposed the death penalty for Mr. Storey to be untrustworthy.

51. This Court finds also that the following sequence of events occurred which lends further support to the finding that the prosecution did not disclose the evidence:
    a. Glenn Cherry approached Cory Session on December 20, 2016, and informed Mr. Session about their opposition to Mr. Storey's then-imminent execution. (3.SHRR.152-172).
    b. Mr. Session informed Mike Ware, one of the attorneys for Mr. Storey (3.SHRR.158), and Mr. Ware, in turn, informed Larry Moore. (3.SHRR.9-10).
    c. Mr. Moore later informed his co-counsel, Bill Ray. (3.SHRR.9)(5.SHRR, Defense Exhibit 4).
    d. These events further confirm that no disclosure regarding this issue was ever made to Applicant's counsel until after December 20, 2016.

52. This Court finds that the prosecution had a duty to disclose, but did not disclose to any defense attorney that Judith and Glenn Cherry opposed the death penalty for Applicant.

III.
CONCLUSIONS OF LAW

A. 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.

1. 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). *See also Smith v. State*, 100 Tex. Crim. 23, 235, 272 S.W. 793, 794 (Tex. Crim. App. 1925) ("It is [a] well settled principle of law

that a party cannot benefit from his own wrong [.]"). Because the State secreted evidence it was legally required to disclose, it cannot benefit from its wrong-doing by faulting habeas counsel for failing to discover its own misconduct.

2. 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). This Court therefore equitably estops the State from any argument that Applicant's state habeas counsel, Robert Ford, or any of Applicant's prior counsel, Larry Moore, Bill Ray, or John Stickels, failed to act with due diligence or that the factual basis of the claims was ascertainable. *Gulbenkian v. Penn*, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952).

B. This Court concludes that Robert Ford exercised reasonable diligence as habeas counsel.

1. Robert Ford was appointed as state habeas counsel under Article 11.071 of the Code of Criminal Procedure to represent Applicant in his state post-conviction proceedings.

2. Robert Ford was diligent.

3. Notwithstanding his exercise of reasonable diligence, Robert Ford or Larry Moore, Bill Ray, or John Stickels did not ascertain the factual basis of the four claims.

4. Robert Ford could not have ascertained the factual basis of any of the four claims based on the Cherrys' opposition to Mr. Storey receiving the death penalty on or before May 26, 2011, the date of the filing of the initial writ application.

C. The prosecution introduced false evidence that the Cherrys supported Applicant's execution and knew the evidence to be false.

1. Robert Ford could not have ascertained the factual basis of any of the four claims based on the Cherrys' opposition to Mr. Storey receiving the death penalty on or before May 26, 2011, the date of the filing of the initial writ application.

2. This Court concludes that the jury argument regarding the Cherrys support for Applicant's execution constituted false evidence. *Ex parte Robbins*, 360 S.W.3d

445, 460 (Tex. Crim. App. 2011)(quoting *Ex parte Chavez*, No. AP-76291 (Tex. Crim. App., delivered November 17, 2010)(not designated for publication)(internal citations omitted)(false evidence includes "'improper suggestions, insinuations and, especially, assertions of personal knowledge.'[.]"). *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).

3. The prosecution was aware of the falsity of its argument.

4. The prosecution made the argument intending it to affect the jury's verdict.

5. This Court concludes the false argument was reasonably likely to affect the jury's verdict.

6. The prosecution's knowing, false argument violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Miller v. Pate*, 386 U.S. 1, 4 (1967).

D. The prosecution suppressed evidence that the Cherrys supported Applicant's execution.

1. The prosecution had an affirmative, legal duty to reveal to the defense the evidence regarding the Cherrys' desire that Applicant be spared death both under the trial court's order and under the Fourteenth Amendment to the Constitution of the United States. *Brady v. Maryland*, 373 U.S. 83 (1963); *Ex parte Mitchell*, 853 s.W.2d 1, 4 (Tex. Crim. App. 1993). This duty applies to evidence that is material to punishment. *Brady v. Maryland*, 373 U.S. at 87. The prosecution had an affirmative duty to disclose this information under Texas Disciplinary Rule of Professional Conduct 3.09(d).

2. The evidence of the Cherrys' opposition to the death penalty for Mr. Storey constituted mitigating evidence.

3. The evidence of the Cherrys' opposition to the death penalty for Mr. Storey was relevant to the mitigation issue under Article 37.071, Section 2(e)(1) of the Code of Criminal Procedure.

4. If the evidence can serve as a basis for a sentence less than death, jurors contemplating the mitigation issue are entitled to consider the evidence. *Skipper v. South Carolina*, 476 U.S. 1 (1986).

5. The evidence of the Cherrys' opposition to the death penalty for Mr. Storey was admissible. Even if not initially admissible, the prosecution's argument misleading

the jury invited its admission. *Bowley v. State*, 310 S.W.3d 431, 435 (Tex. Crim. App. 2010)("[A] party who 'opens the door' to otherwise inadmissible evidence risks the adverse effect of having that evidence admitted."); *Bass v. State*, 270 S.W.3d 557 (Tex. Crim. App. 2008)(counsel's statements to jury opens door to evidence); *Daggett v. State*, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005)(door is opened when the State leaves a false impression to the jury).

6. Disclosure of the Cherrys' opposition would have chilled Jack's efforts to prejudice the jury with her false argument.

7. This Court concludes that had this evidence been disclosed, there is a reasonable probability that the jury would have answered the mitigation issue differently. The existence of this probability undermines this Court's confidence in the outcome of the punishment trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

E. Conclusions of Law Regarding Claim Five: whether the death penalty in this case is constitutionally unreliable.

1. The prosecution's suppression of mitigating evidence, as well as its injection of false evidence, has rendered the death penalty in this case to be unconstitutionally unreliable and a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. *See e.g., Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). *Johnson v. Mississippi*, 486 U.S. 578 (1988); *See, also, Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010).

2. The false argument also had the effect of reducing the responsibility of jurors by inviting them to acquiesce to the falsely-asserted desire of the victim's family for death, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

III.
RECOMMENDATIONS

1. This Court recommends relief on the second ground for relief because 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.

2. This Court recommends relief on the third ground for relief because the prosecution introduced false evidence, thereby depriving Mr. Storey of a fair punishment trial

and in violation of the Fourteenth Amendment to the Constitution of the United States.

3. This Court recommends relief on the fourth ground for relief because 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.

4. This Court recommends relief on the fifth ground for relief because the State of Texas rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments to the Constitution of the United States by suppressing mitigating evidence and introducing false evidence to the jury, which would have been constitutionally prohibited, even if it were true.

5. This Court recommends to the Court of Criminal Appeals that it reform the death sentence in this case to a life sentence without parole.

SIGNED AND ENTERED this the 8th day of May 2018.

JUDGE PRESIDING

NO. C-3-W011020-1042204-B

EX PARTE	§	**IN CRIMINAL ~~DISTRICT~~**
	§	
	§	**COURT NO. 3 OF**
	§	
PAUL DAVID STOREY	§	**TARRANT COUNTY, TEXAS**

ORDER

Having entered these findings of fact and conclusions of law, this Court recommends that Applicant's application for relief be **GRANTED**.

The Court **ORDERS THE CLERK** to immediately forward to the **Court of Criminal Appeals** a copy of this order, along with a copy of Applicant's application; the State's answer; the orders of this court; and the proposed findings of fact and conclusions of law of both parties, and any other documents duly filed by the parties. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(d)(1).

The clerk is further ordered to send to **Applicant's counsel** and **counsel for the State** a copy of these findings of fact and conclusions of law. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(d)(1).

SIGNED AND ENTERED this the 8th day of May 2018.

JUDGE PRESIDING

Appendix B. The Texas Court of Criminal Appeals' (TCCA) per curiam dismissal of petitioner's subsequent petition for writ of habeas corpus, *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App 2019) and dissenting opinions.

Ex parte Storey

Court of Criminal Appeals of Texas

October 2, 2019, Decided; October 2, 2019, Filed

NO. WR-75,828-02

Reporter

584 S.W.3d 437 *; 2019 Tex. Crim. App. LEXIS 958 **; 2019 WL 4866006

EX PARTE PAUL DAVID STOREY, Applicant

Notice: Publish

Subsequent History: US Supreme Court certiorari denied by Paul David S. v. Tex., 2020 U.S. LEXIS 2569 (U.S., May 4, 2020)

Prior History: [**1] ON APPLICATION FOR WRIT OF HABEAS CORPUS. CAUSE NO. C-3-011020-1042204-B IN CRIMINAL DISTRICT COURT NO. 3, TARRANT COUNTY.

Ex parte Storey, 2017 Tex. Crim. App. Unpub. LEXIS 283 (Tex. Crim. App., Apr. 7, 2017)

Counsel: For APPELLANT: Keith S. Hampton, Austin, TX; Michael Logan Ware, Fort Worth, TX.

For STATE: Travis G. Bragg, Assistant Attorney General / Criminal District Attorney Pro Tem Tarrant County, Austin, TX.

Judges: HERVEY, J., filed a concurring opinion in which KEASLER, RICHARDSON and NEWELL, JJ., joined. YEARY, J., filed a dissenting opinion in which SLAUGHTER, J., joined. WALKER, J., filed a dissenting opinion in which SLAUGHTER, J., joined. KEEL, J., concurred.

Opinion

[*438] *Per Curiam.*

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In September 2008, a jury convicted Applicant of the offense of capital murder for murdering a person in the course of robbing him. Tex. Penal Code § 19.03(a)(2). The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Storey v. State*, No. AP-76,018, 2010 Tex. Crim. App. Unpub. LEXIS 602 (Tex. Crim. App. Oct. 6, 2010)(not designated for publication). This Court

not ascertainable through the exercise of reasonable diligence.

Following a three-day hearing in September and October 2017, the trial court adopted Applicant's proposed findings of fact and conclusions of law. The trial court found that the remanded claims met Section 5 and had merit, and it recommended that punishment relief be granted. We disagree.

On post-conviction review of habeas corpus applications, the convicting court [**4] is the "original factfinder" and this Court is the "ultimate factfinder." *Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017), *citing* *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). In most circumstances, we defer to the trial judge's findings of fact and conclusions of law because the trial judge is in the best position to assess the credibility of the witnesses. *Id.* We will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record. *Id.* But if our independent review of the record reveals circumstances that contradict or undermine the trial judge's findings and conclusions, we can exercise our authority to enter contrary findings and conclusions. *Id.*

At the hearing on remand, the prosecutors testified that they told trial counsel about the victim's parents' anti-death penalty views prior to trial. However, the prosecutors acknowledged that those discussions were not documented or formalized. Trial counsel testified that they could not remember if the State told them this information. We defer to the trial court's credibility choice in favor of trial counsel and the finding that the State did not inform trial counsel about the victim's parents' anti-death penalty views.

One of the prosecutors testified that he told trial counsel [**5] that the victim's parents "preferred not to be contacted." But that prosecutor further testified that he told trial counsel "that they were certainly free to contact them" if they wished to do so.

Robert Ford, who was Applicant's habeas counsel on his initial writ application, is now deceased. The trial court found that Ford did not know that the victim's parents opposed a death sentence for Applicant. This finding is not supported by the record. Applicant did not present any evidence showing what Ford did or did not know regarding the victim's parents' anti-death penalty views. The victim's father testified that he has disclosed his anti-death penalty views to "anybody that wants to know or has ever asked me." This testimony undermines the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application. And although the trial court found that Ford generally "had a strong reputation for his diligence," Applicant

382, 391 (Tex. Crim. App. 1987) (trial) (citing *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)). A prosecutor's improper trial comments violate the Fourteenth Amendment if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). A prosecutor's improper sentencing comments violate the Fourteenth Amendment if they so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty [**8] a denial of due process. *Romano*, 512 U.S. at 12. This test is necessarily a general one because in these types of cases the State did not deny a defendant "the benefit of a specific constitutional right, such as the right to counsel, or in which the remarks so prejudiced a specific right as to amount to a denial of that right."[1] *Id.*

[*441] Instead of resorting to creating some kind of novel, constitutional "psuedo false-evidence" jurisprudence, we could use the well-known *Darden* test. The problem here, as the Court points out, is that the factual predicate for Applicant's claims—regardless of how you characterize them (e.g., false evidence, *Brady*, *Darden*, etc.)—is not newly available, so we cannot reach the merits of those claims.

III.

Second, even if we assume that the State's knowledge of the victim's parents' position on the death penalty was information favorable to Applicant and that the State suppressed it, I fail to see how Applicant can show that the information is material.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1973), Brady and a co-defendant murdered the victim. Brady admitted his guilt but sought to avoid the death penalty by arguing that he was not the shooter, his co-defendant was. Unbeknownst to Brady, his co-defendant [**9] gave a statement to police in which he admitted that he killed the victim. Brady did not learn of his co-defendant's statement, however, until after he was convicted because it was suppressed by the State. The Supreme Court agreed that Brady was entitled to a new trial because the statement was "highly significant to the primary jury issue" of whether a death sentence was appropriate to his level of participation in the crime.

This case is not like *Brady*. Applicant admitted that, after his co-defendant

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[1] Judge Yeary claims that Darden and *Romano*, among others, are easily distinguishable based on their facts. I agree, but that misses the point. The Darden/Romano test is used to determine whether improper comments by a prosecutor rise to the level of a due-process violation because the comments could so infect the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process. *Romano*, 512 U.S. at 12. It seems obvious to me that, if a prosecutor makes false statements during closing argument, those could be considered under the *Darden* test.

made every day just better because he was part of it. And now everything that I thought I was going to have, I am just never going to have.

So it's kind of hard to describe how it impacts you. But every single way something could impact you, it has impacted me that way.

Some jurors were crying during her testimony. There was also evidence that, after [**12] executing the victim, Applicant and his co-defendant went to Cash America to shop, then Braum's to eat, before returning to Cash America. Surveillance video taken in Cash America showed Applicant and his co-defendant joking and laughing with each other while they looked for something to buy with the money that they stole. Other evidence showed that, before the murder, Applicant robbed numerous drug dealers because he knew that they would not report the robberies to the police. On the other hand, more than a half-dozen witnesses, who personally knew Applicant, testified in great detail why the jury should spare his life.

In light of all of this, it is difficult—if not impossible—to conclude that the victim's parents' general opposition to the death penalty would cast "the whole case in a different light . . . ." *United States v. Agurs*, 427 U.S. 97, 109-10, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Consequently, even if the basis for Applicant's *Brady* claim was not known when he filed his subsequent writ application, which is doubtful, filing and setting this case to get briefing about the "due diligence" requirement is unnecessary.

IV.

For years, great debate over prosecutorial discretion in seeking the death penalty has existed. And attention to the facts and circumstances [**13] of each case necessarily includes the rights of the victim of a crime. But even legislative consideration of victims' rights only directs prosecutors to keep victims informed! A victim's desires, wishes, thoughts, and suggestions should be, and often are, sought out by prosecutors, but the victim's wishes do not override prosecutorial discretion, including regarding whether to seek the death penalty.

V.

With these comments, I concur in the Court's dismissal of Applicant's subsequent application for a writ of habeas corpus.

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Filed: October 2, 2019

Dissent by: YEARY; WALKER

Dissent

[*443] **DISSENTING OPINION**

During her final summation at the punishment phase of Applicant's capital murder trial, the prosecutor made the

prior to filing Applicant's original post-conviction writ application. Court's Order at 4-5; *see* Tex. Code Crim. Proc. art. 11.071, § 5(e) (a factual basis [*444] was previously unavailable if it "was not ascertainable through the exercise of reasonable diligence" prior to the due date for a previous capital writ application). There is reason to doubt the propriety of the Court's conclusion, and we would benefit from additional briefing from the parties.

Specifically, there is reason to doubt—whatever the ordinary parameters of "reasonable diligence" might ultimately prove to be in a habeas corpus investigation—that Applicant's initial habeas counsel should have been required to investigate the veracity of assertions of fact that the prosecutor made during her closing argument. The United States Supreme Court has made it clear that due process will not tolerate the imposition of a diligence requirement [**16] upon a habeas applicant who claims deliberate and persistent prosecutorial misconduct. *See* *Banks v. Dretke*, 540 U.S. 668, 675-76, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."). And that is, in essence, what Applicant appears to claim has happened here.

In *Banks*, the State of Texas failed to disclose, both at trial and at any point during the subsequent post-conviction proceedings, that one of its principal punishment phase witnesses had testified falsely. *Id.* at 678, 680 & 683. It was not until Banks finally obtained discovery of the State's file and an evidentiary hearing during federal habeas corpus proceedings that he uncovered the falsehoods, as well as the State's persistent failure to disclose them. *Id.* at 684-85. The federal district court granted Banks a new punishment-phase hearing, while affirming the guilt phase of his trial. *Id.* at 686-87. In the appeal that followed, the State argued that Applicant should not have been granted an evidentiary hearing in federal court because he had not pursued his *Brady* claim with sufficient diligence during the state post-conviction habeas corpus proceedings, and the Fifth Circuit agreed. [**17] *Id.* at 688.

On petition for certiorari, however, the United States Supreme Court reversed the Fifth Circuit's judgment. It held that to impose a requirement of diligence upon a federal habeas applicant to pursue a *Brady* claim, even in the face of stubbornly persistent prosecutorial denials that any exculpatory or impeaching evidence remained undisclosed, was inconsistent with bedrock due process principles. *See* *id.* at 694 ("[I]t was . . . appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for

the defense under *Brady*. Indeed, on the surface, Applicant's claims do not seem to involve *evidence* at all; rather, they seem to involve some kind of error in the jury argument, occurring after the presentation of evidence was complete and the parties had closed.

The prosecutor assured the jury that *all* of the victim's family supported the State's attempt to obtain the death penalty for Applicant. Even assuming that this was objectively accurate, no evidence to that effect was introduced at trial. Applicant's trial counsel could therefore have objected—conceivably on at least three grounds. First, it constituted facts not in evidence, since no family member testified to that effect. *See* *Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011) ("A prosecutor may not use closing arguments to present [**20] evidence that is outside the record."). Second, it might be argued that the victim's family's belief that death would be the appropriate punishment for the victim's murder is irrelevant to the future dangerousness special issue, and that it inappropriately invades the jury's normative function under the mitigation special issue. Tex. Code Crim. Proc. art. 37.071, §§ 2(b)(1) & 2(e)(1). Third, such evidence has been held to be patently objectionable under the Eighth Amendment.[3] *Bosse v.* [*446] *Oklahoma*, 137 S. Ct. 1, 2, 196 L. Ed. 2d 1 (2016). Applicant could have—but did not—make a trial objection on any of these bases.[4] Had they done so, the error inherent in the prosecutor's assertion might have been limited in concept to an ordinary jury-argument error, quite apart from the fact that it was false.[5]

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[3] Whether the family thinks a death sentence for Applicant would be appropriate is simply irrelevant to the question whether he would continue to commit criminal acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). Whether it might be relevant to the jury's determination of the weight of the mitigating evidence is, perhaps, debatable. Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). But even if relevant to the jury's mitigation determination, it is arguably more prejudicial than probative to the extent that it might cause a jury to simply abdicate its own normative judgment in favor of the family's preference, and it might be objectionable under Rule 403 for that reason. Tex. R. Evid. 403. In any event, the United States Supreme Court has held that evidence of the family's punishment preference in a death penalty case is objectionable under the Eighth Amendment. *See* *Booth v. Maryland*, 482 U.S. 496, 508-09, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) (testimony from family members in a capital case relating their opinions about appropriate punishment violates the Eighth Amendment); *Bosse*, 137 S. Ct. at 2 (applying *Booth*'s holding to prohibit testimony from family members that a capital murder defendant should receive the death penalty).

[4] In an affidavit attached to Applicant's subsequent writ application, one of his trial attorneys explains that he did not object because "I believed that the Court would find that the argument was 'invited' by and in response to the testimony that we had introduced from members of [Applicant's] family asking that the jury spare his life. As I believed that the Court would ultimately overrule my objection on that basis, I did not want to provide the State with the opportunity to repeat or emphasize the argument in response to my objection."

[5] But, of course, such errors would then be available on direct appeal, and not ordinarily the subject of a post-conviction application for writ of habeas corpus—much less a subsequent writ application. *See* *Ex parte Moss*, 446 S.W.3d 786, 788-90 (Tex. Crim. App. 2014) (holding that only category one claims, under the rubric of *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), can be raised for the first time in an initial post-conviction application for writ of habeas corpus when it could have been, but was not, raised on direct appeal; but warning that even such a category one *Marin* claim may not be actionable in a subsequent writ application).

claims.

What I would not do is simply declare that Applicant's original writ counsel—who is now deceased and unable to respond to claims about his diligence—failed to diligently investigate the present claims, and dismiss the subsequent writ application on that basis. I would file and set the cause and order additional briefing, as indicated above. Because the Court does not, I respectfully dissent.

FILED: October 2, 2019

PUBLISH

DISSENTING OPINION

Paul David Storey, Applicant, was convicted of capital murder for intentionally causing the death of Jonas Cherry while in the course of committing robbery. During the State's punishment phase closing argument, one of the prosecutors, Christy Jack,[1] said in reference to testimony by Applicant's family members:

> -- and you know what?
>
> His whole family got up here yesterday and they pled for you to spare his life. And it should go without saying that all of Jonas's family and everyone who loved him believe the death penalty is appropriate.

Rep. R. vol. 39, 12, *Storey v. State*, No. AP-76,018, 2010 Tex. Crim. App. Unpub. LEXIS 602 (Tex. Crim. App. Oct. 6, 2010) [**23] . After the statement was made, Applicant's trial counsel did not object. Following deliberation, the jury answered the special issues set forth in article 37.071 of the Code of Criminal Procedure, and the trial court sentenced Applicant to death. On direct appeal, we affirmed the conviction and sentence in an [*448] unpublished opinion. *Id.*, 2010 Tex. Crim. App. Unpub. LEXIS 602, 2010 WL 3901416 at *25 (not designated for publication). Shortly thereafter, Applicant sought habeas corpus relief, which we denied. *Ex parte Storey*, No. WR-75,828-01, 2011 Tex. Crim. App. Unpub. LEXIS 441, 2011 WL 2420707 (Tex. Crim. App. June 15, 2011) (not designated for publication).

In December of 2016, Applicant's trial counsel became aware that Jack's statement during closing argument, that "all of Jonas's family and everyone who loved him believe the death penalty is appropriate," was in fact false. Jonas Cherry's parents, Dr. Judith Cherry and Glenn Cherry, had long been opposed to the death penalty, and the State's prosecutors—Christy Jack and Robert Foran[2] —knew prior to trial that the Cherrys were opposed to the death penalty.

Today, we are presented with

[1] Texas Bar No. 10445200.

[2] Texas Bar No. 07220600.

"reasonable diligence" suggests at least some kind of inquiry has been made into [*449] the matter at issue. *Ex parte Lemke*, 13 S.W.3d 791, 794 (Tex. Crim. App. 2000), *overruled on other grounds by* *Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013).

II — The Current Application

In this application, Applicant raises six claims, that: (1) newly-discovered evidence "compels relief"; (2) the State denied him his right to due process because it argued "evidence" it knew to be false; (3) [**26] the State introduced false evidence which unconstitutionally deprived him of a fair punishment trial; (4) the State denied him his right to due process by suppressing mitigating evidence; (5) by arguing false aggravating evidence and suppressing mitigating evidence, the State rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments; and (6) the State violated the Fourteenth Amendment by seeking death in this case.

After reviewing Applicant's writ application, we found that claims two through five arguably satisfied § 5, but we concluded that the record was insufficient to determine, with assurance, whether Applicant could have previously discovered the evidence about which he complained. *Ex parte Storey*, No. WR-75,828-02, 2017 Tex. Crim. App. Unpub. LEXIS 283, 2017 WL 1316348 at *1 (Tex. Crim. App. Apr. 7, 2017) (not designated for publication). We remanded to the trial court to further develop the record, to make findings of fact and conclusions of law regarding whether the factual basis of those claims was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed, and to review the merits of Applicant's claims. *Id.*

Pursuant to our remand order, the trial court held a hearing in which the attorneys involved in Applicant's case [**27] testified, including attorneys for both Applicant and for the State, except for his habeas counsel on the initial writ application, Robert Ford, who is deceased. Additionally, the Cherrys testified. The trial court made the following findings of fact:

A. Robert Ford exercised due diligence as habeas counsel

1. Robert Ford, now deceased, was state habeas counsel for Applicant in his initial state writ brought under art. 11.071.
2. Glenn and Judith Cherry, the parents of the victim, opposed Applicant receiving the death penalty.
3. Robert Foran and Christy Jack were the trial prosecutors for the State in both this case and in the co-

Cherrys' opposition to Applicant receiving the death penalty and the corresponding false argument made by trial prosecutor Jack, was not ascertainable by Applicant or his counsel, through the exercise of reasonable diligence on May 26, 2011, the day the initial state writ was due and was filed.

16. This Court further finds that the failure of Mr. Ford to ascertain the Cherrys' opposition to the death penalty in general and specifically as to the Applicant, does not constitute a lack of reasonable diligence. [**30]

17. This Court finds that Mr. Ford acted with reasonable diligence.

B. Findings of Fact Regarding Claims Two, Three, and Five: whether the prosecution introduced known, false evidence, and made known false assertions during argument, that the Cherrys supported a death sentence for Applicant.

18. Glenn and Judith Cherry opposed Applicant receiving the death penalty and communicated their opposition to trial prosecutors Robert Foran and Christy Jack, the first time they met about the case, prior to trial.

19. Both Christy Jack and Robert Foran knew the Cherrys opposed Applicant receiving the death penalty.

20. Neither Christy Jack, nor Robert Foran, nor anyone else from the State disclosed, or otherwise communicated to Applicant's trial counsel, Larry Moore or Bill Ray that Glenn and Judith Cherry opposed the death penalty for the client, Paul Storey.

21. At punishment, Christy Jack argued to the jury, in pertinent part, "And it should go without saying [*451] that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate."

22. This argument was improper because it was outside the record.

23. Christy Jack's argument was prejudicial in as much as it purported [**31] to interject the wishes of the victim's family for the jury to return a verdict of death for Applicant, which is constitutionally impermissible.

24. Christy Jack conceded during the habeas proceeding that her argument was outside the record and improper but she did not think it would result in a mistrial.

25. The Cherrys' opposition to the death penalty and their opposition to Applicant's execution is long-standing and deeply-felt.

26. Christy Jack testified Glenn Cherry approached her after Marilyn Shankle, Paul Storey's mother, testified at punishment and asked, "do you want me to or should I testify

and everyone who loved him believe the death penalty is appropriate." Her admission of this prosecutorial misconduct further undermines her credibility.

k. Assistant criminal district attorney Ashlea Deener testified that her opinion of Christy Jack's credibility is "not a favorable one."

l. The State introduced testimony of Letitia Martinez, Judge Mollee Westfall and Magistrate Jeffrey Cureton, all of whom had a favorable opinion of Christy Jack's character for truthfulness. However, Ms. Martinez is Jack's current partner in private practice. Judge Westfall had equally favorable opinions of Larry Moore, Mark Daniel and Tim Moore, all of whom contradict Christy Jack's accounts. Magistrate Cureton is Ms. Martinez' husband. Magistrate Cureton [**34] had never handled a death penalty case and had no opinion of any of the experienced death penalty attorneys involved in this case. In light of Judge Westfall's endorsement of the veracity of Larry Moore and the attorneys for Mr. Porter, this Court finds that the opinion evidence offered by the State does not alter state of the evidence or the other findings in this case.

m. No such opinion evidence was offered in support of Robert Foran.

n. Suman Cherry made an out of court admission that Jack's and Foran's contention that either Glenn or Judith Cherry ever deviated from their opposition to the death penalty for Paul Storey was 9 "bullshit."

o. As the findings fact regarding the *Brady* issue detail *infra*, Christy Jack and Robert Foran are not credible and their trial testimony is not believable.

28. Even were Christy Jack's account of her mid trial exchange with Glenn Cherry true, it is vague and does not change the falsity of the prosecution argument that "it goes without saying that everyone" who loved the victim wanted Mr. Storey's death.

29. There is no evidence that Judith Cherry ever had any change of heart in her opposition to Applicant's execution.

30. This Court finds Jack's argument [**35] to be false, regardless of whether she had the conversation with Mr. Cherry as related by Jack.

C. Findings of Fact Regarding Claim Four: whether the prosecution suppressed Glenn and Judith Cherry's opposition to Applicant receiving the death penalty.

31. On February 8, 2008, the trial

evidence until 2017, after Larry Moore informed him.

c. Neither Tim Moore nor Mark Daniel were ever made aware of the evidence by the prosecution.

d. Neither John Stickels, Applicant's appellate attorney, nor Robert Ford, Applicant's habeas counsel, were informed about or otherwise knew about the evidence.

e. Assistant Tarrant County Criminal District Attorney Chip Wilkinson, who handled the direct appeal and initial state writ for the state, did not know about the Cherrys' opposition to Applicant receiving the death penalty.

f. This Court finds no evidence that is consistent with defense attorney knowledge of this evidence, i.e., no defense notes reflecting knowledge, no discussions of the evidence and no use or effort to use [*454] this evidence, and no objection when the State unequivocally argued the opposite to the jury.

g. Likewise, the Court finds that there is absolutely no written record or memoranda in the State's [**38] possession that would support Robert Foran's and Christy Jack's contention that the information was disclosed.

h. This Court finds the totality of the circumstantial evidence to be inconsistent with disclosure to defense counsel, based on the trial record and the records of all post-conviction proceedings.

I. This Court finds Larry Moore, Bill Ray, Tim Moore and Mark Daniel to be credible, experienced attorneys in death penalty cases; and this Court finds it implausible that any and/or all of these attorneys would have been the recipients of this evidence, yet left no record that they did receive it and all decided to do nothing at all with this information.

44. This Court finds Larry Moore and Bill Ray to be credible and their testimony trustworthy.

45. Christy Jack confirmed that she did not formally disclose the evidence to any defense attorney.

46. Robert Foran never testified he ever disclosed the evidence to Larry Moore.

47. Christy Jack testified that she did not make a formal disclosure before jury selection.

48. Robert Foran testified he disclosed the evidence to Bill Ray long before jury selection.

49. Robert Foran's testimony that he ever disclosed the evidence to Bill Ray is not [**39] credible based on the following evidence:

a. Robert Foran testified he made disclosure to Bill Ray in January or February, 2007. This testimony is inconsistent with Foran's supervisor, Bob Gill, who testified

introduced false evidence, the prosecution suppressed evidence, and the death penalty in this case was unconstitutionally unreliable. Accordingly, the trial court recommended that we grant habeas corpus relief.

III — Ford's Knowledge, or Lack Thereof, Can Be Inferred

Today, the Court concludes that the article 11.071 § 5 bar applies because there was no proof regarding Ford's diligence in this case, and, thus, Applicant failed to show that Ford could not have ascertained the factual basis for Applicant's claims (that the Cherrys were actually opposed to the death penalty) through the exercise of reasonable diligence at the time of the initial application. Specifically, the Court determines that the trial court's finding—"that Ford did not know that the victim's parents opposed a death sentence for Applicant"—is not supported by the record because Applicant did not present any evidence showing what Ford did or did not know regarding the Cherrys' anti-death penalty views. Based upon this determination, the Court concludes that Applicant failed to meet [**42] his burden. I disagree.

We have consistently recognized that proof of a mental state, such as knowledge, "is of such a nature that it must be inferred from the circumstances." *In re State ex rel. Weeks*, 391 S.W.3d 117, 125 n.36 (quoting *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *see also Okonkwo v. State*, 398 S.W.3d 689, 701 n.16 (Tex. Crim. App. 2013) (Cochran, J., concurring) ("Of course, this element [knowledge] is usually established by circumstantial evidence."). Thus, the fact that Applicant did not present direct evidence showing what Ford did or did not know regarding the Cherrys' anti-death penalty views should not end the inquiry regarding Ford's knowledge. Much evidence was presented at the hearing regarding Ford's competence and diligence, and from this evidence I believe we can circumstantially infer that Ford did not know that the Cherrys opposed the death penalty.

First, in my opinion it should be taken as a given that if a reasonably competent habeas attorney knew that Jack's argument to the jury indicating that the victim's parents favored the death penalty was untrue, then the attorney would certainly raise that issue. An issue like this for a habeas attorney is like hitting the [*456] jackpot on the Texas Lottery, and I cannot imagine how a reasonably competent habeas attorney who knows about the issue would nevertheless choose [**43] not to raise it.

Second, the trial court found that Ford "had a strong reputation for his diligence" and was "invariably regarded

said in *Lemke*—that "reasonable diligence" suggests that "at least some kind of inquiry was made"—should be required only when an inquiry is "reasonable" under the circumstances.

Under the circumstances of this case, some kind of inquiry into the Cherrys' feelings about the death penalty would have been unreasonable.[3] "Reasonable" diligence [*457] 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." Findings, 5th Suppl. Clerk's R. at 7. The trial court's finding is supported by the record. At the habeas hearing, Mark Daniel, who represented co-defendant Mark Porter, testified:

> Q. And in your -- in the normal course of your representation in death penalty cases, do you usually think it's a good idea to reach out and -- to the survivors of the murder victim and have a conversation with them about their feelings and thoughts?
>
> A. If you have not had a door slammed in your face recently and hope that one is, [**46] it's just -- it's such a -- such a strange dynamic. You approach somebody with a phone call or knock on a door or reach out to them with a email message, I'd like to talk to you about this, I've never done that, I guess for the fear that I suspect it will prove futile.
>
> then to say, hi, how do you feel about the death penalty, especially in this case? And I'm not saying this because the issue in this matter before Judge Young right now, but I expect that to be something the prosecutors might let me know. That's what I would expect.
>
> Q. In other words, it's reasonable to assume that in most cases the survivors of the murder victim are not eager to speak with the attorney representing their loved one's killer?
>
> A. That would be accurate.

Rep. R. vol. 3, 107. Another attorney, Fred Cummings, explained the issue from the perspective of trial counsel:

> Q. Have you ever, ever in any of the death penalty cases you've ever handled as a defense lawyer contacted the victim's family?
>
> A. No, sir.
>
> Q. Is there a reason for that?

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[3] Additionally, I submit that *Lemke*'s requirement of "some kind of inquiry" was satisfied because Foran told Ray and Moore that the Cherrys preferred not to be contacted. Obviously, if Ray and Moore asked Foran if they could contact the Cherrys, and Foran told them the Cherrys preferred not to be contacted, some kind of inquiry has been made. If Foran told Ray and Moore this information before they could ask, Foran's caution that the Cherrys preferred not to be contacted negated the need for Ray and Moore to ask in the first place.

Futhermore, Jack's closing argument, wherein she stated that "all of Jonas's family and everyone who loved him believe the death penalty is appropriate," told Ray and Moore the answer to the question (although a false one, to be sure).

From the standpoint of habeas counsel Ford, the inquiry—the question—was either already asked and answered or just simply already answered.

these propositions, and [**49] her statement, while untruthful, was not an obvious lie at the time;

• Ray and Moore, at that point, had no reason to believe that Jack lied;

• Foran told Ray and Moore that the Cherrys preferred not to be contacted;

• Ray and Moore filed a motion for *Brady* material and did not get any information related to the Cherrys' opposition to the death penalty; and

• The trial court ordered that all exculpatory and mitigating evidence be disclosed regardless of admissibility, and Ray and Moore did not get any information pursuant to the court order related to the Cherrys' opposition to the death penalty.

Based on the circumstances at the time Ford prepared and filed the first application, there was no reason to suspect that Jack was untruthful. Instead, it would have been reasonable for Ford to presume that Jack told the truth and that there was no need to pursue the Cherrys to find out otherwise. After all, any competent death penalty trial attorney certainly would have objected to Jack's untruthful statement had he or she known the statement was untruthful, and neither of the trial attorneys objected.

The Court today, however, finds that because Glenn Cherry would have told anyone who asked his [**50] position on the death penalty, and because there is no record evidence as to whether Ford asked or knew the Cherrys' position, there is no showing that Ford could not have ascertained the Cherrys' position through the exercise of reasonable diligence. True, had [*459] Ford questioned the Cherrys, he likely would have learned that the Cherrys were indeed opposed to the death penalty for Applicant, the prosecution failed to disclose this information, and Jack was untruthful to the jury during her closing argument. However, this judges Ford's diligence based on hindsight. Reasonable diligence should be measured from the standpoint of an applicant or counsel at the time the application was filed. *See* TEX. CODE CRIM. PROC. Ann. art. 11.071 § 5(e) ("a factual basis of a claim is unavailable on or before [the date the applicant filed the previous application] if the factual basis was not ascertainable through the exercise of reasonable diligence *on or before that date*") (emphasis added). At the time Ford filed the previous application, a reasonably diligent habeas attorney would not have sought out the Cherrys and would not have probed their feelings about the case and about the death penalty for Applicant. Habeas counsel should not be required [**51] to assume that every unsubstantiated claim a prosecutor makes in closing argument is likely to be untrue. On the contrary, habeas counsel should assume that prosecutors do not generally lie to juries in closing

of a deceased victim" includes a person who is a parent of the deceased victim. *Id.* art. 56.01(1).

Notably, in 2013, the Legislature amended article 56.02 by adding what is now subsection (a)(14),[5] dealing with defense-initiated victim outreach in capital cases.[6] That provision states:

> (a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:
>
> (14) if the offense is a capital felony, the right to:
>
> (A) receive by mail from the court a written explanation of defense-initiated victim outreach if the court has authorized expenditures for a defense-initiated victim outreach specialist;
>
> (B) *not be contacted* by the victim outreach specialist *unless the victim, guardian, or relative has consented to the contact* by providing a written notice to the court; and
>
> (C) designate a victim service provider to receive all communications from a victim outreach specialist acting on behalf [**54] of any person.

Tex. Code Crim. Proc. Ann. art. 56.02(a)(14) (emphasis added). Although this provision was not in existence at the time of Applicant's initial writ, the supporters' arguments in favor of this provision, as noted in the Bill Analysis, are telling:

> HB 899 is needed to protect the rights of crime victims. The bill would assert the rights of victims to refuse contact from a victim outreach specialist, who may be causing stress or trauma by contacting the victim. Since Defense Initiated Victim Outreach began in Texas, crime victims and their families have been harassed by victim outreach specialists who persist in attempts to contact them. Victims have had to make complaints to victims' assistance services and prosecutors for help in stopping the stream of letters and attempts at contact from specialists. Crime victims deserve to move on with their lives without being re-victimized by the defense team of a person who has already hurt them. HB 899 would allow them to do so.
>
> The bill would alleviate the impact of the Defense Initiated Victim Outreach program on victims and the appropriate punishment of heinous crimes. Victim outreach specialists can emotionally

---

[5] Act of May 22, 2013, 83rd Leg., R.S., § 1, 2013 Tex. Gen. Laws 1736 (amending Tex. Code Crim. Proc. 56.02(a) by adding what was originally designated (a)(16)); Act of May 29, 2015, 84th Leg., R.S., ch. 1236, § 4.002, 2015 Tex. Gen. Laws 4096, 4099 (redesignating (a)(16) as (a)(14)).

[6] "Defense Initiated Victim Outreach is a program in which a victim outreach specialist — if requested by the defense attorney in a criminal case, usually a capital felony — contacts the victim of a crime to ascertain questions and needs that the victim may have that the defense may be able to address." House Comm. on Criminal Jurisprudence, Bill Analysis at 1, Tex. H.B. 899, 83rd Leg., R.S.

Code Ann. § 508.1531. These particular provisions, it should be noted, were also not in effect at the time Ford prepared and filed the initial application.[7] They do, however, further indicate the Legislature's, and therefore society's, interest in shielding victims and their families from unwanted and unwarranted contact by defendants and their attorneys.

The emphasis on victims' rights is also ingrained into our state's constitution. Article 1, § 30(a) of the Texas Constitution, adopted November 7, 1989, provides:

> (a) A crime victim has the following rights:
>
> (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process; and
>
> (2) the right to be reasonably protected from the accused throughout the criminal justice process.

Tex. Const. art. 1, § 30(a).

Thus, it is apparent that significant strides have been made to place more emphasis [*462] on the victims of crime, including the surviving family members of murder victims, to treat them with fairness and with respect for their dignity and privacy, and to reasonably protect them from the accused. Requiring uninvited questioning by the lawyers of the person who killed their loved ones, especially [**58] when the lawyers had no apparent reason to do so, just to meet a requirement of "reasonable diligence," flies in the face of these legislative and constitutional efforts and is another factor showing why it is actually unreasonable.

Yet, the Court today faults Ford for failing to intrude upon the Cherrys' peace and for failing to question them about their feelings regarding Applicant's case. True, in hindsight had Ford actually done those things, the Cherrys likely would not have objected. But at the time Ford filed Applicant's initial habeas application, there was no indication that the Cherrys would have been different from any other family or that they should have been inquired upon. At that point, Ford would not have known Jack was untruthful about the Cherrys' position on the death penalty or that the matter was even an issue. To learn the truth, he would have had to probe their thoughts, concerns, and feelings over a broad range of topics until he eventually struck gold with the specific issue of the appropriateness of the death penalty. Such an interrogation of a victim's family is hardly reasonable. We should not create a *per se* rule that habeas counsel should question the feelings [**59] of every State's witness,

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[7] *See* Act of May 16, 2011, 82nd Leg., R.S., ch. 491, §§ 1-4, 2011 Tex. Gen. Laws 1246 (adding Tex. Code Crim. Proc. art. 42.24; amending Tex. Code Crim. Proc. art. 42.032 § 5; amending Tex. Gov'T Code § 498.0042(b); and adding Tex. Gov'T Code § 508.1531).

dissent.

Filed: October 2, 2019

Publish

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

WR-75,828-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/16/2019 7:05 PM
Accepted 10/17/2019 3:41 PM
DEANA WILLIAMSON
CLERK

IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

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10/17/2019
DEANA WILLIAMSON, CLERK

EX PARTE

NO. WR-75,828-02

PAUL DAVID STOREY

SUGGESTION FOR RECONSIDERATION ON THE COURT'S OWN INITIATIVE

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Michael Ware and Keith S. Hampton, attorneys for Applicant in the above-entitled cause, and respectfully suggests that this Court make the extraordinary decision in this extraordinary case to reconsider[1] the unprecedented review expressed in its per curiam and concurring opinions on October 2, 2019, and would show the Court the following relevant facts either cited in abbreviated fashion in these opinions or ignored altogether, and would reurge the law which should be considered as a preliminary matter before any decision to dismiss Applicant's claims as barred.[2] Counsel therefore shows the following:

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[1] Rule 79.2(d) of the Texas Rules of Appellate Procedure provides:

> A motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

Tex.R.App.Pro. 79.2(d).

[2] This Court should also have had the full record in this cause, as argued in Applicant's *Alternative Suggestion for Reconsideration on this Court's own Initiative.*

Facts Supported by the Record Are Dispositive of Habeas Claims.

Tarrant County prosecutor Christy Jack argued to the jury at the sentencing phase of Applicant's death penalty case:

> 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[3] that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate.

(Vol. 39; pp. 11-12). The Cherrys in fact did not believe the death penalty was appropriate; in fact, they were affirmatively opposed to Applicant's execution. After extensive hearings, the trial court determined that both Jack and her co-counsel, Robert Foran, knew this claim to be false. Its falsity was a closely-kept secret.

Jack testified that she did not tell Bob Ford, Applicant's initial habeas counsel, about the falsity of her assertion. (Vol. 1, pp. 130-132). Foran testified that he also

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[3] The phrase "it goes without saying" means:

> It is unambiguous, perfectly clear, or self-evident that; to be already widely acknowledged, established, or accepted that. *I know it goes without saying, but the staff restrooms are not to be used by students or visitors. It should go without saying, but you will receive an automatic zero if you are caught cheating on the exam.*

Farlex Dictionary of Idioms (2015).

> You say it goes without saying to mean that something is obviously true. *It goes without saying that if someone has lung problems they should not smoke. It goes without saying that you will be my guest until you leave for Africa.*

Idioms Dictionary, 3rd ed (Harper Collins Publishers 2012).

did not tell Ford. (Vol. 1, pp. 259-260). Applicant's appellate counsel, John Stickels, testified he did not know. (Vol. 4, pp. 26-27). Ford's counterpart, the State's appellate and habeas prosecutor in state court, Edward "Chip" Wilkinson, testified he did not know. (Vol. 4, pp. 19-21). Applicant's trial attorneys, Larry Moore and Bill Ray, did not know. (Vol. 2, pp. 31-32)(Vol. 4, p. 71). The State was also seeking the death penalty against Applicant's co-defendant, Mark Porter; however, his attorneys, Mark Daniel and Tim Moore, testified they also did not know. (Vol. 3, pp. 97-100; 133). No one else knew about the extraordinary fact of the Cherrys' opposition to Applicant's execution, and consequently, no one told Bob Ford.

Ford had no reason to know that Jack had lied and that she and Foran were concealing anything. Habeas counsel interviewed Applicant's trial counsel who had been informed by the prosecutor that the Cherrys "preferred not to be contacted[.]" (Vol. 2, p. 252). Ford had no reason to doubt these false assertions. There would be no reason for the issue to arise during habeas interviews of trial counsel. If it had, Bob Ford would have learned from trial counsel that any interview effort would likely be futile or worse. But it probably did not arise because absolutely no one would have thought it a good idea for Bob Ford to conduct a fishing expedition with the grieving parents of a murdered son.

There is no evidence that anyone other than Jack and Foran knew. Not even

Chip Wilkinson, the State's writ lawyer, knew. This circumstance weighs heavily in favor of the reasonable inference that Bob Ford was no exception to the category of lawyers, both State and defense, who were unaware of these unusual and important facts. Under the facts of this record, the trial court – with ample supporting evidence – found Bob Ford to be unaware of this hidden fact. Under well-established law, the trial court concluded Bob Ford to be reasonably diligent. *Holland v. Florida*, 560 U.S. 631, 653 (2010)(due diligence "is reasonable diligence, not maximum feasible diligence.")(internal citations and quotations omitted). The district judge, then, was compelled, in light of his assessment of the facts before him and well established law, to find that Bob Ford was unaware, a conclusion unsurprising in light of the unawareness of all the other lawyers involved in this case, State and defense.

Nevertheless, this Court completely discounted the district judge's well supported findings and dismissed Applicant's subsequent writ application because it attributed Bob Ford's unawareness solely to his own lack of reasonable diligence. *Ex parte Storey*, No. WR-75,828-02, pp. 4-5, 2019 Tex.Crim.App. LEXIS 958 (Tex.Crim.App. Oct. 2, 2019)(per curiam).[4] This Court's attribution is contrary to the

[4] "'Per curiam' is a Latin phrase meaning 'by the court,' which should distinguish an opinion of the whole Court from an opinion written by any one Justice." *Montana v. Hall*, 481 U.S. 400, 409 (1987)(Marshall, J., dissenting)(complaining about the misuse of per curiam opinions "over the dissent of those who would set the case for briefing, to resolve the merits of a case without devoting the usual time or consideration to the issues presented, is wrong.").

trial court's extensive and well supported investigation. It is also contrary to this Court's own established habeas standard of review.

Under ordinary habeas review, these facts would have been enough for this Court to defer to the trial court's conclusion that Bob Ford was diligent because he, like everyone else, did not know of the extraordinary circumstance in this case. In an ordinary habeas review, this Court would have deferred to a trial court's supported factual findings and adopted its recommendation. *See, e.g., Ex parte Garcia*, 353 S.W.3d 785, 787-88 (Tex.Crim.App. 2011)("this Court 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."). Yet this ordinary review is replaced by a per curiam opinion that 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.

This Court's per curiam opinion rejected the trial court's diligence findings because Applicant's counsel did not provide direct evidence from Bob Ford "showing what Ford did or did not know regarding the victim's parents' anti-death penalty views." *Ex parte Storey*, No. WR-75,828-02, p. 5, 2019 Tex.Crim.App. LEXIS 958 (Tex.Crim.App. Oct. 2, 2019)(per curiam). Under the per curiam's new requirement, the overwhelming and uncontradicted circumstantial evidence that Bob Ford was

unaware of the Cherrys' opposition is insufficient. Counsel must now directly prove a negative – lack of knowledge – from the testimony from a deceased attorney.

It is not reasonable to infer that Bob Ford knew. It is reasonable to infer that he did not know. In fact, the only reasonable inference is that had he known, he would have raised the issue.

There is absolutely no evidence, direct or circumstantial, that Bob Ford was aware. Any finding that Bob Ford *did* know would be one wholly unsupported by the evidence. Judge Young made findings that supported his considered recommendations and this Court should respect his findings, particularly in the light of the evidence in this case.[5] Unfortunately, the per curiam opinion charts a radical new review nullifying Judge Young's work.

This Court's New Rule of Habeas Review

The per curiam opinion rewrites the rule of deference to a trial court's fact-finding role. The long-standing rule has been that this Court upholds the findings if they are supported by the record. Under this opinion, however, this Court instead

[5] The concurring opinion asserted that Ford's unawareness of the prosecution's hidden facts was "doubtful." *Ex parte Storey*, No. WR-75,828-02, p. 6, 2019 Tex.Crim.App. LEXIS 958 (Crim. App. Oct. 2, 2019)(Hervey, J., concurring). There is literally no evidence whatsoever in this case that Bob Ford had any inkling that the Cherrys opposed execution for their son's killer. The concurring opinion's "finding" is wholly unsupported by the record. Were the concurring opinion written by a trial judge, this Court would be authorized – even obligated – to reject it.

scours the record to find any evidence that "undermines" the trial court's findings.

This per curiam opinion found that a single, snapshot portion of Mr. Cherry's testimony "undermines" the trial court's factual finding regarding Bob Ford's due diligence. *Ex parte Storey*, No. WR-75,828-02, p. 5 (per curiam). Relying exclusively upon one remark by Mr. Cherry, the per curiam opinion suggested that Bob Ford could have unquestionably discovered the prosecution's secret by merely interrogating the victim's father, Glen Cherry. As the per curiam analyzed the issue:

> The victim's father testified that he has disclosed his anti-death penalty views to ***"anybody that wants to know or has ever asked me."*** This testimony undermines the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application.

Id. (emphasis added). The per curiam opinion implicitly suggests that Mr. Cherry's testimony establishes that all Bob Ford needed to do was to simply ask him.

This Court should evaluate that slice of testimony in its context from the entire relevant portion of this questioning of Mr. Cherry. Under the State's examination, Mr. Cherry testified:

> A. Yes, I'm against the death penalty.
>
> Q. So that position formed before this terrible set of circumstances, correct?
>
> A. Yes.

Q. And your opposition to the death penalty would be to any – to anybody being executed?

A. I don't believe in the death penalty for anybody.

Q. And they asked you about Mr. Storey's mother, about your feelings about that. But that would be for any mother that was going to lose a son, you know, to execution, correct?

A. Yeah, I don't want anybody to have to go through that.

Q. Have you spoken with friends and family about your views on the death penalty?

A. Well, I know most of my family's views, I think.

Q. But, I mean, have you told them your views?

A. Yeah, it's not a secret.

Q. Yeah. And certainly you've told friends?

A. Yeah, anybody that wants to know or has ever asked me or we've ever talked about it. I don't just go around telling everybody all my views.

(Vol. 3, pp. 174-175).[6]

Mr. Cherry's inflection or tone of voice or facial expressions are not reflected in this record. His hesitations, his confidence, his pauses are nowhere to be found by

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[6] Beyond the per curiam's abbreviated recitation of the statement of facts, it is also significant that the testimony was elicited by the State, despite Applicant's *Motion to Preclude the State from Contending That Counsel Failed to Exercise Due Diligence In Ascertaining the Cherrys' Opposition to Paul David Storey's Execution*, filed with the Tarrant County District Clerk on September 11, 2017. This Court apparently never received, and therefore did not consider, this motion. It did however, have the State's objections.

any judge of this Court. The only judge who actually witnessed Mr. Cherry during his testimony was Judge Young who was called upon to consider different interpretations of testimony, including interpretations in light of other evidence and the testimony of other witnesses.

One interpretation of Mr. Cherry's statement suggests he was ready and willing to disclose his opposition to habeas counsel, had Bob Ford merely called. Another interpretation is that he was a private man, though open to those who were close to him, like friends and family, and would not have returned a call. Judge Young resolved these competing interpretations by considering all the evidence and live testimony developed on this issue.

The interpretation of Mr. Cherry's testimony is wholly dependent on the trial judge's attention to his testimony, body language and other measures. Judge Young was called upon to resolve the meaning of Mr. Cherry's statement, and he resolved it in favor of his ultimate conclusion regarding Bob Ford's diligence. This Court should defer to his finding.

Invariably there will be evidence that is arguably inconsistent with or "undermines" other evidence. It is the trial court which resolves clashing evidence, particularly live testimony. If this Court can supplant the trial court whenever it finds a piece of evidence that arguably "undermines" a trial court's finding which is

otherwise well supported by the record, trial courts may justifiably wonder whether their fact-finding efforts matter.

Instead of asking whether the judge's findings are supported by the record, this Court now asks a new question – whether other evidence can be found which "undermines" the trial court's ultimate factual determinations. This new standard renders trial court resolutions meaningless because almost any case will have arguably conflicting evidence, which can then form a new factual basis for members of this Court to arrive at exactly the opposite determination entrusted to trial judges like Judge Young. This departure is unwarranted and remains completely and totally unsupported by any of the scant caselaw citations in the per curiam or concurring opinions.

The per curiam opinion relied upon *Ex parte Thuesen*, 546 S.W.3d 145 (Tex.Crim.App. 2017). *Thuesen* concerned purely legal matters – the authority and propriety of a trial court judge who recused himself, then withdrew his recusal. *Id.* *Thuesen*, then, offers no support for any of the propositions in the per curiam opinion.

Thuesen relied upon *Ex parte Reed*, 271 S.W.3d 698 (Tex.Crim.App. 2008) for the proposition that this Court "is the ultimate factfinder in habeas corpus proceedings. The trial judge on habeas is the 'original factfinder.'" *Id.* at 727. While counsel agrees with this general observation, *Reed* offers no support for this Court's

disposition of Applicant's claims. *Reed* supports Judge Young. Had Judge Young made a contrary finding, he would have found himself on the wrong side of this Court's decision in *Reed* (condemning unfounded trial court findings).

This Court in *Reed* made it a point to look for evidence which *supported* the trial court's findings of fact, not evidence which *undermined* its findings of fact. This Court in the instant case has fundamentally altered its habeas review by inverting its long standing rule of looking for evidence supporting the trial court's findings, to looking for any evidence at all which arguably "undermines" those findings. *Reed* supports Applicant's position, not the new review undertaken in this case.

Further, in *Reed*, the trial judge had "adopt[ed] the State's proposed findings and conclusions verbatim" including those which were unsupported or misleading. *Ex parte Reed*, *supra* at 729. While this Court admonished courts to refrain from rubber-stamping proposed findings, this Court ultimately decided "that the few instances in which [a trial judge's] findings are inconsistent or misleading do not justify a decision [by the Court of Criminal Appeals] to totally disregard the findings that are supported by the record[.]" *Id.* Thus, even when a judge has adopted unfounded or misleading findings, this Court still insists on upholding that judge's

findings when they are supported by the record.[7] Judge Young – who made no unsupported or misleading findings – is surely owed at least the same deference as a judge who did.

The issue in *Reed* was how this Court would treat a trial court's findings that were both founded and accurate reflections of the record as well as findings that were unfounded or misleading.[8] *Reed*, *supra* at 726. This Court resolved the issue by holding that "it is appropriate to remain faithful to our precedent" which requires this Court to defer to trial judge findings that are supported by the record, but clarified that this Court would "afford no deference to findings and conclusions that are not supported by the record[.]" *Id.* at 727. Despite the troubling fact-finding

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[7] In this case, Judge Everett Young carefully prepared his own findings. The per curiam opinion states: "Following a three-day hearing in September and October 2017, the trial court adopted Applicant's proposed findings of fact and conclusions of law." *Storey*, *supra* at 3. A cursory comparison between Applicant's proposed findings and Judge Young's findings reveals that he acted completely independently, contrary to the per curiam opinion's assertion. The assertion that he simply adopted Applicant's proposed findings like the judge in *Reed* is inaccurate and unfair to Judge Young. Compare 4th Supplemental Clerk's record (proposed findings and conclusions) with 5th Supplemental Clerk's record (Judge Young's actual findings and conclusions).

[8] This Court had identified the issues as:

> Assuming, *arguendo*, that the court has entered a finding of fact or conclusion of law that has multiple sentences or phrases and that a portion of the finding or conclusion is supported by the record, while another portion is not, to what extent does this Court owe deference to the trial court on such a finding or conclusion? May the Court disregard the finding or conclusion in its entirety?
>
> Assuming, *arguendo*, that numerous findings and conclusions, or parts thereof, are not supported by the record, how should this affect the level of deference to the findings and conclusions as a whole?

Ex parte Reed, *supra* at 726.

irregularities in *Reed*, this Court nevertheless deferred to trial court findings which were suspect because some were unsupported or misleading.

Judge Young's findings contain nothing that is unsupported or misleading. On the contrary, his findings are strongly supported by this record. They are not misleading, but spot on.

Insofar as the per curiam opinion suggests that Judge Young's judgment lacked gravity, this Court need only look at the overwhelming evidence that supports the judge's conclusion that Bob Ford was diligent. Nowhere is there any identification of unsupported findings. Indeed, the per curiam opinion could find only one remark by one witness plucked out of its context.

The established standard of review should govern this case. The issue for this Court under settled precedence – including *Reed* upon which this Court's decision rests – is whether the trial court's findings in this case are supported by the record. The trial court's findings in this case are strongly supported by the evidence. Accordingly, this Court should defer to the trial court's well supported findings that Bob Ford was unaware of the Cherrys' opposition to Paul Storey's execution and that reasonable diligence did not require him to make unwarranted inquiries to the Cherrys. Yet this Court has spurned its own law, and now demands contact between those who wish to be left alone and lawyers who also wish to leave them alone.

This Court's New Requirement for Initial Habeas Counsel

The per curiam opinion determined Bob Ford to be less than diligent because all he had to do was seek the answer about a fact he had no reason to question. This new rule imposes upon initial habeas counsel an additional duty which, if unfulfilled, declares him to be less than reasonably diligent. Lawyers who represent death-sentenced defendants must now make efforts to determine the murder victim survivors' views, just in case in light of the *Storey* rule. It is a bad rule that no one asked for or welcomes.

No one suggested this view. Prosecutors did not request this new rule. Defense lawyers are already cringing. Victims and their families do not want to be contacted by anyone, especially by defense attorneys or their agents. This new rule – making lawyers for a death-sentenced inmate interrogate the survivors of the murder victim – is, at a minimum, dysfunctional, and at worst, insensitive and immoral. Undoubtedly, it will have disastrous consequences, particularly in the lives of victims.

This focus on the views of the Cherrys also misses the entirety of this subsequent writ application. It is not merely that the Cherrys were opposed to Applicant's execution. Applicant's claims are rooted in the fact that the prosecution knew of their opposition and recognized the many ways it could be used by the

defense not only at trial but also during the plea negotiation process. The prosecutors hid their knowledge and misled trial counsel, lied to the jury and the trial judge, concealed these facts from habeas counsel, then tried to cover it up, including through untruthful sworn testimony found to be not credible by the district judge. These are the facts which should occupy this Court's attention.

Under the Court's opinions, the only blameworthy court participant is Bob Ford. He is the only person faulted. On account of his being dead, he cannot provide that direct evidence demanded by the per curiam opinion. Ford can be faulted only under this Court's new form of review of counsel's performance, its new "hindsight review."

This Court's New Hindsight Review

The Court's review of Bob Ford judges him solely through the lens of hindsight. Everywhere in law, hindsight is forbidden. There is good reason for judicial disfavor of hindsight review.

As a matter of constitutional law, hindsight judicial review is condemned:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 U.S. 668, 689-90 (1984). Hindsight makes it "all too easy for a court ... to conclude that a particular act or omission of counsel was unreasonable." *Id.* "[I]t is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight." *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965). This prohibition against this sort of review is mirrored in civil malpractice law. *Ex parte Lewis*, 537 S.W.3d 917, 921 n.16 (Tex.Crim.App. 2017)(perceived errors by counsel "should not be gauged by hindsight or second-guessed")(quoting 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §18.17 at 59 (5th ed. 2000)). Prosecutors are similarly spared hindsight review. *See, e.g., Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 56 (D.D.C. 2009)(immunity reflects "the profound societal concern that prosecutors be free to perform their vital duties courageously and without fear that their actions will be judged in hindsight.").

Defendants accused of civil negligence are also spared the glaring review of hindsight, like their counterparts in criminal court. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994)(judicial review "requires an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight."). Civil liability "is not measured by hindsight, but instead by what the actor knew or should have known at the time of the

alleged negligence. In other words, there is neither a legal nor a moral obligation to guard against that which cannot be foreseen in the light of common or ordinary experience[.]" *Boren v. Texoma Med. Ctr.*, 258 S.W.3d 224, 230 (Tex.App. – Dallas 2008, *no pet.*)(internal citations and quotations omitted).

This Court, then, is well aware of why hindsight review of attorney behavior is wrong. Yet it singled out habeas counsel and judged him by one remark from Mr. Cherry spotted in the pure beam of hindsight. This review is unfair for all the reasons hindsight is rejected in law.

In hindsight and under one eclectic imaginary scenario, Bob Ford would have located and interrogated the Cherrys who would have promptly shocked him with news of their opposition to his client's execution. Under this "what-if" scenario, Bob Ford should have trekked to the home of the grief-stricken parents of a murdered son and gently rung the doorbell, a conversation with Mr. Cherry would have ensued, all the facts revealed. If only Bob Ford had undertaken this measure, hindsight assures the per curiam opinion, he would have discovered the prosecution's secret just in time for the imagineers' fairy-tale ending.

Here in the real world, hindsight is not helpful to judicial review, but distracting and misleading. It does not renounce assumptions; it feeds them. This case is the paradigm why hindsight is not employed to resolve issues of fact.

Hindsight is never wrong because the view is always clear and perfect. What might have occurred becomes what would have occurred. It is a view judges should avoid.

Even in hindsight under this imagined scenario, Bob Ford was diligent. Being unaware of the Cherrys' opposition, he would have had no reason to inquire about it. After Mr. Cherry answered that hypothetical doorbell, the conversation would have more likely been:

> BOB FORD: Hello, I'm Bob Ford, Mr. Storey's attorney. I'm sorry about your loss.
>
> GLEN CHERRY: Why are you here?
>
> BOB FORD: I'm not sure. I don't usually do this.
>
> GLEN CHERRY: How can I help you?
>
> BOB FORD: I'm not sure about that, either. Do you have anything to tell me that would raise a factual claim cognizeable in an initial application for writ of habeas corpus?
>
> GLEN CHERRY: Like what?
>
> BOB FORD: I wish I knew.

A Fair Assessment of Bob Ford's Reasonable Diligence

If hindsight is removed from this Court's review, it should be clear that Bob Ford exercised reasonable diligence. His initial writ application – which this Court possesses – reflects his diligence. It also contains nothing about the issue in this case,

evidence from which this Court can infer reflects Bob Ford's unawareness of the issue. In fact, that is the only reasonable inference. Counsel for Applicant's co-defendant, Mark Daniel, testified about Ford:

> Bob Ford was a passionate lawyer. He was a fearless advocate. Not only at the trial level but the post-conviction work he did. He was thorough beyond description. When you said the question was work ethic, Bob probably worked too hard, in my estimation. ... [D]ue diligence is kind of a baseline standard, in my estimation. Bob Ford always performed far and above what is considered to be due diligence. He went far beyond what is considered to be due diligence in his trial work and his appellate work, from my outside observations.

(Vol. 2, pp. 99-100). From all other "outside observations," every testifying witness affirmed this estimation. None contradicted it.

Bob Ford remained unaware of the key facts in the same way everyone else was unaware. Trial counsel Larry Moore did not know:

> I have no doubt that I would have been telling Bob Ford, he wouldn't have had to ask me about it because I would have been telling him, that is the first and foremost thing that you need to put in this writ to bring forward to the Court of Criminal Appeals because it's absolutely atrocious.

(Vol. 2, pp. 31-32). Trial counsel Bill Ray testified that he, like Moore, did not know. (Vol. 4, p. 71). Ford's counterpart, counsel for the state in the initial writ, Chip Wilkinson, did not know. (Vol. 4, pp. 19-21). Like all other lawyers involved in the case, Bob Ford was unaware because no one told him and he had no reason to believe

that the Cherrys were opposed to Applicant's execution.

Ford's sterling reputation for diligence is unassailed. Every witness, including the State's witnesses, agreed that Bob Ford was diligent. Judge Mollie Westfall described Bob Ford as "very zealous" and "very diligent." (Vol. 3, p. 203). Even Christy Jack agreed Bob Ford was "very diligent." (Vol. 1, pp. 130-132). Only this Court disagrees under a record that is completely unsupportive of this contrary conclusion.

It is unreasonable to assume that Bob Ford acted without diligence in this case. These witnesses are people who knew him and worked with him. Their collective description portrayed an aggressive and diligent lawyer who would not have remained silent, stationary or sympathetic to the prosecutorial self-interests upon learning that Jack and Foran had hidden this favorable information from him. Consistent with everyone else in this case who was unaware, Ford proceeded with his work not as a lawyer inattentive to facts learned through his investigation, but as another victim of the prosecution's calculated concealment.

Wholly absent from this Court's distorted review of Bob Ford's diligence was the unfairness of faulting him for failing to discover what the prosecution successfully had hidden from him. Under this Court's order and opinions, the State may poke out the eyes of habeas counsel, then benefit from its crime on the grounds

that counsel is blind. This Court should reconsider its analysis under basic applicable and very long established equitable doctrines.

Equitable doctrines unmentioned by this Court's reasonable diligence analysis.

Habeas corpus is "governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963). This Court applies equitable common-law principles of "elements of fairness and equity" because "habeas corpus is an equitable remedy." *Ex parte Perez*, 398 S.W.3d 206, 210, 216 (Tex.Crim.App. 2013). While equitable principles govern, some have been codified.

The reasonable diligence requirement in chapter 11 is simply a legislative recognition of the judiciary's doctrine that "equity aids the vigilant, not those who slumber on their rights." *Callahan v. Giles*, 137 Tex. 571, 576, 155 S.W.2d 793, 795-96 (1941)(due diligence maxim is "a fundamental principle of equity jurisprudence"). Article 38.49 is another example of codification of an equitable doctrine, i.e., forfeiture by wrongdoing. Tex Code Crim. Pro. art. 38.49. Accordingly, this Court should reconsider its opinions and decision by addressing the other applicable equitable doctrines under the unique circumstances in this case.

The State secreted the Cherrys' opposition to the death penalty from trial counsel – a fact recognized by every member of this Court. None of the opinions, per

curiam or concurring, even attempt to justify the prosecution's lie to the jury, the prosecutors' concealment from counsel, or their lies to the court. Even the concurring opinion considers how their bad acts should be considered, not whether they were wrong. No one on this Court defends the prosecutors' concealment of this fact or their dishonest sworn testimony at the writ hearings. The indefensibility of misconduct should be included in this Court's diligence analysis.

The analysis should also recognize the value of the Cherrys' opposition. The concealed facts were so valuable to the prosecution that it concealed them from discovery. Under this Court's current decision, it is a wrong worth committing, contrary to long-standing principles of equity. This Court should reconsider its decisions in light of this unjust consequence.

"He that hath committed iniquity shall not have equity." Richard Francis, Maxims of Equity 5 (London, Henry Lintot, 3rd ed. 1746). Contrary to this ancient equitable maxim, this Court's dismissal of this subsequent writ application delivers the deceivers their greatest prize. That prize is awarded for winning a death sentence by falsely asserting to the judge and jury that the Cherrys supported a death sentence. The per curiam opinion is faithless to the "well settled principle of law that a party cannot benefit from his own wrong[.]" *Smith v. State*, 272 S.W. 793, 794 (Tex.Crim.App. 1925)); *Reynolds v. United States*, 98 U.S. 145, 160 (1878)("no one

shall be permitted to take advantage of his own wrong."). This Court should reconsider its opinions as a matter of equity and conscience.

The fuller equitable inquiry Applicant seeks is no different from how the federal courts employ equity in cases where counsel misses a statutory deadline. The federal courts provide the remedy of equitable tolling under the same equitable principles urged herein. Where counsel is found to have failed to exercise due diligence (whether it is timeliness or discovery), the federal courts also ask whether "some extraordinary circumstance stood in his way" which prevented counsel from meeting his duty. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). If an "extraordinary circumstance" hobbled counsel, then any lack of diligence is excused. *Holland v. Florida*, 560 U.S. at 632 (courts "must often "exercise [their] equity powers ... on a case-by-case basis" to permit consideration of otherwise barred claims)(citations omitted). Concealment of the Cherrys' views stood invisibly in the way of Bob Ford's awareness of these facts.

The remaining equitable question for this Court is the value it assigns to the prosecutorial misconduct in this case. This Court must regard it as either routine and ordinary, or unusual and extraordinary. If this Court considers the prosecutorial misconduct established in this case to be extraordinary, then this Court should not fault Bob Ford for his failure to learn about the prosecution's deception. Bob Ford's

unawareness was due to the extraordinary efforts by prosecutors which prevented him from discovering their hidden and concealed misconduct, just as they had duped trial counsel for both defendants and even to their own state habeas counsel.

Emphatically, this case does not concern merely an issue of negligent counsel, i.e., something habeas counsel should have done, but failed to do. It is different because the prosecution had a clear and unclean hand in sabotaging habeas counsel's investigation. In order to fairly consider Bob Ford's diligence, this Court should consider the prosecution's misconduct in this regard.

Equity demands that Bob Ford be regarded as diligent. To do otherwise congratulates identified wrongdoers at the expense of a universally recognized conscientious attorney. After all, the judiciary's equitable powers "can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933).

Equity's fairness inquiry is the "linchpin" for the judiciary. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000). Equity seeks "to promote justice and to prevent a party from benefitting by his own misleading representations[.]" *Richey v. Miller*, 142 Tex. 274, 279, 177 S.W.2d 255, 257 (1944).

Equity considers whether one party knowingly makes "a false representation or concealment of material facts" which prejudices an unaware adversary. *Gulbenkian v. Penn*, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952)(stating the requirements for equitable estoppel). If new trials may be awarded under these circumstances, surely this Court will consider the prosecution's misconduct in evaluating Bob Ford's performance.

It is unusual for this Court to withdraw its opinions. However, this case is unusual for many reasons. The new rule of review of the supported independent findings of a trial court deserves reconsideration. The new duty imposed upon habeas counsel needs serious reflection. The other arguments advanced by habeas counsel regarding how the prosecutors' misconduct impacted Bob Ford's representation ought in fairness be addressed by this Court.

This Court's concurring and dissenting opinions indicate some desire for counsel to address at least some aspects of Applicant's substantive arguments. Additionally, the concurring opinion in this case addresses in *dicta* some of the merits of Applicant's substantive arguments, but contains serious misperceptions of Applicant's claims. In light of the unusualness of this case and its issues, this Court should order the parties to brief the questions which clearly trouble members of this Court, as reflected in the dissenting and concurring opinions. *Ex parte Storey*, *supra*

(Hervey, J., concurring)(Yeary, J., dissenting). For these reasons, this Court should, on its own initiative and inherent constitutional powers, withdraw its previous opinions and file and set this case for additional briefing on these issues under the circumstances of this unusual case.

PRAYER

Counsel prays this Court to reconsider its opinions, apply settled law and equity to its review of Bob Ford's diligence, and order further briefing on the issues raised by the opinions in this case.

Respectfully submitted,

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Attorneys for Paul David Storey

CERTIFICATE OF SERVICE: By my signature below, I certify I have served a true and correct copy of the foregoing pleading upon counsel for the State, Attorney Pro Tem Travis Bragg, at Travis.Bragg@oag.texas.gov on October 16, 2019.

Appendix D. The TCCA's denial of Storey's *Suggestion for Reconsideration* on the TCCA's Own Initiative, November 6, 2019 (four judges dissenting).

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11/6/2019

STOREY, PAUL DAVID Tr. Ct. No. C-3-011020-1042204-B WR-75,828-02

This is to advise that the applicant's suggestion for reconsideration has been denied without written order. Judges Yeary, Newell, Walker, and Slaughter would grant.

Deana Williamson, Clerk

PAUL DAVID STOREY
C/O KEITH HAMPTON
1103 NUECES ST.
AUSTIN, TX 78701

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.

WR-75,828-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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Accepted 8/17/2022 10:37 AM
DEANA WILLIAMSON
CLERK

CAUSE NO. WR-75,828-02

EX PARTE	§	**IN THE TEXAS COURT OF**
	§	
PAUL DAVID STOREY	§	**CRIMINAL APPEALS**

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STATE'S MOTION FOR THE COURT TO RECONSIDER THE DENIAL OF APPLICANT'S SUBSEQUENT WRIT ON ITS OWN INITIATIVE

To the Honorable Judges of Said Court:

Former Tarrant County Criminal District Attorneys Christy Jack and Robert Foran committed "serious . . . prosecutorial malfeasance" during Storey's trial and then "ran out the clock by failing to disclose [it] throughout Storey's initial postconviction proceedings." *Storey v. Lumpkin*, 142 S. Ct. 2576, 2577, 2578 (2022) (Sotomayor, J., respecting the denial of certiorari). This is the very antithesis of due process.

The prosecutor plays a special role "in the search for truth in criminal trials." *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (citations omitted). "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) ("The prudence of the careful prosecutor should not . . . be discouraged.")). But in this case, that is exactly what has happened. Although "the sole court to decide the merits of [Storey's] misconduct claims found him entitled to receive a new punishment trial," *Storey*

v. Lumpkin, 142 S. Ct. at 2578, both this Court and the Fifth Circuit Court of Appeals found it was too late because Storey's claims should have been raised long ago "regardless of the extent of the State's malfeasance or whether he should have known of it at the time." *Id.*

Pursuant to Rule of Appellate Procedure 79.2(d), this Court may reconsider an application for state habeas relief that has been denied on its own initiative. Due process, combined with the extraordinary burden now facing state habeas counsel, requires that this Court do just that.

I. Procedural History

On September 19, 2008, Paul Storey was sentenced to death. His conviction and sentence were affirmed on direct appeal. *Storey v. State*, No. AP-76,018 (Tex. Crim. App. Oct. 6, 2010), *cert. denied, Storey v. Texas*, 563 U.S. 919 (2011). After both state and federal habeas relief were denied,[1] Storey's execution was set for April 12, 2017.

On March 31, 2017, Storey filed a subsequent application for state habeas relief. This Court stayed the execution and remanded the writ back to the district

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[1] *Ex parte Storey*, No. WR-75,828-01 (Tex. Crim. App. June 15, 2011) (unpublished order); *Storey v. Stpehens*, 2014 WL 11498164, 4:11-CV-433 (N.D. Tex. June 9, 2014), *affirmed*, 606 F. App'x 192 (5th Cir. 2015), *cert. denied*, 577 U.S. 857 (2015).

court for further proceedings. *Ex parte Storey*, No. WR-75,828-02 (Tex. Crim. App. April 7, 2017) (unpublished order). Once back in district court, the Tarrant County Criminal District Attorney's Office (TCCDA) voluntarily recused itself because First Assistant Larry Moore's role as Storey's former defense counsel created a clear conflict of interest—the TCCDA was in the untenable position of being both prosecutor and witness.

With the federal habeas proceedings concluded (thus relieving Mr. Moore of his role as witness) and Storey's claims arising from Christy Jack's blatant disregard for candor to the tribunal denied, the TCCDA moved for, and was granted, reinstatement to "set the record straight with respect to the veracity of" Ms. Jack's statement during closing argument. *Ex parte Storey*, 584 S.W.3d 437, 445 (Tex. Crim. App. 2019) (Yeary, J., dissenting) ("Assuming that the prosecutor's jury argument that the family had endorsed Applicant's execution was indeed false, the State has yet to 'set the record straight' with respect to the veracity of that statement.").

II. The Court Should Grant the State's Motion for Reconsideration, Adopt—In Their Entirety—the Findings of Fact and Conclusions of Law Entered by the District Court, and Grant Storey a New Punishment Trial.

"While our system is an adversarial one, it works in most cases because the parties trust that the other side is playing by the same rules." *Ex parte Storey*, 584 S.W.3d at 462 (Walker, J., dissenting). Unfortunately, that is not what happened here. In her closing argument and in response to the testimony of Storey's family, Ms. Jack told the jury,

> His whole family got up here yesterday and they pled for you to spare his life. And it should go without saying that all of Jonas's family and everyone who loved him believe the death penalty is appropriate.

39 Reporter's Record (RR) 12. As we now know, this was a lie. Jonas's family, in particular his parents, did *not* want the death penalty for the man who had brutally murdered their son. *Findings of Fact, Conclusions of Law, and Recommendation* at 5 (¶ 18). They had made that clear to the prosecutors. *Id.* But this was never disclosed to defense counsel, not at trial, not on appeal, and not during the first state habeas proceedings. *Id.* at 6 (¶ 20). And but for a twist of fate, it would not have been disclosed during the second habeas proceedings. *Id.* at 11 (¶ 51).

This Court "defer[ed] to the trial court's credibility choice in favor of trial counsel and the finding that the State did not inform trial counsel about the

victim's parents' anti-death penalty views." *Ex parte Storey*, 584 S.W.3d at 439; *see Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶ 4), 6 (¶ 20), 9–10 (¶¶ 42–47). Then having acknowledged the trial court's finding regarding state habeas counsel's "strong reputation for [] diligence," Storey was denied relief because he "presented no evidence showing that Ford was diligent *in his particular case*." *Ex parte Storey*, 584 S.W.3d at 439 (emphasis added). But "[a] rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696; *see also Ex parte Storey*, 584 S.W.3d at 444 (Yeary, J., dissenting).

The trial court concluded that the State should not be allowed to invoke Section 5 because of its own wrongdoing: "Because the State secreted evidence it was legally required to disclose, it cannot benefit from its own wrongdoing by faulting habeas counsel for failing to discover its own misconduct." *Findings of Fact, Conclusions of Law, and Recommendation* at 11–12 (¶ 1) (citations omitted). Likewise, the trial court invoked the doctrine of unclean hands. *Id.* at 12 (¶ 2) (citations omitted).[2]

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[2] *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1222 (1986) ("[W]hen a capital defendant raises a nonfrivolous constitutional question, neither state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should

Habeas corpus is "governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963); *see also Ex parte Perez*, 398 S.W.3d 206, 216 (Tex. Crim. App. 2013) ("[T]he writ of habeas corpus is an extraordinary remedy, any grant of which must be underscored by elements of fairness and equity.") (citations omitted). Given this, the State concedes that it should not benefit from the application of the Section 5 bar. There is simply no way Storey's initial state habeas counsel—well-known for his diligence and his work ethic[3]—could have discovered that Ms. Jack had lied during her closing argument when no one had any reason to believe that was the case, when not a single note in the State's trial file suggested that was the case. *Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶¶ 13–15), 9–10 (¶¶ 43(f–g), 49(b–c).

III. Death is Different.

It is true that these facts do not "fit the mold of either 1) the presentation of false evidence or 2) the suppression of evidence favorable to the defense under *Brady*."[4] *Ex parte Storey*, 584 S.W.3d at 445 (Yeary, J., dissenting). But it is also true that "death is different." *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)

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expressly provide that in matters of procedural default, as in other matters, death is different.").

3 *See Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶ 6).

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

(opinion of Stewart, Powell, and Stevens, JJ.). Where the State has exercised its discretion to charge a defendant with a capital crime and the jury has imposed a sentence of death, there should be "a correspondingly greater degree of scrutiny." *McCleskey v. Kemp*, 481 U.S. 279, 348 (1987) (Blackmun, J., dissenting) (internal quotation marks and citation omitted).

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*;[5] whatever questions about its admissibility remain,[6] it was most certainly favorable to Storey. *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (explaining that *Brady* held "that the suppression of evidence favorable to an accused upon request violates due process whether the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution") (citation omitted). Indeed, Larry Moore testified in some detail about "how it would have changed the course of his representation and the trial." *Findings of Fact, Conclusions of Law, and Recommendation* at 9 (¶ 37) (citing 3 RR 10–

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[5] *See Findings of Fact, Conclusions of Law, and Recommendation* at 8–11 (¶¶ 31–52), 13–14 (¶¶ 1–7).

[6] *See Bosse v. Oklahoma*, 137 S. Ct. 1 (2016 (per curiam).

11, 14, 21); *see also id.* at 9 (¶¶ 38–41). At the very least, Mr. Moore testified that he would have "tried to convince them, the State to waive the death penalty and proceed with - - as a waiver case." 3 RR 11; *see also id.* at 21 ("We would have tried to get that in front of the jury in every way imaginable.").

CONCLUSION

Ms. Jack's statement has been characterized as "facts not in evidence," "irrelevant," and "patently objectionable under the Eighth Amendment." *Ex parte Storey*, 584 S.W.3d at 445 (Yeary, J., dissenting); *see also Findings of Fact, Conclusions of Law, and Recommendation* at 6 (¶¶ 22, 24, 27(j)), 12–14. More importantly, though, it was unquestionably *false*. Also unquestionably false were Ms. Jack's and Mr. Foran's attempts to provide a basis for the argument during the subsequent state habeas proceedings. *See Findings of Fact, Conclusions of Law, and Recommendation* at 6–8 (¶ 27).

Whatever diligence requires of defense counsel (whether at trial, on appeal or during state habeas proceedings), it cannot possibly require them to search for, much less find, something hidden from them which they do not even know to search for. *See Ex parte Storey*, 584 S.W.3d at 456–57 (Walker, J., dissenting) ("Under the circumstances of this case, some kind of inquiry into the Cherrys' feeling about

the death penalty would have been *unreasonable*. 'Reasonable' diligence would not go prying into the private feelings of a murder victim's family without a very good reason for doing so.") (emphasis added, footnote omitted); *see also id.* at 459 ("Requiring an applicant or his counsel to go on fishing expeditions and blindly querying capital victims' families (themselves victims in many ways) without a good reason for doing so is unreasonable.").

In the federal courts, "a petitioner shows 'cause' when the reason for his failure to develop the facts in state-court proceedings was the State's suppression of the relevant evidence[.]" *Banks*, 540 U.S. at 691. Ms. Jack and Mr. Foran "not only failed to disclose Cherry's parents' unwavering desire that Storey not be sentenced to death, but also misled the jury in summation to successfully secure a death sentence. The State then ran out the clock by failing to disclose its malfeasance throughout Storey's initial postconviction proceedings." *Storey*, 142 S. Ct. at 2578.

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 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.

Respectfully submitted,

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NO. WR-75,828-02

IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE PAUL DAVID STOREY

On Writ of Habeas Corpus C-3-W011020-1042204-B in the Criminal District Court No. 3 of Tarrant County, Texas, the Hon. Judge Everett Young Presiding

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STATE'S BRIEF

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Oral argument is requested ONLY if granted to Applicant.

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To the Honorable Judges of Said Court:

Former Tarrant County Criminal District Attorneys Christy Jack and Robert Foran committed "serious . . . prosecutorial malfeasance" during Storey's trial and then "ran out the clock by failing to disclose [it] throughout Storey's initial postconviction proceedings." *Storey v. Lumpkin*, 142 S. Ct. 2576, 2577, 2578 (2022) (Sotomayor, J., respecting the denial of certiorari). This is the very antithesis of due process.

The prosecutor plays a special role "in the search for truth in criminal trials." *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (citations omitted). "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) ("The prudence of the careful prosecutor should not . . . be discouraged.")). But in this case, that is exactly what has happened. Although "the sole court to decide the merits of [Storey's] misconduct claims found him entitled to receive a new punishment trial," *Storey v. Lumpkin*, 142 S. Ct. at 2578, both this Court and the Fifth Circuit Court of Appeals found it was too late because Storey's claims should have been raised long ago "regardless of the

extent of the State's malfeasance or whether he should have known of it at the time." *Id.*

On August 17, 2022, the Tarrant County Criminal District Attorney's Office (TCCDAO) asked this Court to reconsider, on its own motion, its October 2, 2019 opinion denying habeas relief.[1] In response to that motion, this Court has ordered the parties, including amicus curiae,[2] to brief the following issues:

> (1) What authority allowed the trial court to remove the duly sworn and serving Attorney Pro Tem and replace him with the TCCDAO, which had previously recused itself and premised its reinstatement in the case on the fact that habeas proceedings had ended?
>
> (2) In the order dismissing Applicant's -02 writ, we noted that the victim's father testified at the habeas hearing that he has disclosed his anti-death penalty views to "anybody that wants to know or has ever asked me." We further noted that this testimony undermined the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application. What evidence supports the position that the factual basis of the

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1 *See Ex parte Storey*, 584 S.W.3d 439 (Tex. Crim. App. 2019).

2 The Texas Criminal Defense Lawyer's Association (TCDLA) and the Texas Attorney General's Office (OAG) each filed an amicus brief in this matter.

remanded claims was not in fact ascertainable before the filing of the initial writ application?

(3) The merits of the remanded claims (Claims 2 through 5).

Ex parte Storey, Order of June 28, 2023.[3]

I. Procedural History

On September 19, 2008, Paul Storey was sentenced to death. His conviction and sentence were affirmed on direct appeal. *Storey v. State*, No. AP-76,018 (Tex. Crim. App. Oct. 6, 2010), *cert. denied, Storey v. Texas*, 563 U.S. 919 (2011). After both state and federal habeas relief were denied,[4] Storey's execution was set for April 12, 2017.

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[3] The remanded claims are: (1) whether Storey was denied due process under the *Fourteenth Amendment* when the prosecution argued aggravating evidence it knew to be false (Issue 2), (2) whether the prosecution introduced false evidence, which deprived Storey of a fair punishment trial in violation of the Fourteenth Amendment (Issue 3), (3) whether the prosecution suppressed mitigating evidence (Issue 4), and (4) whether Storey's death sentence was rendered unreliable because the prosecution argued false aggravating evidence and suppressed mitigating evidence (Issue 5). *See Ex Parte Storey*, No. WR-75,828-02 (Order of April 7, 2017).

[4] *Ex parte Storey*, No. WR-75,828-01 (Tex. Crim. App. June 15, 2011) (unpublished order); *Storey v. Stephens*, 2014 WL 11498164, 4:11-CV-433 (N.D. Tex. June 9, 2014), *affirmed*, 606 F. App'x 192 (5th Cir. 2015), *cert. denied*, 577 U.S. 857 (2015).

On March 31, 2017, Storey filed a subsequent application for state habeas relief and moved for a stay of execution. This Court granted the stay and remanded the writ back to the trial court for further proceedings. *Ex parte Storey, Order of April 7, 2017*. Once back in trial court, the TCCDAO voluntarily recused itself because Chief of the Criminal Division Larry Moore's[5] role as Storey's former defense counsel created a clear conflict of interest—the TCCDAO was in the untenable position of being both prosecutor and witness. The OAG was appointed as Criminal District Attorney Pro Tem and took the lead for the remainder of the state habeas proceedings; the OAG also handled the federal habeas proceedings that followed. *See Storey v. Lumpkin*, 8 F.4th 382 (5th Cir. 2012), *cert. denied, Storey v. Lumpkin*, 142 S. Ct. 2576.

With the federal habeas proceedings concluded (thus relieving Mr. Moore of his role as witness) and Storey's claims arising from Ms. Jack's blatant disregard for candor to the tribunal denied, the TCCDAO moved for,

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[5] In this role, Mr. Moore would have direct supervision over the habeas prosecutors.

and was granted, reinstatement. In filing the motion to reconsider, the TCCDAO accepted the invitation to "set the record straight with respect to the veracity of" Ms. Jack's statement during closing argument. *Ex parte Storey*, 584 S.W.3d at 445 (Yeary, J., dissenting) ("Assuming that the prosecutor's jury argument that the family had endorsed Applicant's execution was indeed false, the State has yet to 'set the record straight' with respect to the veracity of that statement.").

Once the TCCDAO had been reinstated, it filed a motion with this Court, asking that the denial of habeas relief be reconsidered. Amicus briefs were filed in support of (TCDLA) and against (OAG) that request. This Court has now ordered both parties and the amicus curiae (if they wish) to answer the questions set out and brief issues two through five as raised in Storey's habeas application.

II. The Trial Court's Authority to Reinstate the TCCDAO Is Derived from Texas Code of Criminal Procedure Article 2.07(b-1).

Texas Code of Criminal Procedure Article 2.07(b-1)[6] allows an attorney for the state who is not otherwise disqualified to ask the trial court to be recused for "good cause"; if that request is granted, the attorney becomes "disqualified." *See Coleman v. State*, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008) ("This procedure allows the district attorney to avoid conflicts of interest and even the appearance of impropriety by deciding not to participate in certain cases.") (citing *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 & n.6 (Tex. Crim. App. 2006)).

In this case, the TCCDAO premised its request for recusal on the conflict that arose from the claims in Storey's second writ application—the Chief of the Criminal Division, Larry Moore, had served as Storey's defense attorney and would now be a witness, putting the office in the untenable position of being both prosecution and witness. *See Letter Brief for the Office*

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[6] Repealed and renumbered as Article 2A.104(c), H.B. 4504, 88th Leg., R.S. (2023) (effective Jan. 1, 2025),

of the Attorney General of Texas as Amicus Curiae, Exhibit 1 at 1–3. In the order appointing the OAG as Criminal District Attorney Pro Tem, the trial court ordered the appointment to "remain in force and effect throughout the investigation, prosecution, appeals, and post-trial matters, if any, of this matter, regardless of the cause numbers or courts assigned to this matter." *Id.* at 5.

The reinstatement was premised on the dissolution of that conflict, and only on that: "Now, given that Mr. Moore is no longer a potential witness, the Tarrant County Criminal District Attorney's Office requests to be reinstated for all purposes and for all further prosecutorial duties."[7] *See id.*, Exhibit 2 at 1–3. And the dissolution of the conflict came about because Storey's requests for relief in both state and federal court were unsuccessful. *Id.* In granting the request to be reinstated, the trial court specifically found

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[7] Importantly, since that motion was filed, the TCCDAO has had a complete change of administration—there is no one here who was a *material* part of either the trial or the habeas proceedings which gave rise to the recusal. Terri Moore, Deputy Chief, Criminal Division (one of four), was appointed to help defense counsel during the federal habeas proceedings to procure affidavits; she also made a video for Storey's clemency petition. 4 State Habeas Reporter's Record (SHRR) 51–52.

that "the claim giving rise to the recusal is no longer viable." *Order Granting State's Request to be Reinstated After Recusal, State v. Storey*, No. 1042204D (August 5, 2022),

This Court has explained that "the appointment of an attorney pro tem lasts until the purposes contemplated by that appointment are fulfilled," and exactly how long an appointment lasts "depends upon the terms of the appointment order." *Coleman*, 246 S.W.3d at 83. But "it is not inexorably bound by the duration of the district attorney's disqualification." *Id.* (citing *State ex rel. Manlove*, 33 Tex. 798, 800 (1871)). Here, the appointment was to remain in effect through the "post-trial matters, if any, *of this matter*." *Letter Brief for the Office of the Attorney General of Texas as Amicus Curiae*, Exhibit 1, at 5 (emphasis added). The words "of this matter" can only be read to refer to Storey's second habeas application. Because "the claim giving rise to the recusal [was] no longer viable," there was no longer a conflict of interest. Therefore, the TCCDAO was no longer in the position of being both

prosecutor and witness. Under these circumstances, the trial court was well within its authority to reinstate the TCCDAO.[8]

III. Glenn Cherry's Testimony that He Has Disclosed His Anti-Death Penalty Views to "Anybody that Wants to Know or Has Ever Asked Me" Does Not Undermine the Trial Court's Finding that the Factual Basis of Applicant's Claims Was Not Ascertainable through the Exercise of Due Diligence.

Texas Code of Criminal Procedure Article 11.071, Section 5(a)(1) requires the Applicant establish that "the current claims or issues have not been and could not have been previously presented in a timely application or in a previously considered application. . . because the factual or legal basis was unavailable on the date the applicant filed the previous application[.]" Subsection (e) explains that "unavailable" means that "the factual basis was not ascertainable through the exercise of reasonable diligence[.]" There are three broad reasons as to why the underlying facts for claims 2 through 5 could not have been discovered through the exercise of due diligence.

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[8] That the TCCDAO filed a motion to reconsider does not change this. There is no more fact finding to be done or that can even be done. The TCCDAO was, and is, only asking for this Court to reconsider its legal conclusions based on the facts already found by the trial court.

First, state habeas counsel had no reason to even suspect the Cherrys opposed the death penalty and had communicated as much with the prosecutors. *See Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶ 3), 5 (¶ 18) (citing 3 SHRR 167–68, 186–87). Second, because they had not testified at trial, in any way, he had no obvious reason to try and talk to them as he investigated and prepared the first state habeas application. Putting that aside, Robert Foran testified as follows at the hearing:

> Q. Did you ever relate to the Defense essentially the Cherrys' preference for contact?
>
> A. I believe we had a conversation with Mr. Ray and Mr. Moore that they preferred not to be contacted, but I explained the same information I just related that they were certainly free to contact them or not contact them. I certainly wasn't preventing them. I explained to the Cherrys that the defense was entitled to contact them if they chose to.

2 SHRR 252; *see Findings of Fact, Conclusions of Law, and Recommendation* at 5 (¶ 9). Thus, if state habeas counsel had been told anything by defense counsel, it was that the Cherrys did not want to be contacted.

Finally, as Judge Walker explained in his concurring opinion:

> Under the circumstances of this case, some kind of inquiry into the Cherrys' feelings about the death penalty would have been unreasonable. "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 lawyers representing the person found guilty of killing their loved one." [*Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶ 7) (citing 3 SHRR 107; 4 SHRR 38)]. The trial court's finding is supported by the record.

Ex parte Storey, 584 S.W.3d at 456–57; *see id.* at 457–58 (quoting 3 SHRR 107; 4 SHRR 38–39). Judge Walker went on to explain that at the time he filed the first writ application, Mr. Foran was "faced with these realities":

- Families of murder victims generally do not wish to speak to lawyers representing the person found guilty of killing their loved one [*See Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶ 8).];

- It is highly unusual for the parents of murder victims to oppose the death penalty for their child's murderer [*See Findings of Fact, Conclusions of Law, and Recommendation* at 9 (¶ 35).];

- [Ms.] Jack's closing argument matched these propositions, and her statement, while untruthful, was not an obvious lie at the time;

- [Mr.] Ray and [Mr.] Moore, at that point, had no reason to believe that Jack lied;

- [Mr.] Foran told [Mr.] Ray and [Mr.] Moore that the Cherrys preferred not to be contacted [*See Findings of Fact, Conclusions of Law, and Recommendation* at 5 (¶ 9 (citing 2 SHRR 252)).];

- [Mr.] Ray and [Mr.] Moore filed a motion for *Brady*[[9]] material and did not get any further information related to the Cherrys' opposition to the death penalty [*See Findings of Fact, Conclusions of Law, and Recommendation* at 9 (¶ 42 (citing 1 SHRR 78–79; 3 SHRR 29; Applicant's Exhibit 3))]; and

- The trial court ordered that all exculpatory and mitigating evidence be disclosed regardless of admissibility, and [Mr.] Ray and [Mr.] Moore did not get any information pursuant to the court order related to the Cherrys' opposition to the death penalty. [*See Findings of Fact, Conclusions of Law, and Recommendation* at 8 (¶ 31), 9 (¶ 42), 11 (¶ 49(c)).]

Id. at 458 (footnote added).

IV. The Prosecutor Made a Closing Argument that She Admitted She Knew Was Outside the Record; the Prosecutor Made a Choice to Violate Her Ethical Duties and Responsibilities. Therefore, Applicant Is Entitled to a New Punishment Trial.

In its final question, this Court asked for briefing on claims 2 through 5—these are the claims that this Court remanded when it granted the stay of execution. *See Ex parte Storey, Order of April 7, 2017.* The TCCDAO briefs

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9 *Brady v. Maryland*, 373 U.S. 83 (1963).

these claims together. While there might be some issue of admissibility and categorization, i.e., argument v. evidence, the underlying facts are the same, and there is no issue of the prosecutor's duties and responsibilities.

A. Prosecutors are held to a higher standard.

"While our system is an adversarial one, it works in most cases because the parties trust that the other side is playing by the same rules." *Ex parte Storey*, 584 S.W.3d at 462 (Walker, J., dissenting). Unfortunately, that is not what happened here. In her closing argument and in response to the testimony of Storey's family, Ms. Jack told the jury,

> His whole family got up here yesterday and they pled for you to spare his life. And it should go without saying that all of Jonas's family and everyone who loved him believe the death penalty is appropriate.

39 Reporter's Record (RR) 12. As we now know, as Ms. Jack admitted during the state habeas hearing,[10] this was, at the very least, outside the record. At the very worst, it was a lie. Jonas's family, in particular his parents, did *not*

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[10] *See* 2 SHRR 113 ("It was outside the record and I should not have done that."); *see also id.* at 108–14; *see also Findings of Fact, Conclusions of Law, and Recommendation* at 6 (¶¶ 22, 24), 7 (¶¶ 27(f), 27(j)).

want the death penalty for the man who had brutally murdered their son. *Findings of Fact, Conclusions of Law, and Recommendation* at 5 (¶ 18). They had made that clear to the prosecutors. *Id.* But this was never disclosed to defense counsel, not at trial, not on appeal, and not during the first state habeas proceedings. *Id.* at 6 (¶ 20). And but for a twist of fate, it would not have been disclosed during the second habeas proceedings. *Id.* at 11 (¶ 51).

This Court "defer[ed] to the trial court's credibility choice in favor of trial counsel and the finding that the State did not inform trial counsel about the victim's parents' anti-death penalty views." *Ex parte Storey*, 584 S.W.3d at 439; *see Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶ 4), 6 (¶ 20), 9–10 (¶¶ 42–47). Then having acknowledged the trial court's finding regarding state habeas counsel's "strong reputation for [] diligence," Storey was denied relief because he "presented no evidence showing that [Mr.] Ford was diligent *in his particular case*." *Ex parte Storey*, 584 S.W.3d at 439 (emphasis added). But "[a] rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to

accord defendants due process." *Banks*, 540 U.S. at 696; *see also Ex parte Storey*, 584 S.W.3d at 444 (Yeary, J., dissenting).

The trial court concluded that the State should not be allowed to invoke Section 5 because of its own wrongdoing: "Because the State secreted evidence it was legally required to disclose, it cannot benefit from its own wrongdoing by faulting habeas counsel for failing to discover its own misconduct." *Findings of Fact, Conclusions of Law, and Recommendation* at 11–12 (¶ 1) (citations omitted). Likewise, the trial court invoked the doctrine of unclean hands. *Id.* at 12 (¶ 2) (citations omitted).[11]

Habeas corpus is "governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963); *see also Ex parte Perez*, 398 S.W.3d 206, 216 (Tex. Crim. App. 2013) ("[T]he writ of habeas corpus is an extraordinary remedy, any grant of which must be underscored by elements of fairness and equity.")

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[11] *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1222 (1986) ("[W]hen a capital defendant raises a nonfrivolous constitutional question, neither state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should expressly provide that in matters of procedural default, as in other matters, death is different.").

(citations omitted). Given this, the State concedes that it should not benefit from the application of the Section 5 bar. There is simply no way Storey's initial state habeas counsel—well-known for his diligence and his work ethic[12]—could have discovered that Ms. Jack had lied during her closing argument when no one had any reason to believe that was the case, when not a single note in the State's trial file suggested that was the case. *Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶¶ 13–15), 9–10 (¶¶ 43(f–g), 49(b–c).

B. Death is Different.

It is true that these facts do not "fit the mold of either 1) the presentation of false evidence or 2) the suppression of evidence favorable to the defense under *Brady*." *Ex parte Storey*, 584 S.W.3d at 445 (Yeary, J., dissenting). But it is also true that "death is different." *See, e.g., Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Where the State has exercised its discretion to charge a

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12 *See Findings of Fact, Conclusions of Law, and Recommendation* at 4 (¶ 6).

defendant with a capital crime and the jury has imposed a sentence of death, there should be "a correspondingly greater degree of scrutiny." *McCleskey v. Kemp*, 481 U.S. 279, 348 (1987) (Blackmun, J., dissenting) (internal quotation marks and citation omitted).

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*;[13] whatever questions about its admissibility remain,[14] it was most certainly favorable to Storey. *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (explaining that *Brady* held "that the suppression of evidence favorable to an accused upon request violates due process whether the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution") (citation omitted). Indeed, Mr. Moore testified in some detail about "how it would

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13 *See Findings of Fact, Conclusions of Law, and Recommendation* at 8–11 (¶¶ 31–52), 13–14 (¶¶ 1–7).

14 *See Bosse v. Oklahoma*, 137 S. Ct. 1 (2016 (per curiam).

have changed the course of his representation and the trial." *Findings of Fact, Conclusions of Law, and Recommendation* at 9 (¶ 37) (citing 3 RR 10–11, 14, 21); *see also id.* at 9 (¶¶ 38–41). At the very least, Mr. Moore testified that he would have "tried to convince them, the State to waive the death penalty and proceed with - - as a waiver case." 3 SHRR 11; *see also id.* at 21 ("We would have tried to get that in front of the jury in every way imaginable.").

CONCLUSION

Ms. Jack's statement has been characterized as "facts not in evidence," "irrelevant," and "patently objectionable under the *Eighth Amendment*." *Ex parte Storey*, 584 S.W.3d at 445 (Yeary, J., dissenting); *see also Findings of Fact, Conclusions of Law, and Recommendation* at 6 (¶¶ 22, 24, 27(j)), 12–14. More importantly, though, it was unquestionably *false*. *See Findings of Fact, Conclusions of Law, and Recommendation* at 5 (¶ 18), 6 (¶ 20). Also unquestionably false were Ms. Jack's and Mr. Foran's attempts to provide a basis for the argument during the subsequent state habeas proceedings. *See Findings of Fact, Conclusions of Law, and Recommendation* at 6–8 (¶ 27).

Whatever diligence requires of defense counsel (whether at trial, on appeal or during state habeas proceedings), it cannot possibly require them to search for, much less find, something hidden from them which they do not even know to search for. *See Ex parte Storey*, 584 S.W.3d at 456–57 (Walker, J., dissenting) ("Under the circumstances of this case, some kind of inquiry into the Cherrys' feeling about the death penalty would have been *unreasonable*. 'Reasonable' diligence would not go prying into the private feelings of a murder victim's family without a very good reason for doing so.") (emphasis added, footnote omitted); *see also id.* at 459 ("Requiring an applicant or his counsel to go on fishing expeditions and blindly querying capital victims' families (themselves victims in many ways) without a good reason for doing so is unreasonable.").

In the federal courts, "a petitioner shows 'cause' when the reason for his failure to develop the facts in state-court proceedings was the State's suppression of the relevant evidence[.]" *Banks*, 540 U.S. at 691. Ms. Jack and Mr. Foran "not only failed to disclose Cherry's parents' unwavering desire that Storey not be sentenced to death, but [they] also misled the jury in

summation to successfully secure a death sentence. The State then ran out the clock by failing to disclose its malfeasance throughout Storey's initial postconviction proceedings." *Storey*, 142 S. Ct. at 2578.

In 2008, Ms. Jack and Mr. Foran failed to tell defense counsel that the Cherrys did not want the death penalty for Storey, that they did not believe in the death penalty for anyone. Ms. Jack compounded this action when she blatantly lied during her closing argument at trial, something she admitted to during the state habeas hearing. *See* 2 SHRR 113, 108–14; *see also Findings of Fact, Conclusions of Law, and Recommendation* at 6 (¶¶ 22–24), 7 (¶¶ 27(f), 27(j)). 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 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.

Respectfully submitted,

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Tarrant County, Texas

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Chief, Post-Conviction

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word count requirements of Tex. R. App. P. 9.4 because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains approximately 4,251 words, excluding those parts specifically exempted, as computed by Microsoft Office Word 2016 - the computer program used to prepare the document.

/s/ Fredericka Sargent
FREDERICKA SARGENT

CERTIFICATE OF SERVICE

A copy of the State's Brief has been electronically sent to Mr. Paul Davis Storey by and through his attorney of record, Mr. Keith S. Hampton, at keithshampton@gmail.com, and Mr. Michael Ware, at ware@mikewarelaw.com, on the 28th day of August 2023.

/s/ Fredericka Sargent
FREDERICKA SARGENT

Appendix F. The TCCA's order of June 28, 2023 for briefing for reconsideration of Storey's subsequent writ application.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-75,828-02

EX PARTE PAUL DAVID STOREY, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. C-3-011020-1042204-B IN CRIMINAL DISTRICT COURT NO. 3 TARRANT COUNTY

***Per curiam*. KELLER, P.J., and KEEL, J., dissented. MCCLURE, J., not participating.**

O R D E R

Before us is "[The] State's Motion for the Court to Reconsider the Denial [sic] of Applicant's Subsequent Writ on Its Own Initiative" ("Suggestion to Reconsider), filed in this Court by the Tarrant County Criminal District Attorney's Office (TCCDAO) on August 17, 2022. Although TCCDAO represents itself as "the State" in this matter, we find that representation to raise questions since, throughout the pendency of Applicant's writ and its dismissal, TCCDAO had recused itself and an Attorney Pro Tem was appointed to represent

the State.

In light of TCCDAO's Suggestion to Reconsider, we direct the parties (including the two amici,[1] should they so desire) to provide briefing on the following issues:

(1) What authority allowed the trial court to remove the duly sworn and serving Attorney Pro Tem and replace him with TCCDAO, which had previously recused itself and premised its reinstatement in the case on the fact that habeas proceedings had ended?

(2) In the order dismissing Applicant's -02 writ, we noted that the victim's father testified at the habeas hearing that he has disclosed his anti-death penalty views to "anybody that wants to know or has ever asked me." We further noted that this testimony undermined the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application. What evidence supports the position that the factual basis of the remanded claims was not in fact ascertainable before filing of the initial writ application? And,

(3) The merits of the remanded claims (Claims 2 through 5).

Briefs are due in this Court within thirty (30) days of the date of this order.

IT IS SO ORDERED THIS THE 28th DAY OF JUNE, 2023.

Do Not Publish

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[1] The Office of the Attorney General of Texas and the Texas Criminal Defense Lawyers' Association have submitted amicus briefs in this matter, respectively opposing and supporting TCCDAO's Suggestion to Reconsider.

Appendix G. *Applicant's Briefing On the Issues and Queries Identified in this Court's Order Of June 28, 2023*, filed August 28, 2023.

WR-75,828-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 8/28/2023 2:37 PM
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DEANA WILLIAMSON
CLERK

No. WR-75,828-02

IN THE

COURT OF CRIMINAL APPEALS

EX PARTE

PAUL DAVID STOREY

APPLICANT'S BRIEFING

ON THE ISSUES AND QUERIES

IDENTIFIED IN THIS COURT'S ORDER

OF JUNE 28, 2023

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OTHER AUTHORITIES

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Michael Ware and Keith S. Hampton, attorneys for Applicant in the above-entitled cause, and offers this brief which discusses and answers the following three questions and queries, as stated by this Court:

> (1) What authority allowed the trial court to remove the duly sworn and serving Attorney Pro Tem and replace him with TCCDAO, which had previously recused itself and premised its reinstatement in the case on the fact that habeas proceedings had ended?
>
> (2) In the order dismissing Applicant's -02 writ, we noted that the victim's father testified at the habeas hearing that he has disclosed his anti-death penalty views to "anybody that wants to know or has ever asked me." We further noted that this testimony undermined the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application. What evidence supports the position that the factual basis of the remanded claims was not in fact ascertainable before filing of the initial writ application? And,
>
> (3) The merits of the remanded claims (Claims 2 through 5).

Ex parte Storey, WR-75, 828-02, *Order*, June 28, 2023.

Counsel is grateful for the opportunity for more informative briefing. Counsel for Applicant provides additional argument and authority to

support its suggestions that this Court reconsider its *per curiam* opinion in *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App. 2019). Other than the Eighth Amendment issue, the briefing falls under four broad areas: **(1)** the identity of counsel for the State and its confession of error; **(2)** why there is no procedural bar to this Court's review of the merits of the trial court's findings and conclusions; **(3)** how habeas counsel, Mr. Robert Ford, was reasonably diligent; and **(4)** why the Due Process Clause and false evidence jurisprudence requires relief in this case. Counsel incorporates the arguments made in previous pleadings, including the *Suggestion for Reconsideration on this Court's own Initiative*, but for the sake of avoiding repetition and prolixity, adopts them here by reference. This brief will directly answer the Court's questions with argument in addition to and complementary of those made previously.

The Tarrant County District Attorney represents and speaks for the State of Texas, and the State of Texas agrees that relief should be granted in this case.

On July 14, 2022, Tarrant County District Attorney Sharen Wilson filed the *State's Motion to be Reinstated after Recusal*. The motion sought the reinstatement of her office on the case. The Criminal District

Attorney Pro Tem, Travis G. Bragg, an Assistant for the Office of Attorney General ("OAG"), was served with the motion on that date. On August 5, 2022, the district court granted the motion, reinstated the District Attorney and removed Mr. Bragg. At no point in this process did anyone in the OAG, including Mr. Bragg, oppose or object to the reinstatement.

On August 17, 2022, the District Attorney filed the *State's Motion for the Court to Reconsider the Denial of Applicant's Subsequent Writ on its Own Initiative*. It was not until September 30, 2022 that the OAG made any complaint. The OAG's complaints had nothing to do with the district court's order. Its chief complaint was not the procedure or propriety of replacement, but that the district attorney confessed error long denied by the OAG.

In its brief to this Court, the OAG did not identify itself as the attorney representing the State of Texas. It wisely refrained from reclaiming its former *pro tem* role. But it unfortunately and wrongly identified itself as "amicus." The OAG cannot appear as amicus because the OAG is the State's former counsel. *Booth v. State*, 499 S.W.2d 129, 136 (Tex.Crim.App. 1973)(party's prior counsel's appearance as amicus

before this Court refused because amicus "cannot be subverted to the use of a litigant in the case.")(citations omitted).

This Court's holding in *Booth* makes sense. Counsel, having previously appeared in the role of advocate, should not later appear in the same litigation donning an amicus mask. As neither counsel for a party nor a true amicus, this Court should disregard any briefing from the OAG.

This Court's first issue asks for the "authority" which "allowed the trial court to remove" the OAG. Taken literally, the question appears to reverse the structure of the constitutional power of district courts. District courts are invested with judicial power under Article V §8 of the Texas Constitution, which states:

> District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.

Tex. Const. art. V §8. Jurisdiction is judicial power. *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (1933); *Kelley v. State*, 676 S.W.2d 104, 107 (Tex.Crim.App. 1984). The issue, then, cannot be what authority "allows" a district court to grant an unopposed motion filed by a duly

elected District Attorney. The only issue is what authority specifically empowers "some other court, tribunal, or administrative body" to make that decision. There is none.

The OAG has never questioned this constitutional order. Its acquiescence may be attributable to its appreciation that attorney *pro tem* does not mean attorney *in perpetuum*. "Pro tem" is an abbreviation of *pro tempore*, meaning "for a time." Black's Law Dictionary (11th ed. 2019). The OAG's time was appropriately terminated.

The Legislature recognizes the district court's authority in its "Attorney Pro Tem" provision in the Code of Criminal Procedure. Tex. Code Crim. Proc. Ann. art. 2.07. It speaks to appointments by district courts according to periods of limited duration, such as when the district attorney is "absent from the county or district, or is otherwise unable to perform the duties of the attorney's office[.]" *Id.* In this case, the appointment lasted so long as the District Attorney's determination of its need for recusal, one that was removed after the exhaustion of habeas proceedings in district court.

The Legislature plainly empowered district courts with the

regulation of attorneys *pro tem*. Tex. Code Crim. Proc. Ann. art. 2.07(b-1)(prosecutor "may request the court" to remove another prosecutor, but only "on approval by the court[.]"). This same statute implicitly empowers district courts with the authority of reinstatement – after all, district attorneys who are absent may return, and disabled district attorneys may recover. It would be inconsistent with the Texas Constitution's empowerment of district courts to conclude that the Legislature intended that district courts may remove prosecutors, but are somehow powerless to reinstate them.

The Texas Constitution does more than "allow[]" a district court to reinstate previously self-recused prosecutors to a case. The Constitution invests district courts with the authority to do so as an exercise of their constitutionally apportioned judicial power. The Legislature affirmed that authority over attorneys *pro tem* expressly in Article 2.07 of the Code of Criminal Procedure. The district court's decision to reinstate the Tarrant County District Attorney as counsel for the State is thus well grounded in constitutional and statutory law.

The district court's decision was a reasonable exercise of its

authority. There is no law that prohibits a district court from granting an unopposed motion for reinstatement of a District Attorney. The district court heard no objection to the exercise of its authority. The Tarrant County District Attorney therefore represents the State of Texas in this case, which now finally brings the clarity that members of this Court requested when this case was initially reviewed. Having settled the constitutional and statutory law regarding the role and authority of district courts, this Court should now consider the facts, which the State of Texas at last sets straight.

The State of Texas finally "sets the record straight."

"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004). As Judge Yeary observed in his dissent to the *per curiam* opinion, "Assuming that the prosecutor's jury argument that the family had endorsed Applicant's execution was indeed false, the State has yet to 'set the record straight' with respect to the veracity of that statement." *Ex parte Storey*, 584 S.W.3d at 446 (Yeary, J., dissenting, joined by Walker,

J.)(quoting *Banks v. Dretke*, *supra*). At the time of this Court's initial disposition, the State had yet to diligently fulfill its duty. But it has now done so, a development that significantly changes the posture of this case from its status at the time of the issuance of this Court's initial *per curiam* opinion.

Through current counsel, the State of Texas recognizes the accuracy of the district judge's findings, including the intentional falsity of the prosecution's assertion to the jury. The State's former counsel, the OAG, had a clear opportunity to confirm the veracity of the factual basis of Applicant's claims. It could have done so when every survivor of Mr. Cherry's murder testified during habeas proceedings. It could have done so before those hearings. It could have done so when it appeared before this Court, but the OAG made no effort to clarify the matter. The OAG has never refuted nor confirmed this centerpiece issue on behalf of the State of Texas.

Instead the OAG has steadfastly defended the two trial prosecutors and their misconduct, even offering their perjured testimony during the habeas proceedings. Up to now, it has successfully shielded them from

accountability. Today, the State of Texas itself removes that shield.

Judith and Glenn Cherry themselves refuted the truthfulness of the prosecution's assertion to the jury that "all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate." The OAG never confirmed the falsity of the prosecution's assertion, as it could and should have done.[1] The State of Texas is now clear through its elected district attorneys, both current and past.

The State of Texas fully endorses this Court's vacation of the death penalty and its remand to the trial court for a new penalty phase trial. The State's counsel, Tarrant County District Attorney Sharen Wilson, made that representation on behalf of the State of Texas to this Court on August 17, 2022. Counsel expects the current elected Tarrant County District Attorney, Phil Sorrells, to do the same today.

This Court should credit the Tarrant County District Attorneys' assessment of the three lawyers at issue in this case (Mr. Robert Ford, Mr.

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[1] "[A] prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder." American Bar Association, Prosecution Function, Standard 3-1.4. The OAG chose to defend the misconduct in this case rather than correct it.

Robert Foran and Ms. Christy Jack) more than any OAG portrayal. Each were attorneys with reputations earned locally among judges and veteran death penalty litigators. Both district attorneys encountered them with far more frequency than the OAG, and their collective view should prevail over the OAG's less-informed estimations.

The State of Texas affirms that the prosecutors in this case knew that Glenn and Judith Cherry opposed seeking the death penalty against Mr. Storey; that the prosecutors did not disclose this information to the trial attorneys, to Robert Ford, or to anyone associated with the defense; that the prosecutors exploited their strategic secretion of that information, and lied to the jury when they falsely asserted that they supported a death sentence; that the prosecutors hid this evidence; and that this egregious misconduct influenced at least one juror to vote for death when he would have voted for life had the prosecution not misled him. The State of Texas endorses the well considered factual findings by Judge Young, including his findings regarding the reasonable diligence of Mr. Robert Ford. The support for relief from the death sentence in this case, then, is unanimous and unambiguous.

The district court recommended relief. The State of Texas and Glenn and Judith Cherry are all in agreement. It is a fair question to ask what legitimate impediment prevents this Court from granting relief.

This Court has an opportunity it did not have at the time of this Court's initial *per curiam* opinion. A stubborn allegiance to that opinion would be misguided because its rationale unfairly projects the justice system's own failure to prevent injustice onto those who worked most to rectify it. It wrongly faulted habeas counsel for failing to spontaneously experience an epiphany about the existence of an unlikely, rare, buried truth, blaming him for not divining facts he had no reason to believe existed. By reference to his one slender, misinterpreted remark, it also blamed Glenn Cherry for the death penalty he always sought to prevent. The attribution of Mr. Storey's execution to the only people who honestly sought to save his life, while sparing any censure of the only two people who dishonestly sought his death, is wrong and can be righted in light of this new opportunity to reconsider its previous opinion.

Applicant's claims are not barred by Article 11.071 §5.

Section 5 is no bar to this Court's consideration of the district judge's findings. Section 5 does not apply because there was no basis for habeas counsel to suspect the existence of the key facts in this case. If it did apply, the State has affirmed that habeas counsel was reasonably diligent. Even if the State had not so affirmed, equity in any event would remove any such bar to prevent the prosecutors from benefitting from their own misconduct. Thus, this Court can and should reach the merits of this writ application, as each of these reasons will be more fully explicated *infra*.

The statutory bar in Section 5 was never triggered because habeas counsel could not verify facts he had no basis to believe even existed. Equity reaches the same result – there is no bar to consideration of Judge Young's findings and conclusions because any bar would constitute a shield for unethical prosecutors. The record is more than sufficient to support the conclusion of Mr. Ford's reasonable diligence. In any event, the State's concession of Mr. Ford's reasonable diligence removes Section 5's application altogether. This Court's review of the merits of Judge Young's findings and conclusions are and remain unimpeded.

Contrary to the initial *per curiam* opinion, Glenn Cherry's single statement does nothing to "undermine" the district court's findings. Closer inspection by this Court will reveal that Mr. Cherry's remark actually supports them; when read carefully and in context, Mr. Cherry's disclosure of his views was limited to friends and family. Ultimately, this Court should reach and embrace the district court's findings and conclusions, and in light of the Due Process Clause, this Court's own false evidence caselaw and the Eighth Amendment, grant relief.

Because Mr. Robert Ford had no basis or reason to believe or suspect these unlikely facts existed, he had no duty to ascertain those facts.

The statutory procedural question for claims filed in subsequent writ applications is whether the factual basis of those claims were "available" on or before the initial writ was filed. Tex. Code Crim. Proc. Ann. art. 11.071, §5(a)(1). The claims are considered available only if their factual bases were "ascertainable" through reasonable diligence. Tex. Code Crim. Proc. Ann. art. 11.071, §5(e). The application of this bar, then, is dependent upon the meaning of "ascertain" and "reasonable diligence."

The Meaning of "Ascertain" and Reasonable Diligence

"Ascertain" means to "find something out for certain; make sure of." *Ex parte Lovings*, 480 S.W.3d 106, 112 (Tex.App. – Houston [14th] 2015, *no pet.*). *See also Villareal v. State*, No. 05-03-00743-CR, 2004 Tex.App. LEXIS 1653, at *1 n.2 (Tex.App. Feb. 19, 2004)(unpublished)(contrasting the verb "ascertain," with "inquire," meaning "to ask a question; to make an investigation"); *Ex parte Lovings*, *supra)*(rejecting idea that "ascertained" can mean "ascertainable" or "can be ascertained"). It connotes with verbs like "verify" and "confirm" and "resolve."

"Ascertainable" does not mean that it was "discoverable" because anything is discoverable. Rather, it is a term that presupposes suspected but undetermined facts subject to confirmation, i.e., able to be ascertained. Accordingly, Section 5 imposes its diligence duty only when habeas counsel fails to conduct an investigation into facts he had reason to believe existed.[2]

Mr. Ford had no reason to suspect the Cherrys opposed the

[2] This reading of Section 5 is also consistent with federal treatment of this issue. *Strickler v. Greene*, 527 U.S. 263 (1999)(counsel does not fall short of reasonable diligence when he had no reason to suspect the concealed fact) and *Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45 (D.D.C. 2009)(counsel is diligent when the fact was ultimately discovered by "mere fortuity"), discussed *infra*.

prosecution's pursuit of Mr. Storey's execution. On the contrary, he had every reason to presume that the prosecution's representation was not some sort of calculated lie. Accordingly, the predicate necessary for this Court's diligence review is absent and Section 5 therefore does not apply.

The State agrees that Mr. Robert Ford was reasonably diligent.

If this Court concludes that Section 5's requirement does apply in this case, it should regard the issue of reasonable diligence as equitably precluded, as the trial court found,[3] or no longer a controversy in light of

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[3] The trial court found:

> Because the State concealed the evidence at issue in this subsequent writ application, it has forfeited its argument that Applicant' 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). *See also Smith* v. *State,* 100 Tex.Crim. 23, 235, 72 S.W. 793, 794 (Tex.Crim.App. 1925) ("It is [a] well settled principle of law that a party cannot benefit from his own wrong[.]"). Because the State secreted evidence it was legally required to disclose, it cannot benefit from its wrong-doing by faulting habeas counsel for failing to discover its own misconduct.
>
> [T]his 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.

(continued...)

the State's agreement that Mr. Ford was reasonably diligent. Thus, no barrier prevents this Court from considering the trial court's findings and conclusions. Nevertheless, Applicant will specify the direct and circumstantial evidence proving that Mr. Ford acted with reasonable diligence both as a matter of fact and as a matter of law.

Both direct and circumstantial evidence overwhelmingly establishes that habeas counsel, Mr. Robert Ford, was reasonably diligent in this case.

This Court fashioned its query of habeas counsel's diligence as:

> "What evidence supports the position that the factual basis of the remanded claims was not in fact ascertainable before filing of the initial writ application?"

First, the question erroneously equates discoverable claims with ascertainable ones. Second, it unfairly burdens Applicant to prove a

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[3](...continued)
Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814-15 (1945). This Court therefore equitably estops the State from any argument that Applicant's state habeas counsel, Robert Ford, or any of Applicant's prior counsel, Larry Moore, Bill Ray, or John Stickels, failed to act with due diligence or that the factual basis of the claims was ascertainable. *Gulbenkian v. Penn,* 151 Tex. 412,418, 252 S.W.2d 929, 932 (1952).

Ex parte Paul David Storey, WR-75,828-02, Findings of Fact, Conclusions of Law and Recommendation (5th Supp. Clerk's R. pp. 8-15).

negative – that facts were not obtainable. *Johnson v. State*, 815 S.W.2d 707, 710 (Tex.Crim.App. 1991)(burdening State with proving a negative is "ludicrous"). Third, the question rewords the statute by omitting its qualifying language "through the exercise of reasonable diligence." Counsel therefore objects to the wording of the question on each of these grounds.

"The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. N.Y., New Haven & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957). This fundamental rule of law therefore protects Applicant from any sort of burden on this point, which means he has no burden to prove his diligence, notwithstanding the presumption inherent in this Court's query. This Court, then, is left to first consider, as a preliminary question, the availability of the secreted facts from the only two sets of people who knew the truth, i.e., the two prosecutors and Glenn and Judith Cherry.

The facts could not have been either ascertainable or discoverable from the prosecutors because it should be clear that in light of their

concealment, they would not have disclosed them and might well have lied, as their perjury during the habeas hearings confirms. No other lawyer ever ascertained or discovered those facts – not trial counsel, not appellate counsel, and none of the other prosecutors associated with the case. Even as late as the habeas hearings, the prosecutors fought the ascertainment of those facts. Thus, the prosecutors would hardly have become a fountainhead of honest disclosure to habeas counsel, leaving Judith and Glenn Cherry as the only remaining sources of the information.

The *per curiam* opinion rested its pronouncement entirely upon one sentence from Glenn Cherry's testimony as proof that the facts were ascertainable through him. A closer inspection of his testimony, however, refutes that premise. That single sentence uttered by the traumatized parent of a murdered son is no basis for concluding that habeas counsel was derelict in his duties.

Glenn Cherry's testimony does not establish that he would have disclosed that he and his wife, Judith Cherry, were both opposed to the execution of Mr. Storey.

This Court fixated only upon one-half of Glenn Cherry's answer and concluded that his first sentence, by itself, fatally undermined the entirety of the trial court's findings. Contrary to the *per curiam*'s version of the record, Mr. Cherry's complete statement to the OAG's leading question was more inclusive and with an important addition. His full response to the question about whether he disclosed his anti-death penalty views to "friends" was:

> Yeah, anybody that wants to know or has ever asked me or we've ever talked about it. I don't just go around telling everybody all my views.

(Vol. 3, pp. 174-175). Glenn Cherry's full answer was one direct response to a general question.

The context of his response is important. It came during this examination by the OAG:

> A. Yes, I'm against the death penalty.
>
> Q. So that position formed before this terrible set of circumstances, correct?
>
> A. Yes.

Q. And your opposition to the death penalty would be to any – to anybody being executed?

A. I don't believe in the death penalty for anybody.

Q. And they asked you about Mr. Storey's mother, about your feelings about that. But that would be for any mother that was going to lose a son, you know, to execution, correct?

A. Yeah, I don't want anybody to have to go through that.

Q. Have you spoken with friends and family about your views on the death penalty?

A. Well, I know most of my family's views, I think.

Q. But, I mean, have you told them your views?

A. Yeah, it's not a secret.

Q. Yeah. And certainly you've told friends?

A. Yeah, anybody that wants to know or has ever asked me or we've ever talked about it. I don't just go around telling everybody all my views.

(Vol. 3, pp. 174-175).

The OAG did not specifically ask whether he told anyone that *both* he and Judith Cherry were opposed to the death penalty *for the person who murdered their son.* His answer does nothing to support the supposition that his deeply personal beliefs could have been learned by a

stranger by chance. On the contrary, it shows that Glenn Cherry was willing to share his *own* views *in general* and *only* with friends and family.[4] The *per curiam* opinion read more from Mr. Cherry's testimony than he actually provided.

Glenn Cherry gave his answer in direct response to the question which was put to him, and he confined it to people with whom he was intimate – family and friends. Reasonable inferences from this response would be that Mr. Cherry might have been more casual about the morality or propriety of capital punishment in general to people with whom he was familiar. His answer would lead to the equally reasonable inference that he might not have been so forthcoming with strangers about the murder of his own son. His answer therefore does not support the conclusion that Mr. Cherry would have revealed anything at all to habeas counsel.

Glenn Cherry's express qualification, "I don't just go around telling

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[4] This Court should also recognize that Glenn Cherry gave his answer during a proceeding in which he was compelled to relive the death of his son and re-experience a death penalty trial he and his wife always opposed. He could not have known that his one answer to this one question would become the purported procedural linchpin for this Court's *per curiam* 2019 decision. Any attribution to Mr. Cherry's testimony as a revelation of his easy availability is worse than wrong. It is not merely ironic, but perverse to impute Mr. Cherry with responsibility for an execution he has always passionately opposed.

everybody all my views," further removes his testimony as any support for the *per curiam*'s rationale. The OAG asked nothing further after his answer, abandoning this line of questioning. This Court cannot conclude in light of Mr. Cherry's express limitation that habeas counsel – who was not a family member or one of Glenn Cherry's friends – would or could have elicited his views as easily as his friends or family.

Mr. Cherry's general death penalty views are not the same as opposition to a specific execution. People, including Mr. Cherry, are entitled to create exceptions to their general views. In order for the theory that Mr. Ford was negligent because of his failure to extract the truth through Mr. Cherry, habeas counsel would have had to learn far more than what Mr. Cherry only disclosed to his own family and friends, a proposition not supported by any evidence, including Mr. Cherry's testimony.

Mr. Ford would have needed to elicit from Mr. Cherry more than his own personal and general opposition to the death penalty. Mr. Cherry would also have had to convey Judith Cherry's views as well. Moreover, he would also have had to made clear that they both opposed the death

penalty for Applicant in particular. Finally, he would also have had to inform habeas counsel that they both told the prosecutors that they opposed the death penalty for Applicant before trial, enabling Mr. Ford to ascertain that prosecutor Christy Jack had in fact intentionally lied to the jury in her argument. These are far too many revelations for this Court to presume from an imaginary conversation between Mr. Ford and Mr. Cherry.

Judge Young personally witnessed Mr. Cherry's testimony, "I don't just go around telling everybody all my views," which might have been growled or shouted or whispered or uttered in despair and torment. Judge Young was well aware that Mr. Ford's diligence was an issue. From his firsthand observation of Mr. Cherry's demeanor and expressions, Judge Young interpreted Mr. Cherry's testimony in such a way that he concluded that Mr. Ford was reasonably diligent. This Court should credit Judge Young's findings more than a conjectured conversation that exists only in a hypothetical.

Robert Ford was reasonably diligent as a matter of fact.

In its *per curiam* opinion, this Court decided that habeas counsel, Robert Ford, was not reasonably diligent, i.e., negligent: "[A]lthough the trial court found that Mr. Ford generally 'had a strong reputation for his diligence,' Applicant presented no evidence showing that Ford was diligent in [t]his particular case." *Ex parte Storey*, 584 S.W.3d at 439. This Court's opinion downgraded the evidence before the district court as nothing more than reputation evidence, then reduced it even further, considering it be so inconsequential as to be regarded as "no evidence." *Id.* In fact, it was strong circumstantial evidence of habeas counsel's diligence.

"Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt" beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). This principle is so important that anyone who cannot follow it is unqualified to serve as a juror. *See, e.g., Caldwell v. State*, 818 S.W.2d 790 (Tex.Crim.App. 1991), *overruled on other grounds, Castillo v. State*, 913 S.W.2d 529, 533 (Tex.Crim.App. 1995)(bias against the law to impose burden of producing

direct evidence on the prosecution). If circumstantial evidence can prove criminality beyond a reasonable doubt, this Court should regard it as enough to prove a lawyer's diligence. In short, this Court should consider the evidence of diligence in this case in accordance with the law's high regard for circumstantial evidence.

Mr. Ford prepared and filed a well-researched, well-written writ application based on a reasonable investigation of his case, and mentioned nothing of the facts discovered later. Had Mr. Ford actually known about the undisclosed facts of this case, his reputation compels the reasonable inference that he would have asserted everything that present counsel has done. The fact that a "gifted" and "passionate" lawyer proven in the habeas proceedings to be "tenacious," "extremely diligent," and "extremely zealous" would do nothing with this information is more than evidence of reputation; it is strong circumstantial evidence that he did not know.

Prevailing norms of attorney performance provide additional proof of the information's unavailability. Judge Walker, in his dissenting opinion to the *per curiam* decision, summarized the evidence developed during the habeas proceedings and its support for the reasonableness of

Mr. Ford's work:

> Under the circumstances of this case, some kind of inquiry into the Cherrys' feelings about the death penalty would have been unreasonable. "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." The trial court's finding is supported by the record. At the habeas hearing, Mark Daniel, who represented co-defendant Mark Porter, testified:
>
> > Q. And in your – in the normal course of your representation in death penalty cases, do you usually think it's a good idea to reach out and – to the survivors of the murder victim and have a conversation with them about their feelings and thoughts?
> >
> > A. If you have not had a door slammed in your face recently and hope that one is, it's just – it's such a – such a strange dynamic. You approach somebody with a phone call or knock on a door or reach out to them with a email message, I'd like to talk to you about this, I've never done that, I guess for the fear that I suspect it will prove futile.
> >
> > [T]hen to say, hi, how do you feel about the death penalty, especially in this case? And I'm not saying this because the issue in this matter before Judge Young right now, but I expect that to be something the prosecutors might let me know. That's what I would expect.
> >
> > Q. In other words, it's reasonable to assume that in

most cases the survivors of the murder victim are not eager to speak with the attorney representing their loved one's killer?

A. That would be accurate.

Another attorney, Fred Cummings, explained the issue from the perspective of trial counsel:

Q. Have you ever, ever in any of the death penalty cases you've ever handled as a defense lawyer contacted the victim's family?

A. No, sir.

Q. Is there a reason for that?

A. Yes, sir. It's my opinion and belief based upon practicing in this county for 31 years that if – my primary responsibility in defending someone is to, in a death case, is to save that individual's life. Reaching out to the deceased's family would be extremely dangerous in that regard, in my opinion.

Q. Can you explain that?

A. Yes. The – so much about death penalty representation is, or litigation, it's discretionary on the part of the DA's office. They get to decide whether or not they're going to seek death or not, they get to decide whether or not they're going to waive. DA's tend to be possessive about the victim and the victim's family. Reaching out to a parent of a deceased might very well alienate the very people that I'm trying to convince to waive death.

> I have defended three death cases, but I've had 27 other capital murder cases that have resulted in other outcomes short of a death sentence, and that's the goal is to try to avoid doing that.
>
> Plus, you don't know whether – what type of reaction you're going to get reaching out to someone who is grieving. So it's just a dangerous practice and it's not a common practice. I know every capital litigator in this county, and I don't believe that it is a good practice and I don't think it's commonly done here.

The State, in its objections to the trial court's findings and conclusions, did not contest this point.

Ex parte Storey, 584 S.W.3d 437, 456-58 (Tex.Crim.App. 2019)(internal citations omitted)(Walker, J., dissenting, joined by Slaughter, J.).

This expert testimony establishes that the factual basis was not reasonably ascertainable according to common practice. Moreover, as experienced lawyers attested, it would be a risky endeavor and contrary to basic respect for people likely hostile to inquisitive lawyers representing the killer of their loved one. Consistent with these prevailing norms, habeas counsel's diligence was reasonable.

One of the prosecutors admitted that during his "conversation with Mr. [Bill] Ray and Mr. [Larry] Moore that they [the Cherrys] preferred not

to be contacted[.]" (Vol. 2, p. 252). If the lawyers for both Mr. Storey and his co-defendant, Mr. Porter, believed that neither Glenn nor Judith Cherry wished to be contacted, Mr. Ford can hardly be faulted for having the same belief.[5] This belief – shared among all the trial attorneys for both the State and defense – is further affirmative proof that habeas counsel was not somehow negligent for failing to cold-call either Glenn or Judith Cherry. To this date, the *per curiam* opinion's assumption that disclosure was ever available through a surprise visit to Glenn Cherry can find no evidence to support it.

This Court's query is: "What evidence supports the position that the factual basis of the remanded claims was not in fact ascertainable before filing of the initial writ application?" Applicant answers that all of the evidence adduced at the habeas proceedings proves that the suppressed facts were not "ascertainable" by reasonably diligent counsel in this case. A contrary conclusion can only be made on the rigged scales of hindsight.

Mr. Ford would have no chance of proving his diligence under a

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[5] It should be noted that both Mark Daniel and Tim Moore (attorneys for co-defendant Mark Porter) testified that no one informed them of the Cherrys' opposition and that they had no idea until so informed by undersigned counsel.

standard that retrospectively looks to what he *could* have known. Because no lawyer would ever be considered diligent under this standard, it is not a standard at all. The question then is not whether habeas counsel could have or would have discovered evidence in the perpetually sunny light of hindsight, but whether habeas counsel exercised reasonable diligence under the same judgmental review as applied to the actions of any other lawyer.

Judicial review of attorney performance is by now well established. Courts have reviewed attorneys' reasonable diligence or lack thereof for a very long time, whether as a matter of the Due Process Clause or the Sixth Amendment, discussed *passim*. This Court should not blind itself to such review, but should instead rely upon and apply its familiar principles to habeas counsel in this case.

The determination of a failure to exercise reasonable diligence is not meaningfully distinguishable from a determination of deficient performance by the trial or appellate attorney. It is essentially a conclusion of ineffective assistance of habeas counsel. This Court should reassess Mr. Ford's performance in the same way as any other ineffective

assistance claim.

This Court should consider the reasonableness of Robert Ford's diligence without hindsight. Instead, it should make a "fair assessment of attorney performance," one which "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984). Here, counsel was oblivious to carefully concealed information about a matter that would never occur (and did not occur) to reasonable veteran defense lawyers who have tried death penalty cases. Judged in that light, Mr. Ford was a reasonably diligent lawyer. He was not negligent.

In contrast, hindsight is the view from a hypothetical world and a perspective wholly removed from the real one. In a scripted imaginary scenario, Mr. Ford would have simply encountered Mr. Cherry who would have then told him of their opposition to the pursuit of Mr. Storey's execution, and revealed the depth and scope of the prosecution's misconduct. This scenario exists only in this magical hypothetical world.

To fault Mr. Ford, because he failed to undertake actions that appear reasonable only in speculative reflection, is nothing more than an exercise in hindsight, a judgment of attorney performance rejected everywhere in law, including constitutional law and civil law. *See, e.g., Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994)(judicial review looks at the standpoint of the actor "without viewing the matter in hindsight."). Prosecutors are likewise spared this harsh and unfair judgment. *See, e.g., Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 56 (D.D.C. 2009)(prosecutors should not "fear that their actions will be judged in hindsight."). Habeas counsel deserves the same consideration.

This Court recently considered whether a lawyer should be faulted for his failure to ascertain a legal development regarding his client's duty to register as a sex offender. *Ex parte Lane*, 670 S.W.3d 662 (Tex.Crim.App. 2023). This Court concluded:

> Viewing the circumstances from counsel's perspective at the time of the representation, the law was unsettled with respect to whether Applicant had a duty to register following the trial court's order setting aside the conviction under the judicial-clemency provision. Because Salinas cannot be deficient for failing to "discover" something that was unsettled or unclear under the law, Applicant cannot establish the deficient-performance prong of his ineffective-assistance claim.

Ex parte Lane, 670 S.W.3d at 670. As the concurrence recognized, a lawyer is not ineffective "for failure to predict the future." *Ex parte Lane*, 670 S.W.3d at 680 (Richardson, J., concurring, joined by Slaughter, J.).

Lawyers are no more clairvoyant about unlikely, rare, and deliberately concealed facts. Mr. Ford is no more ineffective or less diligent in this case than Mr. Salinas in *Ex parte Lane*. Mr. Ford's reasonable diligence is not only established as a matter of fact but, as demonstrated next, as a matter of law as well.

Mr. Ford was reasonably diligent as a matter of law.

"The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)(cited by *Banks v. Dretke*, *supra*). This Court's review of Mr. Ford's performance as habeas counsel should be viewed with this presumption in mind.

Before trial, the district court ordered the prosecutors "to produce any and all" evidence "of material importance to the Defense even though

it may not be offered as testimony or exhibits by the prosecution at the trial of this case on the merits." (Vol. 2, p. 77). Both the district judge and trial counsel relied on the prosecution to comply with this order, consistent with the presumption of regularity. It is no less reasonable for Mr. Ford, as habeas counsel, to have done the same.[6]

"[T]he novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion" that prosecutorial misconduct "may have occurred" is inconsistent with "[t]he presumption, well established by tradition and experience, that prosecutors have fully discharged their official duties[.]" *Strickler v. Greene*, 527 U.S. 263, 285 (1999)(internal citations and quotations omitted). Consequently, defense counsel does not lack diligence for failing to discover favorable facts concealed by the prosecution when "it is especially unlikely that counsel would have suspected" suppression. *Strickler v. Greene*, 527 U.S. at 285. "Mere

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[6] In her testimony, Jack conceded that the information she possessed concerning the Cherrys' opposition was within the purview of this order and that she was required to disclose it. She simply maintained that she had disclosed it. That contention was clearly contrary to the evidence and was found to be not credible by the district court. *Ex parte Paul David Storey*, WR-75,828-02, Findings of Fact, Conclusions of Law and Recommendation (5th Supp. Clerk's R. pp. 8-9).

speculation that some exculpatory material may have been withheld" is insufficient "to impose a duty on counsel to advance a claim for which they have no evidentiary support." *Id.* at 286. In this case, there is no basis whatsoever for Mr. Ford to have even suspected that both Glenn and Judith Cherry opposed the prosecution's pursuit of Mr. Storey's execution or that this fact had been secreted by the prosecutors, who then intentionally lied to the jury and the court about it. Thus, he did not lack reasonable diligence.[7]

Banks v. Dretke dealt directly with reasonable diligence of habeas counsel in the face of suppressed *Brady* material. "[I]t was ... appropriate for Banks to assume that his prosecutors would not" engage in misconduct. *Ex parte Storey*, 584 S.W.3d at 444 (Yeary, J., dissenting, joined by Walker, J.)(quoting *Banks v. Dretke*). This Court's original *per curiam* decision would reverse this holding by declaring habeas counsel to be unreasonable to make this very assumption. *Banks v. Dretke* and *Strickler v. Greene* apply to this case, and they counsel this Court to

[7] As a matter of federal habeas law, a petitioner's counsel is not regarded as lacking diligence for failing to raise a claim under the Due Process Clause in state court when the prosecution withheld *Brady* material and the defense reasonably relied on the prosecutor's obligation to disclose the material. *Strickler v. Greene*, 527 U.S. at 288-89.

conclude that if the assumptions made by counsel for Mr. Strickler and Mr. Banks were reasonable, so, too, was it for Mr. Storey's counsel as well.

Federal court evaluations of the diligence of federal habeas counsel reach the same conclusion. One decision is not only instructive but on point – *Amadeo v. Zant*, 486 U.S. 214 (1988) – in which habeas counsel belatedly discovered the State's misconduct[8] "by mere fortuity[.]" A unanimous Supreme Court found those circumstances "ample" enough to excuse counsel's failure to bring it to light sooner. There is no meaningful distinction between the circumstances in *Amadeo v. Zant* and those in this case.

Habeas counsel was guided by law in the performance of his duties. The law informed him to presume that prosecutors have followed the law unless he learns of evidence to the contrary. Mr. Ford made that presumption and was therefore reasonably diligent as a matter of that law. As demonstrated next, had he chosen the path insisted upon by this Court's initial *per curiam* opinion, he would have undertaken an unwise course of action, as the expert attorneys established during the habeas

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[8] It was a scheme to manipulate jury pools against women and African Americans.

proceedings as a matter of fact, and which is now condemned as a matter of Texas law.

Habeas counsel was not unreasonable for failing to contact Glenn Cherry.

Article 55A.051 of the Code of Criminal Procedure provides certain rights specifically aimed at the survivors of a capital murder:

> A victim, guardian of a victim, or close relative of a deceased victim is entitled ... if the offense is a capital felony, the right to:
>
> > not be contacted by the victim outreach specialist [from defense counsel] unless the victim, guardian, or relative has consented to the contact by providing a written notice to the court; and designate a victim service provider to receive all communications from a victim outreach specialist acting on behalf of any person.

Tex. Code Crim. Proc. Ann. art. 56A.051(a)(14)(B) & (C). This law was passed in 2013, which post-dates habeas counsel's representation. Nevertheless, it is instructive regarding why the imposition of a duty on habeas counsel to contact the survivors of his client's capital murder is an idea so bad that it is now against the law. Act of June 14, 2013, 83rd R.S., ch. 651, 2013 Tex. Gen. Laws 1736-1738.

Representative Charles Perry was the author of H.B. 899, which was later sponsored in the Senate by then-senator Ken Paxton for passage into law. Both lawmakers advocated for the bill because it was needed to afford the survivors of a capital murder a right of "no contact" to shield them from "outreach" by representatives of the person who committed the murder. Contact was "causing stress or trauma" to these victims, and the law was intended to protect them from harassment and persistent attempts to contact them. House Committee on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 899, 83rd Leg. R.S. (2013). Governor Rick Perry signed the measure on June 14, 2013.

The *per curiam* opinion declares that it was unreasonable for Mr. Ford to not cold-call the Cherrys. In contrast, legislative deliberation and gubernatorial judgment declare his conduct not only reasonable but desirable and humane to the victims of violent crime. The Texas Legislature and the Governor represent the people of Texas, and, through this law, they have resoundingly endorsed Mr. Ford's course of action as praiseworthy. He did not fail in his duty of diligence. He acted in a way universally approved and now codified in state law.

Any continuation of condemnation against Mr. Ford would introduce a new and unnecessary conflict of judicial policy with current Texas law. An extension of this Court's policy expressed in its *per curiam* opinion would be unfair to Mr. Ford and shocking to lawmakers and crime victims. This Court should reconsider its *per curiam* opinion and issue a new one that concludes that Mr. Ford's course of action satisfied the standard for counsel's performance for consideration of subsequent writ applications under Section 5.

In summary, Section 5 should be no bar to the consideration of the merits of this case. First, Section 5's ascertainment requirement does not come into play when counsel has no reason to suspect either the fact that both Glenn and Judith Cherry opposed Mr. Storey's execution or that the prosecutors had carefully concealed this fact. Second, the State agrees that habeas counsel was reasonably diligent, effectively removing the issue altogether. Third, the State's own misconduct itself would in any event preclude Section 5's application. Under these circumstances, nothing stands between Applicant's claims and this Court's review of the district court's resolution of them.

Even were the procedural bar to remain as an issue, Mr. Ford was proven to be reasonably diligent as a matter of fact and law. Mr. Cherry's testimony does nothing to undercut the trial court's well-considered findings, which are supported by both the circumstantial and direct evidence from expert attorneys and local judges, defense lawyers, and prosecutors familiar with their conduct. Declaring habeas counsel to be negligent for not seeking out and interrogating the Cherrys without cause would not only be contrary to the facts and law detailed in this brief, but it would subvert the judicial policy against fishing expeditions.

Fishing expeditions are routinely denounced everywhere in criminal law. Faulting Robert Ford for not engaging in one cannot be reconciled with this well-established judicial policy. Even were this Court to begin awarding fishing licenses to lawyers, surely it would not slight one who failed to cast his net in a desert. Habeas counsel was diligent in fact, his course of action affirmed as a matter of law, and his performance harmonious with this wise judicial policy.

Section 5 is a procedural fence flattened in this case by overwhelming evidence, reasoned law, and sound judicial policy. With no

arguments to the contrary and all arguments in support, this Court should apply long-standing rules of review, defer to Judge Young's findings, affirm his legal conclusions, and accept his recommendation for relief.

Under ordinary standards of review of a trial court's findings of fact, this Court should grant relief.

The trial court conducted a full examination of the claims. This case involved three days of litigation with all witnesses key to Applicant's claims. Judge Young, in accordance with his role, observed the demeanor of each witness and made credibility determinations. His factual determinations are therefore entitled to deference.

The trial court's findings of fact, conclusions of law and recommendation for relief are clearly and overwhelmingly supported by the record. The State agrees with them. The sand that supported the *per curiam* opinion has given way to these new circumstances and consideration of new law and additional argument. This Court should therefore find that Applicant has overcome the Section 5 bar, reach the merits and adopt the district court's extremely well-reasoned

recommendation for relief.[9]

Both the Due Process Clause and this Court's jurisprudence regarding false evidence claims compel relief in this case.

This Court should not view this case narrowly as if it involves only the prosecution's intentional presentation of false evidence or only a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This case actually includes more than the suppression of favorable evidence from the defense and more than a false evidence claim. Prosecutors here did not merely "allow" the falsity to "go uncorrected," as condemned in *Napue v. Illinois*, 360 U.S. 264 (1959). In this case, "[t]he prosecution deliberately misrepresented the truth," condemned in *Miller v. Pate*, 386 U.S. 1, 6 (1967). They knowingly injected falsity into the trial, in violation of *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957). Further, their insertion of falsehood was enabled by their unconstitutional suppression of facts. The

[9] Counsel notes that Judge Young did not merely adopt anyone's proposed findings, as the concurring opinion apparently assumed and erroneously asserted as fact. *Ex parte Storey*, 584 S.W.3d at 439 (Hervey, J., concurring)("Following a three-day hearing in September and October 2017, the trial court adopted Applicant's proposed findings of fact and conclusions of law."). Judge Young was diligent, thorough and independent in his role as the judge of habeas proceedings. He made his own findings of fact and conclusions of law. A side by side comparison leaves no doubt. His findings deserve the respect ordinarily conferred by this Court to district judges.

Due Process Clause, then, clearly reaches the misconduct in this case.

Like the prosecutors in *Giglio v. United States*, 405 U.S. 150 (1972) who falsely told the jury that its key witness "received no promises that he would not be indicted," the State's lawyers here similarly lied to the jury. *Id.* at 152-153 n.4. The Supreme Court's Due Process Clause jurisprudence does not parse or pigeonhole the misconduct, but instead condemns broadly any "deliberate deception of court and jury." *Mooney v. Holohan*, 294 U.S. 103, 112-113 (1935). The form of falsehood matters less to the Due Process Clause than its substance, its unwelcome appearance in court more important than the manner of its materialization.

There are only two main thoroughfares by which unethical prosecutors can introduce falsity into a trial. One method is to directly introduce, or leave uncorrected, false evidence; the other, as was done here, is to make deliberate false statements to the court or to the jury. The only reason that the falsehood in this case was inserted by way of jury argument is that the prosecutors had no false evidence to admit through witnesses – final argument was their only available route, and they took

it.

The fact that the prosecutors chose this path is the only reason that this case does not "fit" comfortably into the facts in *Brady v. Maryland*, *Napue v. Illinois*, *Miller v. Pate*, *Giglio v. United States*, *Banks v. Dretke*, or *Mooney v. Holohan*, as discussed *infra*. Both the *per curiam*'s concurring and dissenting opinions noted the imperfect tailoring of this case to the facts of those decisions. *Ex parte Storey*, 584 S.W.3d at 440 (Hervey, J., concurring)(case "does not fit at all" in false evidence jurisprudence); *Ex parte Storey*, 584 S.W.3d at 443 (Yeary, J., dissenting, joined by Walker, J.)(case "does not fit neatly" with *Brady* or false evidence jurisprudence). The question, then, is not whether the prosecutors' course of action in this case "fits" into these decisions as factually on point. Instead, the true question is whether this misconduct somehow evades the Due Process Clause's purview. The differences in these cases are immaterial to the principles and application of the Due Process Clause. As demonstrated next, falsity spouted from the mouths of unethical prosecutors resulting in vacated judgments is not an unfamiliar phenomenon to constitutional law.

The Due Process Clause applies to intentional false representations by prosecutors to jurors.

The scope of the Due Process Clause includes prosecutors' knowingly false arguments to the jury. In *Miller v. Pate*, the prosecution argued to the jury about stains found on a pair of men's underwear near the scene of a rape-murder, the theory being that the underwear belonged to the defendant and that the stains were the victim's blood stains. In fact, it was not blood – it was paint, and the prosecutor knew it was paint. *Miller v. Pate*, 386 U.S. at 4. The Supreme Court was unanimous that the prosecution's false argument violated the Due Process Clause.

In *Giglio v. United States*, a crucial government witness testified that he had no deal with the prosecution for his testimony. The prosecutor asserted to the jury that the witness "received no promises that he would not be indicted." *Giglio v. United States*, 405 U.S. at 152. The prosecution knew this to be untrue. With two justices not participating, the Supreme Court was unanimous that the prosecution's false argument violated the Due Process Clause.

Both *Miller v. Pate* and *Giglio v. United States* also involved the introduction of false evidence. But the Supreme Court did not confine its

holdings to those particular facts in exclusion of the prosecution's arguments. Instead, the Court clearly identified the false argument to the jury as well. In both *Miller v. Pate* and *Giglio v. United States*, the Supreme Court spoke broadly about the full scope of the Due Process Clause because the Clause is meant to capture this form of intentional prosecutorial misconduct in all its variations.[10]

"[D]eliberate deception of a court and jury by the presentation of known false evidence is incompatible with 'rudimentary demands of justice[,]'" and "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Giglio v. United States*, 405 U.S. at 153 (citations and internal quotations omitted). "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that

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[10] This misconduct is distinguished from mere "improper" comments to a jury. *Donnelly v. Dechristoforo*, 416 U.S. 637, 647 (1974)(emphasizing "the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in *Miller* and *Brady*," as violations of the Due Process Clause). The distinction was recognized in the opinions of members of this Court. *Ex parte Storey*, 584 S.W.3d at 441 n. 1 (Hervey, J., concurring)("I agree" with Judge Yeary that decisions applying *Donnelly v. Dechristoforo* "are easily distinguishable based on their facts."). *Ex parte Storey*, 584 S.W.3d at 446, n. 6 (Yeary, J., dissenting, joined by Walker, J.)(finding same cases "plainly distinguishable.").

established principle. There can be no retreat from that principle here." *Miller v. Pate*, 386 U.S. at 7 (referencing *Mooney v. Holohan*, 294 U.S. 103 (1935)). *See also Alcorta* v. *Texas*, 355 U.S. 28 (1957)(per curiam)("Under the general principles laid down by this Court in *Mooney v. Holohan*, 294 U.S. 103, and *Pyle v. Kansas*, 317 U.S. 213 [(1942)], petitioner was not accorded due process of law."). A conclusion by this Court that the mendacious jury argument in this case somehow falls outside the Due Process Clause would be contrary to the Clause's entire body of law.

A new exception to the Due Process Clause would introduce a constitutional anomaly deforming its jurisprudence. It would mean that the concealment of favorable evidence from the defense, or the introduction of false evidence or the State's failure to correct it at trial are all strictly prohibited, but intentional, false representations to juries are purely discretionary. Such a miscreant policy would, to put it charitably, send a mixed message to prosecutors.

To put it less charitably, a new safe zone for prosecutorial misconduct would be worse than an invitation for egregious misbehavior. This case would create a guide. False representations to the jury at final

argument would be the most risk-free tactic because it would become the one route to evade all other decisions applying the Due Process Clause to prosecutorial misconduct. The new *Storey* rule would be: "Due Process Clause stuff aside, it's okay to knowingly lie to juries."

There does not exist any such constitutional exception to the "rudimentary demands of justice" or "the general principles" of the Due Process Clause. These fundamental principles have been consistently enforced for almost 90 years, through generations of courts, without controversy, and with frequent unanimity among the judges. Its creation would be unwelcome in law.

It would regard the Due Process Clause in the narrowest way, squinting hard to find an excuse or loophole for the prosecutorial misconduct in this case. It would embrace the very approach long rejected by the Supreme Court in its bedrock decision, *Mooney v. Holohan.*

Mooney sought relief under the Due Process Clause because his conviction was obtained through the knowing use of perjured testimony and the deliberate suppression of favorable evidence. *Mooney v. Holohan*, 294 U.S. at 110. The State argued that the actions or omissions of

prosecutors cannot "*in and by themselves*" be reviewable under the Due Process Clause. *Id.* at 112-113 (italicization in original). Only when prosecutorial conduct denies a defendant constitutionally required notice or prevents him from the presentation of such evidence would the Due Process Clause apply, the State argued. *Id.*

A unanimous Supreme Court rejected this constricted characterization of the Due Process Clause and instead endorsed a broad view:

> Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Mooney v. Holohan, 294 U.S. at 111-13 (citations omitted). *A fortiori*, the

same can be said when the prosecution lies to "procure" a death sentence. Whether the judgment is won through intimidation or deceit, the Due Process Clause provides a remedy. The suppression of the Cherrys' opposition to Mr. Storey's execution and the concomitant lie to the jury in this case is exactly the "contrivance" and "deliberate deception of court and jury" the Due Process Clause reaches, grasps, and corrects.

This Court's false evidence jurisprudence applies to intentional false representations by prosecutors to jurors.

This Court has "explained that '[t]estimony that is untrue' is one of many ways jurists define false testimony [and the] Supreme Court has indicated that 'improper suggestions, insinuations and, especially, assertions of personal knowledge' constitute false testimony." *Ex parte Robbins*, 360 S.W.3d 446, 460 (Tex.Crim.App. 2011)(citations omitted). This jurisprudence thus reaches more than testimony; it includes all forms of falsehood. Under this broad view, this Court effectively refuses to elevate the form of falsity over its substance; state action that introduces a material, intentional falsehood into the courtroom is enough to earn this Court's correction.

The scope of this Court's false evidence jurisprudence has roots in *Berger v. United States*, 295 U.S. 78 (1935), as this Court has recognized. *Ex parte Robbins*, 360 S.W.3d at 460. The prosecutor in *Berger* infused the trial with falsities in various ways:

> He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.

Berger v. United States, 295 U.S. at 85. Significantly, the *Berger* prosecutor's falsities were introduced primarily from his own mouth, just as effectively as a jury argument. Yet the Supreme Court (again, unanimous) condemned what this Court's false evidence decisions and the Due Process Clause just as emphatically denounce. The inclusion of the deliberately false jury argument in this case is completely consistent with these decisions and their underlying philosophy.

A prosecutor's representation of facts to a jury is powerful, as the

Supreme Court observed:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [to be truthful], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. at 88. "The prosecutor enjoys presumptive credibility in the eyes of the jury and, unlike witnesses who take an oath and are subject to testing through cross-examination and impeachment, the prosecutor is rarely specifically so challenged." Poulin, A., *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Calif. L. Rev. 1423, 1465 (Oct. 2001).

In this case, the impact upon the jury is not merely conjectural. Juror Sven Berger could not have been more clear:

> As a juror, had I known that Jonas Cherry's parents were opposed to Paul Storey receiving the death penalty, there is no doubt in my mind, I would never have voted for death or in such a way that the death penalty would be imposed. I would have held out for a life without possibility for parole for as long as it took.

(Affidavit of Sven Berger, executed March 16, 2017). The materiality of the misconduct in this case is factually proven; the lie made the difference

between death and life.

The factual assertion in this case was indisputably false and material, and was so found by the district court. This Court's jurisprudence regarding the intentional introduction of false evidence applies to the facts of this case. Accordingly, this Court should grant relief on this ground as well.

The prosecutors concealed information that was favorable and material, and its disclosure would have altered the entire course of the case.

There is no doubt in this case that the evidence the prosecutors concealed was favorable to the defense, which is one reason why the prosecutors concealed it. The materiality of the evidence is likewise established by the unimpeached and unchallenged affidavit of Juror Sven Berger. Relief is as straightforwardly justified under *Brady* as it is under the false evidence decisions.

Had the defense known – *before trial* – those facts, it would have altered the entire course of all proceedings. At the pretrial stage, both adversaries, prosecutors and defense attorneys alike, weigh risks and probabilities against the potentiality of trial when considering if and how

the case should be settled, i.e., a negotiated plea, or a jury or bench trial. The Cherrys would have centered prominently in any discussion between the attorneys for the State and Applicant over such crucial considerations, most especially whether the prosecution would even seek the death penalty.

How important and material was this information? It was so significant that the prosecutors sealed it off from everyone to ensure the defense would never learn about it. The prosecutors guarded this information because they appreciated its high value at the pretrial stage. Their careful concealment of these facts reflects the prosecutors' own belief that its revelation to the defense would likely defeat their pursuit of the death penalty. The materiality of this information, then, is questionable only by those who have never negotiated a case.

The information was favorable to the defense. Its materiality was proven by the prosecutors' own behavior, by the testimony of lawyers who have tried death penalty cases, and by the juror who would have ensured a life sentence. The suppression of this evidence, then, offends the Due Process Clause, and this Court should thus grant relief.

The prosecutors violated the Eighth Amendment because their argument rendered the death verdict in this case unreliable.

The point of the prosecutors' lie to the jury was to make it easier for the jurors to impose the death penalty. Its brevity did not diminish its power. For Juror Berger, it was a crucial representation for the sentence.

The Supreme Court has recognized the power of a prosecutor's argument, as its Due Process Clause jurisprudence, discussed *supra*, makes clear. The Supreme Court regulates prosecutorial argument under the Eighth Amendment as well. Prosecution argument which even implies a falsity renders a death sentence unconstitutionally unreliable under the Eighth Amendment. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). U.S. Const. amend. VIII & XIV.

In *Caldwell v. Mississippi*, the prosecutor (after an apparently compelling argument for a life sentence by the defense) argued at the sentencing phase of a death penalty trial: "[Y]our decision is not the final decision." *Caldwell v. Mississippi*, 472 U.S. at 325. The prosecutor told the jury that "the decision you render is automatically reviewable by the Supreme Court." *Id.* at 325-326. While technically and factually true, the Supreme Court recognized not only the persuasiveness of the argument,

but also the falsity of its implication.

Its persuasiveness is obvious. A juror wrestling with the imposition of the death penalty would be relieved by the reassurance that learned judges might correct any mistake he might make in favoring a death sentence. *Caldwell v. Mississippi*, 472 U.S. at 331-333. But the Supreme Court also recognized why the argument was misleading:

> The [mercy] plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant. There is no appellate mercy.

Caldwell v. Mississippi, 472 U.S. at 331 (quoting the state court dissenting opinion). Because the prosecution's argument suggested otherwise, the death sentence obtained through that winning argument violated the Eighth Amendment because it was imposed "by a sentencer who has been [falsely] led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. at 328-29.[11]

The argument in this case was far worse. It was not even technically

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[11] The belief was on based on a "mistaken impression" with jurors, as Justice O'Connor concluded. *Caldwell v. Mississippi*, 472 U.S. at 343 (1985)(O'Connor, J., concurring).

true. Its falsity was not implied but expressly asserted. It demonstrably persuaded at least one juror who would have ensured a life sentence. An expressly false argument that won a death verdict ought to be condemned even more emphatically than one that is technically true.

The prosecutors' argument in this case relieved the jurors in a more pernicious way than the *Caldwell* jurors. The *Caldwell* prosecutor assured jurors by implication that judicial authorities would correct a death verdict, should it be wrong. The prosecutors in this case directly asserted that the decision was already made – with unanimity by "his family and all who loved him" and with such clarity that "it goes without saying." The prosecution's argument was a direct invitation for the jury to join with the victims and affirm their judgment.

This false argument would be irresistibly persuasive to a juror respectful to those with greater moral authority – "his family and all who loved him." For that juror, the "real" and best-informed jurors would have already spoken. In this way, the jury argument in this case warped the capital sentencing jury's role, contrary to the Eighth Amendment and *Caldwell v. Mississippi*.

Conclusion

There are no other constitutional boundaries left for the prosecutors in this case to cross. They violated the Due Process Clause by suppressing favorable evidence then, again, by lying to jurors. Further, they violated the Eighth Amendment through their false argument to the jury. Then they committed perjury during habeas proceedings, as is evident from the record and as the habeas court found. The State now agrees. This subsequent writ application would therefore appear to be a fairly straightforward matter for this Court to resolve by its merits, but for this Court's treatment in its original *per curiam* opinion of Robert Ford's performance as habeas counsel and Glenn Cherry's testimony during the habeas hearings.

Mr. Ford had no more reason than any other lawyer to believe or suspect that the prosecutors suppressed the facts or lied to jurors. The evidence in this case, both direct and circumstantial, confirms his reasonable diligence. In this light, habeas counsel cannot be considered derelict.

It is both factually and legally reasonable that habeas counsel would

conclude that "his family and all who loved him" included his own parents. The prosecution asserted it as fact to the jury, a representation that Mr. Ford, like trial counsel and everyone else, assumed to be true. All were entitled to that presumption as a matter of law, and that presumption was confirmed by all of the evidence produced at the habeas proceedings. Under these legal presumptions and evidence, counsel for Mr. Storey has overcome Section 5's procedural bar (assuming it even applies), and his claims may therefore be addressed and vindicated as meritorious.

Glenn Cherry's testimony does not defeat Judge Young's considered findings. Even out of context, his one remark cannot be fairly regarded as proof that he would have been a well-spring of full disclosure had counsel only asked. Nor is there any factual basis that he would have revealed that his wife, Judith, shared his views and that they were specific to Mr. Storey. On the contrary, his own limitations to his statement reveal that, at best, he would have disclosed only his general philosophy against capital punishment and only to friends and family.

There is nothing to subvert Judge Young's findings. The record contains much evidence to support those findings. This Court should

follow familiar law and defer to the trial court's well-considered and supported factual findings. This Court's grant of relief would be welcomed by both the State of Texas and the surviving victims in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE: By my signature below, I certify I have served a true and correct copy of the foregoing pleading upon counsel for the State, the Tarrant County District Attorney at Fsargent@tarrantcountytx.gov, amicus curiae representing the Texas Criminal Defense Lawyers Association at stacie@capds.org, and "amicus," former counsel Travis Bragg, at Travis.Bragg@oag.texas.gov, on or before August 28, 2023.

Appendix H. The TCCA' denial of the State's motion/suggestion for reconsideration of Storey's subsequent writ application, June 19, 2024 (three judges dissenting).

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

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6/19/2024

STOREY, PAUL DAVID Tr. Ct. No. C-3-011020-1042204-B WR-75,828-02

This is to advise that the State's suggestion for reconsideration has been denied without written order. Judge Yeary, Walker, and Slaughter dissented. Judge McClure did not participate.

Deana Williamson, Clerk

PAUL DAVID STOREY
C/O KEITH HAMPTON
1103 NUECES ST.
AUSTIN, TX 78701

Appendix I. *Storey v. Lumpkin*, 142 S. Ct. 2576 (2022)(Statement of Sotomayer).

SUPREME COURT OF THE UNITED STATES

PAUL DAVID STOREY *v.* BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21–6674. Decided June 30, 2022

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

The facts of this case offer a cautionary tale for those Courts of Appeals that have yet to define what constitutes a restricted "second or successive habeas corpus application," 28 U. S. C. §2244(b)(2), in the context of prosecutorial misconduct. I write to underscore how erroneous the Fifth Circuit's definition is and how it unfairly deprives individuals of an opportunity to raise serious claims of prosecutorial malfeasance in federal habeas proceedings.

After a jury convicted petitioner Paul David Storey of murdering Jonas Cherry in the course of a robbery, prosecutors argued for a death sentence. In the State's punishment-phase closing argument, a prosecutor told the jury: "[I]t should go without saying that all of Jonas's family and everyone who loved him believe the death penalty is appropriate." *Ex parte Storey*, 584 S. W. 3d 437, 447 (Tex. Crim. App. 2019) (Walker, J., dissenting). The jury sentenced Storey to death.

In December 2016, eight years after trial and months before Storey's scheduled execution, Storey's counsel learned that the prosecutor's assertion during the punishment-phase closing arguments was false. In truth, Cherry's parents vigorously and consistently opposed the State's choice

to seek the death penalty for Storey. Cherry's parents communicated their views to the State's prosecutors before trial, including the prosecutor who told the jury otherwise in closing. But the State never disclosed Cherry's parents' wishes to Storey or his counsel. Instead, the prosecutor knowingly and affirmatively misrepresented those wishes to the jury in order to secure a death sentence.

Based on this revelation, Storey sought postconviction relief in state court. He asserted that the State's misconduct during his prosecution violated the constitutional rules set forth in cases like *Brady* v. *Maryland*, 373 U. S. 83 (1963) (State's failure to turn over exculpatory evidence violates due process), and *Napue* v. *Illinois*, 360 U. S. 264 (1959) (State's elicitation of knowingly false testimony violates due process). Because Storey had previously filed an application for postconviction relief, Texas law required Storey to establish that the factual basis for his new claims was unavailable when he filed his first application. See Tex. Code Crim. Proc. Ann., Art. 11.071, §5(a)(1) (Vernon Supp. 2006). A state postconviction court found this standard satisfied, held that the prosecutor's knowingly false statement in closing argument violated the Constitution, and recommended that Storey receive a new punishment trial.

A fractured Texas Court of Criminal Appeals reversed. The majority held that Storey could not bring his misconduct claims because he had failed to show that those claims' factual basis was not previously available through the exercise of reasonable diligence. The majority reached this conclusion in part because although Storey's prior postconviction counsel (who by then was deceased) had a strong reputation for diligence, Storey had been unable to present specific evidence proving that this deceased attorney had exercised diligence in his particular case. *Ex parte Storey*, 584 S. W. 3d, at 439. Judge Yeary and Judge Walker filed dissents, both joined by Judge Slaughter.

Storey then sought relief in federal court, which the Fifth

Circuit ultimately denied on federal procedural grounds. See 8 F. 4th 382 (2021). The State argued that Storey's request for relief constituted a "second or successive habeas corpus application" under 28 U. S. C. §2244(b), which bars federal courts from considering such applications except in limited circumstances not present here. Storey maintained that his request was not "'an abuse of the writ'" under this Court's case law and therefore not successive, given that he was not aware of the State's misconduct until late 2016. *Banister* v. *Davis*, 590 U. S. ___, ___ (2020) (slip op., at 7); see *ibid.* (explaining that if a "later-in-time filing would have 'constituted an abuse of the writ'" under "'our prior habeas corpus cases,'" "it is successive; if not, likely not"). The Fifth Circuit concluded otherwise, finding itself bound by Circuit precedent holding that "'*Brady* claims raised in second-in-time habeas petitions are successive regardless of whether the petitioner knew about the alleged suppression when he filed his first habeas petition.'" 8 F. 4th, at 392 (quoting *In re Will*, 970 F. 3d 536, 540 (CA5 2020)).

As I have previously explained, the Fifth Circuit's "illogical rule" defining "second or successive" in this fashion "rewards prosecutors who successfully conceal their *Brady* and *Napue* violations until after an inmate has sought relief from his convictions on other grounds." *Bernard* v. *United States*, 592 U. S. ___, ___ (2020) (dissenting opinion) (slip op., at 4). "Under this rule, prosecutors can run out the clock and escape any responsibility for all but the most extreme violations." *Id.*, at ___ (slip op., at 5).

The Fifth Circuit's rule contravenes this Court's precedent. *Panetti* v. *Quarterman*, 551 U. S. 930 (2007), holds that a petition bringing a claim that was not ripe when the petitioner filed his first-in-time petition is not "second or successive." That reasoning "applies with full force to *Brady* claims" like Storey's, where the issue is that the State unlawfully failed to disclose evidence favorable to the

defense, and the petitioner is not aware of that evidence until after the first-in-time petition. *Bernard*, 592 U. S., at ___–___ (SOTOMAYOR, J., dissenting) (slip op., at 4–5). By ignoring *Panetti*'s logic, the Fifth Circuit's rule improperly "produce[s] troublesome results, create[s] procedural anomalies, and close[s] our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti*, 551 U. S., at 946 (internal quotation marks omitted).*

The posture of Storey's case renders it a poor fit for this Court's review. His case, however, illustrates the injustice that can flow from an overbroad view, unsupported by precedent, of what constitutes a "second or successive" habeas petition. Prosecutors not only failed to disclose Cherry's parents' unwavering desire that Storey not be sentenced to death, but also misled the jury in summation to successfully secure a death sentence. The State then ran out the clock by failing to disclose its malfeasance throughout Storey's initial postconviction proceedings. When Storey later sought postconviction relief based on the facts the State had misrepresented, the sole court to decide the merits of his misconduct claims found him entitled to receive a new punishment trial. But under the Fifth Circuit's irrational rule, it was too late: Storey should have raised these claims in his first federal habeas petition, regardless of the extent of the State's malfeasance or whether he could have known of it at that time. As a result, Storey now faces the possibility of execution without resolution of his claims. I trust that

*At least three other Courts of Appeals have adopted the same erroneous interpretation as the Fifth Circuit. See *In re Wogenstahl*, 902 F. 3d 621, 626–628 (CA6 2018) (*per curiam*); *Brown* v. *Muniz*, 889 F. 3d 661, 668–671 (CA9 2018); *Tompkins* v. *Secretary, Dept. of Corrections*, 557 F. 3d 1257, 1259–1260 (CA11 2009) (*per curiam*). But see *Scott* v. *United States*, 890 F. 3d 1239, 1254–1258 (CA11 2018) (disagreeing with *Tompkins* at length but following it as binding); *In re Jackson*, 12 F. 4th 604, 611–616 (CA6 2021) (Moore, J., concurring) (opining that *Wogenstahl* was wrongly decided).

other federal courts will pay closer heed to *Panetti* and *Banister* when they confront this important issue.