No. 24-5791

IN THE

Supreme Court of the United States

PAUL DAVID STOREY,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works to ensure justice and due process for those accused of crime or misconduct on behalf of defense attorneys. NACDL is the only nationwide professional bar association for public defenders and private defense lawyers. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has numerous committees including the Capital Defense Committee, which is dedicated to ensuring that capital defendants are afforded all of their constitutional rights throughout criminal proceedings.

NACDL files in support of Mr. Storey's petition because the decision of the Texas Court of Criminal Appeals ("TCCA") places capital criminal defense counsel in an untenable position. The decision holds that the clients of defense counsel are entitled to no relief if they cannot demonstrate maximum feasible diligence with respect to the discovery of the prosecution's presentation of false argument concerning the victim's family's wishes to the jury, even where the information demonstrating the falsity was actively concealed by prosecutors through successive post-conviction proceedings. This holding creates an

1. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties received timely notice of *Amicus*' intent to file this brief.

obligation for Texas capital defense counsel to seek out the victim's family at every stage of the years-long litigation of capital cases and ask them if they know something about the case that defense counsel does not or risk the TCCA imposing a procedural bar later, when the truth comes to light—even when the information is affirmatively and purposely concealed by the State.

INTRODUCTION AND SUMMARY OF ARGUMENT

After Petitioner Paul David Storey's execution date was set, following the exhaustion of initial state and federal habeas proceedings, his counsel discovered that the Tarrant County prosecutors in his capital trial made a significant misrepresentation to the jury during the punishment phase. Appendix A, at pp. 2, 9, 11.[2] The prosecutors told the jury that the parents of the victim, Jonas Cherry, wanted a death sentence, but this was false. *Id.* The truth was that the victim's family opposed the death penalty for Mr. Storey, a fact that the prosecutors willfully and deliberately withheld from Mr. Storey's counsel. *Id.*

Mr. Storey's counsel filed for successive state habeas relief. *Id.*, at p. 2. The State—opposing relief—was represented by the Office of the Attorney General because Mr. Storey's trial attorney was then the First Assistant District Attorney in Tarrant County. Appendix E, State's Brief, at pp. 10-11. After an extensive evidentiary hearing, a state district court held that the prosecutors

2. All references to the Appendix are to the Appendix filed by Mr. Storey with his Petition for Writ of Certiorari.

had violated Mr. Storey's federal constitutional rights, and that Mr. Storey's initial habeas counsel could not have discovered that the Cherrys opposed the death penalty, despite his reasonable diligence. *See* Appendix A. The state district court recommended the TCCA grant relief and recommended that Mr. Storey's death sentence be converted to life without parole. *Id.* at p. 15.

The TCCA denied relief, imposing the procedural bar in Texas Code of Criminal Procedure article 11.071 § 5 and holding that Mr. Storey failed to prove his initial habeas counsel—who passed away before the evidentiary hearing—was not diligent. *Ex parte Storey*, 584 S.W.3d 437 (Tex. Crim. App. 2019). Mr. Storey was subsequently denied relief in federal court, and this Court declined to grant certiorari. *See Storey v. Lumpkin*, 142 S. Ct. 2576 (2022).

After successive post-conviction proceedings concluded, the Tarrant County Criminal District Attorney's Office ("TCCDA"), which had stepped back in to represent the State, came forward and admitted that: (1) the trial prosecutors withheld pertinent information from defense counsel in violation of Mr. Storey's federal constitutional due process rights; (2) suppression continued through the successive post-conviction proceedings; (3) the trial prosecutors likely committed perjury during the successive proceedings in an effort to further the suppression; (4) the trial prosecutors lied to the jury; (5) initial habeas counsel, Robert Ford, was diligent in the face of the willful, deliberate, and long-standing suppression of the victim's parents' wishes, and; (6) Mr. Storey is entitled to punishment phase relief. *See* Appendix E. The TCCDA requested that the TCCA

reconsider its decision. *Id.* The TCCA ordered briefing on the procedural bar and the merits. *Ex parte Storey*, No. WR-75,828-02, 2023 WL 4234389, at *1 (Tex. Crim. App. June 28, 2023). Then, without notation in that day's public hand-down list, the TCCA denied reconsideration without written opinion. *See* Appendix H.

This case is replete with "blatant and repeated violations of a well-settled constitutional obligation" that deprived Mr. Storey of a fair punishment trial. *See Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., concurring). The TCCA's decisions in this case weaken prosecutorial independence, risk exposing family members of victims of violent crime to interrogation by the Texas criminal defense bar, and undermines confidence in the criminal justice system.

ARGUMENT

A. The TCCA's Holding Places Defense Counsel in an Untenable Position.

Though defense counsel's obligation to investigate the State's case is well-established, the reasonableness of those efforts depends on the information available to counsel. *See*, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 681 (1984). Counsel and courts assume prosecutors have correctly discharged their duties, and "[c]ourts, litigants, and juries properly anticipate that [']obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.[']" *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). For these reasons, this Court held in *Banks* that "[a] rule

thus 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 Strickler v. Greene*, 527 U.S. 263 (1999) (rejecting the argument that information available to the defense should have led it to find that there had been undisclosed police interviews of a witness). The law does not require defendants to “scavenge for hints of undisclosed” information when the prosecution represents, as they did in this case, that “all such material has been disclosed.” *Banks*, 540 U.S. at 695. Indeed, “[p]rosecutors’ dishonest conduct or unwarranted concealment should attract no judicial approbation.” *Id*., at 696; *see also Kyles*, 514 U.S. at 440 (“The prudence of the careful prosecutor should not therefore be discouraged.”)

In this case, the TCCA excused the duty of disclosure and instead held that, in order to meet the diligence standard of Article 11.071 § 5 (a) (1), Mr. Storey’s initial post-conviction counsel should have approached the victim’s family and—despite having no reason to suspect prosecutors were withholding information—asked the victim’s family their views on the death penalty and whether the prosecution knew those views prior to the trial. *Ex parte Storey*, 584 S.W.3d at 439. The TCCA’s decision results in the “maximum feasible diligence” requirement for defense counsel, a requirement this Court has rejected in the equitable tolling context. *Holland v. Florida*, 560 U.S. 631, 653 (2010). “The diligence required for equitable tolling purposes is [‘]reasonable diligence[’] . . . not [‘]maximum feasible diligence,[’]” *Id.* (citations omitted). The same should be true for discovery of due process violations where the State actively concealed them. Shifting the burden to require “maximum feasible diligence” by

the defense bar under this set of circumstances—where the State confesses that prosecutors intentionally withheld favorable information for years—will cause legal and ethical conflicts for criminal defense counsel. This is particularly true in Texas where access by capital defense teams to families of victims can be limited by statute. *See* Tex. Code Crim. Proc. Art. 56A.051 § (a) (14) (B). For capital cases like these, the TCCA's decision obligates capital defense counsel to make multiple inquiries to the victim's family—the first pretrial, the second in state post-conviction, and the third during federal habeas proceedings—or risk allegations of ineffectiveness and lack of diligence. "Reasonable diligence should not require an applicant, or his counsel, to query a victim's family as to whether the prosecutor was telling the truth. Requiring habeas counsel to question the statements of the prosecutor will also add needless and counterproductive grit into our system of criminal justice." *Ex parte Storey*, 584 S.W.3d at 462 (Walker, J., dissenting).

This Court's precedent is clear: "the prosecutor may not hide and require defense counsel to seek." *Banks*, 540 U.S. at 696. The TCCA's decision is contrary to precedent by requiring defense attorneys to undertake the obligation to contact a grieving family of the victim of a murder uninvited and, without reason, to suspect the victim's family had pertinent information. No defense counsel should be required to do this, especially in a case like this where the State: admits to the prosecutorial misconduct; concedes to active suppression of evidence; concedes the trial prosecutor lied to the jury, and; asserts that initial post-conviction counsel could not possibly have known about the information because of the prosecutors' active concealment.

B. Adherence to This Court's Precedent and Deference to the Prosecution's Confession of Error Is Warranted.

"So basic to our jurisprudence is the right to a fair trial that it has been called [']the most fundamental of all freedoms[']." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., concurring in judgment) (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965)). Though this Court is not a court of error correction, the confluence of the exceptional circumstances in this case warrant this Court's intervention. Confessions of error are rare, and prosecutors do not make such confessions glibly. Rather, it takes indisputable evidence of misconduct or mistake after painstaking review of the entire record to confess such error. Thus, "[t]he considered judgment" of the prosecution "that reversible error has been committed" is "entitled to great weight." *Young v. U.S.*, 315 U.S 257, 258 (1942). Confessions of error that call for vacating capital proceedings are "extraordinary," "remarkable," and "to [a State's] credit." *Buck* v. *Davis*, 580 U.S. 100, 124-25 (2017) (citation omitted). In situations in which the State takes such extraordinary steps, this Court should take notice and appropriate remedial action. *See*, *e.g.*, *Escobar v. Texas*, 143 S. Ct. 557 (2023) (granting, vacating, and remanding the TCCA's denial of relief in light of the State's confession of error).

This Court has long held that significant deprivations of defendants' federal constitutional due process rights by the State cannot stand:

> As long ago as *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that

> deliberate deception of a court and jurors by presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue v. Illinois*, 360 U.S. 264 (1959), we said "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269. Thereafter, *Brady v. Maryland*, [373 U.S. 83, 87 (1963)], held that suppression of material evidence justifies a new trial "irrespective of the good or bad faith of the prosecution."

Giglio v. United States, 405 U.S. 150, 153 (1972). Here, the TCCA disregarded the evidence adduced at the evidentiary hearing and the factual findings and recommendation of the district court, which was in the best position to judge the credibility of the witnesses, including the two trial prosecutors who testified.

The record reflects that the withheld information is material and that the outcome of the punishment phase of Mr. Storey's trial would have been different. If trial counsel had known about the Cherrys' wishes, he would have objected to prosecutor's representations about those wishes when she made them to the jury. Indeed, in 2017, Juror Sven Berger submitted an affidavit stating:

> 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 life without the possibility of parole for as long as it took.

See Appendix G, at p. 52.

With respect to the application of the procedural bar in this case, when gross prosecutorial misconduct is the cause for late discovery of the violation of a federal constitutional right, this Court has previously held that reasonably diligent defense attorneys in capital cases should not be responsible. *See*, *e.g.*, *Murray v. Carrier*, 477 U.S. 478 (1985), *superseded by statute on other grounds AEDPA*, Pub.L. 104–132, 110 Stat. 1214; *Strickler*, 527 U.S. 263; *Banks*, 540 U.S. 668; *see also Williams v. Taylor*, 529 U.S. 362 (2000) (interpreting the "diligence" requirement of 28 U.S.C. § 2254). "The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsels' efforts to comply with the State's procedural rule." *Murray*, 477 U.S. at 488; *see also Maples v. Thomas*, 565 U.S. 266, 293 (2012) (Scalia, J., with Thomas, J., dissenting). "When . . . 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*, 540 U.S. at 675-76. Here, prosecutors did just that, and deference to that confession of error is warranted. This is particularly true where the miscarriage of justice was undertaken by the very office confessing to it.

In these circumstances, this Court's action is necessary and appropriate to prevent irreparable harm—the execution of someone sentenced to death against the wishes of the victim's family because of egregious

prosecutorial misconduct. "When the Government has suggested that an error has been made by the court below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court." *Alvarado v. United States*, 497 U.S. 543, 544 (1990) (per curiam); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* (11th ed. 2019) ("[S]ummary disposition is appropriate to correct clearly erroneous decisions of lower courts," especially "error[s] of great magnitude.") Indeed, this Court does not hesitate to summarily reverse in a capital case where the State confesses error. *Wearry v. Cain*, 577 U.S. 385, 395–96 (2016) (per curiam) ("[s] summarily deciding a capital case, when circumstances so warrant, is hardly unprecedented.") Even in state courts, this Court does not hesitate to correct patent violations of federal constitutional rights: "This Court, of course, has jurisdiction over the final judgments of state postconviction courts . . . and exercises that jurisdiction in appropriate circumstances." *Id.*, *see also*, *e.g.*, *Escobar*, 143 S. Ct. 557 (granting, vacating, and remanding the TCCA's denial of relief in light of the State's confession of error); Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 180-83 (2021) (citing numerous direct collateral review cases from recent terms).

CONCLUSION

NACDL respectfully requests this Court grant the petition for writ of certiorari, reverse and remand with instructions to order a new punishment trial. Alternatively, the petition filed by Mr. Storey's counsel should be held for resolution of *Glossip v. Oklahoma*, No. 22-7466 (U.S.) (petition for writ of certiorari granted Jan. 22, 2024).

Respectfully submitted,

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