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 TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF JUDITH AND GLENN CHERRY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are Judith and Glenn Cherry—the mother and father of Jonas Cherry. In 2006, Jonas was tragically taken from the Cherrys by Paul Storey. *Storey v. Lumpkin*, 142 S. Ct. 2576 (2022) (Sotomayor, J., respecting the denial of certiorari). Despite the tremendous loss Storey caused them, the Cherrys have always opposed the State of Texas executing him. Killing Storey will not bring Jonas back. Nor will it bring the Cherrys any closure. Moreover, the Cherrys do not want to see Storey's mother suffer through losing a child like they have.

The Cherrys have gone to great lengths to convince the State not to execute Storey. But at every step of the way the State and its officials have ignored their efforts.

Prior to Storey's trial, the Cherrys informed the State and its prosecutors that they wanted mercy for Storey and asked that the State not seek the death penalty. But their request fell on deaf ears as the State ultimately did seek the death penalty. What is more, one of the prosecutors then lied the jury at Storey's trial

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[1] Pursuant to S. Ct. Rule 37, all parties received notice of *Amici*'s intent to file this brief at least 10 days prior to the due date of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

by telling the jury that the Cherrys actually supported the State's attempt to obtain a death sentence.

Later, when Storey filed an application for postconviction relief based on the prosecutor's falsehood, the Cherrys provided testimony at an evidentiary hearing. The Cherrys provided this testimony *in support* of Storey's application. However, the Texas Court of Criminal Appeals ("TCCA") took one sentence of their testimony out of context and used it to deny Storey relief. *Ex parte Storey*, 584 S.W.3d 437, 439 (Tex. Crim. App. 2019).

All told, the Cherrys haven taken tremendous steps to ensure that the State does not execute Storey. But the State and its officials have refused to listen to them. The Cherrys now come before this Court asking that their voices finally be heard. This Court has shown a willingness to listen to victims' families. *See, e.g.*, Tr. Oral Arg., *Glossip v. Oklahoma*, No. 22-7466 (referencing amicus brief submitted by Van Treese family several times). The Cherrys respectfully ask that the Court do the same for them.

Based on the foregoing, the Cherrys have an interest in this case. Specifically, the Cherrys have an interest in this Court granting certiorari so that the State does not carry out the death sentence that the State procured by falsely telling the jury that the Cherrys wanted it.

SUMMARY OF ARGUMENT

This case involves what one member of this Court has described as "serious claims of prosecutorial malfeasance." *Storey*, 142 S. Ct. at 2577 (Sotomayor, J., respecting the denial of certiorari).

Paul Storey was convicted of murdering Jonas Cherry. Before Storey's trial, Jonas's parents told the State and its prosecutors—including two prosecutors named Christy Jack and Robert Foran—that they opposed the State seeking the death penalty. The State withheld this information from Storey and his counsel. Ms. Jack then lied to the jury during Storey's trial by telling them that "all of Jonas's family and everyone who loved him believe the death penalty is appropriate."

Eight years after his trial, Storey's counsel discovered for the first time that Ms. Jack's statement was a lie and that the State had withheld evidence that the Cherrys opposed Storey receiving the death penalty. Based on this discovery, Storey filed an application for postconviction relief in state court.

This was Storey's second application. Consequently, a court could only consider the merits of his claims if Storey showed that the factual basis for his claims "was not ascertainable through the exercise of reasonable diligence on or before" the date he filed his first application. Tex. Code Crim. Proc. Art. 11.071, § 5. The district court found that Storey had made this showing, held that the prosecution had violated Storey's rights under the Eighth and Fourteenth Amendments, and recommended that

Storey receive a new punishment trial. But a fractured TCCA reversed based on its finding that the factual basis for Storey's claims was ascertainable through the exercise of reasonable diligence.

The State then took the remarkable and laudable step of moving the TCCA to reconsider its decision. In its motion, the State waived the application of Article 11.071, § 5, confessed that the prosecution had violated Storey's constitutional rights, and asked that Storey be given a new punishment trial. In the State's own words:

> 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. … Under these most extraordinary circumstances, Storey should, at the very least, be granted a new punishment trial. Justice demands it.

Appendix E at 9-10.

The TCCA gave the State's waiver and confession of error precisely zero weight. A bare majority of the TCCA denied the State's motion for reconsideration. The court did not even issue a written opinion. Instead, the court sent Storey a postcard, which stated: "This is to advise that the State's suggestion for reconsideration has been denied without written order." Appendix H.

This Court should grant certiorari to correct the TCCA's failure to even consider the State's confession of error. Such "[c]onfessions of error are … entitled to and given great weight." *Sibron v. New York*, 392 U.S. 40, 58 (1968). And when a lower court fails to give the "great weight" to which such a confession is entitled, this Court has not hesitated to grant certiorari to correct the failure. *See, e.g.*, *Escobar v. Texas*, 143 S. Ct. 557 (2023).

In addition, this Court should grant certiorari to provide lower courts with guidance on precisely how much weight the Constitution requires them to give a State's confession of error. The present case is at least the fourth time in three years that a death row inmate has petitioned this Court for certiorari after a State's highest court refused to give any weight to a State's confession of error. *Storey v. Texas*, No. 24-5791; *Escobar v. Texas*, No. 23-934; *Glossip v. Oklahoma*, No. 22-7466; *Escobar v. Texas*, No. 21-1601.[2] The Court will likely continue to see these petitions until it issues the guidance that lower courts desperately need.

[2] *See also Prosecuting Att'y ex rel. Williams v. Missouri*, No. 24-5612 (petitioning this Court for certiorari after Missouri Supreme Court gave no weight to prosecutor's confession of error).

ARGUMENT

I. THE STATE CONFESSED THAT THE PROSECUTION VIOLATED STOREY'S CONSTITUTIONAL RIGHTS.

The State has described the actions by the prosecution during Storey's trial as "the very antithesis of due process." Appendix E at 1. This description is quite accurate. Not only did the prosecution falsely tell the jury that all of Jonas's family members and loved ones wanted Storey to be sentenced to death in violation of *Booth v. Maryland*, 482 U.S. 496 (1987), but the prosecution also failed to disclose evidence that Jonas's parents actually opposed Storey being sentenced to death in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Each of these violations independently entitles Storey to a new trial.

A. The prosecution violated *Booth* by telling the jury that all of the victim's family members wanted Storey to be sentenced to death.

In *Booth*, this Court held that informing the jury of the victim's family members' opinions about the appropriate sentence for a capital defendant violates the Eighth Amendment. 482 U.S. at 509; *see also Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).

These opinions "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth*, 482 U.S. at 508. Such opinions are "inconsistent with the reasoned

decision-making [the Eighth Amendment] require[s]," *id*. at 508-09, and their "admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner," *id*. at 502-03.[3]

Under *Booth*, the victim's family members may not directly inform the jury of their opinions through testimony. Nor may a prosecutor indirectly inform the jury of these opinions through argument. *South Carolina v. Gathers*, 490 U.S. 805, 811 (1989); *Payne*, 501 U.S. at 826 ("In *Gathers*, … we extended the holding of *Booth* barring victim impact evidence to the prosecutor's argument to the jury.").

Finally, although *Booth* was decided nearly 40 years ago, this Court recently reminded lower courts that they remain "bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about … the appropriate sentence unless this Court reconsiders that ban." *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam).

In the present case, a prosecutor violated *Booth* by expressly telling the jury that "all of the Jonas's family and everyone who loved him believe the death penalty is appropriate." The effect of this statement was to "assure[ ] the jury that *all* of [Jonas's] family

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[3] Such opinions also invite the jury to defer to the views of the victim's family, thereby "minimiz[ing] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985); *see also* Wayne Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. Rev. 517, 544 (2000).

supported the State's attempt to obtain the death penalty." *Ex parte Storey*, 584 S.W.3d at 445 (Yeary, J., dissenting). The statement served no other purpose than to inflame the jury, and it created "a constitutionally unacceptable risk that the jury … impose[d] the death penalty in an arbitrary and capricious manner." *Booth*, 482 U.S. at 502-03. Accordingly, the state habeas district court found that the statement violated Storey's rights under the Eighth Amendment. Appendix A at 15.[4]

Whether the statement actually influenced the jury's decision to sentence Storey to death does not matter. As explained by Justice Marshall, "the reasoning of the *Booth* opinion made clear that the result in that case did not require a showing that the victim impact evidence actually influenced the sentencer." *Post v. Ohio*, 484 U.S. 1079, 1081 (1988) (Marshall, J., dissenting from the denial of certiorari). Rather, the *Booth* Court "expressly stated that the victim impact evidence was inadmissible because it created 'a constitutionally unacceptable *risk*' that the sentencer would impose the death penalty in an arbitrary manner." *Id.* Thus, the "constitutionally unacceptable risk" that the prosecutor's statement may have influenced the jury is sufficient to entitle

[4] Because the statement was also false and related to facts not in evidence, the state habeas district court found that the statement also violated Storey's rights under the Fourteenth Amendment's Due Process Clause. Appendix A at 12-13; *see also Napue v. Illinois*, 360 U.S. 264 (1959); *Berger v. United States*, 295 U.S. 78, 84 (1935).

Storey to a new trial regardless of whether the statement actually influenced the jury.

That said, the statement undoubtedly influenced the jury. "Jurors in a death penalty case cannot so easily shrug off what the victim's family or friends want." *Compton v. State*, 666 S.W.3d 685, 734 (Tex. Crim. App. 2023) (Walker, J., concurring). "Information that the victim's family and friends … want the death penalty" is "emotionally charged and inflammatory" and "appeals to an innate, primal sense of justice." *Id.* Thus, it "would be unrealistic and unwise" to think that the jury was not moved by the prosecutor telling them that all of Jonas's family members and loved ones wanted the jury to sentence Storey to death. *Post*, 484 U.S. at 1082 (Marshall, J., dissenting from the denial of certiorari).

B. The prosecution violated *Brady* by withholding evidence that the victim's parents opposed Storey being sentenced to death.

The prosecution withholding evidence that Jonas's parents opposed the State seeking the death penalty also entitles Storey to a new trial.

In *Brady*, this Court held that "when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant's right to due process." *Cone v. Bell*, 556 U.S. 449, 451 (2009). Withheld evidence that could have been introduced during the punishment phase of a capital trial is material if there is a "reasonable probability that the withheld evidence would have

altered at least one juror's assessment of the appropriate penalty." *Id*. at 452.

In the case at hand, there is a reasonable probability that had the prosecution not withheld evidence that the Cherrys opposed Storey being sentenced to death at least one juror would have voted against the death penalty. Accordingly, the state habeas district court found that the prosecution violated *Brady*. Appendix A at 13. And "[t]he State concede[d] the evidence that the Cherrys vehemently opposed the death penalty was not disclosed in violation of *Brady*." Appendix E at 7.

Had the prosecution disclosed this evidence, the defense could have used it to refute the false statement made by the prosecutor at trial. Under Texas law, an attorney arguing facts outside the record "opens the door" for opposing counsel to introduce evidence that rebuts those facts. *See Coutta v. State*, 385 S.W.3d 641, 663 (Tex. App. 2012). Thus, Storey's counsel could have called the Cherry to the stand and had them testify that they actually opposed Storey being sentenced to death.

The Cherrys simply testifying that they wanted the jury to spare Storey's life certainly would have convinced at least one juror to vote against the death penalty. *See* Joseph Hoffmann, *Revenge or Mercy - Some Thoughts about Survivor Opinion Evidence in Death Penalty Cases*, 88 Cornell L. Rev. 530, 539 (2003) (arguing that a victim's "survivors' desire to extend mercy, forgiveness, or both seems very likely to influence the jury's sentencing decision

in favor of life instead of the death penalty"). Indeed, one juror from Storey's trial even submitted an affidavit in the proceedings below in which he stated, "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." Appendix G at 52.

The Cherrys' testimony also would have undermined the jury's trust in the prosecution. This Court has recognized that "the average jury … has confidence" that a prosecutor will "refrain from improper methods calculated to produce a wrongful conviction." *Berger*, 295 U.S. at 88. Consequently, anything a prosecutor says is "apt to carry much weight" with the jury. *Id*.

The Cherrys' testimony showing the jury that the prosecutor had just lied to them would have shattered any confidence that the jury had in this particular prosecutor. The jury would have understood that this particular prosecutor was willing to lie in order to obtain a death sentence. This would have given the jury greater reason to question prosecutor's truthfulness as to everything else she said throughout the trial. The "jury's estimate of the truthfulness and reliability" of the prosecutor "may well [have] be[en] determinative" in Storey's case. *See Napue,* 360 U.S. at 269.

At bottom, if the jury that sentenced Storey to death had been told that the prosecution had lied to them and the Cherrys wanted them to spare Storey's life, there is a reasonable probability that at least one

of the jurors would have voted against the death penalty. "Even if the jury—armed with all of this new evidence—could have voted" for a death sentence, this Court cannot have "confidence that it would have done so." *Wearry v. Cain*, 577 U.S. 385, 394 (2016).

II. THE TCCA REFUSED TO GIVE THE STATE'S CONFESSION ANY WEIGHT.

This Court has "several times underscored the special role played by the American prosecutor in the search for truth in criminal trials." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88. As such, it is as much a prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*.

When a prosecutor fails to live up to this obligation and uses an improper method to produce a wrongful conviction, the public trust requires him to confess his error. Put differently, "[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young v. United States*, 315 U.S. 257, 258 (1942).

Of course, prosecutors do not confess error lightly. Prosecutors—like all people—have a natural incentive to defend the validity of their own work.

Thus, once they obtain a conviction, prosecutors are unlikely to confess that the conviction is tainted by error. And they are particularly unlikely to confess to errors that accuse the prosecution itself of misconduct, such as the claims at issue in this case. Jon Gould & Richard Leo, *The Path to Exoneration*, 79 Alb. L. Rev. 325, 360-61 (2016).

Given these natural incentives to defend their convictions, when prosecutors actually do confess error, such confessions are entitled to respect from the courts. *Young*, 315 U.S. at 258; *Sibron*, 392 U.S. at 58. When a lower court fails to give a prosecutor's confession of error the "great weight" to which the confession is entitled, this Court has not hesitated to grant certiorari to correct the failure. This is especially true in recent years. *See, e.g.*, *Escobar*, 143 S. Ct. at 557.

In this case, the State confessed error. "The State concede[d] that Ms. Jack's closing argument included what she knew to be a false statement regarding the victim's family"[5] and further "concede[d] that the evidence that the Cherrys vehemently opposed the death penalty was not disclosed in violation of *Brady*." Appendix E at 7. "Under these most extraordinary circumstances," the State believed that "Storey should, at the very least, be granted a new punishment trial." *Id*. at 10.

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[5] It is worth noting that even Ms. Jack conceded her statement was improper. As explained by the district court, "Jack conceded during the habeas proceeding that her argument was outside the record and improper …" Appendix A at 6.

Although all confessions of error from a State are entitled to great weight, this particular confession was entitled to even greater weight. The confession related to prosecutorial misconduct, which is a type of error that the State is uniquely positioned to identify given its unique access to the prosecution's casefiles and the prosecutors themselves. In addition, the confession took place in the context of a death penalty case. "[T]he severity of [a death] sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

Rather than give the State's confession of error the great weight to which it was entitled, the TCCA gave the confession precisely zero weight. A bare majority of the TCCA denied the State's motion for reconsideration without explanation. Instead of issuing an opinion explaining why it was departing from its practice of "ordinarily accept[ing] a confession of error by the State," *Piland v. State*, 453 S.W.3d 473, 476 (Tex. App. 2014), the TCCA sent Storey a postcard, which stated: "This is to advise that the State's suggestion for reconsideration has been denied without written order." Appendix H.[6]

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[6] To demonstrate just how little weight the TCCA gave to the State's confession of error, consider a case in which this Court recently granted certiorari. In *Glossip v. State*, the State of Oklahoma confessed error. 529 P.3d 218, 226 (Okla. Crim. App. 2023). Although the Oklahoma Court of Criminal Appeals gave the confession no weight, the court at least issued a published opinion in which it acknowledged the State of Oklahoma was confessing error and then provided a short explanation for why it was not accepting the confession. *Id*. In

The TCCA refusing to even consider the State's confession of error is problematic for several reasons. First, it puts the State in an impossible position. The State believes that Storey's death sentence was unconstitutionally procured. Because of the TCCA's decision, the State will now have to carry out what it believes to be an unconstitutional execution unless this Court intervenes.

Second, the TCCA's refusal to consider the State's confession brings into question the court's neutrality. In this Country's adversarial justice system, courts are supposed to be passive instruments of government. *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020). The TCCA disregarding the State's confession of error is an extreme departure from this principle. Both parties to this case agree that Storey is entitled to a new trial. Nevertheless, the TCCA concluded that the State must execute Storey. By doing so, the interest of the public, as represented by the State, in not executing Storey was subverted by the TCCA's desire to see Storey be executed.

Finally, the TCCA's refusal to give the State's confession any weight is the latest example of a troubling trend. The present case is at least the fourth time in the last three years that a prisoner on death row has petitioned this Court for certiorari after a State's highest court refused to give any weight to the State's confession of error. *See Storey*, No. 24-5791;

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the case at hand, the TCCA did not even acknowledge that the State was taking the remarkable step of confessing error.

Escobar, No. 23-934; *Glossip*, No. 22-7466; *Escobar*, No. 21-1601; *see also Prosecuting Att'y ex rel. Williams*, No. 24-5612.

In each of these cases, the State confessed that the prisoner's trial was constitutionally defective and therefore the prisoner was entitled to a new one. However, the State's highest court refused to give any weight to the confession. Fortunately, this Court granted certiorari in two of the cases and petitions for certiorari remain pending in the other two. Thus, no State has had to carry out what they believed to be an unconstitutional execution. That said, this is a recurring problem that is unlikely to go away on its own. Lower courts like the TCCA need guidance from this Court on precisely how much weight the Constitution requires them to give a State's confession of error.

III. THERE IS NO INDEPENDENT AND ADEQUATE STATE LAW GROUND PREVENTING THIS COURT FROM GRANTING RELIEF.

The TCCA never reached the merits of Storey's claims. Instead, the court found that his claims were barred by Tex. Code Crim. Proc. Art. 11.071, § 5. Pursuant to that statute, before a court can consider the merits of claims that are raised in a second habeas application, the applicant must show that the factual basis for his claims "was not ascertainable through the exercise of reasonable diligence on or before" the date that he filed his first application. *Id*. The TCCA found that the factual basis for Storey's claims was ascertainable through the exercise of reasonable

diligence and so did not consider the merits of his claims.

"This Court will not take up a question of federal law in a case if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Cruz v. Arizona*, 598 U.S. 17, 25 (2023).

As Storey explains in his petition, the TCCA's application of Article 11.071, § 5 is not an independent and adequate state law ground because the State affirmatively waived the application of that statute. Pet. 26-29.[7] But even if the State had not, the TCCA's application of the statute still would not be an independent and adequate state law ground.

"It is settled that a state court may not … defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any *fair or substantial support*." *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960) (emphasis added); *Ward v. Love County*, 253 U.S. 17, 22 (1920).

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[7] In the State's own words, "the State concedes that it should not benefit from the application of the Section 5 bar. There is simply no way Storey's initial habeas counsel … 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." Appendix E at 6. "Whatever diligence requires of defense counsel …, it cannot possibly require them to search for, much less find, something hidden from them which they do not even know to search for." *Id*. at 8.

Here, the TCCA held that Article 11.071, § 5 barred Storey's claims based on its finding that the factual basis for Storey's claims was ascertainable through the exercise of reasonable diligence. *Ex parte Storey*, 584 S.W.3d at 439. But this finding has no fair or substantial support in the record. Thus, the TCCA's application of Article 11.071 § 5 is not an adequate state law ground.

The only way that Storey's initial habeas counsel (Robert Ford) could have discovered the factual basis for Storey's claims in the current case was by contacting the Cherrys and asking them about their views on the death penalty. Thus, the relevant question is whether "reasonable diligence" required Ford to do that.

When Ford was preparing Storey's first application, he was confronted with three pieces of information. First, a prosecutor had already said the Cherrys supported the State's attempt to obtain a death sentence. Second, the prosecution had an obligation under both *Brady* and a discovery order issued by the trial court[8] to disclose any evidence that the prosecution had that the Cherrys opposed Storey being sentenced to death. Third, "[f]amilies of murder victims generally do not wish to speak to lawyers representing the person found guilty of killing their

[8] As found by the state habeas district court, "the trial court ordered the prosecutors to produce any and all such evidence of material importance to the Defense …" Appendix A at 8. "It is uncontroverted that the disclosures required by the Order … would also include the Cherrys' opposition to [Storey] receiving the death penalty." *Id*.

loved one." *Ex parte Storey*, 584 S.W.3d at 458 (Walker, J., dissenting).

Consequently, for Ford to have contacted the Cherrys, he would have needed to (1) presume that the prosecutor lied, (2) presume that the prosecution violated its obligations under *Brady* and the trial court's discovery order, and (3) ignore the fact that families of murder victims generally do not wish to speak to lawyers representing the person who killed their loved one.

As explained by Judge Walker in his dissent, *reasonable* diligence did not require Ford to do any of this. First, reasonable diligence did not require Ford to presume that the prosecutor lied. Indeed, "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." *Id.* at 458. "[R]easonable diligence should not require an applicant, or his counsel, to query a victim's family as to whether the prosecutor was telling the truth." *Id.* at 462. "[H]abeas counsel should assume that prosecutors do not generally lie to juries in closing argument." *Id.* at 459; *see also Banks*, 540 U.S. at 694 (explaining that it was "appropriate for [defendant] to assume that his prosecutors would not stoop to improper litigation conduct").

Second, reasonable diligence did not require Ford to presume that the prosecution had violated their obligations under *Brady* and the trial court's discovery order. Rather, it was reasonable for Ford to "presum[e] that the prosecutor would fully perform

his duty to disclose all exculpatory materials." *Strickler v. Greene*, 527 U.S. 263, 284 (1999); *Banks*, 540 U.S. at 696 ("[W]e presume that public officials have properly discharged their official duties.").

Finally, reasonable diligence did not require Ford to ignore the fact that families of murder victims like the Cherrys generally do not wish to speak to lawyers representing the person who murdered their loved one. Ford should not be faulted "for failing to intrude upon the Cherrys' peace and for failing to question them about their feelings regarding [Storey's] case." *Ex parte Storey*, 584 S.W.3d at 462 (Walker, J., dissenting). "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." *Id*. "Reasonable diligence would not go prying into the private feelings of a murder victim's family without a very good reason for doing so." *Id*. at 456–57. "Requiring an applicant or his counsel to go on fishing expeditions and blindly querying capital murder victims' families … is not reasonable." *Id*. at 459.

In sum, the TCCA's finding that the factual basis for Storey's claims was ascertainable through the exercise of reasonable diligence on or before the date Storey filed his original application does not have fair or substantial support. The TCCA's application of Article 11.071, § 5 is therefore not an adequate state law ground preventing this Court from granting relief. *Wolfe*, 364 U.S. at 185; *Ward*, 253 U.S. at 22.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 20, 2024 Respectfully Submitted,

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