

ORIGINAL

CAPITAL CASE

No. 24A242

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

PAUL DAVID STOREY,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITIONER'S REPLY
TO THE STATE'S RESPONSE IN OPPOSITION

Keith S. Hampton*
State Bar No. 08873230
Attorney at Law
600 West 9th Street
Austin, Texas 78701
512-476-8484 (office)
(512) 762-6170 (cell)
keithshampton@gmail.com

Michael Logan Ware*
State Bar No. 20864200
Attorney at Law
300 Burnett Street
Suite 160
Fort Worth, Texas 76102
817-338-4100 (office)
817-698-0000 (fax)
ware@mikewarelaw.com

*Member, United States Supreme Court Bar

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REPLY

Petitioner replies to the *State's Response in Opposition*, pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States. This *Reply* is limited to the new arguments urged by the State, will not repeat the arguments made in Mr. Storey's petition for writ of certiorari, and would show this Court the following:

I. The State has not withdrawn its confession of error.

Before addressing what the State actually says in its brief, it is worth noting what the State does not say. Nowhere in its brief does the State say that it is withdrawing its confession of error.¹ Therefore, the State presumably still believes that Mr. Storey's constitutional rights were violated and still stands by the following statements it made in the proceedings below:

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

¹ In its brief, the State refers to its own confession of error as the confession of a previous District Attorney. *See* State's Br. 6. This statement is misleading for two reasons. First, the statement suggests that a confession of error from a District Attorney is not the same as a confession of error from the State when in reality it is given that a District Attorney is the State's representative in this proceeding. *See* Tex. Code Crim. Proc. Ann. art. 2.01. Second, the statement suggests that only the previous District Attorney confessed error when in actuality both the previous District Attorney and the District Attorney that is currently opposing Mr. Storey's petition confessed error.

closing argument at trial, something she admitted to during the state habeas hearing. 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.

Appendix E, p. 24 of State's Brief.²

II. Mr. Storey does not need to prove his state postconviction proceedings denied him due process for this Court to grant his petition.

The State first argues that this Court cannot grant Mr. Storey's petition because although Mr. Storey alleges that he was denied due process during his trial, he does not allege that he was denied due process during his state postconviction proceedings. *See* State's Brief, pp. 12-15. The State's argument has no support in this Court's precedent. This Court routinely grants certiorari in state postconviction cases without the petitioners alleging that the state postconviction proceedings denied them due process. *See, e.g., Escobar v. Texas*, 143 S.Ct. 557 (2023). Thus, although Mr. Storey's due process rights likely were violated in his state

² The quote above was taken from the brief filed by the *current* District Attorney, Phil Sorrells, filed in the Texas Court of Criminal Appeals in August, 2023.

postconviction proceedings when the TCCA refused to give any weight to the State's confession of error,³ Mr. Storey need not make this showing. The violation of his due process rights at his trial is sufficient to invoke this Court's jurisdiction to grant his petition for writ of certiorari.⁴

III. There is no adequate state law ground precluding review.

The State's second argument is that the TCCA's previous decision that Mr. Storey's application was barred by Tex. Code Crim. Proc. Ann. art. 11.071 and/or the TCCA's refusal to reconsider its previous decision pursuant to Tex. R. App. P. 79.2(d) are adequate state law grounds precluding this Court's review. *See* State's Br. pp. 15-17. The State's arguments fail.

The TCCA's previous decision that Mr. Storey's application was barred by Tex. Code Crim. Proc. Ann. art. 11.071 cannot be an adequate

³ This Court recently granted certiorari to answer the very question of whether a court failing to reverse a conviction in light of a State's confession of error violates due process. *See* Pet., *Glossip v. Oklahoma*, No. 22-7466 ("This petition presents the following questions: ... Whether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it.").

⁴ The State's contention is also a straw man argument. Black's Law Dictionary (11th ed. 2019)(straw man is a fallacious "counterargument that an advocate makes for the sole purpose of disproving it," usually in a "tenuous and exaggerated" way).

state law ground because the State waived the application of that statute, as Mr. Storey explained in his petition. *See* Pet. pp. 26-29. Even without the State’s waiver, the TCCA’s application of the statute still would not be sufficient because it has no fair or substantial support, as explained by the Cherrys in their amicus brief. Cherrys’ Brief, pp. 16-20.

The TCCA’s refusal to reconsider its previous decision pursuant to Tex. R. App. P. 79.2 also cannot be an adequate state law ground. This Court has made clear that “[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.” *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). Thus, “a state procedural ground is not ‘adequate’ unless the procedural rule is strictly or regularly followed.” *Id.* at 262-63; *see also Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Williams v. State of Georgia*, 349 U.S. 375, 383 (1955).

Other than Mr. Storey’s case, there is only one other case in Texas where the TCCA denied an application for postconviction relief as being procedurally barred only for the State to then confess error, waive the procedural bar, and ask the TCCA to reconsider its decision: *Ex parte*

Dyson, 631 S.W.3d 117 (Tex.Crim.App. 2021). In that case, James Dyson filed a second application for postconviction relief in state court alleging that the State had used false testimony to obtain his conviction. Like Mr. Storey's second application, the TCCA denied Dyson's application as being a subsequent writ and therefore procedurally barred. The State then confessed error, waived the procedural bar, and asked the TCCA to reconsider its decision, just as it did in Mr. Storey's case. The TCCA agreed to do so and granted Dyson relief. *Ex parte Dyson*, No. WR-51,197-03, 2021 WL 359461, at *1 (Tex.Crim.App. Feb. 3, 2021); *Ex parte Dyson*, No. WR-51,197-03, 2021 WL 4451203, at *1 (Tex.Crim.App. Sept. 29, 2021).

In a concurring opinion, three judges explained their reasoning for agreeing to reconsider their previous dismissal of Dyson's application in light of the State's confession of error:

Initially we dismissed [Dyson's] application as a subsequent writ; however, in an unusual move, pursuant to TRAP 79.2(d), the State, not the Applicant, asked this Court to reconsider the case on its own initiative. We did. ... When the State concedes they used material testimony that is false to obtain a conviction and a habeas court agrees, applicants should be afforded relief from the highest court in the State. To hold otherwise would call into question the principles of fairness

and impartiality on which our legal system is based.

Ex parte Dyson, 631 S.W.3d 117, 117-18 (Tex.Crim.App. 2021)(Richardson, J., concurring, joined by Newell and Hervey, JJ.).

Ex parte Dyson makes clear that the TCCA does not strictly and regularly refuse to reconsider its previous decision that a habeas applicant's application is procedurally barred when the State confesses error, waives the procedural bar, and requests that the TCCA reconsider its decision. Indeed, prior to Mr. Storey's case, the TCCA had *always* agreed to reconsider its decision under such circumstances. Accordingly, its refusal to reconsider its decision in Mr. Storey's case cannot be an adequate state law ground precluding this Court's review.

Conclusion

The State confessed to the TCCA that it violated this Court's decisions in *Alcorta v. Texas*, 355 U.S. 28 (1957), *Brady v. Maryland*, 373 U.S. 83 (1963), *Miller v. Pate*, 386 U.S. 1 (1967), *Giglio v. United States*, 405 U.S. 150 (1972), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). It maintains its confession even today. Its *Response* offers no reason why this Court's jurisdiction is defeated. Yet it urges this Court to refrain from exercising its discretion to grant Mr. Storey's petition for writ of certiorari. Its prayer to this Court is effectively: "please do nothing about our confessed violations of the Due Process Clause." This Court should decline the State's inexplicable invitation.

Petitioner respectfully requests that the Court grant the petition for a writ of certiorari, reverse and remand with instructions to order a new punishment trial.

Respectfully submitted,

Keith S. Hampton /s/
Keith S. Hampton
State Bar No. 08873230
Attorney at Law
P.O. Box 66488
Austin, Texas 78731
(512) 476-8484 (office)
(512) 762-6170 (cell)
keithshampton@gmail.com

Mike Ware /s/
Michael Logan Ware
State Bar No. 20864200
Attorney at Law
300 Burnett Street, Ste 160
Fort Worth, Texas 76102
817-338-4100 (office)
817-698-0000 (fax)
ware@mikewarelaw.com

Attorneys for Paul David Storey