(CAPITAL CASE)

No. 24-5791

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL STOREY,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

PHIL SORRELLS
Criminal District Attorney
Tarrant County, Texas

STEVEN W. CONDER
Assistant Criminal District Attorney
Chief, Post-Conviction Unit

FREDERICKA SARGENT
Assistant Criminal District Attorney
Counsel of Record

Tarrant County Criminal District Attorney's Office
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-3109
fsargent@tarrantcountytx.gov

THIS IS A CAPITAL CASE

QUESTION PRESENTED

It has long been a rule of habeas that federal courts shall not interfere where a state court has interpreted and applied its own state law unless the interpretation and application rise to the level of a violation of due process. Here, Paul Storey filed a subsequent application for a state writ of habeas corpus. The Texas Court of Criminal Appeals (TCCA) remanded the case to the trial court, where a live evidentiary hearing was held. The trial court entered its findings, which were then reviewed by the TCCA. That court, free to accept or reject those findings after its independent review of the record, rejected them and denied habeas relief. Not satisfied, Storey filed two suggestions urging the court to reconsider its decision. *See* Tex. R. App. P. 79.2(d) (expressly proscribing motions for rehearing in Texas state habeas procedure but recognizing the TCCA may reconsider a case on its own motion). The court declined to do so. Storey then took his claims to federal court, where he was repeatedly turned away. It was then that the previous administration of the Tarrant County Criminal District Attorney's Office (TCCDAO) agreed to file its own motion, which the TCCA reconstrued as a suggestion under Rule 79.2(d), asking the TCCA to reconsider its previous denial. After briefing was requested by the court, the motion was denied. This procedural posture gives rise to the following question:

> Where the state highest criminal court declines a suggestion to reconsider a case on its own initiative, which it was under no obligation to even acknowledge, has there been such a denial of due process so as to warrant this Court's intrusion into state habeas proceedings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In 2008, Petitioner Paul Storey was found guilty and sentenced to death for the capital murder of Jonah Cherry during a robbery. Storey's conviction was affirmed on direct appeal, and requests for both state and federal habeas relief were denied. Just prior to his scheduled execution date in 2017, Storey filed a subsequent state habeas application alleging multiple constitutional violations all stemming from the State's failure to disclose evidence that members of Mr. Cherry's family opposed the death penalty. Again, requests for both state and federal habeas relief were denied. Upon the completion of federal habeas review, Storey returned to state court, now aided by the TCCDAO's confession of error (though from a prior administration). But the TCCA, on its own initiative, declined to reconsider the previous denial of relief. It is from that denial that Storey now appeals. Certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Offense

As set out by the TCCA on direct appeal:

> [Storey] was charged with intentionally causing the death of Jonas Cherry while in the courts of committing or attempting to commit robbery. The record reflects that around 8:15 a.m. on October 16, 2006, Cherry left his house and went to work at the Putt-Putt Golf and Games in Hurst, Texas (the Putt-Putt). When Cherry arrived for work, he passed through the east door, which was the employees' entrances, and at 8:43 a.m., he disarmed the security alarm system. When a co-worker, Timothy Flow, arrived about ten minutes later, he found Cherry lying in a pool of blood in the office area. Flow noticed that Cherry was holding a key to the door of the manager's office, which was locked. Concerned

that the perpetrator might still be present, Flow retreated outside. Once he saw that only his and Cherry's car were in the parking lot, he went back inside to check on Cherry. Based on his observations, he believed that Cherry was dead. Flow then walked back outside while calling 9-1-1 on his cell phone, and he waited in his truck until the police arrived. Officer Samantha Wilburn and Corporal Lonnie Brazell responded first. After speaking with Flow and observing Cherry's body, they called for the assistance of additional officers.

With the help of the manager, Patrick Arenare, police officers gained entry to the manager's office, where the business's surveillance equipment was kept. Four separate videocassette recorders (VCRs) should have been set up for surveillance. However, one VCR had been stolen, and videotapes had been stolen from two other VCRs. The fourth VCR still contained a surveillance videotape and was functioning. It was connected to a video camera that monitored a section of the business's driveway that led from the road and into the parking areas. When officers played the videotape, they overserved a red two-door Ford Explorer with its hood up and its lights flashing, rolling from the direction of the road into the public parking area, and then moving out of view as it continued through the parking lot. A few minutes later, the Explorer came back into view, and then it passed out of view again as it rolled toward the employees' parking area. This videotape was released to the media and aired on the local news.

One of [Storey's] friends reported that [Storey] had told her he was present during the office and saw who committed it. She provided the police with [Storey's] phone number. Detective Rick Shelby, a Hurst police officer, contacted [Storey] by telephone. [Storey] acknowledged that he was a former employee of the Putt-Putt, and he admitted that the Explorer that was being shown on the news was his.[1] He stated that he was willing to meet with Shelby at the police station but that he did not have transportation because he was Explorer was not working. He accepted Shelby's offer of a ride and provided Shelby with directions to his house. Shelby and Sergeant Craig Teague then drove to [Storey's] house, where they met [Storey], [Storey's] brother, and a friend. [Storey] and his brother showed them Explorer. [Storey] explained that the license plates on the Explorer did not match the ones in the video that was being shown on the news because he had switched the plates in

[1] The record reflects that the Explorer was owned by [Storey's] mother, but [Storey] drove it regularly.

> order to do a "gas run."[2] [Storey] then accompanied Shelby and Teague to the police station to make a statement.
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> Over the next few days, [Storey] made three oral statements to police. In his first statement, he denied participating in any offense but admitted that he was a witness. In his second statement, he admitted to participating in the offense, but only as a lookout and by helping others gain entry to the Putt-Putt and by warning them to collect the surveillance tapes. In this third statement, he admitted that he had planned and participated in the robbery and that he had shot Cherry.
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> All three of [Storey's] statements were presented to the jury. The medical examiner testified that Cherry suffered two gunshots to his head. One shot entered from the back, where there was one contact wound. Another shot entered from the front, where the entry wound indicated a shot fired at close range. Either shot would have been fatal. Cherry also suffered additional gunshot wounds to both legs and one hand.

Storey v. State, No. AP-76,081, 2010 WL 3901416, at *1–*2 (Tex. Crim. App. Oct. 6, 2010), *cert. denied*, 563 U.S. 919 (2011).

II. The Punishment Phase of Trial

The State presented evidence that Storey behaved in an intimidating fashion while in county jail awaiting trial. 38 Reporter's Record (RR) 11–15, 36–38. They also presented testimony he may waived a pistol at another driver during a road-rage incident. 38 RR 24–30.

The defense presented evidence about the inmate classification process for death-row entry, the security precautions in Texas prisons, and the execution procedure. 38 RR 72–96. Family friends, family, and Storey's girlfriend testified that

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[2] [Storey] explained that this was his term for pumping gas into a vehicle and then driving away without paying.

they trusted him to do tasks for them including taking care of their children, that his father left him at a young age, and that he was good person who could contribute value to others' lives if given life in prison. 38 RR 131–34, 148–50, 161–65, 169–72, 182, 190–96, 208. Storey's brother explained that Storey tried to be a good role model and encouraged him to work hard and respect their mother; he also opined that Storey could still be helpful to him if given a life sentence. 38 RR 254. Storey's mother explained some of his past misdeeds, testified that his father was abusive and left Storey at an early age, and described how Storey struggled with a weight problem and was deeply depressed after his grandmother's death just before he graduated from high school. 38 RR 260–76. Teachers testified that Storey was not a discipline problem and was a good student. 38 RR 216–17, 221–22, 231, 239–42.

Other evidence established that Storey had only been involved in a few minor fights as a child and teenager, that he had only been involved in a few minor altercations while in county jail, and that he had no prior criminal history. 38 RR 17–18, 20–21, 222, 277. The jury also learned that Storey was not a gang member. 38 RR 196.

Finally, defense counsel introduced evidence that Storey had not only graduated from high school, but he was an exemplary student at the alternative school attended; he also graduated from truck driving school. 38 RR 193–94, 219–21, 239, 242.

III. Procedural History

On September 2, 2008, Paul Storey was sentenced to death. His conviction and sentence were affirmed on direct appeal. *Storey v. State*, No. AP-76,018. After both state and federal habeas relief were denied,[3] the trial court set Storey's execution for April 12, 2017.

On March 31, 2017, Storey filed a subsequent application for state habeas relief. He raised six allegations, including claims of prosecutorial misconduct and the denial of due process, all stemming from the State's failure to disclose that members of victim's family opposed the death penalty. *See* Petitioner's Appendix A. The TCCA stayed the execution and remanded the writ back to the trial court for further proceedings. *Ex parte Storey*, No. WR-75,828-02 (Tex. Crim. App. April 7, 2017) (unpublished order). Once back in the trial court, the TCCDAO voluntarily recused itself because First Assistant Larry Moore's 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 Texas Attorney General's Office was appointed District Attorney Pro Tem and assumed the duties of defending the conviction.

A hearing was held, and on May 18, 2018, the trial court issued findings of fact and conclusions of law, ultimately recommending that relief be granted. *See*

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[3] *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).

Petitioner's Appendix A. After its independent review, the TCCA disagreed, and denied relief based on the abuse-of-the-writ bar. *Ex parte Storey*, 584 S.W.3d 437 (Tex. Crim. App. 2019); *see* Tex. Code Crim. Proc. art. 11.071, § 5. Pursuant to Texas Rule of Appellate Procedure 79.2(d), Storey filed a suggestion that the court reconsider the denial on its own initiative, but that request was denied. *See* Petitioner's Appendix C, D.[4]

Thereafter, Storey again sought relief in federal court, where he was again denied. *See Storey v. Lumpkin*, 8 F.4th 382 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2576 (2022).

With the federal habeas proceedings concluded (thus relieving Mr. Moore of his role as witness) and Storey's claims denied, the TCCDAO 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 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."). The TCCDAO then moved the court to reconsider the denial of the subsequent writ application on its own initiative. *See* Petitioner's Appendix E. The court construed this as a suggestion pursuant to Rule 79.2(d) and requested briefing on June 28, 2023. *See* Petitioner's

[4] On the same day Storey filed his suggestion for reconsideration, he also filed an "alternative suggestion" with the TCCA. The court denied them both on the same day, but in separate postcards.

Appendix F. With briefing completed, the TCCDAO's motion was denied without written order. *See* Petitioner's Appendix H. This petition for certiorari review follows.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. As such, this Court only grants petitions for a writ of certiorari for "compelling reasons." Sup. Ct. R. 10. Compelling reasons to grant review of a state court opinion include a state court deciding an important federal question in a way that conflicts with the decisions of another state or federal court, or the state court deciding an important question of federal law that has not been decided by this Court. Here, the state court did no such thing. The denial of the State's motion rests on an independent and adequate state procedural rule that itself is one step removed from the abuse-of-the-writ doctrine applied to deny state habeas relief. Therefore, the present petition presents no compelling reasons for this Court to certiorari.

ARGUMENT

I. Before the Court Can Consider the Merits of Storey's Allegations, It Must Decide that the Postconviction Process He Availed Himself of Somehow Denied Him Due Process.

Shortly before his scheduled execution date, Storey filed a subsequent application for state habeas relief in which he argued multiple constitutional violations stemming from the State's failure to disclose evidence that the victim's parents did not agree with the State's decision to seek the death penalty. The TCCA remanded the application, and the trial court held a hearing, at the conclusion of

which granting relief was recommended. But the TCCA disagreed. Storey filed two suggestions to reconsider, both of which were denied. The State filed a motion to reconsider, which was also denied. Without acknowledging the procedural hurdles he now faces, Storey asks this Court to decide the merits of the underlying issues via an appeal from the TCCA's last denial to reconsider on its own initiative the denial of a subsequent state habeas application.

As this Court has explained:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact civil in nature. *See Fay v. Noia*, 372 U.S. 391, 423–24 (1963). It is a collateral attack that normally only occurs after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief[.]

Pennsylvania v. Finley, 481 U.S. 551, 556–557 (1987) (citing *United States v. MacCollum*, 426 U.S. 317, 323 (1976) (plurality op.)). This Court has long held that a petitioner like Storey has no due process right to collateral proceedings at all. *See Murray v. Giarratano*, 492 U.S. 1, 7–8 (1989); *Finley*, 481 U.S. at 557. "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano*, 492 U.S. at 10. Therefore, "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id*. But when a State does provide postconviction relief, "it must nonetheless act in accord with the dictates of the Constitution—and, in particular, with the Due Process

Clause." *Id*. at 558 (quoting *Evitts v. Lucey*, 469 U.S. 387, 401 (1985)); *see also id*. at 559 ("States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review.").

More importantly, where a State allows for postconviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief). Indeed, as the Court has explained, "Federal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

Storey does not allege that he was, in some way, denied due process. Indeed, he cannot. He was represented by counsel at every step of the state habeas proceedings. His subsequent application was given due consideration, having been remanded by the TCCA. The trial court held a live hearing. Although the TCCA ultimately disagreed with the trial court's recommendation that relief should be granted, suggestions for reconsideration were filed by both Storey and the State. *See* Tex. R. App. P. 79.2(d). And with the State's suggestion, the court ordered further briefing. Ultimately, the State's suggestion for reconsideration was denied.

"Texas has chosen to unequivocally provide both" an avenue for postconviction relief and a lawyer to assist in that quest. *Ex parte Alvarez*, 468 S.W.3d 543, 547 (Tex. Crim. App. 2015) (Yeary, J., concurring). Given that, Storey received all the due process to which he was entitled and then some. More to the point, Storey cannot show a deprivation of due process where the state's appellate rules specifically bar such motion practice. *See* Tex. R. App. P. 79.2(d) (expressly proscribing motions for rehearing in state habeas procedures). That the TCCA reconsidered the case on its own initiative is of no moment and creates no new cause of action in this Court.

Without a showing that he was denied due process, this Court should deny certiorari review.

II. Storey Has Provided No Reason Why Either the TCCA's Denial of the State's Motion or its Application of the Abuse-of-the-Writ Doctrine Should Be Revisited, Regardless of the TCCDAO's Confession.

The state's motion to reconsider was filed pursuant to Texas Rule of Appellate Procedure 79.2(d), which has no federal constitutional underpinnings. And the state writ upon which the suggestions to reconsider were based was denied pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. This has long been recognized as an independent and adequate procedural bar. *See*, *e.g., Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997). Equally long recognized is the maxim that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67–68; *see also Bradshaw v. Richey*, 546 U.S. 74, 77 (2005). And even if "not precluded, [this Court] would still be required 'to accord deference to the state courts' determination of its own law."

Evans v. McCain, 577 F.3d 620, 625 (5th Cir. 2009) (citing *McKay v. Collins*, 12 F.3d 66, 69 (5th Cir. 1994)). Indeed, Storey seems to brush under the rug, the thing he actually appeals—the denial of a suggestion that the TCCA reconsider on its own motion the denial of his subsequent state habeas application—the thing that stands between the issues he presents to this Court and the Court's ability to resolve those issues. The application of a state procedural bar is the quintessential state-court determination of its own law, the decision to grant a suggestion for reconsideration following the negative application of that procedural bar even more so.

Storey muddies the water by repeatedly pointing to the State's concession—which did not come until *after* the application of the procedural bar—by his indignation that the TCCA ignored it. But that is the TCCA's prerogative, even more so in the procedural posture that it was offered in.

In *Young v. United States*, the government confessed error following a petitioner's conviction of certain drug crimes because the government thought the petitioner had been charged under an erroneous construction of the law. 315 U.S. 257, 258 (1942). *Young* held that the prosecutor's exculpatory interpretation was not dispositive because bedrock principles vest in the courts a power and duty of independent judgment. The prosecutor's confession, in other words, did not relieve the court "of the performance of the judicial function." *Id.* Rather, while "[t]he considered judgment of law enforcement officers that reversible error has been committed is entitled to great weight," "judicial obligations" nonetheless compel independent review. *Id.* at 258–59.

Young reasoned that this judicial obligation exists to safeguard the "public interest." *Id.* at 259. It is incumbent on the judiciary, the Court explained, to "promote[] a well-ordered society" by not lightly overturning convictions. *Id.* "Furthermore, [this Court's] judgments are precedents, and the proper administration of criminal law cannot be left merely to the stipulation of parties." *Id.* After all, the judiciary's power to enter judgments is foundational to "the Constitution's separation of powers." *Plant v. Spendthrift Farm, Inc.*, 514 U.S. 211, 213 (1995); *see also, e.g.*, *Engleman Irrigation Dist. v. Shield Bros., Inc.*, 514 S.W.3d 746, 754 (Tex. 2017).

The TCCA performed its constitutional duty and conducted an independent review of the record before it applied the abuse-of-the-writ bar and before it denied the State's motion for reconsideration. Storey has given this Court no reason to upend those decisions or to revisit its original denial of certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari review.

Respectfully submitted,

PHIL SORRELLS
Criminal District Attorney
Tarrant County, Texas

STEVEN W. CONDER
Assistant Criminal District Attorney
Chief, Post-Conviction

/s/ *Fredericka Sargent*
FREDERICKA SARGENT
Assistant Criminal District Attorney
401 West Belknap, 4th Floor
Fort Worth, Texas 76196-0201
(817) 884-3109 – Telephone
fsargent@tarrantcountytx.gov
Counsel of Record