No. 18-1022

IN THE
Supreme Court of the United States

JULIUS JEROME MURPHY,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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MAY 1, 2019

CAPITAL CASE

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

Julius Murphy is on death row despite never having had a constitutionally valid trial. The State violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), when it failed to disclose to Murphy that it had threatened and bargained with two key witnesses. And the State violated *Giglio* v. *United States*, 405 U.S. 150 (1972), when it failed to correct the false impression created by these witnesses' trial testimony. Making matters worse, the trial court violated Murphy's due process rights when it refused to grant Murphy a continuance so that he could secure live witness testimony during habeas proceedings related to these constitutional violations.

The State, in its opposition, argues that the decision below was correct and that, in any event, it is beyond the power of this Court to address. Neither proposition is true.

The State of Texas violated Murphy's constitutional rights. Because Murphy faces execution, the importance of remedying these violations cannot be overstated. Nor can they be shielded from this Court's review by a pro forma appellate-court decision. This Court has authority to grant certiorari. It should.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE TCCA'S MISAPPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

A. This Court Should Grant Certiorari To Evaluate Murphy's *Giglio* Claims Under The Correct Standard And To Resolve The Federal Question Presented By His *Brady* Claims.

This Court can—and should—grant certiorari because the TCCA rejected Murphy's constitutional claims on a basis that "conflicts with relevant decisions of this Court," including *Brady* and *Giglio*. Sup. Ct. R. 10(c); *see also* Pet. 13–22.

The TCCA adopted in full the trial court's misstatement and misapplication of this Court's materiality standard for *Giglio* claims. The correct standard looks to whether there is "*any reasonable likelihood* that the false testimony *could have affected* the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (emphases added). And it applies

in cases like this one—where the "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Id.*

But the trial court instead applied the more burdensome *Brady* materiality standard, which requires an applicant to demonstrate "a reasonable likelihood that it *affected* the judgment of the jury." Pet. App. 46a–47a (emphasis added); *see also* Pet. 19–20. The difference between "could have" and "did" is not merely semantics. *See, e.g.*, *Gilday* v. *Callahan*, 59 F.3d 257, 267 (1st Cir. 1995) (contrasting the *Brady* standard, which requires defendant to show "a reasonable probability that * * * the result of the proceeding *would have been different*," with the *Giglio* standard, which is "more favorable to the defendant" and requires only that the defendant show that the "false testimony *could* have affected" the outcome (quotation marks omitted and emphasis added)). Its adoption of the improper standard infected its conclusions, which the TCCA adopted without additional comment. That was not a misapplication of a properly stated rule of law; it was a finding made under an incorrect standard.

Furthermore, the trial court's determination that the State did not suppress evidence in violation of *Brady* v. *Maryland*, and the TCCA's subsequent adoption of this determination, decided an important federal question in a way that conflicts with the precedent of this court: The State must disclose even the mere "possibility of a reward" offered in exchange for testimony. *United States* v. *Bagley*, 473 U.S. 667, 683 (1985). Here, though, the State failed to disclose threats the prosecutors made to two critical witness-

es, Javarrow Young and Christina Davis. The State withheld from defense counsel its threats to prosecute Young if he failed to cooperate, and promises of leniency if Young testified against Murphy. Pet. 8–10, 15. Davis likewise understood from the State that if she testified against Murphy she would escape all charges, and if she did not, she would be charged with conspiracy to commit murder. *Id.* at 8–10, 21. The defense never heard that, either. The TCCA's finding that these fundamental lapses did not violate *Brady* contravenes this Court's precedent.

In an effort to side-step Murphy's constitutional claims, the State places great weight on the TCCA's use of the phrase "our own review." Pet. App. 3a; *see also* Opp. 17. But these three words do not imply rejection of the *Giglio* materiality standard or the impermissible *Brady* findings. The TCCA made no independent findings of fact or conclusions of law. It instead stated that its "review[ ]" encompassed "the record and the trial court's findings of fact and conclusions of law." Pet. App. 3a. The only reasonable inference from this wide-ranging review and lack of independent findings is that the TCCA adopted the trial court's findings and conclusions in full.

B. A Prosecutor Who Creates A False Impression In The Mind Of Jurors Violates *Giglio*.

The State contends that this Court has not recognized, and should not recognize, *Giglio* violations where a key trial witness creates a "false impression" in the minds of the jury members by omitting facts or offering misleading testimony. Not so. *Giglio* itself states that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 405 U.S. at 154. A nondisclo-

sure, by its definition, is an omission that gives rise to a "false impression"—for example, that a witness is voluntarily testifying, or that no deal has been struck, or that testimony is free from influence.

Several federal courts have held that *Giglio* applies to cases where the prosecutor's nondisclosure created a false impression in the minds of jury members by omitting facts or offering misleading testimony. *See Tassin* v. *Cain*, 517 F.3d 770, 778 (5th Cir. 2008) (finding *Giglio* violations based on State's failure to correct misleading impression created by key witness during testimony regarding promises of leniency); *Jenkins* v. *Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (finding *Giglio* violation where testimony was "probably true" but "misleading"); *United States* v. *Iverson*, 637 F.2d 799, 805 n.19 (D.C. Cir. 1980) ("it makes no difference" for purposes of discerning a *Giglio* violation "whether the testimony is technically perjurious or merely misleading").

Here, the prosecution misled the jury by failing to disclose the influence it had exerted on both Young and Davis. This violated *Giglio* and *Brady*. Although the prosecution put both witnesses on the stand, it did not elicit testimony that would have made this influence apparent. Pet. 18–19, 21. Had the jury members known that both Young and Davis testified under threats of charges and promises of leniency, this information would have undoubtedly impacted their perception of the witnesses' credibility. *Id.* at 18–21. They were given no such opportunity.

II. THE TRIAL COURT'S DENIAL OF A CONTINUANCE RESULTED IN A FUNDAMENTALLY FLAWED HEARING THAT VIOLATED MURPHY'S RIGHT TO DUE PROCESS.

A. The Trial Counsel's Denial Of Murphy's Repeated Requests For A Continuance Denied Him Of His Constitutionally Protected Opportunity To Be Heard.

It is a "'fundamental requisite' of due process * * * that an individual is entitled to an 'opportunity to be heard.'" *Ford* v. *Wainwright*, 477 U.S. 399, 430 (1986) (O'Connor, J., concurring) (quoting *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)). Due process guarantees habeas petitioners an opportunity to develop their claims. *See Tercero* v. *Stephens*, 738 F.3d 141, 148 (5th Cir. 2013). The trial court's arbitrary denial of Murphy's motion for a continuance to secure the live testimony of critical witnesses denied Murphy his constitutionally protected opportunity to present his evidence and be heard. And the TCCA's dismissive ratification of the trial court's findings and conclusions merits summary reversal.

The State distorts the circumstances surrounding Murphy's inability to secure live witness testimony at the hearing. Proceedings at the trial court were placed on hold shortly after the TCCA remanded the matter in 2016. Neither Murphy nor the State had any reason to believe that, in September 2017, the TCCA would order sua sponte that the trial court resolve Murphy's on-hold claims, or that the trial court would then schedule the hearing to occur in less than a month. *See* Pet. App. 8a–9a; *see also* Order at 1–2 (102nd Dist. Ct., Sept. 22, 2017).

In the few weeks between the trial court's order and the hearing, Murphy's counsel went to great lengths to locate Davis and Young and secure their appearances. Even through the morning of the hearing, counsel attempted to serve Davis with a subpoena "in every single location that we know that she lived, ate, or worked at, including multiple residences, including multiple shelters, including multiple other institutions." Hr'g Tr. 11:2–6.

And Murphy *did* serve a subpoena to secure the appearance and testimony of Young, who was incarcerated at the time. The State faults Murphy for failing to seek a bench warrant. Opp. 28 & n.11. But Murphy's counsel inquired about a bench warrant and were specifically told by the constable's office that no bench warrant was needed to secure Young's transport to testify at Murphy's hearing. Hr'g Tr. 10:22–11:1. In other words, the State informed Murphy that a bench warrant was not required, the State failed to transport Young to the hearing, and now the State seeks to shift blame to Murphy for its own failure to produce Young at the hearing.

On short notice, Murphy pursued this hearing with utmost diligence so he could develop and present his evidence to the trial court. Murphy repeatedly requested additional time to secure crucial witnesses' in-person testimony. *See* Unopposed Mot. for Continuance (102nd Dist. Ct., Oct. 12, 2017); Hr'g Tr. at 4:18–20, 6:21–11:14. The trial court's refusal to grant these requests denied Murphy his due process right to have his evidence be heard and merits review, or summary reversal.

B. The Trial Court's Refusal To Continue The Hearing Caused Substantial Harm To Murphy.

The trial court's refusal to continue the hearing completely hamstrung Murphy's ability to present his claims. Young and Davis were key witnesses at Murphy's habeas proceeding: The pair's recent revelations that the State made threats and promises of leniency to secure their trial testimony formed the foundation of Murphy's habeas petition. Arbitrarily denying a continuance and refusing to allow Murphy to secure the pair's live testimony, whom Murphy diligently attempted to bring to the hearing, profoundly impacted Murphy's constitutionally protected right to be heard. *See Hicks* v. *Wainwright*, 633 F.2d 1146, 1149 (5th Cir. 1981) (considering, among other factors, the diligence of defense in procuring witnesses' presence and expected favorability of testimony to determine whether a trial court's denial of a motion for continuance was an abuse of discretion).

The State's arguments about these witnesses' credibility belie its claim that Murphy suffered no harm from the trial court's refusal to continue the hearing. The State asserts that Davis "was simply not credible" because her statements were disputed in live testimony. Opp. 21–22. Likewise, the State argues that "[t]he testimony at the evidentiary hearing flatly contradicted Young's affidavit." *Id.* at 18. But these assertions only heighten the impact of the trial court's due-process denials. While the trial court purported to accept Young and Davis's signed affidavits in lieu of live testimony, it summarily discredit-

ed both witnesses because they did not testify in person. *See* Pet. App. 39a, 41a.

The State, like the trial court, portrays as infallible the live testimony presented at the hearing and discredits written testimony that contradicts any live testimony. But in doing so, the State ignores Murphy's introduction of deeply damaging evidence that prosecutor Al Smith had previously engaged in prosecutorial misconduct. *See* Hr'g Tr. 93–102. Had Murphy had an opportunity to present in-person testimony of *two* witnesses offering exculpatory evidence, rebutting Smith's statements, and underscoring Smith's history of prosecutorial misconduct with testimony about his threats and promises made to secure their trial testimony, the trial court could have reached a different credibility determination of both the witnesses. In sum, the trial court prejudiced Murphy's ability to present his case. A constitutional violation of this magnitude warrants this Court's review.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DEATH PENALTY IS UNCONSTITUTIONAL.

A. The TCCA Dismissed Murphy's Eighth Amendment Claim On Federal Grounds.

The State argues that the decision below is immunized from review because it rests on an adequate and independent state ground. Opp. 31-32. That is wrong.

This Court has created a "conclusive presumption" of federal jurisdiction over state-court decisions, *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991),

when the decision below "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," *Michigan* v. *Long*, 463 U.S. 1032, 1040–41 (1983). *See also Harris* v. *Reed*, 489 U.S. 255, 263 (1989) (extending presumption to cases on habeas review).

This presumption applies here. *First*, the decision below rested on federal law. The State claims the TCCA's use of the word "dismissal" nests this decision firmly in state law. Opp. 31. But state courts cannot so easily foreclose review: It is "the duty of the federal courts * * * to determine the scope of the relevant state court judgment." *Coleman*, 501 U.S. at 739. This duty allows federal courts to look beyond the face of the decision and to the arguments below. *Id.* at 740. Murphy's arguments below sought review under Section 5(a)(1) of the Texas Code of Criminal Procedure Article 11.071. *See* Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015) at 44–45 ("Appl."). Section 5(a)(1) allows a court to hear a subsequent application where "(1) * * * the factual or legal basis for the new claim was unavailable as to previous applications, and (2) * * * the specific facts alleged rise to a constitutional violation." *In re Davila*, 888 F.3d 179, 188 (5th Cir. 2018). The first element is "a state-law question;" the second is a "question of federal constitutional law." *Id.* (quotation marks omitted). In his application, Murphy explained that Section 5(a)(1) applied because of a previously unavailable fact: the nationwide consensus against the death penalty that had arisen after he litigated his first petition. Appl. 45. Because Murphy could not predict this consen-

sus, this fact was previously unavailable as a matter of state law. The court's dismissal, then, *must* have turned on a finding that Murphy failed to allege a constitutional violation—a question of federal law.

Second, because the decision below "fairly appears" to rest on federal law, this Court lacks jurisdiction only if it is "clear from the face of the opinion" that the TCCA did *not* rely on federal law. *Long*, 463 U.S. at 1040–41. The TCCA made no such clear statement. This Court thus has jurisdiction over Murphy's Eighth Amendment claim.

B. Murphy's Eighth Amendment Claim Is Not Barred By Principles Of Retroactivity.

The State's next procedural argument—that *Teague* v. *Lane*, 489 U.S. 288 (1989), bars review—is even more off-base. *Teague* is not absolute. "[C]ourts must give retroactive effect to new substantive rules of constitutional law." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 728 (2016). Such rules include those that "deprive[ ] the State of the power to impose a certain penalty." *Penry* v. *Lynaugh,* 492 U.S. 302, 330 (1989), *abrogated on different grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002). A rule barring capital punishment is just that. *See id.* at 330 (noting that a new rule prohibiting executing intellectually disabled persons "would be applicable to defendants on collateral review."); *Atkins*, 536 U.S. at 319 (recognizing such a rule); *see also Montgomery*, 136 S. Ct. at 734 (holding as retroactive rule barring life without parole for juvenile offenders). It would therefore be retroactive to Murphy's case.

C. The Death Penalty Violates The Eighth Amendment.

1. The State seems to misunderstand Murphy's showing that the death penalty is arbitrarily imposed. Murphy acknowledges that "this Court's precedent * * * recognizes the need for * * * discretion" in the imposition of the death penalty. Opp. 33. Murphy's point is that *this discretion itself* renders the imposition of the death penalty unconstitutional. *See* Pet. 25–28. That is, because *no* "constitutionally-permissible sentencing structure," Opp. 33, can remedy the arbitrariness inherent in our capital-punishment scheme, the death penalty is unconstitutional.

The State's remaining arguments on this point attack straw men. Murphy's Eighth Amendment claim is not based on the fact that *his* death sentence was arbitrary. Its basis is that that the death penalty *writ large* is arbitrary.

2. The State's dismissal of the "overwhelming" evidence that States have executed the innocent is shockingly cavalier. *Glossip* v. *Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting). It fails to confront the full scope of Murphy's argument, and instead glibly labels detailed studies "dubious." Opp. 34. A problem of such moral gravity deserves a full briefing on the merits, not an offhand dismissal.

3. The State likewise maintains that this Court has definitively held that decades-long delays in imposing capital sentences have no bearing on the cruelty or penological utility of the punishment. *Id.* at 35. This Court has long suggested otherwise. *See, e.g.*, *In re Medley*, 134 U.S. 160, 172 (1890).

4. Finally, the State offers little to rebut Murphy's showing that a widespread consensus has emerged that the death penalty is categorically impermissible. *See* Pet. 32–35. The State does not dispute that 31 States have abandoned capital punishment and that the frequency of death sentences and executions has plummeted. *See id.* at 32–34. Instead, it chalks up the low frequency of executions to the very discretion that makes capital punishment arbitrary. Opp. 36. The reality is that "evolving standards of decency" have led the majority of States in this Nation to collectively renounce the death penalty. *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). This Court should do the same.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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