IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2019

No. 19-6927

TONY EGBUNA FORD,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

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Respondent's Brief in Opposition [BIO] is based on a fundamental misperception of the applicable law and of the material facts. When these misperceptions are sorted out, the worthiness of the issue presented by Mr. Ford for the Court's review comes into even clearer focus.

1. In light of the merits issues raised by Mr. Ford, the Texas Court of Criminal Appeals' summary disposition of his case as an abuse of the writ raises – rather than answers -- the question whether the procedural ruling was "adequate."

The BIO takes the position that the CCA's disposition of Mr. Ford's case as an abuse of the writ ends the need for further inquiry. The State says, "Ford's claims are ... unequivocally procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute." BIO, at 12. The flaw with this argument is that the "adequacy" of a ruling based on a state procedural ground, *i.e.*, it's capacity to foreclose federal review of alleged constitutional error, is dependent on whether a particular application of a state procedural rule in a case is in keeping with the Constitution. As the Court explained in *Ward v. Board of Com'rs of Love County*, 253 U.S. 17, 22 (1920), if a state court "put[s] forward non-federal grounds of decision that were without any fair or substantial support," the grounds cannot be deemed adequate to preclude federal review. If such "non-

federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Id*. *See also Staub v. City of Baxley*, 355 U.S. 313, 318-20 (1958) (discussing and applying these principles).

As the Petition makes clear, Mr. Ford has a state-created right, protected by Due Process, to have his subsequent state habeas corpus application authorized for consideration if it meets the requirements of the state habeas statute. His claims, as highlighted in the Petition, did meet those requirements. The denial of his claims for abuse of the writ, accordingly, "put[s] forward non-federal grounds of decision that were without any fair or substantial support...." *Ward*.

The State does not even acknowledge that an abuse of the writ ruling by the CCA can be subject to scrutiny by this Court. BIO, at 13 ("this Court should not second-guess a decision of the highest court of a state on a matter of pure state law"). *Ward* and its progeny hold otherwise. Such state court rulings must at least not be "untenable" and must have "fair or substantial support" in the case. The CCA's ruling here had no fair or substantial support in the case. The State has not been able to point to any tenable basis for the CCA's ruling.

With respect to Mr. Ford's *Napue/Brady* claim, based on the eyewitnesses' false assertions of certainty about their identification of Mr. Ford, the State recites correctly the circumstances surrounding the fortuitous discovery, beginning in

2002 – long after the initial state habeas application had been denied -- of the facts supporting this claim. BIO, at 15. The State then suggests that this claim did not meet the requirement of a newly discovered factual basis for a subsequent habeas application because "Ford has, in one form or another, repeatedly contested issues related to the validity of the Murillo sisters' identification for decades now." BIO, at 15. The State then concludes, "Ford's ability to file a new state habeas application is not refreshed every time that he gathers another scrap of evidence in support of his identity claim or repackages it in a new legal framework." BIO, at 15-16.

When the State's hyperbole is set aside, there is no substance to its argument. Attacking a misidentification on different grounds over time does not preclude the presentation of a new claim attacking the misidentification so long as the new claim is based on (1) newly discovered facts, (2) supporting a claim that has not previous been presented, (3) which has *prima facie* merit. That is what the Texas habeas statute Tex. Code Crim Proc. Art. 11.071 § 5 (a)(1) says, and that is what the CCA has said. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex.Crim.App. 2007); *Ex parte Brooks*, 219 S.W.3d 396, 400-01 (Tex.Crim.App. 2007) – both of which were discussed in the Petition, at 26. Moreover, that is what Mr. Ford's subsequent habeas application plainly demonstrated as to the

Napue/Brady claim.

With respect to Mr. Ford's *Enmund/Tison* claim that the facts at trial, coupled with the discovery of previously unavailable facts since the conclusion of the initial state habeas proceeding, have demonstrated that Mr. Ford is and was at trial ineligible for the death penalty, the State suggests that the CCA has previously declined to extend the death-penalty-ineligibility criterion of Tex. Code Crim Proc. Art. 11.071 § 5 (a)(3) to such an *Enmund/Tison* claim. BIO, 16 & n.8. To the contrary, the concurring opinion cited by the State in *Ex parte Wood*, 498 S.W.3d 926 (Tex.Crim.App. 2016) (Alcala, J., concurring), *does not* indicate, as the State suggests, that "the CCA has previously declined to find another capital inmate could circumvent the Section 5 bar on this basis." BIO, 16 n.8. Rather, Judge Alcala explains that she would find that an *Enmund/Tison* claim meets the requirements of Art. 11.071 § 5(a)(3), and urges the Court to address this question. 498 S.W.3d at 929. If the Court had addressed this question, Judge Alcala would have dissented rather than concurring with a recommendation "to file and set the procedural question...." *Id*.

The State also suggests that the CCA may have based its abuse of the writ ruling on the doctrine of laches. BIO, at 16 n.7. This cannot be the unstated basis for the CCA's ruling, because laches is a matter for trial courts to weigh in the first

instance. *Ex parte Perez*, 398 S.W.3d 206, 216-19 (Tex.Crim.App. 2013). The doctrine permits "courts to engage in a case-by-case inquiry to determine whether equitable relief is warranted in light of the particular circumstances surrounding each case." *Id*. at 216-17. To make this inquiry, "courts must 'engage in a difficult and sensitive balancing process' that takes into account the parties' overall conduct." *Id*. at 217 (analogizing to the process of considering a defendant's speedy trial claim at trial). And, "[i]f prejudice to the State is shown, a court must then weigh that prejudice against any equitable considerations that militate in favor of granting habeas relief." *Id*. Plainly, the CCA did not engage in this process, delegated in the first instance, to a trial court.

2. The CCA declared that its ruling did not take into the merits of Mr. Ford's claims, so the State's attempt to raise questions about the merits are not only easily rebutted, but irrelevant to the Question Presented.

In ruling that it was "dismissing the [habeas] application as an abuse of the writ," the CCA went on to say that it made that decision "without considering the merits of the claims." *Ex parte Ford*, 2019 WL 4318695 *1 (Tex.Crim.App. 2019). Accordingly, the State's attacks on the merits of the two claims highlighted by Mr. Ford are completely irrelevant. These attacks are not even relevant within the framework of *Harrington v. Richter*, 562 U.S. 86, 99 (2011) –

were it applicable – because any question about the merits of the claims, by the CCA's own acknowledgment, *could not go* to whether there was a "reasonable basis" for the CCA's decision.

Nevertheless, the State's attacks are readily countered.

The State's attack on the *Napue/Brady* claim is based entirely on speculation about what the facts would show if there were a hearing on the claim – that the court reporter's account of the Murillos' expression of uncertainty on the eve of trial was not credible, that the Murillos' pretrial testimony in which they expressed certainty prior to expressing uncertainty on the eve of trial showed that the court reporter's account was not credible, and that the effective cross-examination of the Murillos at trial rendered any pretrial expression of uncertainty non-prejudicial. Obviously, an evidentiary hearing on this claim is the only way two of these questions could be resolved. Mr. Ford has never had the opportunity to confront Myra and Lisa Murillo with what Robert Thomas overheard them say to the prosecutor just moments before the trial began. Would either or both admit this or deny it? If they admitted that they did express uncertainty, how would they explain their testimony both before and at trial? If they denied that they expressed uncertainty, would Robert Thomas be found more credible than them? And, as a matter of law, there is no way that the cross-examination that took place at trial

without this information was as effective as it could have been in raising doubt about the identification of Mr. For *with* this information. In sum, the State's arguments have no weight at this stage.

The State's attack on the *Enmund/Tison* claim is just as unavailing. The attack rests entirely on the finding by the jury, reaffirmed by the CCA on direct appeal, that Mr. Ford "was identified as the actual killer." BIO, at 23. This argument wholly ignores the factual basis for the *Enmund/Tison* claim. The factual basis starts with the trial evidence, where Mr. Ford's account of his role in the crime would have removed him from eligibility for the death penalty had it been believed. Obviously, the jury did not believe his account. Most of the factual basis for the claim, therefore, rests on the facts that have been discovered by persistent investigation since the conclusion of trial, direct, and the initial state habeas proceeding – the admissions by Victor Belton that he was the shooter, the corroboration by three different witnesses that there were three people involved in the crime and that the actions of one of them conformed perfectly with what Mr. Ford testified he did, Victor Belton's violent character and behavior as compared to Tony Ford's nonviolent behavior and character, the absence of police investigation into the possibility of Victor Belton' involvement, and the wholly unreliable process by which the police secured the identification of Mr. Ford by

Myra and Lisa Murillo. *See* Petition, at 14-19. The State's argument wholly ignores these factual allegations and thus ignores the factual basis for the *Enmund/Tison* claim.

. . . .

For these reasons, along with the reasons presented in the Petition, the Question Presented by Mr. Ford is not a request for error correction. It is instead a request that the Court address a pervasive practice by the Texas Court of Criminal Appeals that, day in and day out, arbitrarily deprives death-sentenced people of the rights Texas, by statute, has provided them. Without intervention by the Court, the CCA's arbitrary practice will continue unabated.

Respectfully submitted,

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