CAPITAL CASE

No. 19-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

PAUL DAVID STOREY,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

Whether it violates due process for a state court to deny substantive review of a constitutional violation in a death penalty case, when the state habeas petitioner has established, in subsequent proceedings, that the prosecution intentionally committed misconduct at trial and intentionally concealed its misconduct from court appointed state habeas counsel?

May a State permanently preclude the invocation of this Court's jurisdiction to review a death sentence by requiring the production of live testimony from deceased habeas counsel to prove his unawareness of the prosecution's intentional misrepresentations at trial and the concealment of those representations from him?

Can both the Eighth or Fourteenth Amendments tolerate a death sentence obtained by false representations by the prosecutor to the judge and jury that the victim's parents wanted the jury to return a death sentence, when in fact, the parents opposed a death sentence?

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Petitioner Paul David Storey asks that this Court issue a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

CITATION TO OPINION BELOW

The Texas Court of Criminal Appeals' remand order is attached to this petition as Appendix A. The district court's findings of fact, conclusions of law and recommendations for relief is attached as Appendix B. The Court of Criminal Appeals' opinions and per curiam dismissal of petitioner's subsequent petition for writ of habeas corpus is attached as Appendix C. Petitioner's *Suggestion for Reconsideration on the Court's Own Initiative* is attached as Appendix D, and the Texas Court of Criminal Appeals' denial of petitioner's *Suggestion* is Appendix E.

JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on October 2, 2019. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Storey having asserted below and asserting in this petition the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "No State shall ... deprive any person of life, liberty, or property, without due process of law [.]" U.S. CONST.,

amend XIV, Section 1. It also involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent part, "[C]ruel and unusual punishments [shall not be] inflicted."

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioner has exhausted all state and federal avenues of relief. U.S. Supreme Court Rule 13.1.

B. Procedural History

A jury found Mr. Storey guilty of capital murder on September 12, 2008. The jury answered the special issues in such a way that required the District Court to enter a sentence of death on September 19, 2008. The Court of Criminal Appeals affirmed the judgment on October 6, 2010. *Storey v. State*, AP-76,018 (Tex.Crim.App., delivered October 6, 2010)(not designated for publication). This Court denied his petition for writ of certiorari on April 3, 2011. *Storey v. Texas*, 563 U.S. 919 (2011).

Counsel for Mr. Storey filed his state application for writ of habeas corpus on May 26, 2010. On June 15, 2011, the Court of Criminal Appeals denied relief.

Ex Parte Storey, Writ No. 75,828-01 (Tex.Crim.App., delivered June 15, 2011)(per curiam)(not designated for publication).

Counsel for Mr. Storey filed a federal habeas petition which the federal district court denied on June 9, 2014. *Storey v. Stephens*, No. 4:11-CV-433-O (N.D. Tex. 2014). The Fifth Circuit affirmed. *Storey v. Stephens*, 606 F. App'x 192 (5thCir. 2015). This Court denied his petition for writ of certiorari on October 5, 2015. *Storey v. Stephens*, 136 S.Ct. 132 (2015).

On September 27, 2016, the trial court set an execution date for April 12, 2017. On March 31, 2017, counsel for Mr. Storey filed a subsequent writ application in state court and, on April 3, 2017, filed a motion to stay the execution. On April 7, 2017, the Court of Criminal Appeals stayed the execution and remanded to the state district court for further proceedings. *Ex Parte Storey*, Writ No. 75,828-02 (Tex.Crim.App., delivered April 7, 2017)(not designated for publication).

Specifically, the Court of Criminal Appeals ordered the district court to resolve, among other issues, whether the prosecution violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States by intentionally arguing a known falsehood to the jury in this death penalty case, then concealing its falsity from petitioner's trial counsel, petitioner's appellate counsel,

petitioner's state and federal habeas counsel, and all other prosecutors and judges associated with the case.

After three days of hearings, the state district court recommended relief on May 8, 2018. On October 2, 2019, the Court of Criminal Appeals dismissed the subsequent writ application. *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App. 2019). On October 16, 2019, counsel for Mr. Storey filed *Suggestion for Reconsideration on the Court's Own Initiative.* The Court of Criminal Appeals denied the *Suggestion* on November 6, 2019. [1]

C. Pertinent Facts and How the Issues Were Raised and Decided Below.

Before Applicant's capital murder trial, the trial court ordered the prosecutors, Christy Jack and Robert Foran, "to produce any and all such evidence" "of material importance to the Defense even though it may not be offered as testimony or exhibits by the prosecution at the trial of this case on the merits." (Vol. 2, p. 77)(Applicant's exhibit 2).[2] Known to both Jack and Foran, the victim's parents, Glenn and Judith Cherry steadfastly opposed the death penalty,

[1] Four of the Five Judges would have granted the suggestion.
2 These citations are to the record from the habeas proceedings.

both generally and in this case. However, neither Jack nor Foran ever disclosed this information to anyone associated with the defense.

The Cherry's opposition was clear and resolute. (Vol. 3, pp. 185). They repeatedly told the prosecutors. (Vol. 2, p. 47; 70-72); (Vol. 3, pp. 167-168; 186-187); (Vol. 4, p. 99). The Cherrys' opposition never changed.[3] (Vol. 3, pp. 170)(Vol. 4, pp. 95-99).

At the penalty phase in this death penalty trial, the prosecution falsely argued:

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3 The Cherrys, in an effort to spare Mr. Storey's life, explained their opposition:

> In spite of the egregious loss of our son at the hands of Paul Storey, we very strongly request that his sentence be commuted to life in prison without possibility of parole. This is primarily based on two factors. (1) As a result of Jonas' death, we do not want to see another family having to suffer through losing a child and family member. It is very painful to us to consider the suffering of Paul Storey's mother, grandmother, and family if he is put to death. We have seen the effect on family from other losses in our lives. His family did not harm us and are innocent regarding our suffering. (2) Due to our ethical and spiritual values we are opposed to the death penalty.
>
> Paul Storey's execution will not bring our son back, will not atone the loss of our son, and will not bring comfort or closure. We are satisfied that Paul Storey remaining in prison until his death will assure that he cannot murder another innocent person in the community, and with this outcome we are satisfied and convinced that lawful retribution is exercised concerning the death of our son.

> So we get to the last question [mitigation] and that is, taking into consideration everything, Ladies and Gentleman, beginning with the circumstances of this crime – and you know what? His [Mr. Storey's] whole family got up here yesterday and pled for you to spare his life. **And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate.**

(Vol. 39; pp 11-12).[4]

The defense attorneys for Mr. Storey testified that the disclosure of this information would have impacted the course of plea negotiations. (Vol. 3, pp. 10-11; 14, 21). Knowledge of this information would have led to very different approaches in jury selection and trial strategy. (Vol. 3, p. 123). At the very least, they would have objected to the prosecutor's lie to the jury. But the Cherrys' opposition remained unknown to anyone other than the two prosecutors until December 20, 2016.

Mr. Storey was scheduled for execution on April 12, 2017. The Cherrys' opposition was exposed by happenstance, as Corey Sessions explained in his affidavit:

(Written Statement of Glenn and Judith Cherry).

4 In an affidavit to the Texas Board of Pardons and Parole, Juror Sven Berger affirmed that he would not have answered the mitigation question negatively. He would have persisted in this position. His vote would have deprived the State of a negative answer to the mitigation question, thereby sparing Mr. Storey's life. (Affidavit of Sven Berger, March 16, 2017).

"On December 20, 2016 around 11:00 a.m. Mr. Glenn Cherry, whom I have known for a few years, came to my place of employment to have his personal vehicle serviced. While waiting for his vehicle to be serviced, Mr. Cherry told me that he had received a letter from the State of Texas which stated that the execution date had been set for April 12, 2017 for Paul Storey. I responded to Mr. Cherry by telling him that I had read about the execution date being set for Paul Storey in the Fort Worth Star-Telegram back in October 2016. Mr. Cherry said that 'they' (State of Texas) wanted to know if the Cherry's wanted to attend the execution. Mr. Cherry said, 'Judy and I don't want any part of that.'

"Mr. Cherry then said 'Judy and I thought you might be able to help us.' I asked Mr. Cherry how is it that I could help them. Mr. Cherry said 'Judy and I don't want to see Paul Storey be executed and we don't want his mother to go through with what we went through with the loss of our son Jonas when he was killed. To be certain that I was understanding the wishes of Glenn and Judy Cherry I said to Mr. Cherry 'so as to be clear, you and your wife do not want Paul Storey to be executed?' Mr. Cherry replied 'yes, that's correct, now we don't want him to get out of prison, we feel he shouldn't ever get out, like the other guy Porter.'

"I then asked Mr. Cherry if he had ever conveyed this to the Tarrant County District Attorney's office. Mr. Cherry said that long before trial, he and his wife had told the Tarrant County District Attorney Prosecutor Christy Jack that they did not want either Paul Storey or Mark Porter to receive the death penalty. In early January 2017, I contacted Mike Ware, Mr. Storey's attorney with this information."

(Affidavit of Corey Sessions, March 31, 2017).

i. The Issues Raised in the Subsequent Writ Petition

Having discovered that the prosecutors had suppressed this material and concealed it from all attorneys, counsel for Mr. Storey filed a subsequent writ application raising the following issues:

> Issue One: Newly-discovered and available evidence compels relief.
>
> Issue Two: The State of Texas denied Applicant his right to due process under the Fourteenth Amendment to the Constitution of the United States by arguing aggravating evidence the prosecution knew to be false.
>
> Issue Three: The prosecution introduced false evidence, thereby depriving Mr. Storey of a fair punishment trial.
>
> Issue Four: The State of Texas denied Applicant his right to Due Process under the Fourteenth Amendment to the Constitution of the United States by suppressing mitigating evidence.
>
> Issue Five: By arguing false aggravating evidence and suppressing mitigating evidence, the State of Texas has rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments to the Constitution of the United States.
>
> Issue Six: The Tarrant County District Attorney's decision to seek death violated the Fourteenth Amendment to the Constitution of the United States by seeking death after offering a life sentence and by failing to consider the wishes of the victim's parents.

The Court of Criminal Appeals remanded to the state district court for further proceedings. *Ex Parte Storey*, Writ No. 75,828-02 (Tex.Crim.App., delivered April 7, 2017)(not designated for publication). Specifically, the Court

found that claims two through five arguably overcame the bar to consideration of the merits of a subsequent writ petition and ordered the trial court to determine whether the basis of the claims were "ascertainable through the exercise of reasonable diligence" by the initial writ attorney, Mr. Robert Ford, and if so, to determine the merits of the claims. *Id.*

ii. The Subsequent Writ Proceedings in District Court

After three days of hearings, the district court made extensive findings of fact.

(Appendix B, pp. 1-16). After observing that counsel for Mr. Storey, Mr. Robert Ford, had filed his initial state application for writ of habeas corpus on May 26, 2010, the court found Mr. Ford, who had since died, to be diligent. *Id.* at 4-5; 12.

The court noted that no one, including other prosecutors, were aware of the Cherry's opposition. *Id.* at 8-9. The court also found that "in most cases family members of murder victims do not wish to speak to lawyers representing the person found guilty of killing their loved one" (which included the Cherrys) and it is highly unusual, in cases such as this one, for the parents of the murder victim to oppose the death penalty for their child's murderer." *Id.* at 4-5. Mr. Ford's was reputed to be zealous and diligent. *Id.* Accordingly, the court found that "Mr.

Ford did not know that the Cherrys opposed the death penalty for the Applicant, his client" and "would not have discovered the factual basis of these claims through the exercise of reasonable diligence." *Id.* at 5.

The prosecutors, both of whom testified at the writ hearing, were found to be not credible in their accounting of events. *Id.* at 8. The court found Glen and Judith Cherry to be credible, as well as the other attorneys who were unaware of their opposition. *Id.* at 6.

The district court also precluded the State from arguing against Mr. Ford's diligence in light of its concealment from everyone, including Mr. Ford. *Id.* at 11-12. "Because the State concealed the evidence at issue in this subsequent writ application, it has forfeited its argument that Applicant's pleading is barred under the doctrine of forfeiture by wrongdoing. The long-standing equitable maxim is that 'no one shall be permitted to take advantage of his own wrong.' *Reynolds v. United States*, 98 U.S. 145, 160 (1878)." *Id.* at 11. It additionally found the State had entered the case with unclean hands. *Id.* at 12. Having made twenty-one findings regarding Mr. Ford's diligence, the court reached the merits and recommended relief to the Court of Criminal Appeals on all four grounds remanded for review. *Id.* at 16.

iii. The Court of Criminal Appeals' Decision

The Court of Criminal Appeals dismissed the writ petition in a published per curiam opinion. *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App. 2019). While it agreed that the State did not inform trial counsel about the Cherrys' opposition to Mr. Storey's execution, it found that the same prosecutor who told trial counsel that the Cherrys "preferred not to be contacted" had also said "that they were certainly free to contact them' if they wished to do so." *Id.* at 439. Moreover, Mr. Cherry had remarked "that he has disclosed his anti-death penalty views to "anybody that wants to know or has ever asked me." *Id.* The Court decided that the failure to present direct evidence "showing what Ford did or did not know regarding the victim's parents' anti-death penalty views," combined with this testimony, defeated the district court's findings of Mr. Ford's diligence. *Id.*

Judge Walker, joined by Judge Slaughter, dissented. *Ex parte Storey*, 584 S.W.3d at 447-462. The dissent found that Mr. Ford's lack of knowledge could be inferred from the circumstantial evidence adduced at the writ hearing. *Id.* Noting Mr. Ford's reputation for diligence, the dissent viewed the discovery of the prosecution's misconduct "like this for a habeas attorney is like hitting the jackpot on the Texas Lottery[.]" *Id.* at 455-456. Moreover, the dissent believed that requiring habeas counsel to approach the survivors of a capital murder victim is

"beyond what a reasonably competent habeas attorney would have done under the circumstances." *Id.* at 456. "'Reasonable' diligence would not go prying into the private feelings of a murder victim's family without a very good reason for doing so. The trial court found that 'in most cases family members of murder victims do not wish to speak to lawyers representing the person found guilty of killing their loved one.'" *Id.* at 456-457.

Judge Yeary dissented as well. *Ex parte Storey*, 584 S.W.3d at 443-447. He did not believe that counsel was required to disbelieve Jack's false argument. *Id.* Relying on this Court's analysis in *Banks v. Dretke*, 540 U.S. 668, 696 (2004), Judge Yeary agreed that "A rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Accordingly, he concluded that Mr. Ford was reasonably diligent. *Id.* at 444.

Judge Hervey, joined by Judges Keasler, Richardson and Newell concurred, agreeing that Mr. Ford failed to exercise due diligence. *Ex parte Storey*, 584 S.W.3d at 440-442. The remainder of the opinion was directed at Judge Yeary's dissenting opinion. The concurrence concluded that the Cherrys' opposition to Mr. Storey's execution and the prosecutor's lie to the jury on that matter was immaterial, and thus no constitutional violation occurred. *Id.* at 441.

Counsel for Mr. Storey filed *Suggestion for Reconsideration on the Court's Own Initiative* on October 2, 2019. (Appendix D). The *Suggestion* complained that the Court's per curiam opinion "imposes a burden unlike anything this Court has ever demanded of State or defense – proof directly from beyond the grave. Short of a seance, this new burden is one that can never be met." (Appendix D, p. 5). The Court of Criminal Appeals denied the *Suggestion* on November 6, 2019, but Judge Newell joined Judges Walker, Yearey and Slaughter to reflect that they would have granted the *Suggestion* and reconsidered its decision. (Appendix E).

REASONS FOR GRANTING THE WRIT

Just as in *Miller v. Pate*, 386 U.S. 1, 6 (1967), "[t]he prosecution deliberately misrepresented the truth." The prosecution in this case suppressed mitigating evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution's misconduct rendered the death penalty in this case unreliable under the Eighth and Fourteenth Amendments to the Constitution of the United States. Its misconduct violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as the state district court concluded, by "reducing the responsibility of jurors by inviting them to acquiesce to the falsely-asserted desire of the victim's family for death, in

violation of the Eighth and Fourteenth Amendments to the Constitution of the United States." (Appendix B, p. 14).

The district court made these finding because it found initial habeas counsel to have acted with diligence and that the factual basis of the claims were not ascertainable due to the State's successful strategy of concealing the truth of the Cherrys' views from everyone, including habeas counsel. Tex. Code Crim. Pro. art. 11.071, §5(e). In light of its on-going misconduct, the district court estopped the State's argument regarding habeas counsel's diligence on the equitable grounds that "it cannot benefit from its wrong-doing by faulting habeas counsel for failing to discover its own misconduct." (Appendix B, pp. 11-12). The district court therefore concluded as a matter of fact that "Mr. Ford did not know that the Cherrys opposed the death penalty for the Applicant, his client" and that he "would not have discovered the factual basis of these claims through the exercise of reasonable diligence." (Appendix B, p. 5).

Despite the well supported factual determinations by the district court, the Texas Court of Criminal Appeals dismissed the subsequent writ petition and denied review of these federal constitutional claims. It did so by creating, for the first time, a barrier to this Court's review of federal constitutional rights. Its

unprecedented interpretation could not be anticipated. Its interpretation of the due diligence requirement is, in this case, literally insurmountable.

The Texas Court of Criminal Appeals's new rule requires direct proof of habeas counsel's knowledge, even if habeas counsel is deceased and even if the State intentionally concealed the evidence from habeas counsel. *Ex parte Storey*, 584 S.W.3d at 439. Circumstantial evidence, however overwhelming, is insufficient as a matter of state law under the Court's new diligence standard. *Id.* In short, the Court of Criminal Appeals has sanctioned exactly what equity punishes – the prosecution's successful concealment of its misconduct from habeas counsel.

The direct effect of the new rule is that no subsequent habeas petitioner whose initial counsel has died can ever have his federal claims reviewed by any court. However clear the violation of the Constitution may be, no matter how well developed the record, no matter how specific the credibility findings made by a trial court, there can be no review under the Court of Criminal Appeals' new, novel approach.

This Court has held that due diligence "is reasonable diligence, not maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010)(internal citations and quotations omitted). The Court of Criminal Appeals'

bar to consideration of federal constitutional claims goes further. For subsequent habeas petitioners, even "maximum feasible diligence" is insufficient. Such petitioners are required to prove lack of knowledge of initial habeas counsel, even if habeas counsel has been fatally struck by lightening and therefore cannot directly attest to what is otherwise obvious, his or her lack of knowledge.

Where a petitioner "could not fairly be deemed to have been apprised of" a state procedural rule barring review of claims of violations of federal constitutional rights, this Court may exercise its jurisdiction and power to review. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 457-58 (1958). "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* The Court of Criminal Appeals has more than erected an unexpected and unfair procedural barrier to substantive review of claims of federal constitutional violations. It has created a door that no court, most pointedly, this Court, can open.

"[W]here a State allows questions of this sort [federal constitutional claims] to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal

right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner." *Williams v. Georgia*, 1955, 349 U.S. 375, 382-83 (1955). Accordingly, this diligence rule does not constitute an adequate state ground precluding this Court's review. *Barr v. Columbia*, 378 U.S. 146, 149-50 (1964)("state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review").

Mr. Storey's right to relief under settled federal constitutional law is clear. The presentation of false testimony which affects the verdict constitutes prosecutorial misconduct. *Giglio v. United States*, 405 U.S. 150, 152, 153, n.4 (1972)(prosecutor falsely told jury that its key witness "received no promises that he would not be indicted," held to be a violation of the Due Process Clause).

In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), a desperate petitioner filed a petition for original writ of habeas corpus in this Court because his efforts at federal review had been denied. *Id.* at 109-10. While denying the petitioner's leave to file in light of available state court avenues of relief, this Court declined the State's narrow construction of the Due Process Clause and held that a prosecution's "deliberate deception of court and jury by the presentation of testimony known to be perjured" by the prosecution falls within this Court's view

and condemnation of such conduct. *Id.* at 112-13 ("Such a contrivance by a State to procure the conviction and imprisonment of a defendant is [] inconsistent with the rudimentary demands of justice[.]"). Seven years after *Mooney v. Holohan*, this Court affirmed that the prosecution's knowing misrepresentations violated "the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody." *Pyle v. Kansas*, 317 U.S. 213, 216 (1942). This Court again affirmed that the prosecution's intentional falsity of material facts deprive a defendant of due process. *Banks v. Texas*, 355 U.S. 28, 31-32 (1957)(prosecutor's concealment of the falsity of key evidence violates due process).

If this jurisprudence were not clear enough, this Court decided that the prosecution's intentionally false argument to a jury violates the Due Process Clause. *Miller v. Pate*, *supra*. In *Miller v. Pate*, the prosecution won a capital murder conviction by introducing false evidence of blood on the eight-year-old murder victim. Knowing the falsity of this evidence, the prosecution argued to the jury facts it knew to be untrue. *Miller v. Pate*, 386 U.S. at 4. The reddish stain was not dried blood, but paint, which the prosecutor knew as he argued the contrary to the jury. This Court condemned the prosecution's deliberate misrepresentation, discovered – notably – only on a subsequent writ petition.

This Court, exasperated but emphatic, declared: "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here." *Miller v. Pate*, 386 U.S. at 7 (citations omitted). The Texas Court of Criminal Appeals has invited this Court to remind it why the Due Process Clause is offended by the prosecution's intentional falsity to garner convictions or, in this case, win death sentences.

The falsehood that "all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate" violated the Due Process Clause because it was false and the prosecutors knew it was false. Its materiality is underscored if not established by this Court's holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. at 328-29. In *Caldwell*, this Court was concerned with the impact upon a jury reassured that its decision would be ultimately handled by anonymous but superior judicial arbiters.

Here, this Court is presented with a shift of responsibility by jurors not to anonymous decisionmakers, but to the parents of the murder victim. And even that was a lie. The principle of *Caldwell* should apply with fury. This Court has already recognized the reality that jurors are influenced by the knowledge that a reviewing court might correct any mistaken determination that the defendant deserved death, and held that such influence violates the Eighth Amendment. This case is worse than Caldwell because the jury was told that a death sentence had no risk of mistake.

According to the prosecution lie, execution was the will of the victim's parents. Any doubt about the propriety of a death sentence was relieved by the prosecution's matter-of-fact misrepresentation that the people with greater moral authority to make such a judgment (the victim's parents) had already decided the matter. For the juror inclined to give a sentence of less than death, the prayers of grieving parents would surely be the crucible for execution. A prosecution's death penalty falsities both offend the Eighth Amendment's concerns and compounds them under settled Fourteenth Amendment.

None of these considerations would have arisen had the prosecution simply disclosed the truth of the Cherrys' sentiments under equally settled federal constitutional law. The prosecution appreciated the value of its evidence, hid that

evidence, and argued in its death penalty phase a key argument it knew to be untrue. It then hid all of the information from habeas counsel. Perhaps, worst of all, the prosecution cover-up continued through the most recent writ hearings where the former trial prosecutors obviously perjured themselves as was found by the district judge. The Court of Criminal Appeals did not disturb this finding, but was, evidently, completely untroubled by the obvious perjury.

This state of affairs does not trouble five members of the Court of Criminal Appeals. Because of this decision, it will never be troubled again. Unless this Court intervenes, misconduct involving federal constitutional rights will never be heard of again whenever a petitioner has the misfortune of a deceased initial habeas counsel.

CONCLUSION AND PRAYER

Petitioner respectfully requests that the Court grant the petition for a writ of certiorari.

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CERTIFICATE OF SERVICE: By my signature below, I certify I have served a true and correct copy of the foregoing pleading upon counsel for the State, Attorney Pro Tem Travis Bragg, at Travis.Bragg@oag.texas.gov on December 27, 2019.