NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL DAVID STOREY,
Petitioner,

v.

State of Texas,
Respondent.

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

APPENDIX

A. The Texas Court of Criminal Appeals' Remand Order

B. District Court's Findings of Fact, Conclusions of Law and Recommendation for Relief.

C. The Court of Criminal Appeals' Opinions and Per Curiam Dismissal of Petitioner's Subsequent Petition for Writ of Habeas Corpus

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E. Texas Court of Criminal Appeals' Denial of Petitioner's *Suggestion*

Appendix A

The Texas Court of Criminal Appeals' remand order

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-75,828-02

EX PARTE PAUL DAVID STOREY, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. C-3-011020-1042204-B IN CRIMINAL DISTRICT COURT NO. 3 TARRANT COUNTY

***Per curiam*. KEEL, J., dissents.**

ORDER

We have before us a post-conviction application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay applicant's execution.

In September 2008, a jury convicted applicant of the offense of capital murder for murdering a person in the course of robbing him. TEX. PENAL CODE § 19.03(a)(2). The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure

Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Storey v. State*, No. AP-76,018 (Tex. Crim. App. Oct. 6, 2010)(not designated for publication). On May 26, 2010, applicant filed in the convicting court his initial application for a writ of habeas corpus in which he raised eight claims. This Court denied applicant relief. *Ex parte Storey*, No. WR-75,828-01 (Tex. Crim. App. June 15, 2011)(not designated for publication).

On March 31, 2017, applicant filed in the convicting court his first subsequent habeas application. In the subsequent application, applicant asserts that (1) newly-discovered evidence "compels relief"; (2) the State denied him his right to due process because it argued "evidence" it knew to be false; (3) the State introduced false evidence which unconstitutionally deprived him of a fair punishment trial; (4) the State denied him his right to due process by suppressing mitigating evidence; (5) by arguing false aggravating evidence and suppressing mitigating evidence, the State rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments; and (6) the State violated the Fourteenth Amendment by seeking death in this case.

After reviewing applicant's writ application, we find that claims two through five arguably satisfy the requirements of Article 11.071 § 5. However, the record is not sufficient to determine with assurance whether applicant could have previously discovered the evidence complained of in the claims. Accordingly, we remand these claims to the trial court for it to develop the record. The trial court is ordered to make

findings of fact and conclusions of law regarding whether the factual basis of these claims was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed. If the court determines that the factual basis of the claims was not ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed, then it will proceed to review the merits of the claims.

Once the court has completed its review, it shall order the case returned to this Court. Applicant's execution is stayed pending further order of this Court.

IT IS SO ORDERED THIS THE 7th DAY OF APRIL, 2017.

Do Not Publish

Appendix B

District Court's findings of fact, conclusions of law and recommendations for relief

NO. C-3-W011020-1042204-B
[WR-75,828-02]

EX PARTE	§	**IN CRIMINAL DISTRICT**
	§	
	§	**COURT NO. 3 OF**
	§	
PAUL DAVID STOREY	§	**TARRANT COUNTY, TEXAS**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

On this day came to be heard Applicant Paul David Storey's subsequent application for writ of habeas corpus filed pursuant to Article 11.071 of the Texas Code of Criminal Procedure and on remand from the Court of Criminal Appeals. Having considered the pleadings of the parties, the arguments of counsel, the law applicable to the case, and the parties proposed findings of fact and conclusions of law, the Court hereby makes the following findings of fact and conclusions of law with a recommendation that relief be granted.

I.
PROCEDURAL HISTORY

1. A jury found Mr. Storey guilty of capital murder on September 10, 2008. The jury returned punishment findings in favor of death and the District court entered a sentence of death on September 15, 2008. The Court of Criminal Appeals affirmed. *Storey v. State*, AP-76,018 (Tex. Crim. App. Oct. 6, 2010 (not designated for publication). The Supreme Court of the United States denied Storey's petition for writ of certiorari on April 3, 2011. *Storey v. Texas*, 563 U.S. 919 (2011).

2. Counsel for Mr. Storey, Mr. Robert Ford, filed his initial 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. June 15, 2011) (not designated for publication).

3. Storey then challenged his conviction and sentence through a federal petition for writ of habeas corpus, which the federal district court denied. *Storey v. Stephens*, No. 4:11-CV-433, 2014 WL 11498164, at *1 (W.D. Tex. June 9, 2014). The Fifth Circuit denied him a Certificate of Appealability. *Storey v. Stephens*, 606 Fed. App'x 192, 198 (5th Cir. Mar. 18, 2015). The Supreme Court again denied his petition for a writ of certiorari, thus concluding his federal habeas proceedings. *Storey v. Stephens*, 136 S. Ct. 132 (2015).

4. On September 27, 2016, the trial court set an execution date for April 12, 2017.

5. On March 31, 2017, Applicant filed a subsequent application for writ of habeas corpus pursuant to Article 11.071 §5 of the Code of Criminal Procedure alleging six grounds for relief: "(1) newly-discovered evidence 'compels relief'; (2) the State denied him his right to due process because it argued 'evidence' it knew to be false; (3) the State introduced false evidence which unconstitutionally deprived him of a fair punishment trial; (4) the State denied him his right to due process by suppressing mitigating evidence; (5) by arguing false aggravating evidence and suppressing mitigating evidence, the State rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments; and (6) the State violated the Fourteenth Amendment by seeking death in this case." *Ex parte Storey*, No. WR-75,828-02, 2017 WL 1316348, at *1 (Tex. Crim. App. Apr. 7, 2017) (not designated for publication).

6. On April 7, 2017, the Court of Criminal Appeals stayed Applicant's execution and remanded this case to the trial court to determine whether the factual basis of these claims was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed. If the claims were not so ascertainable, this Court was ordered to proceed to review the merits of four of the six claims. *Ex parte Storey*, No. WR-75,828-01 (Tex. Crim. App. April 7, 2017).

7. The Court of Criminal Appeals designated four issues for resolution:

   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 to the jury at punishment that the prosecution knew to be false.

   Issue Three: The prosecution introduced false evidence, thereby depriving Mr. Storey of a fair punishment trial and in violation of the Fourteenth Amendment to the Constitution of the United States.

   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 at punishment 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.

8. On August 9, 2017, Applicant filed his *Request for Affirmative Finding That Robert Ford Exercised Due Diligence in His Representation of Applicant.*

9. On September 11 and 12, 2017, and October 20, 2017, this Court presided over habeas proceedings regarding the designated issues.

10. The following individuals testified during proceedings: Christy Jack, Robert "Bob" Gill, Robert Foran, Larry Moore, Ashlea Deener, Mark Daniel, William "Bill" Ray, Tim Moore, Cory Session, Glenn Cherry, Judith "Judy" Cherry, Leticia Martinez, Mollee Westfall, Jeffrey Cureton, Edward "Chip" Wilkinson, John Stickels, Fred Cummings, Terri Moore, and Suman Cherry.[1]

11. The Court also admitted the following exhibits: Applicant's Exhibits 1, 2, 3, and 5 (AX); and Respondent's Exhibit 1 (RX).[2]

12. Following the hearing, the Court ordered the parties to submit "additional brief[ing]" or "proposed findings of fact and conclusions of law." 4.SHRR.100.[3]

[1] The Court refers only to Larry Moore as "Moore," and to Tim Moore and Terri Moore by their full names. The Court refers to Glenn, Judy, and Suman Cherry by their first names.
[2] The Court sustained Respondent's objection as to Applicant's Exhibit 4 and included it with the record upon Storey's request only to preserve the issue for appeal. 4.SHRR.10
[3] SHRR refers to the Reporter's Record from the evidentiary hearing held by this Court.

II.

FINDINGS OF FACT

A. Robert Ford exercised due diligence as habeas counsel

1. Robert Ford, now deceased, was state habeas counsel for Applicant in his initial state writ brought under art. 11.071.

2. Glenn and Judith Cherry, the parents of the victim, opposed Applicant receiving the death penalty. (3.SHRR.167-168; 174; 185).

3. Robert Foran and Christy Jack were the trial prosecutors for the State in both this case and in the co-defendant, Mark Porter's, case. Both Foran and Jack knew, prior to Applicant's trial, that Glenn and Judith Cherry opposed Applicant receiving the death penalty.

4. Neither Foran nor Jack nor anyone else from the State, ever informed Mr. Ford that Glenn and Judith Cherry opposed a death sentence for Applicant. (Vol. 2, p. 259-260). Likewise, neither Foran nor Jack, nor anyone else from the State ever informed Larry Moore, Bill Ray (Applicant's trial attorneys), or Mark Daniel or Tim Moore (the co-defendant's attorneys), that Glenn and Judith Cherry opposed the death penalty for both Applicant and his co-defendant, Mark Porter.

5. Tarrant County Assistant District Attorney Edward "Chip" Wilkinson, who represented the State on direct appeal and during the initial state habeas proceedings, was unaware of the Cherrys' opposition to Applicant receiving the death penalty. (4.SHRR.19-21).

6. Mr. Ford had a strong reputation for his diligence. He was described by various attorneys and judges as "extremely zealous," "tenacious," "very aggressive," "gifted," a "passionate lawyer," "fearless advocate," "extremely diligent," and invariably regarded as an exceptional and diligent attorney. (2.SHRR.132; 203-204)(3.SHRR.29-30; 100; 203)(4.SHRR.28-31; 40; 53).

7. This Court finds 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. (3.SHRR.107); (4.SHRR.38).

8. This Court finds that 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.

9. Robert Foran told Bill Ray and Larry Moore, trial counsel for Applicant, that the Cherrys "preferred not to be contacted." (2.SHRR.252).

10. No witness to these proceedings faulted Mr. Ford or any other of Applicant's counsel, or any of the co-defendant's counsel for failing to contact the Cherrys to determine their views on their respective clients receiving the death penalty.

11. Christy Jack did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact. (2.SHRR.130-131).

12. Robert Foran did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact. (2.SHRR.259-260).

13. Mr. Ford did not know that the Cherrys opposed the death penalty for the Applicant, his client.

14. Mr. Ford would not have discovered the factual basis of these claims through the exercise of reasonable diligence.

15. The factual basis of the four claims before this Court, i.e., the Cherrys' opposition to Applicant receiving the death penalty and the corresponding false argument made by trial prosecutor Jack, was not ascertainable by Applicant or his counsel, through the exercise of reasonable diligence on May 26, 2011, the day the initial state writ was due and was filed.

16. This Court further finds that the failure of Mr. Ford to ascertain the Cherrys' opposition to the death penalty in general and specifically as to the Applicant, does not constitute a lack of reasonable diligence.

17. This Court finds that Mr. Ford acted with reasonable diligence.

B. Findings of Fact Regarding Claims Two, Three, and Five: whether the prosecution introduced known, false evidence, and made known false assertions during argument, that the Cherrys supported a death sentence for Applicant.

18. Glenn and Judith Cherry opposed Applicant receiving the death penalty and communicated their opposition to trial prosecutors Robert Foran and Christy Jack, the first time they met about the case, prior to trial. (3.SHRR.167-168; 186-187).

19. Both Christy Jack and Robert Foran knew the Cherrys opposed Applicant receiving the death penalty. (2.SHRR.47; 70-72; 146-147).

20. Neither Christy Jack, nor Robert Foran, nor anyone else from the State disclosed, or otherwise communicated to Applicant's trial counsel, Larry Moore or Bill Ray that Glenn and Judith Cherry opposed the death penalty for their client, Paul Storey.

21. At punishment, Christy Jack argued to the jury, in pertinent part, "And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate." (39.RR(Trial Record).11-12).

22. This argument was improper because it was outside the record.

23. Christy Jack's argument was prejudicial in as much as it purported to interject the wishes of the victim's family for the jury to return a verdict of death for Applicant, which is constitutionally impermissible.

24. Christy Jack conceded during the habeas proceeding that her argument was outside the record and improper but that she did not think it would result in a mistrial. (2.SHRR.119-120).

25. The Cherrys' opposition to the death penalty and their opposition to Applicant's execution is long-standing and deeply-felt. (3.SHRR.169-170)(4.SHRR.95-99).

26. Christy Jack testified Glenn Cherry approached her after Marilyn Shankle, Paul Storey's mother, testified at punishment and asked, "do you want me to or should I testify that we want the death penalty[.]" (2.SHRR.102-103).

27. This Court finds Jack's account regarding Glenn Cherry's question is not credible for the following reasons:
    a. Glenn Cherry is credible. This Court believes his testimony wherein he denies he or Judith Cherry ever supported the death penalty for Applicant during the trial.
    b. This Court further believes that Glenn Cherry never communicated to Jack or Foran during the trial, or at any other time, that either he or Judith Cherry supported the death penalty for Applicant. (3.SHRR.167-170).
    c. Judith Cherry is credible. This Court believes her testimony wherein she denies she or Glenn Cherry ever supported the death penalty for Applicant during the trial, and that she never communicated to Jack or Foran during the trial, or at any other time, that either she or Glenn Cherry supported the death penalty for Applicant. (3.SHRR.185-187; 4.SHRR.94-95).

d. Robert Foran testified inconsistently with Jack's version in that under her version, Glenn Cherry had approached Robert Foran and the conversation had already begun when she walked up. (2.SHRR.96-98). Under Foran's version, the comments were directed at Jack from the start, and Foran just overhead some of the conversation. (2.SHRR.241-243).
e. Glenn and Judith Cherry deny that this encounter with Jack and/or Foran, or anything like it, ever happened.
f. Robert Foran conceded that Christy Jack's argument was, in fact, untrue as to Glenn and Judith Cherry. (2.SHRR.247-248).
g. Christy Jack and Robert Foran testified that the two of them never had a conversation about Glenn Cherry's change in his views on capital punishment. (2.SHRR.107; 238).
h. It is not credible that prosecutors would have had no discussion about such a pivotal change in Glenn Cherry's views; and hence, this testimony creates an additional reasonable inference that the account is not true.
i. Christy Jack testified she did not question Mr. Cherry about his dramatic change in position. (2.SHRR.105). This inexplicable behavior further casts doubt on the believability of her testimony regarding a mid-trial conversation with Mr. Cherry in which he purportedly completely changed his position on the death penalty.
j. Christy Jack admitted that she, at the very least, intentionally and improperly argued outside the record in making her assertion, "And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate." Her admission of this prosecutorial misconduct further undermines her credibility. (2.SHRR.107; 109).
k. Assistant criminal district attorney Ashlea Deener testified that her opinion of Christy Jack's credibility is "not a favorable one." (3.SHRR.89).
l. The State introduced testimony of Letitia Martinez, Judge Mollee Westfall and Magistrate Jeffrey Cureton, all of whom had a favorable opinion of Christy Jack's character for truthfulness. (3.SHRR.197-210). However, Ms. Martinez is Jack's current partner in private practice. Judge Westfall had equally favorable opinions of Larry Moore, Mark Daniel and Tim Moore, all of whom contradict Christy Jack's accounts. Magistrate Cureton is Ms. Martinez' husband. Magistrate Cureton had never handled a death penalty case and had no opinion of any of the experienced death penalty attorneys involved in this case. In light of Judge Westfall's endorsement of the veracity of Larry Moore and the attorneys for Mr. Porter, this Court finds that the opinion evidence offered by the State does not alter state of the evidence or the other findings in this case.

m. No such opinion evidence was offered in support of Robert Foran.
n. Suman Cherry made an out of court admission that Jack's and Foran's contention that either Glenn or Judith Cherry ever deviated from their opposition to the death penalty for Paul Storey was "bullshit." (4.SHRR.95-97).
o. As the findings fact regarding the *Brady* issue detail *infra*, Christy Jack and Robert Foran are not credible and their testimony is not believable.

28. Even were Christy Jack's account of her mid trial exchange with Glenn Cherry true, it is vague and does not change the falsity of the prosecution argument that "it goes without saying that everyone" who loved the victim wanted Mr. Storey's death.

29. There is no evidence that Judith Cherry ever had any change of heart in her opposition to Applicant's execution.

30. This Court finds Jack's argument to be false, regardless of whether she had the conversation with Mr. Cherry as related by Jack.

C. Findings of Fact Regarding Claim Four: whether the prosecution suppressed Glenn and Judith Cherrys' opposition to Applicant receiving the death penalty.

31. On February 8, 2008, the trial court ordered the prosecutors 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," and that the State answer the Defense's request for such information in writing. (2.SHRR.77)(Applicant's exhibit 2).

32. It is uncontroverted that the disclosures required by the Order of February 8, 2008 would also include the Cherrys' opposition to Applicant receiving the death penalty. (2.SHRR.78).

33. Christy Jack and Robert Foran were aware of the Cherrys' opposition to Applicant receiving the death penalty. (2.SHRR.47; 70-72; 146-147).

34. Under the Order of February 8, 2008, the prosecution had a duty to disclose the Cherrys' opposition to Applicant receiving the death penalty to Larry Moore and Bill Ray. Applicant and his attorneys had every right to rely on the Court Order and that the state would adhere to it.

35. It is exceptional and unusual that the parents of a murdered son would seek to spare the life of their child's killer. (2.SHRR.53); (3.SHRR.14, 84, 121); (3.SHRR.14).

36. Christy Jack and Robert Foran regarded this evidence as out of the ordinary and material and led to a discussion with their supervisor Bob Gill about it. (2.SHRR.62; 83; 199; 202).

37. Larry Moore viewed the evidence as material. He testified in detail how it would have changed the course of his representation and the trial. (3.SHRR.10-11; 14; 21).

38. Bill Ray also regarded this evidence as material. (3.SHRR.123); (5.SHRR, Applicant's exhibit 4).

39. Tim Moore also regarded this evidence as material. (3.SHRR.136).

40. Mark Daniel's testimony further details the materiality of the Cherrys' opposition to the death penalty for Applicant and his own client, co-defendant Mark Porter. (3.SHRR.98-99; 106-107).

41. Based upon the unanimity of the testimony of witnesses for the State as well as Applicant, this Court finds the evidence of the Cherrys' opposition to Mr. Storey's execution to be both favorable and material. The State had the obligation to disclose the information under the United States Constitution and the Court's order.

42. The prosecution did not reveal the Cherrys' opposition to Mr. Storey's execution in the "State's First Amended Notice of *Brady* Material," filed July 10, 2008. (1.SHRR.78-79)(Applicant's exhibit 3) (3.SHRR.29).

43. This Court finds that Applicant's trial counsel, Larry Moore and Bill Ray, were not made aware of Glenn and Judith Cherrys' opposition to Applicant receiving the death penalty based on the following evidence:
    a. Larry Moore testified he was never informed about the Cherrys' position from the prosecution. (3.SHRR.9-10).
    b. Bill Ray was unaware of this evidence until 2017, after Larry Moore informed him. (3.SHRR.121-122); (4.SHRR.71).
    c. Neither Tim Moore nor Mark Daniel were ever made aware of the evidence by the prosecution. (3.SHRR.97-98; 99; 133).
    d. Neither John Stickels, Applicant's appellate attorney, nor Robert Ford, Applicant's habeas counsel, were informed about or otherwise knew about the evidence. (4.SHRR.19-31).
    e. Assistant Tarrant County Criminal District Attorney Chip Wilkinson, who handled the direct appeal and initial state writ for the state, did not know about

the Cherrys' opposition to Applicant receiving the death penalty. (4.SHRR.26-28).

f. This Court finds no evidence that is consistent with defense attorney knowledge of this evidence, i.e., no defense notes reflecting knowledge, no discussions of the evidence and no use or effort to use this evidence, and no objection when the State unequivocally argued the opposite to the jury.
g. Likewise, the Court finds that there is absolutely no written record or memoranda in the State's possession that would support Robert Foran's and Christy Jack's contention that the information was disclosed.
h. This Court finds the totality of the circumstantial evidence to be inconsistent with disclosure to defense counsel, based on the trial record and the records of all post-conviction proceedings.
i. This Court finds Larry Moore, Bill Ray, Tim Moore and Mark Daniel to be credible, experienced attorneys in death penalty cases; and this Court finds it implausible that any and/or all of these attorneys would have been the recipients of this evidence, yet left no record that they did receive it and all decided to do nothing at all with this information.

44. This Court finds Larry Moore and Bill Ray to be credible and their testimony trustworthy.

45. Christy Jack confirmed that she did not formally disclose the evidence to any defense attorney. (2.SHRR.62).

46. Robert Foran never testified he ever disclosed the evidence to Larry Moore.

47. Christy Jack testified that she did not make a formal disclosure before jury selection. (2.SHRR.62).

48. Robert Foran testified he disclosed the evidence to Bill Ray long before jury selection. (2.SHRR.217-220; 225).

49. Robert Foran's testimony that he ever disclosed the evidence to Bill Ray is not credible based on the following evidence:
   a. Robert Foran testified he made disclosure to Bill Ray in January or February, 2007. (2.SHRR.218; 225-226). This testimony is inconsistent with Foran's supervisor, Bob Gill, who testified that Foran discussed the issue of disclosure with him sometime after July 1st or 2nd, 2008. (2.SHRR.199; 202). This Court can discern no reason for prosecutors to discuss disclosure of material evidence in July 2008 had disclosure already been made long before, in early 2007. In the alternative, this Court can discern no reason for a prosecutor to seek supervisory affirmation for a disclosure that purportedly occurred more than a year prior.

b. Robert Foran testified that his disclosure was verbal only and that he made no written internal memo that he had disclosed it. (2.SHRR.225-226).
c. A disclosure of this evidence was not included in any written Brady notice.
d. Robert Foran testified he also disclosed the information to either Tim Moore or Mark Daniel who were originally scheduled to go to trial before Applicant. (2.SHRR.225). Like Applicant's trial counsel, both Mr. Tim Moore and Mr. Daniel denied they were ever made aware of the evidence.

50. This Court, therefore, finds Robert Foran's testimony not credible regarding the disclosure of material evidence. This Court further finds that his testimony that he disclosed that Judith and Glenn Cherry opposed the death penalty for Mr. Storey to be untrustworthy.

51. This Court finds also that the following sequence of events occurred which lends further support to the finding that the prosecution did not disclose the evidence:
    a. Glenn Cherry approached Cory Session on December 20, 2016, and informed Mr. Session about their opposition to Mr. Storey's then-imminent execution. (3.SHRR.152-172).
    b. Mr. Session informed Mike Ware, one of the attorneys for Mr. Storey (3.SHRR.158), and Mr. Ware, in turn, informed Larry Moore. (3.SHRR.9-10).
    c. Mr. Moore later informed his co-counsel, Bill Ray. (3.SHRR.9)(5.SHRR, Defense Exhibit 4).
    d. These events further confirm that no disclosure regarding this issue was ever made to Applicant's counsel until after December 20, 2016.

52. This Court finds that the prosecution had a duty to disclose, but did not disclose to any defense attorney that Judith and Glenn Cherry opposed the death penalty for Applicant.

III.
CONCLUSIONS OF LAW

A. The State is precluded from arguing that Applicant is barred under Section 5 of Article 11.071 of the Code of Criminal Procedure in light of the findings of fact made herein.

1. 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). *See also Smith v. State*, 100 Tex. Crim. 23, 235, 272 S.W. 793, 794 (Tex. Crim. App. 1925) ("It is [a] well settled principle of law

that a party cannot benefit from his own wrong [.]"). Because the State secreted evidence it was legally required to disclose, it cannot benefit from its wrong-doing by faulting habeas counsel for failing to discover its own misconduct.

2. For similar reasons, this Court concludes that equity precludes the State from asserting that Section 5 bars this Court from consideration of Applicant's claims. *Fay v. Noia*, 372 U.S. 391, 438 (1963)("[H]abeas corpus has traditionally been regarded as governed by equitable principles."). Because the State comes to this Court with unclean hands due to its suppression of *Brady* material and false use of the evidence, it is barred from reliance on Section 5. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945). This Court therefore equitably estops the State from any argument that Applicant's state habeas counsel, Robert Ford, or any of Applicant's prior counsel, Larry Moore, Bill Ray, or John Stickels, failed to act with due diligence or that the factual basis of the claims was ascertainable. *Gulbenkian v. Penn*, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952).

B. This Court concludes that Robert Ford exercised reasonable diligence as habeas counsel.

1. Robert Ford was appointed as state habeas counsel under Article 11.071 of the Code of Criminal Procedure to represent Applicant in his state post-conviction proceedings.

2. Robert Ford was diligent.

3. Notwithstanding his exercise of reasonable diligence, Robert Ford or Larry Moore, Bill Ray, or John Stickels did not ascertain the factual basis of the four claims.

4. Robert Ford could not have ascertained the factual basis of any of the four claims based on the Cherrys' opposition to Mr. Storey receiving the death penalty on or before May 26, 2011, the date of the filing of the initial writ application.

C. The prosecution introduced false evidence that the Cherrys supported Applicant's execution and knew the evidence to be false.

1. Robert Ford could not have ascertained the factual basis of any of the four claims based on the Cherrys' opposition to Mr. Storey receiving the death penalty on or before May 26, 2011, the date of the filing of the initial writ application.

2. This Court concludes that the jury argument regarding the Cherrys support for Applicant's execution constituted false evidence. *Ex parte Robbins*, 360 S.W.3d

445, 460 (Tex. Crim. App. 2011)(quoting *Ex parte Chavez*, No. AP-76291 (Tex. Crim. App., delivered November 17, 2010)(not designated for publication)(internal citations omitted)(false evidence includes "'improper suggestions, insinuations and, especially, assertions of personal knowledge.'[.]"). *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).

3. The prosecution was aware of the falsity of its argument.

4. The prosecution made the argument intending it to affect the jury's verdict.

5. This Court concludes the false argument was reasonably likely to affect the jury's verdict.

6. The prosecution's knowing, false argument violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Miller v. Pate*, 386 U.S. 1, 4 (1967).

D. The prosecution suppressed evidence that the Cherrys supported Applicant's execution.

1. The prosecution had an affirmative, legal duty to reveal to the defense the evidence regarding the Cherrys' desire that Applicant be spared death both under the trial court's order and under the Fourteenth Amendment to the Constitution of the United States. *Brady v. Maryland*, 373 U.S. 83 (1963); *Ex parte Mitchell*, 853 s.W.2d 1, 4 (Tex. Crim. App. 1993). This duty applies to evidence that is material to punishment. *Brady v. Maryland*, 373 U.S. at 87. The prosecution had an affirmative duty to disclose this information under Texas Disciplinary Rule of Professional Conduct 3.09(d).

2. The evidence of the Cherrys' opposition to the death penalty for Mr. Storey constituted mitigating evidence.

3. The evidence of the Cherrys' opposition to the death penalty for Mr. Storey was relevant to the mitigation issue under Article 37.071, Section 2(e)(1) of the Code of Criminal Procedure.

4. If the evidence can serve as a basis for a sentence less than death, jurors contemplating the mitigation issue are entitled to consider the evidence. *Skipper v. South Carolina*, 476 U.S. 1 (1986).

5. The evidence of the Cherrys' opposition to the death penalty for Mr. Storey was admissible. Even if not initially admissible, the prosecution's argument misleading

the jury invited its admission. *Bowley v. State*, 310 S.W.3d 431, 435 (Tex. Crim. App. 2010)("[A] party who 'opens the door' to otherwise inadmissible evidence risks the adverse effect of having that evidence admitted."); *Bass v. State*, 270 S.W.3d 557 (Tex. Crim. App. 2008)(counsel's statements to jury opens door to evidence); *Daggett v. State*, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005)(door is opened when the State leaves a false impression to the jury).

6. Disclosure of the Cherrys' opposition would have chilled Jack's efforts to prejudice the jury with her false argument.

7. This Court concludes that had this evidence been disclosed, there is a reasonable probability that the jury would have answered the mitigation issue differently. The existence of this probability undermines this Court's confidence in the outcome of the punishment trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

E. Conclusions of Law Regarding Claim Five: whether the death penalty in this case is constitutionally unreliable.

1. The prosecution's suppression of mitigating evidence, as well as its injection of false evidence, has rendered the death penalty in this case to be unconstitutionally unreliable and a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. *See e.g., Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). *Johnson v. Mississippi*, 486 U.S. 578 (1988); *See, also, Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010).

2. The false argument also had the effect of 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. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

III.
RECOMMENDATIONS

1. This Court recommends relief on the second ground for relief because 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.

2. This Court recommends relief on the third ground for relief because the prosecution introduced false evidence, thereby depriving Mr. Storey of a fair punishment trial

and in violation of the Fourteenth Amendment to the Constitution of the United States.

3. This Court recommends relief on the fourth ground for relief because 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.

4. This Court recommends relief on the fifth ground for relief because the State of Texas rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments to the Constitution of the United States by suppressing mitigating evidence and introducing false evidence to the jury, which would have been constitutionally prohibited, even if it were true.

5. This Court recommends to the Court of Criminal Appeals that it reform the death sentence in this case to a life sentence without parole.

SIGNED AND ENTERED this the 8th day of May 2018.

JUDGE PRESIDING

NO. C-3-W011020-1042204-B

EX PARTE	§	**IN CRIMINAL ~~DISTRICT~~**
	§	
	§	**COURT NO. 3 OF**
	§	
PAUL DAVID STOREY	§	**TARRANT COUNTY, TEXAS**

ORDER

Having entered these findings of fact and conclusions of law, this Court recommends that Applicant's application for relief be **GRANTED**.

The Court **ORDERS THE CLERK** to immediately forward to the **Court of Criminal Appeals** a copy of this order, along with a copy of Applicant's application; the State's answer; the orders of this court; and the proposed findings of fact and conclusions of law of both parties, and any other documents duly filed by the parties. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(d)(1).

The clerk is further ordered to send to **Applicant's counsel** and **counsel for the State** a copy of these findings of fact and conclusions of law. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(d)(1).

SIGNED AND ENTERED this the 8th day of May 2018.

JUDGE PRESIDING

Appendix C

The Court of Criminal Appeals' opinions and per curiam dismissal of petitioner's subsequent petition for writ of habeas corpus

Ex parte Storey

Court of Criminal Appeals of Texas

October 2, 2019, Decided; October 2, 2019, Filed

NO. WR-75,828-02

Reporter

584 S.W.3d 437 *; 2019 Tex. Crim. App. LEXIS 958 **; 2019 WL 4866006

EX PARTE PAUL DAVID STOREY, Applicant

Notice: Publish

Prior History: [**1] ON APPLICATION FOR WRIT OF HABEAS CORPUS. CAUSE NO. C-3-011020-1042204-B IN CRIMINAL DISTRICT COURT NO. 3, TARRANT COUNTY.

Ex parte Storey, 2017 Tex. Crim. App. Unpub. LEXIS 283 (Tex. Crim. App., Apr. 7, 2017)

Counsel: For APPELLANT: Keith S. Hampton, Austin, TX; Michael Logan Ware, Fort Worth, TX.

For STATE: Travis G. Bragg, Assistant Attorney General / Criminal District Attorney Pro Tem Tarrant County, Austin, TX.

Judges: HERVEY, J., filed a concurring opinion in which KEASLER, RICHARDSON and NEWELL, JJ., joined. YEARY, J., filed a dissenting opinion in which SLAUGHTER, J., joined. WALKER, J., filed a dissenting opinion in which SLAUGHTER, J., joined. KEEL, J., concurred.

Opinion

[*438] *Per Curiam.*

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In September 2008, a jury convicted Applicant of the offense of capital murder for murdering a person in the course of robbing him. Tex. Penal Code § 19.03(a)(2). The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the

trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Storey v. State*, No. AP-76,018, 2010 Tex. Crim. App. Unpub. LEXIS 602 (Tex. Crim. App. Oct. 6, 2010)(not designated for publication). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Storey*, No. WR-75,828-01, 2011 Tex. Crim. App. Unpub. LEXIS 441 (Tex. Crim. App. June 15, 2011)(not designated for publication). After Applicant unsuccessfully pursued relief in federal habeas court, the trial court set [**2] an execution date for April 12, 2017.

On March 31, 2017, Applicant filed this subsequent application for writ of habeas corpus raising six claims for relief. On preliminary review, we found that the following four claims arguably satisfied the requirements of Article 11.071, § 5:

> 2. 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.
>
> 3. The prosecution introduced false evidence, thereby depriving Applicant of a fair punishment trial and in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> 4. 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.
>
> 5. 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.

These claims arise from a statement that a prosecutor made during closing argument at the punishment phase of trial that "all of [the victim's] family and everyone who loved him believe the death penalty is appropriate." Applicant contends that he recently discovered that the parents of the victim were opposed to the death penalty and they communicated their views to the State prior to trial. [**3] Applicant asserts that he meets Section 5 because the factual basis of these claims was unavailable on the date he filed his initial writ application. Tex. Code Crim. Proc. Art. 11.071, § 5(a)(1).

Because the record was not sufficient to determine with assurance whether Applicant could have previously discovered the evidence complained of in these claims, on April 7, 2017, we stayed Applicant's execution and remanded this case for the trial court to develop the record. We ordered the trial court to make findings of fact and conclusions of law regarding whether the factual basis of these claims was ascertainable [*439] through the exercise of reasonable diligence on or before the date the initial application was filed. We further instructed the trial court to review the merits of the claims if it determined that the factual basis was not ascertainable through the exercise of reasonable diligence.

Following a three-day hearing in September and October 2017, the trial court adopted Applicant's proposed findings of fact and conclusions of law. The trial court found that the remanded claims met Section 5 and had merit, and it recommended that punishment relief be granted. We disagree.

On post-conviction review of habeas corpus applications, the convicting court [**4] is the "original factfinder" and this Court is the "ultimate factfinder." *Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017), *citing Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). In most circumstances, we defer to the trial judge's findings of fact and conclusions of law because the trial judge is in the best position to assess the credibility of the witnesses. *Id.* We will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record. *Id.* But if our independent review of the record reveals circumstances that contradict or undermine the trial judge's findings and conclusions, we can exercise our authority to enter contrary findings and conclusions. *Id.*

At the hearing on remand, the prosecutors testified that they told trial counsel about the victim's parents' anti-death penalty views prior to trial. However, the prosecutors acknowledged that those discussions were not documented or formalized. Trial counsel testified that they could not remember if the State told them this information. We defer to the trial court's credibility choice in favor of trial counsel and the finding that the State did not inform trial counsel about the victim's parents' anti-death penalty views.

One of the prosecutors testified that he told trial counsel [**5] that the victim's parents "preferred not to be contacted." But that prosecutor further testified that he told trial counsel "that they were certainly free to contact them" if they wished to do so.

Robert Ford, who was Applicant's habeas counsel on his initial writ application, is now deceased. The trial court found that Ford did not know that the victim's parents opposed a death sentence for Applicant. This finding is not supported by the record. Applicant did not present any evidence showing what Ford did or did not know regarding the victim's parents' anti-death penalty views. The victim's father testified that he has disclosed his anti-death penalty views to "anybody that wants to know or has ever asked me." This testimony undermines the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application. And although the trial court found that Ford generally "had a strong reputation for his diligence," Applicant presented no evidence showing that Ford was diligent in his particular case.

Based on our own review, we conclude that Applicant has failed to meet his burden [**6] to show that the factual basis for the remanded claims was unavailable on the date he filed the previous application. With regard to Claims 2, 3, 4, and 5, Applicant has failed to satisfy the requirements of Article 11.071, § 5.

We have also reviewed Applicant's claims that newly discovered evidence "compels

relief" (Claim 1) and the State violated the Fourteenth Amendment by seeking death in this case (Claim 6). With regard to these claims, we find that Applicant [*440] has also failed to satisfy the requirements of Article 11.071, § 5. Accordingly, we dismiss all of Applicant's claims as an abuse of the writ without reviewing the merits.

IT IS SO ORDERED THIS THE 2ND DAY OF OCTOBER, 2019.

Publish

Concur by: HERVEY

Concur

CONCURRING OPINION

I join the Court in dismissing Applicant's writ application because he cannot overcome the Section 5 subsequent writ bar. I write separately to briefly address Judge Yeary's suggestion that order briefing on whether the State's closing argument, which is not evidence, amounted to the knowing use of false evidence against Applicant. I also write separately to address a better analytical framework, Applicant's *Brady* claim, and the Crime Victims' Rights Act.

I.

This case is not a false-evidence case because no evidence of the family's preference [**7] was introduced at trial. That should be the end of the analysis. There is no question of whether Applicant's claim fits neatly within our false-evidence jurisprudence; it does not fit at all, even in some "yet-to-be-fully-articulated way," and asking the parties to brief a claim which Applicant can never win is an exercise in futility. Dissenting Op. at 2 (Yeary, J.).

II.

Instead of taking the radical step of possibly recognizing a new due-process ground for relief based on a legal fiction fabricated by this Court, we could apply longstanding, well-settled precedent from the United States Supreme Court.

It is well established that comments and conduct by a prosecutor during trial or at a sentencing proceeding might amount to prosecutorial misconduct depriving a defendant of due process. *Romano v. Oklahoma*, 512 U.S. 1, 12-13, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (death-penalty sentencing proceeding); *Miller v. State*, 741 S.W.2d 382, 391 (Tex. Crim. App. 1987) (trial) (citing *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)). A prosecutor's improper trial comments violate the Fourteenth Amendment if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). A prosecutor's improper sentencing comments violate the Fourteenth Amendment if they so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty [**8] a denial of due process. *Romano*, 512 U.S. at 12. This test

is necessarily a general one because in these types of cases the State did not deny a defendant "the benefit of a specific constitutional right, such as the right to counsel, or in which the remarks so prejudiced a specific right as to amount to a denial of that right."[1] *Id.*

[*441] Instead of resorting to creating some kind of novel, constitutional "psuedo false-evidence" jurisprudence, we could use the well-known *Darden* test. The problem here, as the Court points out, is that the factual predicate for Applicant's claims—regardless of how you characterize them (e.g., false evidence, *Brady, Darden*, etc.)—is not newly available, so we cannot reach the merits of those claims.

III.

Second, even if we assume that the State's knowledge of the victim's parents' position on the death penalty was information favorable to Applicant and that the State suppressed it, I fail to see how Applicant can show that the information is material.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1973), Brady and a co-defendant murdered the victim. Brady admitted his guilt but sought to avoid the death penalty by arguing that he was not the shooter, his co-defendant was. Unbeknownst to Brady, his co-defendant [**9] gave a statement to police in which he admitted that he killed the victim. Brady did not learn of his co-defendant's statement, however, until after he was convicted because it was suppressed by the State. The Supreme Court agreed that Brady was entitled to a new trial because the statement was "highly significant to the primary jury issue" of whether a death sentence was appropriate to his level of participation in the crime.

This case is not like *Brady*. Applicant admitted that, after his co-defendant shot the kneeling victim in the back of the head, he shot the victim at least four more times because he "kind of got caught up in all of it." He made those admissions only after repeatedly lying about his level of participation in the murder. Initially, he claimed that a fictional person killed the victim, then he told police that someone named Carlos, whom Applicant did not like and who had nothing to do with the crimes, was the shooter. In another variation, he said that he was only the get-away driver. Ultimately, he conceded that he planned the robbery and directed his co-defendant during the robbery. And this was not some spur of the moment crime. Applicant wrote his plan down, [**10] then later attempted to burn it. They knew when the first employee (the victim) would arrive to work that morning and that he would be alone. They knew when the next person would arrive at work, so they could leave before his arrival. They brought a loaded weapon. And they intentionally killed the victim

[1] Judge Yeary claims that Darden and *Romano*, among others, are easily distinguishable based on their facts. I agree, but that misses the point. The Darden/Romano test is used to determine whether improper comments by a prosecutor rise to the level of a due-process violation because the comments could so infect the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process. *Romano*, 512 U.S. at 12. It seems obvious to me that, if a prosecutor makes false statements during closing argument, those could be considered under the *Darden* test.

execution style.

The victim's wife was the first person to testify at the punishment phase. Her testimony was brief, but powerful. When asked to describe the impact of her husband's death on her, she said that,

> Well, I had just come back from lunch, and I was having a pretty good day, and I was pulled into an office at my office. And my best friend was there, and she was crying, and there was a police officer. And I kind of walked in, was kind of confused. Never figured anything had happened. And then the police officer just told me that Jonas was dead; he was killed.
>
> [*442] It's kind of a blur, to be honest with you, as to how my reaction was. I think I started screaming at that point. You know, in that moment, I knew my life was never, ever going to be the same. It felt like my entire life had crumbled right in front of me. It felt like someone had pushed me into a hole and there was no way [**11] of getting out of it. Jonas and I had planned on having children. We owned a home together. I knew I was never going to live there again, which I never did.
>
> I had to tell his parents. And how do you tell, you know, the mother of their only child that, "I'm sorry, you are never going to have grandchildren, and I'm sorry your son was murdered?" I never slept again without medication. I started going to a therapist the next week and had panic attacks every night and was terrified that at any moment in my life, someone I loved was going to die. And I couldn't be in a crowded room. I had to leave the job that I loved for several months.
>
> I mean, it was just — my whole life, it was horrible. Everything has changed. It's like my life is okay now, but it's never going to be as good it was. He and I were so in love, and we were so happy together. And he made every day just better because he was part of it. And now everything that I thought I was going to have, I am just never going to have.
>
> So it's kind of hard to describe how it impacts you. But every single way something could impact you, it has impacted me that way.

Some jurors were crying during her testimony. There was also evidence that, after [**12] executing the victim, Applicant and his co-defendant went to Cash America to shop, then Braum's to eat, before returning to Cash America. Surveillance video taken in Cash America showed Applicant and his co-defendant joking and laughing with each other while they looked for something to buy with the money that they stole. Other evidence showed that, before the murder, Applicant robbed numerous drug dealers because he knew that they would not report the robberies to the police. On the other hand, more than a half-dozen witnesses, who personally knew Applicant, testified in great detail why the jury should spare his life.

In light of all of this, it is difficult—if not impossible—to conclude that the victim's parents' general opposition to the death penalty would cast "the whole case in a

different light . . . ." *United States v. Agurs*, 427 U.S. 97, 109-10, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Consequently, even if the basis for Applicant's *Brady* claim was not known when he filed his subsequent writ application, which is doubtful, filing and setting this case to get briefing about the "due diligence" requirement is unnecessary.

IV.

For years, great debate over prosecutorial discretion in seeking the death penalty has existed. And attention to the facts and circumstances [**13] of each case necessarily includes the rights of the victim of a crime. But even legislative consideration of victims' rights only directs prosecutors to keep victims informed! A victim's desires, wishes, thoughts, and suggestions should be, and often are, sought out by prosecutors, but the victim's wishes do not override prosecutorial discretion, including regarding whether to seek the death penalty.

V.

With these comments, I concur in the Court's dismissal of Applicant's subsequent application for a writ of habeas corpus.

Publish

Filed: October 2, 2019

Dissent by: YEARY; WALKER

Dissent

[*443] **DISSENTING OPINION**

During her final summation at the punishment phase of Applicant's capital murder trial, the prosecutor made the following statement:

> And it should go without saying that all of the Jonas's [the victim's] family and everyone who loved him believe the death penalty is appropriate.

It is bad enough that there was no evidence in the record to support this statement. Applicant now claims that, as it later turned out, it was also patently false.[1]

Applicant has filed a subsequent post-conviction application for writ of habeas corpus, alleging (among other things) that the prosecutor's statement constituted [**14] the knowing use of false evidence and that the failure to disclose its falsehood constituted suppressed evidence that was favorable to the defense, under

[1] We remanded this cause for additional record development with respect to whether Applicant's various claims satisfied Article 11.071, Section 5(a)(1), and instructed the trial court to proceed to the merits should it find no abuse of the writ under that provision. *Ex parte Storey*, No. WR-75,828-02, 2017 Tex. Crim. App. Unpub. LEXIS 283, 2017 WL 1316348 (Tex. Crim. App. Apr. 7, 2017) (not designated for publication); TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1). At an evidentiary hearing on remand, the victim's parents testified that, not only were they opposed to the death penalty in the abstract, they were also specifically opposed to the State's efforts to obtain the death penalty for Applicant's murder of their son. They also maintained that they informed the prosecutors that they opposed the death penalty, both generally and as applied to Applicant, during their initial meeting with the State. While this testimony did not go entirely un-impeached during the writ hearing, the convicting court has recommended that we find that the State's rebuttal evidence lacks credibility. While it may be tempting to rely on information developed at the hearing, we must first decide whether we agree with the trial court's determination that the pleadings in this case satisfy the requirements of Section 5(a)(1). For this reason, I will restrict my own consideration of the issue of initial habeas counsel's "reasonable diligence" to the facts contained in the writ application itself.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). While Applicant's allegation does not fit neatly within either the jurisprudence of false evidence or that of the suppression of favorable evidence for *Brady* purposes, it would not be a stretch to conclude that the prosecutor's statement, if indeed false, violates due process in some yet-to-be-fully-articulated way that is analogous to both of these theories.

Today the Court dismisses Applicant's various claims on the grounds that he "has failed to meet his burden to show that the factual basis for the remanded claims was unavailable on the date he filed" his initial application for post-conviction habeas corpus relief, and therefore "failed to satisfy the requirements of Article 11.071, [Section] 5." Court's Order at 5; *see* Tex. Code Crim. Proc. art. 11.071, § 5(a) (prohibiting courts from entertaining the merits of a claim raised in a subsequent post-conviction writ application unless the application "contains sufficient specific facts establishing that" the factual basis for the claim was unavailable when a previous writ application was filed). It is not self-evident to me, however, that the writ [**15] application fails to "contain sufficient specific facts" to establish unavailability. In my view, the Court should at least file and set this cause to better explain how it comes to that conclusion. The Court seems to conclude that Applicant's initial writ counsel did not exercise "reasonable diligence" to investigate such a claim prior to filing Applicant's original post-conviction writ application. Court's Order at 4-5; *see* Tex. Code Crim. Proc. art. 11.071, § 5(e) (a factual basis [*444] was previously unavailable if it "was not ascertainable through the exercise of reasonable diligence" prior to the due date for a previous capital writ application). There is reason to doubt the propriety of the Court's conclusion, and we would benefit from additional briefing from the parties.

Specifically, there is reason to doubt—whatever the ordinary parameters of "reasonable diligence" might ultimately prove to be in a habeas corpus investigation—that Applicant's initial habeas counsel should have been required to investigate the veracity of assertions of fact that the prosecutor made during her closing argument. The United States Supreme Court has made it clear that due process will not tolerate the imposition of a diligence requirement [**16] upon a habeas applicant who claims deliberate and persistent prosecutorial misconduct. *See Banks v. Dretke*, 540 U.S. 668, 675-76, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."). And that is, in essence, what Applicant appears to claim has happened here.

In *Banks*, the State of Texas failed to disclose, both at trial and at any point during the subsequent post-conviction proceedings, that one of its principal punishment phase witnesses had testified falsely. *Id.* at 678, 680 & 683. It was not until Banks finally obtained discovery of the

State's file and an evidentiary hearing during federal habeas corpus proceedings that he uncovered the falsehoods, as well as the State's persistent failure to disclose them. *Id.* at 684-85. The federal district court granted Banks a new punishment-phase hearing, while affirming the guilt phase of his trial. *Id.* at 686-87. In the appeal that followed, the State argued that Applicant should not have been granted an evidentiary hearing in federal court because he had not pursued his *Brady* claim with sufficient diligence during the state post-conviction habeas corpus proceedings, and the Fifth Circuit agreed. [**17] *Id.* at 688.

On petition for certiorari, however, the United States Supreme Court reversed the Fifth Circuit's judgment. It held that to impose a requirement of diligence upon a federal habeas applicant to pursue a *Brady* claim, even in the face of stubbornly persistent prosecutorial denials that any exculpatory or impeaching evidence remained undisclosed, was inconsistent with bedrock due process principles. *See id.* at 694 ("[I]t was . . . appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction."); *id.* at 696 ("A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *id.* at 698 ("It was not incumbent on Banks to prove [the State's] representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful.").

It is at least arguable that these same bedrock due process principles should be considered when we construe the meaning of "reasonable diligence" for purposes of making the determination whether Applicant's present arguments were "available" at the time when he filed his original post-conviction application for [**18] writ of habeas corpus in this case. If we were to conclude that these principles apply in a case like this, then the Court would be mistaken even to ask whether Applicant's original habeas counsel, Robert Ford (now deceased), ever tried to investigate the accuracy of the prosecutor's assertion during [*445] her final arguments at the punishment phase of trial—that *all* family members wanted Applicant to be executed. 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. Even as late as its original response asking this Court to dismiss Applicant's subsequent writ application for a failure to establish reasonable diligence, the State has failed to concede that the prosecutor's assertion was false.

Because "it is ordinarily incumbent on the State to set the record straight[,]" *id.* at 675-76, we should at least explore the possibility that "reasonable diligence" should not be read to embrace a requirement that original state habeas counsel must second-guess the truthfulness of a prosecutor's factual assertions during final argument in the punishment phase [**19] of a capital murder trial.[2] I would at least file and set

[2] I do not mean to suggest that I believe it has yet been established,

this cause and request additional briefing from the parties regarding this possibility. Because the Court does not, I dissent.

I would also order additional briefing on the merits of Applicant's claims. Additional briefing would be appropriate because Applicant's claims do not readily fit the mold of either 1) the presentation of false evidence or 2) the suppression of evidence favorable to the defense under *Brady*. Indeed, on the surface, Applicant's claims do not seem to involve *evidence* at all; rather, they seem to involve some kind of error in the jury argument, occurring after the presentation of evidence was complete and the parties had closed.

The prosecutor assured the jury that *all* of the victim's family supported the State's attempt to obtain the death penalty for Applicant. Even assuming that this was objectively accurate, no evidence to that effect was introduced at trial. Applicant's trial counsel could therefore have objected—conceivably on at least three grounds. First, it constituted facts not in evidence, since no family member testified to that effect. *See* Freeman v. State, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011) ("A prosecutor may not use closing arguments to present [**20] evidence that is outside the record."). Second, it might be argued that the victim's family's belief that death would be the appropriate punishment for the victim's murder is irrelevant to the future dangerousness special issue, and that it inappropriately invades the jury's normative function under the mitigation special issue. Tex. Code Crim. Proc. art. 37.071, §§ 2(b)(1) & 2(e)(1). Third, such evidence has been held to be patently objectionable under the Eighth Amendment.[3] *Bosse v. [*446] Oklahoma*, 137 S. Ct. 1, 2, 196 L. Ed. 2d 1 (2016). Applicant could have—but did not—make a trial objection on any of these bases.[4] Had they done so, the error inherent in the

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as a matter of fact, that the prosecutor's assertion was false. I mean only to convey that: 1) Applicant has pled facts to establish that it was false, and that the prosecutor knew it to be so; and 2) if those allegations of fact are true, then, in the absence of a concession by the State that the prosecutor's assertion was false, Appellant may well have alleged "sufficient specific facts to establish" the statutory "reasonable diligence" requirement that would authorize him to proceed to litigate his subsequent writ application. We may yet conclude upon full litigation of the issue that the assertion was not false after all, and the State might then prevail on the merits. But the question before us today is simply whether we agree with the convicting court's ultimate conclusion that Applicant should be allowed to proceed to the merits of his claims, given the strictures of Article 11.071, Section 5(a)(1) & (e).

[3] Whether the family thinks a death sentence for Applicant would be appropriate is simply irrelevant to the question whether he would continue to commit criminal acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). Whether it might be relevant to the jury's determination of the weight of the mitigating evidence is, perhaps, debatable. Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). But even if relevant to the jury's mitigation determination, it is arguably more prejudicial than probative to the extent that it might cause a jury to simply abdicate its own normative judgment in favor of the family's preference, and it might be objectionable under **Rule 403** for that reason. TEX. R. EVID. 403. In any event, the United States Supreme Court has held that evidence of the family's punishment preference in a death penalty case is objectionable under the Eighth Amendment. *See Booth v. Maryland*, 482 U.S. 496, 508-09, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) (testimony from family members in a capital case relating their opinions about appropriate punishment violates the Eighth Amendment); *Bosse*, 137 S. Ct. at 2 (applying *Booth*'s holding to prohibit testimony from family members that a capital murder defendant should receive the death penalty).

[4] In an affidavit attached to Applicant's subsequent writ application, one of his trial attorneys explains that he did not object because "I believed that the Court would find that the argument was 'invited' by and in response to the testimony that we had introduced from members of [Applicant's] family asking that the jury spare his life. As I believed that the Court would ultimately overrule my objection on that basis, I did not want to provide the State with the opportunity to repeat or emphasize the argument in response to my objection."

prosecutor's assertion might have been limited in concept to an ordinary jury-argument error, quite apart from the fact that it was false.[5]

But Applicant now claims that it *was also false*, and the record supports the conclusion that Applicant's trial counsel did not know it was false. And that part of Applicant's pleadings injects additional due process considerations into the case, appropriate for consideration in post-conviction habeas corpus proceedings.[6] Had Applicant's [*447] trial lawyers been aware that the prosecutor's family-endorsement argument was not just objectionable, but also false, they might well have [**21] been dissatisfied with merely objecting to it as facts outside the record or facts constitutionally inappropriate to the jury's punishment-phase function. They might have regarded a judicial instruction to the jury to disregard the prosecutor's argument as inadequately remedial.

Instead, having been taken by surprise when the prosecutor made her false assertion, Applicant's trial counsel may well have preferred, had they known it was false, not merely to object to it and to seek an instruction to the jury to disregard it, but to actually refute it with—wait for it—*evidence*. They might have preferred to invoke Article 36.02 of the Code of Criminal Procedure to ask the trial court to reopen the evidence so that the parents (at least) could rectify the prosecutor's falsehood under oath.[7] Of course, because the State had not told defense counsel that the parents actually opposed the death penalty for Applicant (or so Applicant claims), Applicant argues that this now-favorable *evidence* was suppressed, and Applicant's trial counsel did not know that asking the trial court to re-open the case for the introduction of rebuttal *evidence* was an

[5] But, of course, such errors would then be available on direct appeal, and not ordinarily the subject of a post-conviction application for writ of habeas corpus—much less a subsequent writ application. *See Ex parte Moss*, 446 S.W.3d 786, 788-90 (Tex. Crim. App. 2014) (holding that only category one claims, under the rubric of *Marin v. State*, 851 S.W.2d 275 (TEX. CRIM. APP. 1993), can be raised for the first time in an initial post-conviction application for writ of habeas corpus when it could have been, but was not, raised on direct appeal; but warning that even such a category one *Marin* claim may not be actionable in a subsequent writ application).

[6] Judge Hervey argues that, instead of conceptualizing this case along the lines of a false-evidence or suppression-of-mitigating-evidence theory of due process, we should analyze it under the rubric of cases such as *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986), and *Romano v. Oklahoma*, 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). But those cases are plainly distinguishable. *Darden* involved a prosecutor's runaway rhetorical flourishes during his summation, and the question was simply whether his rhetoric was so much more prejudicial than probative as to surpass the tolerances of due process. 477 U.S. at 179-83. In *Romano*, the State was permitted to introduce evidence that the defendant had previously received the death penalty from another jury in another case—which case was later reversed on appeal. The question was whether informing the jury of that prior death sentence rendered his subsequent capital punishment proceeding constitutionally unfair because it undermined the jury's sense of responsibility for determining the appropriateness of the death penalty for the second capital offense. *Romano*, 512 U.S. at 3. Neither of these cases involved an insertion before the jury of facts that were—not just hyperbolic or inflammatory or trivializing—but also *false*. If the prosecutor *knowingly* injected a falsehood into the punishment proceedings, that may well serve to reduce the level of materiality Applicant must satisfy in order to prevail on his due process claim. *See Ex parte Lalonde*, 570 S.W.3d 716, 726-27 (Tex. Crim. App. 2019) (Keller, P.J., concurring) (noting that the materiality standard for the knowing use of false evidence in a post-conviction habeas corpus proceedings "is the same as the harm standard for constitutional error on direct appeal"). Indeed, this potentiality is one reason, among many, that it would benefit the Court to file and set this cause and obtain briefing from the parties.

[7] *See* Tex. Code Crim. Proc. art. 36.02 ("The court shall allow testimony to be introduced *at any time before the argument of a cause is concluded*, if it appears that it is necessary to a due administration of justice.") (emphasis added).

option. In this sense, then, Applicant's claim seems at least analogous [**22] to a *Brady* claim, if not also a false-evidence claim. I would order the parties to brief both of these claims.

What I would not do is simply declare that Applicant's original writ counsel—who is now deceased and unable to respond to claims about his diligence—failed to diligently investigate the present claims, and dismiss the subsequent writ application on that basis. I would file and set the cause and order additional briefing, as indicated above. Because the Court does not, I respectfully dissent.

FILED: October 2, 2019

PUBLISH

DISSENTING OPINION

Paul David Storey, Applicant, was convicted of capital murder for intentionally causing the death of Jonas Cherry while in the course of committing robbery. During the State's punishment phase closing argument, one of the prosecutors, Christy Jack,[1] said in reference to testimony by Applicant's family members:

> -- and you know what?
>
> His whole family got up here yesterday and they pled for you to spare his life. And it should go without saying that all of Jonas's family and everyone who loved him believe the death penalty is appropriate.

Rep. R. vol. 39, 12, *Storey v. State*, No. AP-76,018, 2010 Tex. Crim. App. Unpub. LEXIS 602 (Tex. Crim. App. Oct. 6, 2010) [**23]. After the statement was made, Applicant's trial counsel did not object. Following deliberation, the jury answered the special issues set forth in article 37.071 of the Code of Criminal Procedure, and the trial court sentenced Applicant to death. On direct appeal, we affirmed the conviction and sentence in an [*448] unpublished opinion. *Id.*, 2010 Tex. Crim. App. Unpub. LEXIS 602, 2010 WL 3901416 at *25 (not designated for publication). Shortly thereafter, Applicant sought habeas corpus relief, which we denied. *Ex parte Storey*, No. WR-75,828-01, 2011 Tex. Crim. App. Unpub. LEXIS 441, 2011 WL 2420707 (Tex. Crim. App. June 15, 2011) (not designated for publication).

In December of 2016, Applicant's trial counsel became aware that Jack's statement during closing argument, that "all of Jonas's family and everyone who loved him believe the death penalty is appropriate," was in fact false. Jonas Cherry's parents, Dr. Judith Cherry and Glenn Cherry, had long been opposed to the death penalty, and the State's prosecutors—Christy Jack and Robert Foran[2] —knew prior to trial that the Cherrys were opposed to the death penalty.

[1] Texas Bar No. 10445200.

[2] Texas Bar No. 07220600.

Today, we are presented with Applicant's second application for a writ of habeas corpus relating to this case, based on claims relating both to the failure of the prosecution to disclose the fact that the Cherrys were opposed to the death penalty and to Jack's [**24] closing argument in which she falsely told the jury that the Cherrys were in favor of the death penalty. Instead of addressing these issues, the Court concludes that Applicant's claims are not reviewable due to the procedural bar against subsequent applications under article 11.071 § 5 and summarily dismisses his application as an abuse of the writ. Because I disagree that Applicant's claims are procedurally barred, I respectfully dissent.

I — Section 5

3 Article 11.071, governing habeas corpus procedure in death penalty cases, provides in § 5(a):

> Sec. 5. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application . . . .

Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a). This procedural bar under § 5(a) can be defeated if the subsequent application includes sufficient specific facts establishing that:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but [**25] for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id. § 5(a)(1)-(3). Applicant argues that the discovery of the Cherrys' opposition to the death penalty is a factual basis under § 5(a)(1) that was unavailable when he filed his initial writ application, allowing us to consider the merits of his current application. A factual basis is unavailable if it was not ascertainable through the exercise of reasonable diligence on or before the date of the previous application. *Id.* art. 11.071 § 5(e). In *Lemke*, this Court explained that "reasonable diligence" suggests at least some kind of inquiry has been made into [*449] the matter at issue. *Ex parte Lemke*, 13 S.W.3d 791, 794 (Tex. Crim. App. 2000), *overruled on other grounds by Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013).

II — The Current Application

In this application, Applicant raises six claims, that: (1) newly-discovered evidence "compels relief"; (2) the State denied him his right to due process because it argued "evidence" it knew to be false; (3) [**26] the State introduced false evidence which unconstitutionally deprived him of a fair punishment trial; (4) the State denied him his right to due process by suppressing mitigating evidence; (5) by arguing false aggravating evidence and suppressing mitigating evidence, the State rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments; and (6) the State violated the Fourteenth Amendment by seeking death in this case.

After reviewing Applicant's writ application, we found that claims two through five arguably satisfied § 5, but we concluded that the record was insufficient to determine, with assurance, whether Applicant could have previously discovered the evidence about which he complained. *Ex parte Storey*, No. WR-75,828-02, 2017 Tex. Crim. App. Unpub. LEXIS 283, 2017 WL 1316348 at *1 (Tex. Crim. App. Apr. 7, 2017) (not designated for publication). We remanded to the trial court to further develop the record, to make findings of fact and conclusions of law regarding whether the factual basis of those claims was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed, and to review the merits of Applicant's claims. *Id.*

Pursuant to our remand order, the trial court held a hearing in which the attorneys involved in Applicant's case [**27] testified, including attorneys for both Applicant and for the State, except for his habeas counsel on the initial writ application, Robert Ford, who is deceased. Additionally, the Cherrys testified. The trial court made the following findings of fact:

A. Robert Ford exercised due diligence as habeas counsel

1. Robert Ford, now deceased, was state habeas counsel for Applicant in his initial state writ brought under art. 11.071.
2. Glenn and Judith Cherry, the parents of the victim, opposed Applicant receiving the death penalty.
3. Robert Foran and Christy Jack were the trial prosecutors for the State in both this case and in the co-defendant, Mark Porter's, case. Both Foran and Jack knew, prior to Applicant's trial, that Glenn and Judith Cherry opposed Applicant receiving the death penalty.

4. Neither Foran nor Jack nor anyone else from the State, ever informed Mr. Ford that Glenn and Judith Cherry opposed a death sentence for Applicant. Likewise, neither Foran nor Jack, nor anyone else from the State ever informed Larry Moore, Bill Ray (Applicant's trial attorneys), or Mark Daniel or Tim Moore (the co-defendant's attorneys), that Glenn and Judith Cherry opposed the death penalty for both Applicant [**28] and his co-defendant, Mark Porter.

5. Tarrant County Assistant District Attorney Edward "Chip" Wilkinson, who represented the State on direct appeal and during the initial state habeas proceedings, was unaware of the Cherrys' opposition to Applicant receiving the death penalty.

6. Mr. Ford had a strong reputation for his diligence. He was described by various attorneys and judges as "extremely zealous," "tenacious," [*450] "very aggressive," "gifted," a "passionate lawyer," "fearless advocate," "extremely diligent," and invariably regarded as an exceptional and diligent attorney.
7. This Court finds 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.
8. This Court finds that 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.
9. Robert Foran told Bill Ray and Larry Moore, trial counsel for Applicant, that the Cherrys "preferred not to be contacted."

10. No witness to these proceedings faulted Mr. Ford or any other of Applicant's counsel, or any of the co-defendant's counsel for failing to contact the Cherrys to [**29] determine their views on their respective clients receiving the death penalty.
11. Christy Jack did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact.
12. Robert Foran did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact.
13. Mr. Ford did not know that the Cherrys opposed the death penalty for the Applicant, his client.
14. Mr. Ford would not have discovered the factual basis of these claims through the exercise of reasonable diligence.
15. The factual basis of the four claims before this Court, i.e., the Cherrys' opposition to Applicant receiving the death penalty and the corresponding false argument made by trial prosecutor Jack, was not ascertainable by Applicant or his counsel, through the exercise of reasonable diligence on May 26, 2011, the day the initial state writ was due and was filed.

16. This Court further finds that the failure of Mr. Ford to ascertain the Cherrys' opposition to the death penalty in general and specifically as to the Applicant, does not constitute a lack of reasonable diligence. [**30]
17. This Court finds that Mr. Ford acted with reasonable diligence.

B. Findings of Fact Regarding Claims Two, Three, and Five: whether the prosecution introduced known, false evidence, and made known false assertions during argument, that the Cherrys supported a death sentence

for Applicant.

18. Glenn and Judith Cherry opposed Applicant receiving the death penalty and communicated their opposition to trial prosecutors Robert Foran and Christy Jack, the first time they met about the case, prior to trial.

19. Both Christy Jack and Robert Foran knew the Cherrys opposed Applicant receiving the death penalty.

20. Neither Christy Jack, nor Robert Foran, nor anyone else from the State disclosed, or otherwise communicated to Applicant's trial counsel, Larry Moore or Bill Ray that Glenn and Judith Cherry opposed the death penalty for the client, Paul Storey.

21. At punishment, Christy Jack argued to the jury, in pertinent part, "And it should go without saying [*451] that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate."

22. This argument was improper because it was outside the record.

23. Christy Jack's argument was prejudicial in as much as it purported [**31] to interject the wishes of the victim's family for the jury to return a verdict of death for Applicant, which is constitutionally impermissible.

24. Christy Jack conceded during the habeas proceeding that her argument was outside the record and improper but she did not think it would result in a mistrial.

25. The Cherrys' opposition to the death penalty and their opposition to Applicant's execution is long-standing and deeply-felt.

26. Christy Jack testified Glenn Cherry approached her after Marilyn Shankle, Paul Storey's mother, testified at punishment and asked, "do you want me to or should I testify that we want the death penalty."

27. This Court finds Jack's account regarding Glenn Cherry's question is not credible for the following reasons:

a. Glenn Cherry is credible. This Court believes his testimony wherein he denies he or Judith Cherry ever supported the death penalty for Applicant during the trial.

b. This Court further believes that Glenn Cherry never communicated to Jack or Foran during the trial, or at any other time, that either he or Judith Cherry supported the death penalty for Applicant.

c. Judith Cherry is credible. This Court believes her testimony wherein she denies she [**32] or Glenn Cherry ever supported the death penalty for Applicant during the trial, and that she never communicated to Jack or Foran during the trial, or at any other time, that either she or Glenn Cherry supported the death penalty for Applicant.

d. Robert Foran testified inconsistently with Jack's version in that under her version, Glenn Cherry had approached Robert Foran and the conversation had already begun when she walked up. Under Foran's version, the comments were directed at Jack from the start, and Foran just

overheard some of the conversation.
e. Glenn and Judith Cherry deny that this encounter with Jack and/or Foran, or anything like it, ever happened.
f. Robert Foran conceded that Christy Jack's argument was, in fact, untrue as to Glenn and Judith Cherry.
g. Christy Jack and Robert Foran testified that the two of them never had a conversation about Glenn Cherry's change in his views on capital punishment.
h. It is not credible that prosecutors would have had no discussion about such a pivotal change in Glenn Cherry's views; and hence, this testimony creates an additional reasonable inference that the account is not true.

I. Christy Jack testified she did not question Mr. Cherry [**33] about his dramatic change in position. This inexplicable behavior further casts doubt on the believability of her testimony regarding a mid-trial [*452] conversation with Mr. Cherry in which he purportedly completely changed his position on the death penalty.
j. Christy Jack admitted that she, at the very least, intentionally and improperly argued outside the record in making her assertion, "And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate." Her admission of this prosecutorial misconduct further undermines her credibility.
k. Assistant criminal district attorney Ashlea Deener testified that her opinion of Christy Jack's credibility is "not a favorable one."

l. The State introduced testimony of Letitia Martinez, Judge Mollee Westfall and Magistrate Jeffrey Cureton, all of whom had a favorable opinion of Christy Jack's character for truthfulness. However, Ms. Martinez is Jack's current partner in private practice. Judge Westfall had equally favorable opinions of Larry Moore, Mark Daniel and Tim Moore, all of whom contradict Christy Jack's accounts. Magistrate Cureton is Ms. Martinez' husband. Magistrate Cureton [**34] had never handled a death penalty case and had no opinion of any of the experienced death penalty attorneys involved in this case. In light of Judge Westfall's endorsement of the veracity of Larry Moore and the attorneys for Mr. Porter, this Court finds that the opinion evidence offered by the State does not alter state of the evidence or the other findings in this case.
m. No such opinion evidence was offered in support of Robert Foran.
n. Suman Cherry made an out of court admission that Jack's and Foran's contention that either Glenn or Judith Cherry ever deviated from their opposition to the death penalty

for Paul Storey was 9 "bullshit."

o. As the findings fact regarding the *Brady* issue detail *infra*, Christy Jack and Robert Foran are not credible and their trial testimony is not believable.

28. Even were Christy Jack's account of her mid trial exchange with Glenn Cherry true, it is vague and does not change the falsity of the prosecution argument that "it goes without saying that everyone" who loved the victim wanted Mr. Storey's death.

29. There is no evidence that Judith Cherry ever had any change of heart in her opposition to Applicant's execution.

30. This Court finds Jack's argument [**35] to be false, regardless of whether she had the conversation with Mr. Cherry as related by Jack.

C. Findings of Fact Regarding Claim Four: whether the prosecution suppressed Glenn and Judith Cherry's opposition to Applicant receiving the death penalty.

31. On February 8, 2008, the trial court ordered the prosecutors 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," and that the State answer the Defense's request for such information in writing.

[*453] 32. It is uncontroverted that the disclosures required by the Order of February 8, 2008 would also include the Cherrys' opposition to Applicant receiving the death penalty.

33. Christy Jack and Robert Foran were aware of the Cherrys' opposition to Applicant receiving the death penalty.

34. Under the Order of February 8, 2008, the prosecution had a duty to disclose the Cherrys' opposition to Applicant receiving the death penalty to Larry Moore and Billy Ray, Applicant and his attorneys had every right to rely on the Court Order and that the state would adhere to it.

35. It is exceptional and unusual that the [**36] parents of a murdered son would seek to spare the life of their child's killer.

36. Christy Jack and Robert Foran regarded this evidence as out of the ordinary and material and led to a discussion with their supervisor Bob Gill about it.

37. Larry Moore viewed the evidence as material. He testified in detail how it would have changed the course of his representation and the trial.

38. Bill Ray also regarded this evidence as material.

39. Tim Moore also regarded this evidence as material.

40. Mark Daniel's testimony further details the materiality of the Cherrys' opposition to the death penalty for Applicant and his own client, co-defendant Mark Porter.

41. Based upon the unanimity of the testimony of witnesses for the State as well as Applicant, this Court finds the evidence of the Cherrys' opposition to

Mr. Storey's execution to be both favorable and material. The State had the obligation to disclose the information under the United States Constitution and the Court's order.

42. The prosecution did not reveal the Cherrys' opposition to Mr. Storey's execution in the "State's First Amended Notice of *Brady* Material," filed July 10, 2008.

43. This Court finds that Applicant's trial counsel, Larry [**37] Moore and Bill Ray, were not made aware of Glenn and Judith Cherrys' opposition to Applicant receiving the death penalty based on the following evidence:

a. Larry Moore testified he was never informed about the Cherrys' position from the prosecution.

b. Bill Ray was unaware of this evidence until 2017, after Larry Moore informed him.

c. Neither Tim Moore nor Mark Daniel were ever made aware of the evidence by the prosecution.

d. Neither John Stickels, Applicant's appellate attorney, nor Robert Ford, Applicant's habeas counsel, were informed about or otherwise knew about the evidence.

e. Assistant Tarrant County Criminal District Attorney Chip Wilkinson, who handled the direct appeal and initial state writ for the state, did not know about the Cherrys' opposition to Applicant receiving the death penalty.

f. This Court finds no evidence that is consistent with defense attorney knowledge of this evidence, i.e., no defense notes reflecting knowledge, no discussions of the evidence and no use or effort to use [*454] this evidence, and no objection when the State unequivocally argued the opposite to the jury.

g. Likewise, the Court finds that there is absolutely no written record or memoranda in the State's [**38] possession that would support Robert Foran's and Christy Jack's contention that the information was disclosed.

h. This Court finds the totality of the circumstantial evidence to be inconsistent with disclosure to defense counsel, based on the trial record and the records of all post-conviction proceedings.

I. This Court finds Larry Moore, Bill Ray, Tim Moore and Mark Daniel to be credible, experienced attorneys in death penalty cases; and this Court finds it implausible that any and/or all of these attorneys would have been the recipients of this evidence, yet left no record that they did receive it and all decided to do nothing at all with this information.

44. This Court finds Larry Moore and Bill Ray to be credible and their testimony trustworthy.

45. Christy Jack confirmed that she did not formally disclose the evidence to any defense attorney.

46. Robert Foran never testified he ever disclosed the evidence to Larry Moore.

47. Christy Jack testified that she did not

make a formal disclosure before jury selection.

48. Robert Foran testified he disclosed the evidence to Bill Ray long before jury selection.

49. Robert Foran's testimony that he ever disclosed the evidence to Bill Ray is not [**39] credible based on the following evidence:

a. Robert Foran testified he made disclosure to Bill Ray in January or February, 2007. This testimony is inconsistent with Foran's supervisor, Bob Gill, who testified that Foran discussed the issue of disclosure with him sometime after July 1st or 2nd , 2008. This Court can discern no reason for prosecutors to discuss disclosure of material evidence in July 2008 had disclosure already been made long before, in early 2007. In the alternative, this Court can discern no reason for a prosecutor to seek supervisory affirmation for a disclosure that purportedly occurred more than a year prior.

b. Robert Foran testified that his disclosure was verbal only and that he made no written internal memo that he had disclosed it.

c. A disclosure of this evidence was not included in any written Brady notice.

d. Robert Foran testified he also disclosed the information to either Tim Moore or Mark Daniel who were originally scheduled to go to trial before Applicant. Like Applicant's trial counsel, both Mr. Tim Moore and Mr. Daniel denied they were ever made aware of the evidence.

50. This Court, therefore, finds Robert Foran's testimony not credible regarding the [**40] disclosure of material evidence. This Court further finds that his testimony that he disclosed that Judith and Glenn Cherry opposed the death penalty for Mr. Storey to be untrustworthy.

51. This Court finds also that the following sequence of events occurred which lends further support to the [*455] finding that the prosecution did not disclose the evidence:

a. Glenn Cherry approached Cory Session on December 20, 2016, and informed Mr. Session about their opposition to Mr. Storey's then-imminent execution.

b. Mr. Session informed Mike Ware, one of the attorneys for Mr. Storey, and Mr. Ware, in turn, informed Larry Moore.

c. Mr. Moore later informed his co-counsel, Bill Ray.

d. These events further confirm that no disclosure regarding this issue was ever made to Applicant's counsel until after December 20, 2016.

52. This Court finds that the prosecution had a duty to disclose, but did not disclose to any defense attorney that Judith and Glenn Cherry opposed the death penalty for Applicant.

Findings of Fact, Conclusions of Law and Recommendation, 5th Suppl. Clerk's R. 8-15 (record citations omitted). Based on these findings, the trial court concluded that Ford could not have ascertained the factual [**41] basis of the current claims on or before the date of Applicant's initial habeas application. On the merits, the trial court concluded that the prosecution introduced false evidence, the prosecution suppressed evidence, and the death penalty in this case was unconstitutionally unreliable. Accordingly, the trial court recommended that we grant habeas corpus relief.

III — Ford's Knowledge, or Lack Thereof, Can Be Inferred

Today, the Court concludes that the article 11.071 § 5 bar applies because there was no proof regarding Ford's diligence in this case, and, thus, Applicant failed to show that Ford could not have ascertained the factual basis for Applicant's claims (that the Cherrys were actually opposed to the death penalty) through the exercise of reasonable diligence at the time of the initial application. Specifically, the Court determines that the trial court's finding—"that Ford did not know that the victim's parents opposed a death sentence for Applicant"—is not supported by the record because Applicant did not present any evidence showing what Ford did or did not know regarding the Cherrys' anti-death penalty views. Based upon this determination, the Court concludes that Applicant failed to meet [**42] his burden. I disagree.

We have consistently recognized that proof of a mental state, such as knowledge, "is of such a nature that it must be inferred from the circumstances." *In re State ex rel. Weeks*, 391 S.W.3d 117, 125 n.36 (quoting *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *see also Okonkwo v. State*, 398 S.W.3d 689, 701 n.16 (Tex. Crim. App. 2013) (Cochran, J., concurring) ("Of course, this element [knowledge] is usually established by circumstantial evidence."). Thus, the fact that Applicant did not present direct evidence showing what Ford did or did not know regarding the Cherrys' anti-death penalty views should not end the inquiry regarding Ford's knowledge. Much evidence was presented at the hearing regarding Ford's competence and diligence, and from this evidence I believe we can circumstantially infer that Ford did not know that the Cherrys opposed the death penalty.

First, in my opinion it should be taken as a given that if a reasonably competent habeas attorney knew that Jack's argument to the jury indicating that the victim's parents favored the death penalty was untrue, then the attorney would certainly raise that issue. An issue like this for a habeas attorney is like hitting the [*456] jackpot on the Texas Lottery, and I cannot imagine how a reasonably competent habeas attorney who knows about the issue would nevertheless choose [**43] not to raise it.

Second, the trial court found that Ford "had a strong reputation for his diligence" and was "invariably regarded as an exceptional and diligent attorney." This is supported by the record because there was substantial

testimony at the habeas hearing from a number of attorneys and judges praising Ford. From the evidence, we can accept that Ford was a reasonably competent attorney.

Third, it follows that if Ford, a reasonably competent attorney, knew that the Cherrys were opposed to the death penalty, he would have raised the issue. Fourth, if this proposition is true, then, logically, the contrapositive must also be true: if Ford did not raise the issue, then Ford did not know the Cherrys were opposed to the death penalty. Fifth, Ford did not raise the issue when he prepared and filed Applicant's previous application for habeas relief. Accordingly, we can conclude circumstantially from the evidence that Ford, a reasonably competent attorney, did not raise the issue, that Ford did not know that the Cherrys were opposed to the death penalty.

III — Reasonable Diligence

Furthermore, even if Ford literally could have learned of the Cherrys' opposition to the death penalty if [**44] he had asked them, I disagree that such information was ascertainable through the exercise of reasonable diligence. For the following reasons, I believe requiring Ford to have asked the Cherrys about this information would have required actions on Ford's part that would have gone beyond what a reasonably competent habeas attorney would have done under the circumstances.

As stated above, a factual basis is unavailable for the purposes of article 11.071 § 5(a)(1)'s exception to the procedural bar if it was not ascertainable through the exercise of reasonable diligence on or before the date of the previous application. Tex. Code Crim. Proc. Ann. art. 11.071 § 5(e).

I recognize that *Lemke* explained that "reasonable diligence" suggested that "at least some kind of inquiry" was made. *Lemke*, 13 S.W.3d at 794. However, *Lemke*'s prescription of "at least some kind of inquiry" is overly stringent, especially in cases such as this one where habeas counsel has died and it is impossible to obtain direct evidence of what inquiry, if any, was made. The Legislature, when it drafted article 11.071 § 5(e), used the word "reasonable." When construing statutes, we generally presume that the Legislature intended that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence [**45] should be given effect if reasonably possible. *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997); *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019). Giving effect to the word "reasonable," what we said in *Lemke*—that "reasonable diligence" suggests that "at least some kind of inquiry was made"—should be required only when an inquiry is "reasonable" under the circumstances.

Under the circumstances of this case, some kind of inquiry into the Cherrys' feelings about the death penalty would have been unreasonable.[3] "Reasonable" diligence

[3] Additionally, I submit that *Lemke*'s requirement of "some kind of inquiry" was satisfied because Foran told Ray and Moore that the Cherrys preferred not to be contacted. Obviously, if Ray and Moore asked Foran if they could contact the Cherrys, and Foran told them

[*457] 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." Findings, 5th Suppl. Clerk's R. at 7. The trial court's finding is supported by the record. At the habeas hearing, Mark Daniel, who represented co-defendant Mark Porter, testified:

> Q. And in your -- in the normal course of your representation in death penalty cases, do you usually think it's a good idea to reach out and -- to the survivors of the murder victim and have a conversation with them about their feelings and thoughts?
>
> A. If you have not had a door slammed in your face recently and hope that one is, [**46] it's just -- it's such a -- such a strange dynamic. You approach somebody with a phone call or knock on a door or reach out to them with a email message, I'd like to talk to you about this, I've never done that, I guess for the fear that I suspect it will prove futile.
>
> then to say, hi, how do you feel about the death penalty, especially in this case? And I'm not saying this because the issue in this matter before Judge Young right now, but I expect that to be something the prosecutors might let me know. That's what I would expect.
>
> Q. In other words, it's reasonable to assume that in most cases the survivors of the murder victim are not eager to speak with the attorney representing their loved one's killer?
>
> A. That would be accurate.

Rep. R. vol. 3, 107. Another attorney, Fred Cummings, explained the issue from the perspective of trial counsel:

> Q. Have you ever, ever in any of the death penalty cases you've ever handled as a defense lawyer contacted the victim's family?
>
> A. No, sir.
>
> Q. Is there a reason for that?
>
> A. Yes, sir. It's my opinion and belief based upon practicing in this county for 31 years that if -- my primary responsibility in defending someone is to, in a death case, is to save [**47] that individual's life. Reaching out to the deceased's family would be extremely dangerous in that regard, in my opinion.
>
> Q. Can you explain that?
>
> A. Yes. The -- so much about death penalty representation is, or litigation, it's discretionary on the part of the DA's office. They get to decide whether or not they're going to seek death or not, they get to decide whether or not they're going to waive. DA's tend to be possessive about the victim and the victim's family. Reaching out to a parent

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the Cherrys preferred not to be contacted, some kind of inquiry has been made. If Foran told Ray and Moore this information before they could ask, Foran's caution that the Cherrys preferred not to be contacted negated the need for Ray and Moore to ask in the first place.

Futhermore, Jack's closing argument, wherein she stated that "all of Jonas's family and everyone who loved him believe the death penalty is appropriate," told Ray and Moore the answer to the question (although a false one, to be sure).

From the standpoint of habeas counsel Ford, the inquiry—the question—was either already asked and answered or just simply already answered.

> of a deceased might very well alienate the very people that I'm trying to convince to waive death.
>
> [*458] I have defended three death cases, but I've had 27 other capital murder cases that have resulted in other outcomes short of a death sentence, and that's the goal is to try to avoid doing that.
>
> Plus, you don't know whether -- what type of reaction you're going to get reaching out to someone who is grieving. So it's just a dangerous practice and it's not a common practice. I know every capital litigator in this county, and I don't believe that it is a good practice and I don't think it's commonly done here.

Rep. R. vol. 4, 38-39. The State, in its objections to the trial courts findings and conclusions, [**48] did not contest this point.

Additionally, the trial court made the finding that "it is highly unusual . . . for the parents of the murder victim to oppose the death penalty for their child's murderer." Findings, 5th Suppl. Clerk's R. at 7. This is also supported by the record. Jack testified at the habeas hearing that she thought it was "the only time that that has happened" in her experience. Rep. R. vol. 2, 53. Moore testified that the situation was "extraordinary." Rep. R. vol. 3, 13. Ashlea Deener, an Assistant Tarrant County District Attorney who was an intern working with Jack at the time of Applicant's trial, also testified that the Cherrys' opposition was extraordinary and unusual. *Id.* at 84. Ray testified that it was so unusual that, if he had been informed about it, he would have remembered it. *Id.* at 121.

Ford, when he prepared and filed Applicant's first application for writ of habeas corpus, was faced with these realities:

- Families of murder victims generally do not wish to speak to lawyers representing the person found guilty of killing their loved one;
- It is highly unusual for the parents of murder victims to oppose the death penalty for their child's murderer;
- Jack's closing argument matched these propositions, and [**49] her statement, while untruthful, was not an obvious lie at the time;
- Ray and Moore, at that point, had no reason to believe that Jack lied;
- Foran told Ray and Moore that the Cherrys preferred not to be contacted;
- Ray and Moore filed a motion for *Brady* material and did not get any information related to the Cherrys' opposition to the death penalty; and
- The trial court ordered that all exculpatory and mitigating evidence be disclosed regardless of admissibility, and Ray and Moore did not get any information pursuant to the court order related to the Cherrys' opposition to the death penalty.

Based on the circumstances at the time Ford prepared and filed the first application, there was no reason to suspect that Jack was untruthful. Instead, it would have been reasonable for Ford to presume that Jack

told the truth and that there was no need to pursue the Cherrys to find out otherwise. After all, any competent death penalty trial attorney certainly would have objected to Jack's untruthful statement had he or she known the statement was untruthful, and neither of the trial attorneys objected.

The Court today, however, finds that because Glenn Cherry would have told anyone who asked his [**50] position on the death penalty, and because there is no record evidence as to whether Ford asked or knew the Cherrys' position, there is no showing that Ford could not have ascertained the Cherrys' position through the exercise of reasonable diligence. True, had [*459] Ford questioned the Cherrys, he likely would have learned that the Cherrys were indeed opposed to the death penalty for Applicant, the prosecution failed to disclose this information, and Jack was untruthful to the jury during her closing argument. However, this judges Ford's diligence based on hindsight. Reasonable diligence should be measured from the standpoint of an applicant or counsel at the time the application was filed. *See* TEX. CODE CRIM. PROC. Ann. art. 11.071 § 5(e) ("a factual basis of a claim is unavailable on or before [the date the applicant filed the previous application] if the factual basis was not ascertainable through the exercise of reasonable diligence *on or before that date*") (emphasis added). At the time Ford filed the previous application, a reasonably diligent habeas attorney would not have sought out the Cherrys and would not have probed their feelings about the case and about the death penalty for Applicant. Habeas counsel should not be required [**51] to assume that every unsubstantiated claim a prosecutor makes in closing argument is likely to be untrue. On the contrary, habeas counsel should assume that prosecutors do not generally lie to juries in closing argument.

Nevertheless, the Court concludes that reasonable diligence would have been met only if Ford had questioned whether Jack told the truth despite no indication at the time that Jack was untruthful, and sought out and questioned the Cherrys about their true feelings despite no indication that he should have. Under the circumstances, these actions would have been unreasonable. Requiring an applicant or his counsel to go on fishing expeditions and blindly querying capital murder victims' families (themselves victims in many ways), without a good reason for doing so, is not reasonable. The unreasonableness is dramatically highlighted when we take the next logical step: questioning victims of other highly traumatic and personal crimes, such as rape or child abuse, just in case the prosecution may have lied about something, even though there is no indication at the time that there was any lie.

If I am correct, the Court's decision today threatens to rewrite "reasonable diligence" [**52] into "all diligence" by requiring attorney action that would likely be unwise and go beyond what a reasonably competent habeas attorney should do under the circumstances. The Legislature chose to use the word "reasonable" when it drafted article 11.071 § 5(e), and we should strive

to give effect to the word "reasonable." *Hardy*, 963 S.W.2d at 520.

Aside from the factors discussed above indicating the unreasonableness of questioning the Cherrys—namely, the fact that Ford had no reason to believe the Cherrys actually opposed the death penalty and the fact that Ford had no reason to believe Jack was untruthful about the Cherrys' views—there are additional considerations suggesting that questioning victims and their families, without any particular reason to, is generally unreasonable.

One important factor indicating that questioning the family of a murder victim, without a good reason for doing so, is unreasonable is the increasing emphasis on victims' rights in the criminal justice system since the 1980s. In response to the Victims' Rights Movement,[4] in 1985 the Legislature added Chapter 56, "Rights of [*460] Crime Victims," to the Code of Criminal Procedure. Act of May 20, 1985, 69th Leg., R.S., ch. 588, § 1, 1985 Tex. Gen. Laws 2217, 2217 (codified [**53] at TEX. CODE CRIM. PROC. Ann. ch. 56). Article 56.02, entitled "Crime Victim's Rights," grants rights not only to victims, but also to a "close relative of a deceased victim." TEX. CODE CRIM. PROC. Ann. art. 56.02(a). "Close relative of a deceased victim" includes a person who is a parent of the deceased victim. *Id.* art. 56.01(1).

Notably, in 2013, the Legislature amended article 56.02 by adding what is now subsection (a)(14),[5] dealing with defense-initiated victim outreach in capital cases.[6] That provision states:

> (a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:
>
> (14) if the offense is a capital felony, the right to:
>
> (A) receive by mail from the court a written explanation of defense-initiated victim outreach if the court has authorized expenditures for a defense-initiated victim outreach specialist;
>
> (B) *not be contacted* by the victim outreach specialist *unless the victim, guardian, or relative has consented to the contact* by providing a written notice to the court; and
>
> (C) designate a victim service provider to receive all communications from a victim outreach specialist acting on behalf [**54] of any person.

TEX. CODE CRIM. PROC. Ann. art.

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[4] Much has been written of the Victims' Rights Movement. *See generally*, Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims Into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865-69 (discussing the Victims' Rights Movement); Alice Koskela, Casenote & Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 Idaho L. Rev. 157, 163-67 (same).

[5] Act of May 22, 2013, 83rd Leg., R.S., § 1, 2013 Tex. Gen. Laws 1736 (amending **TEX. CODE CRIM. PROC. 56.02(a)** by adding what was originally designated **(a)(16)**); Act of May 29, 2015, 84th Leg., R.S., ch. 1236, § 4.002, 2015 Tex. Gen. Laws 4096, 4099 (redesignating **(a)(16)** as **(a)(14)**).

[6] "Defense Initiated Victim Outreach is a program in which a victim outreach specialist — if requested by the defense attorney in a criminal case, usually a capital felony — contacts the victim of a crime to ascertain questions and needs that the victim may have that the defense may be able to address." House Comm. on Criminal Jurisprudence, Bill Analysis at 1, Tex. H.B. 899, 83rd Leg., R.S.

56.02(a)(14) (emphasis added). Although this provision was not in existence at the time of Applicant's initial writ, the supporters' arguments in favor of this provision, as noted in the Bill Analysis, are telling:

> HB 899 is needed to protect the rights of crime victims. The bill would assert the rights of victims to refuse contact from a victim outreach specialist, who may be causing stress or trauma by contacting the victim. Since Defense Initiated Victim Outreach began in Texas, crime victims and their families have been harassed by victim outreach specialists who persist in attempts to contact them. Victims have had to make complaints to victims' assistance services and prosecutors for help in stopping the stream of letters and attempts at contact from specialists. Crime victims deserve to move on with their lives without being re-victimized by the defense team of a person who has already hurt them. HB 899 would allow them to do so.
>
> The bill would alleviate the impact of the Defense Initiated Victim Outreach program on victims and the appropriate punishment of heinous crimes. Victim outreach specialists can emotionally manipulate victims and influence them into advising the prosecutor [**55] not to seek the death penalty. By providing minor concessions and attempting to appeal to the victim's sympathy, the program tends to manipulate victims into asking the prosecutor to seek a lesser punishment. The bill would mitigate the ability of defense teams and third parties to insinuate [*461] themselves into the victim's life in this way.
>
> The bill would provide an option to victims who did not wish to be contacted by a specialist but would not affect the rights of victims who felt they could benefit from the program. Not every victim heals from crime in the same way. Different victims have different reactions to crime and to the defendants who harmed them. Many do not wish to have contact with a victim outreach specialist, even one who has suffered from a similar crime. By strengthening victims' rights to decline contact from a specialist, the bill would empower all victims, not just those who would seek Defense Initiated Victim Outreach.
>
> The bill would protect victims from being forced to communicate directly with a person who represented the interests of the defense team. It is the policy of the Defense Initiated Victim Outreach program to require that a refusal come from the victim [**56] or family member of the victim themselves, rather than allowing them to pass that message on through a victim's advocate or prosecutor. This can result in stress and trauma for victims who want to allow an agent to refuse on their behalf and do not want to have contact with the defense team or anyone hired by them. The bill would ensure that victims had the ability to designate another person to refuse contact on their behalf.

House Comm. on Criminal Jurisprudence,

Bill Analysis at 2-3, Tex. H.B. 899, 83rd Leg., R.S. It is clear that a defendant or his lawyers contacting a victim can be harmful and is disfavored, and such unsolicited contact is likely to be unreasonable if there is no apparent reason for the contact.

Additionally, outside of Chapter 56, the Legislature has enacted a number of provisions which not only discourage contacting a victim or a member of the victim's family, but actually punish such contact. If a defendant is sentenced to a term of confinement or imprisonment, a convicting court may, as part of the sentence, enter an order prohibiting the convicted defendant from contacting a victim or a member of the victim's family. Tex. Code Crim. Proc. Ann. art. 42.24. Violations of such an order can lead to the loss of accrued good conduct time. *Id.* art. 42.032 § 5(3); Tex. Gov'T Code Ann. § 498.0042(b). Contact can [**57] also negatively impact release on parole or to mandatory supervision. Tex. Gov'T Code Ann. § 508.1531. These particular provisions, it should be noted, were also not in effect at the time Ford prepared and filed the initial application.[7] They do, however, further indicate the Legislature's, and therefore society's, interest in shielding victims and their families from unwanted and unwarranted contact by defendants and their attorneys.

The emphasis on victims' rights is also ingrained into our state's constitution. Article 1, § 30(a) of the Texas Constitution, adopted November 7, 1989, provides:

> (a) A crime victim has the following rights:
>
> (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process; and
>
> (2) the right to be reasonably protected from the accused throughout the criminal justice process.

Tex. Const. art. 1, § 30(a).

Thus, it is apparent that significant strides have been made to place more emphasis [*462] on the victims of crime, including the surviving family members of murder victims, to treat them with fairness and with respect for their dignity and privacy, and to reasonably protect them from the accused. Requiring uninvited questioning by the lawyers of the person who killed their loved ones, especially [**58] when the lawyers had no apparent reason to do so, just to meet a requirement of "reasonable diligence," flies in the face of these legislative and constitutional efforts and is another factor showing why it is actually unreasonable.

Yet, the Court today faults Ford for failing to intrude upon the Cherrys' peace and for failing to question them about their feelings regarding Applicant's case. True, in hindsight had Ford actually done those things, the Cherrys likely would not have objected. But at the time Ford filed Applicant's initial habeas application, there was no indication that the Cherrys would

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[7] *See* Act of May 16, 2011, 82nd Leg., R.S., ch. 491, §§ 1-4, 2011 Tex. Gen. Laws 1246 (adding Tex. Code Crim. Proc. art. 42.24; amending Tex. Code Crim. Proc. art. 42.032 § 5; amending Tex. Gov'T Code § 498.0042(b); and adding Tex. Gov'T Code § 508.1531).

have been different from any other family or that they should have been inquired upon. At that point, Ford would not have known Jack was untruthful about the Cherrys' position on the death penalty or that the matter was even an issue. To learn the truth, he would have had to probe their thoughts, concerns, and feelings over a broad range of topics until he eventually struck gold with the specific issue of the appropriateness of the death penalty. Such an interrogation of a victim's family is hardly reasonable. We should not create a *per se* rule that habeas counsel should question the feelings [**59] of every State's witness, every victim, and every victim's family, just to ferret out the possibility that the trial prosecutors lied about those feelings.

Finally, we should not foster a culture in which habeas attorneys must presume prosecutors misrepresented the truth or even lied. In *Lemke*, in which the applicant's claim was that his attorney lied about whether a plea deal was offered by the prosecutor, we found that reasonable diligence does not require a defendant to query the prosecutor as to whether his lawyer was telling the truth. *Lemke*, 13 S.W.3d at 794. Likewise, reasonable diligence should not require an applicant, or his counsel, to query a victim's family as to whether the prosecutor was telling the truth.

Requiring habeas counsel to question the statements of the prosecutor will also add needless and counterproductive grit into our system of criminal justice. In this case, Jack was untruthful, but Ford had no reason to believe that she was untruthful at the time he prepared and filed the first application. Should Ford have been expected to question everything Jack said, even those statements that are generally true? While our system is an adversarial one, it works in most cases because the [**60] parties trust that the other side is playing by the same rules. We should not inject an element of distrust into the system just to preserve future claims for habeas relief on the chance that some unknown fact is later revealed after an initial application for habeas relief.

Absent some additional circumstance indicating that the Cherrys should have been contacted, the fact that the Cherrys were actually opposed to the death penalty and the consequent fact that Jack was untruthful about the Cherrys' true feelings were not ascertainable through the exercise of reasonable diligence. The factual basis for Applicant's current claims was not available at the time Ford filed Applicant's previous application for habeas relief. The § 5(a) procedural bar should not apply, and Applicant's claims should be addressed rather than dismissed.

[*463] IV — Conclusion

In conclusion, we are not procedurally barred by article 11.071 § 5(a) from considering the merits of Applicant's claims for habeas corpus relief. Reasonable diligence should not require habeas counsel to pry and probe a murder victim's family to determine whether the prosecutor was untruthful during closing argument where there was no reason at the time to question the truthfulness [**61] of the prosecutor's statement in closing argument, even though

it may have been improper. I disagree with the Court's decision to dismiss Applicant's claims as an abuse of the writ without reviewing the merits, and I respectfully dissent.

Filed: October 2, 2019

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Appendix D

Petitioner's *Suggestion for Reconsideration on the Court's Own Initiative*

WR-75,828-0
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/16/2019 7:05 PM
Accepted 10/17/2019 3:41 PM
DEANA WILLIAMSON
CLERK

IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

EX PARTE

NO. WR-75,828-02

PAUL DAVID STOREY

SUGGESTION FOR RECONSIDERATION ON THE COURT'S OWN INITIATIVE

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Michael Ware and Keith S. Hampton, attorneys for Applicant in the above-entitled cause, and respectfully suggests that this Court make the extraordinary decision in this extraordinary case to reconsider[1] the unprecedented review expressed in its per curiam and concurring opinions on October 2, 2019, and would show the Court the following relevant facts either cited in abbreviated fashion in these opinions or ignored altogether, and would reurge the law which should be considered as a preliminary matter before any decision to dismiss Applicant's claims as barred.[2] Counsel therefore shows the following:

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[1] Rule 79.2(d) of the Texas Rules of Appellate Procedure provides:

> A motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

Tex.R.App.Pro. 79.2(d).

[2] This Court should also have had the full record in this cause, as argued in Applicant's *Alternative Suggestion for Reconsideration on this Court's own Initiative.*

Facts Supported by the Record Are Dispositive of Habeas Claims.

Tarrant County prosecutor Christy Jack argued to the jury at the sentencing phase of Applicant's death penalty case:

> 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[3] that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate.

(Vol. 39; pp. 11-12). The Cherrys in fact did not believe the death penalty was appropriate; in fact, they were affirmatively opposed to Applicant's execution. After extensive hearings, the trial court determined that both Jack and her co-counsel, Robert Foran, knew this claim to be false. Its falsity was a closely-kept secret.

Jack testified that she did not tell Bob Ford, Applicant's initial habeas counsel, about the falsity of her assertion. (Vol. 1, pp. 130-132). Foran testified that he also

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[3] The phrase "it goes without saying" means:

> It is unambiguous, perfectly clear, or self-evident that; to be already widely acknowledged, established, or accepted that. *I know it goes without saying, but the staff restrooms are not to be used by students or visitors. It should go without saying, but you will receive an automatic zero if you are caught cheating on the exam.*

Farlex Dictionary of Idioms (2015).

> You say it goes without saying to mean that something is obviously true. *It goes without saying that if someone has lung problems they should not smoke. It goes without saying that you will be my guest until you leave for Africa.*

Idioms Dictionary, 3rd ed (Harper Collins Publishers 2012).

did not tell Ford. (Vol. 1, pp. 259-260). Applicant's appellate counsel, John Stickels, testified he did not know. (Vol. 4, pp. 26-27). Ford's counterpart, the State's appellate and habeas prosecutor in state court, Edward "Chip" Wilkinson, testified he did not know. (Vol. 4, pp. 19-21). Applicant's trial attorneys, Larry Moore and Bill Ray, did not know. (Vol. 2, pp. 31-32)(Vol. 4, p. 71). The State was also seeking the death penalty against Applicant's co-defendant, Mark Porter; however, his attorneys, Mark Daniel and Tim Moore, testified they also did not know. (Vol. 3, pp. 97-100; 133). No one else knew about the extraordinary fact of the Cherrys' opposition to Applicant's execution, and consequently, no one told Bob Ford.

Ford had no reason to know that Jack had lied and that she and Foran were concealing anything. Habeas counsel interviewed Applicant's trial counsel who had been informed by the prosecutor that the Cherrys "preferred not to be contacted[.]" (Vol. 2, p. 252). Ford had no reason to doubt these false assertions. There would be no reason for the issue to arise during habeas interviews of trial counsel. If it had, Bob Ford would have learned from trial counsel that any interview effort would likely be futile or worse. But it probably did not arise because absolutely no one would have thought it a good idea for Bob Ford to conduct a fishing expedition with the grieving parents of a murdered son.

There is no evidence that anyone other than Jack and Foran knew. Not even

Chip Wilkinson, the State's writ lawyer, knew. This circumstance weighs heavily in favor of the reasonable inference that Bob Ford was no exception to the category of lawyers, both State and defense, who were unaware of these unusual and important facts. Under the facts of this record, the trial court – with ample supporting evidence – found Bob Ford to be unaware of this hidden fact. Under well-established law, the trial court concluded Bob Ford to be reasonably diligent. *Holland v. Florida*, 560 U.S. 631, 653 (2010)(due diligence "is reasonable diligence, not maximum feasible diligence.")(internal citations and quotations omitted). The district judge, then, was compelled, in light of his assessment of the facts before him and well established law, to find that Bob Ford was unaware, a conclusion unsurprising in light of the unawareness of all the other lawyers involved in this case, State and defense.

Nevertheless, this Court completely discounted the district judge's well supported findings and dismissed Applicant's subsequent writ application because it attributed Bob Ford's unawareness solely to his own lack of reasonable diligence. *Ex parte Storey*, No. WR-75,828-02, pp. 4-5, 2019 Tex.Crim.App. LEXIS 958 (Tex.Crim.App. Oct. 2, 2019)(per curiam).[4] This Court's attribution is contrary to the

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[4] "'Per curiam' is a Latin phrase meaning 'by the court,' which should distinguish an opinion of the whole Court from an opinion written by any one Justice." *Montana v. Hall*, 481 U.S. 400, 409 (1987)(Marshall, J., dissenting)(complaining about the misuse of per curiam opinions "over the dissent of those who would set the case for briefing, to resolve the merits of a case without devoting the usual time or consideration to the issues presented, is wrong.").

trial court's extensive and well supported investigation. It is also contrary to this Court's own established habeas standard of review.

Under ordinary habeas review, these facts would have been enough for this Court to defer to the trial court's conclusion that Bob Ford was diligent because he, like everyone else, did not know of the extraordinary circumstance in this case. In an ordinary habeas review, this Court would have deferred to a trial court's supported factual findings and adopted its recommendation. *See, e.g., Ex parte Garcia*, 353 S.W.3d 785, 787-88 (Tex.Crim.App. 2011)("this Court is the ultimate finder of fact; the trial court's findings are not automatically binding upon us, although we usually accept them if they are supported by the record."). Yet this ordinary review is replaced by a per curiam opinion that 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.

This Court's per curiam opinion rejected the trial court's diligence findings because Applicant's counsel did not provide direct evidence from Bob Ford "showing what Ford did or did not know regarding the victim's parents' anti-death penalty views." *Ex parte Storey*, No. WR-75,828-02, p. 5, 2019 Tex.Crim.App. LEXIS 958 (Tex.Crim.App. Oct. 2, 2019)(per curiam). Under the per curiam's new requirement, the overwhelming and uncontradicted circumstantial evidence that Bob Ford was

unaware of the Cherrys' opposition is insufficient. Counsel must now directly prove a negative – lack of knowledge – from the testimony from a deceased attorney.

It is not reasonable to infer that Bob Ford knew. It is reasonable to infer that he did not know. In fact, the only reasonable inference is that had he known, he would have raised the issue.

There is absolutely no evidence, direct or circumstantial, that Bob Ford was aware. Any finding that Bob Ford *did* know would be one wholly unsupported by the evidence. Judge Young made findings that supported his considered recommendations and this Court should respect his findings, particularly in the light of the evidence in this case.[5] Unfortunately, the per curiam opinion charts a radical new review nullifying Judge Young's work.

This Court's New Rule of Habeas Review

The per curiam opinion rewrites the rule of deference to a trial court's fact-finding role. The long-standing rule has been that this Court upholds the findings if they are supported by the record. Under this opinion, however, this Court instead

[5] The concurring opinion asserted that Ford's unawareness of the prosecution's hidden facts was "doubtful." *Ex parte Storey*, No. WR-75,828-02, p. 6, 2019 Tex.Crim.App. LEXIS 958 (Crim. App. Oct. 2, 2019)(Hervey, J., concurring). There is literally no evidence whatsoever in this case that Bob Ford had any inkling that the Cherrys opposed execution for their son's killer. The concurring opinion's "finding" is wholly unsupported by the record. Were the concurring opinion written by a trial judge, this Court would be authorized – even obligated – to reject it.

scours the record to find any evidence that "undermines" the trial court's findings.

This per curiam opinion found that a single, snapshot portion of Mr. Cherry's testimony "undermines" the trial court's factual finding regarding Bob Ford's due diligence. *Ex parte Storey*, No. WR-75,828-02, p. 5 (per curiam). Relying exclusively upon one remark by Mr. Cherry, the per curiam opinion suggested that Bob Ford could have unquestionably discovered the prosecution's secret by merely interrogating the victim's father, Glen Cherry. As the per curiam analyzed the issue:

> The victim's father testified that he has disclosed his anti-death penalty views to ***"anybody that wants to know or has ever asked me."*** This testimony undermines the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application.

Id. (emphasis added). The per curiam opinion implicitly suggests that Mr. Cherry's testimony establishes that all Bob Ford needed to do was to simply ask him.

This Court should evaluate that slice of testimony in its context from the entire relevant portion of this questioning of Mr. Cherry. Under the State's examination, Mr. Cherry testified:

> A. Yes, I'm against the death penalty.
>
> Q. So that position formed before this terrible set of circumstances, correct?
>
> A. Yes.

Q. And your opposition to the death penalty would be to any – to anybody being executed?

A. I don't believe in the death penalty for anybody.

Q. And they asked you about Mr. Storey's mother, about your feelings about that. But that would be for any mother that was going to lose a son, you know, to execution, correct?

A. Yeah, I don't want anybody to have to go through that.

Q. Have you spoken with friends and family about your views on the death penalty?

A. Well, I know most of my family's views, I think.

Q. But, I mean, have you told them your views?

A. Yeah, it's not a secret.

Q. Yeah. And certainly you've told friends?

A. Yeah, anybody that wants to know or has ever asked me or we've ever talked about it. I don't just go around telling everybody all my views.

(Vol. 3, pp. 174-175).[6]

Mr. Cherry's inflection or tone of voice or facial expressions are not reflected in this record. His hesitations, his confidence, his pauses are nowhere to be found by

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[6] Beyond the per curiam's abbreviated recitation of the statement of facts, it is also significant that the testimony was elicited by the State, despite Applicant's *Motion to Preclude the State from Contending That Counsel Failed to Exercise Due Diligence In Ascertaining the Cherrys' Opposition to Paul David Storey's Execution*, filed with the Tarrant County District Clerk on September 11, 2017. This Court apparently never received, and therefore did not consider, this motion. It did however, have the State's objections.

any judge of this Court. The only judge who actually witnessed Mr. Cherry during his testimony was Judge Young who was called upon to consider different interpretations of testimony, including interpretations in light of other evidence and the testimony of other witnesses.

One interpretation of Mr. Cherry's statement suggests he was ready and willing to disclose his opposition to habeas counsel, had Bob Ford merely called. Another interpretation is that he was a private man, though open to those who were close to him, like friends and family, and would not have returned a call. Judge Young resolved these competing interpretations by considering all the evidence and live testimony developed on this issue.

The interpretation of Mr. Cherry's testimony is wholly dependent on the trial judge's attention to his testimony, body language and other measures. Judge Young was called upon to resolve the meaning of Mr. Cherry's statement, and he resolved it in favor of his ultimate conclusion regarding Bob Ford's diligence. This Court should defer to his finding.

Invariably there will be evidence that is arguably inconsistent with or "undermines" other evidence. It is the trial court which resolves clashing evidence, particularly live testimony. If this Court can supplant the trial court whenever it finds a piece of evidence that arguably "undermines" a trial court's finding which is

otherwise well supported by the record, trial courts may justifiably wonder whether their fact-finding efforts matter.

Instead of asking whether the judge's findings are supported by the record, this Court now asks a new question – whether other evidence can be found which "undermines" the trial court's ultimate factual determinations. This new standard renders trial court resolutions meaningless because almost any case will have arguably conflicting evidence, which can then form a new factual basis for members of this Court to arrive at exactly the opposite determination entrusted to trial judges like Judge Young. This departure is unwarranted and remains completely and totally unsupported by any of the scant caselaw citations in the per curiam or concurring opinions.

The per curiam opinion relied upon *Ex parte Thuesen*, 546 S.W.3d 145 (Tex.Crim.App. 2017). *Thuesen* concerned purely legal matters – the authority and propriety of a trial court judge who recused himself, then withdrew his recusal. *Id.* *Thuesen*, then, offers no support for any of the propositions in the per curiam opinion.

Thuesen relied upon *Ex parte Reed*, 271 S.W.3d 698 (Tex.Crim.App. 2008) for the proposition that this Court "is the ultimate factfinder in habeas corpus proceedings. The trial judge on habeas is the 'original factfinder.'" *Id.* at 727. While counsel agrees with this general observation, *Reed* offers no support for this Court's

disposition of Applicant's claims. *Reed* supports Judge Young. Had Judge Young made a contrary finding, he would have found himself on the wrong side of this Court's decision in *Reed* (condemning unfounded trial court findings).

This Court in *Reed* made it a point to look for evidence which *supported* the trial court's findings of fact, not evidence which *undermined* its findings of fact. This Court in the instant case has fundamentally altered its habeas review by inverting its long standing rule of looking for evidence supporting the trial court's findings, to looking for any evidence at all which arguably "undermines" those findings. *Reed* supports Applicant's position, not the new review undertaken in this case.

Further, in *Reed*, the trial judge had "adopt[ed] the State's proposed findings and conclusions verbatim" including those which were unsupported or misleading. *Ex parte Reed*, *supra* at 729. While this Court admonished courts to refrain from rubber-stamping proposed findings, this Court ultimately decided "that the few instances in which [a trial judge's] findings are inconsistent or misleading do not justify a decision [by the Court of Criminal Appeals] to totally disregard the findings that are supported by the record[.]" *Id.* Thus, even when a judge has adopted unfounded or misleading findings, this Court still insists on upholding that judge's

findings when they are supported by the record.[7] Judge Young – who made no unsupported or misleading findings – is surely owed at least the same deference as a judge who did.

The issue in *Reed* was how this Court would treat a trial court's findings that were both founded and accurate reflections of the record as well as findings that were unfounded or misleading.[8] *Reed, supra* at 726. This Court resolved the issue by holding that "it is appropriate to remain faithful to our precedent" which requires this Court to defer to trial judge findings that are supported by the record, but clarified that this Court would "afford no deference to findings and conclusions that are not supported by the record[.]" *Id.* at 727. Despite the troubling fact-finding

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[7] In this case, Judge Everett Young carefully prepared his own findings. The per curiam opinion states: "Following a three-day hearing in September and October 2017, the trial court adopted Applicant's proposed findings of fact and conclusions of law." *Storey, supra* at 3. A cursory comparison between Applicant's proposed findings and Judge Young's findings reveals that he acted completely independently, contrary to the per curiam opinion's assertion. The assertion that he simply adopted Applicant's proposed findings like the judge in *Reed* is inaccurate and unfair to Judge Young. Compare 4th Supplemental Clerk's record (proposed findings and conclusions) with 5th Supplemental Clerk's record (Judge Young's actual findings and conclusions).

[8] This Court had identified the issues as:

> Assuming, *arguendo*, that the court has entered a finding of fact or conclusion of law that has multiple sentences or phrases and that a portion of the finding or conclusion is supported by the record, while another portion is not, to what extent does this Court owe deference to the trial court on such a finding or conclusion? May the Court disregard the finding or conclusion in its entirety?
>
> Assuming, *arguendo*, that numerous findings and conclusions, or parts thereof, are not supported by the record, how should this affect the level of deference to the findings and conclusions as a whole?

Ex parte Reed, supra at 726.

irregularities in *Reed*, this Court nevertheless deferred to trial court findings which were suspect because some were unsupported or misleading.

Judge Young's findings contain nothing that is unsupported or misleading. On the contrary, his findings are strongly supported by this record. They are not misleading, but spot on.

Insofar as the per curiam opinion suggests that Judge Young's judgment lacked gravity, this Court need only look at the overwhelming evidence that supports the judge's conclusion that Bob Ford was diligent. Nowhere is there any identification of unsupported findings. Indeed, the per curiam opinion could find only one remark by one witness plucked out of its context.

The established standard of review should govern this case. The issue for this Court under settled precedence – including *Reed* upon which this Court's decision rests – is whether the trial court's findings in this case are supported by the record. The trial court's findings in this case are strongly supported by the evidence. Accordingly, this Court should defer to the trial court's well supported findings that Bob Ford was unaware of the Cherrys' opposition to Paul Storey's execution and that reasonable diligence did not require him to make unwarranted inquiries to the Cherrys. Yet this Court has spurned its own law, and now demands contact between those who wish to be left alone and lawyers who also wish to leave them alone.

This Court's New Requirement for Initial Habeas Counsel

The per curiam opinion determined Bob Ford to be less than diligent because all he had to do was seek the answer about a fact he had no reason to question. This new rule imposes upon initial habeas counsel an additional duty which, if unfulfilled, declares him to be less than reasonably diligent. Lawyers who represent death-sentenced defendants must now make efforts to determine the murder victim survivors' views, just in case in light of the *Storey* rule. It is a bad rule that no one asked for or welcomes.

No one suggested this view. Prosecutors did not request this new rule. Defense lawyers are already cringing. Victims and their families do not want to be contacted by anyone, especially by defense attorneys or their agents. This new rule – making lawyers for a death-sentenced inmate interrogate the survivors of the murder victim – is, at a minimum, dysfunctional, and at worst, insensitive and immoral. Undoubtedly, it will have disastrous consequences, particularly in the lives of victims.

This focus on the views of the Cherrys also misses the entirety of this subsequent writ application. It is not merely that the Cherrys were opposed to Applicant's execution. Applicant's claims are rooted in the fact that the prosecution knew of their opposition and recognized the many ways it could be used by the

defense not only at trial but also during the plea negotiation process. The prosecutors hid their knowledge and misled trial counsel, lied to the jury and the trial judge, concealed these facts from habeas counsel, then tried to cover it up, including through untruthful sworn testimony found to be not credible by the district judge. These are the facts which should occupy this Court's attention.

Under the Court's opinions, the only blameworthy court participant is Bob Ford. He is the only person faulted. On account of his being dead, he cannot provide that direct evidence demanded by the per curiam opinion. Ford can be faulted only under this Court's new form of review of counsel's performance, its new "hindsight review."

This Court's New Hindsight Review

The Court's review of Bob Ford judges him solely through the lens of hindsight. Everywhere in law, hindsight is forbidden. There is good reason for judicial disfavor of hindsight review.

As a matter of constitutional law, hindsight judicial review is condemned:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 U.S. 668, 689-90 (1984). Hindsight makes it "all too easy for a court ... to conclude that a particular act or omission of counsel was unreasonable." *Id.* "[I]t is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight." *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965). This prohibition against this sort of review is mirrored in civil malpractice law. *Ex parte Lewis*, 537 S.W.3d 917, 921 n.16 (Tex.Crim.App. 2017)(perceived errors by counsel "should not be gauged by hindsight or second-guessed")(quoting 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §18.17 at 59 (5th ed. 2000)). Prosecutors are similarly spared hindsight review. *See, e.g., Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 56 (D.D.C. 2009)(immunity reflects "the profound societal concern that prosecutors be free to perform their vital duties courageously and without fear that their actions will be judged in hindsight.").

Defendants accused of civil negligence are also spared the glaring review of hindsight, like their counterparts in criminal court. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994)(judicial review "requires an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight."). Civil liability "is not measured by hindsight, but instead by what the actor knew or should have known at the time of the

alleged negligence. In other words, there is neither a legal nor a moral obligation to guard against that which cannot be foreseen in the light of common or ordinary experience[.]" *Boren v. Texoma Med. Ctr.*, 258 S.W.3d 224, 230 (Tex.App. – Dallas 2008, *no pet.*)(internal citations and quotations omitted).

This Court, then, is well aware of why hindsight review of attorney behavior is wrong. Yet it singled out habeas counsel and judged him by one remark from Mr. Cherry spotted in the pure beam of hindsight. This review is unfair for all the reasons hindsight is rejected in law.

In hindsight and under one eclectic imaginary scenario, Bob Ford would have located and interrogated the Cherrys who would have promptly shocked him with news of their opposition to his client's execution. Under this "what-if" scenario, Bob Ford should have trekked to the home of the grief-stricken parents of a murdered son and gently rung the doorbell, a conversation with Mr. Cherry would have ensued, all the facts revealed. If only Bob Ford had undertaken this measure, hindsight assures the per curiam opinion, he would have discovered the prosecution's secret just in time for the imagineers' fairy-tale ending.

Here in the real world, hindsight is not helpful to judicial review, but distracting and misleading. It does not renounce assumptions; it feeds them. This case is the paradigm why hindsight is not employed to resolve issues of fact.

Hindsight is never wrong because the view is always clear and perfect. What might have occurred becomes what would have occurred. It is a view judges should avoid.

Even in hindsight under this imagined scenario, Bob Ford was diligent. Being unaware of the Cherrys' opposition, he would have had no reason to inquire about it. After Mr. Cherry answered that hypothetical doorbell, the conversation would have more likely been:

> BOB FORD: Hello, I'm Bob Ford, Mr. Storey's attorney. I'm sorry about your loss.
>
> GLEN CHERRY: Why are you here?
>
> BOB FORD: I'm not sure. I don't usually do this.
>
> GLEN CHERRY: How can I help you?
>
> BOB FORD: I'm not sure about that, either. Do you have anything to tell me that would raise a factual claim cognizeable in an initial application for writ of habeas corpus?
>
> GLEN CHERRY: Like what?
>
> BOB FORD: I wish I knew.

A Fair Assessment of Bob Ford's Reasonable Diligence

If hindsight is removed from this Court's review, it should be clear that Bob Ford exercised reasonable diligence. His initial writ application – which this Court possesses – reflects his diligence. It also contains nothing about the issue in this case,

evidence from which this Court can infer reflects Bob Ford's unawareness of the issue. In fact, that is the only reasonable inference. Counsel for Applicant's co-defendant, Mark Daniel, testified about Ford:

> Bob Ford was a passionate lawyer. He was a fearless advocate. Not only at the trial level but the post-conviction work he did. He was thorough beyond description. When you said the question was work ethic, Bob probably worked too hard, in my estimation. ... [D]ue diligence is kind of a baseline standard, in my estimation. Bob Ford always performed far and above what is considered to be due diligence. He went far beyond what is considered to be due diligence in his trial work and his appellate work, from my outside observations.

(Vol. 2, pp. 99-100). From all other "outside observations," every testifying witness affirmed this estimation. None contradicted it.

Bob Ford remained unaware of the key facts in the same way everyone else was unaware. Trial counsel Larry Moore did not know:

> I have no doubt that I would have been telling Bob Ford, he wouldn't have had to ask me about it because I would have been telling him, that is the first and foremost thing that you need to put in this writ to bring forward to the Court of Criminal Appeals because it's absolutely atrocious.

(Vol. 2, pp. 31-32). Trial counsel Bill Ray testified that he, like Moore, did not know. (Vol. 4, p. 71). Ford's counterpart, counsel for the state in the initial writ, Chip Wilkinson, did not know. (Vol. 4, pp. 19-21). Like all other lawyers involved in the case, Bob Ford was unaware because no one told him and he had no reason to believe

that the Cherrys were opposed to Applicant's execution.

Ford's sterling reputation for diligence is unassailed. Every witness, including the State's witnesses, agreed that Bob Ford was diligent. Judge Mollie Westfall described Bob Ford as "very zealous" and "very diligent." (Vol. 3, p. 203). Even Christy Jack agreed Bob Ford was "very diligent." (Vol. 1, pp. 130-132). Only this Court disagrees under a record that is completely unsupportive of this contrary conclusion.

It is unreasonable to assume that Bob Ford acted without diligence in this case. These witnesses are people who knew him and worked with him. Their collective description portrayed an aggressive and diligent lawyer who would not have remained silent, stationary or sympathetic to the prosecutorial self-interests upon learning that Jack and Foran had hidden this favorable information from him. Consistent with everyone else in this case who was unaware, Ford proceeded with his work not as a lawyer inattentive to facts learned through his investigation, but as another victim of the prosecution's calculated concealment.

Wholly absent from this Court's distorted review of Bob Ford's diligence was the unfairness of faulting him for failing to discover what the prosecution successfully had hidden from him. Under this Court's order and opinions, the State may poke out the eyes of habeas counsel, then benefit from its crime on the grounds

that counsel is blind. This Court should reconsider its analysis under basic applicable and very long established equitable doctrines.

Equitable doctrines unmentioned by this Court's reasonable diligence analysis.

Habeas corpus is "governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963). This Court applies equitable common-law principles of "elements of fairness and equity" because "habeas corpus is an equitable remedy." *Ex parte Perez*, 398 S.W.3d 206, 210, 216 (Tex.Crim.App. 2013). While equitable principles govern, some have been codified.

The reasonable diligence requirement in chapter 11 is simply a legislative recognition of the judiciary's doctrine that "equity aids the vigilant, not those who slumber on their rights." *Callahan v. Giles*, 137 Tex. 571, 576, 155 S.W.2d 793, 795-96 (1941)(due diligence maxim is "a fundamental principle of equity jurisprudence"). Article 38.49 is another example of codification of an equitable doctrine, i.e., forfeiture by wrongdoing. Tex Code Crim. Pro. art. 38.49. Accordingly, this Court should reconsider its opinions and decision by addressing the other applicable equitable doctrines under the unique circumstances in this case.

The State secreted the Cherrys' opposition to the death penalty from trial counsel – a fact recognized by every member of this Court. None of the opinions, per

curiam or concurring, even attempt to justify the prosecution's lie to the jury, the prosecutors' concealment from counsel, or their lies to the court. Even the concurring opinion considers how their bad acts should be considered, not whether they were wrong. No one on this Court defends the prosecutors' concealment of this fact or their dishonest sworn testimony at the writ hearings. The indefensibility of misconduct should be included in this Court's diligence analysis.

The analysis should also recognize the value of the Cherrys' opposition. The concealed facts were so valuable to the prosecution that it concealed them from discovery. Under this Court's current decision, it is a wrong worth committing, contrary to long-standing principles of equity. This Court should reconsider its decisions in light of this unjust consequence.

"He that hath committed iniquity shall not have equity." Richard Francis, Maxims of Equity 5 (London, Henry Lintot, 3rd ed. 1746). Contrary to this ancient equitable maxim, this Court's dismissal of this subsequent writ application delivers the deceivers their greatest prize. That prize is awarded for winning a death sentence by falsely asserting to the judge and jury that the Cherrys supported a death sentence. The per curiam opinion is faithless to the "well settled principle of law that a party cannot benefit from his own wrong[.]" *Smith v. State*, 272 S.W. 793, 794 (Tex.Crim.App. 1925)); *Reynolds v. United States*, 98 U.S. 145, 160 (1878)("no one

shall be permitted to take advantage of his own wrong."). This Court should reconsider its opinions as a matter of equity and conscience.

The fuller equitable inquiry Applicant seeks is no different from how the federal courts employ equity in cases where counsel misses a statutory deadline. The federal courts provide the remedy of equitable tolling under the same equitable principles urged herein. Where counsel is found to have failed to exercise due diligence (whether it is timeliness or discovery), the federal courts also ask whether "some extraordinary circumstance stood in his way" which prevented counsel from meeting his duty. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). If an "extraordinary circumstance" hobbled counsel, then any lack of diligence is excused. *Holland v. Florida*, 560 U.S. at 632 (courts "must often "exercise [their] equity powers ... on a case-by-case basis" to permit consideration of otherwise barred claims)(citations omitted). Concealment of the Cherrys' views stood invisibly in the way of Bob Ford's awareness of these facts.

The remaining equitable question for this Court is the value it assigns to the prosecutorial misconduct in this case. This Court must regard it as either routine and ordinary, or unusual and extraordinary. If this Court considers the prosecutorial misconduct established in this case to be extraordinary, then this Court should not fault Bob Ford for his failure to learn about the prosecution's deception. Bob Ford's

unawareness was due to the extraordinary efforts by prosecutors which prevented him from discovering their hidden and concealed misconduct, just as they had duped trial counsel for both defendants and even to their own state habeas counsel.

Emphatically, this case does not concern merely an issue of negligent counsel, i.e., something habeas counsel should have done, but failed to do. It is different because the prosecution had a clear and unclean hand in sabotaging habeas counsel's investigation. In order to fairly consider Bob Ford's diligence, this Court should consider the prosecution's misconduct in this regard.

Equity demands that Bob Ford be regarded as diligent. To do otherwise congratulates identified wrongdoers at the expense of a universally recognized conscientious attorney. After all, the judiciary's equitable powers "can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933).

Equity's fairness inquiry is the "linchpin" for the judiciary. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000). Equity seeks "to promote justice and to prevent a party from benefitting by his own misleading representations[.]" *Richey v. Miller*, 142 Tex. 274, 279, 177 S.W.2d 255, 257 (1944).

Equity considers whether one party knowingly makes "a false representation or concealment of material facts" which prejudices an unaware adversary. *Gulbenkian v. Penn*, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952)(stating the requirements for equitable estoppel). If new trials may be awarded under these circumstances, surely this Court will consider the prosecution's misconduct in evaluating Bob Ford's performance.

It is unusual for this Court to withdraw its opinions. However, this case is unusual for many reasons. The new rule of review of the supported independent findings of a trial court deserves reconsideration. The new duty imposed upon habeas counsel needs serious reflection. The other arguments advanced by habeas counsel regarding how the prosecutors' misconduct impacted Bob Ford's representation ought in fairness be addressed by this Court.

This Court's concurring and dissenting opinions indicate some desire for counsel to address at least some aspects of Applicant's substantive arguments. Additionally, the concurring opinion in this case addresses in *dicta* some of the merits of Applicant's substantive arguments, but contains serious misperceptions of Applicant's claims. In light of the unusualness of this case and its issues, this Court should order the parties to brief the questions which clearly trouble members of this Court, as reflected in the dissenting and concurring opinions. *Ex parte Storey*, *supra*

(Hervey, J., concurring)(Yeary, J., dissenting). For these reasons, this Court should, on its own initiative and inherent constitutional powers, withdraw its previous opinions and file and set this case for additional briefing on these issues under the circumstances of this unusual case.

PRAYER

Counsel prays this Court to reconsider its opinions, apply settled law and equity to its review of Bob Ford's diligence, and order further briefing on the issues raised by the opinions in this case.

Respectfully submitted,

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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 October 16, 2019.

Appendix E

The Texas Court of Criminal Appeals' denial of petitioner's *Suggestion*

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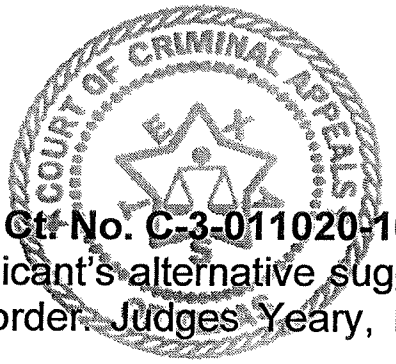

11/6/2019

STOREY, PAUL DAVID Tr. Ct. No. C-3-011020-1042204-B WR-75,828-02

This is to advise that the applicant's alternative suggestion for reconsideration has been denied without written order. Judges Yeary, Newell, Walker, and Slaughter would grant.

Deana Williamson, Clerk

PAUL DAVID STOREY
C/O KEITH HAMPTON
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Deana Williamson, Clerk

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11/6/2019

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This is to advise that the applicant's alternative suggestion for reconsideration has been denied without written order. Judges Yeary, Newell, Walker, and Slaughter would grant.

Deana Williamson, Clerk

DISTRICT CLERK TARRANT COUNTY
THOMAS WILDER
401 W. BELKNAP
FORT WORTH, TX 76196
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This is to advise that the applicant's alternative suggestion for reconsideration has been denied without written order. Judges Yeary, Newell, Walker, and Slaughter would grant.

Deana Williamson, Clerk

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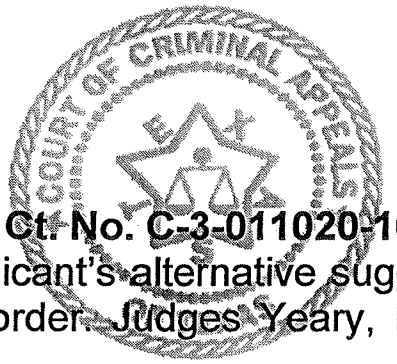

11/6/2019

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Deana Williamson, Clerk

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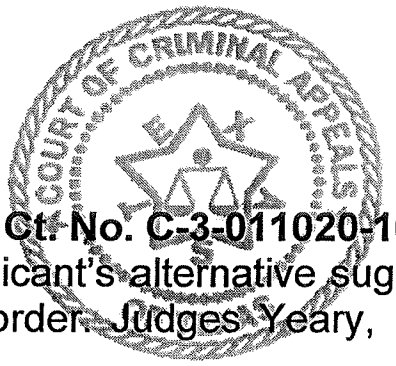

11/6/2019

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Deana Williamson, Clerk

PRESIDING JUDGE CRIMINAL DISTRICT COURT
NO. 3 TARRANT COUNTY
401 W. BELKNAP
FT. WORTH, TX 76196-0215
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11/6/2019

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This is to advise that the applicant's alternative suggestion for reconsideration has been denied without written order. Judges Yeary, Newell, Walker, and Slaughter would grant.

Deana Williamson, Clerk

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