No. 19-7099

IN THE
Supreme Court of the United States

PAUL DAVID STOREY,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction where the Court of Criminal Appeals applied a state procedural bar, that has been long been held as independent and adequate, in a routine manner.

2. Whether this Court should expend limited judicial resources to review claims of prosecutorial misconduct where the petitioner has no legal right to relief.

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BRIEF IN OPPOSITION

Petitioner Paul David Storey was convicted of capital murder and sentenced to death for the brutal slaying of Jonas Cherry during the course of a robbery. After he completed his direct and initial collateral review proceedings in both state and federal courts, he filed a subsequent state habeas application alleging claims of prosecutorial misconduct, all relating to a single statement made by the prosecution during its punishment-phase closing arguments. The Court of Criminal Appeals (CCA) remanded several of the claims for further proceedings in the state trial court to determine: 1) whether the application met an exception to Texas's abuse-of-the-writ procedural bar, and if so; 2) whether the underlying claims had merit.

The trial court held an evidentiary hearing on both the state procedural issue and the underlying claims. That court entered findings of fact and conclusions of law finding first that Storey met the exception to Texas's procedural bar, and second that Storey's claims warranted state habeas relief. However, based on its independent review of the testimony and evidence submitted in the court below, the CCA held that Storey failed to make the requisite showing to overcome Texas's

abuse-of-the-writ bar. Thus, it dismissed the application without consideration of the merits. Storey petitions this Court for a writ of certiorari off that state court decision. But this Court lacks jurisdiction to consider Storey's petition. Further, the underlying claims do not merit certiorari review. Therefore, his petition should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

> The record reflects that around 8:15 a.m. on October 16, 2006, Cherry left his house and went to work at the Putt-Putt Golf and Games in Hurst, Texas ("the Putt-Putt"). When Cherry arrived for work, he passed through the east door, which was the employees' entrance, and at 8:43 a.m., he disarmed the security alarm system. When a co-worker, Timothy Flow, arrived about ten minutes later, he found Cherry lying in a pool of blood in the office area. Flow noticed that Cherry was holding a key to the door of the manager's office, which was locked. Concerned that the perpetrator might still be present, Flow retreated outside. Once he saw that only his and Cherry's cars were in the parking lot, he went back inside to check on Cherry. Based on his observations, he believed that Cherry was dead. Flow then walked back outside while calling 9-1-1 on his cell phone, and he waited in his truck until the police arrived. Officer Samantha Wilburn and Corporal Lonnie Brazell responded first. After speaking with Flow and observing Cherry's body, they called for the assistance of additional officers.
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> With the help of the manager, Patrick Arenare, police officers gained entry to the manager's office, where the business's surveillance equipment was kept. Four separate videocassette recorders ("VCRs") should have been set up for surveillance.

However, one VCR had been stolen, and videotapes had been stolen from two other VCRs. The fourth VCR still contained a surveillance videotape and was functioning. It was connected to a video camera that monitored a section of the business's driveway that led from the road and into the parking areas. When officers played the videotape, they observed a red two-door Ford Explorer with its hood up and its lights flashing, rolling from the direction of the road into the public parking area, and then moving out of view as it continued through the parking lot. A few minutes later, the Explorer came back into view, and then it passed out of view again as it rolled toward the employees' parking area. This videotape was released to the media and aired on the local news.

One of [Storey]'s friends reported that [Storey] had told her he was present during the offense and saw who committed it. She provided the police with [Storey]'s telephone number. Detective Rick Shelby, a Hurst police officer, contacted [Storey] by telephone. [Storey] acknowledged that he was a former employee of the Putt-Putt, and he admitted that the Explorer that was being shown on the news was his. He stated that he was willing to meet with Shelby at the police station but that he did not have transportation because his Explorer was not working. He accepted Shelby's offer of a ride and provided Shelby with directions to his house. Shelby and Sergeant Craig Teague then drove to [Storey]'s house, where they met [Storey], [Storey]'s brother, and a friend. [Storey] and his brother showed them the Explorer. [Storey] explained that the license plates on the Explorer did not match the ones in the video that was being shown on the news because he had switched the plates in order to do a "gas run." [Storey] explained that this was his term for pumping gas into a vehicle and then driving away without paying. [Storey] then accompanied Shelby and Teague to the police station to make a statement.

Over the next few days, [Storey] made three oral statements to police. In his first statement, he denied participating in any

> offense but admitted that he was a witness. In his second statement, he admitted to participating in the offense, but only as a lookout and by helping others gain entry to the PuttPutt and by warning them to collect the surveillance tapes. In his third statement, he admitted that he had planned and participated in the robbery and that he had shot Cherry.
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> All three of [Storey]'s statements were presented to the jury. The medical examiner testified that Cherry suffered two gunshots to his head. One shot entered from the back, where there was a contact wound. Another shot entered from the front, where the entry wound indicated a shot fired at close range. Either shot would have been fatal. Cherry also suffered additional gunshot wounds to both legs and one hand.

Storey v. State, 2010 WL 3901416, at *1–2 (Tex. Crim. App. Oct. 6, 2010) (not designated for publication).

II. Initial State and Federal Proceedings

On September 15, 2008, the Criminal District Court No. 3 of Tarrant County, Texas, entered a judgement of conviction for capital murder and sentence of death. 2.CR.430–33.[1] The CCA affirmed the judgment on direct appeal. *Storey*, 2010 WL 3901416, at *1. This Court denied Storey's petition for writ of certiorari. *Storey v. Texas*, 563 U.S. 919 (2011). The CCA also denied relief in his initial state habeas

[1] CR refers to the clerk's record of pleadings and documents from Storey's trial filed in the state trial court. It is preceded by the volume number and followed by the pertinent page numbers.

proceedings adopting the trial court's findings of fact and conclusions of law. *Ex parte Storey*, No. WR-75,828-01, 2011 WL 2420707, at *1 (Tex. Crim. App. June 15, 2011) (not designated for publication).

Storey then filed a federal habeas petition. *Storey v. Stephens*, No. 4:11-CV-433, 2014 WL 11498164, at *1 (W.D. Tex. June 9, 2014). The federal district court denied relief and denied a certificate of appealability (COA). *Id.* at *23. The Fifth Circuit also denied him a COA. *Storey v. Stephens*, 606 Fed. App'x 192, 198 (5th Cir. Mar. 18, 2015). This Court again denied his petition for a writ of certiorari, thus concluding his federal habeas proceedings. *Storey v. Stephens*, 136 S. Ct. 132 (2015).

III. Subsequent State Habeas Proceedings

With Storey's federal habeas proceedings ended, the state trial court entered an order setting his execution for April 12, 2017. *Ex parte Storey*, 584 S.W.3d 437, 438 (Tex. Crim. App. 2019) (per curium), Pet.App.C at 2. Less than two weeks before his scheduled execution, he filed a subsequent state habeas application alleging several claims of prosecutorial misconduct. *Ex parte Storey*, 2017 WL 1316348, at *1 (Tex. Crim. App. June 15, 2011) (not designated for publication); Pet.App.A at 2.

Specifically, Storey asserted 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.

Id. The CCA remanded all but the first and sixth claims back to the trial court to determine first whether Storey satisfied an exception to Texas's abuse-of-the-writ procedural bar. *Id.* The trial court was "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." *Id.* at 2–3; *see also* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), (e). If the trial court found Storey could overcome the procedural bar, the CCA ordered that court to proceed to the merits of his claims. Pet.App.A at 3.

Storey's claims surrounded a single statement made by the State during closing arguments of the punishment phase of his trial. Amid its

twenty-five pages of closing arguments, the prosecution said: "[Storey's] 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." 39.RR.12.[2] Storey later discovered that the parents of the victim, Glenn and Judith Cherry (the Cherrys), are generally opposed to the death penalty. Pet.App.C at 2.

The trial court held a three-day hearing during which it heard testimony from, among others, the two prosecuting attorneys—lead attorney Robert Foran and second chair Christy Jack; Storey's trial counsel—lead attorney Bill Ray and second chair Larry Moore; the Cherrys; and Suman Cherry, the victim's wife. *See generally* Pet.App.B; Pet.App.C at 3. Based on the testimony and evidence, the trial court entered findings and conclusions that: 1) determined the factual basis of the claims was unavailable when Storey filed his initial state habeas application; and 2) recommended granting relief as to all claims. Pet.App.B at 12–15.

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[2] RR refers to the reporter's record from the trial. It is preceded by the volume number and followed by the pertinent page numbers.

However, the CCA, based on its own review, held that the trial court made several critical errors in its assessment of the procedural bar. Pet.App.C at 3. First, the CCA found that although there was ample testimony that state habeas counsel (who was deceased when Storey filed his subsequent application) was a generally good and diligent attorney, Storey in fact failed to present any evidence demonstrating the diligence of that attorney "in his particular case." *Id.* Storey also failed to present evidence "showing what [initial state habeas counsel] did or did not know regarding the victim's parents' anti-death penalty views." *Id.*

Conversely, the CCA relied on the testimony of the Glenn Cherry who testified that he was open about his beliefs and had talked about it "to 'anybody that wants to know or has ever asked me.'" *Id.* (quoting 3.SHRR.175).[3] Based on the lack of evidence presented by Storey and the contradictory testimony by Glenn Cherry, the CCA concluded that Storey failed to show the factual basis of the remanded claims and of claims One and Six were unavailable. *Id.* at 3–4. Thus, in a published opinion the CCA dismissed all claims as an abuse of the writ. *Id.* at 4.

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[3] SHRR refers to the reporter's record from the evidentiary hearing that was a part of Storey's subsequent habeas proceedings. It is preceded by the volume number and followed by the pertinent page numbers.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction to Consider Storey's Underlying Claims Because the CCA Relied on an Adequate and Independent State Procedural Bar.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). The CCA here applied Texas's statutory abuse-of-the-writ bar to Storey's claims. Pet.App.C at 3–4; *see also* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), (e). However, Storey argues that the bar was not adequate in this case because the CCA's application was novel or arbitrary. Specifically, he contends that the CCA required direct proof of state habeas counsel's knowledge via testimony from that counsel even though he was deceased at the time of the hearing. Pet.15–18. He asserts this was a new rule created for the first time in his case.

This Court has said that "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 534 U.S. 362, 376

(2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). "There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id.* This case, however, is not that.

In *Lee*, the defendant at trial sought a continuance, which the court denied. *Id.* at 369–70. On appeal, the state court procedurally barred Lee's due process claim because he did not fully comply with Missouri's technical requirements for such a motion. *Id.* at 372–73. However, this Court held that these rules, "as injected into this case by the state appellate court, did not constitute a state ground adequate to bar federal habeas review." *Id.* at 366. The impetus for the Court's decision was twofold: 1) the state rules that would bar federal consideration of Lee's claim were simply technical in nature; and 2) the "essential requirements" of the rules were "substantially met" in his case in that it clearly informed the trial court (and appellate courts) of the bases for his motion so that it could make a reasoned decision. *Id.* at 381–85.

Here, the bar at issue is not purely technical. Rather, it is central to preserving a defendant's ability to bring a potentially meritorious claim within a reasonable time after discovering the underlying facts

while also balancing finality and judicial economy, a balancing act also recognized by the rules governing federal habeas petitions. *Compare* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), (e), *with* 28 U.S.C. § 2244(b)(2)(b)(i). And by engaging its fact-finding authority, the CCA simply exercised its discretion in applying Section 5.[4] More importantly, Storey did not "substantially meet" the "essential requirements" of the rule.

For decades, the Fifth Circuit Court of Appeals has recognized the bar in Section 5 to be an independent and adequate state ground. *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997) (holding that Article 11.071, section 5, is an adequate and independent procedural bar); *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (holding that Texas common law abuse-of-the-writ doctrine has been strictly and regularly applied since 1994 and is an independent and adequate procedural bar); *see also Vasquez v. Stephens*, 597 Fed. App'x 775, 778 (5th Cir. 2015); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *Kunkle v.*

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[4] To the degree that Storey would argue this discretion to eschew the trial court's findings and conclusion would also render the procedural bar inadequate, this is clearly not the case. *See Beard v. Kindler*, 558 U.S. 53, 60–61 (2009) (holding that a "discretionary state procedural rule . . . . can be 'firmly established' and 'regularly followed'" such that it is an adequate bar to federal review).

Dretke, 352 F.3d 980, 988–89 (5th Cir. 2003). An applicant may escape the bar if he or she can show, as relevant here, that "the factual basis was not ascertainable through the exercise of reasonable diligence on or before" the date the initial habeas application was filed. Tex. Code Crim. Proc. art. 11.071, § 5(e).

Storey misconstrued this requirement at the state habeas hearing, just as he does now. At the hearing he presented ample testimony that his initial state habeas counsel, Bob Ford, was *generally* a diligent attorney. Indeed, everyone who testified on this issue agreed. *See e.g.,* 2.SHRR.132–34 (Jack's testimony); 3.SHRR.29–30 (Moore's testimony).[5] However, outside of this general opinion testimony, Storey proffered no further evidence as to Ford's diligence *in this case.*

Storey at least strongly implies that this could only be accomplished through Ford's testimony. But of course, there are other ways by which those seeking habeas relief, whether in the state or federal courts, attempt to prove diligence, e.g., billing records, notes, interview transcripts. Nowhere in its order did the CCA chastise Storey for not

[5] Three of the witnesses at the hearing had the surname Moore. In its brief, the State refers only to Larry Moore as "Moore" and to Tim Moore and Terri Moore by there full names.

presenting Ford as a witness. Rather, it noted the simple truth that Storey "presented no evidence showing that Ford was diligent in his particular case." Pet.App.C at 3.

The greater flaw in Storey's legal analysis, though, is that the statute is not focused on the quality of the attorney in question. Instead, the emphasis is on the underlying facts and whether they could have been discovered by a reasonably diligent attorney viewed through an objective lens. And to this point, there was direct testimony demonstrating that the factual predicate of Storey's claims—the Cherrys' general opposition to the death penalty—was ascertainable through reasonable diligence.

The Cherrys both testified that they were open regarding this opinion and had conversations with friend and family about it. 3.SHRR.175, 189. And as the CCA correctly noted, Glenn Cherry said that he talked about it to "anybody that wants to know or has ever asked me." 3.SHRR.175. Further, Storey's second chair at trial, Moore, testified that he attempted to reach out to victim's family members in most death penalty cases that he handled to:

> get their feelings regarding the death penalty, get some idea of what their testimony is going to be like, and see if there's any way in the world that we could intrigue them to the

> degree that they'd be willing to say that they didn't want to pursue -- have the State pursue the death penalty in the case.

3.SHRR.40.[6] In fact, he spoke with Foran, the lead prosecutor, about contacting the Cherrys and Suman in this case. 3.SHRR.11. Foran told Moore that he was free to reach out to them. 2.SHRR.252; *see also* Pet.App.C at 3.

Based on the above testimony, the CCA reasonably determined that Storey failed to show the factual basis of his claim was not available. This was not a novel application of the rule. Nor was this a misinterpretation of a federal constitutional issue. *See Smith v. Texas*, 550 U.S. 297, 313 (2007) (finding a procedural bar was inadequate where it was based on the CCA's misinterpretation of this Court's decision in *Penry v. Johnson*, 532 U.S. 782 (2001)). Rather here, the CCA routinely applied a long-standing independent and adequate state procedural bar. Therefore, this Court lacks jurisdiction.

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[6] Jack testified that, as a defense attorney, she has also reached out to family members of victims. 2.SHRR.190–91.

II. The Underlying Claims Do Not Merit Certiorari Review.

Even were this Court to possess jurisdiction, this case would not warrant certiorari review as, ultimately, Storey is not entitled to relief on any of his claims. His various claims of prosecutorial misconduct can be summarized as: 1) the State made a false argument when it said that all of the victim's family would have voted for the death penalty; 2) in making this argument, the State introduced false evidence; 3) the State committed a *Brady* violation by not disclosing to the defense information regarding the Cherrys' general opposition to the death penalty; and 4) Storey's death sentence was rendered unreliable by the misconduct.

A. The single statement made by the State in its closing arguments was not so manifestly prejudicial to render the trial fundamentally unfair.

"Only where improper prosecutorial comments substantially affect the defendant's right to a fair trial do they require reversal." *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001). In other words an "improper jury argument by the state does not present a claim of constitutional magnitude . . . unless it is so prejudicial that the state court trial was rendered fundamentally unfair . . . ." *Jones v. Butler*, 864 F.2d 348, 356 (5th Cir. 1988). Storey simply cannot show the statement was extreme or manifestly improper such as to undermine the jury's verdict.

First, the statement was a small portion of the State's argument. In the twenty-five pages of closing arguments by the State, totaling 616 lines in the record, the single sentence comprised two-and-a-half (2.5) lines of record, or less than one-half-of-one percent (0.005) of the State's closing arguments at punishment. *See* 39.RR.4–19, 42–52. Stated another way, the statement probably took less than ten seconds of the State's opening remarks, which lasted approximately twenty minutes. *See* 3.SHRR.49.

As Ray, Storey's first chair at trial, acknowledged, "I can't say that absolutely I would have lodged an objection because the fact of the matter in this case is after she said that, she went on to something else." 3.SHRR.124. He added that "it would have caused a great amount of attention to it as well. I mean, so -- I mean, the objection would have been probably sustained and the jury told to disregard and we'd all gone down the road." 3.SHRR.125–26.

Foran said that the argument did not "make that much of an impression" on him because it was one line in several page of argument. 2.SHRR.247. Neither Glenn nor Judy recalled the statement at the evidentiary hearing. 3.SHRR.178–79, 194. And even though both were

present for the argument, neither said anything at the time about the veracity of the statement.

Second, the statement was hyperbole. The State did not call "all of Jonas's family" and "everyone who loved him" to testify at the trial. There was no testimony to otherwise support this statement. From the position of the jury box, this could not be taken as true evidence because it simply was nothing more than, at best, puffery. And, as Moore testified, it is fair to assume the jury already believed this to be true, or at least believed the one person from Jonas's family who testified, his wife Suman, would be in favor of the death penalty. *See* 3.SHRR.19, 45, 47.

Third, the complained-of-statement simply pales in comparison to what the jury heard from Jonas's widow during punishment. *See* 37.RR.55–58. Although she did not state her position in favor of Storey receiving a death sentence, it was not hard to infer from her deeply impactful testimony when asked to describe how the news of her husband's death impacted her. Jack, second chair for the State who was a seasoned prosecutor and now defense attorney, recalled that Suman's testimony was one of the most compelling victim impact statements Jack

had ever heard (which at the time included more than 150 jury trials). 2.SHRR.152–53.

Jack testified that Suman's testimony was powerful because of her ability to eloquently describe the loss of her husband and the emotion behind it. *Id.* Jack recalled that several jurors were tearful during the testimony. *Id.* Moore agreed that it was very emotional. 3.SHRR.33. Given the brutal honesty of Suman's testimony, the State's one line in closing arguments is not so extreme, manifestly improper, or harmful so as to constitute reversible error.

In addition to Suman, the State's punishment case was substantial, in large part due to Storey's behavior during and after the commission of the murder. The trial court detailed the case for death in its findings and conclusions recommending the denial of Storey's initial habeas application:

> . . . the ruthless nature of the crime; [Storey's] premeditation and cold calculation; his careful attempts to cover his involvement, including implicating an innocent man; his cavalier behavior in a pawn shop only hours after the crime; his admission that he committed three to four armed robberies of drug dealers because they could not report the crime to the authorities; and his complete failure to express any remorse . . . .

SHCR-01.362.[7] Suman's testimony, the prosecution's evidence as to future danger, the brutally heinous nature of the crime, and the other 613.5 lines of closing arguments certainly held greater weight than a single sentence.

Fourth, as this Court has consistently held, jury instructions on the proper evidence to be considered, or that closing arguments are not evidence, can cure any perceived harm. *Darden v. Wainwright*, 477 U.S. 168, 178–83 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643–46 (1974). And juries are presumed to follow the trial court's instructions to consider or disregard certain kinds of evidence. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). Here, the jury was properly instructed that they could only consider the testimony and evidence presented "from the witness stand." 2.CR.413 (jury charge during the guilt phase of trial: "You must decide the issues in the case solely on the testimony and exhibits admitted into evidence before you."), 424 (jury charge during the punishment phase of trial: "You are charged that it is

[7] SHCR-01 refers to the clerk's record from Storey's initial state habeas proceedings.

only from the witness stand that the jury is permitted to receive evidence regarding the case . . ."). Thus, any potential harm was cured.

Storey relies on *Miller v. Pate*, 386 U.S. 1 (1967), in contending that the false argument violated Storey's due process. Pet.19–20. *Miller* is inapposite of the case here. Miller was charged with the brutal sexual assault and murder of an eight-year-old girl. *Id.* at 2–3. "A vital component of the case against him was a pair of men's underwear shorts covered with large, dark, reddish-brown stains—People's Exhibit 3 in the trial record." *Id.* at 3. In that case the State knew this stain to be paint. However, the State put on an array of testimony that the stain was in fact blood. *Id.* at 3–6. The stain "was variously described by witnesses in such terms as the 'bloody shorts' and 'a pair of jockey shorts stained with blood.'" *Id.*

There was then testimony regarding the blood types of both victim and defendant. *Id.* at 3. The State also called a chemist who testified the stain was in fact blood and was the same type as the victim. *Id.* at 4. "In argument to the jury the prosecutor made the most of People's Exhibit 3," making several statements regarding the bloody shorts. *Id.* "The 'blood stained shorts' clearly played a vital part in the case for the

prosecution." *Id.* However, the Court found the prosecution obtained the conviction "by the knowing use of false evidence" under *Napue v. Illinois*, 360 U.S. 264 (1959) and *Mooney v. Holohan*, 294 U.S. 103 (1935). *Id.* at 6–7.

All three cases—*Miller*, *Napue*, and *Mooney*—dealt with the prosecution's deliberate use of perjured *testimony* elicited from the witness stand, which is clearly evidence before a jury. That simply is not the case here. Further, the evidence in *Miller* was far more damning and the error far more egregious than here. Ultimately, considering that the argument comprised two-and-a-half (2.5) of the 616 lines of closing argument by the State (less than one-half-of-one percent (0.005)), whatever effect it had on the jury was de minimis.

B. Closing arguments are not evidence.

Storey does not delineate his underlying claims as clearly in his petition before this Court as he did in state habeas application. But assuming he asserts, as he did in the court below, that the statement in closing arguments amounted to false evidence, this is not a legally sound position. Statements made during closing arguments are not evidence before the jury. *Cf. Darden*, 477 U.S. at 182–83; *DeChristoforo*, 416 U.S.

at 644 (both noting the longstanding precept included in jury instructions that closing arguments are not evidence).[8]

Even if this statement amounted to evidence, Storey failed to demonstrate the argument was material. *See Giglio v. United Staes*, 405 U.S. 150, 154 (1972) (noting that materiality, as discussed in *Brady v. Maryland*, 373 U.S. 83 (1963), applies to a claim of false testimony); *see also Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000) (applying the harmless error standard from *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). As discussed above, the two-and-a-half-line sentence was de minimis, especially when compared to Suman's testimony, the evidence as to future danger, the brutally heinous nature of the crime, and the other 613.5 lines of the State's closing arguments.

And again, a jury instruction on the proper evidence to be considered or that closing arguments are not evidence can cure any

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[8] *See also Moreno v. State*, 1 S.W.3d 846, 855 (Tex. App.—Corpus Christi 1999, pet. ref'd) (distinguishing between evidence presented at trial and statements made during closing argument); *Torres v. State*, 976 S.W.2d 345, 354 (Tex. App.—Corpus Christi 1998, no pet. h.) ("statements by counsel are not evidence"); *In re A.L.R.*, No. 03-02-00176-CV, 2002 WL 31833703, at *3 (Tex. App.—Austin Dec. 19, 2002, no pet. h.) ("this assertion was made by trial counsel during closing argument and does not amount to evidence."); *Alfaro v. State*, No. 13-01-064-CR, 2002 WL 31477190, at *2 (Tex. App.—Corpus Christi Nov. 7, 2002, no pet. h.) ("[t]he complained-of-statement of the prosecutor was made during the State's closing statement and, therefore, does not constitute evidence.").

perceived harm. *Darden*, 477 U.S. at 178–83; *DeChristoforo*, 416 U.S. at 643–46. And juries are presumed to follow the trial court's instructions to consider or disregard certain kinds of evidence. *Thrift*, 176 S.W.3d at 224. Here, the jury's proper instruction cured any resulting harm. *See* 2.CR.413 (jury charge during the guilt phase of trial: "You must decide the issues in the case solely on the testimony and exhibits admitted into evidence before you."), 424 (jury charge during the punishment phase of trial: "You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding the case . . .").

C. Storey fails to demonstrate the evidence was favorable or material.

To establish a due process violation arising from the State's failure to disclose evidence, a petitioner must demonstrate: 1) the prosecution willfully or inadvertently suppressed evidence; 2) the evidence was favorable to him because it was exculpatory or impeaching; and 3) the evidence was material either to guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *Brady*, 373 U.S. at 87. Favorable evidence is that which "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). Favorable evidence includes exculpatory evidence and impeachment evidence.

Exculpatory evidence is that which may justify, excuse, or clear the defendant from fault. *Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006); *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

Evidence is constitutionally material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10 (1976). Rather, the suppression must reasonably cast "the whole case in a different light so as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). When evaluating whether the materiality standard is satisfied, the strength of the exculpatory evidence is balanced against the evidence supporting conviction. *Smith v. Cain*, 565 U.S. 73, 76 (2012).

At the hearing, all the witnesses who testified on the matter agreed that Glenn and Judy's opposition to the death penalty was general, had formed well before Storey murdered their son, and would apply to any defendant regardless of the situation. Therefore, their opinion is not

exculpatory because it does not "justify, excuse, or clear" Storey from fault. It also does not fall under mitigating evidence. Under Texas law, mitigating evidence is defined as "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(1). Glenn and Judy's opinion does not speak to any of these issues, certainly not Storey's personal moral culpability.

Further, "[t]he wishes of the victim's family members as to the defendant's fate fall beyond the parameters of victim-impact evidence and are not admissible." *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003); *cf. Payne v. Tennessee*, 501 U.S. 808, at 830 n. 2 (1991) (overruling the portion of *Booth v. Maryland*, 482 U.S. 496 (1987), barring victim-impact evidence, but not overruling the prohibition on the victim's family's opinions on the defendant or the punishment he should receive).[9] Even if court erred at trial and allowed the Cherrys to testify, they simply would have said that their opposition to the death penalty was general

[9] Although these cases all arose from situations where the victim's or the defendant's family asked for death, neither this Court nor the CCA cabined these opinions to only apply when the witness wants death. Rather the language is broad and clear, a family member may not testify as to the ultimate question before the jury at punishment.

in nature and not specific to Storey or the facts of this case. The State would then have had the ability to rebut that testimony with Suman's opinion that Storey should receive the death penalty. Indeed, both Jack and Moore noted that was a distinct possibility. 2.SHRR.153–55; 3.SHRR.20.

Again, this must be weighed against the evidence actually presented during the punishment phase. Moore agreed that the mitigation case was difficult given Storey's lack of remorse. 3.SHRR.42–44. The trial court had previously noted that the ruthless nature of the murder, evidence of premeditation and calculation, and Storey's careful attempts to cover his involvement combined with his lack of remorse made a formidable case for future danger. And Suman was the first witness the jury heard during the punishment phase, perhaps the strongest testimony on the matter. She provided an emotional and evocative depiction of the extreme pain and loss she suffered as a result of the murder. When placed in the whole of the punishment phase, Glenn and Judy's opinion cannot reasonably be said to cast the whole case in a different light so as to undermine confidence in the verdict.

Further, *Brady* evidence that does not constitute "significant new evidence" does not warrant habeas relief. *Westley v. Johnson*, 83 F.3d 714, 725 (5th Cir. 1996). *Brady* claims only encompass "the discovery of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103. "Under *Brady*, the prosecution has no obligation to produce evidence or information already known to the defendant, *or that could be obtained through the defendant's exercise of reasonable diligence*." *Castillo v. Johnson*, 141 F.3d 218, 223 (5th Cir. 1998) (emphasis added). There is no *Brady* violation if the defendant, using due diligence, could have obtained the information. *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994); *see also West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996) ("Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.").

Here, the CCA "deferred to the trial court's credibility choice in favor of trial counsel" and its finding "that the State did not inform trial counsel about the [Cherrys'] anti-death penalty views." Pet.App.C at 3. However, the logic the court then applied to the question of whether initial state habeas counsel could have discovered this fact through the

exercise of reasonable diligence is analogous to trial counsel. After all, the CCA noted that Glenn Cherry testified he would talk "to '*anybody* that wants to know or has ever asked me.'" *Id.* (quoting 3.SHRR.175). The CCA also noted that when trial counsel asked the prosecutor about contacting the Cherrys, the State made sure he understood they were free to do so. *Id.* And this counsel testified that his reason for contacting the Cherrys was specifically to "get their feelings regarding the death penalty . . . ." 3.SHRR.40. So then, legally there can be no *Brady* violation where, like initial state habeas counsel, trial counsel could have obtained the information through reasonable diligence.

D. Because Storey cannot show entitlement to relief based on any of his prosecutorial misconduct claims, he cannot show that his death sentence is constitutionally unreliable.

As a catchall to the complained of errors, Storey asserts that the cumulative affect is that his death sentence is constitutionally unreliable. For this proposition he relies on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), but this case is inapposite. In *Caldwell*, the prosecution specifically argued that the jury need not worry about voting for death because, due to the appellate process, they would not make the final decision. 472 U.S. at 325–26. The prosecution expressly reduced the

responsibility of the jury. Here, that is simply not the case. Further, as discussed above, the jury instructions served to cure any potential error.

CONCLUSION

In dismissing his subsequent state habeas application, the CCA applied a long-held independent and adequate state procedural bar. As such, this Court lacks jurisdiction to consider Storey's petition. Further, the underlying claims do not merit certiorari review. Consequently, his petition should be denied.

Respectfully submitted,

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