CAPITAL CASE

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

PAUL DAVID STOREY,
Petitioner

v.

BOBBY LUMPKIN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Keith S. Hampton*
State Bar No. 08873230
Attorney at Law
P.O. Box 66488
Austin, Texas 78766
(512) 476-8484 (office)
(512) 762-6170 (cell)
keithshampton@gmail.com

Michael Logan Ware*
State Bar No. 20864200
Attorney at Law
300 Burnett Street
Fort Worth, Texas 76102
817-338-4100 (office)
817-698-0000 (fax)
ware@mikewarelaw.com

*Member, United States Supreme Court Bar

CAPITAL CASE

QUESTION PRESENTED

Does 28 U.S.C. §2244 bar claims of prosecutorial misconduct that were deliberately and successfully concealed by the prosecution until after the petitioner's first federal habeas petition was resolved?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paul David Storey asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Fifth Circuit's published opinion is reported as *Storey v. Lumpkin*, 8 F.4th 382 (5th Cir. 2021) and attached as Appendix 1. Its Order denying en banc review is attached as Appendix 2. The district court's orders (dismissing Petitioner's motion as successive and transferring the motion to the Court of Appeals under 28 U.S.C. §1631) are unreported and attached as Appendices 4 and 5.

JURISDICTION

The Fifth Circuit denied Petitioner's appeal on August 6, 2021 and denied en banc review on September 21, 2021. Appendices 1 and 2. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves 28 U.S.C. §2244. The text of this statute is contained in Appendix 3. This case also involves the Fourteenth Amendment to the Constitution of the United States. U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Introduction

Petitioner Paul David Storey was charged with the murder of Jonas Cherry. Glenn and Judith Cherry, Jonas Cherry's parents, implored prosecutors not to seek a death sentence against Mr. Storey, in part to spare Mr. Storey's family from the same profound loss they had suffered. Ignoring the Cherrys' pleas, the prosecutors sought and won the death penalty against Mr. Storey.

In final argument at the death penalty phase, the prosecutors assured the jury – falsely – that the Cherrys desired to see Mr. Storey executed:

> So we get to the last question [mitigation] and that is, taking into consideration everything, Ladies and Gentleman,

> beginning with the circumstances of this crime – and you know what? His [Mr. Storey's] whole family got up here yesterday and pled for you to spare his life. And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate.

They not only misled the jury, they also concealed the Cherrys' requests to spare Mr. Storey's life from all parties involved and throughout all phases of litigation. Consequently, the Cherrys' opposition to Storey's execution and the falsity of the prosecutors' jury argument remained unknown to defense counsel at trial, on appeal, and throughout Mr. Storey's initial habeas proceedings in state and federal court.

Years later, as Mr. Storey's execution date neared, Glenn Cherry had an unexpected conversation with a friend, Corey Sessions. Mr. Cherry told Mr. Sessions that he and his wife were experiencing frustration and despair at the prospect of Mr. Storey's impending execution. Mr. Sessions knew Mr. Storey's federal habeas counsel and related the conversation. But for this chance encounter, none of Mr. Storey's counsel would ever have known that the Cherrys adamantly opposed the State's pursuit of death all along and had repeatedly told the State so. Nor would counsel have ever known the prosecution knowingly

presented a prejudicial falsehood to the jury.

In light of this revelation, Mr. Storey's counsel filed a subsequent application for state habeas relief. The Texas Court of Criminal Appeals stayed the execution and instructed the state district court to resolve the issues raised in the subsequent writ. After extensive live evidentiary hearings, the convicting court entered detailed findings that the prosecutors had knowingly concealed information and prejudicially lied to the jury in closing argument at the penalty phase. It recommended Mr. Storey receive a new sentencing trial. The Texas Court of Criminal Appeals ("TCCA"), however, declined to reach the merits of Mr. Storey's claims of state misconduct. The TCCA asserted its right as the "ultimate fact-finder" under Texas law to reject the convicting court's view of the testimony and concluded instead that the prosecutors' misconduct, including their intentional and prejudicial lie to the jury, could and should have been discovered in time to include those claims in Mr. Storey's initial state habeas application. *See infra*.

Mr. Storey then filed a second-in-time habeas petition in federal district court, raising his newly discovered claims of prosecutorial

misconduct. 28 U.S.C. §2254. He maintained that where a petitioner was unable to include claims of prosecutorial misconduct in his initial federal habeas petition because the prosecution was then still concealing the factual basis for those claims, a second-in-time petition asserting those claims was not "second or successive" within the meaning of 28 U.S.C. §2244(b). The district court disagreed and ultimately transferred the petition to the Fifth Circuit under 20 U.S.C. §1631, and Mr. Storey appealed.

The Fifth Circuit affirmed. Relying on its own precedent, it held that "*Brady* claims [and presumably *Napue* claims and all forms of prosecutorial misconduct] raised in second-in-time habeas petitions are successive regardless of whether the petitioner knew about the alleged suppression when he filed his first habeas petition." *Storey v. Lumpkin*, 8 F.4th 382, 392 (5th Cir. 2021)(quoting *In re Will*, 970 F.3d 536, 540 (5th Cir. 2020)).

B. Procedural History

Mr. Storey was sentenced to death on September 19, 2008. The

TCCA affirmed and this Court denied review. *Storey v. State*, AP-76,018 (Tex.Crim.App., October 6, 2010), *cert. denied*, *Storey v. Texas*, 563 U.S. 919 (2011).

After Mr. Storey unsuccessfully sought state and federal habeas corpus relief,[1] the trial court set an execution date for April 12, 2017. On March 31, 2017, Mr. Storey filed a subsequent application for state habeas relief. The TCCA stayed his execution and remanded to the convicting court for further proceedings. *Ex Parte Storey*, No. WR 75,828-02 (Tex.Crim.App., April 7, 2017)(unpublished).

After three days of hearings, the state district court entered detailed factual findings and recommended relief. As noted, however, the TCCA instead dismissed Mr. Storey's application, substituting its own factual finding that Mr. Storey could have uncovered the prosecutors' misconduct in time to include it in his initial state habeas petition. *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App. 2019). Shortly thereafter, Mr. Storey

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1 *Ex Parte Storey*, Writ No. 75,828-01 (Tex.Crim.App., delivered June 15, 2011)(per curiam)(unpublished)(denying initial application for state habeas relief); *Storey v. Stephens*, No. 4:11-CV-433-O (N.D. Tex. 2014)(denying federal habeas relief); *Storey v. Stephens*, 606 F. App'x 192 (5thCir. 2015)(denying certificate of appealability), *cert. denied*, *Storey v. Stephens*, 577 U.S. 857 (2015).

urged the TCCA to reconsider its decision in his case on its own initiative, but the court declined the suggestion.

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

The Cherrys were clear and resolute in opposing a death sentence for Mr. Storey. (Vol. 3, pp. 185).[2] It is undisputed that they repeatedly conveyed their deeply held moral choice to the trial prosecutors, Christy Jack and Robert Foran. (Vol. 2, p. 47; 70-72); (Vol. 3, pp. 167-168; 186-187); (Vol. 4, p. 99). The Cherrys' opposition never changed. (Vol. 3, pp. 170)(Vol. 4, pp. 95-99). Until the clemency process, when Mr. Storey's execution was imminent, the Cherrys' had no opportunity to communicate to anyone in authority (beyond the two prosecutors who had ignored them) that they vigorously opposed a death sentence for the man who killed their only son.

Sidelined, ignored and inexperienced in the criminal justice system, the Cherrys could only watch as their wishes were subordinated to the

2 These citations are to the record of the proceedings for Mr. Storey's subsequent writ application for state relief.

prosecutors' dogged pursuit of a "win," i.e., Mr. Storey's execution. Near the eve of his scheduled execution, the Cherrys issued a joint written statement (as well as three video presentations) to the Texas Board of Pardons and Paroles and to Texas Governor Greg Abbott, which said in pertinent part:

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

(Written Statement of Glenn and Judith Cherry, addressed to Governor Greg Abbott and the Board of Pardons and Paroles, dated February 14, 2017).

Before trial, the state district court had 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." (Vol. 2, p. 77). Despite the trial court's order and the mandates of the Due Process Clause, the prosecutors secreted the facts regarding the Cherrys' wishes. Worse still, at the penalty phase they intentionally and falsely argued:

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

(Vol. 39; pp 11-12). The argument falsely reassured the jury that a death verdict would comfort the victim's family when the opposite was true. Thus urged, the jury returned a "no" answer to the question whether mitigating circumstances warranted a sentence less than death for Mr. Storey. Given the jury's responses to the other Texas special issues, that answer compelled a death sentence, which the trial court imposed on September 15, 2008.

After state and federal post-conviction proceedings were concluded, *see supra*, the trial court set Mr. Storey's execution for April 12, 2017. Mr. Storey's counsel commenced clemency proceedings with the Texas Board of Pardons and Paroles. It was at this time that counsel discovered for the first time that the Cherrys were vehemently opposed to Mr. Storey's execution, and always had been.

As Glenn Cherry's friend Corey Sessions recounted:

> "On December 20, 2016 around 11:00 a.m. Mr. Glenn Cherry, whom I have known for a few years, came to my place of employment to have his personal vehicle serviced. While waiting for his vehicle to be serviced, Mr. Cherry told me that he had received a letter from the State of Texas which stated that the execution date had been set for April 12, 2017 for Paul Storey. I responded to Mr. Cherry by telling him that I had read about the execution date being set for Paul Storey in the Fort Worth Star-Telegram back in October 2016. Mr. Cherry said that 'they' (State of Texas) wanted to know if the Cherry's wanted to attend the execution. Mr. Cherry said, 'Judy and I don't want any part of that.'
>
> "Mr. Cherry then said 'Judy and I thought you might be able to help us.' I asked Mr. Cherry how is it that I could help them. Mr. Cherry said 'Judy and I don't want to see Paul Storey be executed and we don't want his mother to go through with what we went through with the loss of our son Jonas when he was killed. To be certain that I was understanding the wishes of Glenn and Judy Cherry I said to Mr. Cherry 'so as to be clear, you and your wife do not want Paul Storey to be executed?' Mr. Cherry replied 'yes, that's correct, now we don't

> want him to get out of prison, we feel he shouldn't ever get out, like the other guy Porter [Mr. Storey's co-defendant].'
>
> "I then asked Mr. Cherry if he had ever conveyed this to the Tarrant County District Attorney's office. Mr. Cherry said that long before trial, he and his wife had told the Tarrant County District Attorney Prosecutor Christy Jack that they did not want either Paul Storey or Mark Porter to receive the death penalty. In early January 2017, I contacted ... Mr. Storey's attorney with this information."

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

I. The Issues Raised and Decided by the State District Court

Mr. Storey filed a subsequent application for state habeas relief, alleging that prosecutors had intentionally suppressed mitigating evidence and presented jury argument they knew to be false. The TCCA stayed his execution and authorized further proceedings on the new application, after which the convicting court took evidence for three days. The hearings revealed in greater detail how the prosecutors concealed and misrepresented the Cherrys' views. The attempted concealment continued through the hearing itself in which, as found by the district court, Foran and Jack both presented false testimony in their continued cover-up.

After seeing and hearing from numerous witnesses, the convicting

court entered extensive findings of fact. First, the state district court found that state habeas counsel, Mr. Bob Ford, did not know and would not have discovered that the Cherrys opposed a death sentence for Mr. Storey. *Id*. at 5. Second, after hearing live testimony from the prosecutors, the court found that their claims to the contrary were not credible. *Id*. at 8. Third, the court found Glen and Judith Cherry to be credible in stating that they urged the prosecutors not to pursue a death verdict against Mr. Storey. *Id*. at 6. In light of this misconduct and other findings, the convicting court recommended that the Court of Criminal Appeals grant Mr. Storey a new punishment hearing. *Id*. at 16.

II. The Court of Criminal Appeals' Decision

The TCCA agreed that the prosecutors failed to disclose to Mr. Storey's attorneys the information in their possession about the Cherrys' opposition to a death sentence for Mr. Storey. *Ex parte Storey*, 584 S.W.3d 437 (Tex.Crim.App. 2019)(per curiam). However, the unsigned majority opinion faulted original state habeas counsel, Mr. Ford, for his purported lack of diligence in discovering the Cherrys' opposition and the related misrepresentation made by the prosecutors to the jury. Despite the

convicting court's conclusion after hearing extensive live testimony that reasonably diligent counsel would not have learned of the Cherrys' views, the TCCA majority asserted its authority to make a contrary finding. It based that finding on the testimony of the prosecutors – the same two witnesses the convicting court had found *not* credible – that they told defense counsel that they "'were certainly free to contact [the Cherrys]," even as they *also* told defense counsel that the Cherrys "preferred not to be contacted." *Id*. at 439. The TCCA concluded that Mr. Ford should have contacted the Cherrys and asked them about their views on capital punishment. The TCCA majority opinion also faulted Mr. Storey's counsel on the subsequent application for not"showing what Ford did or did not know regarding the victim's parents' anti-death penalty views," despite the fact that Mr. Ford was deceased by the time Mr. Storey was first able to advance these claims in 2017, having died six years earlier in 2011. Having substituted its own findings for those made by the convicting court, the TCCA dismissed Mr. Storey's application.[3] *Id.*

3 The per curiam opinion also noted without further comment Mr. Cherry's remark made during the habeas proceeding that he has disclosed his views regarding capital punishment to "anybody that wants to know or has ever asked me." *Id.*

Three judges dissented. *Ex parte Storey*, 584 S.W.3d at 443-447 (Yeary and Slaughter, JJ., dissenting); 447-462 (Walker and Slaughter, JJ., dissenting). Judges Walker and Slaughter concluded that even in the absence of direct evidence about what original state habeas counsel, Mr. Ford, knew about the Cherrys' views, it was reasonable for the convicting court to conclude that Mr. Ford, like the other lawyers who testified in the hearing, had been unaware of their opposition to a death sentence for Mr. Storey, even the State's own writ attorney testified that he did not know. They took strong issue with the majority's suggestion that Mr. Ford should have contacted the Cherrys and inquired about their feelings regarding capital punishment, describing such an action as "beyond what a reasonably competent habeas attorney would have done under the circumstances." *Id*. at 456. Judges Yeary and Slaughter quoted this Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004): "A rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Storey*, 584 S.W.3d at 444 (dissent)(citing *Banks* at 696).

Four judges concurred in the decision to dismiss the petition. *Ex*

parte Storey, 584 S.W.3d at 440-442 (Hervey, J., joined by Keasler, J., Richardson, J., and Newell, J.). The concurring judges agreed that Mr. Storey's original state habeas counsel had been negligent in failing to seek out the Cherrys' beliefs about the appropriate sentence. However, they regarded the Cherrys' opposition to Mr. Storey's execution as immaterial and thus concluded that no constitutional violation had occurred. *Id*. at 441.

After the decision, Mr. Storey's counsel suggested that the TCCA reconsider its decision *sua sponte* under Tex. R. App. Proc. 79.2(d), arguing that placing a duty on state habeas counsel to interview a murder victim's parents was unwise, unprecedented, and unfair to all concerned. While the Court declined to revisit its ruling, Judge Newell changed his vote and joined the dissent, reflecting that four judges ultimately disagreed with the majority's disposition of the case.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision suggests that the question in this case is limited to the essentiality of *Brady v. Maryland*, 373 U.S. 83 (1963) to

American criminal justice. But this case actually includes much more than a *Brady* violation. Prosecutors here did not merely "allow" the falsity to "go uncorrected," as in *Napue v. Illinois*, 360 U.S. 264 (1959). In this case, the prosecutors hid the truth and "deliberately misrepresented the truth," as condemned by this Court in *Miller v. Pate*, 386 U.S. 1, 6 (1967). The prosecutors intentionally injected a false claim of material fact into the trial, in violation of *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957). Like the prosecutors in *Giglio v. United States*, 405 U.S. 150 (1972) who falsely told the jury that its key witness "received no promises that he would not be indicted," the State's lawyers here similarly lied to the jury. *Id*. at 152-153 n.4. This Court has long condemned "deliberate deception of court and jury." *Mooney v. Holohan*, 294 U.S. 103, 112-113 (1935). The question presented to this Court, then, should be taken as short-hand for the entire gamut of prosecutorial misconduct this Court has addressed under the Due Process Clause because this case involves them all.

If lawyerly malefactors can successfully and permanently bury their misconduct, then none of this Court's proclamations have any real effect. The question broadly implicated is whether, if the State manages to

conceal a due process violation until after a petitioner's first federal habeas petition has been adjudicated, it can thereby block the petitioner from ever obtaining federal judicial review of that claim. In short, the issue is whether a deliberately thwarted deadline can prevent relief otherwise afforded by the Due Process Clause. U.S. Const. amend. XIV.

1. A prosecutorial due process violation raised only after the resolution of a first-in-time federal petition is not an abuse of the writ and considering such claims on the merits in a second-in-time petition is consistent with AEDPA.

The federal habeas petition at issue in this case was Mr. Storey's second-in-time. But this observation begins rather than ends the inquiry into whether the petition is barred as "second or successive" under 28 U.S.C. §2244. *Banister v. Davis*, 140 S.Ct. 1698, 1703 (2020)("Chronology is by no means all"); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998)(rejecting as "far-reaching and seemingly perverse" the State's contention that any second-in-time petition is necessarily "second or successive"). As this Court has recognized, whether a second-in-time petition should be treated as "successive" depends on whether it

constitutes an "abuse of the writ." *Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007). To resolve the question, this Court looks to the relevant case law and considers the purpose of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA").

Under pre-AEDPA abuse-of-the-writ doctrine, a subsequently raised claim was not regarded as abusive if the petitioner had "cause" for not raising the claim earlier and could demonstrate prejudice from the alleged violation underlying the claim. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991). Where an "external impediment" had prevented the petitioner from raising the claim earlier, it was no abuse of the writ for him to raise it after that impediment was overcome, i.e., the claim was discovered. *Murray v. Carrier*, 477 U.S. 478, 492 (1986)(cause established upon "a showing of some external impediment preventing counsel from constructing or raising the claim").

In *Amadeo v. Zant*, 486 U.S. 214 (1988), a unanimous Court found that the petitioner's discovery "by mere fortuity" that local officials had schemed to ensure that black people and women would remain underrepresented in jury pools constituted "ample" cause for belatedly

raising the claim because the district attorney and jury commissioners had concealed the documentary evidence of their actions. Similarly, the petitioner in *Strickler v. Greene*, 527 U.S. 263 (1999) established cause to consider his *Brady* claim where trial counsel had reasonably relied on the district attorney's misrepresentation about the openness of his discovery. *Id.* at 289. Mr. Storey's second-in-time federal petition raising claims of prosecutorial misconduct would never have been considered abusive under this Court's long-standing jurisprudence regarding "cause."

This case also involves a fundamental canon of equity even older than this Court's pre-AEDPA habeas decisions. The prosecutorial misrepresentation in this case could not be discovered, as in *Amadeo* and *Strickler*, in any writing in the State's voluminous files. It was unrecorded and known only to the trial prosecutors themselves. This Court has never abandoned the equitable tenet "that no one shall be permitted to take advantage of his own wrong." *Reynolds v. United States*, 98 U.S. 145, 160 (1878). Permitting claims in second-in-time petitions for constitutional violations with this level of culpability ensures the continued vitality of this fundamental doctrine.

The treatment of *Brady* claims arising after the first petition as second-in-time and not successive does no harm to AEDPA's purposes to ensure "comity, finality, and federalism." *Panetti*, 551 U.S. at 945-47 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 337 (2003)). The state courts oversaw both extensive trial court proceedings and appellate litigation concerning Mr. Storey's due process claims, and the state trial court made favorable and undisturbed factual findings that formed the basis of Mr. Storey's second federal petition. Comity and federalism – the policies of respecting state judicial process and requiring exhaustion of state remedies to prevent federal courts from disrupting state-court decisionmaking – are satisfied. *E.g., Wainwright v. Sykes*, 433 U.S. 72, 80 (1977)(recognizing that state-court exhaustion of federal claims satisfies comity and federalism concerns). As for the State's interest in finality, the State forfeited any such interest when prosecutors concealed their misconduct through every stage of state and federal post-conviction proceedings. *Scott v. United States*, 890 F.3d 1239, 1250-51 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 842 (2019)(where a new trial is necessitated by the government's own misconduct, it cannot be heard to complain of

prejudice because in such circumstances "it is solely responsible for inflicting any such prejudice on itself").

None of the AEDPA's purposes are frustrated by allowing a federal court to consider in a second federal habeas petition a claim of prosecutorial misconduct that a petitioner was prevented from discovering in time to include it in his first such petition. *Panetti*, 551 U.S. at 946 (finality "not implicated" where unavailability of evidence would keep courts from resolving relevant claims); *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (en banc) (Wynn, Thacker, and Harris, JJ., concurring)(in enacting AEDPA, Congress "[c]ertainly" could not have intended to "allow the government to profit from its own egregious conduct."). For due process violations based on prosecutorial misconduct and discovered only after the initial federal petition has been adjudicated, a second-in-time petition is the appropriate vehicle to remedy this wrong and is wholly harmonious with AEDPA's purpose.

2. Under *Panetti*, designating Mr. Storey's federal petition as second-in-time is a practical way to resolve claims of prosecutorial misconduct that were prevented by prosecutorial concealment from being reached earlier.

In *Panetti*, this Court held that a prisoner was spared the bar against "successive" writ petitions and permitted to raise a claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986) in a second-in-time petition. The *Ford* claim was by definition only "ripe" when execution was imminent, so it could only be raised at that time. *Panetti* at 943. In a sort of cost-benefit analysis, the Court expressly considered "the practical effects" and "implications for habeas practice" were it to bar petitioners from raising execution-incompetency claims in second-in-time petitions. *Panetti*, 551 U.S. at 945-47. Such considerations, the Court found, were appropriate given that applying the bar would permanently deny such a petitioner an "opportunity for any federal review" of his constitutional claim. *Id*. at 945-46.

This Court decided that applying 2244's bar to these claims would actually produce results antithetical to AEDPA. Rather than promoting any of AEDPA's legitimate goals, it would instead compel habeas counsel to include in initial federal petitions *Ford* claims that would be meritless and premature when filed. *Panetti*, 551 U.S. at 943. This consequence would only "add to the burden imposed on courts, applicants, and the

States, with no clear advantage to any." *Id*. at 931.

These same considerations apply with even greater force to prosecutorial misconduct and *Napue* claims. Like *Ford* claims, such claims should be understood to "ripen" when discovered, even if that occurs after a first federal petition has been adjudicated.[4] But there are far more varieties of prosecutorial misconduct – *Miller* and *Alcorta* and *Brady* to name three – than *Ford* claims. A mandate to counsel to assert allegations of prosecutorial misconduct which are presently baseless in hopes that factual support for those claims will be forthcoming would be equally perverse and routinely impose far more widespread burdens. The expense to courts and litigants would be substantial and pervasive with no countervailing benefit. Practicality, consistency with AEDPA, established habeas jurisprudence and fundamental equitable principles of law, then, all weigh in favor of regarding a petition that alleges previously unavailable claims of prosecutorial misconduct as second-in-time rather than "successive" or an abuse of the writ.

Despite these considerations, the Fifth Circuit has cemented in this

4 Like *Panetti*, Mr. Storey's claim arose only when his execution was imminent.

case its previous decisions in *Blackman v. Davis*, 909 F.3d 772, 778-79 (5th Cir. 2018), *cert. denied*, 139 S.Ct. 1215 (2019) and *In re Davila*, 888 F.3d 179 (5th Cir. 2018). In *Blackman*, a lawyer found that the prosecution had suppressed favorable eyewitness identification, but his discovery came after the denial of his client's first two untimely federal habeas applications. Disagreeing with the federal district court, the Fifth Circuit regarded the third petition based on a *Brady* claim to be "successive" and dismissed it, relying on its previous decision the same year, *In re Davila*, *supra*.

In *Davila*, the second-in-time petition alleged that the State had suppressed evidence that the death-sentenced prisoner was intoxicated at the time of the murder. *Id*. at 185. The Fifth Circuit expressly "focused solely on the due diligence exercised in discovering" the *Brady* violation and found it to be deficient. *Id*. at 184. It rejected the argument that "due diligence corresponds directly with the date of discovery" because, in its view, to so hold would "thwart" AEDPA and "nullify" its bar against second or successive petitions "in a wide range of cases." *Id*. at 186. With the present case, the Fifth Circuit affirms that prosecutorial misconduct

claims raised in second-in-time habeas petitions are "successive regardless of whether the petitioner knew about the alleged suppression when he filed his first habeas petition." *Storey v. Lumpkin*, 8 F. 4th at 391-392. This view is increasingly the subject of criticism by other federal judges.

3. Various federal judges have thoughtfully, but sharply criticized the rationale adopted by the Fifth Circuit and other circuits.

While there may not be a full split among the circuits regarding the issue presented in Mr. Storey's case, there is an unmistakable splintering of opinion. The evolution of the view shared by the Fifth Circuit and other courts of appeals is informative. Judges have developed grave doubts and are rethinking the initial decisions that foreclosed bringing prosecutorial misconduct claims in second habeas petitions under conditions like those in present case.

The Eleventh Circuit led the way in barring as "successive" second-in-time federal habeas based on *Brady* violations. *Jimenez v. Sec'y, Fla. Dep't of Corr.*, 758 F. App'x 682, 686-87 (11th Cir. 2018)(Carnes, C.J., joined by Tjoflat, J., concurring). In *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257 (11th Cir. 2009), the Court rejected reliance on *Panetti* because

"[t]he *Panetti* case involved only a *Ford* claim, and the Court was careful to limit its holding to *Ford* claims." *Tompkins* at 1259. As for the argument that prosecutorial misconduct due process claims ripen when they are discovered, "ripening," according to the Eleventh Circuit, applies only in execution-incompetency cases. *Id*. at 1260.

A month after (and in contrast to) the *Tompkins* decision, the Tenth Circuit read *Panetti* more broadly in allowing a petitioner to supplement his federal petition to add a second *Brady* claim. *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009). Its decision cited *Panetti*'s observation that this Court has resisted interpreting the federal habeas statutes to "produce troublesome results, create procedural anomalies, and close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Id*. at 1188 (quoting *Panetti*). However, nine years after *Douglas v. Workman*, two more circuits, in addition to the Fifth Circuit in *Davila* and *Blackman*, decided that *Brady* claims are so barred.

The Ninth Circuit read *Panetti* as foreclosing second-in-time petitions unless "the factual predicate [for the state misconduct claim] did

not *exist* at the time of the initial habeas petition." *Brown v. Muniz*, 889 F.3d 661, 668 (9th Cir. 2018)(emphasis in original)(citing *Panetti*, 551 U.S. at 945). It contrasted a *Ford* claim, which necessarily does not exist at the time a first federal petition is filed, with a *Brady* claim, which, the Court assumed, necessarily would have existed at that time, i.e., the claim arose at the time the *Brady* material was suppressed, regardless of when the petitioner learned of its suppression. *Brown v. Muniz*, 889 F.3d at 671-672.

The same year, the Sixth Circuit decided in *In re Wogenstahl*, 902 F.3d 621, 627-28 (6th Cir. 2018), holding, like the Ninth Circuit, that even prosecutorial misconduct claims that a petitioner could not have discovered in time to include them in his first habeas petition were barred as successive. Quoting *Panetti*, the *Wogenstahl* court acknowledged the distinction between second-in-time petitions and "second or successive" ones, but interpreted *Panetti* to require a showing of ripeness and followed the Ninth Circuit in equating ripeness with the date of the underlying *Brady* violation. *In re Wogenstahl*, 902 F.3d at 627-28. Despite these opinions, there was a sentiment among some judges that state misconduct

claims should be spared from Section 2244's bar. This seems particularly true where, as here, the state irrefutably engaged in a concerted and ongoing effort to cover-up their misconduct.

Even before *Brown v. Muniz*, a Ninth Circuit panel acknowledged the merits of considering *Brady* claims in second-in-time petitions. *Cage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015). The *Cage* panel openly worried that the Ninth Circuit's "constrained reading" of *Panetti* would give prosecutors "an incentive to refrain from disclosing *Brady* violations related to prisoners who have not yet sought collateral review." *Id.*

The Eleventh Circuit (via Judges Rosenbaum and Pryor, and District Judge Bartle (of the Eastern District of Pennsylvania, sitting by designation)) issued a detailed and thorough opinion urging their court to "establish[] the correct rule and framework for determining whether any particular second-in-time collateral motion based on a *Brady* claim is cognizable." *Scott v. United States*, 890 F.3d 1239, 1243-44 (11th Cir. 2018). The opinion demonstrated, under *Panetti*'s analysis, how treating as abusive second-in-time petitions raising *Brady* violations that even a diligent prisoner could not have previously discovered would adversely

affect habeas practice and would be inconsistent with the historic understanding of abuse-of-the-writ doctrine. *Id*. at 1249-1253. The *Scott* opinion also urged that Eleventh Circuit precedent to the contrary be overruled. *Id*. at 1253-1259.

More recently, Judge Moore, who had previously joined the Sixth Circuit's *Wogenstahl* opinion, has announced a change of view. Judge Moore now believes *Wogenstahl* was wrongly decided and that state misconduct claims should be cognizable in second-in-time federal habeas petitions. *In re Jackson*, No. 21-3102, 2021 U.S. App. LEXIS 26528, at *11-12 (6th Cir. Sep. 2, 2021)(Moore, J., concurring). She concluded that *Panetti*'s reasoning cannot be limited to execution-incompetency claims. *Jackson*, at *8 (Moore, J., concurring). In her view, *Panetti* was better regarded as a "quintessential example" of an unripe claim that is not "second or successive" under AEDPA. *Id*. She noted that her own court treats ex-post-facto claims as appropriately raised in second-in-time petitions, where their factual basis post-dates the initial petition. *Id*. at *14 (citing *In re Jones*, 652 F.3d 603, 605-06 (6th Cir. 2010)(per curiam)(concluding that the "ex post facto claim is not properly classified

as 'second or successive'").

In Judge Moore's view, the majority's approach would require counsel to include in initial federal petitions *Brady* claims as baseless and unripe as the *Ford* claims that would have been mandated by a contrary outcome in *Panetti*. *Id*. at *18-19 (Moore, J., concurring). Barring second-in-time petitions raising *Brady* claims, Judge Moore concluded, would reward "the culpable state actors for their misconduct" by erecting "a heightened gatekeeping requirement that could prevent the petitioner from challenging that misconduct at all," a "perverse incentive" Congress could not have intended. *Id*. That approach would ill-serve the interests of comity, finality and federalism. *Id*. at 19. Finally, Judge Moore took strong issue with the prevailing assumption that a *Brady* claim is ripe when committed, rather than when it is discovered:

> In a very practical sense, disclosure or awareness of the suppressed evidence or false testimony in question is a necessary predicate for a *Brady*-type claim – a meritorious *Brady*-type claim simply cannot be brought prior to some form of disclosure – and thus such a claim is unripe until the disclosure occurs.

Id. at *19.

These concerns about the intersection of *Brady* and Section 2244 are

shared by members of this Court. *Bernard v. United States*, 141 S.Ct. 504, 506 (2020)(Sotomayer, J., joined by Breyer and Kagan, JJ., dissenting from the denial of certiorari and stay of execution). There, the Fifth Circuit in a per curiam opinion denied Mr. Bernard the opportunity to present his *Brady* claim in a second-in-time petition. *United States v. Bernard*, 820 F. App'x 309 (5th Cir. 2020). Doubling down on its misreading of *Panetti*, the Fifth Circuit declared that *Panetti* "reinforce[d]" its holding barring Bernard's *Brady* claim because that claim "existed long before Bernard filed his first habeas petition," i.e., when the government first suppressed the evidence, prior to Bernard's trial. *Id*. at 310-311. It is worth noting that the Fifth Circuit's opinion in *Bernard* relied heavily on *Wogenstahl*, the very decision Judge Moore has since forcefully disavowed. *Id*.

The dispute among federal courts and judges about how to treat prosecutorial misconduct claims arising in second-in-time petitions is well joined. This case presents the issue with clarity of events, and does so on a factual record that is well-developed and detailed. In short, Mr. Storey's case is an excellent vehicle for deciding an issue where numerous federal

judges, including three Justices of this Court, have expressed the view that decisions like the Fifth Circuit's are squarely in conflict with *Panetti*.

The Fifth Circuit takes the view that the race to discover prosecutorial misconduct begins when the misconduct occurs, when the State did not disclose the exculpatory evidence, as though such a non-disclosure were a measurable event. Nowhere else in law are procedural deadlines measured from an effectively absent and indeterminate event. Insofar as *Panetti* seeks to prevent AEDPA anomalies, treating *Brady* claims as "second or successive" according to a nonevent that cannot be pinpointed would create an egregiously burdensome abnormality unique in law.

The government's failure to disclose is an event which, by definition, the defendant is unaware. He necessarily does not know he is in a race to discover due process violations before his first federal habeas petition is resolved, or that he will lose forever the opportunity to have it reviewed by a federal court. Congress could not have intended this result by enacting Section 2244(b).

The Fifth Circuit's view gives too little weight to the vital due

process in ensuring a level playing field at trial, and rewards government officials who conceal their own wrongdoing. It is incompatible with AEDPA's purpose and *Panetti*'s reasoning and this Court should correct it.

CONCLUSION AND PRAYER

These important and unresolved questions of law are straightforwardly presented by the Fifth Circuit's treatment of Mr. Storey's second-in-time federal habeas petition. The facts of Mr. Storey's due process allegations are well-grounded in the detailed determinations of the state court after extensive litigation over the issue. The conflicting views of federal judges about how to resolve these claims have solidified across the country in the years since *Panetti*. Petitioner respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Keith S. Hampton
State Bar No. 08873230
Attorney at Law
P.O. Box 66488
Austin, Texas 78731
(512) 476-8484 (office)
(512) 762-6170 (cell)
keithshampton@gmail.com

Mike Ware /s/
Michael Logan Ware
State Bar No. 20864200
Attorney at Law
300 Burnett Street
Fort Worth, Texas 76102
817-338-4100 (office)
817-698-0000 (fax)
ware@mikewarelaw.com

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 or before December 20, 2021.