No. 21-6674 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

PAUL DAVID STOREY,
Petitioner

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice
Correctional Institutions Division,
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE PROSECUTOR'S LIE TO THE JURY

In its "Brief in Opposition" to Petitioner Paul Storey's Petition for a Writ of Certiorari, the State of Texas mischaracterizes and attempts to downplay the deliberate, calculated, pernicious lie the trial prosecutor told the jury during the punishment phase of this death penalty case. It is undisputed, and the state district court found, that the prosecutor lied to the jury in order to enhance the State's chances of winning a death sentence. (State's Br. at 3).

The State's argument assumes that there is a spectrum of pernicious, deliberate lies a prosecutor can tell a jury in order to win a death sentence and that some of those lies are negligible and therefore acceptable. Such an assumption is fundamentally antithetical to our Constitutional jurisprudence. The lie at issue here was deliberate, willful, calculated to be prejudicial, and it was actually prejudicial. Thus even under the State's presumed spectrum of acceptable misrepresentations, the one at the center of this case would be unacceptable.

By misrepresenting the Cherrys' deeply held ethical and spiritual beliefs as they pertained to the death penalty generally and to this case especially, the trial prosecutors callously trampled on the dignity of the Cherrys, the victim's parents and therefore themselves victims. The State, now before this Court, attempts to trivialize the depth of this government misconduct. This misconduct was a willful lie perpetrated to directly influence a life or death decision by the jury.

By intentionally assigning false beliefs to the Cherrys which the prosecutor well knew were directly contrary to their true beliefs, the prosecutor used the Cherrys as unwitting props to achieve an outcome the Cherrys vehemently did not, and to this day do not want. It was not, as the State argues, a negligible or acceptable lie.

BANISTER v DAVIS

Although the State briefly cites, in passing, to this Court's recent opinion in *Banister v. Davis*, 140 S.Ct. 1698, 1707 (2020), it overlooks the most important and relevant passages in *Banister* as pertains to the germane issues now in front of this Court. (State's Br. at 10, 16).

In *Banister*, a recent 7-2 decision out of this Court, Justice Kagan,

writing for the seven member majority stated as follows:

> The phrase "second or successive application," on which all of this rides is a "term of art," which "is not self-defining." [citations omitted] We have often made clear that it does not "simply 'refer'" to all habeas filings made "'second or successively in time,'" following an initial application. [citations omitted].

Banister at 68.

Perhaps most relevant to this case, and tellingly omitted by the State in its references to *Banister*, Justice Kagan, writing for the 7-2 majority went on to state:

> In addressing what qualifies as second or successive, this Court has looked for guidance in two main places. First, we have explored historical habeas doctrine and practice. The phrase "second or successive application," we have explained, is "given substance in our prior habeas corpus cases," including those "predating [AEDPA's] enactment.". . . In particular, we have asked whether a type of later-in-time filing would have "constituted an abuse of the writ, as that concept is explained in our [pre-AEDPA] cases." . . . <u>If so, it is successive; if not, likely not . . .</u>

Banister at 68 (emphasis added).

In other words, if the second in time filing can meet the pre-AEDPA abuse of the writ "cause and prejudice" requirement, it is "likely not" "successive", even though second in time. If it cannot meet

that requirement and would have been considered an "abuse of he writ" under pre-AEDPA law, it is "successive" and must, therefore, meet an exception for successive writs under §2244. If the defendant can meet a §2244 exception, he or she may have their claim decided on the merits, even though "successive".

PETITIONER CLEARLY MEETS THE CAUSE AND PREJUDICE PRE-AEDPA TEST FOR ABUSE OF THE WRIT

Petitioner can clearly establish that prosecutorial misconduct prejudiced his punishment trial and that there is good cause as to why the prejudicial misconduct was not raised in his first in time §2254. Therefore, this second in time §2254 is not an "abuse of the writ" and is not "successive" within the meaning of §2244.

The State contends that Petitioner could not show "cause" under the cause and prejudice standard (State's Br. at 14-15), but that is unequivocally not true. The state district court made extensive findings supported by overwhelming evidence in the record as to both "cause" and "prejudice". (ROA. pp. 455-470). The Texas Court of Criminal Appeals, on the other hand, took one quote out of context from the

testimony of Mr. Cherry at the state writ hearing that he had expressed his opposition to the death penalty to anyone who asked him, as sufficient evidence to find that the state writ lawyer (who died in 2011 and was therefore six years deceased by the time of the hearing) could have uncovered, through reasonable diligence, the mendacious nature of the prosecutors' death argument, even as the prosecutors' thorough attempts to conceal their mendaciousness extended through those same state writ hearings. It was an unsupported and irrational finding by the Texas Court of Criminal Appeals and would not withstand reasonable federal scrutiny, which has yet to be applied. As Judge Walker wrote in his dissenting opinion, "'Reasonable' diligence would not go prying into the private feelings of a murder victim's family without a very good reason for doing so." *Ex parte Storey*, 584 S.W.3d at 456-457 (Walker, J. dissenting).

It is gravely disconcerting that this death penalty case absurdly, but actually, now hangs on that one line taken out of context. It is unbelievable and cruelly ironic that the Texas Court of Criminal Appeals' decision to ignore the state district court findings of four

separate constitutional violations and uphold the death penalty on purely procedural grounds is attributed to an offhand statement by the victim's father, who adamantly never wanted the death penalty imposed at all.

Although Petitioner has consistently asserted his position that his second in time habeas was not "successive", first in the district court, then at the Fifth Circuit on appeal and in his Motion for Rehearing, no court has even acknowledged the issue. Although Petitioner's arguments below cited and argue *Banister* numerous times, neither the district court nor the Fifth Circuit attempted to distinguish or even cited to *Banister*. The Courts below effectively counted to two in chronological order and ended their Constitutional and due process analysis there. The Fifth Circuit went so far as to declare that all *Brady, Giglio,* and *Napue* claims under all circumstances are barred in a second in time habeas petition, unless they meet a §2244 exception. In *In re Will*, 970 F.3d 536, 540 (5th Cir. 2020), Judge Higginson wrote in the opinion below:

> . . . this court has "definitively . . . determined that *Brady*

> 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 382 (5th Cir. 2020).

And presumably, regardless of the role the State played in hiding the violation.

Because Petitioner was deprived of a fair punishment hearing through prosecutorial misconduct in a death penalty case, as found by the state district judge in his subsequent state writ[1], he cannot meet the requirements of §2244 which require a showing of actual innocence of the crime, but that does not address the issue of prosecutorial misconduct or any constitutional claim at the punishment stage of a death penalty case.

Whether couched as 6th, 8th or 14th amendment violations, this Court has a rich history of recognizing Constitutional violations pertaining to the penalty phase in state death penalty prosecutions. The

[1] The state district court's findings of four substantive and prejudicial constitutional violations regarding the punishment stage of Petitioner's trial remain undisturbed. The Court of Criminal Appeals only addressed procedural bars, based on Mr. Cherry's off-hand statement.

Brady case itself involved the nondisclosure of evidence relevant only to punishment in a death penalty case. Thus, under the rule advocated by the State and endorsed by the Fifth Circuit, even *Brady* could not have asserted a *Brady* claim in a second in time writ, even if he could meet the cause and prejudice test, no matter how egregious the prosecutorial misconduct, and no matter how shameless and deliberate the State's cover-up of the misconduct, because *Brady's* claim did not pertain to guilt or innocence as required by §2244, but to mitigation of punishment in a death penalty case. It simply cannot be the law, that *Brady, Giglio,* and *Napue* claims such as made here, are now per se barred in second in time habeas filings.

STATE'S CONTENTION OF NO CIRCUIT SPLIT

The State mistakenly argues that there is no actual "circuit split". (State's Br. at 18). Of course, in light of this Court's opinion in *Banister*, whether there is a "circuit split" is not as relevant as *Banister* itself.

As pointed out above, this Court in *Banister* recognized that a second in time §2254 filing which would not have been deemed an "abuse of the writ" under pre-AEDPA analysis is likely not a

"successive" writ and need not meet a §2244 analysis at the Circuit Court level. Whether or not it meets pre-AEDPA "abuse of the writ", "cause and prejudice" analysis is an analysis made first at the district court level. That was never done by the district court in this case. Without acknowledging Petitioner's argument or this Court's opinion in *Banister*, the district court summarily transferred this case as a successive §2254 to the Circuit Court for §2244 analysis. The Fifth Circuit likewise failed to even acknowledge this Court's opinion in *Banister*, notwithstanding Petitioner's argument citing to *Banister*.

Nevertheless, doubling down on their misdirected argument, the State "uncovers" and cites to two pre-*Banister* cases from the Tenth Circuit, one from 2013, one from 2001, as purported confirmation of their erroneous assertion of no circuit split. (State's Br. at 18). The State's argument here reveals that it has conflated and confused the concepts of second in time but <u>not</u> successive with meeting the requirements of §2244(b). In both *Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013) and *LaFevers v. Gibson*, 238 F.3d 1263 (10th Cir. 2001), the habeas applicants simply asserted their *Brady* claims at the Circuit

Court under §2244(b). They prevailed and then litigated their claims in district court and lost. The habeas applicants in *Case* and *Hatch* never asserted that their claims were not "successive". In addition, unlike here, their *Brady* claims pertained to guilt/innocence which is addressed in §2244(b). A *Brady* violation pertaining to punishment, even as to a death penalty case, is not addressed by §2244(b). See, also, *In re Torrence*, 828 Fed.Appx. 877 (4rth Cir. 2020), in which the Fourth Circuit highlights the distinction neither the State nor the Fifth Circuit has been able to discern. "Although Torrence seeks authorization from this Court to file his second-in-time 28 U.S.C. §2254 petition in district court, his counsel argues the proposition that Torrence does not need such authorization because the proposed §2254 petition is not "second or successive" within the meaning of 28 U.S.C. §2244(b)(3). More specifically, the contention presented here is that Torrence's §2254 petition is not "second or successive" because it does not constitute an abuse of the writ . . . we agree and deny Torrence's §2244(b) motion as unnecessary." *Id.* at 879.

CONCLUSION AND PRAYER

Petitioner requests that this Court grant this Petition for Writ of Certiorari, and clarify for the lower courts its decision in *Banister* and resolve the split in the lower courts as to the meaning of "successive" under §2244(b) as it applies to second in time habeas filings alleging prosecutorial misconduct and "cause and prejudice".

Respectfully submitted,

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