

MAY 08 2018

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BY [Signature] DEPUTY

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

EX PARTE

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IN CRIMINAL DISTRICT

COURT NO. 3 OF

PAUL DAVID STOREY

TARRANT COUNTY, TEXAS

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION**

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

I.

PROCEDURAL HISTORY

1. A jury found Mr. Storey guilty of capital murder on September 10, 2008. The jury returned punishment findings in favor of death and the District court entered a sentence of death on September 15, 2008. The Court of Criminal Appeals affirmed. *Storey v. State*, AP-76,018 (Tex. Crim. App. Oct. 6, 2010 (not designated for publication)). The Supreme Court of the United States denied Storey’s petition for writ of certiorari on April 3, 2011. *Storey v. Texas*, 563 U.S. 919 (2011).
2. Counsel for Mr. Storey, Mr. Robert Ford, filed his initial state application for writ of habeas corpus on May 26, 2010. On June 15, 2011, the Court of Criminal Appeals denied relief. *Ex parte Storey*, Writ No. 75,828-01 (Tex. Crim. App. June 15, 2011) (not designated for publication).

3. Storey then challenged his conviction and sentence through a federal petition for writ of habeas corpus, which the federal district court denied. *Storey v. Stephens*, No. 4:11-CV-433, 2014 WL 11498164, at *1 (W.D. Tex. June 9, 2014). The Fifth Circuit denied him a Certificate of Appealability. *Storey v. Stephens*, 606 Fed. App'x 192, 198 (5th Cir. Mar. 18, 2015). The Supreme Court again denied his petition for a writ of certiorari, thus concluding his federal habeas proceedings. *Storey v. Stephens*, 136 S. Ct. 132 (2015).
4. On September 27, 2016, the trial court set an execution date for April 12, 2017.
5. On March 31, 2017, Applicant filed a subsequent application for writ of habeas corpus pursuant to Article 11.071 §5 of the Code of Criminal Procedure alleging six grounds for relief: “(1) newly-discovered evidence ‘compels relief’; (2) the State denied him his right to due process because it argued ‘evidence’ it knew to be false; (3) the State introduced false evidence which unconstitutionally deprived him of a fair punishment trial; (4) the State denied him his right to due process by suppressing mitigating evidence; (5) by arguing false aggravating evidence and suppressing mitigating evidence, the State rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments; and (6) the State violated the Fourteenth Amendment by seeking death in this case.” *Ex parte Storey*, No. WR-75,828-02, 2017 WL 1316348, at *1 (Tex. Crim. App. Apr. 7, 2017) (not designated for publication).
6. On April 7, 2017, the Court of Criminal Appeals stayed Applicant’s execution and remanded this case to the trial court to determine whether the factual basis of these claims was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed. If the claims were not so ascertainable, this Court was ordered to proceed to review the merits of four of the six claims. *Ex parte Storey*, No. WR-75,828-01 (Tex. Crim. App. April 7, 2017).
7. The Court of Criminal Appeals designated four issues for resolution:

Issue Two: The State of Texas denied Applicant his right to due process under the Fourteenth Amendment to the Constitution of the United States by arguing aggravating evidence to the jury at punishment that the prosecution knew to be false.

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

Issue Four: The State of Texas denied Applicant his right to Due Process

under the Fourteenth Amendment to the Constitution of the United States by suppressing mitigating evidence.

Issue Five: By arguing false aggravating evidence at punishment and suppressing mitigating evidence, the State of Texas has rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments to the Constitution of the United States.

8. On August 9, 2017, Applicant filed his *Request for Affirmative Finding That Robert Ford Exercised Due Diligence in His Representation of Applicant*.
9. On September 11 and 12, 2017, and October 20, 2017, this Court presided over habeas proceedings regarding the designated issues.
10. The following individuals testified during proceedings: Christy Jack, Robert “Bob” Gill, Robert Foran, Larry Moore, Ashlea Deener, Mark Daniel, William “Bill” Ray, Tim Moore, Cory Session, Glenn Cherry, Judith “Judy” Cherry, Leticia Martinez, Mollee Westfall, Jeffrey Cureton, Edward “Chip” Wilkinson, John Stickels, Fred Cummings, Terri Moore, and Suman Cherry.¹
11. The Court also admitted the following exhibits: Applicant’s Exhibits 1, 2, 3, and 5 (AX); and Respondent’s Exhibit 1 (RX).²
12. Following the hearing, the Court ordered the parties to submit “additional brief[ing]” or “proposed findings of fact and conclusions of law.” 4.SHRR.100.³

¹ The Court refers only to Larry Moore as “Moore,” and to Tim Moore and Terri Moore by their full names. The Court refers to Glenn, Judy, and Suman Cherry by their first names.

² The Court sustained Respondent’s objection as to Applicant’s Exhibit 4 and included it with the record upon Storey’s request only to preserve the issue for appeal. 4.SHRR.10

³ SHRR refers to the Reporter’s Record from the evidentiary hearing held by this Court.

II.

FINDINGS OF FACT

A. Robert Ford exercised due diligence as habeas counsel

1. Robert Ford, now deceased, was state habeas counsel for Applicant in his initial state writ brought under art. 11.071.
2. Glenn and Judith Cherry, the parents of the victim, opposed Applicant receiving the death penalty. (3.SHRR.167-168; 174; 185).
3. Robert Foran and Christy Jack were the trial prosecutors for the State in both this case and in the co-defendant, Mark Porter's, case. Both Foran and Jack knew, prior to Applicant's trial, that Glenn and Judith Cherry opposed Applicant receiving the death penalty.
4. Neither Foran nor Jack nor anyone else from the State, ever informed Mr. Ford that Glenn and Judith Cherry opposed a death sentence for Applicant. (Vol. 2, p. 259-260). Likewise, neither Foran nor Jack, nor anyone else from the State ever informed Larry Moore, Bill Ray (Applicant's trial attorneys), or Mark Daniel or Tim Moore (the co-defendant's attorneys), that Glenn and Judith Cherry opposed the death penalty for both Applicant and his co-defendant, Mark Porter.
5. Tarrant County Assistant District Attorney Edward "Chip" Wilkinson, who represented the State on direct appeal and during the initial state habeas proceedings, was unaware of the Cherrys' opposition to Applicant receiving the death penalty. (4.SHRR.19-21).
6. Mr. Ford had a strong reputation for his diligence. He was described by various attorneys and judges as "extremely zealous," "tenacious," "very aggressive," "gifted," a "passionate lawyer," "fearless advocate," "extremely diligent," and invariably regarded as an exceptional and diligent attorney. (2.SHRR.132; 203-204)(3.SHRR.29-30; 100; 203)(4.SHRR.28-31; 40; 53).
7. This Court finds that in most cases family members of murder victims do not wish to speak to lawyers representing the person found guilty of killing their loved one. (3.SHRR.107); (4.SHRR.38).
8. This Court finds that it is highly unusual, in cases such as this one, for the parents of the murder victim to oppose the death penalty for their child's murderer.

9. Robert Foran told Bill Ray and Larry Moore, trial counsel for Applicant, that the Cherrys “preferred not to be contacted.” (2.SHRR.252).
10. No witness to these proceedings faulted Mr. Ford or any other of Applicant’s counsel, or any of the co-defendant’s counsel for failing to contact the Cherrys to determine their views on their respective clients receiving the death penalty.
11. Christy Jack did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact. (2.SHRR.130-131).
12. Robert Foran did not inform Mr. Ford that the Cherrys opposed the death penalty for the Applicant and was not aware of anyone else informing him of that fact. (2.SHRR.259-260).
13. Mr. Ford did not know that the Cherrys opposed the death penalty for the Applicant, his client.
14. Mr. Ford would not have discovered the factual basis of these claims through the exercise of reasonable diligence.
15. The factual basis of the four claims before this Court, i.e., the Cherrys’ opposition to Applicant receiving the death penalty and the corresponding false argument made by trial prosecutor Jack, was not ascertainable by Applicant or his counsel, through the exercise of reasonable diligence on May 26, 2011, the day the initial state writ was due and was filed.
16. This Court further finds that the failure of Mr. Ford to ascertain the Cherrys’ opposition to the death penalty in general and specifically as to the Applicant, does not constitute a lack of reasonable diligence.
17. This Court finds that Mr. Ford acted with reasonable diligence.

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

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

19. Both Christy Jack and Robert Foran knew the Cherrys opposed Applicant receiving the death penalty. (2.SHRR.47; 70-72; 146-147).
20. Neither Christy Jack, nor Robert Foran, nor anyone else from the State disclosed, or otherwise communicated to Applicant's trial counsel, Larry Moore or Bill Ray that Glenn and Judith Cherry opposed the death penalty for their client, Paul Storey.
21. At punishment, Christy Jack argued to the jury, in pertinent part, "And it should go without saying that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate." (39.RR(Trial Record).11-12).
22. This argument was improper because it was outside the record.
23. Christy Jack's argument was prejudicial in as much as it purported to interject the wishes of the victim's family for the jury to return a verdict of death for Applicant, which is constitutionally impermissible.
24. Christy Jack conceded during the habeas proceeding that her argument was outside the record and improper but that she did not think it would result in a mistrial. (2.SHRR.119-120).
25. The Cherrys' opposition to the death penalty and their opposition to Applicant's execution is long-standing and deeply-felt. (3.SHRR.169-170)(4.SHRR.95-99).
26. Christy Jack testified Glenn Cherry approached her after Marilyn Shankle, Paul Storey's mother, testified at punishment and asked, "do you want me to or should I testify that we want the death penalty[.]" (2.SHRR.102-103).
27. This Court finds Jack's account regarding Glenn Cherry's question is not credible for the following reasons:
 - a. Glenn Cherry is credible. This Court believes his testimony wherein he denies he or Judith Cherry ever supported the death penalty for Applicant during the trial.
 - b. This Court further believes that Glenn Cherry never communicated to Jack or Foran during the trial, or at any other time, that either he or Judith Cherry supported the death penalty for Applicant. (3.SHRR.167-170).
 - c. Judith Cherry is credible. This Court believes her testimony wherein she denies she or Glenn Cherry ever supported the death penalty for Applicant during the trial, and that she never communicated to Jack or Foran during the trial, or at any other time, that either she or Glenn Cherry supported the death penalty for Applicant. (3.SHRR.185-187; 4.SHRR.94-95).

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

- m. No such opinion evidence was offered in support of Robert Foran.
 - n. Suman Cherry made an out of court admission that Jack's and Foran's contention that either Glenn or Judith Cherry ever deviated from their opposition to the death penalty for Paul Storey was "bullshit." (4.SHRR.95-97).
 - o. As the findings fact regarding the *Brady* issue detail *infra*, Christy Jack and Robert Foran are not credible and their testimony is not believable.
28. Even were Christy Jack's account of her mid trial exchange with Glenn Cherry true, it is vague and does not change the falsity of the prosecution argument that "it goes without saying that everyone" who loved the victim wanted Mr. Storey's death.
29. There is no evidence that Judith Cherry ever had any change of heart in her opposition to Applicant's execution.
30. This Court finds Jack's argument to be false, regardless of whether she had the conversation with Mr. Cherry as related by Jack.

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

31. On February 8, 2008, the trial court ordered the prosecutors to produce any and all such evidence "of material importance to the Defense even though it may not be offered as testimony or exhibits by the prosecution at the trial of this case on the merits," and that the State answer the Defense's request for such information in writing. (2.SHRR.77)(Applicant's exhibit 2).
32. It is uncontroverted that the disclosures required by the Order of February 8, 2008 would also include the Cherrys' opposition to Applicant receiving the death penalty. (2.SHRR.78).
33. Christy Jack and Robert Foran were aware of the Cherrys' opposition to Applicant receiving the death penalty. (2.SHRR.47; 70-72; 146-147).
34. Under the Order of February 8, 2008, the prosecution had a duty to disclose the Cherrys' opposition to Applicant receiving the death penalty to Larry Moore and Bill Ray. Applicant and his attorneys had every right to rely on the Court Order and that the state would adhere to it.

35. It is exceptional and unusual that the parents of a murdered son would seek to spare the life of their child's killer. (2.SHRR.53); (3.SHRR.14, 84, 121); (3.SHRR.14).
36. Christy Jack and Robert Foran regarded this evidence as out of the ordinary and material and led to a discussion with their supervisor Bob Gill about it. (2.SHRR.62; 83; 199; 202).
37. Larry Moore viewed the evidence as material. He testified in detail how it would have changed the course of his representation and the trial. (3.SHRR.10-11; 14; 21).
38. Bill Ray also regarded this evidence as material. (3.SHRR.123); (5.SHRR, Applicant's exhibit 4).
39. Tim Moore also regarded this evidence as material. (3.SHRR.136).
40. Mark Daniel's testimony further details the materiality of the Cherrys' opposition to the death penalty for Applicant and his own client, co-defendant Mark Porter. (3.SHRR.98-99; 106-107).
41. Based upon the unanimity of the testimony of witnesses for the State as well as Applicant, this Court finds the evidence of the Cherrys' opposition to Mr. Storey's execution to be both favorable and material. The State had the obligation to disclose the information under the United States Constitution and the Court's order.
42. The prosecution did not reveal the Cherrys' opposition to Mr. Storey's execution in the "State's First Amended Notice of *Brady* Material," filed July 10, 2008. (1.SHRR.78-79)(Applicant's exhibit 3) (3.SHRR.29).
43. This Court finds that Applicant's trial counsel, Larry Moore and Bill Ray, were not made aware of Glenn and Judith Cherrys' opposition to Applicant receiving the death penalty based on the following evidence:
 - a. Larry Moore testified he was never informed about the Cherrys' position from the prosecution. (3.SHRR.9-10).
 - b. Bill Ray was unaware of this evidence until 2017, after Larry Moore informed him. (3.SHRR.121-122); (4.SHRR.71).
 - c. Neither Tim Moore nor Mark Daniel were ever made aware of the evidence by the prosecution. (3.SHRR.97-98; 99; 133).
 - d. Neither John Stickels, Applicant's appellate attorney, nor Robert Ford, Applicant's habeas counsel, were informed about or otherwise knew about the evidence. (4.SHRR.19-31).
 - e. Assistant Tarrant County Criminal District Attorney Chip Wilkinson, who handled the direct appeal and initial state writ for the state, did not know about

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

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

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

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

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

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

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

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

- a. Robert Foran testified he made disclosure to Bill Ray in January or February, 2007. (2.SHRR.218; 225-226). This testimony is inconsistent with Foran's supervisor, Bob Gill, who testified that Foran discussed the issue of disclosure with him sometime after July 1st or 2nd, 2008. (2.SHRR.199; 202). This Court can discern no reason for prosecutors to discuss disclosure of material evidence in July 2008 had disclosure already been made long before, in early 2007. In the alternative, this Court can discern no reason for a prosecutor to seek supervisory affirmation for a disclosure that purportedly occurred more than a year prior.

- b. Robert Foran testified that his disclosure was verbal only and that he made no written internal memo that he had disclosed it. (2.SHRR.225-226).
 - c. A disclosure of this evidence was not included in any written Brady notice.
 - d. Robert Foran testified he also disclosed the information to either Tim Moore or Mark Daniel who were originally scheduled to go to trial before Applicant. (2.SHRR.225). Like Applicant’s trial counsel, both Mr. Tim Moore and Mr. Daniel denied they were ever made aware of the evidence.
50. This Court, therefore, finds Robert Foran’s testimony not credible regarding the disclosure of material evidence. This Court further finds that his testimony that he disclosed that Judith and Glenn Cherry opposed the death penalty for Mr. Storey to be untrustworthy.
51. This Court finds also that the following sequence of events occurred which lends further support to the finding that the prosecution did not disclose the evidence:
- a. Glenn Cherry approached Cory Session on December 20, 2016, and informed Mr. Session about their opposition to Mr. Storey’s then-imminent execution. (3.SHRR.152-172).
 - b. Mr. Session informed Mike Ware, one of the attorneys for Mr. Storey (3.SHRR.158), and Mr. Ware, in turn, informed Larry Moore. (3.SHRR.9-10).
 - c. Mr. Moore later informed his co-counsel, Bill Ray. (3.SHRR.9)(5.SHRR, Defense Exhibit 4).
 - d. These events further confirm that no disclosure regarding this issue was ever made to Applicant’s counsel until after December 20, 2016.
52. This Court finds that the prosecution had a duty to disclose, but did not disclose to any defense attorney that Judith and Glenn Cherry opposed the death penalty for Applicant.

III.
CONCLUSIONS OF LAW

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

- 1. Because the State concealed the evidence at issue in this subsequent writ application, it has forfeited its argument that Applicant’s pleading is barred under the doctrine of forfeiture by wrongdoing. The long-standing equitable maxim is that “no one shall be permitted to take advantage of his own wrong.” *Reynolds v. United States*, 98 U.S. 145, 160 (1878). *See also Smith v. State*, 100 Tex. Crim. 23, 235, 272 S.W. 793, 794 (Tex. Crim. App. 1925) (“It is [a] well settled principle of law

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

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

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

1. Robert Ford was appointed as state habeas counsel under Article 11.071 of the Code of Criminal Procedure to represent Applicant in his state post-conviction proceedings.
2. Robert Ford was diligent.
3. Notwithstanding his exercise of reasonable diligence, Robert Ford or Larry Moore, Bill Ray, or John Stickels did not ascertain the factual basis of the four claims.
4. Robert Ford could not have ascertained the factual basis of any of the four claims based on the Cherrys’ opposition to Mr. Storey receiving the death penalty on or before May 26, 2011, the date of the filing of the initial writ application.

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

1. Robert Ford could not have ascertained the factual basis of any of the four claims based on the Cherrys’ opposition to Mr. Storey receiving the death penalty on or before May 26, 2011, the date of the filing of the initial writ application.
2. This Court concludes that the jury argument regarding the Cherrys support for Applicant’s execution constituted false evidence. *Ex parte Robbins*, 360 S.W.3d

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

3. The prosecution was aware of the falsity of its argument.
4. The prosecution made the argument intending it to affect the jury’s verdict.
5. This Court concludes the false argument was reasonably likely to affect the jury’s verdict.
6. The prosecution’s knowing, false argument violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Miller v. Pate*, 386 U.S. 1, 4 (1967).

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

1. The prosecution had an affirmative, legal duty to reveal to the defense the evidence regarding the Cherrys’ desire that Applicant be spared death both under the trial court’s order and under the Fourteenth Amendment to the Constitution of the United States. *Brady v. Maryland*, 373 U.S. 83 (1963); *Ex parte Mitchell*, 853 s.W.2d 1, 4 (Tex. Crim. App. 1993). This duty applies to evidence that is material to punishment. *Brady v. Maryland*, 373 U.S. at 87. The prosecution had an affirmative duty to disclose this information under Texas Disciplinary Rule of Professional Conduct 3.09(d).
2. The evidence of the Cherrys’ opposition to the death penalty for Mr. Storey constituted mitigating evidence.
3. The evidence of the Cherrys’ opposition to the death penalty for Mr. Storey was relevant to the mitigation issue under Article 37.071, Section 2(e)(1) of the Code of Criminal Procedure.
4. If the evidence can serve as a basis for a sentence less than death, jurors contemplating the mitigation issue are entitled to consider the evidence. *Skipper v. South Carolina*, 476 U.S. 1 (1986).
5. The evidence of the Cherrys’ opposition to the death penalty for Mr. Storey was admissible. Even if not initially admissible, the prosecution’s argument misleading

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

6. Disclosure of the Cherrys' opposition would have chilled Jack's efforts to prejudice the jury with her false argument.
7. This Court concludes that had this evidence been disclosed, there is a reasonable probability that the jury would have answered the mitigation issue differently. The existence of this probability undermines this Court's confidence in the outcome of the punishment trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

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

1. The prosecution's suppression of mitigating evidence, as well as its injection of false evidence, has rendered the death penalty in this case to be unconstitutionally unreliable and a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. *See e.g., Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). *Johnson v. Mississippi*, 486 U.S. 578 (1988); *See, also, Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010).
2. The false argument also had the effect of reducing the responsibility of jurors by inviting them to acquiesce to the falsely-asserted desire of the victim's family for death, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

III.

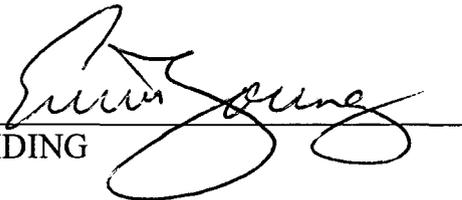
RECOMMENDATIONS

1. This Court recommends relief on the second ground for relief because the State of Texas denied Applicant his right to due process under the Fourteenth Amendment to the Constitution of the United States by arguing aggravating evidence the prosecution knew to be false.
2. This Court recommends relief on the third ground for relief because the prosecution introduced false evidence, thereby depriving Mr. Storey of a fair punishment trial

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

3. This Court recommends relief on the fourth ground for relief because the State of Texas denied Applicant his right to Due Process under the Fourteenth Amendment to the Constitution of the United States by suppressing mitigating evidence.
4. This Court recommends relief on the fifth ground for relief because the State of Texas rendered the death sentence in this case unreliable under the Eighth and Fourteenth Amendments to the Constitution of the United States by suppressing mitigating evidence and introducing false evidence to the jury, which would have been constitutionally prohibited, even if it were true.
5. This Court recommends to the Court of Criminal Appeals that it reform the death sentence in this case to a life sentence without parole.

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



JUDGE PRESIDING

FILED
THOMAS A WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS

MAY 08 2018

TIME 10:49
BY [Signature] DEPUTY

NO. C-3-W011020-1042204-B

EX PARTE

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IN CRIMINAL DISTRICT

COURT NO. 3 OF

PAUL DAVID STOREY

TARRANT COUNTY, TEXAS

ORDER

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

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

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

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

[Signature]
JUDGE PRESIDING