**No. 02-8286**

IN THE

# Supreme Court of the United States

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DELMA BANKS, JR.,
*Petitioner*,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Did the Fifth Circuit commit legal error in rejecting Banks' *Brady* claim-that the prosecution suppressed material witness impeachment evidence that prejudiced him in the penalty phase of his trial-on the grounds that:

> (a) the evidence supporting the claim was procedurally defaulted, notwithstanding the fact that, like in *Strickler v. Greene*, 527 U.S. 263 (1999), there was no reasonable basis for concluding that counsel for Banks could have discovered the suppressed evidence prior to or during the trial or state post-conviction proceedings; and
>
> (b) the suppressed evidence was immaterial to Banks' death sentence, where the panel neglected to consider that the trial prosecutors viewed the evidence to be of "utmost importance" to showing a capital sentence was appropriate?

2. Did the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?

3. Did the Fifth Circuit act contrary to *Harris v. Nelson*, 394 U.S. 286 (1969) and *Withrow v. Williams*, 507 U.S. 680 (1993) in holding that Fed. R. Civ. P. 15(b) does not apply to *habeas* proceedings because "evidentiary hearings" in those proceedings are not similar to civil "trials"?

## LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Delma Banks, Jr. was the appellee, cross-appellant below. Janie Cockrell was the appellant, cross-appellee below.

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STATUTES

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported. It is reprinted at Pet. App. A1-A78, and the Fifth Circuit's order denying rehearing is found at JA 450. The unreported decision of the United States District Court for the Eastern District of Texas is reprinted at Pet. App. B 1-B6.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 2002. A timely petition for rehearing was denied on September 23, 2002. The petition for writ of certiorari was filed on December 23, 2002. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution, which provide respectively that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"; "nor [shall] cruel or unusual punishments [be] inflicted"; and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves 28 U.S.C. § 2253(c)(2), reprinted at Pet. App. J1; and Fed. Rule Civ. Pro. 15(b), "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

## STATEMENT OF THE CASE

Delma Banks' conviction and death sentence were procured through the prosecution's deliberate presentation of false testimony and suppression of material impeachment evidence, together with devastating ineptitude by defense counsel. The Fifth Circuit below refused to rectify these

constitutional violations for reasons that cannot bear examination under this Court's precedents. What the record shows is this:

## A. State Trial Court Proceedings

### 1. *The Crime*

On Monday, April 14, 1980, at roughly 10:00 a.m., the body of sixteen-year-old Richard Whitehead was found in a Bowie County, Texas park. 9R 2169.[1] He had been shot three times. Police learned that 21-year old Delma Banks, Jr. had been with Whitehead when Whitehead was last seen alive, on the evening of April 11. Banks, who had no prior record, was charged with Whitehead's murder after one Charles Cook told police that Banks had admitted the crime and given Cook the murder weapon.

### 2. *Trial Proceedings*

Trial began on September 29, 1980. 9R 208.1 The District Attorney told the jurors that the State's case depended heavily on Cook, a twice-convicted felon who was awaiting prosecution on habitual offender charges.[2]

The State had no eyewitnesses, no confession other than the purported one to Cook, and no evidence independent of Cook linking Banks to the murder.

Two witnesses, Patricia Hicks and Patricia Bungardt, both acquaintances of Whitehead, identified Banks as having been

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[1] References to the Joint Appendix will be cited as JA and then the page number. References to the state trial record will appear as volume and page number, __ R __. References to the state post-conviction record will appear as volume and page, __ SH__. References to the federal habeas record will appear as volume and page, __ FH __.

[2] The prosecutor told jurors, "Charles Cook is a very important witness for two reasons. First, because Delma Banks admitted to Charles Cook that he killed Richard Whitehead and robbed him of his automobile. Second, because Delma Banks left the murder weapon and the stolen vehicle with Charles Cook." 9R 2128-29.

with Whitehead on the evening of April 11. 9R 2150, 2154. Hicks, a 14-year-old, testified that she, Whitehead and Banks spent part of the evening drinking beer at the park where Whitehead was later found. *Id.* at 2150. Bungardt testified that Banks and Whitehead visited her home between 11:00 and midnight. 9R 2155. Neither testified about any animosity between Banks and Whitehead.

Mike Fisher, who lived near the park, testified that he was awakened by two loud noises at roughly 4:00 a.m. on Saturday morning. *Id.* at 2158. Pathologist Vincent DiMaio testified that Whitehead died from three bullet wounds. *Id.* at 2390.

Bowie County Deputy Sheriff Willie Huff, the lead investigator, testified that he received a tip on April 23 that Banks would travel to Dallas that evening. He and other officers followed a car containing Banks, Robert Farr and Marcus Jefferson. Jefferson testified that after arriving in Dallas, Banks drove to a South Dallas house, went to the front door, and returned a short time later with a pistol. 9R 2265. Farr testified that Banks then said that this was not his pistol; his was with a "broad in West Dallas." *Id.* at 2254-61, 2267-69.[3]

Deputy Huff testified that after seeing the car stop at the South Dallas house and Banks return with an object in his hand, police stopped and searched the car. They found a .22 caliber pistol and shortly thereafter went to the house where Banks had been. The officers entered the house and confronted the occupant, Charles Cook. Later that morning, Cook went to a neighbor's house and returned with a .25 caliber pistol. Huff testified that he submitted this weapon for forensic testing for comparison against the bullets recovered from Whitehead. 9R 2208.

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[3] On cross-examination, Farr admitted that he used illegal drugs, but denied that he was a paid informant. *Id.* at 2274. He also denied receiving any consideration for his testimony, and he swore that he had not spoken with law enforcement officials about the case. *Id.* at 2274, 2276-77.

Charles Cook, the prosecution's key guilt-phase witness, testified that Banks drove up in front of Cook's Dallas home at roughly 8:30 a.m. on Saturday, April 12 in a green Mustang, said he was unfamiliar with Dallas, and asked whether Cook would help him find a place to stay. 9R 2285-86. Cook agreed to aid Banks, and Banks stayed with Cook the following two days. *Id.* at 2293, 2299. Banks drove Cook's wife to work, and when they returned home, Cook noticed what he thought was blood on Banks' right leg. *Id.* at 2287-88. According to Cook, Banks told Cook that Banks "got into it on the highway with a white boy" and that Banks shot him. *Id.* at 2289.

Cook further testified that he then gave Banks fresh clothes and they visited Cook's sister who had a new baby. *Id.* at 2289-90. Cook next took Banks to a motel where Banks slept for a number of hours. *Id.* at 2290-91. Cook and Banks went out that evening. *Id.* at 2293. Cook showed Banks around Dallas. *Id.* They returned to Cook's house, and Cook told Banks to sleep in a room opposite his and his wife's. *Id.* at 2293-94. Cook testified that just before going to bed, he saw Banks sitting on the bed "with his head down." *Id.* at 2294. Cook testified that Banks then confessed that he had not been truthful with Cook; that Banks had driven around the night before with a "white boy and his girl friend"; and that Banks had shot the white boy "for the hell of it" and taken his car to drive to Dallas. *Id.* at 2295. Cook testified that he was afraid and told Banks that Cook could no longer allow him to stay in the house. Cook testified that, before retreating to his room, he noticed for the first time that Banks had a pistol. *Id.* at 2296, 2299.

Cook testified that the following day, he searched unsuccessfully for another place for Banks to stay. *Id.* at 2297-98. He also testified that Banks agreed to return home the next day and spent Sunday evening at Cook's home. Cook testified that before going to sleep, Cook persuaded Banks to let him hold the pistol for his family's safety. *Id.* at 2300.

Cook testified that on Monday both Cook and his wife worked all day and, when they returned home, drove Banks to the bus station where Banks caught the bus back to Texarkana. *Id.* at 2302. Cook testified that Banks left the car and gun with him. *Id.* at 2303-04. Cook testified that on the following day, he drove the car to Canada Drive in West Dallas and abandoned it. *Id.* at 2303. Cook testified that on Tuesday evening, he sold the pistol to a neighbor, Benny Lee Jones, for $10. *Id.* at 2305. Cook also testified that he sold Jones jumper cables and a tool box from the car. *Id.*

Cook testified that nearly two weeks later, police came to his house searching for Banks' pistol and Cook retrieved it for them. *Id.* at 2305-06. He testified that Banks called him to make sure that Cook had disposed of the car and that Banks requested that Cook mail him the pistol. *Id.* at 2307-08. He testified that the next time he saw Banks, Banks showed up at Cook's front door in the wee hours of the morning, again requesting return of his pistol, and that this was the same morning the police came in search of the gun. *Id.* at 2309-10.

On cross-examination, Cook denied that he had rehearsed his testimony with law enforcement officials or spoken to anyone about his testimony.[4] He acknowledged that an arson charge and habitual offender papers were pending against him in Dallas but denied any deal for his testimony. 9R 2323.

Firearms examiner Allen Jones testified summarily that the bullets recovered from Mr. Whitehead and the crime scene likely were fired from the .25 pistol Cook retrieved from Bennie Lee Jones. *Id.* at 2357-58. The firearms examiner did not describe how he arrived at this conclusion, nor was he

[4] "Q. Who all have you talked to about this, Mr. Cook? A. I haven't talked to anyone about it. Q. Haven't talked to anyone? A. No sir. Q. Mr. Raffaelli just put you on the stand, not knowing what you were going to testify to. Is that what you're telling me? A. That's what I'm telling you." 9R 2314.

cross-examined about it. The State then rested its case. 1OR 2412. The defense rested without calling a witness.

The closing arguments of counsel focused upon the credibility of Robert Farr and Charles Cook. Prosecutor James Elliott asserted that Farr's candor in acknowledging his drug use showed that he was a truthful witness. 1OR 2449. Elliott told the jurors that "Charles Cook didn't hide anything from you either." *Id.* at 2450. He assured them that "Charles Cook brought you absolute truth," and that he and District Attorney Raffaelli "didn't hide anything with regard to any of these witnesses." *Id.* at 2450. Defense counsel Cooksey noted that Cook was the key witness and urged the jury to find that his testimony was not credible. *Id.* at 2465, 2471. The jury retired to deliberate at 7:55 p.m. and returned a guilty verdict at 11:08 p.m. *Id.* at 2485.

The penalty phase began the next morning.[5] The State's case for death and its submission that Banks would likely commit acts of violence in the future rested upon the testimony of two witnesses: Vetrano Jefferson and Robert Farr. Jefferson, Banks' common-law brother-in-law, testified that, without provocation, Banks struck him with a pistol and threatened to kill him one week prior to the Whitehead killing. *Id.* at 2493-94. Farr returned to the stand and testified that the reason Banks drove to Dallas on the evening of his arrest was so that Banks could reclaim his gun and commit armed robberies. *Id.* at 2500-02. Farr also testified that Banks said the gun would allow him to take care of any trouble that might arise during a robbery. *Id.*

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[5] This case was tried pursuant to the former Texas procedure that required the jury to make findings upon three special issues during the sentencing hearing. If the jury concluded unanimously and beyond a reasonable doubt that the defendant had deliberately killed the victim, that the victim had not provoked the crime, and that it was reasonably likely that the defendant would commit acts of violence in the future, the death penalty would be imposed. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

On cross-examination, Farr denied that he had contacted Deputy Huff on April 23 to alert Huff that Banks would be traveling to Dallas to obtain a weapon. 1OR 2503-04. Farr also denied that he was seeking to please the prosecution. *Id.* at 2505. Farr denied that he "got Delma to go" to Dallas, and Farr denied that he was carrying narcotics during the trip. *Id.*

The defense called several hastily assembled acquaintances of Banks and his parents. First, Mr. Banks, Sr. and then a number of adult acquaintances testified briefly that Delma, Jr., was a respectful, churchgoing young man and a hard worker. *Id.* at 2514-31. Two witnesses were called to discredit Farr. James Kelly testified that he had recently driven Farr to a number of doctors' offices to fill phoney prescriptions, *id.* at 2546-51; and former Arkansas police officer Gary Owen testified that Farr had served as a paid informant in that state and was known as unreliable. *Id.* at 2557-58. Banks testified and maintained his innocence. He pointedly contested Farr's account that he, rather than Farr himself, wanted a gun to commit robberies, and he denied owning a .25 caliber pistol. He assured jurors that he would live peacefully in prison if given a life sentence. *Id.* at 2566-69. Ellean Banks, Banks' mother, in very brief testimony, asked the jury to spare her son, whom she described as innocent and a good son. *Id.* at 2575-76.

In closing, the prosecutor argued that the evidence showed that Banks would be dangerous in the future. *Id.* at 2578-82. In urging the jury to find that the special issue of future dangerousness had been proven, he relied exclusively upon Farr's testimony,[6] who, he reminded jurors, "has been open

[6] The prosecutor told jurors: "Take the testimony of Robert Farr. They went to Dallas to get the pistol. Delma Banks' pistol. Do harm? Robbery? Delma Banks said he was going to get the pistol to do armed robbery. . . . And you heard Robert Farr tell him, as he drove away, to load it, and that, `I'll take care of it.' I submit to you beyond a reasonable doubt that the State has again met its burden of proof, and that the answer to question two should also be yes." *Id.* at 2589-90.

and honest with you in every way." *Id.* at 2579. He urged the jurors to discount the defense "character" witnesses as not useful.

In a brief closing, defense counsel Cooksey argued that the evidence supporting the future dangerousness special issue was insufficient. *Id.* at 2590-95. He said that the State had failed to present expert testimony in support of danger ousness and that "the testimony they have that would involve Delma in any future acts of violence is the statement of Robert Farr." *Id.* at 2591. He urged the jury to be wary of Farr's testimony—" I plead with you, please examine Robert Farr's testimony." *Id.*

In rebuttal, the prosecutor reinforced the importance of Farr's testimony. He told jurors it was "of utmost significance." *Id.* at 2593. The jury found that the State's evidence established the statutory special issues and the judge imposed a sentence of death. *Id.* at 2598-2602.[7]

**B. Post-Conviction Proceedings**

Thereafter, Banks sought post-conviction relief, first in the Texas state courts and then in the federal courts. On January 13, 1992, Banks filed a state habeas application and pleaded, *inter alia*, claims alleging prosecutorial misconduct that included the handling of State witnesses Farr and Cook and a claim of ineffective assistance of counsel at both the guilt and penalty phases of trial.[8] The state trial court recommended

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[7] On direct review, the Texas Court of Criminal Appeals affirmed the conviction and death sentence. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1982), *cert. denied, Banks v. Texas*, 464 U.S. 904 (1983).

[8] Banks had filed two earlier petitions challenging his capital conviction and sentence. The first was filed on December 27, 1983 and denied by the Court of Criminal Appeals on February 29, 1984 in an unpublished order. *Ex parte Banks*, No. 13, 568-01. The second was filed on May 2, 1984 and denied in a published opinion. *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). In those actions Banks did not raise the claims presented herein.

denial of these claims and never acted upon requests for discovery and an evidentiary hearing. The Court of Criminal Appeals accepted these recommendations and denied relief.[9]

Banks filed his application for federal habeas relief on March 7, 1996,[10] raising the same claims. As he had in state court, he moved for an evidentiary hearing and for limited discovery. 1FH 303, 2FH 527.

### 1. Farr Misrepresentation and Suppression Claim

Banks alleged that Farr was a paid informant, that he set up Banks' arrest, that these critical facts were known to the trial prosecutors, and that they suppressed them. Banks sought discovery and an evidentiary hearing on this claim. The Magistrate Judge initially denied discovery because Banks failed to make specific allegations as required by *Harris v. Nelson,* 394 U.S. 286 (1969). 2FH 586.

Thereafter, Banks supplemented his discovery requests with affidavits from five state witnesses. Each asserted that significant portions of their trial testimony against Banks were misleading or false, and that they had testified falsely under pressure from law enforcement officials. 2FH 598-619. Robert Farr and Charles Cook both recanted important aspects of their trial testimony and described their previously undisclosed involvement with law enforcement prior to trial. Vetrano Jefferson disavowed his penalty-phase testimony insofar as it accused Banks of being the aggressor in the early April, 1980 fight. JA 337. Carol Cook, Charles Cook's sister,

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[9] The procedural history of these proceedings is both complex and crucial to the resolution of the issues before this Court. To promote clarity, we will discuss that history in the Argument section relating to each claim.

[10] This case is governed by pre-AEDPA standards except for 28 U.S.C. § 2253, relating to certificates of appealability. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Slack v. McDaniel*, 529 U.S. 473 (2000).

stated that Deputy Huff told her to testify that the car in which she saw Banks and her brother riding was green, though the one she saw was actually red. JA 333. Marcus Jefferson, the person who had driven to Dallas with Banks and Robert Farr, stated that it was Farr's idea, not Banks' idea, to go to Dallas to obtain a gun. JA 334.

On the basis of these proffers, Banks again moved for discovery concerning impeachment material, and for an evidentiary hearing. 2FH 618. The proffers led the Magistrate Judge to reconsider and order disclosure of files in the State's possession relating to these witnesses. The Magistrate Judge thereafter ordered an evidentiary hearing. 3FH 625-31.

At the hearing Banks presented evidence that proved beyond doubt that Farr had served as a paid informant during the investigation which led to charging Banks with Whitehead's murder; that that status was known to the prosecutors; *and* that key portions of Farr's trial testimony were inaccurate and misleading. Farr, who was then residing in California, testified by declaration that in 1980 he was an informant for several law enforcement agencies, including those in Texarkana, and that Deputy Huff requested his assistance in Banks' case. Farr agreed to help because he believed that if he refused, Huff would arrest him on drug charges. Farr demanded money and Huff agreed to and did pay him $200. Farr testified that he then went to work to "set Delma up."

> I told Delma that I wanted to rob a pharmacy to get drugs but that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery.

JA at 438.

Farr thereafter apprized Deputy Huff when Farr, Banks and Marcus Jefferson drove to Dallas. After Banks was

arrested, Farr was free to leave even though he had been carrying drugs. He also received an additional $25 from another law enforcement officer working on this case. JA 439.

Trial prosecutor Elliott testified, and confirmed that Farr had served as an informant in this case. Huff testified that he had personally recruited Farr and paid him $200. 6FH 54-55; 6FH 89. Neither Elliott nor Huff disputed the substance of Farr's declaration nor claimed that Farr's informant status had been disclosed to defense counsel previously.

**2. The Ineffective Assistance of Counsel Claim**

Banks pleaded ineffective assistance at both phases of trial. Because the state court held no hearing on this claim and made no findings, the Magistrate Judge ordered a limited hearing. 1FH 32-33; 1SH 88-115.

At the federal hearing, Banks presented the following evidence, which was consistent with the evidence he had proffered in the state courts. Two psychologists, Gregorio Pina and Mark Cunningham, found that Banks was beset with a chronic, uncontrollable skin disorder that led to unending pain, disfigurement, and irreparable damage to his sense of self-worth. "From Mr. Banks' birth, he has suffered from a severe and chronic dermatological illness characterized by hives, rashes, and severe and uncontrollable burning and itching of the skin. . . . As a result of his condition, Mr. Banks suffered from chronic raw and bleeding skin and hives . . . ." JA 207. Throughout his developmental years, he often displayed this acute, disfiguring skin condition. "This is not a subtle rash. We're talking about weeping, oozing, bleeding lesions and sores and cracks in the skin." JA 355. These sores drew such disgust and degradation from his peers that Banks grew socially, as well as physically, deformed, and came to view himself as grotesque. "He was ridiculed by peers who responded to these open, oozing sores with teasing and disgust. . . ." JA 355. "[These sores] also had *catastrophic* consequences for Mr. Banks' emotional and psychological

development. Mr. Banks learned to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore. . . .” JA 208 (emphasis in original).

The evidence documented other handicaps to Banks’ development as well: he functions as borderline mentally retarded, has significant short term memory and communication deficits, and shows indications of organic brain impairment. *See* JA 205-206, 353-54.

In addition, Banks was the target of his alcoholic father’s repeated acts of abuse and physical trauma. “It was a climate of physical abuse and emotional terrorization that was directed toward Delma Banks by his father. . . . [He] was beaten with a belt, strap, horse whip, extension cord, coat hanger.” JA 351-52. On numerous occasions, from the time that he was an infant through his developmental years, he had to flee the home with his mother and siblings to escape his father’s drunken rage. On other occasions, he was “beaten and terrorized by his alcoholic father; at least one such beating involved young Delma’s being tied to a tree and whipped,” JA 207, “and then left with statements of how the wild animals were going to find him and begin to chew on him during the night.” JA 352.

Mr. Banks’ full psychological evaluation revealed that he was not likely to engage in future acts of violence in the structured setting of prison. “[S]ome of these features of Mr. Banks’ psychological profile accurately would have predicted that he would prove a ‘safe,’ nonviolent inmate during his present incarceration. . . . He is best described as a docile, obedient, and subservient person who is eager to please even those who incarcerate him.” JA 210-11. “The prison system provides a significant degree of external structure to help insulate and support the damages that have occurred to somebody up to that time. . . . [I]n the frame work of prison with work and confinement and structure and treatment and staff, it helps block and insulate much of the adverse

expressions and damage that might have otherwise been done." JA 358.

At the hearing, Vetrano Jefferson admitted that his trial testimony had been false and that he, not Banks, was the aggressor during their fight. "I was drunk that day . . . and I was threatening my sister and he defended her. . . ." 6FH 166. When asked who started the fight, Jefferson stated "I did." *Id.* He also testified that he never spoke to defense counsel prior to trial and that he would have been willing to do so if they had asked to speak with him about the incident. *Id.* at 168.[11]

Banks' mother testified that trial counsel demanded a fee of $10,000 but the family could pay only $1,000. 6FH 221. She recounted that "[h]e never did tell me anything that I was supposed to say or [that] he was going to ask me or what's going to happen." *Id.* at 227. This echoed her proffered evidence in state court that "I had no idea what Mr. Cooksey was going to ask me or what exactly I could say to help Delma Jr. . . . I just begged the jury to spare my son's life, but if Mr. Cooksey had helped me get ready to testify I know I could have told the jury more important things about my son's life." 2SH 11.

The Director presented only one rebuttal witness—defense investigator Dennis Waters. 6FH 334. Waters conceded that Cooksey never requested that he take a social history from Banks or obtain school records. *Id.* at 340. He confirmed that his efforts focused mostly on the guilt phase rather than the

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[11] James Kelly, a defense penalty-phase witness, also testified at the federal hearing. 6FH at 232. Prior to trial, he had never been contacted by the defense nor told that he would likely be a witness. Even on the morning of the sentencing hearing, he "was drunk." *Id.* at 233. In court, he spoke for the first time to Cooksey, but in that minute or two, he did not learn why he was being called. Kelly's trial testimony focused upon Robert Farr and Farr's use of bogus prescriptions to secure drugs. IOR 2248-50. (Kelly's name was spelled "Kelley" in the trial transcript, but "Kelly" in the federal. For consistency, "Kelly" is used throughout this brief.)

punishment phase of trial. *Id.* at 336. He said that Banks told him prior to trial that Banks had hitchhiked to Dallas during the early morning hours of April 12 but that Banks was unable to provide Waters with the name of the individual who picked him up, and therefore Waters did not believe Banks' account. *Id.* at 337.

### 3. The Cook Misrepresentation and Suppression Claim

Banks alleged suppression of evidence that critically impeached prosecution witness Charles Cook. Given Cook's central role in the State's case for guilt, Banks argued that such evidence was plainly material. 1FH 46. After Banks proffered Cook's declaration, the Magistrate Judge ordered limited discovery and a hearing. 2FH 584, 588. Included in the materials Banks obtained on April 14, 1999 were 74 undated transcript pages of Cook speaking to law enforcement officials shortly before Banks' trial.

This transcript, which had never been turned over to the defense, indicated, *inter alia*: (1) that when Cook gave his initial statement to police in April of 1980, Cook was frightened of being arrested and going to jail himself[12]; (2) that Cook had been drinking on the evening and early morning hours of April 23-24; (3) that police fed Cook critical information about the crime which he otherwise did not know[13]; and (4) that Cook's interrogators repeatedly

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[12] "Well, you know the morning that I gave this statement, uh, I was scared and I wanted to hurry up and get it over with, so they won't lock me up, and I wanted to get back home to my family . . . I'm scared of jails, you know, I don't like being around no jail house." JA 31.

[13] Cook stated on three occasions that he knew the exact date that Banks had first come to Dallas because *the police had told him* the date of the murder before he gave his statement. Cook also said that before he gave his statement, *the police had told him* when the murder took place, and that they specifically referred to the murder victim as a "white boy." JA 20.

expressed concern about his credibility and his ability to testify at trial consistently with his initial, April, 1980 statement. An assistant prosecutor at one point told Cook forthrightly that his April statement must be "screwed up" because it lacked a great deal of information that Cook was now providing and that some portions of his statements simply made no sense. JA 24.

Prior to the hearing, both parties agreed that this transcript would be submitted into evidence. At the hearing, Banks introduced the transcript and extensively examined prosecutor Elliott about it. 6 FH 75. Elliott confirmed that the transcript had not been turned over to the defense at trial, *id.* at 47, and had been disclosed only to comply with the Magistrate Judge's discovery order. *Id.* 69. Counsel for the State also examined Elliott about the transcript, attempting to establish that it did not show Cook had been rehearsed or directed to testify falsely. 6FH 54-55.

## SUMMARY OF ARGUMENT

Egregious error by both prosecution and defense counsel deprived Banks of a fundamentally fair verdict at both phases of his capital trial.

1. The record now demonstrates clearly that the prosecution relied on perjured testimony to secure Banks' death sentence. Robert Farr, who served as a paid informant in this case, repeatedly told the jurors that he had no relationship whatsoever with law enforcement. And the prosecutors themselves assured the jurors that Farr had testified honestly. This is a flagrant violation of Due Process under *Napue v. Illinois*, 360 U.S. 264 (1959), and its progeny. These deceptions were highly prejudicial because Farr was the State's central sentencing phase witness and provided the most important evidence to demonstrate that Banks would likely commit future acts of violence, a necessary finding for a capital sentence in Texas. *Kyles v. Whitley*, 514 U.S. 419 (1995). The evidence demonstrating the Due Process

violation was properly before the federal court because the prosecutors promised to provide such material at trial and suppressed it. Banks' repeated attempts to raise Farr's informant status at trial and again in state post-conviction proceedings were defeated due to the prosecution's suppression, interference and misstatement, not through inattention or neglect by Banks. *Strickler v. Greene*, 527 U.S. 263 (1999); *Williams v. Taylor*, 529 U.S. 420 (2000).

2. Defense counsel provided plainly deficient representation at Banks' capital sentencing hearing. Counsel performed no investigation and presented witnesses whom he had never interviewed. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). A reasonably conducted investigation would have revealed compelling mitigation evidence showing that Banks was repeatedly abused by his alcoholic father; that he functions in the borderline retarded range; that he has other significant mental impairments; and that since birth he has lived with a disfiguring skin disease that led to continuous, devastating humiliation and isolation. Such evidence is relevant to moral culpability, and the failure of counsel to prepare and present it was prejudicial. *See Williams*, 529 U.S. 362 and *Wiggins v. Smith*, 539 U.S. (2003). Banks' evidence supporting this claim was properly before the lower courts. *See Vasquez v. Hillery*, 474 U.S. 254 (1986).

3. The record also shows that the prosecutors suppressed a pretrial statement made by their key guilt-phase witness Charles Cook which would have shown the jury that Cook lied about not having been prepared by prosecutors for his testimony and that he repeatedly gave inconsistent statements during the prep sessions. This issue was not adjudicated below because the District Court determined that Banks had not specifically enumerated this claim in his petition, even though the issue was tried at the evidentiary hearing. The Court of Appeals in turn held that Banks was not entitled to a Certificate of Appealability on the question whether Rule

15(b) of the Federal Rules of Civil Procedure applies to habeas hearings. This ruling is flatly inconsistent with *Miller-El v. Cockrell*, 537 U.S. 322 (2003), because jurists of reason would find the issue debatable. Indeed, this Court has long assumed that Rule 15(b) applies in habeas. *Withrow v. Williams*, 507 U.S. 680 (1993). Given Cook's central role in the State's case for conviction-as the only witness tying Banks to the crime-the failure to disclose the statement violated Due Process. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

## ARGUMENT

### I. The State Violated Due Process By Concealing A Key Witness's Paid Informant Status And By Vouching for That Witness's Known False Testimony

The District Court and Fifth Circuit reached different results on this issue. The District Court accepted the Magistrate Judge's finding that "[t]he state attempted to portray Farr's involvement with Banks as one of an innocent acquaintance" while the record showed conclusively that Farr was a paid informant. It also accepted the Magistrate Judge's finding that Farr's misrepresentation prejudiced Banks.[14]

[14] "Fan was one of the only two witnesses called by the State during the punishment phase. He testified that he, along with Banks and Marcus Jefferson, traveled to Dallas to retrieve the gun so that Banks could commit several armed robberies. The clear purpose of this testimony was to persuade the jury that Banks posed a continuing danger to society. Fan's testimony was misleading and inaccurate. At no time did the State correct Fan's erroneous testimony or announce Fan's paid informant status. Moreover, the State placed great reliance on Farr's testimony during the penalty phase. Indeed, the prosecutor characterized Farr's punishment phase testimony as `of the utmost significance,' because it helped establish that Banks posed a `danger to friends, and strangers alike.'" Pet. App. C at 43-44.

The Court of Appeals overturned relief for two reasons. First, it held that the district court had erred in granting a hearing and in considering Banks' evidence because Banks had failed to present the evidence in state court and had not shown cause and prejudice to excuse his failure. Pet. App. A at 16-23. Second, it held that any undisclosed evidence, while favorable to Banks, was not material under the materiality standard of *United States v. Bagley*, 473 U.S. 667, 682 (1985); because Farr had already been otherwise impeached, there was no reasonable probability that the jury would have found differently on the future-dangerousness special issue. Pet. App. A at 24-33.

A review of the record reveals that the District Court was correct to admit the evidence and grant Banks sentencing relief.

### A. The Farr Claim Was Not Adjudicated in State Court Because the Prosecution Concealed the Relevant Facts

In Banks' 1992 state habeas filing, he pleaded that the prosecutors engaged in "wholesale misrepresentation of material facts to the jury at both phases of trial." 1SH 131-32. As an example, the petition alleged that "upon information and belief, the prosecution knowingly failed to turn over exculpatory evidence [that] . . . would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a 'set up.'" *Id.* at 137.[15] The State made no response to this claim.[16] On February 22, 1993, the trial court filed Findings

[15] In support of this claim, Banks proffered the testimony of Demetra Jefferson, Banks' common-law wife. She stated, *inter alia*, that Robert Farr was addicted to prescription drugs and was well-connected with area law enforcement. 2SH 138-39.

[16] As with all claims pleaded in the petition, the State opposed an evidentiary hearing and asserted that the Court of Criminal Appeals could adequately resolve any disputes over the facts "upon review of official court records and without need for an evidentiary hearing." 4SH 42.

of Fact and Conclusions of Law that made no finding on this claim. Pet. App. G. The Court of Criminal Appeals accepted the trial court's recommendations and summarily denied relief. Pet. App. F at 3.

Banks again raised the claim in his federal petition and the State moved for summary judgment due to the absence of supporting evidence. 1FH 109. The Magistrate Judge at first denied discovery, 2FH 586, but ordered a hearing after Banks filed Farr's declaration.[17] 2FH 588.

The facts developed at the hearing showed that Farr fled Texas shortly after the Banks trial at the urging of his law enforcement handlers and would not have spoken to Banks' representative until the fall of 1996, nine months after state proceedings had concluded. JA 444. Trial prosecutor Elliott and Deputy Huff testified as well. Neither asserted that he had revealed Farr's informer status prior to the hearing or would have done so without the hearing. Indeed, before Huff would confirm that Farr was his informant, he sought clarification from the Magistrate Judge that he could answer the question. 6FH 87.

### B. The District Court Correctly Found That Farr's Deception Denied Banks Due Process in Sentencing

After hearing all of the relevant evidence, the Magistrate Judge found that governing law required the State to disclose its relationship to Farr, that Farr's status as a paid informant was undisclosed, that portions of Farr's testimony were misleading and inaccurate and went uncorrected, and that Banks had established "materiality." 5FH 1132-33. Her recommendation to grant penalty relief was correct. The Due Process Clause forbids official misrepresentations of fact and

[17] The Magistrate Judge noted that the State objected to the hearing on *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), grounds, and carried that objection along with the hearing. 6FH 10.

requires disclosure of evidence that probably could aid the defense to obtain a different outcome.[18] The failure of a prosecutor to correct the false testimony of a prosecution witness also violates Due Process. *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that the Due Process prohibition against the State's knowing use of false testimony includes that which "goes only to the credibility of the witness").

This Court extended the rule prohibiting misrepresentation to require disclosure of known exculpatory and impeachment evidence in the seminal case of *Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory material), and again in *Giglio v. United States*, *405* U.S. 150 (1972) (impeachment material). The *Brady* Court imposed upon prosecutors "an affirmative duty to disclose evidence favorable to the defense," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), in part because allowing them to withhold evidence that could change the outcome of a trial "casts the prosecutor in the role of an architect of a proceeding that does not comport to the standards of justice . . ." *Brady*, 373 U.S. at 88.[19]

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[18] *See, e.g. Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Miller v. Pate*, 386 U.S. 1 (1967).

[19] In subsequent cases, the Court has established the materiality standards that courts are to apply to determine whether misrepresentation, deception or withholding of evidence deprived the defendant of a fair trial. In *United States v. Agurs*, 427 U.S. 97, 103 (1976), the Court held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id. Agurs* distinguished the two remaining categories where helpful evidence was not disclosed based on the type of request made. *Id.* In *United States v. Bagley*, 473 U.S. 667 (1985), however, the Court "abandoned the distinction between the second and third *Agurs* circumstances," *Kyles*, 514 U.S. at 433, and established a common materiality standard for all favorable evidence, irrespective of the type of request made. *Id.* When the prosecution has withheld exculpatory or

There is no doubt that once the prosecutors decided to call Farr as a witness at Banks' trial, they had a duty to disclose that he had served as a paid informant in the case. *Hoffa v. United States*, 385 U.S. 293 (1966); *Bagley*, 473 U.S. at 676 (compensation paid to a witness can show interest or bias and is impeaching). Such disclosure is crucial because it allows the defense to cross-examine the witness and government agents about the compensation arrangement and the terms of the witness's relationship to the government and gives the jury a basis for assessing the witness's motivation.

Nor is there any doubt that the Magistrate Judge was correct in finding that Farr's status was not disclosed to the defense, and that his misrepresentations went uncorrected by the prosecution. The record unmistakably shows that the prosecutors made a deliberate choice both to let Farr lie about his status and then to assure jurors that his dishonest testimony was the truth. The District Court's acceptance of the Magistrate Judge's report on this point is unassailable. FRCP 52; *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

The Magistrate Judge also found that "the State placed great reliance on Farr's testimony during the punishment phase," and "characterized Farr's punishment phase testimony as 'of the utmost significance,' because it helped establish that Banks posed 'a danger to friends, and strangers alike."' 5FH 1133. Under these circumstances, she concluded that the undisclosed impeaching material held a reasonable probability of a different result. *Id.* This finding of materiality under the proper standard, note 19 *supra*, is fully supported by the record.

The State's case for a death sentence was weak. Banks had no prior convictions, and the State produced no law en-

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impeachment evidence, relief is to be ordered if the court finds a reasonable probability that the trier of fact would have reached a different outcome had the evidence been disclosed and used at trial. *Bagley*, 473 U.S. at 677.

forcement witnesses who testified that he had a violent or dangerous reputation. Neither did the State present a mental health witness to opine that Banks would likely be a danger in the future. Instead, it presented only Vetrano Jefferson's testimony about his fight with Banks one week prior to the crime (since shown to be misleading, pages 33-34, *infra*), and Farr. Farr's testimony that Banks sought a pistol to commit armed robberies was most damaging to Banks because, if believed, it would provide a solid basis for the jury to find a reasonable likelihood of additional acts of violence. Thus, when the prosecutor subsequently argued his case for the death penalty, he focused on Farr's testimony, and no other evidence, to persuade the jury that the State had established the future dangerousness special issue. 1OR 2577-81.

Given the importance of Farr's testimony, it was critical to the State's case that the jurors find him credible. Therefore, the prosecutors portrayed him as a lay witness who had no prior or current association with law enforcement. During the guilt phase, defense counsel asked him directly, "have you ever taken any money from some police officers?" He replied unequivocally, "No." 9R 2274. In argument, the prosecution told the jury that it should find Farr especially credible, in part, because he admitted that he used illegal drugs. "You know, *he has been open and honest with you in every way*." 1OR 2579 (emphasis added).

The suppression of Farr's paid informant status made this fiction possible. Had that information been disclosed, he and his testimony would have been cast in a dramatically different light. Despite the prosecution's earlier argument to the jury that it should "search [its] memories and recall the testimony and see if [it could] discern any reason why these people would falsify for vengence [sic] or for advantage or to save their hides," adding, "I didn't see any," 1OR 2448, Farr was no disinterested witness. Cooksey attempted to ask Farr, "And you know that you're drawn up tight over that, and you're going to testify to anything anybody wants to hear,

aren't you, Robert?" IOR 2505. Farr replied with a more powerful question, "Can you prove it?" *Id.* The State remained silent. Cooksey persisted, "I asked you a question, Robert." *Id.* Farr replied again, simply, "No, can you prove it?" *Id.* Cooksey could not prove it, and the State made no effort to provide the truth to either judge or jury.

Had Farr's status been known, the jury could have dismissed him as a thoroughly compromised witness who would do and say anything to remain on the street. The limited, and failed, attempts to impeach Farr created the false impression that such efforts were baseless. Had the truth been disclosed, the defense effort to show that the older, craftier Farr had set up the younger Banks would have made sense. Thus, the defense could have discredited Farr's most damning testimony, that Banks sought to arm himself in order to rob and, if necessary, kill again.

Given that the Magistrate Judge found Farr's testimony to be deceptive, Banks was entitled to relief if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Agurs*, 427 U.S. 97, 103 (1976). Banks' evidence surely met this standard. In addition, because of the central importance of Farr's testimony to the State's case for death, the suppression of compelling impeachment evidence comported a reasonable likelihood of affecting the outcome. *See Bagley*, 473 U.S. 667, 683 (1985).

### C. The Fifth Circuit Disregarded Settled Law in Vacating Relief

#### 1. *The Fifth Circuit's materiality ruling is erroneous*

The Circuit panel recognized that Farr's testimony was crucial to the State's case for death but nevertheless held that Farr's informant status was not material. Pet. App. A at 33. This conclusion was based upon three factors: Farr's

testimony was largely corroborated by other witnesses, Farr was generally impeached, and Banks had to satisfy the *Bagley* reasonable probability standard rather than the *Giglio* reasonable possibility standard because his petition raised only *a Brady* and not *a Giglio* claim. *Id.* at 31. The panel erred in each finding.

First, while Farr's account of the trip to Dallas was corroborated, his most damaging assertion—that Banks went to Dallas to arm himself and planned to commit armed robberies on the way home—was corroborated by no one. The State did not and could not establish Banks' future dangerousness on Farr's corroborated testimony; instead, the prosecutor urged the jury to find that Banks probably would commit violent future acts solely on the basis of Farr's assertion of Banks' intent. 1OR 2581.

Second, the impeachment evidence that was put before the jury-namely, Farr's drug habit and his unreliable reputation as an informant in another state—did not shatter his credibility. The prosecution got around that impeachment by touting Farr's disinterested status *in this case.* The revelation of Farr's informer role would have demolished the prosecution's ploy, and would have "put the whole case in a different light so as to undermine the credibility of the verdict," *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), precisely because the prosecution went out of its way to depict Farr falsely as a disinterested witness with no axe to grind. Morever, one of the witnesses presented to impeach Farr appeared in court drunk, 6FH 233, and the other was about to take a job with the defense investigator. 1OR 2559-60. Their evidence was a far cry from what has now emerged as suppressed impeachment evidence: Farr's admission, the lead investigator's admission, *and* the prosecutor's admission that Farr was a paid informer and lied in denying it.

Third, Banks pleaded a misrepresentation claim in his petition, he proved misrepresentation, and the Magistrate

Judge found misrepresentation in both Farr's testimony and the prosecutor's knowing misleading of the jury. *Giglio*'s materiality standard applies.

### 2. *The Supporting Evidence Was Not Defaulted*

Solely because Banks did not produce Farr and Huff's testimony in state post-conviction proceedings, the Fifth Circuit taxed him for failing to do so and held that he had not shown sufficient cause to allow this evidence to be presented below. Pet. App. A at 18-20. This ruling affronts *Strickler v. Greene*, 527 U.S. 263 (1999), and *Williams v. Taylor*, 529 U.S. 420 (2000).

To determine whether a habeas petitioner has defaulted a claim or supporting evidence by not presenting it in state post-conviction proceedings, a federal habeas court must examine the entire state record to see if the State interfered with discovery or presentation of the relevant facts. In *Strickler*, the Court reviewed a court of appeals decision, much like the present one, which had held that state habeas counsel's insufficient diligence in investigating the basis of a *Brady* claim defaulted the claim. The court of appeals there found ample public notice to alert counsel to the existence of the witness statements that were subsequently disclosed, and held that counsel's failure to pursue these accessible leads defaulted the claim.

This Court disapproved that analysis and held that the reasonableness of state habeas counsel's conduct must be assessed in the light of relevant trial court proceedings. In those proceedings, the prosecutor purported to maintain an open-file discovery policy, and defense counsel had reviewed the file on several occasions. The documents that became the basis of the *Brady* claim were not in the file. Because it was reasonable for trial counsel to conclude that the prosecutor would discharge his duty and disclose all exculpatory mate-

rial, the Court reasoned that "if it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory material, but also the implicit representation that such material would be included in the open files tendered to defense counsel upon their examination, we think such reliance by counsel . . . in state habeas proceedings was equally reasonable." *Strickler*, 527 U.S. at 284; *accord*, *Williams v. Taylor*, 529 U.S. 420 (state habeas counsel did not default evidence of juror bias by failing to seek it in reasonable reliance on the assumption that the juror and the prosecutor would reveal such evidence if they were aware it existed).

These cases show that Banks adequately explained why his facts in support of the Farr claim were not first presented in state-court proceedings. At the trial level, he was told again and again that Farr was not an informant. These denials were more direct than in *Strickler*. Banks tried repeatedly to raise this issue in the trial court; Farr's denials and the prosecutor's ringing endorsement of Farr's deception are the reasons why Farr's informant status was not exposed at trial. Similarly, in state post-conviction proceedings, Banks attempted to raise the issue. But when he pleaded the claim, the prosecutor—like the one in *Williams*—said nothing; he ignored the claim, despite his knowledge of the facts supporting it. The record here further shows that Farr was not available: at the suggestion of his law-enforcement handlers, he fled Texas shortly after Banks' trial and went to California so that he could not be found by those, like Banks, whom he had implicated. JA 444. His declaration establishes unequivocally that he would not have provided Banks with any information until the fall of 1996, long after the state courts had dismissed Banks' habeas case. JA 444. Banks had no reason to believe that Huff, a member of the prosecution team, would belie Farr's explicit trial testimony, backed by the prosecutor's

assurances that Farr was telling the truth. Moreover, because of this record, he had no good-faith basis to seek discovery.[20]

In short, Banks repeatedly sought to litigate his Farr claim in the state courts; his efforts were frustrated by suppression, denial and deception on the State's part. The Fifth Circuit erred in overturning relief on the claim because of Banks' supposed "failure" to present his finally discovered evidence earlier.

## II. The Fifth Circuit Erred in Reversing The District Court's Grant of Relief for Counsel's Ineffectiveness

The District Court and the Fifth Circuit reached different results on Banks' Sixth Amendment claim. Although there was no disagreement that trial counsel's performance was deficient, the courts below disagreed in the application of the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and about what evidence of prejudice was properly before them.

### A. Banks Presented the Same Claim and Supporting Facts Before the State and Federal Courts

In state court, Banks' ineffective assistance claim alleged, *inter alia*, that trial counsel did not prepare for the penalty phase. Counsel made no investigation into Banks' lifelong handicaps and disabilities and made no effort whatsoever to prepare penalty-phase witnesses for their testimony or even

[20] Banks did seek discovery on two other prosecution misconduct issues for which he was able to proffer a good-faith basis. He sought discovery and funds to investigate his jury discrimination claim and the Cook impeachment claim, and supported these requests with affidavits attesting a likelihood of merit. These motions were ignored and never acted upon by the state court, even after Banks filed supplemental motions and requests for rulings. JA 214-32.

to speak to them before calling them to the stand. 1SH 112-15.

Banks proffered the affidavits of his parents, a mental health professional, and other witnesses in support of this claim. Mrs. Banks' statement explained that (1) her husband's drinking nearly tore the family apart and often required her and the children to run away from home to avoid physical harm; (2) her son suffered from a life-threatening hyper-allergenic condition from birth that led to constant humiliation and shattered his self-image; (3) it was only after the guilty verdict that trial counsel Cooksey urged her to contact ministers for the penalty phase; and (4) because she had no prior warning that counsel would call her as a witness at the penalty phase, all she could think to do. when called was to beg the jury to spare her son's life. 2SH 11. Mr. Banks, Sr.'s proffer said that he too had no warning that he would be called. 2SH 15. (He also said that during trial, the State offered Delma, Jr. a life sentence and that his son turned it down because he was innocent. 2SH 17.) Demetra Jefferson's proffer stated that she informed defense investigator Waters before trial that her brother, Vetrano Jefferson, had started the fight with Banks that ended with Banks hitting Vetrano with a pistol-a basis for the State's submission that Banks represented a future danger and so must be sentenced to death-and that she would have so testified if called. 2SH 137.

Banks also proffered testimony from psychologist Gregorio Pina.[21] Dr. Pina determined that Banks suffered from brain impairment which caused significant language and cognitive disabilities. He also found that Banks had experienced numerous intense traumas during his childhood as a direct result of his abusive, alcoholic father's beating and

[21] An initial report by Dr. Pina was filed with the state habeas petition in January, 1992; a supplemental report was filed with the Court of Criminal Appeals in February, 1993. JA 198-211.

terrorizing him. He confirmed that Banks suffered from chronic bleeding skin and hives throughout his life and that these "largely untreated symptoms" led to disfigurement and distress. Dr. Pina proffered Mr. Banks' Stanford-Binet Short Term Memory Intelligence score of 67 and his Abstract and Visual Reasoning score of 61. JA 206. Dr. Pina concluded from Banks' entire profile that he was likely to be a nonviolent inmate in a highly structured environment such as prison.[22] JA 210-11.

The State's answer urged denial of the claim without a hearing and asserted facts as if they had already been established. For example, the answer asserted that "'the totality of the representation' afforded the Applicant in the instant case is beyond reproach. At all times Cooksey was fully prepared for the sentencing hearing, despite allegations to the contrary. He began preparation of his punishment phase file well in advance of the actual sentencing date. Cooksey affidavit" 4SH 19. (The answer several times referred to a "Cooksey affidavit," though no such affidavit accompanied it. Banks replied that "the State cannot properly rely on 'strategic reasons' for Cooksey when he has been unwilling to sign the State's prepared affidavit."[23] 5SH 9.

The trial court recommended denial of the claim, summarily reciting that Cooksey provided effective assistance, "includ[ing] adequate and effective investigation of matters relevant to both the guilt/innocence and punishment phases

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[22] Banks also proffered the testimony of Robert Harlan, an auto mechanic, who opined after reviewing the record that it was highly unlikely that Mr. Whitehead's car could have made the trip from Texarkana to Dallas—180 miles—without repairs that would have taken a trained mechanic hours to complete. 2SH 149.

[23] Thereafter, Cooksey filed a brief affidavit in which he stated without particulars that "the decisions made and the actions taken on behalf of Delma Banks were the result of my professional judgment." 5SH 137. He said he was unaware of Banks' mental impairment and skin ailments. *Id.*

of trial." Pet. App. G at 3, 7. The Court of Criminal Appeals adopted this finding. *See* Pet. App. F.

In his federal petition, Banks pleaded the same claim. 1FH 32-38. Because the state courts had conducted no hearing and made no findings of fact, the Magistrate Judge ordered a limited hearing directed at, *inter alia*, the adequacy of trial counsel's preparation for the penalty phase and failure to have Banks examined by a mental health expert. 2FH 626-28.

### B. Both Courts Below Agreed, and Properly Held, That Counsel's Performance Was Deficient

In two recent cases, this Court has provided detailed guidance concerning the responsibility of counsel to prepare adequately for a capital sentencing hearing. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court determined that counsel's failure to begin preparation for the sentencing hearing until a week before trial, and subsequent failure to uncover and present evidence showing his client's highly traumatic and abusive childhood, showed deficient performance. In *Wiggins v. Smith*, 539 U.S. __ (2003), the Court held that while counsel did take steps to identify helpful mitigating evidence, his performance was unreasonable because he failed to follow up on information indicating that Wiggins had a depraved childhood and had been the victim of sexual abuse.

By these lights, the present record fully supports the lower courts' conclusions of deficient performance. Before trial, Cooksey made no investigation of Banks' social history or mental health. He did not obtain a mental-health evaluation of Banks, or attempt to speak to State penalty-phase witnesses, like Vetrano Jefferson, who would have spoken to him. Moreover, he delegated to Banks' mother—at 11:00 p.m. after the guilty verdict and when she was on her way to a hospital after collapsing—the task of assembling mitigation witnesses for the following morning. 6FH 225-26. He put

those witnesses on the stand without ever speaking to them, and during the penalty hearing admitted on the record that he did not know who the witnesses were or how they could help. IOR 2536. This was plainly substandard performance.

### C. The District Court's Prejudice Determination is Fully Consistent with *Williams* and *Wiggins*

The Magistrate Judge properly considered all the available evidence and held that Banks had established a reasonable probability of a different outcome. *5FH 1206-07.* This judgment, approved by the district court, is demonstrably correct.

Banks' undeveloped mitigation evidence, which the district court credited and which the State made no effort to dispute, is precisely the kind that this Court has found relevant to moral culpability. *Wiggins,* No. 02-311, Slip Op. at 23 (June 26, 2003); *Williams*, 529 U.S. 362; *Penry v. Lynaugh*, 492 U.S. 302 (1989). The present case is very similar to *Williams* in regard to what the jury heard, and did not hear, in mitigation. There, trial counsel presented testimony from Williams' mother and two neighbors and a taped statement from a psychologist. "The three witnesses briefly described Williams as a 'nice boy' and not a violent person." *Williams,* 529 U.S. at 369. The psychologist's statement informed jurors that in prior crimes, Williams had removed bullets from his gun so he would not hurt his victims. In post-conviction proceedings, Williams presented evidence that as a child, he had endured extensive abuse and neglect at the hands of his parents, was borderline mentally retarded, and was likely to be a non-violent prisoner. *Id.* at 395-96. The Court found that the absence of this evidence at trial "prejudiced Williams within the meaning of *Strickland*," *id.* at 396, even though Williams—altogether unlike Banks—had an extensive record of violent crimes.

Banks' jury heard a similarly meager mitigation case and did not learn of the abuse Banks endured from his alcoholic father, nor of his borderline intellectual functioning, nor of

his other neurological deficits, nor of his lifelong chronic skin pain and disfigurement and the resulting social rejection and isolation, nor of his likelihood for a non-violent adjustment to prison.

While Banks' unheard mitigation alone makes his case quite like *Williams*, the cases differ significantly with regard to aggravation. Williams made no effort to show that the State's aggravating evidence was inaccurate; Banks discredited much of the State's aggravating evidence. Robert Farr recanted his testimony that Banks planned to commit acts of violence. JA 438-39. Vetrano Jefferson made clear that he, not Banks, was the aggressor, in their brief fight. 6FH 166. The Magistrate Judge credited both. 5FH 1112, 1131-32. Thus, unlike *Williams*, little remains of the State's case for the death penalty beyond the crime itself. Because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support," *Strickland v. Washington*, 466 U.S. 668, 696 (1984), the District Court correctly determined that trial counsel's dismal performance prejudiced Banks during the penalty phase of his capital trial.

### D. The Fifth Circuit Erred in Denying Relief

Although the district court found that Banks met his burden of proving a reasonable likelihood of a different result, the Fifth Circuit reversed. It concluded that the district court had erred in considering evidence from witnesses whom Banks had not proffered in the state courts. Moreover, instead of inquiring whether the remaining mitigating evidence, considered collectively, demonstrated a reasonable likelihood of a different result, the Circuit panel erroneously weighed each category of mitigation separately and found each—in isolation—wanting. Pet. App. A at 36-44.

### 1. *Banks did not rely upon unexhausted evidence*

The Court of Appeals believed that because Banks did not proffer before the state courts the testimony of Vetrano Jefferson and Dr. Cunningham, their testimony below was not exhausted and thus could not be considered. Pet. App. A at 38, 42. This ruling is inconsistent with precedent because Banks exhausted both his legal claim of penalty-phase ineffectiveness and its factual basis by proffering evidence comprehending the testimony that Jefferson and Cunningham gave below.

Before a federal habeas petitioner can present facts in support of a constitutional claim, s/he must have presented the state courts with the same factual basis for the claim. No more is required. *See Vasquez v. Hillery*, 474 U.S. 254 (1986). Banks did this with respect to the facts of his ineffectiveness claim.

#### a. The facts to which Jefferson and Cunningham testified were pleaded and proffered in state court

Banks' state petition asserted in support of his Sixth Amendment claim that prosecution witness Vetrano Jefferson's penalty-phase testimony was misleading in casting Banks as an unprovoked aggressor, 1SH 112, when in truth Jefferson was intoxicated and was responsible for the fight. To sustain this allegation, Banks proffered the testimony of Demetra Jefferson, Vetrano Jefferson's sister, who witnessed the events. 2SH 137.

Banks' state petition also alleged in detail that trial counsel had not performed a social or psychological investigation for mitigating evidence. 1SH 91-103. To sustain these allegations, Banks proffered, *inter alia*, reports by psychologist Gregorio Pina evaluating Banks' history and clinical condition. JA 198-211.

The State offered no contradictory facts; it urged the state courts to deny the claim without an evidentiary hearing. The trial court did not hold a hearing, made no findings, and summarily concluded only that counsel had provided effective assistance at all phases of the trial. That court never reached the issue of prejudice in recommending a denial of relief. The Court of Criminal Appeals accepted this recommendation by *fiat. See* Pet. App. F.

**b. The federal testimony was consistent with these proffers**

In the absence of any state-court factfinding, the Magistrate Judge properly conducted a limited hearing on this claim. *See Townsend v. Sain*, 372 U.S. 293 (1963). To prove the alleged fact that Vetrano Jefferson's penalty-phase testimony was misleading, Banks presented Vetrano Jefferson himself instead of Demetra Jefferson. Vetrano Jefferson's testimony is entirely consistent with that proffered to the state court-that he, rather than Banks, was the aggressor and initiator in the fight between the two that was the subject of his penalty-phase testimony.

Banks also called Dr. Cunningham, rather than Dr. Pina, to testify about Banks' disabilities and social history. The scope of Dr. Cunningham's testimony was consistent with the contents of Dr. Pina's proffered state-court testimony. Dr. Cunningham discussed Banks' intellectual functioning and limitations, the allergies and suppurating sores and their effects upon Banks' development, Delma, Sr.'s alcoholism and abusive treatment of Delma, Jr. and other family members. Like Pina, he offered an assessment of Banks' likelihood to commit future violent acts.[24] 6FH 243-63.

[24] In only one respect was Cunningham's testimony different in kind from Pina's proffer. Pina came to the view after his clinical assessment that Banks would likely pose no particular danger in a controlled prison environment. Cunningham came to same conclusion after performing a risk assessment, and after having thoroughly reviewed the literature on this matter that was in existence at the time of Banks' trial. 6FH 243-63.

Thus, the *facts* presented by these witnesses at the hearing below had been specifically pleaded and proffered before the state courts. The sole difference was that Banks used different *witnesses* to present the facts. This Court has never held that fact-exhaustion requires a habeas petitioner to present the same witness at a federal hearing as before the state court. The relevant inquiry is whether the facts presented before the federal court substantially or fundamentally altered the claim that was presented before the state court. Here they did not.

### 2. *The panel misapplied Strickland's prejudice test*

The Court of Appeals also erred in its purported application of *Strickland's* prejudice test to the facts it deemed exhausted. In *Strickland*, the Court explained that:

> When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the errors, balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court the sentencer . . . would have concluded that the hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

466 U.S. at 695. And recently in *Wiggins*, the Court stressed that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of the available mitigating evidence." *Wiggins v. Smith*, No. 02-311, Slip Op. at 22 (June 26, 2003).

Instead of weighing the totality of the mitigating evidence, the Court of Appeals segregated the evidence into three discrete categories, Dr. Pina's mental health testimony, Banks' parents' testimony, and Vetrano Jefferson's testimony. With regard to Dr. Pina's testimony, even though Pina reported brain damage, the terrorizing of Banks by his father, and the ghastly skin disorder whose oozing lesions disfigured Banks

and destroyed his sense of self, the panel concluded that the evidence "while possibly mitigating, does not present a reasonable probability that, had the jury been presented with it, it would not have assessed the death penalty." Pet. App A at 39.[25] The panel next considered the parents' testimony, framing the issue as whether counsel's failure to present that evidence raised a reasonable probability that "the jury would not have assessed the death penalty." *Id.* at 40. Then, after ruling that Vetrano Jefferson's testimony was not exhausted and thus could not be considered, it held alternatively that this evidence, also taken by itself, failed to show a reasonable probability of a lesser sentence. *Id.* at 41. Never did the panel weigh *all* of this evidence against the aggravating evidence as *Strickland* and its progeny require. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995).

## III. The Court of Appeals Erred in Denying a COA On the Cook Nondisclosure Claim

### A. The Record Leaves No Doubt That The Non-Disclosure Claim Was Litigated By Implied Consent of the Parties Within the Meaning of FRCP 15(b)

Beginning with his habeas petition, continuing through efforts to gain discovery, and leading up to the evidentiary hearing below, Banks again and again put the State on notice that his *Brady* claim concerning Charles Cook included, but was not limited solely to, the assertion that Cook testified pursuant to a deal for dismissal of the arson charge pending against him. While the State did oppose the hearing on all claims under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), it never argued that Banks was expanding his legal claim to cover grounds beyond those he had pleaded. Thus, when the

[25] The characterization of this uncontested evidence as only "possibly mitigating," is also contrary to this Court's repeated holdings that mental limitations, child abuse and major medical ailments are unquestionably mitigating. E.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989).

subject of non-disclosure of the pretrial statement was addressed at the hearing, both Banks and the State agreed that the 74 pages of transcript would be admitted, and both examined prosecutor Elliott about its origin, contents, and belated disclosure to the defense. 6FH 43-47, 103-05. If ever an issue was tried with the consent of the parties, it was this one.

Banks gave adequate notice of this issue in his petition. He alleged, *inter alia*, a broad prosecutorial misconduct claim and charged that the prosecution had withheld *Brady* material. 1FH 46. He provided a specific example—the allegation of a deal for Cook's testimony but he also made clear that the grounds of the claim "includ[ed] but [were] by no means limited to" that one example. 1FH 43. He also moved for discovery on the claim. *Id.* at 291.

The State's answer leaves no doubt that it understood that Banks was pleading a broad suppression claim. The State acknowledged, under the heading "The State did not suppress favorable, material evidence," that *Brady* imposes "an affirmative duty [upon the trial prosecutors] to disclose to the defense evidence that is both favorable to the accused and material to guilt or punishment," and that "such favorable evidence includes impeachment evidence." 1FH 204-05. The response further acknowledged that Banks was contending that "the State suppressed material impeachment evidence in connection with its witness Charles Cook." *Id.* at 207.

Continuing efforts begun in state court, Banks again tracked down Cook, and this time secured a signed declaration. JA 322-27. Among other things, Cook asserted, contrary to his trial testimony, that he had engaged in extensive discussions with law enforcement officials about his testimony shortly before trial. JA 325. This led Banks to move again for discovery. Largely because of Cook's detailed declaration, the Magistrate Judge granted limited discovery and ordered the production of records in the possession of the State that concerned, *inter alia*, "interview notes, and all other written

or recorded documentation" concerning Charles Cook. 2FH 621.

In compliance, the State disclosed, for the first time, portions of the District Attorney's file. One document contained in that file consisted of 74 transcript pages of a pretrial interview between law enforcement officials and Charles Cook. After these disclosures, and well in advance of the scheduled evidentiary hearing, the Magistrate Judge issued an order establishing the issues upon which the parties could submit evidence. The court understood that Banks wanted to present evidence on three issues, the first one being "whether Petitioner's Fourteenth Amendment rights were violated by the State's withholding critical exculpatory and impeaching evidence concerning at least two important witnesses—Charles Cook and Robert Farr." 2FH 625-26. The Order restated the State's position on this issue: no such hearing should take place because Banks "has had an adequate opportunity to develop the factual background in state court." 2FH 626. Notably the State made no objection of surprise, no assertion that Banks was expanding his Due Process claim, and no contention that any portion of the issues upon which the Magistrate Judge would hear evidence was unexhausted or unanticipated.

Thereafter, the State provided notice that it would use this very exhibit to defend against the Due Process claim, 3FH at 689, and that it would call Assistant District Attorney Elliott and former Bowie County Deputy Sheriff Willie Huff "to defend against the due process claim." 3FH 689. Similarly, Banks made it very clear that he would use the Cook pretrial statement—Exhibit B-04—to establish the Due Process claim. 3FH 736.

At the hearing, the claim that the prosecutors had suppressed important impeachment material as to Cook took center stage. Counsel for Banks opened by stating that he would prove, *inter alia*, that the trial prosecutors had

unconstitutionally withheld impeachment evidence with regard to Cook. *See* 6FH 8. Banks' counsel examined prosecutor Elliott as to his understanding of the duty to disclose exculpatory and impeachment material. 6FH 25-27. When he examined Elliott about Cook's statement, Elliott confirmed that the document, Exhibit B-04, had *not* been disclosed at trial. 6FH 43-47. On redirect, counsel returned to the issue and asked Elliott to review portions of the document that showed a staff prosecutor coaching Cook on how to answer questions concerning an earlier, April, 1980 statement by Cook which, in the interviewer's view, made little sense. 6FH 64-68. On further redirect, Elliott was asked yet additional questions about inconsistencies between Cook's trial testimony and statements in Exhibit B-04. 6FH 72-74. Without objection, the Magistrate Judge admitted the exhibit into evidence. 6FH 75. Banks included an extensive discussion of this issue in the Proposed Findings of Facts and Conclusions of Law which he submitted to the Magistrate Judge, and he reiterated that discussion in his objections to the Magistrate's report and recommendation. 4FH 921, 930-31, 953-60; 5FH 1184, 1185-86.

Given the undisputed facts that (1) Mr. Banks explicitly pleaded a Due Process claim of suppression of *Brady* impeachment material in his petition; (2) the State made clear in its first responsive pleading that it understood the claim to include suppression of impeachment material concerning Mr. Cook; (3) the discovery process forced the State to reveal for the first time Cook's extensive eve-of-trial statement; (4) the Magistrate Judge and the parties agreed that one issue to be litigated at the evidentiary hearing was whether the trial prosecutors withheld material impeachment evidence; (5) the pretrial statement, Petitioner's Exhibit B-04, was introduced and admitted without objection as evidence relevant to the claims at issue; and (6) state witnesses were extensively questioned about both the circumstances of the taking of this statement and its tardy disclosure, it could not be plainer that

this issue was "tried" by consent of the parties.[26] *See, e.g.*, *Mongrue v. Monsanto Co*., 249 F.3d 422, 427 (5th Cir. 2001); *Steger v. General Electric*, 318 F.3d 1066, 1077 (11th Cir. 2003); *Clark v. Martinez*, 295 F.3d 809, 815 (8th Cir. 2002); *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367 (4th Cir. 2001); *see also, Pals v. Schepel Buick*, 220 F.3d 495, 501 (7th Cir. 2000).

### B. The Cook Issue Was Properly Before the Federal Courts, Pursuant to Federal Civil Rule 15(b) and the Rules Governing Habeas Corpus Proceedings

Although Banks' petition claimed that the State withheld *Brady* material concerning key guilt-phase witness Charles Cook, and although that issue was tried at the evidentiary hearing, the lower courts refused to adjudicate the claim with respect to the non-disclosure of Cook's 74-page statement. Their refusal to reach the merits of the issue and to grant relief on it was unwarranted. Even if they were correct that this portion of the claim was not sufficiently pleaded,[27] it was

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[26] That the Fifth Circuit should have considered the Cook prosecutorial misconduct claim as litigated by consent of the parties is further supported by this Court's analysis in *Roell v. Withrow*, 123 S.Ct. 1696 (2003). In *Roell*, the Court reaffirmed the principles of litigation by consent of the parties: when parties appear before a court, litigate their claims, stand silently as the court adjudicates those claims and express no reservation about the court's jurisdiction over the claims, the parties are deemed to have consented to litigation in that court. *See id.* at 1700, 1701 ("[T]he record shows that [the petitioners] voluntarily participated in the entire course of the proceedings before the Magistrate Judge, and voiced no objection when, at several points, the Magistrate Judge made it clear that she believed they had consented.").

[27] In fact, the issue was adequately pleaded in Banks' petition. Rule 2(c) of the Rules Governing § 2254 Cases sets forth the pleading standard for claims in habeas petitions. It provides in relevant part, "[the petition] shall specify all the grounds which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each

properly before the district court for adjudication under Rule 15(b) of the Federal Rules of Civil Procedure.

Rule 15(b) provides: "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." A "failure to so [actually] amend does not affect the result of the trial of these issues." The district court, however, held these provisions inapplicable to evidentiary hearings in habeas corpus matters, and the Fifth Circuit denied a COA to review that holding.

Both of these rulings fly in the face of precedent. It is settled that the Federal Rules of Civil Procedure apply to habeas corpus proceedings unless there is some inconsistency between a particular civil rule and the Rules Governing § 2254 Cases in the United States District Courts or a traditional peculiarity of habeas practice.[28] There is no such

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of the grounds thus specified." The Court has construed this provision as requiring litigants to plead facts sufficiently so as to show "a real possibility of constitutional error," *Blackledge v. Allison*, 431 U.S. 63, 75-76 & nn.7 & 8 (1977), or "the factual underpinnings of [the] claim[]." *McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring in part and dissenting in part). Banks pleaded the suppression of *Brady* material, and he could not pinpoint the exact nature of the suppressed material solely because of the State's successful withholding of the statement in question. 1FH 46.

[28] Rule 11 of the Rules Governing § 2254 Cases in the United States District Courts provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Federal Civil Rule 81(a)(2) states that the civil rules apply to habeas proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Consistently with these provisions, the Court has long applied a straightforward approach in determining which rules of civil procedure apply in the habeas context: The civil rules presumptively apply unless a § 2254 rule or an accepted habeas practice is incompatible with the specific civil rule. *See Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 267-68, 269 (1978); *Hilton v. Braunskill*, 481 U.S. 770, 775-76,

inconsistency in the case of Rule 15(b). Indeed, this Court has previously characterized Rule 15(b) as one of a number of "noncontroversial rules" that the federal courts have applied in habeas proceedings. *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969).[29] More recently, in *Withrow v. Williams*, 507 U.S. 680, 695-96 & n.7 (1993), the Court assumed Rule 15(b)'s application to a habeas proceeding. There, a prisoner had filed a one-claim federal petition alleging that his custodial statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court found that statements taken from him prior to the administration of *Miranda* warnings should have been suppressed and ordered a new trial. In addition, it adjudicated a second issue and held that his statements taken *after* the administration of the *Miranda* warnings were involuntary. The warden protested that this second adjudication was improper because Williams had not raised the involuntariness claim in either the state courts or his federal habeas petition. Williams argued that although he had not pleaded the involuntariness claim in the petition, it had been tried by implied consent of the parties. This Court expressed no qualms about the general applicability of Rule 15(b) to habeas cases but reversed the lower court's grant of relief on the involuntariness ground because the record "reveal[ed] neither thought, word, nor deed of [the warden] that could be taken as any sort of consent to the determination of an independent due process

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& n.5 (1987) (quoting *Harris v. Nelson*, 394 U.S. 286, 294 (1969)); *see also McFarland v. Scott*, 512 U.S. 849, 866 n.2 (1994) (Thomas, J., dissenting) ("The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus statute.").

[29] This has been accepted Fifth Circuit practice as well. *See, e.g.*, *James v. Whitley*, 926 F.2d 1433, 1435 (5th Cir. 1991); *Robinson v. Wade*, 686 F.2d 298, 304 & n.10 (5th Cir. 1982); *Streeter v. Hopper*, 618 F.2d 1178, 1180 (5th Cir. 1980); *Mosley v. Dutton*, 367 F.2d 913, 914 (5th Cir. 1966).

claim, and [the warden] was manifestly prejudiced by the District Court's failure to afford her an opportunity to present evidence bearing on the claim's resolution." *Withrow*, 507 U.S. at 696. *See also Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring).

This line of authority strongly suggests that the decision of the district court below categorically barring the application of Rule 15(b) to habeas corpus evidentiary hearings is wrong. At the least, it is a decision that jurists of reason would find debatable; and thus the Court of Appeals erred in denying a COA to review it. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1039 (2003).

### C. The Suppressed Evidence Allowed The Prosecutors to Misrepresent Cook's Credibility

The suppressed pretrial statement establishes that Cook perjured himself when he denied at trial that he had spoken with prosecutors about his testimony. The prosecutors not only failed to correct this false testimony but urged the jury to believe it. Such sponsorship of perjury is a plain violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Alcorta v. Texas*, 355 U.S. 28 (1957).

Moreover, the suppressed statement contains an extraordinary array of impeachment evidence, the suppression of which undermines confidence in the outcome of the guilt phase of Banks' trial. Given that Cook's credibility was key to the State's case for a capital conviction, and that the defense's trial strategy was to demonstrate that he was an untrustworthy witness, there is a reasonable probability of a different result had the pretrial statement been timely disclosed to the defense. *Kyles v. Whitley*, 514 U.S. 419 (1985).

#### 1. *The* Napue/Alcorta *violation*

District Attorney Raffaelli established during opening statements that Charles Cook was a central witness and that only he could link Banks to the crime. 9R 2128-30. Yet,

contrary to their promise that the jury would gain a full picture of the case from Cook's testimony, the prosecutors allowed Cook to obscure significant information and mislead the jury time and again about his credibility and his incentive to testify against Delma Banks.

The prosecution permitted Cook to testify perjuriously that he had never rehearsed his trial testimony with the prosecutors. 9R 2314.[30] In closing arguments, the prosecution assured the jurors that they had no reason to doubt Charles Cook's credibility. 10R 2450, 2453[31] Again, the truth—documented in 74 pages of pretrial rehearsal transcript—is that not only did Cook lie when he claimed not to have discussed his testimony with the prosecutors, but the prosecutors themselves misrepresented the truth and withheld evidence bearing directly on Cook's credibility.[32]

### 2. *The extraordinary array of impeachment*

After Cook's direct examination, the prosecution turned over to the defense Cook's April, 1980 statement to police. 9R 2312. Cooksey indicated that that was the first time he had seen Cook's statement and asked for a recess so that he could read it before cross-examining Cook. *Id.* Cooksey's central defense strategy was to impeach Cook. *Id.* at 2314-15, 2322-23, 2324, 2465, 2466-68, 2469, 2470, 2471. Had the

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[30] "A: I haven't talked to anyone about [my testimony]. Q: Haven't talked to anybody? A: No, sir. Q: Mr. Raffaelli just put you on the stand not knowing what you were going to testify to? A: That's what I'm telling you."

[31] "Charles Cook didn't hide anything from you . . . Charles Cook brought you the absolute truth."; "Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling the truth."

[32] Cook also testified during the federal evidentiary hearing that he met several times with trial prosecutors before he testified against Banks. 6FH 134 ("Prior to trial, I . . . spoke extensively with trial prosecutors."); *id.* at 146 ("I participated in three or four . . . practice sessions prior to the [Banks] trial.").

prosecution abided by its promise to turn over all discoverable material, which certainly included the 74-page pretrial transcript, Cooksey would have been armed with an impeachment arsenal. Instead, the State disclosed only the earlier, April statement, which was for the most part consistent with Cook's trial testimony. This consistency was itself concocted: the 74-page undisclosed transcript reveals the prosecutors literally hammering Cook's testimony into the mold of the April, 1980 statement.

Comparison of the disclosed April, 1980 statement, the undisclosed 74-page transcript, and Cook's trial testimony reveals the following inconsistencies, among others:

*Concerning Blood on Banks' Clothes and Banks' Change of Clothes*: In the 74-page transcript, Cook was asked to tell the prosecutors when he first noticed blood on Banks' pants. He replied that he saw the blood on Banks' pants after Banks took Cook's wife to work that morning. JA 24. Assistant District Attorney McDaniel berated Cook for this response, saying "It does not make any sense that he changed clothes and you got back into the car and went riding and then you noticed blood on his pants because if he changed clothes he wouldn't have had any blood on his pants." JA 24. McDaniel then provided specific direction on how to handle this problem if it arose at trial: "[T]hey are going to ask you about it and you are just going to have to explain it. That you might [sic] a mistake and you got your facts out of sequence." JA 24. Immediately after "correcting" Cook's chronology of when Banks had changed his clothing, McDaniel questioned Cook about contradictory statements that Cook had made regarding the color of the clothing. JA 24.[33] Then McDaniel

[33] Initially, during Cook's pre-trial testimony, Cook stated that "[he] put him in a pair of blue pants," and "a [blue] flowered shirt to go with [his] blue pants." JA 6. Yet, in Cook's April statement, he had given a different account, stating that he gave Banks a brown pair of pants and blue shirt. McDaniel pointed out the discrepancy. JA 24. In response, Cook claimed that his April statement was incorrect. JA 24.

gave Cook this instruction: "Anyway, *the way this statement should read is that* . . . on the way back [from the hotel] you noticed blood on [Banks'] pants so you took him home and changed his clothes[.]" JA 26 (emphasis added). Apparently, Cook got the message. At trial, Cook testified to that order of events and, in addition, avoided giving any specific description of the clothing. 9SR 2281-91.

*Concerning When Cook First Spotted Banks' Gun:* In April, Cook told the prosecutors that he first noticed Banks' gun on Saturday night before Banks confessed to the killing. JA 447. Yet, in the 74-page transcript, at first Cook said that he saw Banks' gun on Sunday night when he took the gun from him because he wanted to protect his family. JA 11. The 74-page transcript reflects that after hearing this statement, McDaniel inquired whether Cook had ever seen the gun before Sunday night. JA 11. Cook responded that the first time he saw the gun was in the console of the car on the Saturday morning that Banks arrived in Dallas. JA 11. When McDaniel asked Cook whether he could tell him what was inconsistent between what he had just reported and what he had told police in April, Cook recognized that in April, he had not reported seeing the pistol in the console of the car, as he had just a few minutes prior to McDaniel's question. JA 28. Nevertheless, during the pretrial rehearsal session, Cook again stated not only that he saw Banks' pistol on Saturday morning in the car, but that he showed Banks his own gun when they returned to Cook's home on Saturday in order to demonstrate that he was not intimidated. JA 35. At trial, Cook testified that he first saw the gun on Saturday night when Banks allegedly confessed to him and that he felt threatened thereafter. 9R 2296-97. The trial testimony was consistent with his initial statement to police, that was turned over to the defense. JA 447.

*Concerning Disposal of the Car*: Cook gave conflicting accounts of his disposal of the car that he said Banks was driving. In the 74-page transcript, Cook stated that he had

left the car on "Town Drive" and left the keys in the ignition. JA 12-13. Yet, in his April statement, Cook had said that he had left the car at "Canna Drive" and left the car keys under the seat. JA 448. Again, McDaniel read Cook his April statement that contained the inconsistent story; but either McDaniel did not mention the name of the street or that name was not transcribed.[34] Thereafter, McDaniel said, "Now you told me a minute ago you left the keys in the ignition." JA 30. Going along with the version that was consistent with his April statement, Cook replied, "I left them up under the seat." JA 30. Then McDaniel said, "Which one is it[?]" Cook responded, "I left them up under the seat." JA 30. At trial, Cook simply testified that he dumped the car on Canada Drive on Tuesday morning, and said nothing about where he left the keys. 9R 2303-04.

*Concerning the Disposal of Other Physical Evidence:* In his April statement, Cook indicated that on the day after Banks left Dallas, Cook not only dumped the car but sold the car's radio, booster cables, tool box and Banks' pistol to Cook's friend across the street. JA 448. In the 74-page transcript, Cook said that *Banks* sold the car's radio. JA 13. Also, when McDaniel asked Cook when Cook sold the items, Cook demonstrated considerable confusion about which day it was. JA 13-14. After questioning Cook about his other inconsistent statements, McDaniel returned to the issue of whether Cook or Banks sold the car's radio. McDaniel said, "Now you told us that Delma sold that cassette . . . [.]" JA 30. Cook maintained his position that Banks had sold the radio. JA 30. As a result, McDaniel asked, "Your statement says that you sold it . . . That's not right?" *Id.* Cook said, "No[.]" JA 30. At trial, the benefits of McDaniel's coaching were evident during this part of Cook's testimony. Cook told

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[34] The 74-page transcript at this point reads: "[T]he next morning around 6:00 I took the hot car and left it at the end of _____drive with the keys under the seat." JA 30.

the jury that he sold his neighbor the tool box, the cables, and the gun, on Tuesday evening. 9R 2305. He did not mention anything about a car radio. *Id.*

*Concerning Activities in Dallas on Saturday Morning*: In the 74-page transcript, Cook reported that on the Saturday when Banks arrived in Dallas, Cook initially took Banks to a friend's home where Banks could take a bath. JA 6. Banks disappeared upstairs in Cook's friend's home for several minutes and then returned without bathing and asked Cook to take him to a motel. JA 6. Cook never mentioned this significant detail in his April statement. Presumably this fact would have been important to police because, if true, it would have provided additional witnesses who had seen Cook and Banks together and could have connected them to the Mustang. Again, McDaniel noticed the discrepancy; McDaniel questioned Cook specifically about why Cook had left the visit to the friend's house out of Cook's April statement; and McDaniel went on to question whether other problems beset Cook's stories. ("Okay, there is nothing in your [April] statement about taking him to a friend's house . . . Didn't you tell me before that the police told you you needed to put everything in there you knew? . . . But you didn't do that. . . What all else did you leave out. You left that out of your statement."). JA 25-26.

*Concerning the Motive for the Slaying*: In the 74-page transcript, Cook gave a different motive for the killing than he had given in his April statement or later gave at trial. The transcript discloses Cook saying on at least two occasions that Banks killed Richard Whitehead because Banks wanted to steal Whitehead's car. JA 8-9. According to this version of the murder-motive information, Cook asked Banks why Banks shot the victim, and Banks said "[U]h I don't know man I wanted his car man." JA 9. Yet, Cook had told the police in his April statement that Banks said he killed Whitehead "for the hell of it." JA 447. Once more, McDaniel noted this significant inconsistency and set about reconciling

Cook's stories. JA 28. McDaniel read Cook the relevant portion of his April statement and said, "You realize what I just read you is different that [sic] what you told me before?" JA 28. Cook responded affirmatively. JA 28. After correcting several other parts of the statement, however, Cook maintained, once again, that Banks killed Whitehead for his car and he said nothing further in the transcript about Banks' killing Whitehead "for the hell of it." JA 28. Then, at trial Cook-forewarned by McDaniel's concern to avoid inconsistencies-testified more or less consistently with his April statement that Banks told him Banks decided to kill Whitehead for the hell of it. 9R 2295.[35]

The prosecutors were acutely aware that successful impeachment of Cook would have dismantled their case against Banks. Defense counsel's efforts to impeach Cook were crippled by the prosecution's suppression of the multiple inconsistent statements in the 74-page transcript. There can be no doubt, as the prosecutors contemporaneously

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[35] Other significant discrepancies in Cook's statements, which the prosecutors called to his attention in the 74-page transcript, included: Cook's failure to mention in April that Whitehead and Banks had been accompanied by Whitehead's date ("[T]his is by far the most important part of your statement . . . And you were supposed to put down every detail, and you didn't do that, you left out something real important about the fact that there was a girl with him. That's not even in your statement at all."), JA 28; Cook's inability to report accurately how many times the victim had been shot, JA 29; his failure to report in April that he had told his wife about Banks' confession, JA 29; his failure to mention that Banks phoned home while staying with the Cooks, and his failure to include in his April statement that Banks had later phoned Cook requesting that Cook mail Banks his gun ("[Y]our statement doesn't say anything about Delma calling you on Thursday, or he called you twice before the police came to your door. He called once and talked to you and once called and talked to Ida. You didn't put anything in your statement about that . . . You didn't think it was important to put in there that Delma called you and wanted you to mail him his pistol back?"), JA 30-31.

recognized, that turning that transcript over to the defense was likely to affect the outcome of Banks' trial. So they did not turn it over.

## CONCLUSION

The decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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