No. 02-8286

In The Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erroneously applied a procedural bar to Banks's unexhausted claim that the prosecution suppressed material and favorable impeachment evidence during the penalty phase of trial and whether the Fifth Circuit erred in alternatively holding that the evidence was immaterial to Banks's death sentence;

2. Whether the Fifth Circuit misapplied *Strickland v. Washington,* 466 U.S. 668 (1984), and *Williams v. Taylor,* 529 U.S. 362 (2000), to Banks's claim of ineffective assistance of counsel during the punishment phase of trial when it found no prejudice; and

3. Whether the Fifth Circuit violated *Harris v. Nelson,* 394 U.S. 286 (1969), and *Withrow v. Williams,* 507 U.S. 680 (1993), by holding that FED R. CIV. P. 15(b) does not apply to habeas corpus proceedings because "evidentiary hearings" are not sufficiently similar to "civil trials."

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF OF RESPONDENT

This Court should affirm the Fifth Circuit's decision because Petitioner Delma Banks, Jr. ("Banks")[1] deprived the Texas courts of an opportunity to adjudicate his *Brady* and *Strickland* claims[2] based on the evidence later presented in federal court. Banks negligently failed to inquire into the paid informant status of State's witness Robert Farr or to present his allegations of child abuse and recanted punishment phase testimony despite multiple evidentiary hearings and ample resources. Instead, Banks bypassed the state courts and thereby defaulted his claims and supporting evidence. In any event, Banks does not demonstrate the materiality or prejudice required to obtain habeas relief under *Brady* or *Strickland.* Moreover, the lower courts correctly denied a certificate of appealability ("COA") concerning his FED. R. CIV. P. 15(b) claim because it is not debatable that a habeas claim may not be tried by implied consent. Nor does Banks show that the claim was actually tried by express or implied consent, or that the underlying *Brady* issue is meritorious.

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[1] Respondent Doug Dretke will be referred to herein as "the Director."

[2] *Brady v. Maryland,* 373 U.S. 83 (1963); *Strickland v. Washington,* 466 U.S. 668 (1984).

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals accurately summarized the evidence of Banks's guilt in its opinion on direct appeal:

> The body of the deceased, Richard Wayne Whitehead, was found in an abandoned park near Nash[, Texas] on the morning of April 15, 1980. [Whitehead] had been shot three times, twice in the head and once in the upper back. One shot had been fired at a maximum distance of eighteen to twenty-four inches. Near the scene several empty beer cans and two spent shell casings were found.
>
> Patricia Hicks testified that she was a friend of [Whitehead] and that she was with [him] during the evening of April 11, 1980. Whitehead was driving his automobile, a two-door 1969 Mustang with a light green colored body, a black vinyl top, and red hood. During the course of the evening the pair were joined by [Banks] and at his suggestion beer was purchased. The three went to the park near Nash and drank beer. [Banks]'s residence was a little more than a half mile from the park. At approximately 11:00 or 11:15 p.m. Hicks was taken home.
>
> Patty Bungardt testified that [Banks] and [Whitehead] visited her at her house around 11:30 p.m. on April 11[th]. They stayed for approximately ten to fifteen minutes.
>
> Mike Fisher testified that he lived about one hundred yards from the park in Nash. At approximately 4:00 a.m. on April 12[th], he heard two gun shots.

Charles Cook testified that he met [Banks] on the morning of April 12[th] in Dallas. [Banks] was driving a vehicle which had the same description as [Whitehead]'s. Cook and his wife befriended [Banks] and allowed him to stay with them at Cook's grandfather's home. Cook had noticed a sprinkle of blood on [Banks]'s pants and asked [Banks] about it. [Banks] told him that he had shot a white boy. Later that evening [Banks] told Cook that he had killed someone. [Banks] told him he had been riding around with a white boy and his girl friend, and after they took the girl home he and the white boy went to the woods together and drank beer. [Banks] decided to kill the person for the hell of it and take his automobile to Dallas. Cook eventually obtained a pistol and the automobile from [Banks]. The pistol was later identified through ballistic testing as the murder weapon. [Banks] later returned to Texarkana by bus. Cook sold the pistol to his neighbor and took the automobile to West Dallas and left it. It was never recovered. The pistol was recovered from the neighbor, Bennie Lee Jones.

Cook's wife and sister testified that they saw [Banks] driving a green Mustang on April 12[th]. Cook's grandfather stated that [Banks] stayed at his house for a night or two. Cook's neighbor, Jones, also testified that he met [Banks] during the same time. [Banks] told him he had had a little misunderstanding with someone and had broken his jaw or "something like that." [Banks] asked Jones "did I want to buy any iron, whatever, to make it back to Texarkana."

After [Whitehead]'s body was found [Banks] was placed under surveillance by law enforcement officers. On April 23[rd] or 24[th] they observed [Banks], Marcus Jefferson, and Robert Farr,

> drive together from Texarkana to Dallas. [Banks] was driving the vehicle and after a few stops he eventually went to where Cook resided. The officers watched [Banks] leave the automobile, walk to the front door and then return to the automobile carrying an object. Jefferson and Farr testified that when [Banks] returned to the automobile he told them that Cook did not have his gun and Cook gave him another gun.

Banks v. State, 643 S.W.2d 129, 131-32 (Tex. Crim. App. 1982). On September 30, 1980, Banks was convicted of murder during the course of a robbery, a capital offense. *Id.* at 131; Tr 85-93.[3]

II. Facts Relating to Punishment

During the punishment phase of trial, Banks's brother-in-law Vetrano Jefferson testified that he fought with Banks shortly before Whitehead's murder. JA:104.[4] During that incident, Banks pistol-whipped Jefferson in the face and threatened to kill him. JA:105. Farr took the stand again and explained that when he, Marcus Jefferson, and Banks traveled to Dallas to retrieve Banks's gun, they did so in order to commit some robberies. JA:107-09.

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[3] "Tr" refers to the transcript of pleadings and documents filed with the court during trial, followed by page numbers. "SF" refers to the statement of facts – the transcribed trial proceedings – preceded by volume number and followed by page numbers. "FR" refers to the federal record on appeal, preceded by volume number and followed by page numbers.

[4] "JA" refers to the joint appendix, followed by page numbers. "PA" refers to the appendices to Banks's petition for writ of certiorari, followed by a letter designation and page numbers. "JL" refers to the joint lodging material, followed by page numbers.

The defense then called several witnesses – Banks's parents, two pastors, a family friend, a former teacher, and a former employer – to testify that Banks was a good, respectful, religious young man who should not be sentenced to death. JA:113-14, 137-39; 10 SF 2514-32, 2563-65, 2573-76. An Arkansas police officer, Gary Owen, testified that Farr was a drug addict who worked as a police informant. JA:9-31. In Owen's opinion, Farr was neither truthful nor reliable, and Owen had ceased to use him as an informant. JA:130-31. Finally, Banks testified that Farr planned to commit robberies himself, although it was Banks's idea to retrieve the murder weapon in order to facilitate Farr's scheme. JA:134-37. On cross-examination, Banks admitted that he had pistol-whipped Jefferson and threatened to kill him. JA:136.

At the conclusion of the sentencing phase on October 1, 1980, Banks was sentenced to death. Tr 109-10.

III. Direct Appeal and Postconviction Proceedings

Banks's conviction and sentence were affirmed on direct appeal, and this Court denied certiorari review. *Banks v. State,* 643 S.W.2d at 135, *cert. denied,* 464 U.S. 904 (1983). In 1983 and 1984, Banks filed the first two of five state habeas applications challenging his conviction and death sentence. After evidentiary hearings, the Court of Criminal Appeals denied relief based upon the trial court's findings of fact and conclusions of law. *Ex parte Banks,* No. 13,568-01 (Tex. Crim. App. 1984) (unpublished order); *id.,* 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) (order on rehearing).

In 1992, Banks filed his third state habeas application raising, *inter alia, Brady* claims concerning a testimonial deal with Cook, and Farr's police informant status and an ineffective assistance of counsel claim. JA:150-76, 180. Although the trial court recommended that relief be denied, PA:G1-7, the Court of Criminal Appeals ordered the lower court to conduct an evidentiary hearing to resolve Banks's *Swain* claim.[5] PA:F1-3. In 1993, after holding a four-day evidentiary hearing, the trial court issued further findings of fact and conclusions of law recommending that relief be denied. PA:E1-9. The Court of Criminal Appeals then denied relief based on the trial court's findings and conclusions.[6] PA:D1.

On March 7, 1996, Banks filed a federal habeas petition reasserting his *Brady* and *Strickland* claims. JA:248-57, 259-60. After the federal magistrate judge held an evidentiary hearing over the Director's objection in 1999, the parties submitted proposed findings of fact in which Banks first argued that the State suppressed the transcript of a pretrial interview ("the Cook transcript") which he could have used to impeach Cook's testimony as "coached." JA:369-70, 373-74, 378-91. The magistrate judge then recommended granting the writ based on her conclusions that: (1) the prosecution withheld evidence that Farr was a paid police informant; (2) trial counsel was constitutionally ineffective during punishment proceedings; and

[5] *Swain v. Alabama*, 380 U.S. 202 (1965).

[6] A fourth state habeas application filed by Banks did not substantively challenge his conviction or sentence. *Ex parte Banks*, No. 13,568-04 (Tex. Crim. App. 1993) (unpublished order).

(3) the cumulative effect of these errors rendered Banks's sentencing trial fundamentally unfair. PA:C21-25, 40-44, 54. On August 18, 2000, the district court adopted the magistrate's report with minor modifications and conditionally granted Banks relief from his death sentence. PA:B1-7. However, the court declined to consider the Cook transcript claim or to upset Banks's capital murder conviction. PA:B1-7; JA:421-23. The court also denied a COA. JA:432-33.

The Director subsequently appealed and Banks cross-appealed. The Fifth Circuit reversed, rendered judgment in favor of the Director, and denied a COA as to Banks's cross-appeal claims. PA:A1-78. After the court of appeals denied Banks's petition for rehearing, this Court granted a writ of certiorari on April 21, 2003.[7] *Banks v. Cockrell,* 123 S. Ct. 1784 (2003).

SUMMARY OF THE ARGUMENT

This is a case about federalism. Banks bypassed the state courts with the substance of his *Brady* and *Strickland* claims while he litigated his now defunct *Swain* claim. When Banks was ultimately unable to prove an equal protection violation under *Swain,* he abruptly switched gears and began to develop, for the first time in

[7] On March 4, 2003, Banks filed a fifth state habeas application raising the Cook transcript claim, which was ultimately dismissed as an abuse of the writ. *Ex parte Banks,* No. 13,586-05 (Tex. Crim. App. 2003) (unpublished order). This Court denied certiorari review. *Banks v. Cockrell,* 123 S. Ct. 1810 (2003).

federal court, his current claims of prosecutorial misconduct and ineffective assistance of counsel. As a result, the state courts were never afforded a fair opportunity to adjudicate his *Brady* and *Strickland* claims based on the evidence later presented in federal court. Despite Banks's *post hoc* attempts to justify his failure to adequately present the evidence supporting the instant claims during state postconviction proceedings, he neglects to prove the evidence was not reasonably available or the State prevented him from marshaling the facts and making his case in a procedurally correct manner.

First, Banks did not inquire into the paid informant status of State's witness Farr during trial or collateral proceedings in state court, despite the fact that trial counsel was aware Farr was an informant. Banks not only failed to take advantage of available state court discovery procedures, he neglected to attempt to locate, interview, or examine the witnesses who were available during three state habeas hearings. Further, even assuming Farr would not have spoken with Banks prior to federal habeas proceedings, as Banks dubiously alleges, there is absolutely no proof that Farr's taciturnity was the result of official interference.

Nevertheless, had Farr's paid informant status been revealed to the jury during the punishment phase of trial, there is no reasonable probability that Banks would not have been sentenced to death. Virtually all of Farr's testimony was corroborated by other witnesses, who confirmed that Banks traveled to Dallas soon after the instant murder in order to retrieve his handgun and that he offered it to Farr so he could perpetrate further violent crimes. Banks himself admitted, without reservation, that he was willing to provide Farr the means to commit one or

more armed robberies. Moreover, Farr's testimony was thoroughly impeached when trial counsel proved Farr lied about a variety of subjects and previously served as an informant with a motivation to cooperate with law enforcement. The only remaining, credible portion of Farr's testimony was Banks's willingness to abet a violent felony, a fact that Banks himself confirmed. As a result, even assuming Banks could excuse his procedural default, Farr's paid informant status was immaterial within the meaning of *Brady*.

Second, Banks failed to present his serious allegations of child abuse and recanted testimony to the state courts, although he advances no justification for not developing his underlying ineffective assistance of counsel claim when he had the opportunity to do so. Contrary to Banks's argument, these allegations significantly altered and bolstered the claim raised during state habeas proceedings. In any event, there is no reasonable probability Banks's punishment trial would have resulted in a life sentence had he provided the jury with the questionable evidence he relies upon now. Neither of Banks's psychological experts possesses any reliable basis for concluding that he was abused as a child, and Banks's parents do not admit to such abuse. Similarly, Banks's alleged "life-threatening" skin condition is simply not supported by the evidence. Further, Banks's below-average intelligence is not a persuasive reason to conclude that the jury would have rendered a different verdict. Finally, trial counsel cannot be deemed ineffective for failing to suborn perjury from Jefferson or Banks on the issue of future dangerousness. Consequently, even considering the evidence procedurally defaulted by Banks, the balance of mitigating and

aggravating evidence adduced cannot support a finding of *Strickland* prejudice.

Third, it is not debatable that FED. R. CIV. P. 15(b) does not apply to habeas proceedings insofar as the concept of "implied consent" is inconsistent with the doctrine of exhaustion and the nature of postconviction litigation. Further, even if Rule 15(b) applies, Banks fails to show the Cook transcript claim was tried by express or implied consent. It is also not debatable that there is no reasonable probability the jury would have acquitted Banks had the Cook transcript been disclosed to the defense and used to impeach Cook's trial testimony.

ARGUMENT

I. The Court of Appeals Properly Denied Banks's *Brady* Claim Concerning Farr's Paid Informant Status Because the Claim Is Factually Unexhausted, Procedurally Defaulted And, Alternatively, Without Merit.

Banks initially contends that the prosecution suppressed material impeachment evidence – that Farr was paid $200 to assist police in recovering the murder weapon – in violation of *Brady v. Maryland*. However, the Court should reject this contention because the evidence establishing Farr's paid informant status was unexhausted and procedurally defaulted. Additionally, Banks failed to show cause and prejudice for his failure to present the evidence in a procedurally correct manner. Finally, notwithstanding the procedural bars, Banks's *Brady* claim is without merit because he fails to prove that evidence was suppressed or to demonstrate a reasonable probability that his sentencing

trial would have ended differently had Farr's paid informant status been disclosed.

A. The court of appeals correctly held that Banks failed to diligently develop and present the factual basis of the instant *Brady* claim during state court proceedings and thereby procedurally defaulted the claim.

The Fifth Circuit concluded that the evidence supporting Banks's claim that Farr was a paid informant was never presented to the state habeas court. PA:A20-23. Moreover, Banks did not demonstrate cause and prejudice or a fundamental miscarriage of justice that would excuse his failure to afford the state court a fair opportunity to resolve his constitutional claim. PA:A17-22. As a result, the district court was not entitled to consider Banks's unexhausted evidence, much less grant habeas relief thereupon. PA:A22-23. Nor was the court permitted to hold an evidentiary hearing at which unexhausted evidence could be developed. PA:A17-20. As demonstrated below, the Fifth Circuit's decision should be affirmed in all respects.

It is well settled that habeas relief "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (West 1995); *Rose v. Lundy,* 455 U.S. 509, 518 (1982). The exhaustion doctrine is more than a "procedural hurdle"; it reflects a long-standing policy of comity between state and federal courts in order to provide the state courts "an initial opportunity to pass upon and correct" alleged constitutional violations. *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 9 (1992); *Picard v. Connor,* 404

U.S. 270, 275 (1971). Moreover, "[e]xhaustion means more than notice," and requires a petitioner to fairly present a constitutional claim *and* its supporting factual allegations to a state court before seeking federal habeas relief. *Tamayo-Reyes,* 504 U.S. at 9-10; *Connor,* 404 U.S. at 276. Accordingly, when material, additional evidentiary support that fundamentally alters or significantly bolsters a claim is presented for the first time in federal court, exhaustion is not satisfied. *Vasquez v. Hillery,* 474 U.S. 254, 259-60 (1986); *Dowthitt v. Johnson,* 230 F.3d 733, 745-46 (5th Cir. 2000); *Demarest v. Price,* 130 F.3d 922, 936 (10th Cir. 1997); *Aiken v. Spaulding,* 841 F.2d 881, 883 (9th Cir. 1988); *Wise v. Warden, Maryland Penitentiary,* 839 F.2d 1030, 1033 (4th Cir. 1988).

Banks concedes that, in state court, he presented only the conclusory allegation that the State suppressed evidence Farr was a "police informant and Mr. Banks's arrest was a 'set-up.'" JA:180. The only evidentiary support offered for the claim was a hearsay statement alleging that Farr was "well-connected to law enforcement people."[8] JA:195; 2 SHTr 144.[9] Thus, as the lower court correctly

[8] This statement, attributed to Demetra Jefferson, appears in an unsigned affidavit and in an investigator's affidavit. Although this hearsay failed to apprise the state court that Banks was claiming the State suppressed Farr's informant status, paid or not, it also failed to create a fact issue at all. *See Dowthitt,* 230 F.3d at 758 (*unsigned* affidavits or investigator's affidavits presented to state court, in absence of showing *signed* affidavits could not be obtained without discovery order or hearing, do not constitute "due diligence" within meaning of *Williams v. Taylor,* 529 U.S. 420 (2000) ("*Williams II*")).

[9] "SHTr" refers to the transcript of pleadings and documents filed with the court during Banks's third state habeas proceeding, preceded

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held, the additional evidentiary support for Banks's *Brady* claim – introduced for the first time during federal proceedings – is not exhausted. PA:A22. Further, it is undisputed that the claim would be dismissed as an abuse of the writ if it was presented in yet another state habeas application. *See* TEX. CODE CRIM. PROC. art. 11.071 §5(a)(1) (West 2003) (barring subsequent applications unless claim could not have been presented previously). Because the Texas abuse-of-the-writ statute is an independent and adequate state procedural bar, the court of appeals correctly held that the claim and its supporting evidence are undoubtedly defaulted in federal court. PA:A22-23; *Coleman v. Thompson,* 501 U.S. 722, 735 n. 1 (1991); *Nobles v. Johnson,* 127 F.3d 409, 422-23 (5th Cir. 1996).

Similar considerations significantly limit a federal court's ability to allow evidentiary development where, as here, a habeas petitioner failed to develop the claim in state proceedings. *Tamayo-Reyes,* 504 U.S. at 11-12. "[E]ncouraging the full factual development in state court of a claim [of] constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance" and prevents the waste of "scarce judicial resources" where a petitioner "negligently failed to take advantage of opportunities in state-court proceedings." *Id.* at 9. Thus, a claim raised but not developed in state court is also procedurally defaulted and a federal court is prohibited from granting relief *or* from conducting

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by volume (or supplemental volume) number and followed by page numbers.

an evidentiary hearing. *Id.* at 11-12; *see also Williams II,* 529 U.S. at 425-37 (where petitioner fails to diligently develop record in state court, "himself . . . contributing to the absence of a full and fair adjudication," evidentiary hearing is barred). In either instance, only a showing of cause and prejudice or fundamental miscarriage of justice will excuse lack of exhaustion or failure to diligently develop the record in state court.[10] *Coleman,* 501 U.S. at 750.

This Court has explained that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). A demonstration that "the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause under this standard."[11] *Id.* (internal citations and quotations omitted). The question revolves around Banks's conduct: specifically, whether Banks "possessed, or by reasonable means could have obtained, a sufficient basis" to prove the instant claim in state court. *McCleskey v. Zant,* 499 U.S. 467, 498 (1990). In other words, the "petitioner must conduct a reasonable and diligent investigation aimed at including all relevant

[10] As the lower court noted, Banks does not advance a fundamental miscarriage of justice argument for his default. PA:A19-20.

[11] The Court also noted that a violation of the Sixth Amendment right to constitutionally effective counsel would constitute a state-sponsored impediment sufficient to establish cause. *Carrier,* 477 U.S. at 488. However, Banks does not argue that his counsel was constitutionally ineffective for failing to develop the instant claim.

claims and grounds for relief" in the state habeas application. *Id.*

The lower court found that Banks's excuses for not developing or presenting the evidence supporting the instant claim in state court were insufficient to establish cause. First, as Banks concedes, he did not request discovery or investigative assistance from the state court in order to develop the claim. PA:A17-19. Second, Banks obtained an evidentiary hearing on his *Swain* claim, as discussed *supra,* but did not seek further discovery, leave to expand the scope of the hearing to include his paid informant claim, or further supplementation of the record. JA:214-20, 225-26, 229-30; 1st Supp. SHTr 40-46; 2nd Supp. SHTr 5-7. These failures are fatal to Banks's claim because diligence requires, at a minimum, a good faith attempt to develop the facts "in the manner prescribed by state law." *Williams II,* 529 U.S. at 437. Texas law provides that all normal, civil discovery mechanisms – including deposition and hearing – are available to an inmate who presents "controverted, previously unresolved facts which are material to the legality of the applicant's confinement." TEX. CODE CRIM. PROC. art. 11.07 §2(d) (West 1991).

That Banks made no attempt to invoke these procedures or to create a fact issue of any kind indicates that Banks's investigation of the claim was unreasonable and cannot amount to cause as contemplated by *Murray* or *McCleskey.* Banks now suggests that he had "no good-faith basis" to seek discovery and that the state court would have ignored his entreaties had they been made. Yet any belief on Banks's part that such efforts would have been futile does not excuse his failure to attempt to develop the claim in state court. "If what petitioner knows or could discover upon reasonable investigation supports a claim

for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might have supported or strengthened the claim." *McCleskey,* 499 U.S. at 498; *cf. Engle v. Isaac,* 456 U.S. 107, 130 (1982) (futility of presenting claim cannot amount to cause and petitioner "may not bypass the state courts simply because he thinks they will be unsympathetic"). Clearly, Banks's deliberate decision not to request investigative assistance is insufficient cause to excuse his default.[12]

Third, the fact that Farr claimed he would not have revealed his paid informant status to Banks, or anyone else, prior to federal habeas proceedings was immaterial because it was unreasonable for Banks not to attempt to speak with Farr at an earlier date, even if such an attempt would have been unsuccessful. PA:A19, 22. Indeed, there is no doubt "[Banks] *believed* Farr had been a paid informant" during state habeas proceedings. PA:A21-22 (emphasis in original). The transcript of the pre-indictment examining trial reveals that counsel knew the State had used a confidential informant to determine Banks was traveling to Dallas to obtain the murder weapon,[13] and counsel's cross-examination of Farr at trial evidences that

[12] Lack of resources was most certainly not an issue. Banks employed numerous attorneys, investigators, law students, and experts throughout collateral proceeding in this case.

[13] Deputy Willie Huff testified during the May 21, 1980 examining trial that he received information from a confidential informant that Banks was traveling to Dallas to obtain a weapon. JA:15-17. Trial counsel then questioned Huff as to whether the informant was from Texarkana or Dallas. JA:21.

counsel knew Farr was that individual.[14] *See, e.g.,* JA:21-23, 37-38, 109-12. As in *Williams II,* 529 U.S. at 439-40, and *McCleskey,* 499 U.S. at 498-500, the trial transcript put Banks on notice Farr was a police informant. During both phases of trial, counsel repeatedly cross-examined Farr over his relationship with law enforcement, specifically his cooperation with Deputy Huff in retrieving the murder weapon, the fact that he was never charged or convicted with crimes despite his long-term drug abuse, and his informant relationship with Arkansas police officer Gary Owen. JA:35-39, 109-12. Although Farr denied any such involvement, trial counsel proved that Farr was an informant for Owen, and called attention to the fact during closing argument. JA:129-30, 145.

These facts distinguish the present case from *Strickler v. Greene,* where the prosecution represented that all evidence had been turned over pursuant to an open file policy, and the Court determined that defense counsel was entitled to rely on this representation. 527 U.S. 263, 276-78 (1999). Here, the State acknowledged the existence of a confidential informant but refused to divulge his identity and, as noted, the trial record undoubtedly suggests the identity of the informant.[15] *See* JA:21; *cf. Strickler,* 527

[14] Prior to trial, the prosecution promised Banks's attorney all discovery "to which [he] was entitled." 1 SF 13. As explained below, the State disclosed that an informant was used but did not reveal the identity of that informant because Banks was not entitled to such information.

[15] *Strickler* is clearly inapposite here, where the State was not required to automatically disclose Farr's identity as the informant. As the Fifth Circuit recognized in *Gonzales v. Beto,* "[i]t has been observed that identification of the informer may render him useless. Even more persuasive to us is the possibility that it may render him dead." 425

(Continued on following page)

U.S. at 288 n. 33 (declining to "reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them"). A reasonable attorney would have pursued the issue on these bases alone, whether during trial or on collateral attack.

Moreover, even assuming the truth of Farr's alleged reticence, a witness's refusal to speak with defense attorneys cannot amount to official interference as contemplated by *Carrier,* 477 U.S. at 488. Farr "may have made a personal choice to avoid such contact – a choice that is well within his rights." *Johnson v. Puckett,* 176 F.3d 809, 816 (5th Cir. 1999); *United States v. Troutman,* 814 F.2d 1428, 1453 (10th Cir. 1987); *United States v. Black,* 767 F.2d 1334, 1338 (9th Cir. 1985); *see also United States v. Soape,* 169 F.3d 257, 271 n. 9 (5th Cir. 1999) ("[A] government witness who does not wish to speak to or be interviewed by the defense prior to trial may not be required to do so.") (internal quotation marks omitted); *United States v.*

F.2d 963, 971 (5th Cir. 1970) (footnote omitted). Because of such concerns, disclosure is not automatic under either federal or state law. *See Scher v. United States,* 305 U.S. 251, 254 (1938) (public policy forbids disclosure unless it is essential to the defense); *Roviaro v. United States,* 353 U.S. 53, 62 (1956) (no fixed rule could be formulated as to when an informer's identity must be disclosed; rather, "[t]he problem is one that calls for balancing the public interest in promoting the flow of information against the individual's right to prepare his defense"). Consequently, it was Banks's duty to move for disclosure of otherwise privileged material. Banks's complete failure to seek information regarding the informant prior to trial, and then his complete failure to develop the facts to support his instant claim during any of his three state habeas proceedings, is inexcusable.

Bennett, 928 F.2d 1548, 1554 (11th Cir. 1991) (same). "No right of a defendant is violated when a potential witness freely chooses not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or the defense." *Kines v. Butterworth,* 669 F.2d 6, 9 (1st Cir. 1981) (citing *United States v. Scott,* 518 F.2d 261, 268 (6th Cir. 1975)); *see also United States v. Bittner,* 728 F.2d 1038, 1041 (8th Cir. 1984) (defendant's right of access is not violated when witness chooses voluntarily not to be interviewed). Banks cites no contrary authority. Additionally, Banks does not prove that he was unable to speak with Farr because he disappeared "at the suggestion of his law-enforcement handlers," and Farr's unsworn declarations unequivocally do not support such a conclusion.[16]

Finally, the court of appeals correctly concluded that "Banks should have at least attempted to interview the investigating officers, such as Deputy Huff, to ascertain Farr's status." PA:A22. Banks argues that he had "no reason to believe" Deputy Huff or trial prosecutor James Elliot would have revealed that Banks was a paid informant prior to the federal evidentiary hearing. However, Banks cannot show diligence by simply alleging that an investigation would have been useless. This argument assumes without any evidentiary support that it would have been futile to question these witnesses – or trial counsel himself – about Farr's status when they testified at the state court evidentiary hearing, or by deposition or

[16] Rather, Farr's declarations indicate that he was told to "stop working for the police because [his] life might be in danger," but do not allege that he was instructed, cajoled, or forced to leave Texarkana in any way. JA:440, 444.

simple interview. *See, e.g.,* 3 SHSF 533, 756; 4 SHSF 877.[17] Consequently, Banks fails to demonstrate cause for his default, and his *Brady* claim concerning Farr was properly denied by the lower court.[18]

B. In any event, the Fifth Circuit properly found that Farr's paid informant status was not "material" within the meaning of *Brady.*

Even if Banks could establish cause for his default, his claim fails on its merits. To establish a *Brady* violation, a habeas petitioner must prove that: (1) the prosecution suppressed evidence; (2) the evidence was favorable; (3) the evidence was material either to guilt or punishment; and (4) the allegedly favorable evidence was not discoverable through due diligence. *Strickler,* 527 U.S. at 281-82; *Brady,* 373 U.S. at 87; *Rector v. Johnson,* 120 F.3d 551, 558 (5th Cir. 1998).[19] Both impeachment evidence and exculpatory

[17] "SHSF" refers to the state habeas statement of facts – the transcribed evidentiary hearing held during Banks's third habeas proceeding – preceded by volume number and followed by page numbers.

[18] Additionally, as demonstrated below, Banks fails to demonstrate "prejudice" sufficient to overcome any procedural default. *See Strickler,* 527 U.S. at 282 (unless non-disclosed materials "were 'material' for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default").

[19] When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation. *Herrera v. Collins*, 954 F.2d 1029, 1032 (5th Cir. 1992), *aff'd*, 506 U.S. 390 (1993). *Brady* applies only to "the discovery, after trial[,] of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Despite learning prior to Banks's indictment that

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evidence may give rise to a *Brady* violation. *United States v. Bagley,* 473 U.S. 667, 676 (1985). This Court has explained that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley,* 473 U.S. at 682; *see also Strickler,* 527 U.S. at 291 (petitioner must show "reasonable *probability*," rather than "reasonable *possibility*," of different result in order to obtain relief under *Brady*) (emphasis in original); *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict of confidence").

The Fifth Circuit properly applied this standard and determined that, even assuming Farr's paid informant status was improperly concealed from the defense,[20] the undisclosed evidence was not of such a character as to undermine confidence in the outcome of Banks's sentencing proceeding.[21] PA:A25-33. The lower court first explained that

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the State employed a confidential informant, trial counsel did not investigate further, did not formally request disclosure of the informant's identity or file a motion *in limine* to exclude evidence obtained through the informant, and did not move for a continuance. Nor did postconviction counsel exercise due diligence in locating Farr until federal habeas proceedings began.

[20] Banks never offered any evidence from trial counsel to suggest that Farr's informant status was suppressed, despite the fact that trial counsel provided affidavits and live testimony during state habeas proceedings. Although the court of appeals assumed the evidence was suppressed, the Director maintains that Banks failed to prove that fact in the lower courts.

[21] Banks suggests that the materiality analysis of *Giglio v. United States*, 405 U.S. 150 (1972), should apply. However, as noted by the

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Farr's testimony was adequately corroborated by other witnesses at trial, including Banks himself. PA:A26-27, 32. Additionally, the evidence had only minimal impeachment value in the context of the trial. PA:A27-28, 32-33. The court therefore properly found that Banks's *Brady* claim was without merit. PA:A33.

1. Farr's testimony was adequately corroborated by other witnesses at trial.

As discussed *supra,* Farr testified during both phases of trial that he traveled with Banks and Jefferson to the

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court of appeals, *Giglio* involves a distinct constitutional claim from *Brady* and utilizes a different standard for assessing materiality. PA:A29-30. The lower court also held Banks waived any *Giglio* claim because he did not raise it in either his state or federal habeas petitions, and did not request a COA on the issue. PA:A30-31. The Farr claim as it appeared in Banks's state habeas application alleged only that "the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady* . . . [including] information that would have revealed Farr as a police informant" and, in his federal habeas petition, the claim was worded nearly identically. JA:180, 259-60. The only reference to *Giglio* appears in association with a state habeas claim addressing "the prosecutors' determined concealment of information" and "failure to disclose" concerning Cook. JA:152-54. Banks's federal petition does not even cite *Giglio.* As a result, this Court also lacks jurisdiction to address Banks's putative *Giglio* claim. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962).

Nevertheless, the *Giglio* materiality standard – which embraces the harmless error rule of *Chapman v. California,* 386 U.S. 18 (1967) – was arguably abrogated by this Court's opinion in *Brecht v. Abrahamson,* 507 U.S. 619 (1993). *See Barrientes v. Johnson,* 221 F.3d 741, 756-57 (5th Cir. 2000) (assuming *Brecht* harmless error standard applies to *Giglio* claims raised in federal habeas proceedings) (citing *Gilday v. Callahan,* 59 F.3d 257, 268 (1st Cir. 1995)). Because this is a postconviction proceeding, the Director no longer bears the onus of proving harmlessness of trial error under *Chapman*; rather, it is Banks who must prove harm.

Dallas home of Cook to retrieve Banks's pistol. JA:34-35, 105. Farr recalled that Banks spoke with Cook for several minutes on the porch while Farr and Jefferson waited in the car. JA:34-35, 107. Banks then returned to the car and explained that Cook no longer had his gun but had provided him with a different pistol instead. JA:35, 107-08. During the punishment phase of trial, Farr added additional information about this transaction that was relevant to Banks's future dangerousness. When asked about what they had intended to do with the gun, Farr answered, "I don't know. We were going to pull some robberies on the way back [to Texarkana]." JA:108. He also testified that Banks asked him whether the gun Cook had given him would "do," explaining that Banks asked this question because "the gun that we went after, it was a small type of gun and we needed a small type of gun" in order to conceal it. JA:107-08. Finally, when asked whether he had inquired of Banks what would happen if there was any trouble "during those burglaries," Farr responded that "[Banks] said he would take care of it." JA:109.

The details of this event were largely corroborated by the testimony of several other witnesses. Marcus Jefferson confirmed that he had driven to Dallas with Banks and Farr. 9 SF 2256-57. He recalled that when they got to Dallas, the three of them "just rode around . . . looking for a house." *Id.* at 2257. Jefferson stated that once they located the house, Banks walked up to the porch while he and Farr remained in the car. *Id.* at 2257-58. When Banks returned about five minutes later, he told them that "this Two-two dude gave him another gun. He didn't have [Banks's gun] . . . [Banks] said that Two-two said that some girl had [Banks's] gun, and so Two-two gave him another gun." *Id.* at 2264-65.

Cook also provided testimony during guilt-innocence describing Banks's attempts to retrieve his handgun. Cook stated that he sold Banks's gun to his neighbor and, later that week, Banks called and asked if "I got rid of the car and where was that pistol, and I told him that I got rid of it." JA:54-56. Banks called on a second occasion and stated that he was not far from Cook's house and that he needed to speak with him. JA:57. When Banks arrived, he told Cook that "he needed a pistol and he asked . . . where was his pistol." JA:57.

Finally, Banks himself corroborated much of Farr's testimony when he took the stand during punishment proceedings. Banks recalled that Farr planned to commit "some robberies." JA:134. Although Banks claimed that he did not personally plan to participate in any robbery, he acknowledged that it was his "idea to go get the gun. . . . [s]o [Farr] could pull one." JA:134. On cross-examination, Banks admitted that, in supplying the gun, he was "going to supply [Farr] the means and possible death weapon in an armed robbery case." JA:136-37.

Thus, the record strongly corroborates Farr's testimony regarding Banks's attempt to recover his handgun. Farr, Jefferson, and Banks testified they went to Dallas together, and Farr and Banks both admitted the purpose of the trip was for Banks to retrieve his weapon from Cook. Both Farr and Banks also stated that the gun was to be used for one or more robberies, although the witnesses disagreed about who would commit them. Banks himself admitted it was his idea to retrieve the weapon. Any attempt by the defense to demonstrate that Farr was acting at the behest of police would have done little to undercut the State's case. *Cf. Strickler,* 527 U.S. at 294 (record provided "strong support" for conclusion petitioner

would have been convicted of capital murder and sentenced to death even if eyewitness was severely impeached with *Brady* evidence).

Specifically, even if trial counsel could have proved that Farr fabricated a plan to commit robberies only because he was paid to recover the murder weapon for police, Banks himself was unaware that Farr did not actually intend to commit the robberies. As a result, in the jury's eyes, the damaging evidence was Banks's willing abetment of Farr's commission of a violent crime, *not* Banks's own intent to commit such an act. As in *Strickler,* the jury would likely have reached the same conclusion concerning Banks's culpability for the proposed robbery plan based on the remaining evidence, with or without Farr's testimony.[22] 527 U.S. at 292. Consequently, the identified impeachment value of Farr's paid informant status would not have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435 (footnote omitted).

[22] Contrary to Banks's suggestion, his future dangerousness did not entirely depend on Farr's testimony. Obviously, Banks's crime revealed his wanton disregard for human life, and the fact that Banks pistol-whipped Vetrano Jefferson, and threatened to kill him only days before Whitehead's murder, was compelling and sufficient to prove future dangerousness. *See Hughes v. Johnson,* 191 F.3d 707, 620-21 (5th Cir. 1999) (evidence sufficient to support future dangerousness even where defendant's criminal history was minimal); *Fierro v. Lynaugh,* 879 F.2d 1276, 1280 (5th Cir. 1989) (same); *cf. Strickler,* 527 U.S. at 292-94 (defendant's guilt did not depend on impeached eyewitness testimony).

2. Any additional impeachment material would have added little to Banks's defense.

Moreover, Farr's paid informant status would have had little impeachment value in the context of Banks's trial given the substantial material already offered to impeach Farr's credibility. In particular, Farr denied during cross-examination that: (1) he informed Deputy Huff that he, Banks, and Jefferson were leaving for Dallas; (2) he attempted to obtain false prescriptions the previous week and had an altercation with a doctor who refused to provide him with one; (3) he was a "snitch" for Arkansas narcotics officer Gary Owen; and (4) his wife had shot him. JA:109-13.

However, the defense presented the testimony of James Kelly, who contradicted Farr's account of events involving the Arkansas physician. Kelly testified that Farr had hired him to take him to Arkansas to get a prescription filled, and recalled that when they reached the hospital, Farr began "fussing" with a doctor over filling the prescription. JA:124. According to Kelly, the doctor then ordered Farr "to get his ass out of there." JA:124. Kelly also testified that, after Farr unsuccessfully attempted to obtain prescription drugs from several other hospitals in Arkansas, he indicated that he was determined to get the drugs before he returned to Texarkana. JA:125-26.

Owen also disputed portions of Farr's testimony. He indicated that he knew Farr from his duties and described Farr as a "doper." JA:130. He also opined that Farr was not a truthful person and that he was unworthy of belief. JA:130. Owen indicated that he used Farr as an informant on two or three occasions, but Farr's information was incorrect and he no longer used him. JA:130-31. Finally,

Owen testified that Farr was shot by his wife and that he was a convicted forger. JA:132. Also, Farr admitted during guilt-innocence that he abused the drug Dilaudid for seven years and had "track marks" on his arm as a result. JA:36. He also acknowledged that he abused heroin and smoked marijuana. JA:36-37.

The Fifth Circuit correctly observed that the defense had successfully impeached Farr's credibility with this evidence. PA:A32-33. Indeed, sufficient impeachment evidence lessens the materiality of *Brady* evidence, and effectively renders it immaterial when it merely furnishes a cumulative or collateral basis on which to impeach a witness whose credibility has already been shown to be questionable. *Conley v. United States,* 323 F.3d 7, 30 (1st Cir. 2003); *Edmond v. Collins,* 8 F.3d 290, 294 (5th Cir. 1993); *United States v. Derr,* 990 F.2d 1330, 1336 (D.C. Cir. 1993); *Brewer v. Nix,* 963 F.2d 1111, 1113 (8th Cir. 1992); *United States v. Rossy,* 953 F.2d 321, 324 (7th Cir. 1992); *United States v. Adams,* 914 F.2d 1404, 1406 (10th Cir. 1990). To the extent Farr's paid informant status had any additional impeachment value, it only contradicted Farr's testimony that he did not assist – or was not motivated to assist – Deputy Huff in his investigation. It would not have further damaged Farr's already compromised credibility or undermined Banks's own admission that he was willing to abet an armed robbery by providing the perpetrator with a weapon. Thus, it does not undermine confidence in the outcome of Banks's sentencing trial. *Strickler,* 527 U.S. at 290. The lower court therefore was correct in its assessment that "Farr's paid informant status, when considered against the other impeachment evidence about him, and the fact that much of his testimony concerning the trip to Dallas to retrieve Banks's pistol was corroborated,

does *not* present a reasonable probability that the jury would have found differently concerning Banks's future dangerousness." PA:A33 (emphasis in original, citation omitted).

II. The Lower Court Correctly Held That Banks's Ineffective Assistance of Counsel Claims Were Partially Unexhausted, Procedurally Defaulted And, Alternatively, Without Merit.

Banks also argues that he was denied constitutionally effective counsel during the punishment phase of trial and that the lower court misapplied *Strickland* and *Williams v. Taylor*, 529 U.S. 362 (2000) ("*Williams I*"), to the prejudice component of his claims. Specifically, Banks complains that counsel was deficient for not presenting mitigating evidence from Banks's parents and a mental health expert, or evidence impeaching Vetrano Jefferson's testimony that Banks pistol-whipped and threatened to kill him.[23] Moreover, Banks contends that there is a reasonable probability he would not have been sentenced to death had this evidence been produced. However, this Court should affirm the decision of the court of appeals because significant portions of the supporting evidence are unexhausted and defaulted. Moreover, Banks again fails to show cause and prejudice for his failure to present the evidence at the

[23] This Court did not grant certiorari on the Jefferson claim, and Banks did not include or discuss the claim in the relevant portion of his petition for writ of certiorari. *See Banks,* 123 S. Ct. 1784 ("Petition for writ of certiorari . . . granted limited to Questions 1, 2, and 3 presented by the petition"); *cf.* Petition at 30-33. The Court's order is binding on Banks and, thus, the issue is improperly raised in his merits brief. *Roberts v. Galen of Virginia, Inc.,* 525 U.S. 249, 253-54 (1999).

proper juncture. Finally, assuming that the unexhausted factual support is not barred, the court below correctly denied Banks's claim on its merits.

A. The court of appeals correctly determined that portions of the evidence supporting Banks's Sixth Amendment claim were not presented to the state court.

The Fifth Circuit held the federal court testimony of Dr. Mark Cunningham, detailing the mitigating evidence that was not investigated or presented at trial, was "a significant expansion of the facts and opinions presented in state court" through the affidavits of Dr. Gregorio Piña and, thus, was unexhausted. PA:A37-39. The court also explained that Jefferson's testimony – recanting his own version of events at trial – was not presented during state habeas proceedings, as required by § 2254(b). PA:A41-42. Additionally, Banks never attempted to demonstrate cause and prejudice. PA:A38, 42. As discussed below, the decision of the court of appeals was entirely correct.

Section 2254 and long-standing federal jurisprudence clearly prohibit habeas relief where a claim or its supporting evidence is not exhausted. *Vasquez,* 474 U.S. at 259-60; *Connor,* 404 U.S. at 275-76. Banks does not advance a cause argument; he instead argues that Cunningham's and Jefferson's testimony *were* exhausted because he offered evidence "comprehending the testimony" Cunningham and Jefferson provided in federal court through Piña and Jefferson's sister, Demetra. *See* n. 8, *supra*. Yet a comparison of Banks's proffers in state court to the evidence presented in federal court does not support this contention.

Piña's affidavits submitted in state court vaguely suggest that Banks was "beaten and terrorized by his alcoholic father," and that on one occasion he was "tied to a tree and whipped."[24] JA:207. Piña also opined that Banks's intelligence was below normal,[25] he suffered from a "hyperallergenic" rash which lowered his self-esteem, and he would not be dangerous if incarcerated. JA:207-11. Cunningham's testimony, on the other hand, described extensive physical and emotional abuse directed at Banks, his mother, and his grandmother by his father and grandfather. For example, Cunningham claimed that: (1) Banks's grandfather was a violent alcoholic who, on more than one occasion, chased Banks's grandmother "up a tree where she remained for hours"; (2) Banks's father was also a violent alcoholic who "chased his wife out of the house," relentlessly beat her, and threatened to harm both her and Banks; (3) Banks's father threw food on the floor and discharged firearms in the house; and (4) Banks's father

[24] At the same time, the state court affidavit of Banks's mother suggests only that her husband "hollered" at her when he was drinking and confirms that Banks suffered from an allergic rash. JA:185-88. Not a single reference to physical abuse, whether directed toward her or Banks himself, appears in her affidavit. Banks's father reported one instance of "harsh discipline," *i.e.,* tying Banks to a tree and whipping him with a leather belt as punishment for bullying and stealing from schoolmates. JA:181. As with Banks's mother's affidavit, Banks's father failed to report any physical abuse to the state court.

[25] Piña administered the revised Wechsler Adult Intelligence Scale to Banks in 1992 and 1993 and obtained full scale IQ scores of 85 and 81, including performance IQ scores of 93 and 95. JA:198-99. A Stanford-Binet Intelligence Scale administered to Banks in 1993 revealed a full scale IQ score of 73. JA:203, 205-06.

beat him "with a belt, strap, horse whip, extension cord, [and] coat hanger."[26] JA:349-52.

There can be no doubt that Cunningham's account of Banks's social history is of an entirely different character than the evidence submitted through Banks's parents and Piña. Initially, the fact that neither of Banks's parents confirmed any of Cunningham's allegations but for the skin rash, the alcoholism, and the single incident of harsh discipline casts great doubt over Cunningham's testimony and illustrates the policy justifications for exhaustion. Additionally, Cunningham indicates that he spoke with Banks, his parents, and three of Banks's sisters, and reviewed medical, school, and prison records in order to formulate his opinions. 6 FR 239-41. Yet, other than the previously discussed affidavits, none of this information was presented to the state court through records, affidavits, or witnesses. Not even Piña claims to have reviewed any particular records or to have received any allegations of abuse beyond his interview with Banks.[27] JA:203-04. Thus, the state court was completely unaware of the

[26] During his own testimony at the federal hearing, Banks's father admitted that, in his "younger days," he had a drinking problem. 6 FR 218-19. ("FR" refers to the federal record on appeal, preceded by volume number and followed by page numbers.) The elder Banks explained that he "used to get drunk every weekend," but that he raised his son "real nice," to be a "good boy." *Id.* at 217-18. Banks's mother again described his eczema and his resultant inferiority complex, and confirmed that her husband had a drinking problem in the past. *Id.* at 227-29. Neither admitted to sustained physical abuse or spousal cruelty at any time during their testimony.

[27] Presumably, Piña reviewed at least Banks's father's state habeas affidavit because he does mention the tree-tying incident discussed therein. JA:207.

serious allegations of abuse leveled in federal court, the sources from which they arose, or the reliability of those sources, and was unable to fully consider Banks's asserted constitutional defect.

Similarly, Jefferson's testimony in federal court – attributing the blame for the pistol-whipping incident to himself, 6 FR 166 – was not presented in state court. Indeed, the only comparable evidence advanced in state court was the *unsigned* affidavit of Jefferson's sister, Demetra, and an investigator's affidavit, claiming that Jefferson started the fight in which Banks pistol-whipped him. JA:194; 2 SHTr 144. Because Jefferson testified that Banks pistol-whipped him without provocation during trial, and Banks himself confirmed it, JA:104-05, 135-36, the credibility of Jefferson's late recantation is extremely questionable. Jefferson's testimony loses even more credibility because he gave a written statement to police, confirming his trial testimony, on the night the pistol-whipping occurred. 6 FR 169-70. Once again, the state court was unable to assess Jefferson's credibility because Banks did not exhaust the issue.

As discussed *supra,* exhaustion is more than a "procedural hurdle" or a notice provision; the policy requires a fair presentation of constitutional claims and supporting facts to the state courts. *Tamayo-Reyes,* 504 U.S. at 9-10; *Connor,* 404 U.S. at 276. Moreover, when additional evidence that fundamentally alters or significantly bolsters a claim is presented for the first time in federal court, exhaustion is not satisfied. *Vasquez,* 474 U.S. at 259-60. In the instant case, Cunningham's testimony paints Banks's history as one of extreme violence, while Piña and Banks's parents focus on skin rashes, low self-esteem, and below average intelligence. Moreover, Jefferson's credibility is crucial to

his testimony because he testified to an inconsistent story at trial.

While Banks alleges that Cunningham and Jefferson were merely different witnesses, the record clearly shows that their respective statements were fundamentally different from the evidence submitted in state court. In essence, Banks completely bypassed the state courts, denying them a fair opportunity to apply *Strickland* to his allegations of child abuse, and denying the trier of fact a chance to judge Jefferson's credibility. *Connor,* 404 U.S. at 276-77; *see also Tamayo-Reyes,* 504 U.S. at 9 ("The state court is the appropriate forum for the resolution of factual issues in the first instance"); *Williams II,* 529 U.S. at 437 ("For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error"). As a result, the evidence is unexhausted and defaulted based on the independent and adequate state procedural bar discussed *supra.*[28] *Coleman,* 501 U.S. at 735 n. 1; *Nobles,* 127 F.3d at 422-23.

B. Nevertheless, Banks's ineffective assistance of counsel claim is without merit.

In order to establish a Sixth Amendment ineffective assistance of counsel violation, Banks must affirmatively prove that: (1) in light of all the circumstances as they

[28] Additionally, Banks makes no attempt to prove – in this Court or below – cause and prejudice or a fundamental miscarriage of justice, and such arguments are waived. *Beck,* 369 U.S. at 550-54.

appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," *i.e.,* counsel's performance was deficient under "prevailing professional norms"; and (2) the resultant prejudice was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Bell v. Cone,* 535 U.S. 685, 695 (2002); *Strickland,* 466 U.S. at 687-88, 690. The failure to prove either element is fatal to the claim. *Cone,* 535 U.S. at 695; *Strickland,* 466 U.S. at 697.

In applying the deficiency prong, judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight" and to "evaluate the conduct from counsel's perspective at the time." *Wiggins v. Smith,* 123 S. Ct. 2527, 2536 (2003); *Strickland,* 466 U.S. at 689-90. Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Cone,* 535 U.S. at 698; *Strickland,* 466 U.S. at 689. To prove prejudice, Banks must show a reasonable probability that, but for counsel's assumed deficiencies during punishment, the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Wiggins,* 123 S. Ct. at 2542; *Strickland,* 466 U.S. at 694-95. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Woodford v. Visciotti,* 537 U.S. 19, 23 (2002); *Strickland,* 466 U.S. at 694. However, "it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding." *Williams I,* 529 U.S. at 394; *Strickland,* 466 U.S. at 693. Because Banks cannot establish both elements of *Strickland,* his ineffective assistance of counsel claim should be denied.

1. The mitigating evidence – exhausted and unexhausted – produced by Banks during postconviction proceedings was insufficient to establish prejudice.

Initially, the court of appeals assumed that trial counsel's representation was deficient, PA:A36, 39, but held Banks was not prejudiced by counsel's performance during the punishment phase of trial with regard to mitigating evidence. First, the court noted that the only exhausted evidence supporting Banks's claim that trial counsel should have obtained expert assistance were Piña's affidavits. PA:A36-38. As discussed above, these affidavits contained only vague allegations of abuse. JA:207. Second, the court considered the claim that trial counsel was ineffective for failing to prepare Banks's parents to testify about Banks's father's alcoholism, the tree-tying incident, and Banks's skin problems, and concluded that, "in light of the nature of the murder, Banks'[s] intent soon thereafter to retrieve a weapon to be used in future armed robberies, and Banks'[s] continued denial during the penalty phase that he committed the murder, there is not a reasonable probability that this evidence would have changed the outcome of the penalty phase." PA:A39-40.

The lower court's prejudice determination should be affirmed. As a threshold issue, Piña's abuse allegations – other than the single instance of discipline – are not supported by the evidence because Banks's parents did not

confirm them by affidavit or otherwise.[29] *See* n. 24, 26, *supra*. As a result, the evidence would have been excluded by the trial court as hearsay. Unlike *Wiggins,* in which the Court noted that state law appeared to allow hearsay evidence to be admitted in sentencing, 123 S. Ct. at 2543, such evidence may be excluded at the punishment phase of a Texas capital murder trial unless it falls within a hearsay exception or bears "persuasive assurances of trustworthiness." *Valle v. State,* 109 S.W.3d 500, 506-07 (Tex. Crim. App. 2003). In this case, such persuasive assurances of trustworthiness are absent because Banks's parents never admitted that any abuse occurred. Moreover, the evidence of Banks's skin problems, low self-esteem, troubled childhood, and below average intelligence is significantly weaker than the evidence rejected by this Court in *Visciotti,* 537 U.S. at 26-27, and by other courts in similar cases.

Moreover, even if Cunningham's defaulted testimony is considered, the analysis remains the same. First, much of Cunningham's testimony concerning physical and emotional abuse could have been successfully excluded as hearsay, as discussed *supra.* 6 FR 286-87. Additionally, the medical records relied upon by Cunningham actually undermine Banks's claims that he suffered from a "life-threatening hyper-allergenic condition" characterized by "ghastly," disfiguring, "chronic bleeding skin and hives," as well as "oozing lesions." The records actually demonstrate that Banks suffered a single dermatological incident due

[29] The suggestion that Banks's parents would have testified to any alleged abuse if they had been prepared to do so at trial is unsupported by the record.

to an allergic reaction to penicillin at the age of eighteen months and that his eczema problem was isolated to infancy. 6 FR 275-77; *see also* Fed. Hearing Exhibit C-6. Further, there are no medical or social services records confirming *any* of the reported physical abuse in the instant case, as there were in *Wiggins* and *Williams I. Cf. Wiggins,* 123 S. Ct. at 2533, 2536-37 (Wiggins was hospitalized for burn to hand and extensive social services records detailed circumstances justifying removal to foster care); *Williams I,* 529 U.S. at 370, 373 & n. 4, 395-96 & n. 19 (juvenile, social services, and prison records indicated extensive abuse). In the absence of such documentation, a habeas petitioner's own fervent interest in obtaining relief from a death sentence demands that a court treat such serious allegations with skepticism.[30] Finally, Cunningham's "risk assessment" testimony would not have been persuasive if presented to the jury.[31]

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[30] Where the only evidence of a missing witness's testimony is from the petitioner, as here, claims of ineffective assistance of counsel should be viewed with great caution. *Sayre v. Anderson,* 238 F.3d 631, 636 (5th Cir. 2001); *see also Lincecum v. Collins,* 958 F.2d 1271, 1280 (5th Cir. 1992) ("[W]e are loathe to accept the self-serving statements of habeas counsel as evidence that other persons were willing and able to testify on [petitioner's] behalf").

[31] Cunningham testified extensively about statistical studies demonstrating that violent offenders, when incarcerated, do not pose a significant risk of future dangerousness. 6 FR 243-63, 280-81. However, such evidence is generally insufficient to demonstrate prejudice because prisons are never completely secure, gangs permeate prison society, and inmates are allowed contact with other prisoners, prison personnel, and the outside world. *Id.* at 284-86; *see also, e.g., United States v. Johnson,* No. 02-C-6998, 2003 WL 1193257, *6 (N.D. Ill. 2003) (rejecting risk assessment testimony from Cunningham as proof of prejudice).

Weighing all of the mitigating evidence – defaulted and non-defaulted – against the aggravating evidence produced at trial, there is not a reasonable probability the jury would have concluded that a death sentence was not appropriate.[32] First, Banks's skin condition was clearly not the deadly and crippling disease he makes it out to be, and there is no real evidence of child abuse.[33] Second, Banks's

[32] Banks takes issue with the lower court's sequential analysis of the mitigating evidence and argues that the court did not weigh the totality of the mitigating evidence. However, Banks's assertion is spurious. The court of appeals correctly cited the controlling standard – "whether there is a reasonable probability . . . the sentencer . . . would have concluded the *balance of aggravating and mitigating circumstances* did not warrant death." PA:A34 (quoting *Strickland,* 466 U.S. at 695) (emphasis added). The court then segregated the elements of Banks's claim in order to deal with the complicated exhaustion issues presented and to address the district court's errors, not to compartmentalize the potential impact of the mitigating evidence. To do otherwise would have rendered the court's opinion incomprehensible. Further, with the exception of the Jefferson claim discussed *infra,* the evidence was necessarily intertwined. Piña's affidavits discuss the allegations contained in Banks's parents' testimony; thus, weighing the mitigating evidence as seen by Piña effectively also weighed Banks's parents' accounts. To the extent Banks suggests that the court should have concluded by globally re-weighing its previous weighing of each element of Banks's claim, he is advancing a legal formalism that is overly semantic.

Finally, it must be pointed out that the "weighing" rejected by this Court in *Williams I* as inadequate barely mentioned the mitigating evidence and relied almost exclusively on the overwhelming aggravating evidence. 529 U.S. at 397-98; *cf. Williams v. Warden,* 487 S.E.2d 194, 199-200 (Va. 1997). Here, the court of appeals did no such thing. In fact, it was the district court that improperly "weighed" the evidence by cumulating the prejudicial effect of Banks's *Brady* and *Strickland* claims. PA:A44-47.

[33] Additionally, there was no evidence of sexual abuse in this case as there was in *Wiggins.* 123 S. Ct. at 2533, 2542. Nor were there

(Continued on following page)

low intelligence and his father's alcoholism do not significantly mitigate his conduct, *i.e.,* reduce his moral blameworthiness for his terrible crime, because many individuals do *not* commit capital murder despite sharing similar backgrounds. Third, there is no evidence that Banks was manipulated or controlled by a third party because of his low intelligence, thereby reducing his culpability. Finally, Banks's cold-blooded, execution-style murder of Whitehead in order to steal his vehicle was unnecessary, unprovoked, and completely unjustified. Consequently, the balance of aggravating and mitigating evidence does not suggest a reasonable probability Banks would have been sentenced to life rather than death but for trial counsel's allegedly deficient performance.

2. Banks fails to show deficiency or prejudice with regard to Jefferson's testimony.

As discussed *supra,* Jefferson's trial testimony that Banks was the aggressor in the pistol-whipping incident was confirmed by Banks himself. Banks admitted that he struck Jefferson in the face and threatened to kill him without once attributing the blame for the altercation to Jefferson. JA:136. Further, Jefferson signed a police statement on the night of the pistol-whipping without admitting his purported culpability. 6 FR 169-70. Apparently, Banks argues that trial counsel was ineffective for

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"extensive records graphically describing [a] nightmarish childhood" of abuse and neglect. *Williams I,* 529 U.S. at 395 & n. 19.

failing to suborn perjury at trial by convincing not only Jefferson, but Banks himself, to alter their stories.

Banks's theory is contrary to this Court's settled precedent. In *Nix v. Whiteside,* the Court held that trial counsel had no "reasonable professional" duty to present false evidence. 475 U.S. 157, 166-171 (1986). Similarly, "as a matter of law," such a claim cannot establish prejudice under *Strickland. Id.* at 175. In any event, the court of appeals correctly denied relief because Banks already "*admitted* he hit Jefferson with a gun and *threatened to kill him.*" PA:A43 (emphasis in original). Thus, the only difference between Jefferson's new version of events and the one presented at trial was that Banks pistol-whipped him "in response" to Jefferson's prior threat to "whoop [Banks's] ass." PA:A43. Because Banks's violent reaction was "far from a proportional response to verbal threats of a non-lethal nature," there was no reasonable probability the jury would not have found Banks to be a future danger. PA:A43-44.

III. The Court of Appeals Correctly Determined That FED. R. CIV. P. 15(b) Does Not Excuse Banks's Failure to Timely Raise His Cook Transcript Claim; in Any Event, the Claim Is Entirely Without Merit.

Banks's final contention is that the lower court erred when it declined to grant a COA to review the district court's refusal to consider the Cook transcript claim first articulated in Banks's proposed findings of fact and

conclusions of law.[34] Specifically, Banks argues that the generic *Brady* allegation contained his initial federal habeas petition provided "adequate notice" of the Cook transcript claim or, alternatively, that the issue was tried by "implied consent" pursuant to Rule 15(b) because the Director did not object to the admission of the Cook transcript during the evidentiary hearing. However, this Court should affirm the lower court's denial of a COA because Banks does not prove that his Rule 15(b) issue – or the underlying substantive claim – is debatable among jurists of reason.[35]

A. The court below properly found that it is not debatable whether the Cook transcript claim was tried by consent as contemplated by Rule 15(b).

The court of appeals held Banks's federal habeas petition "did not state a *Brady* claim concerning the [Cook]

[34] A copy of Cook's transcript is provided as a Joint Lodging and is referred to herein as "JA" followed by page numbers.

[35] Banks's right to appeal this issue is governed by the COA requirement of 28 U.S.C. § 2253(c). *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). To satisfy this requirement, Banks is obligated to make a substantial showing of the denial of a constitutional right, *i.e.,* "reasonable jurists could debate whether (or, for that matter, agree that)" the district court should have resolved the claims in a different manner, "or that the questions are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 123 S. Ct. 1029, 1039 (2003) (quoting *Slack,* 529 U.S. at 483-84); *Barefoot v. Estelle,* 463 U.S. 880, 893 n. 4 (1983). Moreover, because the district court denied Banks's claim on procedural grounds, Banks must show both that "jurists of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484 (emphasis added).

transcript, because Banks did not learn of it until *three years after* it was filed." PA:A52 (emphasis in original). This conclusion is not debatable. Banks's petition alleged merely that the prosecution violated *Brady* by suppressing "information that pointed to another suspect in the murder, information that linked prosecution witness Charles Cook to Robert Farr and to Texarkana generally, and information that would have revealed Robert Farr as a police informant and Mr. Bank'[s] arrest as a 'set-up.'" JA:259-60. Banks's claim concerning Cook explicitly focused on an alleged testimonial deal. JA:259-60.[36]

The Cook transcript was provided to Banks pursuant to a scheduling and discovery order issued three years later. 2 FR 620-21. However, the district court did not recognize the existence of a distinct *Brady* claim based thereupon in its order defining the issues for the evidentiary hearing, JA:340-45, and Banks did not seek to expand the scope of the hearing to include any such allegation even after he acknowledged receipt of the Cook transcript.[37] 3 FR 697-702. Thus, the Director could not have objected on the basis of surprise or expansion of the

[36] Banks's attempt to broaden his original allegation by suggesting that his claims were "by no means limited to" those explicitly asserted is disingenuous. *Cf.* JA:257. The cited catchall provision is followed by a litany of prosecutorial misconduct claims concerning inflammatory and improper argument and cannot reasonably be said to have put the Director on notice that Banks's Cook claim was not limited to allegations of a suppressed testimonial deal. JA:257-59.

[37] In fact, Banks's acknowledgment is a single sentence in a discovery motion which accuses the Director of withholding the evidence Banks was really seeking: confirmation of Farr's paid informant status and Cook's testimonial deal. 3 FR 699-700.

issues, as Banks suggests.[38] Although the Cook transcript was discussed and admitted into evidence at the evidentiary hearing, Banks never indicated that it might support a distinct suppression claim. *Cf.* 6 FR 8. Rather, Banks first raised the Cook transcript claim in his proposed findings of fact and conclusions of law and objections to the magistrate's report and recommendation. JA:369-70, 373-74, 378-80, 397-98. Banks then asserted the claim in a motion to alter or amend, JA:404-05, which the Director opposed, JA:407-11, and the district court refused to consider the issue because it was not properly before the court. JA:421-23.

The court of appeals held Banks should have sought leave of court to amend his petition with the claim as required by Rule 15(a). PA:A52 (citing *United States v. Armstrong,* 951 F.2d 626, 630 (5th Cir. 1992)). The court also noted that Banks cited no authority for applying Rule 15(b), which allows issues not raised by the pleadings to be tried by express or implied consent, to a federal habeas proceeding.[39] PA:A50-52. This ruling is not debatable among jurists of reason. Initially, the record reveals

[38] The Director already objected to discovery and a hearing on the basis of *Tamayo-Reyes* and the exhaustion doctrine. 2 FR 560-82. The Director re-urged the same global objection at the commencement of the hearing itself. 6 FR 9-10.

[39] In fact, contrary to Banks's representations he never mentioned Rule 15(b) or trial by consent to the district court. JA:397-98, 404-05. Rather, he raised his Rule 15(b) argument for the first time in the Fifth Circuit. As a result, the district court never "held these provisions inapplicable" or "categorically barr[ed] the application of Rule 15(b) to habeas corpus." Because the district court was never afforded an opportunity to consider whether Rule 15(b) might apply, the argument is not properly before this Court. *Beck,* 369 U.S. at 550-54.

"neither thought, word, nor deed . . . that could be taken as any sort of consent to the determination of an independent due process claim" based on the Cook transcript. *Withrow v. Williams,* 507 U.S. 680, 696 (1993). Moreover, the implied consent provision of Rule 15(b) is not appropriately applied to federal habeas proceedings.

First, as Banks concedes, the federal rules apply only "to the extent they are not inconsistent with" the more specific habeas rules and statutes. *Hilton v. Braunskill,* 481 U.S. 770, 776 n. 5 (1987); *Browder v. Dir., Dep't of Corr. of Illinois,* 434 U.S. 257, 267-69 (1978); 28 U.S.C. § 2254 Rule 11. Yet an implied consent rule *is* inconsistent with habeas practice. *See, e.g.,* 28 U.S.C. § 2254 Rule 5 (requiring respondent to explicitly answer with statement on exhaustion). The federal courts have consistently refused to honor waivers of legal or factual exhaustion unless expressly articulated or unless lack of exhaustion is not raised. *See, e.g., Thompson v. Wainwright,* 714 F.2d 1495, 1501 (11th Cir. 1983); *Brown v. Estelle,* 701 F.2d 494, 495-96 (5th Cir. 1983). This refusal reflects the important policy considerations of comity and federalism embodied in the exhaustion doctrine. Here, the Director strenuously objected to adjudication of any unexhausted claims and to further factual development of Banks's claims in federal court. Such objections would necessarily include Banks's formulation of a brand new claim based on previously unavailable facts, unless expressly excepted.

Second, while federal habeas proceedings are civil in nature, "the label is gross and inexact," and the federal rules "have very limited application." *Harris v. Nelson,* 394 U.S. 286, 293-95 (1969). Thus, broad discovery rules do not apply unless a heightened pleading standard is satisfied. *Id.* at 295. A jury trial is not available; the rules of evidence are

also relaxed during federal habeas proceedings and affidavits are routinely considered. *Stone v. Powell,* 428 U.S. 465, 493 (1976). Therefore, notwithstanding the *dicta* of *Harris,* 394 U.S. at 294 n. 5, the policy interests embodied in the exhaustion doctrine and the practical differences between civil trials and habeas proceedings dictate that Rule 15(b) should not apply in habeas cases, insofar as Banks wishes to wield the implied consent doctrine against the Director.

Nevertheless, even if implied consent could excuse Banks's failure to timely amend his pleadings, his reliance on *Roell v. Withrow,* 123 S. Ct. 1696 (2003), is misplaced. Here, the Director did not "stand silently" and fail to object when the court indicated that consent had been given. *Id.* at 1700 & n. 1. In fact, neither the magistrate nor the district court believed that the Cook transcript claim was raised at all. Similarly, Banks's citation to a laundry list of non-habeas cases is unhelpful, because implied consent under Rule 15(b) does not exist where the opposing party and the court are not on notice that a new claim is being raised. *Mongrue v. Monsanto Co.,* 249 F.3d 422, 427 (5th Cir. 2001).

> Recognition of whether an unpleaded issue has entered the case at trial depends on whether the evidence supporting the issue is also relevant to another issue in the case. If the evidence overlaps in this fashion, it does not equate to implied consent absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.

Portis v. First Nat. Bank of New Albany, Miss., 34 F.3d 325, 332 (5th Cir. 1994) (internal citations and quotations omitted); *see also, e.g., Douglas v. Owens,* 50 F.3d 1226,

1236 (3d Cir. 1995); *In re Acequia, Inc.,* 34 F.3d 800, 814 (9th Cir. 1994); *Gamma-10 Plastics v. Am. President Lines,* 32 F.3d 1244, 1256 (8th Cir. 1994); *Yellow Freight Sys., Inc. v. Martin,* 954 F.2d 353, 358 (6th Cir. 1992). The Cook transcript was also relevant to Banks's claims that the State suppressed evidence of a testimonial deal and that Cook, not Banks, killed Whitehead. JA:259-60. Thus, because the first clear indication Banks was trying to raise a new issue did not occur until he filed his proposed findings of fact and conclusions of law, there was insufficient notice to support a finding of implied consent, and COA was appropriately denied.

B. Nevertheless, it is not debatable that the Cook transcript is not material to Banks's guilt of capital murder within the meaning of *Brady.*

In order to show that the court of appeals erred in denying a COA as to the Cook transcript claim, Banks must also demonstrate that the merits of the claim are debatable among reasonable jurists. *Slack,* 529 U.S. at 484. The Cook transcript is material only if there is a reasonable probability that, had it been disclosed to the defense at trial, the result of the proceeding would have been different.[40] *Bagley,* 473 U.S. at 682. However, even when the numerous impeachment arguments advanced by Banks are considered in their entirety, the State's case against Banks is not undermined.

[40] Banks continually misrepresents the Cook transcript to contain seventy-four pages, despite the fact that it contains only thirty-eight pages and sixteen duplicates.

First, Cook's original April 1980 statement suggests that Banks asked to take a bath to wash blood from his leg, not that Cook spotted the blood after Banks changed clothes. JA:445-46. The Cook transcript and the trial testimony reveal that Cook saw the blood *before* Banks changed clothes. JA:44-45; JL: 5-6. Thus, only the April statement, which was disclosed at trial, 9 SF 2312, had any impeachment value regarding when and how Cook first knew that Banks had blood on his clothing.[41]

Second, Cook's April statement indicated that he first saw Banks's gun in his jacket on Saturday night but does not reveal when Cook took the pistol from Banks. JA:447. During the pretrial interview, Cook related that he *confiscated* Banks's gun on Sunday night, but that he first spotted the gun on Saturday morning. JL:11-12. When questioned about this inconsistency, Cook admitted that he may have omitted a few details when he wrote out his April statement, and confirmed that he saw the pistol both Saturday morning in the car and Saturday night in Banks's jacket pocket. JL:27-28. As Banks correctly notes, Cook testified at trial that he first noticed the gun

[41] Banks's reference to "the way this statement should read" is taken out of context. During the pretrial interview, the assistant district attorney simulated cross-examination when asking Cook about his original statement, suggesting "they are going to rake you over the coals" about the inconsistencies therein. JL:24. Cook admitted that he wrote his April statement himself (a fact that is reflected by the statement's grammar and syntax), and that at the time he "was a little scared" and "thinking too fast." JL:26. The interviewer's comment taken in context – "your statement doesn't make any sense. What you told me before does make sense" – does not suggest that the State was attempting to change Cook's testimony. JL:24. It only indicates that the interviewer was responsibly trying to determine which portions of Cook's April statement needed clarification or more detail.

on Saturday night. JA:49. Cook also stated that he took Banks's gun on Sunday night. JA:51 Thus, the only inconsistency between Cook's three accounts is that, in his pretrial interview, he claimed to have seen Banks's gun on Saturday morning. However, this does not impugn the fact that Cook confiscated Banks's gun and that the gun was indeed the murder weapon, and it does not undermine confidence in the jury's guilty verdict.

Third, the inconsistency between Cook's April statement and the pretrial interview concerning what street he abandoned Whitehead's car on and whether he left the keys in the ignition or under the seat is not remotely material. JA:448; JL:12-13, 30. Fourth, both Cook and Bennie Jones testified at trial that Cook sold him Banks's pistol, a tool box, and a set of jumper cables. JA:54-55; 10 SF 2349-50. The Cook transcript is consistent but adds the fact that Banks sold the radio and a case of oil from the car. JL:13-14, 30. It is only the disclosed April statement, which suggests that Cook sold the radio to Jones, JA:448, that is in conflict with the trial testimony. Thus, the transcript has no impeachment value because no one testified at trial that Banks did *not* sell the car's radio, and it cannot be said to be material.

Fifth, while the April statement does not mention the visit to a friend's house on Saturday morning, it does state that between visiting Cook's grandmother and sister, Banks and Cook "went riding to West Dallas to visit a few friends." JA:445. The Cook transcript reveals that Banks actually entered the house of one of Cook's friends and Cook testified at trial that they visited a friend's house. JA:45; JL:5-6, 25-26. There is no material impeachment value to this insignificant distinction. Finally, the April statement discloses that Banks killed Whitehead and took

his car to Dallas "just for the hell of it." JA:447. The transcript states that Banks wanted the car and Cook testified at trial that Banks decided to kill Whitehead "for the hell of it and take his car and come to Dallas." JA:48; JL:8. Once again, there is no real difference between either statement and Cook's trial testimony.[42]

As demonstrated, the Cook transcript contains no significant impeachment material. Moreover, the argument that trial counsel could have suggested to the jury that Cook's testimony was "coached" or "rehearsed" is unavailing. Cook's testimony is entirely consistent with his April statement on all important matters. Further, Cook was already impeached with his criminal record, drug use, and a pending arson charge. JA:59-63. As a result, confronting Cook with minor inconsistencies such as where he left the car keys and when he first saw Banks's gun would not have made a difference in the jury's guilt determination. Indeed, reasonable jurists could not debate that these matters neither undermine confidence in the verdict nor establish a reasonable probability of a different result. Therefore, the court of appeals properly denied a COA.

[42] Contrary to Banks's innuendo, when the interviewer asked Cook whether he realized his April statement was different than "what you told me before," he was asking about when Cook first saw Banks's pistol and why he did not mention Patricia Hicks earlier. JL:27-28.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed in all respects.

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