No. _____

In The
Supreme Court of the United States

DELMA BANKS,

Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2004, after determining that prosecutors "withheld evidence that would have allowed [Petitioner] Banks to discredit two essential prosecution witnesses," *Banks v. Dretke*, 540 U.S. 668, 675 (2004), and finding a *Brady* violation regarding a penalty-phase witness, this Court vacated Delma Banks' death sentence. Further, the Court unanimously granted a certificate of appealability with regard to a *Brady* issue concerning another witness, whose testimony was crucial to the guilt phase of trial, and directed the lower courts to review whether a new trial was warranted. On remand, the district court found the prosecution's suppression of critical impeachment evidence was material. However, a sharply divided Fifth Circuit panel misread the record, misapplied governing precedent from this Court, and overturned the district court's grant of relief. Banks now seeks review of the following question:

1. Did the panel majority err in reversing the district court's finding that Banks had shown a meritorious *Brady* claim where:

a. this Court has determined already that the prosecution's suppression of a pretrial statement prevented the defense from discrediting the prosecution's key guilt-phase witness;

QUESTION PRESENTED – Continued

b. the prosecutors acted deliberately, did not correct three perjurious statements by this witness, and urged jurors to find all of this witness' testimony truthful; and

c. the prosecution also suppressed another important witness' paid informant status, and failed to correct his false statements as well, revealing a pattern of deliberate misconduct by state officials in this capital case?

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PETITION FOR WRIT OF CERTIORARI

Delma Banks ("Banks") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The September 18, 2009 opinion of the Court of Appeals is reported at 583 F.3d 295 and reprinted in the appendix to this petition ("App.") at 1-121. The decision of the United States District Court for the Eastern District of Texas is reported at 2008 WL 906716 and reprinted at App. 122-38. The report and recommendation of the magistrate judge is found at 2006 WL 4914890 and reprinted at App. 139-57.

JURISDICTION

The Court of Appeals entered its judgment September 18, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves a state criminal defendant's constitutional right to due process under the Fourteenth Amendment, which provides in relevant part:

" . . . nor shall any State deprive any person or life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Introduction

For a second time, Delma Banks seeks this Court's intervention to review the purposeful suppression of important impeachment evidence concerning the prosecution's key witness. In 2004, after examining the record, this Court recognized that "the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses," and "furthermore, [the prosecutors] . . . raised no red flag when [one] testified, untruthfully, that he never gave the police any statement, . . . [and] allowed the other key witness to convey, untruthfully, that his testimony was entirely unrehearsed." *Banks v. Dretke*, 540 U.S. 668, 675 (2004). The Court reversed Banks' death sentence based on the prosecution's violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and unanimously remanded a guilt-phase *Brady* claim. *Banks*, 540 U.S. at 703, 705-06.

On remand, the district court held that the prosecution's suppression of impeachment evidence concerning its linchpin guilt-phase witness undermined confidence in Banks' capital murder conviction. *Banks v. Quarterman,* 2008 WL 906716 (E.D. Tex. 2008).

A sharply-split Fifth Circuit panel overturned the district court's decision. *Banks v. Thaler*, 583 F.3d 295 (5th Cir. 2009). The majority denied relief by concluding this Court's 2004 opinion misapprehended the record. The majority's decision is plainly inconsistent with this Court's *Brady* materiality jurisprudence and with the law of other circuits. The dissent faithfully applied governing law and determined that the district court was correct in concluding Banks was denied a fundamentally fair trial.

B. The Crime and Its Investigation

The body of sixteen-year-old Richard Whitehead was found on Monday morning, April 14, 1980 in a small park in Bowie County, Texas. Whitehead had been shot three times. SR 9/2169; 10/2389.[1]

Bowie County Deputy Sheriff Willie Huff took control of the investigation. He learned that Banks had spent time with Whitehead the evening of April 11, but developed no information tying Banks to Whitehead's murder until he contacted Robert Farr. Huff threatened to prosecute Farr for drug use and promised to pay for his assistance in securing Banks' conviction. FR 2/598 Ex.2.

Farr then spoke to Banks repeatedly, requesting Banks' help getting a gun. At first, Banks refused, but

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[1] Record citations are to "SR" (state trial record), "SHR" (state habeas record), or "FR" (federal record) [volume]/[page].

Farr persisted. *Id.* On April 23, 1980, Huff and other law enforcement officers followed a car with Farr, Banks, and Marcus Jefferson to a south Dallas house. SR 9/2230. Banks went to the front door and returned with a small object. SR 9/2246. Shortly thereafter, police stopped the trio, seized a .22 caliber pistol, and arrested Banks.

Huff and other officers returned to the south Dallas house before dawn and confronted occupant Charles Cook. SR 9/2306. Police took Cook to the police station where he gave a statement, which he supplemented later that morning (herein "April Statement"), *available at* FR 3/702 (exhibit at 29-31). In the Statement, Cook claimed he met Banks on April 12, and Banks later told him he shot a "white boy" near Texarkana "just for the hell of it," and drove the victim's car to Dallas. April Statement at 1-2.

Banks, who had no prior record, was charged with capital murder. He pleaded not guilty and denied any involvement in Whitehead's death.

C. Preparing for Trial

Trial prosecutors faced numerous challenges. They possessed no custodial confession, nor any eye-witness. Whitehead's watch and money had not been stolen, undercutting prosecutors' robbery theory. Prosecutors could not account for Whitehead's car, the sole item they would ask the jury to find stolen.

But their most daunting challenge was to neutralize the very serious credibility problems of their key witness. While they planned to call a dozen or so witnesses during the guilt phase, nearly all were bit players compared to Charles Cook. Cook alone claimed that Banks had confessed to killing someone and stealing the victim's car.

There were good reasons to wonder whether jurors would believe Cook. He was a drug user and twice convicted felon facing a habitual offender prosecution for arson in Dallas.

Just before trial, the prosecution took Cook through at least one comprehensive rehearsal of his trial testimony. His performance, which was recorded in a transcript ("Rehearsal Transcript" or "Transcript"), *available at* FR 3/702 (exhibit), was not encouraging. Cook could not keep his narrative consistent with his April Statement. A prosecutor repeatedly criticized his answers and instructed him how he should testify. Moreover, Cook acknowledged that he was terrified he would be locked up when he made the April Statement implicating Banks, and that police officers had supplied him key information about the case.

D. Trial Proceedings

In his opening statement to the all-white jury, District Attorney Louis Raffaelli informed jurors: "Charles Cook is a very important witness for two reasons. First, because Delma Banks admitted to

Charles Cook that he killed Richard Wayne Whitehead and robbed him of his automobile. Second, because Delma Banks left the murder weapon and the stolen vehicle with Charles Cook." SR 9/2128. Raffaelli further emphasized, "I think the testimony of Charles Cook is critical, and I think that you will look at it and you will fully be able to see the complete picture of what occurred." SR 9/2129.

Patricia Hicks and Patricia Bungardt were the prosecution's first witnesses. Each testified she spent time with Whitehead and Banks on Friday evening, April 11. Hicks and Bungardt recalled that Whitehead's car was not functioning properly, and required jump-starting. Neither reported any animosity between Banks and Whitehead. SR 9/2142-48, 2153-55.

Mike Fisher then testified that he was sleeping in a house near the park where Whitehead's body was found, and was awakened by "two sounds" around 4:00 a.m. on Saturday, April 12. SR 9/2158. Next, Larry Whitehead, Richard Whitehead's father, described his son's car, SR 9/2162, and Deputy Huff described pictures taken at and evidence removed from the crime scene, SR 9/2182-89, 2193-98. Huff also described following Robert Farr, Banks, and Marcus Jefferson to Dallas late in the evening of April 23. SR 9/2230-33, 2246-48. Neither Huff nor the prosecutors informed jurors Farr was a paid informant.

After equivocal testimony from a hesitant Marcus Jefferson, SR 9/2261, 2264-65, Robert Farr took the

stand, described the trip to Dallas, and claimed Banks said his gun was in West Dallas. SR 9/2266-69.

Defense counsel asked Farr, "have you ever taken any money from" police? Farr answered unequivocally "no." SR 9/2274. Asked if the police had promised him anything, Farr answered "no, they have not." *Id.* Asked "what police officers did you talk to about this?", Farr replied, "I have talked to no one about this, outside of when they called us down referring to the case." SR 9/2276-77.

All of these answers were false; prosecutors corrected none of them.

Charles Cook followed Farr. After being led through his criminal history and pending arson charge, SR 9/2282-84, he described meeting Banks on a Saturday when Banks drove up in a Mustang as Cook and his wife were waiting for the bus. They spoke briefly, and he and Banks drove Cook's wife to work. Afterwards, Cook said he noticed blood on Banks' right leg, and Banks told him he shot a "white boy" on the highway. SR 9/2288-89.

Cook testified they then visited Cook's sister Carol, and after dinner, Cook put Banks in a small bedroom. He then noticed that Banks was sitting "on the bed with his head down." Cook asked Banks what was wrong, and Banks changed his earlier story and said he had been drinking beer with a white male in the woods, and "he decided to kill the white boy for the hell of it and take his car and come to Dallas." SR 9/2294-95. Cook said he then noticed, for the first

time, that Banks had a gun, which he identified as the .25 caliber pistol presented by the State. Cook claimed he waited until the next evening to confiscate the gun from Banks. SR 9/2296-2300.

According to Cook, Banks stayed with him until Monday evening, when Banks boarded a bus to Texarkana. The following morning, Cook allegedly abandoned the car on a street in West Dallas, and that evening sold his neighbor Jones the pistol. SR 9/2302-05.

Cook further testified that, two weeks later, law enforcement officials showed up at his house between 3:30 and 4:00 a.m., looking for Banks' pistol, which he retrieved from Jones. Cook said Banks had returned to Cook's house not long before the police, and asked for his pistol. SR 9/2306-09.

Before beginning cross-examination, defense counsel requested prior statements from Cook to investigators. SR 9/2312. Prosecutors possessed at least two such statements: Cook's April Statement and the September Rehearsal Transcript. Prosecutors chose to disclose the April Statement but *not* the Rehearsal Transcript. FR 6/45-47.

Immediately, counsel sought to impeach Cook. His first questions probed how Cook had prepared for his testimony:

> 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 anybody?

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.

Q. Mr. Cook?

A. Yes, sir.

SR 9/2314.

The undisclosed Rehearsal Transcript demonstrates that all of these answers were untruthful. Prosecutors made no effort to correct them.

Instead, on redirect, the prosecution asked Cook if his testimony was the truth. Cook replied:

A. Nothing but the truth.

Q. Complete truth?

A. Yes, sir.

SR 9/2327.

Following Cook, his wife (Ida Marie Cook), sister (Carol Cook), and grandfather (Bennie Whiteurs), and Cook's neighbor Jones, testified that they met Banks in Dallas. SR 10/2339, 2351, 2356, 2364. Ida Marie Cook and Carol Cook stated that Banks was driving a Mustang. SR 10/2340, 2364. Jones identified the .25 Galesi pistol as a gun he had purchased from, and later returned to, Cook. SR 10/2353. Phone

company employee Lou Ann Hamby was called to identify records which showed one collect phone call from the Cook residence to Banks' Texarkana residence. SR 10/2371.

Pathologist Vincent DiMaio testified that he performed an autopsy on Richard Whitehead, and determined he died from one of three gunshot wounds. SR 10/2389-90. (As noted, Mike Fisher testified he heard two sounds the night of April 12.) DiMaio was not asked to determine a time of death. Firearms examiner Allen Jones summarily testified it was his opinion that the .25 caliber Galesi pistol fired the bullets and cartridge cases recovered from the scene. SR 10/2412.

The State rested, and the defense presented no evidence.

Closing arguments focused principally upon whether prosecution witnesses were credible, particularly Charles Cook. Assistant District Attorney James Elliott acknowledged that Cook "looked nervous, and he bit his lips and licked his lips," SR 10/2452, but repeatedly urged jurors to conclude that Cook had been entirely truthful. Elliott told jurors:

> "Now Charles Cook didn't hide anything from you." SR 10/2450.
>
> "He didn't hide a thing from you, . . . " *Id.*
>
> "Charles Cook brought you absolute truth." *Id.*

> "[Defense counsel] pointed his finger at him in numerous ways, but Charles Cook did not budge from the truth, and that's ample evidence that Cook is telling the truth." SR 10/2453.

Elliott also assured jurors that not only did "Charles Cook [not] hide anything from you, [w]e [the prosecution] didn't hide anything with regard to any of these witnesses." *Id.*

Defense counsel likewise repeatedly emphasized Cook's importance, urging jurors to recognize that the prosecution's case depended "on the word of Charles . . . Cook," and that "[t]he word of [Cook] should raise a reasonable doubt in anybody's mind." SR 10/2465, 2469. Counsel reminded jurors that the prosecution also believed its case against Banks rested squarely on Cook's shoulders. "The State, as Mr. Raffaelli told you in its opening statement, the testimony of [Cook] is vital. It's vital. . . . Only thing they've got is [Cook's] uncorroborated statement. That's all they've got. That car need[ed] to be recovered so that that thing could have been dusted and printed, but it hasn't been." SR 10/2471.

At 11:00 p.m., after three hours of deliberation, the jury convicted Banks of capital murder. SR 10/2484-85.

E. Postconviction Proceedings

After exhausting state remedies, Banks sought federal habeas review. In January 1999, Banks filed

declarations from five State witnesses which, Banks asserted, left "little doubt that state misconduct deprived the jury of critical material concerning Mr. Cook and Mr. Farr's credibility." FR 2/606. Cook's declaration stated, *inter alia*, that important portions of his testimony were false. Specifically, Cook denied that Banks had confessed to him and asserted he had been pressured to give such testimony. FR 2/598 Ex.1. Farr explained he cooperated with Huff only after Huff threatened him with prosecution, and that Huff paid him $200. *Id.* Ex.2. Farr and Marcus Jefferson both stated that, contrary to Farr's penalty-phase testimony, it was Farr's idea, not Banks', to drive to Dallas to obtain a pistol. *Id.* Exs.2, 4. Carol Cook stated Huff had threatened her brother and demanded that she identify the car she saw Banks and Cook driving as green rather than red. *Id.* Ex.3. Vetrano Jefferson, a penalty-phase witness, said that Huff had pushed him very hard to identify the .25 Galesi as Banks' gun. Jefferson told Huff he knew what Banks' gun, a .22 caliber, looked like, and the .25 was not Banks'. *Id.* Ex.5.

These declarations led the magistrate judge to order limited discovery, FR 2/621, and, nearly two decades after it was produced, the State finally disclosed the Rehearsal Transcript.

At a subsequent hearing, each of the five declarants testified consistently with their declarations. In addition, prosecutor Elliott confirmed: (1) Raffaelli possessed the Rehearsal Transcript during the trial but never disclosed it, FR 6/45 and (2) the

handwriting that was on Transcript pages was Raffaelli's. *Id.* Huff testified he persuaded Farr to assist in the investigation and paid him $200. FR 6/87-89.

Additional evidence demonstrated that the prosecution's critical timeline—that Banks shot Whitehead on April 12 at roughly 4:00 a.m. and appeared 175 miles away in Dallas by 8:30 a.m.—was highly doubtful. Huff's investigation showed Whitehead's car required repeated jump-starts on April 11 and, when Whitehead, Banks, and Patricia Hicks were driving that night, "when [the car] would run for a while, the headlights would get dim and they would have to pull off, turn the light off and race the motor to get the battery charged back up." Examining Trial, 5/21/80, *available at Banks v. Dretke*, No. 02-8286, Joint Appendix at 11-14. In state postconviction proceedings, a mechanic testified by affidavit that, based on this evidence, it was highly unlikely the car could have made it from Texarkana to Dallas without significant repair (unavailable at 4:00 a.m. on April 12). *See id.* at 212-13; SHR 2/149. Then, at the federal hearing, Mike Fisher testified the two noises he heard that night "[c]ould have been anything." FR 6/204. And LeRoy Riddick, a noted forensic pathologist and then Medical Examiner for the State of Alabama, testified that Dr. DiMaio's thorough autopsy report contained a host of findings strongly suggesting that Whitehead was not killed until late in the evening of April 12 (when Banks was already

in Dallas), or more likely during the early morning hours of April 13. FR 6/185-88.

Banks' post-hearing briefs argued the suppression of the Rehearing Transcript deprived Banks of a fundamentally fair trial. The magistrate judge did not adjudicate this issue and the district court found no error. The Court of Appeals denied Banks' request for a certificate of appealability (COA) on whether this claim had been tried by consent pursuant to Federal Rule of Civil Procedure 15(b).

This Court granted certiorari, and unanimously determined that a COA should have issued concerning whether Rule 15(b) applies to habeas cases such as this one, filed before the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Banks*, 540 U.S. at 705. The Court remanded this issue. Moreover, in a part of the opinion joined by seven Justices, the Court quoted extensively from the Rehearsal Transcript and concluded the Transcript showed prosecutors had intensively coached Cook and failed to correct Cook's perjured statements to the jury. *Id.* at 675, 685.

F. Remand Proceedings

The Fifth Circuit panel thereafter determined that Rule 15(b) applies to pre-AEDPA habeas cases, and remanded for the district court to determine (1) whether the Cook Rehearsal Transcript claim was tried by implied consent, and, if so, (2) whether the

claim was meritorious. *Banks v. Dretke*, 383 F.3d 272, 281 (5th Cir. 2004).

After this remand, the magistrate judge, district court and Fifth Circuit panel all found that the claim had been litigated by consent at the 1999 evidentiary hearing, and that the Transcript had been suppressed and was favorable to Banks. They split only on the question of materiality.

The district court, disagreeing with the magistrate judge, held the prosecution's suppression of the Rehearsal Transcript was material, noting: (1) Cook's testimony was uncorroborated and central to the prosecution's guilt-phase case; (2) "Cook misrepresented the fact that he had been coached, and the prosecution improperly relied upon that misrepresentation"; and (3) "Cook substantially altered his testimony in response to [prosecution] coaching . . . " App. 129. The court granted habeas relief, and the State appealed.

A two-judge majority reversed. In dissent, Judge Dennis concluded the majority fundamentally misapplied this Court's materiality jurisprudence.

REASONS FOR GRANTING THE WRIT

Even though the record clearly shows prosecutors deliberately withheld evidence discrediting their key witness, and repeatedly misrepresented the credibility of this witness and another important witness,

the panel majority overturned the district court's reasoned decision that a new trial is warranted.

The panel majority could reach this result only by: (1) disregarding this Court's conclusions concerning the same evidence; (2) cherry-picking record evidence; (3) effectively applying a sufficiency-of-evidence approach instead of the "reasonable probability of a different verdict" test mandated by this Court's controlling cases; (4) preempting credibility questions that should be resolved by a jury; (5) failing to apply clearly erroneous review to the district court's factual findings; and (6) failing to address significant arguments made by Banks.

As a result, the law of the Fifth Circuit is now contrary to this Court's precedent concerning what is required for a habeas petitioner to show the prosecution's purposeful suppression of favorable evidence and vouching for false testimony deprived him of a fair trial. The law of the Fifth Circuit on this important issue is also now contrary to the law of numerous other circuits. For these reasons, Banks respectfully submits that certiorari review is warranted pursuant to this Court's Rules 10(a) and 10(c).

ARGUMENT

Certiorari Should Be Granted To Confirm That The *Brady* Materiality Standard Is Satisfied When The Prosecution Purposefully Suppresses Evidence Discrediting Its Linchpin Witness

Suppressed evidence is material when there exists a "'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The question is not whether it is more likely than not the suppressed evidence would have affected the outcome, but whether the suppression deprived the petitioner of a "fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434; *see also Banks*, 540 U.S. at 698 (discussing *Kyles*). When suppressed evidence seriously undermines the credibility of a witness whose testimony provided principal support for guilt or punishment, the suppression is material. *See, e.g.*, *Banks*, 540 U.S. at 700-03; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

When this Court reviewed this case in 2004, the parties vigorously contested the Rehearsal Transcript's materiality. *Compare, e.g.*, Brief of Petitioner in *Banks v. Dretke*, No. 02-8286 at 14-15, 43-50 *with* Brief of Respondent at 46-49. After considering these arguments and examining the record, this Court

determined that Charles Cook was an "essential prosecution witness[]," and that the Rehearsal Transcript "would have allowed Banks to discredit" Cook. 540 U.S. at 675; *see also id.* at 685 (quoting and analyzing Rehearsal Transcript).

The Fifth Circuit denied relief by concluding, contrary to these determinations, that (1) Charles Cook was not an essential prosecution witness, *see* App. 40-56, 77-80, and (2) the Rehearsal Transcript would not have discredited Cook, *see* App. 58-73. As Judge Dennis demonstrated, the majority's conclusions are inconsistent with the record.

1. This Court Correctly Recognized that Charles Cook Was an Essential Prosecution Witness

Charles Cook's testimony was, as Judge Dennis recognized, "the indispensable centerpiece of the prosecution's guilt-phase case." App. 102. Cook's testimony that Banks confessed that he shot someone and stole the victim's car was the State's only direct evidence on "the two elements of the capital murder charge, *viz.*, murder during robbery." *Id.* Cook was also the only witness to ascribe a motive to Banks. App. 130 (district court opinion). Cook's testimony on all these points was wholly uncorroborated. *Id.*; App. 116-17 (Dennis, J., dissenting).

Moreover, because Cook claimed that Banks confessed to him, Cook's testimony took on special significance. App. 117 (Dennis, J., dissenting). In

Arizona v. Fulminante, 499 U.S. 279, 283-84 (1991), this Court held that the improper introduction of the defendant's purported confession to an informant was not harmless despite a second confession by the defendant and some circumstantial evidence, explaining: "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Id.* at 296 (citation omitted). As Justice Kennedy wrote in concurrence, "[i]f the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case." *Id.* at 313.

The importance of Cook's credibility to the prosecution's case against Banks is confirmed, indeed it is "best understood[,] by taking the word of the prosecutor." *Kyles*, 515 U.S. at 444. As discussed more extensively above, in its opening statement, the prosecution described Cook's testimony as "critical," App. 71, and "[t]he prosecution relied primarily on Cook's testimony . . . in its guilt-phase closing argument," App. 102 (Dennis, J., dissenting); *see also* App. 12 (majority opinion) (recognizing the prosecution's closing argument "focused extensively on Cook's testimony and credibility"). What this Court stated with respect to Robert Farr at the penalty phase is equally true with respect to Charles Cook at the guilt phase: "The stress placed by the prosecution on" Cook's "testimony, uncorroborated by any other

witness, belies the State's suggestion that" Cook's "testimony was adequately corroborated." *Banks*, 540 U.S. at 700.

For his part, although defense counsel failed to subject the State's case to meaningful adversarial testing in numerous respects (among other things, he did not: cross-examine a number of witnesses; present any evidence; visit the crime scene or even find out where it was, *see, e.g.*, SR 9/2173), defense counsel did attempt to discredit Cook. Indeed, as discussed, Cook's credibility was the focus of not only the prosecution's closing, but also of defense counsel's. *See also* App. 72 (decision below).

i. The Panel Majority Misconstrued the Record when Concluding It Contained Overwhelming Evidence of Guilt

The panel majority acknowledged that Cook "was indeed a key witness," App. 79, and even the Director's brief below noted: "[i]t is beyond dispute that Cook's trial testimony was crucial." Brief of Respondent-Appellant at 50. Nonetheless, the Fifth Circuit concluded that Cook's credibility was not essential to whether Banks received a fair trial. App. 54-56, 77-81. In so holding, the majority first stated that, even without Cook's testimony, there was sufficient evidence to convict. App. 41; *see also id.* at 56. But assuming *arguendo* that is true, this Court has emphasized that "the *Brady* materiality inquiry 'is

not a sufficiency of evidence test.'" *Id.* at 98 (Dennis, J., dissenting) (quoting *Kyles*, 514 U.S. at 434).

The majority also stated that, even without Cook's testimony, the jury heard "overwhelming evidence of Banks' guilt." App. 55. This statement, while relevant to *Brady* materiality, cannot be reconciled with the record. The record instead supports this Court's conclusion that Cook's testimony was essential to the prosecution.

The Fifth Circuit summarized the other evidence presented at Banks' trial, *see* App. 41-55, evidence also discussed *supra*. Much of that evidence does no more than confirm facts uncontested by Banks, namely, he spent time with Richard Whitehead the evening of April 11, and spent the weekend of April 12 with Charles Cook and Cook's family.

Moreover, the majority provided incomplete descriptions of some testimony. For example, Mike Fisher was not certain he heard gunshots, he stated simply that he heard "two sounds that sounded like gunshots," and he "didn't really think about it" when he heard them. SR 9/2158. (This evidence was the sole support for the prosecution's timeline—a tight timeline necessary to its theory of the case but, as noted, one which postconviction evidence seriously undermined.) And Cook's neighbor Bennie Jones did not testify that Banks vaguely suggested he "was in some sort of trouble," App. 50, but rather that Banks said he "broke [someone's] jaw, or something like that," SR 10/2351. As the jury learned during the

penalty phase, in early April 1980, Banks had struck Vetrano Jefferson in the face, SR 10/2493 (the jury did not learn that Jefferson started the fight, as Jefferson confirmed at the habeas hearing, FR 6/166).

The Fifth Circuit further stated that Cook's sister and wife testified that Banks was driving a "distinctive, multi-colored Mustang," which matched the description of Whitehead's vehicle provided by his father, Larry Whitehead. App. 54. In fact, as Judge Dennis recognized, Cook's sister and wife described a similar Mustang, but they did not include the distinctive details described by Larry Whitehead. *Compare* App. 42 *with id.* at 49, 51 (majority opinion); *see id.* at 87 (Dennis, J., dissenting). Most important, the Fifth Circuit failed to acknowledge that Ida Marie Cook and Carol Cook, as Cook's wife and sister, had strong incentives to corroborate Cook's testimony about the car. Ida Marie Cook told jurors she "would do anything to help [her] husband," stay out of prison (he was in jail when he testified). SR 10/2346. At the federal evidentiary hearing, Carol Cook testified she lied about the color of the car because Deputy Huff threatened her brother. FR 6/123-27.

Nor did the majority acknowledge that Cook's testimony about the Mustang was subject to serious doubt. Cook, a convicted felon who regularly used drugs and made roughly $107 a week, testified he did not try to sell the car: he simply abandoned it (though he claimed he sold Banks' pistol, and the battery cables and tool box). SR 9/2303-05, 2315, 2323; 10/2344-45. Cook also told police where he allegedly

abandoned the car. April Statement at 2. Yet, the prosecution presented no evidence of the Mustang at trial, *see* App. 87, 114 (Dennis, J., dissenting)—indeed, the investigative file reveals no efforts by the police even to locate it, *see* FR 3/702 (exhibit).

Finally, the Fifth Circuit asserted evidence other than Cook's testimony established: "in what Banks would apparently have the court believe is mere coincidence—the pistol undisputedly used to kill the victim showed up at. . . . Cook's house . . . 175 miles from the scene of the crime, on exactly the same weekend that Banks did." App. 78; *see also id.* at 55. But the only evidence that the gun in question arrived in Dallas the same weekend as Banks was Cook's testimony; elsewhere, the majority recognized Cook was the only witness who testified Banks was ever in possession of that gun. App. 79. Moreover, as Judge Dennis explained, the prosecution's evidence that this gun was the murder weapon was by no means overwhelming. *See* App. 87. The firearms examiner's entire testimony concerning his tests and conclusions takes up one-and-a-half pages of transcript. SR 9/2411-12. Without any elaboration, Allen Jones summarily stated: "Based on the tests I performed, it is my opinion that the [bullets and spent cartridge cases from the scene] had been fired in the .25 caliber Galesi pistol which Mr. Huff

submitted." SR 9/1412.[2] Jones did not discuss the margin of error in his results or testify in any way about his confidence in his opinion. *Id.* This was the State's only evidence that the pistol produced at trial was the murder weapon.

The majority refused to consider the prosecution's failure to introduce stronger evidence concerning the gun, stating it was "completely beyond the scope of the Cook-transcript *Brady* issue at hand." App. 37. This was error. As Judge Dennis explained, this Court's precedent "requires that the 'materiality' inquiry consider the suppressed evidence in light of the entire record," which necessarily requires "evaluat[ion of] the strength or weakness of the State's other evidence of guilt." App. 114.

ii. The Majority's "Overwhelming Evidence" Conclusion Is Inconsistent with This Court's Precedent and Comparable Circuit Decisions

The Fifth Circuit's assertion that, even without Cook's testimony, there was "overwhelming evidence" that Banks was guilty of capital murder, App. 55, simply cannot be reconciled with the record. For this reason, the majority's reliance on *Strickler v. Greene*, 527 U.S. 263 (1999), was misplaced. *See* App. 54-56,

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[2] Similarly, Jones' written report lists the evidence he received and contains a single conclusory sentence with his opinion. *See* FR 3/702 (exhibit).

82. Indeed, this Court has already distinguished the strength of the untainted evidence in this case from that in *Strickler*. *See* App. 101-02 (Dennis, J., dissenting). In 2004, this Court stated, *inter alia*, "[u]nlike the Banks prosecution, in *Strickler*, 'considerable forensic and other physical evidence linked the defendant to the crime and supported the capital murder conviction.'" *Banks*, 540 U.S. at 701 (citations omitted). In contrast to *Strickler*, *see* 527 U.S. at 267-69, in this case there "was no direct physical evidence, such as fingerprints, hair, blood or other residue linking Banks to the murder weapon, the corpse or the crime scene." App. 87 (Dennis, J., dissenting). Moreover, in *Strickler*, the testimony of the witness who could have been impeached was not important to any element necessary for conviction. *See* 527 U.S. at 292. By contrast, in this case, Cook's testimony was the "only direct evidence" of both elements required for a capital murder conviction (murder in the course of robbery); without it, "the prosecution would have had only inconclusive circumstantial evidence." App. 102 (Dennis, J., dissenting).

Although *Strickler* is inapposite, *Kyles* is on point. In that case, this Court held Kyles' capital murder conviction was unreliable even though "not every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed." 514 U.S. at 451. Indeed, unlike here, in addition to some circumstantial physical evidence, in *Kyles*, direct evidence from two eyewitnesses was unaffected by the suppression. *See id.* at 445, 451-53.

This Court held such evidence, while sufficient to support a conviction, did not establish that Kyles received a fair trial. *Id.* at 453-54. In so holding, the Court explained: "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others. . . ." *Id.* at 445. What was true about the *Kyles* direct evidence is surely true about the inconclusive circumstantial evidence not squarely affected by prosecutorial misconduct here: even assuming the remaining evidence would be sufficient to convict, it is insufficient to establish that Delma Banks received a fair trial.

The decision below is not only inconsistent with *Kyles*—which the majority did not attempt to distinguish—it creates a split between the Fifth Circuit and virtually every other circuit concerning *Brady*'s materiality standard. Since *Kyles*, nine circuits have found suppressed impeachment or exculpatory evidence material where the parts of the prosecution's case unaffected by the suppression were comparable to, or stronger than, here. *See, e.g., Toliver v. McCaughtry*, 539 F.3d 766, 769-70, 778-81 (7th Cir. 2008) (testimony by two eyewitnesses describing petitioner's participation in crime unaffected); *Slutzker v. Johnson*, 393 F.3d 373, 376-78, 386-88 (3d Cir. 2004) ("[s]ignificant evidence showed [petitioner] had been planning to kill [the victim]," and other eyewitnesses supported the State's case); *Castleberry v. Brigano*, 349 F.3d 286, 288, 294 (6th Cir. 2003) (two other witnesses relayed petitioner's inculpatory statements); *Singh v. Prunty*,

142 F.3d 1157, 1158, 1160-61 (9th Cir. 1998) ("The record is replete with circumstantial evidence pointing to [petitioner's] knowledge of and motive for a planned murder of [the victims,]" in a murder-for-hire case); *Clemmons v. Delo*, 124 F.3d 944, 951 (8th Cir. 1997) (unaffected evidence included "extremely damaging eyewitness testimony" by a corrections officer, which was consistent with the physical evidence, and petitioner's admission to another corrections officer); *see also Monroe v. Angelone*, 323 F.3d 286, 302-03, 305-07, 314 (4th Cir. 2003); *Mendez v. Artuz*, 303 F.3d 411 (2d Cir. 2002); *United States v. Scheer*, 168 F.3d 445, 454-57 (11th Cir. 1999); *Banks v. Reynolds*, 54 F.3d 1508, 1512, 1520-22 (10th Cir. 1995).

2. This Court Correctly Recognized that the Rehearsal Transcript Would Have Allowed Banks to Discredit Cook

By suppressing the Rehearsal Transcript, the prosecution prevented the jury from learning three categories of powerful impeachment evidence. The majority below disregarded one of these categories entirely, and badly underestimated the significance of the other two. As a result, it erroneously concluded the Rehearsal Transcript would have had only limited impeachment value, *see* App. 58-73, again reaching a conclusion opposite to this Court, which recognized that the Rehearsal Transcript "would have allowed Banks to discredit" Cook. *Banks*, 540 U.S. at 675.

i. Cook's Repeated, Uncorrected, Vouched-for Perjury

As described, the prosecution three times "allowed [Cook] to convey, untruthfully, that his testimony was entirely unrehearsed," 540 U.S. at 675, even though the lead trial prosecutor had himself reviewed the Rehearsal Transcript and knew Cook had participated in an extensive rehearsal session days before trial, *see* FR 6/45; App. 90-91 (Dennis, J., dissenting). Even worse, because of the purposeful suppression of this Transcript, "[t]he prosecutor in closing argument was able to argue falsely and without fear of contradiction that Cook's entire testimony was the absolute truth." App. 106 (Dennis, J., dissenting); *see also id.* at 91 & n.5; App. 71 (majority opinion); App. 131 (district court opinion).

The Fifth Circuit, however, held the prosecution's sponsorship of Cook's perjury was only marginally significant because, even without the Rehearsal Transcript, Banks' trial counsel contended that Cook's denials that he spoke with anyone were false. *See* App. 61-62. But, because the prosecution suppressed the Rehearsal Transcript, Banks' trial counsel had to argue that Cook meant to deny on cross-examination that he had even an initial conversation with the police. This contention was surely unpersuasive, because Cook testified about his initial contact with the police on direct examination, SR 9/2305-07, 2310, and because counsel's cross-examination questions did not ask Cook whether he had an initial discussion with police, *see* SR 9/2313-14. It was only the

suppressed Rehearsal Transcript which showed that, contrary to Cook's testimony, he had an extensive conversation with law enforcement after his initial contact with the police. *See* App. 105-06 (Dennis, J., dissenting) (recognizing "[t]he jury was ignorant of Cook's three instances of perjury").

ii. Cook's Motive to Lie and Being Supplied Crime Facts

In closing, the prosecution argued there was no evidence that prosecution witnesses had "any reason [to] falsify" their claims about Banks. SR 10/2448. The suppressed Rehearsal Transcript would have belied this argument. It showed that, when Cook gave his initial statement implicating Banks, Cook was "scared" of being "lock[ed] up," and Huff had warned him "we can get you to help us." Rehearsal Transcript at 16, 31; *see also* App. 89 (Dennis, J., dissenting); FR 6/89-91. Cook's motive for inculpating Banks is important: "it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Even though Banks raised this point below, *see* Brief of Petitioner-Appellee at 33, the majority did not address it.

The majority below likewise did not mention another argument Banks raised, *see* Brief of Petitioner-Appellee at 34: by suppressing the Rehearsal Transcript, the prosecution prevented the jury from learning that Cook "admitted . . . that he had been

told before his [initial] statement to police that Banks was wanted for the murder of a white male near Texarkana on April 12, 1980." App. 89 (Dennis, J., dissenting).[3] Yet, it is hornbook law that whether a witness has personal knowledge regarding the matters about which he testifies is for the jury to decide. Weinstein's Federal Evidence §§ 602, 607.04 (2d ed. 2000).

iii. Cook's Multiple Inconsistent Statements and Altered Responses

The Rehearsal Transcript reveals that, days before trial, Cook provided an account of the weekend he spent with Banks that was fundamentally inconsistent both with his initial April Statement and with his subsequent trial testimony about a number of significant facts. Prosecutors repeatedly coached Cook as to how to reconcile his testimony with his April Statement—Cook's only pretrial statement disclosed to the defense.

The Fifth Circuit, however, concluded "the extensive 'coaching' claimed by Banks is simply *not* present." App. 64. In a parenthetical, the majority acknowledged that this Court, "[i]n the introductory paragraphs" of its 2004 opinion, "described Cook's

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[3] The majority only referred to the relevant part of the Transcript as support for its conclusion that, during the rehearsal session, state officials did not engage in improper coaching. App. 67. That point is discussed *infra*.

testimony as 'intensively coached by prosecutors and law enforcement officers.'" *Id.* at 64-65 (quoting *Banks*, 540 U.S. at 675). However, this did not affect the majority's conclusion because: "Obviously, the factual description by the Court is not the law of the case with respect to the Cook-transcript *Brady* claim; the Court's 2004 opinion did *not* address the merits of that claim." *Id.* at 65.

This Court's discussion of the Rehearsal Transcript, however, was not limited to the introductory paragraphs of its 2004 opinion. Rather, later in its opinion, this Court quoted the Rehearsal Transcript extensively, explaining:

> The transcript revealed that the State's representatives had closely rehearsed Cook's testimony. In particular, the officials told Cook how to reconcile his testimony with affidavits to which he had earlier subscribed [*i.e.*, the April Statement] recounting Banks's visit to Dallas. [T]he transcript . . . provided compelling evidence that Cook's testimony had been tutored by Banks's prosecutors.

Banks, 540 U.S. at 685 (quotations to Rehearsal Transcript omitted); *see also* App. 99 (Dennis, J., dissenting).

Moreover, as discussed below, the majority's reasons "for reject[ing] the Supreme Court's evaluation of the same evidence in the context of this same case," are not supported by the record. App. 100 (Dennis, J., dissenting); *see also id.* at 115-16.

a. Banks' Purported Motive

At trial, consistent with his April Statement, Cook testified that Banks told him "he decided to kill the white boy for the hell of it." SR 9/2295; *see* April Statement at 2. Because the prosecution suppressed the Rehearsal Transcript, the jury never learned that days before trial, Cook ascribed a different motive to Banks, claiming in the rehearsal session that Banks told him he shot the victim because Banks "wanted his car." Transcript at 8, 9. Prosecutor Rodney McDaniels later asked Cook whether it made sense that Banks would kill someone over a car when "the thing wouldn't hardly even start?" *Id.* at 38. Cook acknowledged that it did not make sense. *Id.*

Then, at trial, Cook returned to the "for the hell of it" motive alleged in his April Statement, thus "allow[ing] prosecutors to avoid questions about whether the victim's car, which by all accounts was in poor mechanical condition, 'would . . . motivate someone to commit murder.'" App. 96-97 (Dennis, J., dissenting) (quoting App. 135 (district court)).

Lead prosecutor Raffaelli underlined Cook's rehearsal statements about Banks' purported motive and marked "★★★" and "★" next to them, *see* Rehearsal Transcript, at 8, 9, but jurors never learned of Cook's inconsistent account.

In discounting the impeachment value of Cook's ever changing story concerning Banks' alleged motive, the Fifth Circuit twice noted the jury was not required to determine a motive to convict. App. 69; *see*

also id. at 70. But this Court has squarely held that evidence about motive matters even when motive is not an element of the offense: "When identity is in question, motive is key." *House v. Bell*, 547 U.S. 518, 540 (2006).

The majority below also "disagree[d] that the variations in the wording of Cook's statements pertaining to motive . . . display inconsistencies of significant impeachment value." App. 70. The majority noted that Cook referred to Banks' allegedly taking the victim's car in the April Statement, the Rehearsal Transcript, and at trial. *See id.* Only in the Rehearsal Transcript, however, did Cook claim Banks told him he killed the victim for his car; by contrast, Cook never suggested anything akin to the "for the hell of it" motive in that Transcript. Significantly, the district court made a factual finding that, at trial, the prosecution's coaching caused Cook to alter his response regarding motive. App. 134-35. The majority made no mention of the district court's factual finding, even though it was plainly based on a permissible view of the evidence and therefore cannot be clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

b. The Gun

At trial, Cook twice stated, similar to his April Statement, that he first saw Banks' gun on Saturday night, the same night Banks allegedly confessed to killing a white male, while the two were sitting in

Cook's house. SR 9/2296, 2299; April Statement at 2. Cook specifically testified he had not noticed Banks' gun prior to Saturday night. SR 9/2296.

In the Rehearsal Transcript, Cook first mentioned Banks' gun in his description of Sunday night's events. Transcript at 11. McDaniels then asked if Cook had seen Banks' gun prior to Sunday night. Cook said he had, on Saturday *morning*. *Id.* And, according to Cook's Rehearsal Transcript account, Banks showed Cook his gun not at Cook's house, but while they were in the car. *Id.* McDaniels subsequently confronted Cook with the inconsistencies between his rehearsal account and the April Statement, and Cook twice repeated that he first saw the gun Saturday morning while he and Banks were driving. *Id.* at 28, 35-36. Cook also added a new allegation (which did not appear in his April Statement or trial testimony): upon returning to Cook's house on Saturday morning, Cook showed his own pistol to Banks so Banks would know Cook "would protect my family if necessary." *Id.* at 35.

The majority below discounted all of this as a "minor inconsistenc[y]." App. 64. But it is reasonably likely a juror would expect Cook to remember when he first learned a man he just met—who supposedly confessed to recently murdering someone "for the hell of it," and was staying with Cook's family—had a pistol. Presumably, that is why the prosecutor honed in on these inconsistencies during the rehearsal, and why lead prosecutor Raffaelli wrote "1st time saw pistol" on the Transcript. Transcript at 11.

The Fifth Circuit's dismissal of these inconsistencies exemplifies its general misapprehension of its role under *Brady*. As Judge Dennis explained, the majority employed a "methodology . . . that tend[s] to preempt" credibility questions raised by the numerous inconsistencies in Cook's accounts, "credibility questions that should be resolved by the jury." App. 106-07.

c. Cook's Assault Victim

At trial, the prosecution preemptively asked Cook about his criminal history. SR 9/2282-83; *see also* FR 6/67. When Raffaelli asked Cook if he remembered who he had been convicted of assaulting, Cook replied: "No, sir, I can't remember. That has been eight or ten years ago." SR 9/2283. In the Rehearsal Transcript, however, Cook said the victim was a school teacher. Transcript at 33. Raffaelli underlined Cook's answer about the victim's identity, wrote "Do not say" in the margin, and added a "★." *Id.*

In discounting this evidence, the Fifth Circuit stated it could not consider the prosecutor's handwritten notations because "had the transcript been disclosed to Banks' counsel, those handwritten items would not have been included." App. 38 (emphasis omitted). But the Transcript was not disclosed to Banks' counsel, and, as the district court found, the handwritten margin notation "Do Not Say" shows the prosecution capitalized on that suppression to change Cook's testimony. *See* App. 134. This is plainly

relevant evidence of prosecutorial misconduct, just as it would be if a prosecutor testified at a postconviction hearing that he told a witness to lie. Notably, the Director has never argued that the prosecutor's notations on the Transcript cannot be considered.

Next, without referencing the proper standard of review, the majority stated "we disagree" Cook was improperly coached on this point, noting there is no evidence that Cook saw Raffaelli's notations on the Transcript. App. 39. But, given Raffaelli's notations, Cook's changed testimony at trial from his account days earlier, and the variety of ways the prosecution could have communicated Raffaelli's instruction, it was plainly permissible (and thus not clearly erroneous) for the district court to infer that Cook altered his testimony on this point in response to prosecution coaching.

The Fifth Circuit acknowledged Banks could have used the Rehearsal Transcript to show that Cook's testimony was inconsistent with the Transcript and "further insinuate that Cook was not a trustworthy witness." App. 63. The majority nonetheless found such impeachment insignificant because "[t]he jury . . . was already well aware that Cook was a drug user with an extensive criminal history." *Id.* As this Court has recognized, however, when the prosecution suppresses important impeachment evidence, "the fact that the jury was apprised of other" potential impeachment evidence does not necessarily "turn[ ] what was otherwise a tainted trial into a fair one." *Napue*, 360 U.S. at 270. This principle clearly

applies here: the prosecution, just as it did with respect to Farr's drug use, "turned to its advantage [the] evidence concerning" Cook's criminal history, arguing that Cook's alleged candor about his criminal history *supported* his credibility. *Banks*, 540 U.S. at 702; *see* SR 10/2451, 2453. Jurors would have likely made a different assessment of Cook's credibility had they known that, far from candid, Cook lied under oath at the prosecution's behest.

d. The Alleged Blood on Banks' Clothes

In his April Statement, Cook claimed that he noticed blood on Banks' leg *after* Banks changed into clothes Cook provided. April Statement at 1. During the rehearsal session, McDaniels told Cook that this part of his April Statement was "obvi[ ]ously screwed up" and "doesn't make any sense." Transcript at 24. McDaniels explained to Cook "the way this statement should read" and coached Cook that, if asked about what he wrote in his April Statement, he should say he made "a mistake and you got your facts out of sequence." *Id.* at 26, 24.

The Fifth Circuit concluded this part of the Rehearsal Transcript lacked impeachment value because McDaniels simply "pointed out that, logically, Cook must have seen the blood on Banks' leg before Banks changed into new clothes." App. 68 (emphasis omitted). But the point is precisely that jurors would have likely found Cook unreliable had they known

intensive coaching was required to ensure his testimony was not wholly illogical.

e. Additional Inconsistencies

The suppression of the Rehearsal Transcript further prevented Banks from showing, *inter alia*, that Cook provided inconsistent accounts of:

- whether the police discussed the case with Cook before he gave his initial statement implicating Banks, *compare* Rehearsal Transcript at 19 *with id.* at 20;
- how many shots Banks allegedly told Cook he fired, *compare* April Statement at 2 *and* Rehearsal Transcript at 28-29 *with id.* at 21;
- where Cook abandoned the car Banks allegedly drove, *compare* SR 9/2303-04 *and* April Statement at 2 *with* Rehearsal Transcript at 12;
- where Cook left the keys to the car, *compare* April Statement at 2 *and* Rehearsal Transcript at 30 *with id.* at 13;
- whether Cook or Banks sold the car's radio/cassette player, *compare* April Statement at 2 *with* Rehearsal Transcript at 13, 30;
- when Cook allegedly sold Banks' gun, *compare* SR 9/2305 *with* Rehearsal Transcript at 13-14;

- the clothes Cook allegedly gave Banks to wear, *compare* April Statement at 1 *with* Rehearsal Transcript at 6, 24.

For six of these inconsistencies, prosecutor McDaniels asked Cook more than one question highlighting his inconsistent accounts. Transcript at 13-14, 20, 24, 29-30. At one point, McDaniels expressed his own recognition of Cook's unreliability, stating: "I know you don't know how many times he shot him." *Id.* at 29. Cook acknowledged: "I don't know." *Id.*

The Fifth Circuit made no mention of any of these inconsistencies. But these inconsistencies, when considered together, and certainly when considered with all the other impeachment evidence from the Rehearsal Transcript, "'had the potential to significantly affect the jurors' impression of Cook,'" App. 107 (Dennis, J., dissenting) (quoting App. 135 (district court)).

3. The Majority Erroneously Excluded the Farr Misrepresentation and Purposefulness of the State's Deceptions in its Materiality Analysis

As discussed, the suppression of the Rehearsal Transcript, standing alone, is material because, as this Court correctly recognized, that Transcript would have allowed Banks to discredit an essential (indeed, at the guilt phase, *the* essential) prosecution witness. But the panel majority also failed to give adequate consideration to the State's deceptions concerning

witness Robert Farr and the deliberateness of the trial prosecutors' misleading the jury.

The majority determined that the prosecution's suppression of Farr's informant status and failure to correct his false testimony, *see Banks*, 540 U.S. at 678, 680-81; App. 88-89 (Dennis, J., dissenting), were irrelevant to its guilt-phase materiality analysis because the Farr *Brady*-claim was no longer before the court. App. 33-34. But, as Judge Dennis showed in dissent, the *facts* concerning Farr's misrepresentation are highly relevant to materiality, even if Banks' specific *claim* concerning Farr is not separately at issue. App. 108-09. This case's procedural history is no reason to depart from this Court's precedent requiring that the cumulative effect of all suppressions must be considered in evaluating materiality. *Id.* at 109, 114 n.8.

The facts concerning Farr, combined with the facts concerning Cook, show a pattern of egregious misconduct by the State in this capital case. The majority myopically focused on the actions of law enforcement officers during Cook's rehearsal session, and concluded that their conduct was "completely permissible." App. 69; *see also id.* at 66, 67, 81. Given the intensive coaching in the rehearsal session, this conclusion is unpersuasive. *See supra*; *see also Banks*, 540 U.S. at 675, 685. But, regardless of the propriety of state officials' conduct during that interview, the State's pattern of purposefully suppressing significant impeachment evidence and capitalizing on false testimony by its two essential witnesses was both

improper and unconstitutional. Indeed, as Banks noted below—contrary to the majority's description of his brief, *see* App. 35—the State's pattern of misconduct with respect to Cook *and* Farr (as well as other witnesses), would have likely caused jurors to lose confidence not only in Cook, but in the prosecution itself. *See* Brief of Petitioner-Appellee at 43; *see generally Kyles*, 514 U.S. at 446.

Furthermore, this Court has long recognized that the prosecution's purposeful efforts to mislead the jury are highly relevant to whether a defendant received a fundamentally fair trial. *See United States v. Agurs*, 427 U.S. 97, 103 (1976); *Napue*, 360 U.S. at 269-71. Circuit courts have more recently considered such evidence when evaluating *Brady* materiality. *See, e.g., Silva v. Brown*, 416 F.3d 980, 990 (9th Cir. 2005); *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995).

The prosecutors' misconduct in this case reflects a conscious decision to stack the deck, leaving no doubt they feared a fair, adversarial proceeding would not lead to their desired result. While the defense attempted to show jurors that Cook was not worthy of belief, the prosecution repeatedly vouched for his truthfulness and deliberately withheld from Banks—and the jury—the Rehearsal Transcript. The Transcript would have proven Cook perjured himself on the stand, had a strong motive to implicate Banks falsely, had been supplied facts about the crime, could not keep his story straight, and altered his testimony in response to prosecution coaching. Moreover, the

State chose to present Farr in a plainly false light, deliberately hiding his paid informant status, and once again, capitalizing on his perjury.

CONCLUSION

This Court has determined that Charles Cook's testimony was essential to the prosecution's case. Prosecutors themselves recognized as much. They therefore purposefully suppressed the evidence necessary for Banks to discredit Cook. It is hard to imagine a stronger showing of *Brady* materiality.

In reaching a contrary conclusion, the Fifth Circuit made multiple legal errors and reached a decision contrary to this Court's jurisprudence and unsupported by the record. The decision below also creates a sharp circuit split with respect to the important issue of how to apply *Brady* materiality.

Delma Banks respectfully requests that this petition be granted.

Respectfully submitted,

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