No. 09-717

MAR 30 2010

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

REPLY BRIEF

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As this Court has recognized, the State suppressed evidence that "would have allowed [Petitioner Delma] Banks to discredit" Charles Cook, an "essential prosecution witness[ ]." *Banks v. Dretke*, 540 U.S. 668, 675 (2004). The State of Texas ("Texas") contends this Court's conclusions were erroneous and insists Banks received a fair trial. In so arguing, Texas cherry-picks from the record and disregards the case prosecutors presented to the jury.

I. Prosecutors Recognized the Cardinal Importance of Cook's Testimony and Credibility

Texas initially concedes Cook was "a key witness for the State." Brief in Opposition ("BIO") 1. Texas then backtracks, claiming there was "'overwhelming evidence' supporting Banks's conviction" other than Cook's testimony, and "extensive corroboration of almost all of Cook's testimony." BIO 21, 22 (quoting majority below). Texas's position is belied by the record.

District Attorney Louis Raffaelli, who deliberately suppressed the transcript of Cook's pre-trial interview ("Rehearsal Transcript"), told jurors in his opening statement: "I think the testimony of Charles Cook is critical[.]" Petition for Certiorari ("Pet.") 6-7. Indeed, Cook's uncorroborated testimony that Banks confessed to "both of the two elements of the capital murder charge, *viz.*, murder during robbery, was the only direct evidence warranting a guilty-as-charged

verdict rather than a lesser or not guilty verdict." App. 102 (Dennis, J., dissenting); *see also* Pet. 18. 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); *see also Banks*, 540 U.S. at 701 (recognizing the State lacked strong physical evidence in this case). At closing, the prosecution again "relied primarily on Cook's testimony," App. 102 (Dennis, J., dissenting), and vouched for Cook's truthfulness a remarkable six times. Pet. 10-11; *see also* App. 12 (majority opinion) (recognizing the prosecution's closing "focused extensively on Cook's testimony and credibility").

The State's only evidence besides Cook's tainted testimony is discussed at pages 19-22 of Texas's brief. It establishes the following: Banks and Richard Whitehead drank beer together the night of April 11, 1980 in the park near Texarkana where Whitehead's body was discovered the morning of April 14[1]; the morning of April 12, Banks arrived in Dallas, where he met and stayed with Charles Cook; and Banks returned to Cook's house approximately two weeks later. In addition to these uncontested facts, Charles Cook's wife and sister, two witnesses with an obvious interest in corroborating Cook (who was facing other

[1] The majority below, App. 6, erroneously stated Whitehead's body was discovered on April 15. *See Banks*, 540 U.S. at 676 n.1.

criminal charges and threats by Deputy Willie Huff), testified they saw Banks in a Mustang. Pet. 22.

Texas also points to the .25 caliber pistol introduced by the State at trial, but Cook was the only witness who testified Banks ever possessed that gun. Pet. 23; BIO 28; *see also* Pet. 12 (describing postconviction testimony by State witness Vetrano Jefferson that the pistol was not Banks's gun). Furthermore, the only evidence the State offered linking the gun to Whitehead's death was a ballistics examiner's conclusory opinion—without any explanation, analysis, or degree of confidence—that it had fired the bullets and cartridges found at the scene. Pet. 23-24; *see generally United States v. Glynn*, 578 F. Supp. 2d 567, 570-75 & n.14 (S.D.N.Y. 2008) (Rakoff, J.) (recognizing that ballistics identification analysis cannot "fairly be called 'science'"; is "significantly subjective"; "lacks defining standards to a degree that exceeds most other kinds of forensic expertise" (*e.g.*, fingerprint identification); and is insufficiently reliable for a defendant to be convicted based solely on such evidence).

Texas further suggests, as did the majority below, that Banks made a vague, self-incriminating statement to Cook's neighbor Bennie Lee Jones. BIO 21. In fact, the statement Jones recounted clearly referenced an unrelated incident—likely the fight between Banks and Vetrano Jefferson—which did not involve a shooting. *See* Pet. 21-22; BIO 15 (quoting direct appeal opinion).

Finally, the State's entire case depended upon its assumption that Whitehead was shot three times at approximately 4:00 a.m. on April 12—as Texas recognizes, by 8:30 that morning, Banks was 175 miles away in Dallas. BIO 1, 7. The sole support the State offered for its time-of-death assumption is Mike Fisher's inconclusive testimony that he heard two sounds that could have been gunshots. *Compare* Pet. 13, 21 *with* BIO 20. Postconviction review of the State's autopsy findings established that the State's crucial assumption is likely false, and Whitehead was probably not killed until, at the earliest, late in the evening of April 12. Pet. 13-14; *see also id.* (describing additional postconviction evidence confirming the State's timeline is highly unlikely). Only by ignoring this evidence can Texas assert: "On April 12, 1980, Banks murdered 16-year-old Richard Wayne Whitehead[.]" BIO 1 (footnote omitted).

As the foregoing summary demonstrates, "[h]ad Cook's testimony been impeached or discredited, the prosecution would have had only inconclusive circumstantial evidence." App. 102 (Dennis, J., dissenting). That circumstantial case would have been far weaker than the case the prosecution presented to the jury, which centered on the prosecution's claim that Banks confessed to Cook. Pet. 18-20 (citing, *inter alia*, *Arizona v. Fulminante*, 499 U.S. 279 (1991)).

Indeed, the evidence besides Cook's testimony is clearly weaker than the untainted evidence in *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Kyles*, the untainted evidence included some circumstantial

physical evidence and the testimony of two eyewitnesses. *Id.* at 445, 451-53. *Kyles*'s holding that the untainted evidence in that case, although sufficient to support a conviction, was not sufficient to demonstrate that petitioner received a fair trial applies *a fortiori* here. Pet. 25-26. Texas, just as the majority below, does not even attempt to distinguish *Kyles*. Nor does Texas dispute that, applying *Kyles*, nine other circuits have found suppressed evidence material where the untainted evidence was comparable to, or stronger than, here. Pet. at 26-27. The law of the Fifth Circuit—which governs a significant portion of all capital habeas cases—is now in sharp conflict with the law of this Court and that of almost every circuit with respect to the application of *Brady*'s materiality prong, an important issue of federal law. *See also* Brief of the Honorable John J. Gibbons *et al.* 10, 17-22.

II. The Prosecution Rightly Feared Disclosure of the Rehearsal Transcript Because It Would Have Discredited Cook

As this Court recognized in 2004, the suppressed Transcript "would have allowed Banks to discredit" Cook. 540 U.S. at 675; *see also id.* at 685; Pet. 17-18. Texas contends this Court's conclusion (like its other conclusions about Cook) was not binding on the Court of Appeals, because this Court only issued a certificate of appealability. BIO 31-32. But, even assuming the Court's evaluation of the record was dicta, this Court's dicta is "'not something to be lightly cast

aside'" by lower courts. App. 116 (Dennis, J., dissenting) (citation omitted); *see also Miller-El v. Dretke*, 545 U.S. 231, 253-55, 261, 264-65 (2005) (repeatedly relying on the Court's previous evaluation of the record in concluding the Court of Appeals erred by denying relief). Moreover, as was true of the majority below, Texas's reasons "for reject[ing] the Supreme Court's evaluation of the same evidence in the context of this same case," are unpersuasive. App. 100 (Dennis, J., dissenting).

The Rehearsal Transcript revealed three categories of powerful impeachment: (1) Cook's repeated perjury; (2) Cook's strong motive to lie; and (3) Cook's numerous inconsistent statements and malleability to prosecution coaching.

Perjury

On cross-examination, Cook perjured himself three times, claiming "untruthfully, that his testimony was entirely unrehearsed." *Banks*, 540 U.S. at 675. Far from correcting this perjury, the prosecution repeatedly vouched for Cook's truthfulness. Pet. 9-11. The prosecution's conduct was "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959). Moreover, evidence of perjury is "almost unique in its detrimental effect on a witness' credibility." *United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996).

Texas, however, insists the majority below "properly discounted" Cook's perjury. BIO 23. In so arguing, Texas claims the pretrial interview was appropriate. BIO 23-24. But, even if that were true (*i.e.*, putting aside the extensive coaching), it would in no way excuse Cook's lying about that interview. Texas also contends "the jury was already aware . . . that Cook had not been truthful about not talking to others," because jurors knew about Cook's initial statement to the police. BIO 24. But, again, Texas ignores the record. Defense counsel's questions, in context, asked Cook whether he spoke with anyone *after* his initial statement. Pet. 28. If Cook's perjury had been clear at trial, the prosecution would not have: elicited from Cook on redirect that his testimony was the "'[c]omplete truth[ ]'" Pet. 9; or vouched for Cook's credibility *six times* in closing, promising jurors that Cook "'brought you absolute truth'" and "'didn't hide a thing from you,'" Pet. 10-11. Texas's remarkable claim that the Rehearsal Transcript would not have affected the content or persuasiveness of the prosecution's closing, BIO 27-28, is patently untrue.

Motive to Lie and Being Supplied Crime Facts

Motive, of course, is also central to credibility. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *Napue*, 360 U.S. at 269. In this case, the State's closing assured jurors that no prosecution witness had a motive to falsify his or her testimony. Pet. 29. The Rehearsal Transcript, however, reveals

that when Cook made his initial statement implicating Banks, Cook himself feared arrest—thus giving him a compelling motive to lie. *Id.* Texas, like the majority below, simply ignores this critical impeachment evidence.

Texas and the majority below also ignore another important fact revealed by the Rehearsal Transcript: before Cook initially implicated Banks, police told Cook that Banks was wanted for murder, and supplied Cook information about the victim. Cook could have easily fabricated his incriminating claims against Banks after the State fed him this information. Pet. 29-30.

Inconsistencies and Altered Responses

The Rehearsal Transcript reveals that, days before trial, Cook provided an account of the weekend he spent with Banks that was filled with internal inconsistencies, and diverged sharply from both his initial statement to the police and his trial testimony. Pet. 32-39. The Transcript also "provided compelling evidence that Cook's testimony had been tutored by Banks's prosecutors." *Banks*, 540 U.S. at 685; *see also id.* at 675. Texas attempts to diminish the significance of this evidence by once again cherry-picking from the record, and by arrogating the jury's authority to evaluate witness credibility.

Texas ignores the first major inconsistency revealed by the Rehearsal Transcript—Banks's alleged motive for killing Whitehead. Pet. 32-33. Cook's

testimony constituted the State's sole evidence concerning Banks's purported motive, Pet. 18, making the reliability of his account key. *See House v. Bell*, 547 U.S. 518, 540 (2006). The lead prosecutor understood the importance of Cook's testimony on this issue, and the prosecution instructed Cook to change his unlikely motive claim in the Rehearsal interview (that Banks killed the victim for a car that "'wouldn't hardly even start[]'") to the motive Cook ascribed to Banks in Cook's initial statement (that Banks killed the victim "'for the hell of it'"). Pet. 32. Similarly, Texas does not acknowledge that the Rehearsal Transcript revealed Cook's inconsistent accounts about another noteworthy aspect of Banks's alleged confession—how many shots Banks purportedly fired. Pet. 38. The prosecutor ultimately told Cook during the Rehearsal session: "'I know you don't know how many times he shot him.'" Pet. 39.

Texas recognizes Cook conveniently forgot at trial whom he had been convicted of assaulting, even though the Rehearsal Transcript shows that, days earlier, Cook admitted he had assaulted a school teacher. BIO 24-25. Texas claims, however, that this does not reflect improper witness coaching, asserting "the transcript does not evidence prosecutors instructing Cook to 'forget' any details." BIO 25. In fact, the lead prosecutor underlined the identity of Cook's assault victim, wrote "'Do not say'" in the margin,

and added a "★." Pet. 35.[2] The District Court's factual finding that Cook "forgot" whom he had assaulted because of the prosecution's coaching is unassailable, yet, like the majority below, Texas ignores that finding. Pet. 35-36.

Texas also acknowledges multiple additional inconsistencies revealed by the Rehearsal Transcript, but dismisses those inconsistencies as trivial, even though the prosecution found them important enough to warrant extensive questioning during the Rehearsal session. *Compare* Pet. 33-34, 37-39 *with* BIO 25-26. Jurors would have likely expected Cook to remember, *inter alia*, where and when he first saw that Banks—a man staying with Cook's family whom Cook had just met and had supposedly shot someone "for the hell of it"—had a pistol; and where Cook, a convicted felon and regular drug user who made $107 a week, abandoned the car Banks allegedly left with him. Pet. 22, 34, 38. Jurors also surely would have been skeptical to learn Cook's story at trial directly contradicted his narrative in an interview that occurred just days earlier—not five months earlier as Texas misleadingly suggests, BIO 26—and had changed so it would be consistent with Cook's only pretrial statement disclosed to the defense. Pet. 5,

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[2] Work-product protection, which Texas long ago waived, is qualified and cannot shield notes necessary to show a witness was instructed to change his testimony. *See generally In re Grand Jury Subpoena*, 419 F.3d 329, 335-37 (5th Cir. 2005); *In re Lux*, 52 S.W.3d 369, 372 (Tex. Ct. App. 2001).

30.[3] Put simply, the multiple inconsistencies in Cook's account "'had the potential to significantly affect the jurors' impression of Cook.'" App. 107 (Dennis, J., dissenting) (quoting App. 135 (District Court)).

Finally, Texas claims the Rehearsal Transcript was actually "'quite consistent' with Cook's trial testimony [and his initial statement] on the major points at issue." BIO 26. But, as discussed, the police told Cook that Banks was wanted for murder and provided information about the victim before Cook ever said he knew of any such crime. Pet. 29-30. Once Cook decided to implicate Banks falsely (as Cook later acknowledged he had, Pet. 12), it would not be difficult to repeat that unadorned lie. Thus, although Cook implicated Banks again during the Rehearsal session, that did not give prosecutors confidence jurors would find him credible. Instead, the prosecution extensively interrogated Cook about the numerous, significant inconsistencies in his dubious account and instructed him to change portions of his story. Pet. 32-39.[4]

* * *

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[3] Contrary to Texas's assertion, BIO 23 n.18, the record reveals repeated, direct contradictions between the Rehearsal Transcript and Cook's trial testimony. Pet. 32-39.

[4] Texas also notes the jury knew Cook had a criminal history, BIO 29-30 (citing majority below), but this in no way diminishes the importance of the Rehearsal Transcript, Pet. 36-37.

Texas apparently believes Cook's trial testimony is credible notwithstanding his perjury, motive to lie, being fed crime facts, altering his testimony in response to prosecution coaching, and multiple inconsistencies. It is reasonably likely a jury would disagree. The due process clause forbids the State from taking that credibility decision away from the jury, as it did here by purposefully suppressing the Rehearsal Transcript at trial and for almost two decades thereafter; and as it continues to do by claiming Banks received a fair trial notwithstanding that suppression.

III. The Purposefulness of the State's Suppression and Its Pattern of Misconduct Confirm that Banks was Denied a Fair Trial

The suppression of the Rehearsal Transcript, standing alone, was plainly material under this Court's precedent because it would have allowed Banks to discredit the State's linchpin witness. *See, e.g.*, *Giglio*, 405 U.S. at 154-55. The purposefulness of the State's suppression and its pattern of misconduct, as discussed *infra*, confirm the unreliability of Banks's capital conviction. Texas's arguments to the contrary, BIO 32-34, are meritless.

Banks raised these points below. *See* Pet.-Appellee Br. 6-7, 15-16, 31-33, 43-44. Moreover, an issue addressed by the Fifth Circuit, even if not pressed below, is properly before this Court. *See Lebron v.*

Nat'l Railroad Passenger Corp., 513 U.S. 374, 379 (1995).

Texas's extraordinary claim that "there is no evidence of any . . . deliberate act or misdeed by the State's failure to disclose the Cook transcript," BIO 32, is flatly refuted by the record: the prosecution knowingly withheld the Rehearsal Transcript, App. 16 (majority below), even though it proved Cook repeatedly perjured himself and revealed other evidence that, as discussed, would have allowed Banks to destroy Cook's credibility.

It is Texas, not Banks, that improperly merges *Brady*'s suppression and materiality prongs. The purposefulness of the State's conduct, although irrelevant to suppression, is important to materiality—not to sanction the prosecution—but because, similar to opening and closing arguments, it is a significant indicia of whether the evidence was important at trial. Pet. 19, 41. Here, the prosecution's willingness to risk professional sanction by deliberately withholding the Rehearsal Transcript confirms the importance of Cook's credibility, and the devastating effect the Transcript would have had on the prosecution's case. *See also* Brief of the Honorable John J. Gibbons *et al.* 5-6, 13-18.

Finally, the unreliability of Banks's conviction is confirmed by the State's pattern of misconduct, which included: threatening or pressuring multiple witnesses, failing to correct and even vouching for false testimony, and suppressing Robert Farr's paid-informant

status. Pet. 7, 9-11, 12-13. That the District Court held the suppression of Farr's status to be insufficient, by itself, to undermine confidence in Banks's conviction is irrelevant; the cumulative effect of the State's misconduct is what matters. Pet. 40. Farr was a significant prosecution witness, *Banks*, 540 U.S. at 678, whose testimony was not meaningfully corroborated. App. 110-12, 117-19 (Dennis, J., dissenting). Revealing the truth about Farr's paid informant status "would have discredited not only Farr's testimony but that of . . . Deputy Huff, and perhaps the entire prosecution as well." *Id.* at 117. The State's serial misconduct in this capital case once again warrants this Court's review.

IV. Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

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