No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT SPARKS,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Jonathan Landers
LANDERS LAW FIRM
917 Franklin; Suite 300
Houston, TX 77002
Jlanders.law@gmail.com
Member, Supreme Court Bar
(713) 685-5000 (work)
(713) 513-5505 (fax)
Counsel of Record

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 1440
Houston, TX 77002
seth@kretzerfirm.com
Member, Supreme Court Bar
(713) 775-3050 (work)
(713) 929-2019 (fax)

COURT-APPOINTED ATTORNEYS FOR PETITIONER SPARKS

QUESTIONS PRESENTED FOR REVIEW (CAPITAL CASE)

QUESTION ONE:

Does cross-examination of a prosecution's expert cure all harm from that expert's repeated false testimony during a capital punishment proceeding, and is the petitioner or prosecution at fault for failing to correct the expert's false testimony?

QUESTION TWO:

Did the Circuit Court Err by failing to consider whether Bailiff Moorehead's actions created an unacceptable risk of impermissible factors coming into play at Sparks' trial, and does *Brecht's* "substantial and injurious effect or influence" standard of harm apply to impartial jury claims?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all the parties. *See* Sup. Ct. R. 14(1)(b)(i).

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

- Mr. Sparks was sentenced to death for capital murder by the Criminal District Court no. 3, Dallas County, Texas, Cause number f08-01020-J, on December 11, 2008.
- Direct Appeal was to the Texas Court of Criminal Appeals and relief was denied October 20, 2010. *See Sparks v. State*, AP-76,099, 2010 WL 4132769 (Tex. Crim. App. Oct. 20, 2010)
- This Court denied certiorari on April 25, 2011. *Sparks v. Texas*, Cause no. No. 10–8538, 563 U.S. 962 (2011).
- Sparks state writ of habeas corpus was filed in the Criminal District Court no. 3, Dallas County, Texas, which recommended that relief be denied on May 20, 2011, and the Texas Court of Criminal Appeals denied relief on December 14, 2011. *Ex Parte Sparks*, WR-76,786-01, 2011 WL 6293529 (Tex. Crim. App. Dec. 14, 2011). This Court denied certiorari. *Sparks v. Texas*, Cause no. No. 12–5030, 568 U.S. 981 (2012).

- Sparks filed his federal writ of habeas corpus in the Northern District of Texas, Dallas Division, Honorable David C. Godbey presiding. Those proceedings were stayed and Sparks once again returned to the Criminal District Court no. 3 of Dallas County to file a subsequent writ of habeas corpus. The Subsequent writ of habeas corpus was dismissed by the Texas Court of Criminal Appeals on May 14, 2014. *Ex parte Sparks*, WR-76,786-02, 2014 WL 2002211 (Tex. Crim. App. 2014). Sparks returned to the Northern District of Texas, which denied relief on March 3, 2018. *Sparks v. Davis*, 3:12-CV-469-N, 2018 WL 1509205 (N.D. Tex. 2018).
- Sparks sought certificates of appealability and appealed to the Fifth Circuit Court of Appeals, which denied relief on December 8, 2018. *Sparks v. Davis*, Cause no. No. 18-70013, 756 Fed. Appx. 397 (5th Cir. 2018). The motion for rehearing en banc was denied on January 7, 2019.

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TABLE OF CITED AUTHORITIES

Cases

Statutes

CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

The citations of the official and unofficial reports of the opinions and orders entered in this case are:

- *Sparks v. Davis*, Cause no. No. 18-70013, 756 Fed. Appx. 397 (5th Cir. 2018).
- *Sparks v. Davis*, 3:12-CV-469-N, 2018 WL 1509205 (N.D. Tex. 2018).
- *Ex parte Sparks*, WR-76,786-02, 2014 WL 2002211, at (Tex. Crim. App. 2014).
- *Sparks v. Texas*, Cause no. No. 12–5030, 568 U.S. 981 (2012).
- *Ex Parte Sparks*, WR-76,786-01, 2011 WL 6293529 *Sparks v. Texas*, Cause no. No. 10–8538, 563 U.S. 962 (2011).
- *See Sparks v. State*, AP-76,099, 2010 WL 4132769 (Tex. Crim. App. Oct. 20, 2010)

STATEMENT OF JURISDICTION

The Circuit Court's decision was filed December 4, 2018, and Sparks' timely filed Petition for Rehearing En Banc was denied on January 7, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2253. Sparks' filing deadline was previously extended until May 7, 2019. *See* March 4, 2019, letter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.]

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Before sentencing Sparks to death, the jury had to be convinced that Sparks "would commit criminal acts of violence that would constitute a continuing threat to society." CR.499.[1] Of course, "society" for anyone sentenced to life without the possibility of parole is the prison society. If the jury answered this question in the affirmative, it had to decide if "taking into consideration all of the evidence . . . there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." *Id.* If the jury found there were not sufficient mitigating circumstances, then Sparks would be sentenced to death. *See* Tex. Code Crim. Proc. art. 37.071.

The prosecution relied heavily on the false and misleading testimony of "expert" A.P. Merillat to show that Sparks would be classified to a medium security level and provided with countless opportunities for violence if he was sentenced to life in prison. The jury specifically requested, and was provided, Merillat's testimony during their deliberations prior to sentencing Sparks to death. *See* Appendix E, jury notes. The reliability of Sparks' trial was further compromised by the actions of courtroom Bailiff Bobby Moorehead who, on the day the jury began punishment deliberations, wore a black tie emblazoned with a large white hypodermic needle showing his support for the death penalty. *See* Appendix H, picture of Moorehead's tie.

[1] The trail clerk's record is cited as: CR.__. The trial reporter's record is cited as: Volume RR at __. The Record on Appeal from the Fifth Circuit is cited as: ROA.____.

Sparks argues that the actions of state's expert A.P. Merillat and courtroom Bailiff Bobby Moorehead violated his constitutional rights.

I. THE DEFENSE CASE FOCUSED ON PUNISHMENT.

Sparks committed a horrendous crime while suffering from palpable mental illness. On September 15, 2007, Sparks murdered his wife, Chare Agnew, and his two stepsons, Reaqwon Agnew and Harold Sublet Jr., by stabbing them multiple times. 36RR13, 37RR81. He also sexually assaulted his two step-daughters. 37RR77-95; 46RR96-119. He then drove to his child's mother's house, confessed, called 911 to report himself, and took a bus to Austin. 36RR34-51.

The next day, Sparks directly contacted one of the detectives investigating his case, Detective Perez, to inquire if the police had found the recordings he made. 36RR132-34. He believed they would prove that his family was conspiring against him. *Id.* In reality, the tapes were gibberish. *Id.* at 39; State Ex. 117.

Two days later, Sparks was spotted in a red van and a televised chase ensued. *Id.* at 137-52. When Sparks was finally stopped and arrested, he confessed to both the police and news reporters on the scene. He claimed his wife and step-children had been poisoning him. 36RR12-15. He claimed there was a tape to prove it. *Id.* He previously told his child's mother the same story about being poisoned. 36RR29, 34-52.

The media was heavily involved in Sparks' case. *Id.* at 165. Cliff Caldwell, a local reporter, was able to secure an early morning interview with Sparks at the jail

after his arrest but prior to Sparks being appointed an attorney. 37RR13-15. The recording of the interview was introduced against Sparks at trial. State's Ex. 63. Caldwell agreed that Sparks was acting irrationally during the interview. *Id.* at 17.

In his confession, Sparks explained that a voice in his head told him to kill his wife. State's Ex. 60. He asked that his step-daughters be given a polygraph to prove that he was being poisoned. *Id.* Before the murders, Sparks had accused the family of trying to gas him out by leaving the gas stove on when they left the house. *37RR*99. He had screwed the windows shut so his family could not let people in the house to get him. *Id.* at 100.

As might be expected, the defense's case focused on punishment. Sparks had been a special education student who became uncontrollable after his father passed away. 39RR110, 105-107. At the age of seventeen, Sparks was sentenced to twelve years in prison; he served the entire sentence. When he got out, he had changed. *Id.* at 105-113. He had become paranoid. Sounds from the attic or the roof became people trying to get in the house. *Id.* He would crawl in the attic to investigate. He nailed the attic door shut. He stayed up all night drinking coffee and watching out of the windows. *Id.*

His child's mother verified that after he got out of prison, he had changed. *Id.* at 157-161. She thought he was crazy. *Id.* When she first saw him after his release, he was sitting on a couch rocking and talking to himself. *Id.* He was friendly one

minute and hated the world the next. *Id.* He thought people were watching him. *Id.* She told his family that he needed to see a psychiatrist. *Id.*

Psychiatrist working for the defense team found that Sparks' family had a history of mental illness ranging from bi-polar disorder to dementia. 39RR152-56. Dr. Chefetz testified that Sparks was psychotic, suffered from delusions, including persecutory delusions, and had anti-social disorder. 40RR190-94. He was suffering from these illnesses at the time of the murders. *Id.* at 135.

Dr. Compton testified that Sparks suffered from schizoaffective disorder and functioned at the level of a fourth or fifth grader when he left school in the ninth grade. 41RR10-11. When he left school, he was failing every subject with the exception of study hall. *Id.* at 10. Standardized testing showed that he had the vocabulary, reading, and language skills of the average fifth or fourth grader.

Both Dr. Compton and Parkland Hospital had diagnosed Sparks with schizo-effective disorder. *Id*. at 11. This was a schizophrenic spectrum type of disorder which included delusions, hallucinations, and/or a flat affect. *Id*. at 12. Sparks' mental illness symptoms were primarily ones of delusions, which caused him to believe he was being poisoned and that there was a conspiracy against him. *Id.* at 14-15. Sparks' history of antisocial acts at a young age, aggressive behavior, substance abuse, and a lack of empathy for other people were the main features of his antisocial personality disorder. *Id*. at 24. Impulsivity was another feature of his personality. *Id.*

Dr. Compton verified that at the time of the murders Sparks was suffering the effects of a severe mental illness. 41RR30.

II. THE PROSECUTION'S PUNISHMENT CASE RELIED HEAVILY ON THE FALSE TESTIMONY OF SENIOR CRIMINAL INVESTIGATOR A.P. MERILLAT.

The prosecution's first punishment witness, and only expert, was A.P. Merillat, a "criminal investigator with the special prosecution unit in Huntsville." 39 CR 8-36, 68-95. During the *Daubert* hearing, Merillat explained he would testify to "the likelihood or opportunities. . .to be violent" inside prison. *Id.* at 8-9. Eventually, the prosecution revealed that Merillat would testify about security classifications of inmates, prompting strenuous objections on the ground that Merillat was not qualified as an expert in classification. *Id.* at 19. The prosecution and defense debated about whether Merillat could predict Sparks' security classification. *Id.* at 19-23.

Subsequent events prove that Merillat was unqualified to testify about classification issues. Merillat testified falsely about inmate classifications in at least two other capital cases. *See Estrada v. State*, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010); *Velez v. State*, AP-76,051, 2012 WL 2130890 (Tex. Crim. App. 2012). Sparks first learned of Merillat's credibility issues when his neighbor from solitary confinement, Manuel Velez, had his death sentenced overturned in 2012. *See* ROA.679 (Sparks' inmate declaration).

In Sparks' case, Merillat explained that there are multiple security classification levels in Texas prisons, and that a person convicted of capital murder

and given life without parole *would* be assigned to level G-3 upon entering prison. The following testimony was presented to the jury:

> [Question by prosecution] Tell the members of the jury, Mr. Merillat, anyone sentenced to 50 years on up, which obviously includes a capital-murder life without parole, **what is their automatic classification coming into the prison system?**
>
> A. **They're automatically classified as what's called a G-3**. . .
>
> 39RR70 (emphasis added).
>
> ~~~~~~~
>
> Q. [By the prosecution] Mr. Merillat, individuals classified as G-3 inmates receive that classification which you told us capital murderers without parole, that's what they'd be coming in as; is that correct?
>
> A. It's based upon the length of their sentence, yes, sir.
>
> *Id.* at 76.

The jury was twice told Sparks *would* enter TDCJ as a G-3 offender. Further, Merillat told the jury that given this G-3 designation, Sparks would be permitted to go to the mess hall with other inmates, go the library with other inmates, go to school and medical facilities, go to visitation, and that he could work outside the walls of the prison. *Id.* at 76. Thus, there were opportunities for "violent acts to occur in the prison system." *Id.* at 77.

Merillat's false testimony continued on cross-examination:

> Q: You said that anybody convicted and given a sentence over 50 years in the penitentiary would automatically qualify or automatically be a G-3 inmate; is that correct?
>
> A. That's correct.
>
> Q. That's actually not totally correct, is it? The classification board of Texas Department of Criminal Justice can look at the prior background,

> prior incarceration records, prior conduct records of individuals and can raise that classification if they choose to do so, can they not?
>
> A. As a matter of fact, they will look at his prior history, whether he's been to the penitentiary before. Look at any prior convictions that brought him to the prison system. **He's gonna go in as G-3**. . . . What they look at when they consider his prior past bad acts **will be as G-3**, if he needs to be housed in a different area of the prison system or have more restrictions put upon him. Doesn't mean he's gonna be a G-4, G-5 or ad seg.

Id. at 85-86 (emphasis added).

The prosecution relied upon Merillat's testimony in closing argument, specifically reminding the jury that Merillat told them "there's plenty of opportunities to commit acts of violence" in prison. 41RRat 86. The prosecutor suggested the defense wanted the jury "to put the wolf back in the lamb pen . . . ." *Id.*at 86-87.

Jury notes prove that Merillat's false testimony was relied upon by the jury. The jury began deliberations at 1:37 p.m., and just before 7:30 p.m., the jury sent out two questions: "(1) The jury has a conflict regarding the substance of Mr. Marilot's (sic) testimony pertaining to what restrictions are on a G-3 prisoner? (2) If sentenced to a life sentence without parole what would he be classified to?" *See* Appendix E. The judge provided the jury with Merillat's testimony showing that Sparks would "automatically [be] classified as what's called a G-3" and therefore would have ample opportunities for violence. *Id.*

In reality, TDCJ conducts a diagnostic process to determine a new inmate's classification level, and although it is possible for a person sentenced to life in prison to enter at a G-3 level, it was likely Sparks would enter at a more restrictive level.

Frank Aubuchon, who worked over 26 years for TDCJ in jobs that specifically involved inmate classification averred during these federal proceedings that Merillat's testimony was false. ROA.605-608, *See* Appendix G. Aubuchon also provided documentary evidence to prove Merillat's testimony was false. ROA.610-667.

Merillat's testimony that Sparks would "automatically be classified as to what's called a G3" was "inaccurate in several ways." ROA.605. In reality, "[a]ll non-death sentenced offenders are processed through the Reception and Diagnostic Process as described in the TDCJ Classification Plan. . . . Only then can the appropriate custody level be determined." *Id.* (citations omitted). Merillat was also lying when he claimed he received the same training as that of classification employees (which he claimed was no specialized training). ROA.606.

Merillat's insistence on cross examination that anyone sentenced to life in prison would automatically enter as a G-3 inmate was also incorrect because "any inmate with a sufficiently bad disciplinary record or other negative characteristics, with a poor disciplinary record, could be assigned to more restrictive custody, at the G4 or G5 levels." ROA.606. Aubuchon confirmed TDCJ would have taken Sparks' past assaultive behavior into account when setting the initial custody level. *Id.* It is likely that Sparks would not have entered TDCJ at the median G-3 classification level.

It is clear that Merillat testified falsely when he claimed Sparks *would* enter TDCJ at a G-3 custody level. ROA.605-608. The testimony provided to the jury during their deliberations was therefore "misleading and incorrect." ROA.608.

The Merillat claims were first raised in federal post-conviction proceedings. The district court granted Sparks' motion to stay and abet the federal proceedings, noting that Sparks' claims "if true, could support the grant of habeas relief[,]" and that Sparks had "shown good cause for failing to exhaust these claims in the state courts." ROA.428. The government agreed the case should be stayed so that the Merillat claim could be exhausted. *Id.*

Sparks filed a subsequent state application for post-conviction relief. The state, represented by the Dallas District Attorney's Office, filed a motion to dismiss, arguing that Merillat's testimony was not false. ROA.1037. The state falsely claimed "Aubuchon's affidavit supports Merillat's testimony…." The Texas Court of Criminal Appeals dismissed the writ without considering the merits of the claim. ROA.1000.

Sparks returned to federal court and, because the district attorney had refused his request to review the state's file, sought discovery of the state's file. ROA.680. Sparks also requested a hearing. In denying Sparks' request for a hearing, the District Court faulted Sparks for failing "to show that he could not have been immediately assigned to a G3 status upon his arrival"[2] and suggested that Merillat

[2] Sparks has never claimed it was impossible for an offender sentenced to life to be classified at the G-3 level. The problem with Merillat's testimony was his claim that all life offenders *would* be classified to the G-3 status.

had actually corrected himself on cross-examination. ROA.911.

The District Court eventually denied relief on the Merillat claims based upon the idea that Merillat corrected his testimony on cross examination. ROA.969. This idea was based upon the following exchange:

> Q. But as I just pointed out, sir, whether or not you're classified, the minimum classification for a person is G-3 and can go all the way up to an automatic classification of ad seg right off the bat, couldn't it? That's yes or no, sir. Right or wrong?
>
> A: You're wrong.
>
> Q: I'm wrong?
>
> A: Yes.
>
> Q: Couldn't be placed in ad seg?
>
> A. Very limited circumstances. But the broad way you say it is not correct.
>
> Q: He could be, couldn't he?
>
> A: Yes.
>
> Q: Could be G-4, couldn't he?
>
> A: He could be.
>
> Q: Could be G-5.
>
> A: Could be.

ROA.967-68. Notably, the District Court simply omitted the very next question, where Merillat doubled down on his previous claims:

> Q: So your testimony a while ago what I called throwing a skunk over there, you're basically saying is we know what the minimum is, but we

have no idea what it's actually gonna be for Robert Sparks. That's what you're basically saying, isn't it?

A. No, you're wrong.

39RR87. The district court's ruling on both the merits and procedural issues was based upon the idea that Merillat's brief foray into reality cleansed his entire testimony of constitutional error. ROA.967-974.

The Fifth Circuit changed tack and denied the Merillat claim based upon the idea that "Sparks was aware of the allegedly false testimony" in time to raise the issue before the state courts. *Sparks*, 756 Fed. Appx. at 401. The Circuit Court explained that because "Sparks's defense attorney focused on correcting Merillat's testimony during his cross examination . . . Sparks can hardly claim that he was unaware of its inaccuracy." *Id.*

III. BAILIFF BOBBY MOOREHEAD, WHO WAS IN CLOSE CONTACT WITH THE JURORS, SHOWS HIS SUPPORT FOR A DEATH SENTENCE.

Bobby Moorehead was a bailiff at Sparks' trial. He believed that Sparks should get the needle, and expressed his belief by wearing a black tie with a white syringe on the day that the jury began their punishment deliberations. *See* Appendix H (pictures of the tie).

On the day he wore this tie, Moorehead was seated directly behind Sparks in front of the bar, within the jury's view, operating a stun belt that attached to Sparks. SHRR 20-25; 40-45. This same bailiff had been responsible for shepherding the jurors

to and from the court room during the guilt phase of the trial.[3] He had also personally escorted venirepersons—including some that actually sat on the jury--in and out of the courtroom during individual *voir dire*.[4]

The tie issue was first raised during the state habeas proceedings. Perstephanie Sparks, Sparks' sister, submitted an affidavit establishing that on the final day of testimony, the bailiff escorting her brother into the courtroom "had a dark tie with a big white injection needle on it on. Everyone in court knew what it meant." SHCR 29.[5] The prosecution submitted a news article explaining that Moorehead had given his "not-so-subtle take" on the trial by "donning a black tie emblazoned with a white syringe." *Id.* at 32.

Bobby Moorehead testified at the post-conviction hearing. The tie was introduced into evidence. SHRR 15-16.[6] Moorehead had purchased a black tie and "instructed his wife to get a needle emblazoned on it." *Id.* at 17. He wore the black tie with all black shoes and a black shirt, with a black jacket worn open. *Id.* at 18. He admitted that he wore the tie to show his support for the death penalty. *Id*. at 18.

Moorehead wore his tie outside of his clothing for the first two hours of the day on December 10, until the defense counsel instructed him to tuck it into his shirt. *Id.* at 18-20. According to the defense counsel, Moorehead wore the tie outside his shirt

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[3] 36 RR 13, 66, 96; 37 RR 53; 149, 155.

[4] 15 RR 62 (Juror Randel); 28 RR 39 (Juror Powell), 61, 62 (Juror Roberts), 63; 31 RR 183 (Juror Goodwin); 32 RR 59, 33 RR 130 (Juror Cassel).

[5] SHCR is a citation to the State Habeas Clerk's Record.

[6] SHRR is a citation to the State Habeas Reporter's Record.

until closing arguments were taking place, when an individual from the gallery attempted to rush Sparks. *Id.* at 83-84.

Moorehead was sitting behind Sparks, in a chair merely ten yards from the jury box. *Id.* at 41-47. While there is no record of the defense discussing Moorehead's tie with the judge, lead trial counsel was certain he made an objection concerning the tie during a side bar with the judge, off the record. *Id.* at 56.

Moorehead's tie was the final act in a strange trial. A media frenzy surrounded the entire case. During the trial, there were multiple outbursts from the audience, including a victim's father who attempted to approach Sparks during the closing arguments on punishment. 41RR88-89; *see also* State's Exhibit B. At one point, a large hack saw blade was found in the gallery, prompting the court room to be cleared and metal detectors to be placed at the court room doors. 40RR40. And throughout trial, Sparks was shackled and wearing a stun belt. 6RR5-7 (judge discussing the shackles and stun belt).

Sparks argued during his initial post-conviction proceedings that Moorehead's actions violated his right to an impartial jury. SHCR.12-21. The state district court recommended that relief be denied because he "failed to present any evidence proving that any juror considered the Moorehead's necktie during deliberations." *Id.* at 158. The Court of Criminal Appeals signed off on this finding. *Ex Parte Sparks*, 2011 WL 6293529 (2011).

Sparks raised the issue once again in his federal post-conviction proceedings. The district court denied the claim because Sparks had not proven "that the jury actually received the external influence by viewing the image on the tie. . ." ROA.954. The Fifth Circuit did not address the merits in detail, but held the district court's determination was not debatable. *Sparks v. Davis*, 756 Fed. Appx. at 403.

ARGUMENT: REASONS FOR GRANTING RELIEF

I. DOES CROSS-EXAMINATION OF A PROSECUTION'S EXPERT CURE ALL HARM FROM THAT EXPERT'S REPEATED FALSE TESTIMONY DURING A CAPITAL PUNISHMENT PROCEEDING, AND IS THE PETITIONER OR PROSECUTION AT FAULT FOR FAILING TO CORRECT THE EXPERT'S FALSE TESTIMONY?

A.P. Merillat's testimony that Sparks *would* enter TDCJ at the median G-3 classification level, thereby providing Sparks with ample opportunities to commit violence, was false and violated Sparks' Due Process and Eighth Amendment Rights. The District Court's holding that Merillat's false testimony was corrected on cross-examination ignored this Court's precedent that false testimony must be considered in its totality. The Fifth Circuit, on the other hand, faulted Sparks for not discovering the false nature of Merillat's testimony in a timelier manner, a decision contrary to this Court's precedent which places the onus of correcting false testimony on the prosecution.

Sparks sought a Certificate of Appealability (COA) from the Fifth Circuit related to the merits of this claim. COA should be granted if a petitioner demonstrates "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Related to the procedural default issue, COA should issue if the petitioner demonstrates "that a procedural ruling barring relief is itself debatable among jurists of reason." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

A. The lower courts' decisions conflicted with the relevant decisions of this Court, as well as those of other circuit courts and its own prior decisions, because they failed to consider the impression left by Merillat's testimony as a whole.

The District Court denied relief for one reason: the Court claimed Merillat's false testimony was corrected when he briefly flirted with the truth on cross examination. ROA.967-974. The District Court relied upon the portion of cross examination where Merillat briefly and begrudgingly agreed that Sparks could be classified to a more restrictive classification status. The District Court simply omitted the final question of that exchange:

> Q: So your testimony a while ago what I called throwing a skunk over there, you're basically saying is we know what the minimum is, but we have no idea what it's actually gonna be for Robert Sparks. That's what you're basically saying, isn't it?
>
> A. No, you're wrong.

39RR87; ROA.967. Of course, the District Court also omitted that the bulk of the testimony provided to the jury upon request falsely explained that Sparks would "automatically [be] classified as what's called a G-3." CR.490-94; Appendix E.

The Circuit Court recognized that the "testimony in question was inaccurate as first stated," but also gave credence to the idea that "Merillat's testimony was corrected by Merillat during cross-examination . . ." In failing to consider the

impression left by the totality of Merillat's testimony, the lower courts deviated from this Court's precedent.

Due Process is violated when a witness's "testimony, taken as a whole, [gives] the jury the false impression" about a material fact. *Alcorta v. State of Tex.*, 355 U.S. 28, 31 (1957). The Eighth Amendment is also violated when the jury is allowed to consider evidence later revealed to be materially inaccurate in a death penalty case. *Johnson v. Mississippi*, 486 U.S. 578, 579 (1988).

Related to the Eighth Amendment, "the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (*citing Gardner v. Florida*, 430 U.S. 349, 363-364 (1977) (White, J., concurring in judgment) (*quoting Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). In *Johnson*, the Court reversed a death sentence where the "jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* at 590.

Two factors are relevant: (1) was the jury allowed to consider materially inaccurate evidence, and (2) was the evidence prejudicial? *Id.* at 586, 590. In Sparks' case, we know the jury relied upon materially inaccurate testimony. The jury specifically asked for "marilot's testimony." CR.487 (sic). The jury asked "[i]f sentenced to a life sentence without parole, what would he be classified as," and wanted to know "what restrictions are on a G-3 prisoner?" In response, the jury was

given transcripts showing that Sparks would "automatically be classified as what's called a G-3," and told that G-3 prisoners could attend chow hall with other inmates, go to school, have visitation, and go to medical facilities. CR.490-91. And Merillat's testimony on cross examination, also provided to the jury, didn't cure the remainder of false testimony given to the jury. CR.492-94. By failing to consider the entirety of the Merillat's testimony, the lower courts erroneously found that Merillat's testimony was not materially inaccurate.

Sparks was also denied Due Process by the presentation of Merillat's false testimony. Due Process prohibits the prosecution from securing a conviction or death sentence through the use of false or highly misleading evidence. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (holding that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment"). "The same result [is obtained] when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 79. Due Process is implicated when the prosecution knows, or should know, testimony is false. *See e.g., United States v. Agurs*, 427 U.S. 97, 103 (1976).[7] Convictions based on false testimony must be reversed if the false evidence "may have had an effect on the outcome of the trial." *Napue*, 360 U.S. at 272 (1959).

[7] In *Velez*, the Texas Court of Criminal Appeals found that "[b]oth Merillat and the state . . . knew or should have known that Merillat's testimony about the G classification of inmates who were sentenced to life without parole was false." *Velez*, 2012 WL 2130890, at *32.

"A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . ." *Napue*, 360 U.S. at 269-70. Regardless of the intent of the prosecutor, the harm is the same: "preventing, as it did, a trial that could in any real sense be termed fair." *Id.* And more importantly, the fact that the jury learned of other reasons to doubt the witness in *Napue* did not turn "what was otherwise a tainted trial into a fair one." *Id.* Once a witness lies under oath, he "has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity." *Masorash v. United States* , 352 U.S. 1, 14 (1956).

This Court's test is whether the witness's "testimony, taken as a whole, gave the jury the false impression that" Sparks would atomically enter TDCJ at the median G-3 classification level. *See Alcorta v. State of Tex.*, 355 U.S. 28, 31 (1957). The lower courts failed to consider the impact of Merillat's testimony in its entirety. In doing so, the Circuit Court deviated not only from this Court's precedent, but also from its own precedent and that of other circuits. *See United States v. Barham*, 595 F.2d 231, 241 (5th Cir. 1979) ("The testimony heard by the jury, if not outright lies, certainly conveyed the false impression that none of these three witnesses had received any promises of leniency or other considerations."); *United States v. Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978) ("The same rule applies if the prosecution . . . allows the jury to be presented with a materially false impression."); *see also Drake v. Portuondo*, 553 F.3d 230, 240 (2d Cir. 2009) ("The prosecutor plainly crafted the question to achieve literal accuracy while conveying

the false impression that Walter's work had been validated through publication."). "The reviewing court must focus on the impact on the jury. A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury." *Anderson,* 573 F.2d at 1356.

Sparks' death sentence also runs afoul of the *Brady* line of cases. Suppression by the state of evidence favorable to the accused violates due process where the evidence is material to punishment. *Brady v. Maryland*, 373 U.S. 83, 87; 83PS.Ct. 1193, 1197 (1963). The prosecutor's duty to disclose such evidence applies even if there has been no request by the defendant, *United States v. Agurs*, 427 U.S. 97 (1976), and this duty includes both impeachment and exculpatory evidence. *Uniter States v. Bagley*, 473 U.S. 667 (1985).

The State is deemed to possess evidence that is in the possession of any part of the prosecutorial team. *Kyles v. Whitley*, 514 U.S. at 437. Evidence withheld by the state is material, and a new trial is required, if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. *See e.g. Giglio*, 405 U.S. 150, 154.

Prosecutors have a duty to learn of *Brady* evidence known to others acting on the State's behalf in criminal cases. *See Kyles*, 514 U.S. 419. In Sparks' case, the prosecution therefore had a duty to discover what Merillat knew, that Sparks classification level could only be determined after he went through the TDCJ diagnostics process (or that the TDCJ classification manual, which Merillat had at

trial, proved his false testimony). *See* 39RR73 (Merillat explaining he had the classification manual with him at trial).

Finally, "[t]he Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" *Simmons v. S. Carolina*, 512 U.S. 154, 161 (1994) (*citing Gardner v. Florida*, 430 U.S. 349, 362 (1977)). In *Simmons*, the capital defendant repeatedly requested the judge to include a jury instruction notifying the jury that if Simmons was sentenced to life in prison, he would not be eligible for parole. *Id.* at 160. The judge refused. *Id.* Shortly into their punishment deliberation, the jury specifically asked if the defendant would be eligible for parole if sentenced to life in prison. *Id.* They were instructed not to consider the defendant's parole eligibility, and the defendant was sentenced to death. *Id.* Had he been sentenced to life in prison, he would not have been eligible for parole. *Id.*

The Court ruled "it is clear that the State denied petitioner due process." *Id.* at 162. The Court focused on the "misunderstanding reasonable jurors may have" about the term life imprisonment. *Id.* at 159. In Sparks' case, the totality of the testimony, and the court's response to the jury's questions would lead a reasonable juror to believe Sparks would be classified as G-3 regardless of his personal characteristics. *See* CR 487-95. Merillat's limited concession—from which he quickly retreated in the end—during cross examination didn't affect the overall theme of his testimony: sentence Sparks to death or he *will* have opportunities for violence in prison.

Although a full harm analysis goes beyond the purposes of the current briefing, it should be noted that where false evidence is relied upon by the prosecution, the Court has applied a "strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. Given that we know the jury specifically requested Merillat's testimony toward the end of their deliberation, it seems obvious that Merillat's false testimony "may have had an effect on the outcome of the trial[,]" and was therefore prejudicial. *See Napue*, 360 U.S. at 272.

At a minimum, jurists of reason could debate the District Court's resolution of this claim, and a COA should have issued.

B. The Circuit Court's opinion conflicted with the precedent of this Court because the opinion placed the burden of discovering and correcting the prosecution's false testimony on the defendant when that burden belongs solely to the prosecution.

Unlike the District Court, the Circuit Court denied Sparks' COA request based upon the idea that Sparks was at fault for not raising the Merillat claim in his initial habeas application. The Court noted "Sparks's defense attorney focused on correcting Merillat's testimony during his cross examination." *Sparks*, 756 Fed. Appx. at 401. In other words, because Sparks' trial counsel challenged Merillat's testimony, his initial post-conviction counsel should have discovered the testimony was false prior to filing the initial state collateral proceedings. The Fifth Circuit therefore applied a "rule thus declaring 'prosecutor may hide, defendant must seek,' [which] is not

tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

The Merillat claims were procedurally defaulted, but when a petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law[,]" federal courts can review a procedurally defaulted claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "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." *Id.* at 753. In Sparks' case, cause is that the State never corrected the false testimony presented at trial.

"If it was reasonable for trial counsel to rely on . . . the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials. . . we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable." *Strickler v. Greene*, 527 U.S. 263, 283 (1999). In *Stickler,* this Court specifically disavowed the idea that a Due Process claim or a showing of cause must fail where it was possible for the petitioner to have discovered the claim in prior proceedings. *Id.* at 285. Indeed, the Court made clear that a petitioner will not be faulted for failing to uncover constitutional violations unless the petitioner was actually aware of the violation and failed to timely raise the claim for tactical reasons. *Id.* at 288. And, just like the *Stickler* case, "[t]here is no suggestion

that tactical considerations played any role in petitioner's failure to raise his *Brady* claim in state court." *Id.* at 288.[8]

The state never took any action to cure the error in Sparks' case, and if Sparks would not have been Mr. Velez's neighbor on death row it is unlikely this issue would have been discovered. The Dallas County District Attorney certainly took no action to cure the error in this case. Before the state courts the district attorney's office denied that any false testimony had been presented in Sparks' case and refused counsel's request to review their files. *See* Statement of the Case, *supra.*

And contrary to the Fifth Circuit's view, jurists of reason have previously disagreed with their position. For example, in *Estrada*, where Merillat was first outed for testifying falsely, the Texas Court of Criminal Appeals (CCA) waived preservation of error rules despite the fact that Estrada's defense team included a classifications expert who should have identified Merillat's false testimony at trial. 313 S.W.3d at 286. In *Estrada*, the CCA explained, "[w]e believe that the Supreme Court would find this to be constitutionally intolerable." *Id.* at 287. This finding was made in spite of the fact that Estrada's jury was provided correcting testimony by *Estrada's* expert. *Id.* at 286. Before the CCA, the issue became "whether this Court should grant relief on the merits of this claim because it was not, but apparently could have been, raised in the trial court." *Id.* at 288. The CCA went on to grant relief because Estrada "had no duty to object because he could not reasonably be expected

[8] Similarly, in *Banks v. Dretke*, the Court reversed the Fifth Circuit noting "it was incumbent upon the state to set the record straight." 540 U.S. 668, 676 (2004).

to have known that the testimony was false at the time that it was made" and because the case involved "the State's duty to correct 'false' testimony whenever it comes to the State's attention." *Id.* (*citing Napue, supra*).

In *Velez v. State*, the CCA didn't even bother addressing preservation of error. Instead, the CCA simply noted that "[b]oth Merillat and the state knew or should have known of that regulation and therefore knew or should have known that Merillat's testimony about the G classification of inmates who were sentenced to life without parole was false." *Velez v. State*, 2012 WL 2130890, at *32 (Tex. Crim. App. June 13, 2012).

Just like *Banks v. Dretke*, the government here has repeatedly denied that Merillat testified falsely, and the prosecution never complied with its duty to set the record straight. "It was not incumbent on [Sparks] to prove these representations false; rather, [Sparks] was entitled to treat the prosecutor's submissions as truthful." 540 U.S. at 698. The Fifth Circuit's opinion, placing the onus on Sparks to discover the prosecution's false evidence, is contrary to the clearly established precedent of this Court.

At a minimum, a COA should have issued on Sparks' Merillat Claim.

C. The Circuit Court's ruling concerning Sparks' request for discovery and hearing also conflicted with this Court's precedent.

The Circuit Court upheld the District Court's decision denying Sparks a hearing based upon the idea that Sparks did not satisfy the requirements 28 U.S.C.

§ 2254(e)(2). *Sparks*, 756 Fed. Appx. at 401. Once again, the Circuit failed to recognize this Court's controlling precedent. "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel. In this we agree with the Court of Appeals and with all other courts of appeals which have addressed the issue." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). The blame for Sparks' failure to present this claim to the state courts in Sparks' initial collateral proceedings falls squarely on the shoulders of the state, and therefore § 2254(e)(2) had no bearing on Sparks' case.

Also, the Circuit Court's denial of Sparks' appeal related to discovery was based solely upon the idea that Sparks' claim was procedurally defaulted, which was an erroneous finding. *Sparks*, 756 Fed. Appx. at 401. Both issues were decided in error.

D. This Court should grant certiorari.

By failing to consider the impression left by the totality of Merillat's false testimony and by blaming Sparks for the prosecution's failure to correct Merillat's false testimony, the Circuit Court decided an important question of federal law in a way that conflicts with the relevant decisions of this Court. Sup. Ct. R. 10(c). This Court should grant certiorari and allow full briefing on merits.

II. DID THE CIRCUIT COURT ERR BY FAILING TO CONSIDER WHETHER BAILIFF MOOREHEAD'S ACTIONS CREATED AN UNACCEPTABLE RISK OF IMPERMISSIBLE FACTORS COMING INTO PLAY AT SPARKS' TRIAL, AND DOES *BRECHT'S* "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE" STANDARD OF HARM APPLY TO IMPARTIAL JURY CLAIMS?

Sparks was denied his right to a fair trial and impartial jury when Bobby Moorehead, a bailiff who had close and continuous contact with the jury, wore a homemade neck tie in support of the death penalty on the day the jury began punishment deliberations. The District Court denied this claim based upon the idea that Sparks failed to prove that members of the jury actually viewed Moorehead's tie, but this Court's precedent establishes that the relevant question is whether the courtroom arrangement created "an unacceptable risk is presented of impermissible factors coming into play." *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986) (*citing Estelle v. Williams*, 425 U.S. 501, 505 (1976)). The Circuit Court's opinion appears to have rested upon the idea that *Brecht's* "substantial and injurious effect" standard of harm applies to impartial jury claims raised in collateral proceedings, a question which has led to a circuit split and which has not been addressed by the Court.

In any event, it must be recognized that Sparks was denied a COA on this claim, so the relevant question is whether jurists of reason could debate the district court's resolution of the claim or the procedural questions involved. *Buck v. Davis*, 137 S. Ct. at 777; *Miller-El*, 537 U.S. at 327.

A. The lower courts failed to consider whether Bailiff Moorehead's actions created an unacceptable risk of impermissible factors coming into play.

Despite the fact that Bailiff Moorehead was sitting directly behind Sparks on the last day of trial, wearing his homemade syringe tie with his jacket open, and despite the fact that members of gallery, the lawyers, and members of the press all noticed the tie, the District Court denied relief on the basis that Sparks had not proven that the jury actually saw the tie. ROA.954. The Circuit Court rubberstamped that decision. *Sparks*, 756 Fed. Appx. at 403. Both courts failed to apply this Court's precedent in analyzing this claim.

"Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Flynn*, 475 U.S. at 570. "This Court has recognized that certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial." *Carey v. Musladin*, 549 U.S. 70, 72 (2006) (*citing Estelle* v. *Williams*, 425 U. S. 501, 503-506 (1976); *Flynn*, *supra*.). Sparks simply argues that a bailiff openly lobbying for a sentence of death on the day the jury begins deliberations is a practice inherently prejudicial and is unacceptable in a capital trial.

The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Turner v. State of La.*, 379 U.S. 466, 471–72 (1965). This requirement "goes to the fundamental integrity of all that is embraced in the

constitutional concept of trial by jury." *Id.* Justice Holmes observed that "any judge who has sat with juries knows that, in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Id.* (citing *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting)). The principles protecting the sanctity of the judicial environment are long-standing. More than a century ago, the Court instructed that "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox v. U. S.*, 146 U.S. 140, 150 (1892).

When Due Process is implicated by an external pressure on the jury, this Court has established that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). The Fifth Circuit has previously recognized that *Remmer* is clearly established federal law. *Brooks v. Dretke*, 444 F.3d 328, 329 (5th Cir. 2006). Concerning state actors, this Court has historically viewed the "unauthorized conduct of the bailiff" for the probabilities that prejudice will result, as opposed to requiring firm proof of prejudice. *Parker v. Gladden*, 385 U.S. 363, 365 (1966).

Applying this Court's "*Flynn* test," it becomes obvious that Moorehead's open support for the death penalty created an unacceptable risk of impermissible factors coming into play. Moorehead specifically created the tie as a persuasive rhetorical device to show his support for the death penalty. SHRR at 17-18. The media present

at trial saw the tie, defense counsel saw the tie, and the tie was worn on the day the jury began its punishment phase deliberations. SHRR at 19-20, 35-36. The jury sat less than ten yards away from where Merillat sat and portions of the jury box provided an unobstructed view of the tie. *Id.* a 42-43, 52.

The lower court erred by failing to apply this Court's clearly established precedent. Sparks was not required to show that individual jurors "actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Flynn*, 475 U.S. at 570. When the proper test is applied, it is clear that jurists of reason can debate the ruling of the lower courts. The burden was not on Sparks to prove that Bailiff Moorehead's misconduct was noticed by the jury; the burden was the state's in proving that no prejudice resulted from Moorehead's open support for the death penalty.

B. The Circuit Courts need guidance about whether *Brecth's* harm analysis applies to impartial jury claims.

This Court has consistently presumed prejudice when Due Process concerns related to impartial juries are at issue. *See Estes v. Texas*, 381 U.S. 532 (1965) (Trial atmosphere violating Due Process called for reversal despite the absence of any showing of prejudice); *Remmer v. United States*, 347 U.S. 227, 230 (1954) ("any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"); *see also Stockton v. Com. of Va.*, 852 F.2d 740, 743 (4th

Cir. 1988) (once Due Process is implicated "the government bears the burden of demonstrating the absence of prejudice.").

The Circuit Court, however, held that the more onerous harm standard established in *Brecht v. Adamson* applies to impartial juror claims properly raised in post-conviction proceedings. *Sparks*, 756 Fed. Appx. at 403. This Court should take this opportunity to address whether *Brecht* applies to this particular type of non-trial error.

In *Brecht,* the Court explained that the error in question was "trial error[,]" which "'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" 507 U.S. at 629. However, cases involving outside influence, especially on the part of the court staff, do not implicate the type of error that can be quantitatively assessed. This is why the Court directs that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . ." *Remmer*, 347 U.S. at 229 (1954). And in *Sheppard*, the Court recognized that its previous precedent established that harm analysis was inapplicable when "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." 384 U.S. 333, 352 (1966) (citing *Estes*, 381 U.S. 532).

When evaluating whether a constitutional error warrants redress without inquiry into its effects in a particular case, the Court has generally distinguished between "structural defects in the constitution of the trial mechanism" and "trial errors," typically presuming prejudice in the former cases, and applying a case-specific harmless error analysis in the latter cases. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The "common thread" connecting cases deemed amenable to a harmless error analysis "is that each involved 'trial error' - error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless …." *Fulminante*, 499 U.S. at 307-08 (emphasis added). However, other errors, the harm of which cannot be quantitatively assessed, are not "trial error," and are thus treated differently.[9]

The error at issue is not "trial error" because it is not the type of error which can be quantitatively assessed, nor can its effects be contextualized in light of other evidence. This is why the Court presumes error when "an unacceptable risk is presented of impermissible factors coming into play." *Flynn*, 475 U.S. at 570 (1986). This is why *Brecht*, by its own terms, does not apply to the error in question.

[9] *See, e.g., Deck v. Missouri*, 544 U.S. 622, 635 (2005) (shackling of defendant in courtroom during trial); *Sullivan v. Louisiana*, 508 U.S. 275, 279-81 (1993) (erroneous reasonable doubt instruction); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of right to self-representation); Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (counsel "actively represented conflicting interests"); *Geders v. United States*, 425 U.S. 80, 91 (1976) (defendant denied access to counsel between direct and cross-examination); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (complete deprivation of right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (trial conducted by biased judge).

Indeed, in *Brecht* this Court specifically recognized there might be certain circumstances in which the heightened harm analysis might not apply even to errors of the trial type. 507 U.S. at 638 n.9. For this reason, even if the error at issue can be considered trial error, *Brecht* should not apply. And since *Brecht,* some circuit courts have continued to apply the traditional presumption of harm test to outside influence claims. The Eleventh Circuit applied the presumption of prejudice to outside influence claims in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005). In that case, although the appellate court denied relief, the Court clearly applied the presumption of prejudice established by *Turner* and *Remmer*. *Id.* at 1307. And in *Brooks v. Dretke*, the Fifth Circuit employed the doctrine of implied bias when granting relief on an impartial juror claim in the post-conviction context, even going so far as to explain the doctrine of implied bias was firmly established federal law. 418 F.3d 430, 434 (5th Cir. 2005); 444 F.3d 328, 332 (5th Cir. 2006) (denying rehearing). The Ninth Circuit has likewise applied the presumption of prejudice to an impartial juror claim, granting habeas relief where the "government failed to clearly establish that the improper conversation did not affect the verdict by bolstering the detective's credibility or 'creating juror empathy.'" *Caliendo v. Warden*, 365 F.3d 691, 699 (9th Cir. 2004).

The Fourth Circuit on the other hand applies *Brecht* harm analysis to impartial juror claims raised during state habeas. *Barnes v. Joyner*, 751 F.3d 229, 253 (4th Cir. 2014) ("Barnes will not be entitled to the *Remmer* presumption in attempting to make this showing because the presumption does not apply in the

federal habeas context when proving a substantial and injurious effect or influence on the jury's verdict."). And, strangely, both the Fifth Circuit and Ninth Circuit, despite their own precedent to the contrary, have applied *Brecht* to the situation at hand. *See Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008); *Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007).

This Court has not addressed the proper standard of harm applicable to impartial jury claims raised in post-conviction collateral proceedings, and the Circuit Courts have been unable to create uniform jurisprudence on the issue. This Court should take this opportunity to decide whether or not *Brecht's* harm analysis applies to claims which do not involve classic trial error.

C. This Court should grant certiorari.

This Court should grant certiorari because the Fifth Circuit's opinion sanctioned the district court's failure to apply this Court's clearly established impartial jury jurisprudence. Sup. Ct. R. 10 (a). Also, the Fifth Circuit's application of *Brecht's* harm analysis to the Due Process violation in this case conflicts with the decisions of other circuit courts (and its own prior decisions), and decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10 (a), (c).

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully submitted,

Jonathan Landers
LANDERS LAW FIRM
917 Franklin; Suite 300
Houston, TX 77002
Jlanders.law@gmail.com
Member, Supreme Court Bar
(713) 685-5000 (work)
(713) 513-5505 (fax)

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 1440
Houston, TX 77002
seth@kretzerfirm.com
Member, Supreme Court Bar
(713) 775-3050 (work)
(713) 929-2019 (fax)

COURT-APPOINTED ATTORNEYS FOR PETITIONER SPARKS

CERTIFICATION OF SERVICE

I hereby certify that a copy of this petition was delivered to Ellen Stewart-Klein, Assistant Attorney General, via email at Ellen.Stewart-Klein@texasattorneygeneral.gov on May 3, 2019. Further, service will be made as required by Rule 29.

/s/ Jonathan Landers

JONATHAN D. LANDERS

CERTIFICATE OF COMPLIANCE

This petition complies with the word limitation of Rule 33. The relevant portions of the brief include 8,983 words.

/s/ Jonathan Landers

JONATHAN D. LANDERS