NO. 20- (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

REINALDO DENNES,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

The trial prosecutors in this Harris County, Texas capital case hid extensive exculpatory and impeaching evidence relating to the primary State's sentencing phase witness against Petitioner, David Balderas. As a sentencing phase aggravator designed to demonstrate "future dangerousness," Mr. Balderas implicated Petitioner in a separate and unadjudicated home-invasion robbery; his testimony was the only evidence the State presented directly linking Petitioner to this crime. Prosecutors made it the centerpiece of their argument on future danger. Despite adequate *Brady* requests, prosecutor-promises on the record to produce *Brady*, and the court orders directing same, the record below is undisputed that the trial prosecutors failed to disclose to the defense extensive impeaching information about Balderas, including facts so damning of Balderas's fundamental credibility *ab initio,* that a sitting federal judge pronouncing sentence in a later federal prosecution of Balderas would state, on the record, that Balderas was "worthless to the government" as a witness in any case. ROA.4726-32 (*United States v. David Balderas*, U.S. Dist. Judge Hinojosa, Sentencing Hearing Transcript, at pp.8-14). As to sentencing, at the very least, it is difficult to understand a ruling below that both refused to consider facts not discovered until federal proceedings and failed to find such facts material to and violative of this Court's clear and long-standing precedents under *Brady v. Maryland* and *Napue v. Illinois*. Addressing this Court's *Pinholster* jurisprudence is necessary on the first matter, in particular footnote 10 and Justice Sotomayor's dissent in that case; and, dealing with a recurring issue about which the lower costs are divided, in the *Brady/Napue* jurisprudence, is necessary for the second.

Question 1

Given the extreme facts of this case, should this Court finally turn to footnote 10 and Justice Sotomayor's dissenting opinion in *Cullen v. Pinholster* to hold that facts only disclosed after state

court proceedings which give rise to claims under *Brady* and *Napue* must either be considered by federal courts in adjudicating the merits of those claims, or they must be returned to state court for first adjudication there?

Question 2

Should the Court grant certiorari to settle a conflict amongst the circuits as to the answer to question 1?[1]

In this case the lower court applied *Pinholster* to Petitioner's newly discovered *Brady/Giglio* facts to bar consideration thereof, indicating Petitioner knew or should have known State's witness Balderas was a long-time Houston police informant. In doing so, it failed to account for this Court's holdings in *Banks* and *Strickler*, which make plain that trial counsel are entitled to rely upon prosecutor promises to disclose all *Brady* material, particularly when those assertions are confirmed by prosecutors post-trial.[2]

Question 3

Should the Court settle the confusion in the lower courts, both state and federal, concerning whether the lower court should have denied the *Brady* claim here in reliance on the (unsubstantiated) view that Mr. Dennes knew or should have known that the State's chief witness against him was a long-time informant for the Houston Police Department, imposing a *Brady* due diligence requirement in excess of this Court's *Banks* and *Strickler* diligence requirements?

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[1] Compare *Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011)(applying *Rhines* stay and abey to *Banks-Strickler Brady* claim evidence first uncovered in federal habeas) and *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450, 464-65 (6th Cir. 2015)(applying *Banks* and *Strickler* cause and prejudice exception even after *Pinholster*) with *Dennes v. Davis* (applying neither and refusing to consider *Brady* evidence under *Pinholster*).

[2] *Banks v. Dretke*, 540 U.S. 668, 692-93 (2004)(citing *Strickler v. Greene*, 527 U.S. 263, 289 (1999)).

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner Reinaldo Dennes was the Petitioner before the United States District Court for the Southern District of Texas, as well as the Applicant and the Appellant before the United States Court of Appeals for the Fifth Circuit. Dennes is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director was the Respondent before the United States District Court for the Southern District of Texas, as well as the Respondent and the Appellee before the United States Court of Appeals for the Fifth Circuit.

Dennes asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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Reinaldo Dennes respectfully request a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished Opinion and Order of the United States Court of Appeals for the Fifth Circuit denying the appeal on the merits after certificate of appealability is at Tab A of the attached appendix. The unpublished Order of the Fifth Circuit denying the petitions for rehearing is at Tab B. The Merits Brief of Appellant is at Tab C. The unreported Memorandum Opinion of the United States District Court for the Southern District of Texas denying habeas relief is at Tab D. The unpublished Order of the Texas Court of Criminal Appeals denying state post-conviction relief is at Tab E. The state trial court's recommended Findings of Fact and Conclusions of Law is attached at Tab F.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Fifth Circuit had appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Reinaldo Dennes is confined under a sentence of death pursuant to the judgment of the 263rd District Court, Harris County, Texas, case number 750313, which was rendered and entered on September 4th, 1997. (ROA.5568-69).[3]

Petitioner was charged with the murder of Janos Szucs during the course of a robbery on January 24, 1996. (ROA.5415). Petitioner entered a plea of not guilty. (ROA.9619) (RR. Vol. 25 p. 8). Trial before a jury commenced on August 18, 1997.

Paul Terry testified for the State. (ROA.9625) (RR. Vol. 25 p. 14). Terry was a Houston Police officer. (ROA.9625) (RR. Vol. 25 p. 14). On January 24, 1996, he responded to a call at an office building, known as the Greenrich Building, located at 6222 Richmond, in Harris County, Texas. (ROA.9627-29) (RR. Vol. 25 p. 16-18). The time was 7:48 p.m. (ROA.9628) (RR. Vol. 25 p. 17). Inside the building, Terry observed a security guard, David Copeland, lying unconscious on the floor. (ROA.9629) (RR. Vol. 25 p. 18). Copeland had been shot several times. (ROA.9631-34) (RR. Vol. 25 pp. 20-23).

David Walter Copeland testified for the State. (ROA.9712) (RR. Vol. 25 p. 101). Copeland was employed as a security guard assigned to the Greenrich Building. (ROA.9713-17) (RR. Vol. 25 pp. 102-106). His post was a security console near the front of the building. Id.

Copeland was new to the Greenrich Building. January 24, 1996, the day of the alleged offense, was his third day on the job. (ROA.9719) (RR. Vol. 25 pp. 108, 116). Copeland testified that he understood that Petitioner had been a tenant in the building. (ROA.9859) (RR. Vol. 26 p.

[3] The federal record on appeal, filed in the United States District Court for the Southern District of Texas on March 31, 2015 (D.E. 21), is cited to as "ROA.[page]."

46). However, he could not recall having ever seen Petitioner on the premises. (ROA.9859) (RR. Vol. 26 p. 46). Copeland noted that the Greenrich building was secured with automatic electrical security locks which closed the building entrances nightly at 6:00 p.m. (ROA.9720) (RR. Vol. 25 p. 109). Tenants were provided with electronic cards which permitted entry into the building after hours. (ROA.9721) (RR. Vol. 25 p. 110). Copeland further testified that on January 24, 1996, while on duty as security guard from 3:00 p.m. until 11:00 p.m. (ROA.9717) (RR. Vol. 25 p. 106), and after making his rounds, he noticed an individual working on the security console. (ROA.9732) (RR. Vol. 25 p. 121). Copeland assumed that this was the same technician who had been servicing the console earlier in the day. (ROA.9732) (RR. Vol. 25 p. 121). He observed the man as he got up from behind the console and walked briskly toward the loading dock door. (ROA.9733-34) (RR. Vol. 25 pp. 122-123).

Copeland approached the console. (ROA.9736) (RR. Vol. 25 p. 125). He then noticed that the video records contained within the security console had been removed. (ROA.9749) (RR. Vol. 25 p. 138). Copeland also noticed that the same man who had been walking briskly away had turned and was now walking toward him. (ROA.9740) (RR. Vol. 25 p. 129). The man came near Copeland and shot him with a nine millimeter handgun equipped with a silencer. (ROA.9745-46; ROA.9749; ROA.9866) (RR. Vol. 25, pp. 134-135, 138; Vol. 26, p. 53). This man wore a disguise which consisted of a dark pair of glasses and a theatrical mustache. (ROA.9751, ROA.9753-54) (RR. Vol. 25 pp. 140, 142-143). Copeland identified Petitioner as the person he observed on January 24, 1996, wearing the dark sunglasses and the theatrical mustache. (ROA.9753-54; ROA.9860) (RR. Vol. 25 pp. 142-143; Vol. 26 p. 47). Copeland testified he previously identified Petitioner in both a photo spread and a lineup. (ROA.9761, ROA.9766) (RR. Vol. 25 pp. 150, 155).

M.R. Furstenfeld testified for the State. (ROA.10303) (RR. Vol. 28 p. 93). Furstenfeld, a Houston Police officer (ROA.10303) (RR. Vol. 28 p. 93), stated that he had been dispatched to the

Greenrich Building on January 24, 1996. (ROA.10304) (RR. Vol. 28 p. 94). Upon arrival, he proceeded to the seventh floor and entered an office suite marked "J.S. Precious Stones, Inc. JAL Enterprises, Inc." (ROA.10306, ROA.10307) (RR. Vol. 28 pp. 96, 98), where he discovered complainant, Janos Szucs, slumped over a chair in an inner office. (ROA.10317) (RR. Vol. 28 p. 107).

The complainant had been shot. (ROA.10332) (RR. Vol. 28 p. 122). Officer James L. Waltman also testified for the State. (ROA.10377) (RR. Vol. 28 p. 166). Waltman, assigned to investigate the alleged crime scene, (ROA.10378) (RR. Vol. 28 p. 167), stated that the Greenrich Building was monitored throughout by electronic surveillance located in the entrance floor security console. (ROA.10399) (RR. Vol. 28 p. 188). Waltman had examined the complainant's body. (ROA.10414) (RR. Vol. 28 p. 203). He believed that the complainant had been shot with a nine millimeter handgun. (ROA.10416) (RR. Vol. 28 p. 205). Waltman located a safe in the complainant's office. It was locked. (ROA.10417) (RR. Vol. 28 p. 206). When the safe was later opened, it was empty. (ROA.10421) (RR. Vol. 28 p. 210). Waltman noticed that complainant's computer appeared to have been damaged, as if someone had attempted to force a disk out of the computer's drive. (ROA.10454) (RR. Vol. 29 p. 27).

Antonio Ramirez testified for the State. (ROA.9901) (RR. Vol. 26 p. 88). Ramirez, a tool and die maker, (ROA.9901) (RR. Vol. 26 p. 88), was acquainted with both Petitioner and Petitioner's brother, Alberto. (ROA.9904, ROA.9925-27) (RR. Vol. 26 pp. 91, 112-114). Ramirez stated that he had consigned some jewelry and personal rings to Petitioner for sale. (ROA.9907) (RR. Vol. 26 p. 94). Ramirez had also crafted small jewelry parts for Petitioner and had used a lathe located in Petitioner's office. (ROA.9907-09) (RR. Vol. 26 p. 94-96). Petitioner's office was located in the Greenrich Building. (RR. Vol. 26 pp. 92-93). Ramirez testified that in January, 1996, Petitioner had approached him and had requested that he fashion a silencer for a handgun. (ROA.9926) (RR. Vol.

26 p. 113). He received $50 to purchase the necessary parts. (ROA.9928) (RR. Vol. 26 p. 115). Thus, Ramirez constructed a silencer from a metal tube, using Petitioner's lathe and other equipment located in Petitioner's office. (ROA.9930) (RR. Vol. 26 p. 117). Ramirez completed the silencer on January 12, 1996. (ROA.9937) (RR. Vol. 26 p. 124). Petitioner thereafter tested the silencer with a nine millimeter handgun. (ROA.9938) (RR. Vol. 26 p. 125). Petitioner's brother, Alberto, also test fired the weapon. (ROA.9942) (RR. Vol. 26 p. 129). Petitioner was dissatisfied with Ramirez' silencer: he believed that it did not function adequately. (ROA.9938) (RR. Vol. 26 p. 125).

Ramirez subsequently constructed a second silencer. (ROA.9938) (RR. Vol. 26 p. 125). The latter device was completed on January 17, 1996. (ROA.9948) (RR. Vol. 26 p. 135). On the following day, Ramirez, Petitioner and Alberto met in a Chinese restaurant. (ROA.9965) (RR. Vol. 26 pp. 152, 155) . There, Ramirez learned that Petitioner and Alberto planned to rob a jeweler. (ROA.9967-69) (RR. Vol. 26 pp. 154-156). Petitioner invited Ramirez to participate in the planned robbery. (ROA.9967-69) (RR. Vol. 26 pp. 154-156). Ramirez agreed. (ROA.9969) (RR. Vol. 26 p. 156) . According to the plan, Albert would shoot the jeweler, Petitioner would steal the building's surveillance tapes, and Ramirez would seize the jeweler's diamonds. (ROA.9971) (RR. Vol. 26 p. 158).

Ramirez told the jury he had not really wanted to participate in the planned robbery. (ROA.9967-69) (RR. Vol. 26, p. 156). In fact, he had intended to leave the country. (ROA.9969) (RR. Vol. 26, p. 156). On the day after their meeting in the restaurant, Ramirez attempted to retrieve the silencer. (ROA.9972) (RR. Vol. 26, p. 159). Petitioner refused. (ROA.9972) (RR. Vol. 26, p. 159).

Ramirez testified that he did not know that manufacturing a silencer was an illegal offense in the United States. (ROA.10027, ROA.10039) (RR. Vol. 27 pp. 21, 33). Ramirez reiterated that he was unaware that his silencer would be used in the commission of a robbery or a murder.

(ROA.10243, ROA.10245) (RR. Vol. 28 pp. 33, 35). Ramirez insisted that he did not know that the instrument he had created for Petitioner was, in fact, a silencer. (ROA.10040) (RR. Vol. 27 p. 34). He believed that Petitioner should have advised him that it was illegal to manufacture or fashion a silencer. (ROA.10235) (RR. Vol. 27 p. 25). While dining at the Chinese restaurant, Petitioner paid Ramirez $2000. (ROA.9973) (RR. Vol. 26 p. 160). Ramirez was told that the money came from the sale of a portion of the jewelry he had consigned to Petitioner. (ROA.9973) (RR. Vol. 26 p. 160).

Ramirez departed to Ecuador on January 20, 1996. (ROA.9975) (RR. Vol. 26 p. 162). Upon his return to Houston and to Petitioner's office on February 2, 1996, (ROA.9978) (RR. Vol. 26 p. 165), he noted several police officers. There he saw policemen in the building. (ROA.9980) (RR. Vol. 26 p. 167). Ramirez eventually decided to tell the police what he knew. (ROA.9983) (RR. Vol. 26 p. 170).

Estrella Martinez testified for the State. (ROA.10218) (RR. Vol. 28 p. 8). Martinez was responsible for cleaning the Greenrich Building. (ROA.10221) (RR. Vol. 28 p. 11). She was born in Mexico, and was living in the United States illegally. (ROA.10218-19) (RR. Vol. 28 pp. 8, 9). Martinez knew both Petitioner and his brother. (ROA.10221-22, ROA.10228) (RR. Vol. 28 p. 11, 12, 18, 12). At the time of the alleged offense, she was Petitioner's lover. (ROA.10221, ROA.1022) (RR. Vol. 28 p. 11, 12). Martinez testified to the jury that approximately two or three weeks prior to the alleged offense, Petitioner had arranged with her to open a back door entrance of the Greenrich building upon his signal. (ROA.10223) (RR. Vol. 28 p. 13). The entrance was routinely locked after normal business hours. (ROA.10223) (RR. Vol. 28 p. 13). Petitioner told her he wanted to take the security tapes from the security console. (ROA.10223-24) (RR. Vol. 28 pp. 13-14). The Petitioner gave her a cell phone to communicate with him. (ROA.10231) (RR. Vol. 28 p. 21).

On January 24, 1996, Petitioner called her on the cell phone. (ROA.10249, ROA.10254) (RR. Vol. 28 pp. 39, 44). Martinez was working her second maintenance shift at the Greenrich

Building. (ROA.10254) (RR. Vol. 28 p. 44). Over the telephone, Petitioner her asked her to open the back door for him. (ROA.10254) (RR. Vol. 28 p. 44) . Martinez complied. (ROA.10255) (RR. Vol. 28 p. 45) . Petitioner and Alberto entered through the back door, and proceeded up a flight of stairs. (ROA.10255) (RR. Vol. 28 p. 45). Alberto had a bag in his hand. (ROA.10255) (RR. Vol. 28 p. 45). Martinez stated that at approximately 7:00 p.m., Petitioner called her again, and requested that she distract the security guard. (ROA.10258) (RR. Vol. 28 p. 48). Martinez sought the guard and told him she had locked her keys inside one of the business suites. (ROA.10258) (RR. Vol. 28 p. 48). This ploy forced the guard away to leave his post at the building's security console on the ground floor, and to accompany Martinez to the fifth floor of the building. (ROA.10258) (RR. Vol. 28 p. 48).

Petitioner called Martinez a third time at approximately 7:30 p.m. (ROA.10260) (RR. Vol. 28 p. 50). Petitioner requested her to distract the security guard again. (ROA.10260) (RR. Vol. 28 p. 50). Martinez did so by asking the guard to let her in the snack bar area. (ROA.10262) (RR. Vol. 28 p. 52) . While in the snack bar, she saw Petitioner wearing a disguise and walking toward the security guard. (ROA.10267-69) (RR. Vol. 28 pp. 57-59) . She turned around and did not see Petitioner shoot the guard. (ROA.10271) (RR. Vol. 28 p. 61). Martinez told the jury that she met with a business partner of Petitioner on January 25, 1996. (ROA.10281) (RR. Vol. 28 p. 71). She was paid $5,000, and asked to return the cell phone. (ROA.10281-82) (RR. Vol. 28 pp. 71-72). She met Petitioner in his office later that day. (ROA.10293) (RR. Vol. 28 p. 83).

Dr. Tommy Brown testified for the State. (ROA.10670) (RR. Vol. 30 p. 72). Dr. Brown was the Assistant Harris County Medical Examiner assigned to perform an autopsy on the complainant's body. (ROA.10672) (RR. Vol. 30 p. 74). He told the jury the complainant died of multiple gunshot wounds to the head and chest. (ROA.10687) (RR. Vol. 30 p. 89).

Robert Baldwin testified for the State. (ROA.10746) (RR. Vol. 30 p. 148). Baldwin was a Houston Police firearms examiner. (ROA.10746) (RR. Vol. 30 p. 148). He confirmed that nine bullets were recovered from the complainant's body, the complainant's office, and the downstairs hallway of the Greenrich Building. (ROA.10758) (RR. Vol. 30 p. 159). Baldwin stated that based on his examination of the bullets, his expert opinion was that six of the nine bullets had been fired from the same nine millimeter handgun. (ROA.10761) (RR. Vol. 30 p. 162).

Sam Solomay testified for the State. (ROA.11050) (RR. Vol. 31 p. 163). Solomay was a diamond merchant whose business office was located in the Greenrich Building. (ROA.11050) (RR. Vol. 31 p. 163). He told the jury the majority of the building's tenants were diamond and jewelry merchants. (ROA.11054) (RR. Vol. 31 p. 167). Solomay was acquainted with both the complainant and Petitioner. (ROA.11050-51) (RR. Vol. 31 pp. 163-164). The complainant was a well-known diamond merchant. (ROA.11055) (RR. Vol. 31 p. 168). Solomay stated Petitioner visited with the complainant frequently in January, 1996. (ROA.11068) (RR. Vol. 31 p. 181).

Solomay said that at the time of the alleged offense, he shared office space with the complainant. (RR. Vol. 31 p. 169). He estimated the complainant's diamond inventory to be worth three to four million dollars. (RR. Vol. 31 p. 194). On direct examination, he speculated that the complainant's diamond inventory must have been taken during the alleged offense. (RR. Vol. 31 p. 199). On cross-examination, Solomay admitted that the complainant's diamond inventory could have been removed and placed on display for sale at a diamond show. (ROA.11099) (RR. Vol. 31 p. 212). Solomay was aware of the extent and value of the complainant's inventory only through their conversations. (ROA.11086) (RR. Vol. 31 p. 199).

Officer Beth Hailing testified for the State. (ROA.10622) (RR. Vol. 30 p. 24) . On February 22, 1996 she executed a search warrant for Petitioner's office in the Greenrich Building.

(ROA.10634) (RR. Vol. 30 p. 36). There Hailing recovered an owner's manual for a nine millimeter Taurus handgun. (ROA.10634) (RR. Vol. 30 p. 36).

Richard Earnst testified for Petitioner. (ROA.11194) (RR. Vol. 32 p. 83). Ernest was employed as a firearms examiner for Tarrant County, Texas. (ROA.11194) (RR. Vol. 32 p. 83). Ernest examined each of the nine bullets recovered at the scene. (ROA.11219) (RR. Vol. 32 pp. 108-109). He stated that he was unable to confirm that any of the bullets had been fired from the same weapon. (ROA.11219-20) (RR. Vol. 32 p. 108-109) .

Ellis McCullough testified for Petitioner. (ROA.11283) (RR. Vol. 32 p. 172). McCullough was an attorney licensed to practice law in the State of Texas, and had been appointed to represent Petitioner during the February 23, 1996 lineup. (ROA.11288) (RR. Vol. 32 p. 177). He told the jury David Copeland did not identify Petitioner during the lineup. (ROA.11292) (RR. Vol. 32 p. 181). McCullough further stated that the officer in charge had mistakenly noted Copeland as a "tentative ID" on the offense report. (ROA.11292) (RR. Vol. 32 p. 181).

David Balderas testified for the State during the punishment phase of trial. (ROA.11499) (RR. Vol. 34 p. 49). He stated that in October, 1995, Petitioner had asked him to rob a diamond courier. (ROA.11507) (RR. Vol. 34 p. 57). The anticipated robbery would take place in the courier's house. (ROA.11507) (RR. Vol. 34 p. 57). Balderas recruited Hector Fugon and a person he knew only as Francisco to do the actual job. (ROA.11511-12) (RR. Vol. 34 pp. 61-62).

Balderas told the jury he met with Petitioner several times in order to plan the robbery. (ROA.11513-23) (RR. Vol. 34 pp. 63-72). Also present during these meetings were Fugon and Francisco. Their plan consisted of Petitioner following the courier home from the airport, and paging Balderas when it was time for the robbery. (ROA.11518-20) (RR. Vol. 34 p. 67-69). The courier would be carrying the jewels in a black attaché bag. (ROA.11521) (RR. Vol. 34 p. 70).

Balderas testified that one evening, Petitioner paged him. (ROA.11521) (RR. Vol. 34 p. 70). Balderas gathered Fugon and Francisco and proceeded to the courier's house. (ROA.11521-24) (RR. Vol. 34 pp. 70-73). However, it turned out to be the wrong house. (ROA.11527) (RR. Vol. 34 p. 76) . Fugon and Francisco attempted to rob the occupants of the house, and then departed.

Balderas insisted he did not know how the wrong house had been selected. (ROA.11533) (RR. Vol. 34 p. 82). When he reported the mistake to Petitioner, he was accused of lying. (ROA.11527) (RR. Vol. 34 p. 76). Under cross-examination, Balderas testified that he first spoke to State authorities about the Tsang robbery in February 1997, when Balderas voluntarily approached his Houston Police Department homicide detective brother-in-law about a murder-for-hire plot. (ROA.11534-ROA.11539) (RR. Vol. 34 p. 83-88). This testimony was false, and allowed to stand uncorrected by State prosecutors. Balderas had first spoken to the lead homicide investigator in Petitioner's case in July 1996, in a suppressed letter from HPD Sgt. Todd Miller, the lead homicide investigator, to prosecutors in Petitioner's case. The suppressed letter was presented in Petitioner's First Amended Federal Habeas Petition as Exhibit 1 (ROA.4708-ROA.4710), and argued in support of Petitioner's *Brady* suppression and *Napue* false testimony due process claim concerning informant Balderas. (ROA.321-ROA.322). In this suppressed letter to prosecutors the lead homicide investigator told prosecutors that the two persons convicted of the Tsang robbery Balderas testified to had been interviewed by police and that "Fugon and Elvira both denied everything, especially regarding Ray and Albert", and that Balderas had been interviewed by police about his role in the robbery in July 1996, had confessed his role, but inexplicably had not been arrested. (ROA.4708- ROA.4710).[4]

[4] The Fifth Circuit refused to consider the suppressed police letter to prosecutors because it was not first presented in state court proceedings, citing *Pinholster*, 563 U.S. at 185. App. to Pet. for Cert. A17 at footnote 15. Federal habeas counsel uncovered the letter in 2015 after filing of the original Federal Habeas Petition. This letter was produced on federal habeas counsel's third request under the Texas Open Records Act, and after the State had successfully quashed

Danny Tsang testified for the State. (ROA.11552) (RR. Vol. 34 p. 101). Tsang and his family resided in Houston, Texas. (ROA.11553) (RR. Vol. 34 p. 102). He told the jury that on November 16, 1995, two men entered his home, tied him up, and demanded that he produce diamonds. (ROA.11556-61) (RR. Vol. 34 pp. 105-110). Tsang told them they had the wrong house. (ROA.11562) (RR. Vol. 34 p. 111). After searching his home for approximately two and one-half hours, the men left. (ROA.11568) (RR. Vol. 34 p. 117). Tsang identified Fugon and Francisco as the two men who had entered his home. (ROA.11558) (RR. Vol. 34 p. 107).

Petitioner did not testify during the guilt/innocence or punishment phases of trial. The jury was authorized to convict Petitioner of capital murder either as a principal, or under the law of parties. (ROA.5541) (CR. Vol. 1 p. 128). The jury was further instructed that Estrella Martinez was an accomplice witness as a matter of law, and that her testimony required corroboration. (ROA.5546) (CR. Vol. 1 p. 133).

The jury found Petitioner guilty of capital murder, and answered the special issues consistent with him receiving a death sentence. (ROA.5550; ROA.5564-66; ROA.11446; ROA.11812-13) (CR. Vol. 1 pp. 137, 151-153; RR. Vol. 33 p. 107; Vol. 35 pp. 106-107).

Petitioner was sentenced on September 4, 1997. (ROA.5568) (CR. Vol. 1 p. 155). Petitioner filed a timely motion for new trial under *Brady* for suppression of impeaching evidence concerning state informant Balderas on Friday, October 3, 1997, and an amended motion for new trial on Monday, October 6, 1997. (ROA.5615; ROA.12543) (CR. Vol. 1 p. 202; RR. Vol. 39 p. 204 [DX#5]). An evidentiary hearing was conducted on Petitioner's amended motion for new trial based on *Brady* suppression on November 6 and 13, 1997. (ROA.5607-08; ROA.11837; ROA.11955)

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a federal, and, seventeen years earlier, a State subpoena issued for this *Brady* information. See *Pinholster*, 563 U.S. at 214-15 (Sotomayor, J., dissenting)(hypothesizing the exact factual scenario that occurred in this case).

(CR. Vol. 1 pp. 194-195; Vol. 36 pp. 13, 131). At the conclusion of the hearing, the trial court overruled Petitioner's request for a new trial. (CR. Vol. 1 p. 195; RR. Vol. 35 p. 154).

On August 13, 2013 the state habeas court adopted the State's Proposed Findings of Fact verbatim, declining to find a *Brady* violation among other claims. App. Tab F. On December 18, 2013, the CCA summarily adopted the trial court's findings and conclusions and denied state habeas relief in a two-page order. *Ex parte Dennes*, No. WR-34,627-02, App. Tab E.

On March 22, 2017, the District Court denied Dennes's petition for a writ of habeas corpus, wherein Dennes had argued, *inter alia,* that the State had suppressed *Brady* evidence concerning long-time state informant Balderas. App. Tab D. The District Court did not issue a Certificate of Appealability ("COA").

Dennes filed an Application for a Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit on March 5, 2018, arguing that reasonable jurists could debate the District Court's analysis of the informant Balderas *Brady* claim. After granting certificate of appealability, merits briefing and oral argument, the Fifth Circuit issued its opinion denying the habeas petition on January 6, 2020 and an Order Denying Petition for Rehearing on March 3, 2020. App. Tabs A, B. On March 19, 2020 the Court entered an Order extending time due to COVID-19 to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing that extended Dennes's filing date to August 3, 2020.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to decide the question left unanswered in *Cullen v. Pinholster* footnote 10 and Justice Sotomayor's dissent, concerning *Pinholster*'s application to *Brady* evidence that remains suppressed until federal habeas proceedings, despite unfulfilled state promises to comply with *Brady* after defense diligence in requesting production of all *Brady* evidence, defense diligence in obtaining a state court order for *Brady* disclosure, and defense diligence in reasonably relying on State promises to comply with its *Brady* obligations, which the State disobeys throughout state and federal proceedings. Applying *Pinholster* in the manner performed by the Fifth Circuit would overrule this Court's cause and prejudice equitable exception in suppressed *Brady* cases where the State is successful in suppressing *Brady* evidence until federal habeas proceedings, despite defense diligence. Alternatively, the Court should vacate and remand to the district court to stay and abey federal proceedings while the suppressed *Brady* evidence first obtained by the defense during federal habeas is presented to State courts, the remedy offered in Justice Breyer's *Pinholster* Concurrence, and alternatively requested by Petitioner but refused by the Fifth Circuit.

The decision below additionally implicates a deep and growing conflict among federal and state courts regarding a critical issue under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. In particular, courts are divided as to whether a criminal defendant's potential discovery of material, exculpatory evidence withheld by the prosecution, or his ability to acquire it himself despite State suppression, forecloses a claim under *Brady*. This is an important and recurring issue that warrants this Court's review because it bears directly on the fundamental elements and purposes of the *Brady* doctrine and may be dispositive of due process claims in hundreds of state and federal prosecutions.

I. THE COURT SHOULD GRANT THE PETITION TO DECIDE THE QUESTION LEFT UNRESOLVED IN *CULLEN V. PINHOLSTER* FOOTNOTE 10 AND JUSTICE SOTOMAYOR'S DISSENT WHICH IS SQUARELY PRESENTED IN THIS CASE.

The Fifth Circuit's method of responding to the *Cullen v. Pinholster* footnote 10[5] problem presented in Petitioner's *Brady* suppression claim is to neither apply the possible remedy suggested by *Pinholster* footnote 10, that is, to find the new suppressed *Brady* evidence first uncovered in federal habeas creates a new claim, and was therefore was not adjudicated on the merits under § 2254(d) in state court, and is therefore reviewable in federal habeas if cause and prejudice is shown. This Court should grant *certiorari* to decide the appropriate standard for stating a new *Brady* claim under *Pinholster* footnote 10, and to establishing cause and prejudice where evidence is suppressed until federal habeas despite reasonable defense diligence.

Alternatively, neither did the Fifth Circuit apply the other remedy suggested by Justice Breyer's *Pinholster* concurrence, and followed by other Circuits, allowing for a *Rhines*[6] stay and abey for exhaustion of the suppressed *Brady* evidence first uncovered by defense efforts in federal habeas to be presented initially in state court, in order to preserve federal-state comity interests. Petitioner moved for this alternate relief before the Fifth Circuit as suggested in Justice Breyer's concurrence, but this request was also denied.[7] This Court alternatively should remand this case to the Fifth Circuit for entry of a *Rhines* stay and abey order for exhaustion of the suppressed *Brady* evidence in state court. This case presents the opportunity for this Court to clarify this important and recurring problem in *Brady* law by resolving the clearly presented *Pinholster* footnote 10 dilemma in Petitioner's case.

The Fifth Circuit's solution in this case was to employ neither of *Pinholster* footnote 10's

[5] *Cullen v. Pinholster*, 563 U.S. 170, 186 n. 10 (2011).
[6] *Rhines v. Weber*, 544 U.S. 269 (2005).

suggested remedies, but instead to refuse to apply this Court's *Brady* precedents by holding petitioner to a super-diligence requirement regarding state-suppressed *Brady* evidence in circumstances where this Court has refused to require defense diligence any greater than what Petitioner reasonably exerted. The Fifth Circuit finds non-diligence where, as here, the suppressed *Brady* evidence is not ultimately discovered by the defense until federal habeas proceedings, despite the defense's reasonable diligence in both requesting disclosure of all *Brady*/*Giglio*/*Bagley* exculpatory and impeaching evidence from the State,[8] defense diligence in obtaining a state court order mandating State disclosure of exculpatory and impeaching evidence, and the defense's reasonable reliance on state prosecutor promises that they would comply with their obligations under *Brady* and State representations to Court and counsel that the State had no *Brady* evidence.[9] Before the Fifth Circuit requires the State to comply with its court-ordered *Brady* obligations, the defense must thus exercise diligence in actually finding suppressed *Brady* evidence far in excess of what this Court has ever required.[10] This is despite Petitioner's diligence in requesting *Brady* evidence in State proceedings, and both the State's promise to the defense they would produce *Brady* evidence and the State court's order to the prosecution to produce *Brady*, and the prosecution's refusal to comply

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[7] See Dennes Petition for Panel Rehearing, at 7-8. *Rhines* stay and abey to exhaust in state court suppressed *Brady* evidence first arising in federal habeas is a remedy employed by other Circuits. See *Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011)("We conclude that the appropriate course for us at this point is to remand to the district court with instructions that it stay and abey the habeas proceedings to allow Gonzales to present to state court his *Brady* claim including the subsequently-disclosed materials. In effect, we follow the suggestion offered by Justice Breyer in his concurring opinion in *Pinholster* that a petitioner 'can always return to state court presenting new evidence not previously presented. If the state court again denies relief, he might be able to return to federal court to make claims related to the latest rejection.' See *Pinholster*, 131 S.Ct. at 1412 (Breyer, J., concurring)."); *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450, 464-65 (6th Cir. 2015).

[8] ROA.5778-ROA.5780 (MR. VINSON (Prosecutor): Brady would be any evidence that we would have to show this defendant did not commit this offense as favorable to him or that someone else committed it. And I'll follow that right down to the law, according to the case law. But I have nothing there. I haven't stumbled on nothing at this time. THE COURT: You are under an obligation to do so. MR. VINSON: It's a continuing obligation. THE COURT: As soon as, if at any time you find such information, you are under an obligation....THE COURT: Certainly, if you have a witness for the State was testifying and the State is aware that their testimony is tainted or somehow impeachable, or something of that nature, I certainly want you to make that available. MR. VINSON: That's consistent with Brady.).

[9] Id.

[10] *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999); *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

with the State court order to produce *Brady* evidence, whether willfully or inadvertently.

The suppressed *Brady* evidence was clearly material because of false prosecutor representations about the existence of *Brady/Giglio* impeaching evidence to the state trial court during the motion for new trial hearing concerning their key punishment witness Balderas, and his ongoing informant status during the State informant Balderas's participation in the Tsang robbery and at the time of his testimony for the State. The State trial court stated during the motion for new trial hearing that if state informant Balderas had an ongoing informant relationship with the State at the time of his testimony, it would grant Petitioner's motion for new trial for *Brady* suppression.[11] But because the State suppressed truthful information about its ongoing relationship with its informant witness Balderas, the State trial court denied the defense's motion for new trial on the basis of this false information presented by the State. By requiring defense super-diligence despite reasonable defense diligence in making requests for *Brady* evidence and in the face of state promises to produce *Brady*, and state court orders to produce *Brady*, that the defense reasonably relied on in state proceedings, the Fifth Circuit refuses to implement this Court's precedent in *Banks v. Dretke* and *Strickler v. Greene*, which do not require the defense to assume that the State will lie in spite of its promises to court and counsel, and engage in willful disobedience to State court orders to produce *Brady* impeaching evidence during the January 1997 pre-trial hearing.[12]

The State repeated its false promise made to the defense and court pre-trial that there was no *Brady* impeaching or exculpatory information when it represented to the state court during the motion for new trial hearing that there was no ongoing State relationship with informant Balderas at the time of his testimony in Dennes' punishment trial.[13] The State trial court relied on this false

[11] Note 14, infra.
[12] ROA.5776-ROA.5780, cited in COA Merits Brief of Appellant at 11-12, App. to Pet. for Cert. A42-43.
[13] ROA.11945-ROA.11946, cited in COA Merits Brief of Appellant at 4, App. to Pet. for Cert. A35.

representation in denying Petitioner's motion for new trial.[14] The State repeated its *Brady* representations to the defendant in its direct appeal brief to Texas Court of Criminal Appeals that there was no ongoing relationship between the State and its long-time informant Balderas at the time of informant Balderas' testimony at Petitioner's punishment phase,[15] even going so far as to quote the state trial court's finding that it would have granted the motion for new trial if there was an ongoing State relationship with its informant Balderas at the time of his testimony, but since there was no ongoing relationship with the informant at the time of his testimony, there was no *Brady* violation by the State.[16]

In *Strickler v. Greene*, the defendant made a general pretrial request for all exculpatory evidence.[17] In response, the prosecutor claimed that the request was unnecessary because the government had an open-file policy. Despite the open-file policy, the government failed to disclose evidence that cast doubt on the credibility of the state's key witness. Upon discovering the exculpatory evidence, the defendant raised a *Brady* claim in federal habeas proceedings. The Fourth Circuit denied relief because the defendant did not establish cause for failing to raise the *Brady* claim in state court.[18] In the Fourth Circuit's view, a defendant "cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence."[19]

This Court rejected the Fourth Circuit's analysis because the defendant and his lawyers reasonably relied on the prosecutor's open-file policy.[20] This Court explained that especially in light of the open-file policy, it would be unreasonable to expect defense counsel to know that these records existed and make a discovery request: "In the context of a *Brady* claim, a defendant cannot

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[14] ROA.11943, cited in COA Merits Brief of Appellant at 14, App. to Pet. for Cert. A45.
[15] ROA.5347- ROA.5352, State's Appellate Brief, at 30-35.
[16] ROA.5349- ROA.5350, State's Appellate Brief, at 32-33.
[17] 527 U.S. 263 (1999).
[18] *Strickler v. Pruett*, No. 97-29, 1998 WL 340420, at *8 (4th Cir. 1998).
[19] *Strickler*, 527 U.S. at 279.
[20] Id. at 289.

conduct the 'reasonable and diligent investigation' . . . to preclude a finding of procedural default when the evidence is in the hands of the State."[21] In a footnote the Court acknowledged that its decision did "not reach, because it was not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them."[22] The State in Petitioner's case made no showing that defense counsel was aware in 1997 during informant Balderas' punishment trial testimony of the 1999 Balderas federal sentencing transcript disclosing that Balderas had been an active Houston Police Department informant from 1989 until at least 1999, when he was charged and sentenced for federal cocaine trafficking conspiracy, meaning that Balderas was an police informant at the time he orchestrated the Tsang robbery in 1995 in which he later implicated Petitioner, and when he testified in Petitioner's sentencing phase in 1997. The State has made no showing that the defense was aware of this document at any point until federal habeas counsel uncovered the informant Balderas' federal sentencing transcript in 2015 and urged it in support of his *Brady/Banks v. Dretke* claim and attached it in support of his First Amended Federal Writ Petition. The State successfully quashed defense subpoenas requesting *Brady/Giglio* information concerning informant Balderas in the state motion for new trial proceedings in 1997,[23] and again in federal habeas proceedings in 2015,[24] which the federal habeas court also quashed, before federal habeas counsel later independently uncovered it.[25] Despite the State's successful quashing of these defense subpoenas for *Brady* evidence separated by eighteen years, showing defense reasonable diligence far beyond what this Court required for reasonable diligence in *Strickler* and *Banks*, federal habeas counsel obtained this information through its own diligent investigative efforts despite all State efforts to prevent disclosure of *Brady*

[21] Id. at 287–88.
[22] Id. at 288 n.33.
[23] ROA.5647-ROA.5652.
[24] ROA.214-ROA.224.
[25] ROA.253-ROA.254.

impeaching evidence in its possession, and despite State prosecutor promises to the defense and State court to produce all *Brady* evidence.

According to state informant Balderas' 1999 federal sentencing counsel Munier, made in Balderas' presence during his federal sentencing for cocaine trafficking, Balderas did not participate in the Tsang robbery as Balderas testified to in Petitioner's sentencing phase, or receive any consideration for his testimony, thus contradicting informant Balderas' testimony at Petitioner's punishment trial, where Balderas testified that he orchestrated the Tsang robbery at Dennes' direction, and hoped to receive leniency from the State in exchange for his testimony, without any disclosure that Balderas was an active police informant at the time of both his participation in the Tsang robbery and his testimony for the State, but instead that Balderas provided assistance to Houston authorities about a different witness killing scheme Dennes was purportedly involved in. ROA.4728-ROA.4729. Balderas' counsel Munier in Balderas' presence confirmed that Balderas had been an ongoing police informant since at least 1989, ROA.4731, a period of ten years by the time of Balderas' 1999 federal sentencing, and Balderas' long-time informant status was confirmed by the Assistant United States Attorney Martinez through Balderas' Houston Police Department handler, Sergeant Bradley. ROA.4733-ROA.4734. This is all information kept from Petitioner in state proceedings despite a State court order and State promises to provide *Brady* evidence, and more importantly kept from Petitioner's sentencing jury, that might very well have totally disregarded informant Balderas' testimony if the jury knew Balderas was a corrupt informant engaging in repeated felony crimes while at the same time acting on behalf of law enforcement. That a jury would likely disregard any testimony from a corrupt informant committing serious crimes while claiming to work for law enforcement like state informant Balderas was exactly the conclusion Balderas' 1999 federal sentencing judge, U.S. District Judge Hinojosa, reached when made aware of Balderas' history as a corrupt police informant engaging in serious drug crimes that were sentenced in his

Court.

> The Court [U.S. District Judge Hinojosa]: And I have to be real honest with you. I don't have much sympathy for people that are providing cooperation and assistance at the same time that they're violating the law....The people that are out testifying against them, how can we trust them? I mean, how can the system really reward somebody without testifying against somebody for violating the law? If you're the fact-finder, you'll—how can I believe this guy?...Okay. Well, he's been cooperating during all this period of time [since 1989], but there's been a continuation of arrests and dismissals on him, I guess....What the inherent distrust is if somebody acting like they're cooperating and providing assistance and being an informant when they're out violating the law. There's – that makes a very serious mistrust of that type of behavior and that's what we have here....*And believe me, he becomes worthless to the government because you put this man on the stand the next time he testifies, what do you think the jury is going to think about this*? [I]n this case we have the added problem that while he's been adopted, he's running amok here." (emphasis added).[26]

In *Banks v. Dretke* this Court made emphatically clear that "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."[27] The Court went on to explain that "[a] rule . . . declaring that a 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process."[28] The rule adopted by the Fifth Circuit in this case requiring that "a prosecutor may hide, defendants must seek" before defense diligence will be found, and before *Brady*'s obligations will be enforced against the State, is at odds with this Court's precedent.[29] The Fifth Circuit's defense due diligence rule declaring that a 'prosecutor may hide, defendant must seek' before this Court's *Brady* precedents apply, was repeatedly applied in Petitioner's case, in combination with the *Pinholster* footnote 10 problem of

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[26] See First Amended Federal Writ Petition at 68-72, ROA.322-ROA.326, citing Balderas 1999 Federal Sentencing, ROA.4726-ROA.4732, again cited in Petitioner's COA Merits Brief of Appellant at 6, App. to Pet. for Cert. A37.

[27] *Banks v. Dretke*, 540 U.S. 668, 695 (2004).

[28] Id. at 696.

[29] An earlier panel of the Fifth Circuit was willing to apply this Court's *Banks* and *Strickler Brady* precedents, but Petitioner's panel was not, instead applying a *Brady* due diligence requirement in excess of this Court's reasonable diligence requirements. See *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) ("[I]f the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial. See *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 1272-73, 157 L.Ed.2d 1166 (2004); *Strickler*, 527 U.S. at 280-81, 119 S.Ct. 1936."), cited to the Fifth Circuit panel at Petitioner's Application for Certificate of Appealability, at 12.

Brady evidence first discovered during federal habeas, to refuse to evaluate Petitioner's *Banks* cause and prejudice claim, and the collective materiality of suppressed *Brady/Giglio* evidence[30] impeaching the State's future dangerousness case, including regarding the additional Fugon and Elvira evidence further impeaching informant Balderas' testimony. App. to Pet. for Cert. A17-A19. The Fifth Circuit's application of the *Pinholster* bar on considering new evidence first raised in federal habeas, Id. at A18, to the hypothetical factual scenario outlined in *Pinholster* footnote 10 and Justice Sotomayor's dissent but not decided in *Pinholster*, but that is presented in Petitioner's case, because the suppressed *Brady* evidence diligently sought was not uncovered until federal habeas, in combination with the Fifth Circuit's application of a defense *Brady* super-diligence rule in contravention of this Court's *Banks* and *Strickler Brady* reasonable diligence rule, which Petitioner's state trial counsel complied with, *supra*, create an opportunity for this Court to clarify both these important and recurring areas of its *Brady* jurisprudence.

In this situation the Fifth Circuit requires the defense to assume the State will not comply with its constitutional obligations to produce *Brady* evidence despite court orders compelling it to do so, and thus for the Fifth Circuit the defense has a duty to continue investigating for state *Brady* suppression and in fact is culpable if the defense does not independently uncover and present the suppressed *Brady* evidence during State proceedings, despite defense reasonable diligence in obtaining both state promises and court orders to comply with *Brady* disclosure. Under the Fifth Circuit's panel's decision, the defense's failure to uncover *Brady* evidence and present such evidence in State proceedings despite State assurances and court orders to produce all *Brady* evidence makes the suppressed *Brady* evidence first uncovered in federal habeas unreviewable for all purposes. This Fifth Circuit holding contradicts this Court's precedents in *Banks* and *Strickler*, where other Circuits

[30] *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

apply this Court's precedents.[31] This Court should clarify this conflict between the Circuits as to the correct due diligence requirements in *Brady* suppression cases, and clarify the proper resolution of the hypothetical factual scenario outlined in *Pinholster* footnote 10 and Justice Sotomayor's dissent but not resolved there, but that are fully presented by the facts of this case.

II. THE COURT SHOULD ALSO CLARIFY WHETHER *PINHOLSTER* PROPERLY APPLIES TO THIS COURT'S CAUSE AND PREJUDICE CASELAW AS FOUND BY THE FIFTH CIRCUIT. THIS COURT HAS STATED ITS CAUSE AND PREJUDICE CASELAW ARE COURT-MADE EQUITABLE REMEDIES THAT SURVIVED THE PASSAGE OF AEDPA.

The Fifth Circuit applies *Pinholster* outside the context of the Court's holding in that case, which was limited to § 2254(d) analysis. This Court has stated that its cause and prejudice caselaw are court-made equitable remedies that were not eliminated by AEDPA.[32] This Court's equitable exceptions established in *Wainwright v. Sykes*,[33] *Coleman v. Thompson*[34] and *Murray v. Carrier*[35] survived the passage of AEDPA.[36]

> To establish 'cause'--the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.' A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner. It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel. An error amounting to constitutionally ineffective assistance is 'imputed to the State' and is therefore external to the prisoner. Attorney error that does not violate the Constitution, however, is attributed to the prisoner 'under well-settled principles of agency law.'[37]

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[31] In *Wilson v. Beard*, for example, the Third Circuit addressed exculpatory evidence that was, in theory, equally available to the defense and concluded that "the fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel." 589 F.3d 651, 664 (3d Cir. 2009). See also *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) (rejecting "as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes").

[32] *McQuiggin v. Perkins*, 569 U.S. 383, 133 S.Ct. 1924 (2013); *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064 (2006).

[33] 433 U.S. 72, 84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

[34] 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (2000).

[35] 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

[36] *Davila v. Davis*, 137 S.Ct. 2058, 2064-65 (2017). Davila's state trial occurred after the 2008 murder charged, long after the 1996 effective date of AEDPA. Id. at 2063.

[37] Id. at 2065 (citing *Murray*, 477 U.S at 488; *Coleman*, 501 U.S. at 753).

Banks holds *Brady* suppression to be an objective factor external to the defense providing cause for excusing a procedural default.[38]

Martinez v. Ryan, for example, extended *Coleman*'s cause and prejudice equitable exception to a new factual scenario after this Court's opinion in *Pinholster* - ineffective assistance of state habeas counsel as cause for procedural default of a substantial *Strickland* ineffective assistance of trial counsel claim.[39] *Martinez* was a case to which AEDPA otherwise applied, but this Court held that the *Coleman* cause and prejudice equitable exception is not governed by AEDPA and AEDPA "does not speak to the question presented in this case."[40] By imposing *Pinholster*'s rule limiting § 2254(d) determinations to the state court record into a rule for deciding this Court's *Coleman*/*Murray v. Carrier*/*Banks*/*Martinez* cause and prejudice equitable exception to procedural default, the Fifth Circuit contravened this Court's cause and prejudice exception in suppressed *Brady* claims that this Court established in *Banks v. Dretke*, *Strickler v. Greene*, *Murray v. Carrier* and its other precedents. In *Martinez*,[41] for example, this Court cited *Strickler* as an example of *Coleman*'s cause and prejudice caselaw, along with *McCleskey v. Zant*,[42] *Wainwright v. Sykes*,[43] and *Reed v. Ross*.[44] By applying *Pinholster*'s AEDPA interpretation rule to this Court's equitable cause and prejudice caselaw, the Fifth Circuit in effect overruled this Court's cause and prejudice caselaw specifically applicable to *Brady* claims in *Banks* and *Strickler*. The Court should grant certiorari to clarify its cause and prejudice caselaw, and reverse the Fifth Circuit's application of *Pinholster*'s § 2254(d)(1) analysis standard in *Strickland* claims into this Court's cause and prejudice equitable

[38] *Banks*, 540 U.S. at 696 ("The 'cause' inquiry, we have also observed, turns on events or circumstances 'external to the defense.' *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).")
[39] 566 U.S. 1 (2012).
[40] Id. at 17.
[41] Id. at 13.
[42] 499 U.S. 467, 490, 111 S.Ct. 1454 (1991).
[43] 433 U.S. 72, 97 S.Ct. 2497 (1977).
[44] 468 U.S. 1, 104 S.Ct. 2901 (1984)

exceptions to procedural default in *Brady* claims, because AEDPA "does not speak to the question presented in this case," *Martinez*, supra, and only this Court can overrule its own decisions.

III. THE FIFTH CIRCUIT'S HOLDING CONCERNING THE *BRADY* CLAIM EXACERBATES A CIRCUIT SPLIT AND CANNOT BE RECONCILED WITH THIS COURT'S CAUSE AND PREJUDICE PRECEDENT.

The Fifth Circuit also held that Petitioner did not establish cause and prejudice excusing the procedural default of Petitioner's informant Balderas *Brady* claim. The Fifth Circuit held in effect that "a prosecutor may hide, defendants must seek" before State *Brady* suppression and therefore cause will be found because (1) Petitioner could have obtained the information at issue through his own diligence at trial and during direct appeal and state habeas, by questioning Balderas' counsel Munier, who could assert attorney-client privilege for all confidences learned from his client during representation; and (2) the defense could have discovered in 1999 what federal habeas counsel uncovered in 2015, that Balderas had been sentenced for federal cocaine trafficking in 1999, and that his attorney Munier made admissions regarding his client's ongoing informant status with Houston police since 1989 during sentencing proceedings, which Petitioner should then have presented to the State courts in a successor state habeas application. App. to Pet. for Cert. A12-A13. This is even though the 1999 public disclosure of this information was years after Petitioner's 1997 motion for new trial hearing, and the deadlines for filing both the direct appeal and state habeas petitions. The Fifth Circuit decision refused to grant Petitioner's request for a stay and abeyance of Federal habeas proceedings to exhaust this suppressed evidence in state court.[45] More fundamentally, however, the Fifth Circuit panel refused to follow this Court's *Banks* and *Strickler* precedents, and instead imposed all burdens on the defense that "a prosecutor may hide, defendants must seek", and refused to consider Petitioner's reasonable diligence in requesting *Brady* disclosure, obtaining a

[45] See footnote 7, supra.

State court order for *Brady* disclosure, and the defense's reasonable reliance on State promises that it would comply with *Brady* obligations, in contravention of *Banks* and *Strickler*. Supra.

A. **Imposing A Defense Super Diligence Requirement for *Brady* Claims While Refusing to Consider Reasonable Defense Diligence and Defense Reliance on State Promises to Comply with *Brady* Conflicts With The Decisions Of This Court. Federal And State Courts Are Deeply Divided As To Whether *Brady* Requires A Showing That The Defendant Did Not Know Of And Could Not Reasonably Have Obtained The Withheld Evidence.**

The Fifth Court of Appeals held here that "evidence is not suppressed under *Brady* if the defendant knew or should have known of Balderas' status. Here, there is ample evidence to suggest that, at a minimum, Dennes should have known about Balderas's status." App. to Pet. for Cert. A12.[46] Several federal courts of appeals follow the approach the Fifth Circuit Court of Appeals took here, agreeing that there is no *Brady* violation where the prosecution withholds material, exculpatory evidence that the defendant either knew of or could have obtained. The First Circuit, for example, has held that "[e]vidence is not suppressed" within the meaning of *Brady* "if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003) (en banc) (quotation marks omitted). The Fourth Circuit similarly holds that "when exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Parker*, 790 F.3d 550, 561-562 (4th Cir. 2015) (quotation marks omitted); see id. ("a *Brady* violation has not occurred if the defense is aware, or should have been aware, of impeachment evidence in time to use it in a reasonable and effective manner at trial"). At least four other federal circuits appear to adhere to that

[46] But see *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) ("[I]f the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial. See *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 1272-73, 157 L.Ed.2d 1166 (2004); *Strickler*, 527 U.S. at 280-81, 119 S.Ct. 1936.").

rule. See *United States v. Roy*, 781 F.3d 416, 421 (8th Cir. 2015) ("[t]he government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels" (quotation marks omitted)); *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) ("[e]vidence is 'suppressed'" where it "was not otherwise available to the defendant through the exercise of reasonable diligence"; "[s]uppression does not occur when the defendant could have discovered it himself through 'reasonable diligence'"), *but see Boss v. Pierce*, 263 F.3d 734, 740-41 (7th Cir. 2001) (rejecting "as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes....We also find it significant that a defense witness's knowledge is quite different from the type of evidence typically found to be available to defense counsel through the exercise of reasonable diligence. In the typical reasonable diligence case, the question is whether defense counsel had access to the document containing the *Brady* material, through an open file policy, for example. In cases like the present one, the question is whether defense counsel had access to *Brady* material contained in a witness's head. Because mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available in the same way as a document. But, the position the state advances would require a defense witness's knowledge to be treated exactly as information in a document the defense possesses. This stretches the concept of reasonable diligence too far.") (internal citations omitted); *Ferguson v. Secretary for Dep't of Corr.*, 580 F.3d 1183, 1205 (11th Cir. 2009) ("to prevail on a *Brady* claim, [defendant] must establish" that he "did not possess the evidence and could not have obtained it with reasonable diligence" (quotation marks omitted)).

Many state courts have also taken the same approach. As the Supreme Court of Pennsylvania put the rule, "[t]here is no *Brady* violation when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from non-governmental sources." *Commonwealth v. Paddy*, 15 A.3d 431, 451 (Pa. 2011). The

North Dakota Supreme Court has similarly held that "the *Brady* rule does not apply to evidence the defendant could have obtained with reasonable diligence." *State v. Kardor*, 867 N.W.2d 686, 688 (N.D. 2015); see also *Lofton v. State*, 248 So. 3d 798, 810 (Miss. 2018); *State v. Green*, 225 So. 3d 1033, 1037 (La. 2017); *Propst v. State*, 788 S.E.2d 484, 493 (Ga. 2016); *People v. Williams*, 315 P.3d 1, 44 (Cal. 2013); *State v. Rooney*, 19 A.3d 92, 97 (Vt. 2011); *State v. Mullen*, 259 P.3d 158, 166 (Wash. 2011); *Erickson v. Weber*, 748 N.W.2d 739, 745 (S.D. 2008); *Stephenson v. State*, 864 N.E.2d 1022, 1057 (Ind. 2007); *State v. Youngblood*, 650 S.E.2d 119, 130 n.21 (W. Va. 2007); *State v. Bisner*, 37 P.3d 1073, 1082-1083 (Utah 2001); *Cornell v. State*, 430 N.W.2d 384, 385 (Iowa 1988).

In contrast to those decisions, several Federal courts of appeal have held to the contrary that a defendant's knowledge of the suppressed evidence, or his ability to obtain it through reasonably diligent efforts, do not by themselves defeat a *Brady* claim. For example, in *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995), the government argued that the prosecution's failure to disclose exculpatory information did not violate *Brady* because defense counsel independently knew or should have known of it. The Tenth Circuit rejected this argument, holding that "[t]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." Id. Rather, "the fact that defense counsel 'knew or should have known' about the [exculpatory] information ... is irrelevant to whether the prosecution had an obligation to disclose [it]." Id.; see also, e.g., *United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) (while defendant's actual knowledge or possession of evidence may be relevant to materiality, "whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information").

The Ninth Circuit rejected the same argument in *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000), holding that "[t]he availability of particular statements through the defendant himself does not negate the government's duty to disclose." Id. As the Ninth Circuit explained, "[d]efendants

often mistrust their counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences." Id. Therefore, "[t]he prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence." *Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014); see id. 1136-1137 (rejecting state court's decision that a defendant bringing a *Brady* claim must "establish 'an inability to discover and produce the evidence at trial, with the exercise of due diligence'" as contrary to clearly established federal law).

In adopting this approach, several courts have rejected their own prior decisions on the issue—finding them inconsistent with this Court's more recent *Brady* decisions. For example, in *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016) (en banc), the Third Circuit found a *Brady* violation based on the prosecution's failure to disclose a time-stamped receipt corroborating the defendant's alibi—a receipt the defendant's appellate counsel independently uncovered. The government argued that no *Brady* violation had occurred because appellate counsel's discovery of the receipt demonstrated that the evidence was available to the defendant with the exercise of due diligence. Id. at 291-292. Some prior Third Circuit decisions arguably supported that view, suggesting (like the court of appeals held here) that "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." Id. at 292 (quoting *Starusko*, 729 F.2d at 262). In *Dennis*, however, the *en banc* Third Circuit concluded that this Court's more recent precedent—including *Banks v. Dretke*, 540 U.S. 668 (2004), and *Strickler v. Greene*, 527 U.S. 263 (1999)—made clear that "the concept of 'due diligence' plays no role in the *Brady* analysis." 834 F.3d at 291. The Third Circuit therefore rejected any contrary suggestion in its earlier decisions and concluded that it is "[o]nly when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense." Id.

at 292. The Third Circuit concluded that, after *Banks*, "it is clear that there is no additional prong to *Brady* and no 'hide and seek' exception depending on defense counsel's knowledge or diligence." Id. at 293.

Similarly, in *United States v. Tavera*, 719 F.3d 705 (6th Cir. 2013), the government argued that the defendant or his lawyer "should have exercised 'due diligence' and discovered" exculpatory statements given by the defendant's alleged co-conspirator "by asking [the co-conspirator] if he had talked to the prosecutor," id. at 711. Dismissing that contention, the Sixth Circuit acknowledged that "[p]rior to *Banks*, some courts, including the Sixth Circuit ... were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule." Id. at 712. But the court concluded that "the clear holding in *Banks* should have ended that practice." Id. The court therefore "follow[ed] the Supreme Court in *Brady*, *Strickler*, and the recent *Banks* case" by "declin[ing] to adopt the due diligence rule that the government proposes based on earlier, erroneous cases." Id. The Sixth Circuit applies the rules of *Kyles*, *Banks* and *Strickler* even where police conceal impeaching evidence from prosecutors, thus establishing cause excusing procedural default even after *Pinholster*, without a defense due diligence requirement: "To reiterate: *Brady* requires the State to turn over all material exculpatory and impeachment evidence to the defense. It does not require the State simply to turn over some evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs." *Barton v. Warden, So. Ohio Corr. Facility*, 786 F.3d 450, 468 (6th Cir. 2015).

In *Lewis v. Connecticut Commissioner of Correction*, 790 F.3d 109 (2d Cir. 2015), the Second Circuit held that the state court's imposition of "an affirmative 'due diligence' requirement"—which had resulted in denial of the defendant's *Brady* claim because "the exculpatory evidence at issue was available by due diligence to the defense"—"plainly violated clearly established federal law under *Brady* and its progeny." Id. at 121-122 (quotation marks omitted). The court acknowledged

its own prior cases holding that "'[e]vidence is not 'suppressed' [for *Brady* purposes] if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence,'" id. at 121 (quoting *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)). But the court explained that this requirement "speaks to facts already within the defendant's purview" based on the defendant's actual knowledge, not "those that might be unearthed" through an exercise of due diligence. Id.

Finally, in *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887 (D.C. Cir. 1999), the D.C. Circuit rejected the "government's argument that it did not breach a disclosure obligation" with respect to information that was "otherwise available through 'reasonable pre-trial preparation by the defense.'" Id. At 896 (quotation marks omitted). Dismissing the government's contention that the defendant "should have subpoenaed the involved officers themselves" to obtain police agreements with a confidential informant, the court emphasized that "the prosecutor is responsible" for disclosing favorable evidence known to the police; the "appropriate way for defense counsel to obtain such information was to make a *Brady* request, just as she did." Id. at 897 (quoting *Strickler*, 527 U.S. at 275 n.12). Before *In re Sealed Case*, the D.C. Circuit had held that "*Brady* provides no refuge to defendants who have knowledge of the government's possession of possibly exculpatory information, but sit on their hands until after a guilty verdict is returned."[47] Following *In re Sealed Case*, however, "in the D.C. Circuit, the prosecution bears the burden of disclosing any exculpatory evidence in its possession, and it is no response to a *Brady* claim that defense counsel could have learned of the evidence through 'reasonable pre-trial preparation.'" *United States v. Nelson*, 979 F. Supp. 2d 123, 133 (D.D.C. 2013); see id. ("*Brady* does not excuse the government's disclosure obligation where reasonable investigation and due diligence by the defense could also lead

[47] *United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993).

to discovering exculpatory evidence," citing *Banks* and *Strickler*).

State high courts have similarly held that a defendant's knowledge of or access to the suppressed evidence does not preclude a *Brady* claim. In *People v. Chenault*, 845 N.W.2d 731 (Mich. 2014), for example, the Michigan Supreme Court held that a defendant need not show that he "did not possess the evidence nor could he have obtained it himself with any reasonable diligence" in order to prevail under *Brady*, id. at 736. Although the Michigan Supreme Court had previously applied a reasonable-diligence requirement, the court overruled that precedent in *Chenault*, concluding that a due-diligence requirement "is not doctrinally supported" and "undermines the purpose of *Brady*." Id. at 738. Such a requirement, the court explained, is not "consistent with or implied by United States Supreme Court precedent." Id. at 737.

Similarly, although Montana courts previously "considered a fourth factor" for *Brady* claims—i.e., "whether the evidence could have been obtained by the defendant with reasonable diligence"—the Montana Supreme Court "abandoned the diligence factor" in *State v. Reinert*, 419 P.3d 662, 665 n.1 (Mont. 2018), concluding in light of evolving case law that "the diligence factor was inconsistent with federal law and unsound public policy." *State v. Ilk*, 422 P.3d 1219, 1226 (Mont. 2018). The Colorado Supreme Court has likewise criticized the diligence requirement, concluding that this Court "has at least twice rejected arguments similar to the ... assertion" that "where evidence is otherwise available through reasonable diligence by the defendant, that evidence is not suppressed under *Brady*." *People v. Bueno*, 409 P.3d 320, 328 (Colo. 2018) (discussing *Strickler*, 527 U.S. at 283-285, and *Banks*, 540 U.S. at 695-696); see also *Tempest v. State*, 141 A.3d 677, 696 & n.12 (R.I. 2016) (Suttell, C.J., concurring in the judgment and dissenting in part) (emphasizing, where government had waived any diligence argument, that the Rhode Island Supreme Court had "never articulated a 'due diligence' requirement on the part of a defendant who claims a *Brady* violation" since a 2000 decision and that "[f]ollowing *Banks*, several courts have

expressly declined to adopt a due diligence requirement"); *Archer v. State*, 934 So. 2d 1187, 1203 (Fla. 2006) (per curiam) ("The postconviction court is in error to the extent that the court's order is read to mean that [the defendant] had to demonstrate 'due diligence' in obtaining favorable evidence possessed by the State .... [T]here is no 'due diligence' requirement in the *Brady* test.").[48]

In short, this issue has frequently recurred, and there is an established and growing conflict among the federal and state courts as to the question presented. The split has intensified in recent years as many courts have abandoned their own prior decisions that followed the Fifth Circuit's approach here, recognizing them to be irreconcilable with *Banks* and *Strickler*. It was the Fifth Circuit that this Court reversed in *Banks*, on largely the same grounds presented in *Banks* as are present in Petitioner's case: "The Court of Appeals expressed no doubt that the prosecution had suppressed, prior to the federal habeas proceeding, Farr's informant status and his part in the fateful trip to Dallas. But Banks was not appropriately diligent in pursuing his state court application, the Court of Appeals maintained. In the Fifth Circuit's view, Banks should have at that time attempted to locate Farr and question him; similarly, he should have asked to interview Deputy Sheriff Huff and other officers involved in investigating the crime. Banks' lack of diligence in pursuing his 1992 state court plea, the Court of Appeals concluded, rendered the evidence uncovered in the federal habeas proceeding procedurally barred." *Banks*, 540 U.S. at 688. For the same reasons this Court overruled the Fifth Circuit in *Banks*, this Court should grant the petition for certiorari in this case.

[48] Like other jurisdictions, the Florida Supreme Court's decisions have lacked consistency. Contrary to its own decision in *Archer*, the court in *Bogle v. State*, 213 So. 3d 833 (Fla. 2017) (per curiam), applied a reasonable-diligence requirement to reject a *Brady* claim where there was no evidence counsel had attempted to obtain the evidence. Id. at 844 (citing *Peede v. State*, 955 So. 2d 480, 497 (Fla. 2007) (per curiam)). But see *Pittman v. State*, 90 So. 3d 794, 820 (Fla. 2011) (Pariente, J., concurring in result) (criticizing majority for appearing to approve trial court order that appeared to impose a due-diligence requirement, which was a "serious misstatement" of *Brady*); *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000) (per curiam) (although a defendant's actual knowledge or possession of evidence can defeat a *Brady* claim, "the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test" in *Strickler*).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Dennes prays that this Court grant a writ of certiorari to resolve the Questions Presented.

Respectfully submitted,

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