No. 20-5360

IN THE

Supreme Court of the United States

REINALDO DENNES,
Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

Question One

Should this Court overrule *Cullen v. Pinholster* regarding *Brady* claims, despite the fact the evidence allegedly suppressed by the State was not material in this case?

Question Two

Should the Court answer Question One in this case despite the fact there is no disagreement among the circuit courts of appeals about the applicability of *Cullen v. Pinholster* to *Brady* clams?

Question Three

Should this Court choose this case to examine differences among the circuits about the propriety of using the "knew or should have known" analysis in evaluating *Brady* claims, despite the lack of materiality concerning the allegedly suppressed material?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Petitioner Reinaldo Dennes was convicted and sentenced to death for the capital murder of Janos Szucs. During the course of a robbery, Dennes shot and killed Szucs, in addition to shooting a security guard in gaining access to Szucs office.

Dennes now petitions this Court for a writ of certiorari from the Fifth Circuit's affirmance of the district court's decision to dismiss his application for writ of habeas corpus. Upon denial of his writ in the district court, Dennes sought a certificate of appealability from the Fifth Circuit. The Fifth Circuit granted a certificate of appealability as to three claims: 1. the State suppressed evidence that Balderas was a "long-time informant" for law enforcement in Harris County, Texas; 2. the State suppressed evidence or denied due process by not timely revealing information about an extraneous offense proved by the State during punishment; and 3. Whether Dennes satisfied the cause/prejudice standards for not having raised these issues in the state court. The Fifth Circuit examined these issues and affirmed the judgment of the district court.

Dennes is now unable to present any special or important reason to

grant certiorari review of the Fifth Circuit's decision. The appellate court, after appropriately analyzing the facts of the case in conjunction with the caselaw, reasonably concluded that the district court's rulings should be affirmed. Dennes offers no compelling reason to grant certiorari review, and such review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the factual background of this case as follows.

> In December of 1995, Antonio Ramirez came from Ecuador to work in Texas. Shortly after his arrival, Ramirez met a man named Francisco Rojas who sold jewelry for [Dennes]. Sometime later, Ramirez gave several rings to Rojas that he wanted to sell. Rojas then took Ramirez and the rings to [Dennes] at [Dennes]'s office in the Greenrich Building on Richmond Avenue. During this visit, Ramirez noticed a lathe in [Dennes]'s jewelry workshop and began to play with it. [Dennes] asked Ramirez if he knew how to operate the machine and Ramirez said that he did. [Dennes] then "hired" Ramirez to make watch bezels for him.
>
> Shortly thereafter [Dennes] invited Ramirez to travel to Mexico with him to buy a diamond. After the diamond purchase, the pair returned to Texas and [Dennes] gave Ramirez more work. In early January, 1996, [Dennes] made a sketch for Ramirez and asked him if he could make the object depicted. By the time he completed the job, Ramirez had manufactured what turned out to be a silencer for [Dennes]. After the silencer was completed, [Dennes], his brother Alberto, and Ramirez went to a field

> a few minutes away to test it. Thinking the silencer did not work as it should, [Dennes] modified his design and had Ramirez make another one. [Dennes] test fired this model in his office.
>
> Shortly after the completion of the second silencer, [Dennes] asked Ramirez to help him and Alberto rob a jewelry dealer who also had an office in the Greenrich Building. [Dennes] explained that he would take the videotape from the security station while Ramirez secured the diamonds and Alberto shot the dealer. Ramirez consented, but returned to South America two days later.

Estrella Martinez, [Dennes]'s lover, had a cleaning job at the Greenrich Building. In January of 1996, [Dennes] told Martinez he wanted her to let him in a side door of the building after working hours. He told her he was going to take some videotapes from the security guard's station on the first floor. On January 22, 1996, [Dennes] gave Martinez a cellular phone with which he planned to call her to tell her when to let him and Alberto into the building. [Dennes] also wanted Martinez to distract the guard so he could take the tapes.

Janos Szucs was a reputable wholesale diamond dealer who had an office in the Greenrich Building. Shortly before his death, Szucs had a diamond inventory worth more than $3,600,000 which he kept in his office safe. He also had approximately $200,000 in cash that he planned to use to purchase diamonds on an upcoming trip. Szucs did not have a receptionist or secretary; access to his office was controlled through an electronically-locked door. Szucs had a television monitor in his office so he could see who was at the door and he would allow people in by pushing a remote button located on his desk. In early January 1996, Szucs and Sam Solomay formed a partnership and Solomay moved into Szucs's office suite.

On January 24th, Solomay left the office at 5:40 p.m., but Szucs remained, explaining that he had an appointment that

evening. David Copeland was the security guard on duty at the Greenrich Building that evening, working the 3:00 p.m. to 11:00 p.m. shift. A videotape recorder at the security desk recorded the images from the security cameras around the building. When Copeland arrived for his shift, a technician was there working on the surveillance system.

Around 6:30 p.m. that same evening, [Dennes] called Martinez on the cellular phone he had provided her and told her to open the loading dock door. [Dennes] and Alberto entered and immediately turned into a stairwell, thereby avoiding the security guard's desk. Shortly after 7:00 p.m., [Dennes] called Martinez and told her to distract the security guard. Martinez told Copeland that she had locked her keys in a fifth floor office and asked him to help her retrieve them. A little after 7:30 p.m., [Dennes] again called Martinez and told her that he needed another distraction. The security guard kept the key to the snack bar so Martinez approached Copeland and told him that she needed to clean the area and asked if he would let her in. Shortly after Martinez began cleaning, however, the owner of the snack bar arrived and told her to come back later.

When Copeland returned to the lobby, he found a man kneeling behind the security desk apparently working on the security system. Copeland assumed this was related to the earlier repairs. As Copeland approached, the man scrambled to his feet and walked briskly toward the loading dock door. As Copeland neared the security desk, the man turned and headed back toward the guard. When he reached Copeland, the man placed his left hand on Copeland's shoulder, stuck a 9 mm gun with a silencer to Copeland's chest with his other hand and fired. The man shot the guard again after he had fallen. As Copeland lay there playing dead, he heard the man walk to the security desk. He then heard equipment and wires being moved around followed by footsteps running toward the loading dock door. The owner of the snack bar called "911."

Houston Police Officer Paul Terry arrived on the scene to find Copeland lying face down in the lobby. Copeland told Terry what had happened and the officer unsuccessfully searched for a suspect. Inside the lobby, Terry found spent shell casings and fragments of a fired bullet. He also noticed that the video equipment was missing.

That same evening, Szucs's wife, Nicole, became concerned that her husband had not arrived home. After several failed attempts to reach her husband, she received a call from a friend who worked in the Greenrich Building who told her that the building guard had been shot. Nicole asked the friend to contact the building's office manager. Sometime after 11:00 p.m., the building manager approached one of the officers remaining at the scene. Officer M.R. Furstenfeld and a couple of other officers then accompanied the manager to Szucs's suite to check on his welfare. Upon gaining access to the office, Furstenfeld found Szucs's dead body. Detectives who arrived at the scene noted no signs of a forced entry. They also noticed that the safe was empty and there were no signs of the $3.6 million dollar diamond inventory Szucs maintained or the $200,000 he was supposed to have on hand in cash. Plus, Szucs was not wearing the five-carat diamond pinky ring he always wore nor was the ring ever recovered. The detectives also discovered that Szucs's computer had been damaged as if someone had tried to remove a disc with tweezers.

The police eventually focused their investigation upon [Dennes]. A search of his office revealed a lathe that had been broken down and boxed up, a fired 9 mm bullet, and an owner's manual for a 9 mm Taurus handgun. Firearms examiner Robert Baldwin determined that the bullets recovered from Szucs's body, the bullet found in [Dennes]'s office, and the bullets found in the lobby of the Greenrich Building were all fired from the same gun. Moreover, the cartridge casings found in the lobby of the Greenrich Building and those found in the field where [Dennes] tested the silencer

were fired from the same gun. The weapon was determined to be either a Taurus or a Beretta 9 mm handgun.

Dennes v. State, slip op. at 2–7 (Tex. Crim. App. Jan. 5, 2000).

In addition to the heinous nature of this crime, the jury heard evidence at the punishment phase of trial concerning another armed robbery organized by Dennes the year before. In October 1995, Dennes approached an acquaintance of his, David Balderas, about committing a robbery. Dennes told Balderas that he knew someone who had a lot of jewelry in his house and that Balderas just had to tie the man up and take his briefcase. Dennes told Balderas that he could do the job himself or find someone else to do it for him. Balderas decided he did not want to go into the house, so he found two other people, Hector Fugon and Francisco Elvira, to do the job.

In early November, Dennes gave Balderas the address, then drove Balderas into the neighborhood and showed him the house. Dennes told Balderas that the house belonged to a man who flew around the country with a lot of jewelry, but that he never knew when the man would be home because of his frequent travel. When he found the man at home, Dennes would call Balderas, who in turn would contact Fugon and Elvira.

Balderas later received a call from Dennes saying that the man was home, and he relayed the message to Fugon and Elvira.

However, Fugon and Elvira arrived at the home of Danny Tsang. Fugon and Elvira tapped on Tsang's back window and demanded that Tsang open the back door. When he complied, Fugon and Elvira pushed Tsang to the floor, pointed guns at his head, tied him up with the cord from an iron, and demanded to know where the diamonds were kept. Tsang told them that he had no diamonds, but that he knew his neighbor two doors down, Albert Ohayon, was in the jewelry business and that they probably had the wrong house.

Fugon and Elvira did not leave; instead, they made Tsang wake his wife and daughter and ransacked the house for two and a half hours searching for diamonds. They ultimately took some jewelry, a watch, a camera, some clothing, a gun, and a stereo system, and then fled in Tsang's car. Fugon and Elvira paged Balderas after they finished the robbery and advised him that it was the wrong house. When Balderas passed this information on to Dennes, Dennes accused him of lying and said that he would find out the truth in the morning.

The next morning, the Ohayons were awakened by a police officer checking on their welfare because the Tsangs had just been robbed. Albert Ohayon, who was in the diamond wholesale business, had just returned from the airport the prior evening with approximately $500,000 worth of diamonds in his briefcase. Ohayon knew Dennes because they both once worked for the same company, albeit at different times.

II. The State-Court and Federal Appellate Proceedings.

On September 4, 1997, Dennes was convicted of capital murder and sentenced to death for the murder of Janos Szucs during the commission of a robbery. At a motion for new trial hearing, Dennes's counsel argued that Harris County, Texas prosecutors had withheld information about a punishment phase witness's status as a law enforcement informant. During the course of that hearing, Dennes's counsel described witness Balderas as an "ongoing" informant and proffered the testimony of Balderas's attorney to provide evidence of that fact. Dennes's motion for new trial was denied. On direct appeal in the state court, in two separate claims, Dennes argued that the State suppressed evidence of a contract between Dennes and the Houston Police Department and evidence that Dennes had criminal charges dismissed by the Harris County District

Attorney's Office. Dennes filed an application for writ of habeas corpus with the CCA which was denied in 2013. During the pendency of Dennes's state postconviction proceedings, witness Balderas was convicted in federal court. Balderas's attorney, who was the one present as Dennes's witness in the motion for new trial hearing, argued for Balderas by telling the court about Balderas's work as a law enforcement informant from 1989 to the time of the hearing in 1999.

Dennes then sought federal habeas relief on thirty-three grounds in the Southern District of Texas. Dennes combined his two direct appeal claims under *Brady v. Maryland*[1] into one, to which he added additional factual allegations in support. The district court denied habeas relief on all grounds and denied a COA, finding that "each of Dennes's claims" was "foreclosed by clear, binding precedent." *Dennes v. Davis*, 2017 WL 1102697, at *17 (S.D. Tex. Mar. 22, 2017). Dennes then appealed the *Brady* issues and related cause and prejudice standard for overcoming the procedural bar to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the district court's denial of Dennes's claims. Dennes now petitions this Court for a writ of certiorari.

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1 373 U.S. 83 (1963).

REASONS FOR DENYING THE WRIT

Dennes presents no compelling reason for granting review on writ of certiorari, and none exists. *See* Sup. Ct. R. 10 (Certiorari review "is not a matter of right but of judicial discretion," and "will be granted only for compelling reasons.") Indeed, the issues in this case involve only the lower court's proper application of this Court's precedent. Furthermore, a favorable ruling for Dennes on the issues as presented would have no effect on Dennes's judgment and sentence. Accordingly, the petition presents no important question of federal law to justify the exercise of this Court's certiorari jurisdiction.

Under 28 U.S.C. § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100 (2011) (quoting *(Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in state criminal justice systems, not a substitute for ordinary error correction through appeal.

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'" on the correctness of the state court's decision. *Harrington*, 562 U.S. at 87 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Further, in reviewing a state court's merits adjudication for reasonableness, a federal court is limited to the record that was before the state court. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

ARGUMENT

I. The Fifth Circuit opinion.

The Fifth Circuit found that the district court did not err in denying Dennes's *Brady* claim. Pet. App.[2] A at 1.

Dennes's briefing in the federal district court on the *Brady* claim indicated that it was an exhausted claim but included references to evidence not presented to the state courts—the transcript of a 1999

[2] "Pet." refers to Dennes's Petition for Writ of Certiorari. Pet. App." Refers to the appendices to that petition.

sentencing hearing that indicated that Balderas was a long-term informant for the Houston Police Department. As noted by the Fifth Circuit in its opinion, on appeal Dennes focused on the allegation that the State suppressed evidence of Balderas's ongoing informant relationship with the State. Pet. App. A at 8.

The Fifth Circuit analyzed the long-term informant allegation both as new evidence supporting the exhausted claim and, alternatively, a standalone *Brady* claim and noted that Dennes faced insurmountable procedural hurdles under both theories.[3] Pet. App. A at 11-12. As a standalone *Brady* claim, the allegations would be unexhausted and therefore procedurally barred in federal court. *Id.* However, if Dennes presented the evidence to support his pre-existing *Brady* claim, the federal courts are not permitted to consider it under *Cullen v. Pinholster*.[4] *Id.*

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[3] Dennes has always maintained that his *Brady* claim was exhausted, except during oral argument in the Fifth Circuit on his COA application. During argument, Dennes's attorney argued that *Cullen v. Pinholster* did not apply to his *Brady* claim because it had not been adjudicated on the merits in state court. However, Dennes's briefing after the grant of COA returned to the familiar argument that the *Brady* claim had been exhausted and his new evidence merely supported that claim. "Dennes thus satisfied the exhaustion requirement as to the legal ground of his Balderas *Brady* claim." Dennes Supplemental Brief to the Fifth Circuit at 14.

[4] 563 U.S. 170 (2011).

Despite the fact that Dennes had always argued that his new evidence was presented in support of an exhausted *Brady* claim and that *Cullen v. Pinholster* barred consideration of such new evidence not considered in state court, the Fifth Circuit nonetheless evaluated the claim including Dennes's new evidence. In doing so the Fifth Circuit properly acknowledged this Court's precedent and standards set forth in *Banks v. Dretke,* but ultimately concluded that, even considering the new evidence, Dennes failed to meet the cause/suppression and prejudice/materiality elements necessary to prevail on Dennes's *Brady* claim.

On the subject of cause/suppression, the Fifth Circuit found

> Cause, in this context, means that the State prevented Dennes from gaining access to the relevant *Brady* information. Dennes claims he was not aware of Balderas's alleged longstanding status as an informant for Harris County because the State withheld the information. But evidence is not suppressed under *Brady* if the defendant knew or should have known of Balderas's status. Here, there is ample evidence to suggest that, at minimum, Dennes should have known about Balderas's status.
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> At the motion for new trial hearing, Dennes's counsel argued that Balderas "had a working relationship and we believe the documents speak of an *ongoing working relationship* with the State of Texas out of which he received a dismissal of a major drug case . . . that relationship with the State and his desire to work with the state in order to secure dismissal of the case . . . should have been disclosed under *Brady*." During the course of these proceedings, the State also turned over Balderas's informant contract to the trial court and acknowledged his informant

> relationship with the State. And, as if this evidence were not enough, Dennes's counsel proffered the testimony of Balderas's attorney, John Munier, who was present at the motion for new trial hearing and was willing to testify about Balderas's informant relationship with the State. Taken together, these points establish that Dennes had, if not actual knowledge, sufficient opportunity to learn of Balderas's status by the conclusion of the motion for new trial hearing.

Pet. App. A at 12–13.

Turning to prejudice, the Fifth Circuit aptly concluded that, even considering the newly presented evidence, Dennes failed to demonstrate that the allegedly suppressed evidence was material. Pet. App. A. at 13-15. Balderas had been impeached at trial to such an extent that the Fifth Circuit found that there was not a reasonable probability that had the complained of evidence been turned over to the defense, the result of the proceeding would have been different. Pet. App. A at 14. This was because "[a]t the time of Dennes's trial, Balderas had not received an official offer of immunity in exchange for his testimony, and Dennes's counsel drew significant attention to this fact." *Id.* Evidence of Balderas's long-time informant status would have been, at best, cumulative proof of his "glaringly obvious" bias. Pet. App. A at 14-15. But cumulative impeachment is not material. *Id.* Additionally, the new evidence was not completely favorable to Dennes. Pet. App. A at 14. Rather, the sentencing

hearing transcript affirmed the fact that Balderas received nothing in return for his testimony at Dennes's trial. *Id.*

Finally, the Fifth Circuit found that "circumstantial evidence strongly corroborates Balderas's testimony." Pet. App. A at 15. This evidence was such that it is "unlikely that a jury would have found Balderas to be any less credible based on his alleged informant status on unrelated matters." Pet. App. A at 15—16.

II. This case would provide a poor vehicle to address any alleged circuit split, because even when the new evidence is considered, Dennes's substantive *Brady* claim fails.

Certiorari review is not warranted here as any alleged circuit split on the proper application of *Cullen v. Pinholster* to *Brady* claims is not properly implicated. Due to the individual facts of this case and the lower courts' analysis of the issue, this case would be a bad vehicle for addressing any circuit differences.

Dennes clearly states that at issue is the application of *Cullen v. Pinholster* to "*Brady* evidence that remains suppressed until federal habeas proceedings," and a circuit split Dennes claims exists as to that question. Cert. Op. at ii, 13. Dennes's next question assumes the Court decides in his favor on the first two issues, and from there questions

whether what defense counsel knew or should have known remains relevant in light of this Court's decision in *Banks v. Dretke*.

However, no decision on any of these issues will have any impact on the Fifth Circuit's ultimate ruling. Notably absent from the issues Dennes presents in his petition to this Court is any complaint about the Fifth Circuit's decision on the prejudice/materiality prong of Dennes's claim. This is for good reason. Even if Dennes's claim on cause were meritorious, the facts supporting his claim fall lamentably short of that necessary to demonstrate prejudice/materiality.

Despite *Pinholster*'s prohibition on the introduction of new evidence on federal habeas, the Fifth Circuit nonetheless gave full consideration to the evidence of Balderas's long-standing informant status in evaluating prejudice/materiality. The court concluded that the evidence was cumulative to that presented at trial and that there was significant corroborating evidence to support Balderas's testimony. The Fifth Circuit noted, "Balderas's conflict of interest had already been made glaringly obvious to the jury." Pet. App. A at 14. That finding has not been presented to this Court for review. Because the Fifth Circuit evaluated all aspects of Dennes's claim, including the new evidence, neither the

cause/suppression issue or any *Pinholster* argument were uniquely dispositive of the claim—Dennes's failure to prove materiality was fatal in itself.

III. Dennes's new evidence is barred under *Cullen v. Pinholster*.

Dennes has always pled his *Brady* claim as a single exhausted claim and has conceded the claim is exhausted multiple times. As such, Dennes's claim is subject to § 2254(d) analysis and any new evidence Dennes attempts to present in federal court will be barred under this Court's precedent in *Pinholster* which noted that "Section 2254(d) applies" to a claim that "was adjudicated on the merits in state court proceedings[,]" and held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181, 187. Under clearly settled Supreme Court law, Dennes's newly presented evidence cannot be considered when evaluating the reasonableness of the CCA's denial of his exhausted claim, and the Fifth Circuit did not err in so finding.

Therefore, Dennes asks this Court to carve out an exception to *Pinholster* based upon a dissenting opinion in that case. However, such an exception is not warranted in Dennes's case, if at all. Justice

Sotomayor's dissent begins with the observation that some petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. *Pinholster,* 563 U.S. at 206. However, as will be demonstrated below, Dennes's failure to develop the evidence in this case was undoubtedly due in part to Dennes's own inaction—he failed to investigate his *Brady* claim in state court in light of the information available at the time. Dennes had information about Balderas's "ongoing working relationship" with law enforcement, including an informant contract, and access to Balderas's attorney who was present and ready to testify about his knowledge of Balderas's informant status. Therefore, even if this Court were to create a *Brady* claim exception to *Pinholster* similar to the standard for holding an evidentiary hearing contained within § 2254(e)(2), Dennes would be unable to meet that standard.

IV. This Court's decision in *Banks v. Dretke* does not rescue Dennes's claim on any front.

Dennes attempts to escape the deference owed under AEDPA by urging that he can show cause and prejudice under *Banks v. Dretke.* 540 U.S. 668 (2004). But Dennes has conceded that his *Brady* claim is exhausted on multiple occasions. He therefore argues that he has shown

cause and prejudice for his failure to present the additional evidence supporting his claim in state court." However, while, *Banks* did apply the "cause and prejudice" analysis to Banks's exhausted claim when considering evidence he did not present in state court, *Banks* was decided before *Pinholster*. Furthermore, Bank's Brady claim was raised pre-AEDPA, so § 2254(d) was not an issue.

Nonetheless, even without the *Pinholster* problem, Dennes's total reliance on *Banks* falls flat. *Banks* is clearly distinguishable from Dennes's case on a number of points. First, the witness was actually an informant that received payment because of his cooperation with law enforcement in Banks's case. Second, the prosecution allowed the witness's clearly perjured testimony, specifically on the relevant points, to stand uncorrected at trial. And third, the prosecution specifically and categorically denied the informant status of the witness in post-conviction proceedings. As this Court's opinion noted that the cause and prejudice analysis mirrored the suppression and materiality analysis *in Banks's case*, the factual differences between Banks and Dennes are important. 540 U.S. at 691.

In Dennes's case, there was never any doubt that Balderas was an informant for law enforcement. The only question has ever been the specific extent of his work as an informant. This is in stark contrast to the petitioner in *Banks* who alleged that the witness was an informant in postconviction proceedings only to have that fact denied by the State. On the other hand, Dennes knew during trial that Balderas was a police informant. Balderas was cross-examined extensively on the fact that he was hoping for favorable treatment in exchange for his testimony at Dennes's trial. Further, Dennes knew at the motion for new trial that his informant status included a contract with law enforcement and was "ongoing."

Additionally, the perjured testimony in *Banks* was clear and unarguable while Dennes's allegations are, as the Fifth Circuit held, "extreme" and "simply do not square with the record." Pet. App. A at 16.

Further, as the Fifth Circuit indicated, there is some question whether Dennes's state counsel was unaware of the long-term informant status. Dennes maintains that he first learned of Balderas's status from the transcript of Balderas's 1999 sentencing hearing. However, at the motion for new trial hearing, Dennes's counsel speaks about Balderas's

"ongoing working relationship with the State of Texas." The distinction between an "ongoing" working relationship and a "long-term" relationship , if it exists, is very slim indeed.

At that same hearing, Dennes's counsel proffers the testimony of the very man whose statements at the sentencing hearing Dennes claims to have discovered "by luck" on federal habeas. It defies credulity to suggest that, under these circumstances, Dennes was unaware of the long-term status until federal habeas. This is particularly true when the only indication of it is the unsupported allegation itself. As the Director noted in the Fifth Circuit, Dennes has never provided any affidavit from appellate counsel as to what they did or did not know at the time of the direct appeal.

If Dennes knew about the long-term status—and there is no independent evidence he did not—then Dennes's failure to present that evidence in state court could not reasonably be attributed to any action or inaction by the State. This simple fact establishes why the application of the "knew or should have known" principle does not "fly in the face" of this Court's decision in *Banks*. Rather, to suggest the contrary would fly in the face of common sense. If Dennes did not know

about the Balderas's status as a long-term informant, the reason for that would be because he failed to ask his own witness.[5]

As such, the Fifth Circuit's application of *Banks* to the facts in Dennes's case is routine and does not warrant review by this Court.

Dennes essentially claims that *Banks* created a per se rule that a petitioner may always present new evidence on a *Brady* claim. Presumably, a petitioner could always satisfy the cause requirement if he had made a *Brady* request and obtained a prosecutor's statement that they would comply. In this world, petitioner's attorneys can then sit on their hands and do nothing further to develop even an existing *Brady* claim—regardless of petitioner or his attorney's actual or constructive knowledge of the information—and later claim that the State's failure to turn over that information constitutes cause to excuse a procedural bar. The fact that the evidence was displayed on a billboard on counsel's route from the office to the courthouse would be of no moment if the information

[5] Indeed, one would question how Dennes's attorneys were able to elicit the information about Balderas's "ongoing" status without necessarily inquiring into the length of that status or more inexplicably, whether that status was in effect at the time of Balderas's testimony at Dennes's trial. Further, it would certainly be strange for Dennes's attorney not to investigate further, by asking the witness with the information present at the time, about the extent and length of Balderas's cooperation with law enforcement after the judge indicated that he may have ruled differently if Dennes had shown an ongoing relationship.

was not conveyed by the prosecutors. This absurd result demonstrates that Dennes's claim about the current state of the law is an inaccurate interpretation of this Court's precedent.

Dennes counsel were not only aware of evidence suggesting a *Brady* claim directly relating to the informant status of Balderas, but raised this claim as early as the motion for new trial. Expecting a petitioner to fully investigate potential additional facts to the specific *Brady* claim they are already raising is a far cry from the hide and seek, trail of crumbs practice this Court prohibited in *Banks*. The trail from what Dennes's attorney described at the new trial hearing as Balderas's ongoing informant status to his current categorization of Balderas as a long-term informant is very short indeed. In this case, Dennes stood in front of the billboard with his eyes obstinately shut and now attempts to claim it was an outside force that prevented him from seeing the billboard's advertisement.

V. Even when the new evidence is considered, Dennes's *Brady* claim fails on the materiality component of such a claim.

The Fifth Circuit not only found that Dennes failed to prove cause/suppression, rather the court spent significantly more time explaining why Dennes's *Brady* claim failed on the prejudice/materiality prong.

The court accurately cited to this Court's relevant precedent, noting that "[u]nless suppressed evidence is 'material for *Brady* purposes [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default.'" *Banks*, 540 U.S. at 698 (quoting *Strickler v. Greene,* 527 U.S. 263, 282 (1999)). Materiality is met when "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (2004).

However, "[u]ndisclosed evidence that is merely cumulative of other evidence is not material." *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010); *Canales v. Stephens*, 765 F.3d 551, 575–76 (5th Cir. 2014); *see also Felder v. Johnson*, 180 F.3d 206, 213 (5th Cir. 1999) (citing *United States v. Amiel*, 95 F.3d 135, 145 (2d Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.")).

Balderas was thoroughly impeached at trial with his bias to testify for the state. Balderas confessed to helping commit the Tsang home invasion at the behest of Dennes. Balderas testified that he hoped he

would not be charged with the offense and affirmed the statement that based upon his testimony he might get off on the charges. Given that Balderas had already been impeached by the fact that he was hoping to avoid being charged with an offense, further evidence that he worked as an informant in unrelated cases to receive similar benefits would have merely been cumulative.

Moreover, the capital offense Dennes committed circumstantially corroborated Balderas's testimony. The two offenses happened close in time and both were carefully planned and elaborate robberies of diamond wholesalers, who were both connected to the company Dennes had previously worked for. Finally, the aggravating nature of the underlying capital offense itself dispels any reasonable likelihood of a different outcome even if the jury discounted Balderas's testimony. For these reasons, Dennes fails to show materiality under *Brady* and prejudice under *Banks*.

VI. Any conflict in the courts of appeals is insufficient to warrant this Court's exercise of its discretionary authority.

There are two main issues presented by Dennes's petition: the viability of applying *Pinholster* to *Brady* evidence first presented in federal court and the propriety of questioning whether defense counsel

knew or should have known about the purportedly withheld evidence in a cause/suppression analysis on an unexhausted claim. Therefore, the existence, or non-existence, of a circuit split on both is relevant to whether this Court should use its discretionary authority to review this case. However, Dennes combines his discussion of the federal appeals courts' jurisprudence on these issues into one in an attempt to create a circuit split that does not exist as Dennes claims.

As to the question relating to *Pinholster*, Dennes presents no case law that states that *Pinholster* does not apply to the 2254(d)(1) adjudication of an exhausted *Brady* claim.[6] The federal courts of appeals decisions he cites in support of his position were either decided prior to *Pinholster*, or do not contain a *Pinholster* issue.[7]

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[6] Similarly, the undersigned has found no federal circuit court case that stands for the proposition that *Pinholster* is inapplicable to *Brady* claims.

[7] In *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014), *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3rd Cir. 2016), and *Lewis v. Connecticut Cm'r Correction*, 790 F.3d 109 (2d Cir. 2015), the *Brady* evidence was not new in federal court—it had been presented in state court. Both petitioners in *United States v. Tavera* 719 F.3d 705 (6th Cir. 2013) *and United States v. Nelson*, 979 F.Supp.2d 123 (D.C. Cir. 2013), were convicted in federal court and therefore *Pinholster* was inapplicable. In *Barton v. Warden*, 786 F.3d 450 (6th Cir. 2015), *Pinholster* was not implicated because there was no merits adjudication as the state court decided the issue on procedural grounds.

As to the *Banks* issue, of the federal courts of appeals cases Dennes cites to in support of his argument, only six were decided after *Banks.*[8] A review of the cases does indicate different handling of the issue at times.[9] However, the Fifth Circuit certainly does not stand alone in its interpretation. More importantly to Dennes's case, as noted previously, a resolution in his favor on this matter will not benefit him in any way.

CONCLUSION

For all the reasons discussed above, the Court should deny Dennes's petition for a writ of certiorari.

Respectfully submitted,

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[8] *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014), *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3rd Cir. 2016); *United States v. Tavera*, 719 F.3d 705 (6th Cir. 2013); *Barton v. Warden*, 786 F.3d 450 (6th Cir. 2015); *Lewis v. Connecticut Cm'r Correction*, 790 F.3d 109 (2d Cir. 2015).

[9] It is notable, however, that while *Amado* ultimately holds that diligence was not a factor in that case, the Ninth Circuit distinguished, rather than overruled, their previous cases discussing a petitioner's obligations in developing *Brady* claims. The court stated that while he is not obligated to conduct interviews or investigations himself, "[d]efense counsel cannot ignore that which is given to him or of which *he is otherwise aware." Amado,* 758 F.3d at 1137. Further, the court reiterated that "when defense counsel was put on notice as to potential *Brady* material and given the opportunity to seek it out," a defendant could not later claim a *Brady* violation. *Id.*

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