No. 22-6798

In The
Supreme Court of the United States

RONALD JEFFREY PRIBLE,

Petitioner,

v.

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

Respondent.

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

AMICUS CURIAE BRIEF OF TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

STACIE B. LIEBERMAN*
ASHLEY R. STEELE
NATASHA BAKER-BRADLEY
CAPITAL AREA PRIVATE DEFENDER SERVICE
910 Lavaca Street
Austin, TX 78701
(512) 774-4567
stacie@capds.org

JONATHAN D. LANDERS
917 Franklin Street
Suite 300
Houston, TX 77002
(713) 301-3153
jlanders.law@gmail.com

Counsel for Amicus Curiae

**Counsel of Record*

March 8, 2023

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

		Page
Table of Contents		i
Table of Authorities		ii
I.	Interest of Amicus Curiae	1
II.	Introduction and Summary of the Argument	2
III.	Argument	4
	A. The District Court Granted Habeas Relief Based on Findings of Egregious State Misconduct and the Fifth Circuit Reversed, Faulting Petitioner's State Habeas Counsel	4
	B. The Fifth Circuit Ignored *Banks* and *Strickler*'s Bright-Line Rule and Imposed a Maximum Diligence Requirement on State Habeas Counsel	11
	C. Erasing the Bright-Line Rule of *Strickler* and *Banks* Incentivizes Prosecutorial Misconduct	22
IV.	Conclusion	24

TABLE OF AUTHORITIES

Page

CASES

Banks v. Dretke, 540 U.S. 668 (2004)..... 2, 3, 9, 11-17, 22

DeYoung v. Schofield, 609 F.3d 1260 (11th Cir. 2010) 17

Ex parte Dutchover, 779 S.W.2d 76 (Tex. Crim. App. 1989).....18

Ex parte Medina, 361 S.W.3d 633 (Tex. Crim. App. 2011).....18

Ex parte Temple, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016).....9

Ex parte Torres, 943 S.W.2d 469 (Tex. Crim. App. 1997) 19

Holland v. Florida, 560 U.S. 631 (2010).....12

Knowles v. Mirzayance, 556 U.S. 111 (2009).....17

Lema v. United States, 987 F.2d 48 (1st Cir. 1993).....17

Maples v. Thomas, 565 U.S. 266 (2012).....16

Massiah v. United States, 377 U.S. 201 (1964) 10, 11

Prible v. Lumpkin, 43 F.4th 501 (5th Cir. 2022) 3, 13

Strickland v. Washington, 466 U.S. 668 (1984).....2, 17

Strickler v. Greene, 527 U.S. 263 (1999)... 2, 3, 9, 11-13, ... 16, 17, 22, 23

United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).....21

United States v. Mezzanatto, 513 U.S. 196 (1995).....13

Williams v. Taylor, 520 U.S. 420 (2000).....17

TABLE OF AUTHORITIES—Continued

Page

STATUTES

28 U.S.C. § 2254 8

Tex. Code Crim. Proc. art. 11.071.....8, 18-21

Tex. Code Crim. Proc. art. 24.01.....20

RULES

Supreme Ct. R. 37.2.....1

Supreme Ct. R. 37.6.....1

OTHER AUTHORITIES

Comments in Opposition to Certification Submitted by Texas Defender Service, Federal Public Defender for the Northern District of Texas, and the Federal Public Defender for the Western District of Texas (Feb. 26, 2010), https://www.regulations.gov/comment/DOJ-OLP-2017-0010-0048 21

David Freeman & David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 SOC. SCI. & MED. 1757 (1982) 17

Federal Bureau of Prisons, Find an Inmate, www.bop.gov/inmateloc/.....21

Federal Bureau of Prisons, General Visiting Information, www.bop.gov/inmates/visiting.jsp 21

I.

INTEREST OF AMICUS CURIAE[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and to the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership over 3,400 and offers a statewide forum for criminal defense counsel, provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, and assists the courts by acting as amicus curiae.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief, which brief complies with all applicable provisions of the Supreme Court Rules, and copies have been served on all parties.

---

[1] Counsel for both the Petitioner and Respondent were timely notified of the intent to file a brief at least ten days prior to the due date. *See* Supreme Ct. R. 37.2. No counsel for a party authored the brief in whole or in part. *See id.* 37.6. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Id.*

II.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Defendants—and their attorneys—*must* be able to rely on the government's integrity. While defense counsel's obligation to investigate the State's case is well-established, the reasonableness of those efforts depends on the information available to counsel.[2] Defense counsel is not constitutionally required to chase down every speculative lead. "Mere speculation" and "suspicion" do not "suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support." *Strickler v. Greene*, 527 U.S. 263, 286 (1999). "Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them." *Id.* "The presumption, well established by 'tradition and experience,' that prosecutors have fully 'discharged their official duties,' . . . is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert error on the basis of mere suspicion that some prosecutorial misstep may have occurred." *Id.* at 286-87 (quotation omitted).

This Court affirmed that trial and state habeas counsel could reasonably rely on the State's representations that it has discharged its disclosure duties. *Banks v. Dretke*, 540 U.S. 668, 693 (2004) (citing

---

[2] *See*, *e.g.*, *Strickland v. Washington*, 466 U.S. 668, 681 (1984).

Strickler, 527 U.S. at 283-84, 289). In *Banks*, this Court held it was reasonable for a state petitioner to assume his prosecutors "would not stoop to improper litigation conduct to advance prospects for gaining a conviction." 540 U.S. at 694 (citations and footnote omitted). Defendants are not required to "scavenge for hints of undisclosed *Brady* material" when the prosecution represents that material was disclosed. *Id.* at 695. This Court unequivocally held that "defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some procedural misstep may have occurred.'" *Id.* at 695-96 (quoting *Strickler*, 527 U.S. at 286-87).

In *Prible v. Lumpkin*, 43 F.4th 501 (5th Cir. 2022), the Fifth Circuit directly contravened this Court's holdings in *Strickler* and *Banks*, shifting the burden of uncovering the State's misconduct onto the petitioner and his counsel. Rather than follow this Court's established, bright-line rule that the State cannot hide favorable information from the accused, *Prible* effectively mandates that defense lawyers must run down every lead—no matter how speculative, unsupported, or improbable—or risk their client's wrongful imprisonment or execution. This Court should grant certiorari and reverse.

III.

ARGUMENT

A. The District Court Granted Habeas Relief Based on Findings of Egregious State Misconduct and the Fifth Circuit Reversed, Faulting Petitioner's State Habeas Counsel.

For more than two years, the 1999 murders of the Herrera family went unsolved. Despite having an alibi, the couple's friend, Ronald Jeffrey Prible, became a suspect based on the presence of his DNA at the scene. Prible was not indicted due to a paucity of evidence and the case grew cold. In 2001, Harris County prosecutor Kelly Siegler took over the case. *See* Pet. App. A at 2a-4a. Prible, who pleaded guilty to federal bank robbery charges, was housed in the low security unit of the Federal Correctional Institution (FCI) in Beaumont, Texas. Despite lacking any new evidence, in August 2001, Siegler presented the murder case against Prible to a grand jury, which returned an indictment. Post-indictment, Prible was moved to the medium security unit of FCI Beaumont, where Michael Beckcom was housed and Nathan Foreman was recently relocated. Pet. App. C at 34a-36a.

Siegler's case centered on two pieces of evidence the State alleged tied Prible to the crime despite an alibi witness: DNA allegedly deposited in short proximity to the crime, and Beckcom's testimony that Prible allegedly confessed to him at FCI Beaumont. Pet. App. C at 37a. Prible's trial attorney requested pre-trial discovery relating to, *inter alia*, the State's

contacts and relationship with Beckcom. The trial court ordered disclosure of Beckcom's history as an informant, and any deals he had with the State in exchange for cooperating. Siegler "balked" at providing information about her contacts with Beckcom. She asserted no notes existed and told the court she would orally relay to defense counsel "what [she] can remember." The trial court allowed this oral transmission and ruled any notes would be work product. Siegler admitted that in exchange for Beckcom's cooperation and truthful testimony, she promised to notify the Assistant United States Attorney assigned to his case that he had cooperated but claimed she had no influence on his decision. *Id.* at 36a-37a. Siegler provided a note to show Beckcom initiated contact. *Id.* at 85a.

Roland Moore was appointed as Prible's state habeas counsel. In prison after he was convicted and sentenced to death in this case, Prible exchanged rumors about Siegler's use of informants with other inmates. He was convinced he was set up. He asserted Siegler was using informants at FCI Beaumont to obtain convictions. Prible had no corroboration for his theory; he had only jailhouse rumors about Siegler using informants to frame another defendant. Pet. App. C at 49a. Prible told Moore "a [black] man named Walker" had information about the ring-of-informants conspiracy. Pet. App. A at 11a. Prible urged Moore to plead his suspicions in his state habeas application as a prosecutorial misconduct claim. Moore filed the initial state habeas application in November 2004 but did not plead claims about a conspiracy against a prosecutor based

solely on his client's repetition of jailhouse rumors and his unsuccessful attempts to substantiate them. Pet. App. C at 49a.

Frustrated with what he perceived to be his attorney's inaction, Prible filed numerous *pro se* documents asserting, without corroboration, his belief that Siegler recruited a ring-of-informants to obtain his conviction. Pet. App. C at 49a-50a. Prible claimed he had given this information to Moore and urged him to find Walker. In a 2005 pleading, Prible identified a witness to the conspiracy, "Larry Wayne Walker," based on a rumor that "a man named Walker" was another of Siegler's informants at FCI Beaumont. *Id.* at 86a-87a. Prible's state habeas application was denied by the Texas Criminal Court of Appeals (TCCA). The court construed the two *pro se* pleadings as subsequent applications that were procedurally barred from merits review. *Id.* at 50a.

Larry Walker was not involved in Siegler's ring-of-informants. Prible sent letters asking him about his involvement with Siegler. Through a twist of fate, after the initial state habeas application was filed, Larry Walker met former FCI Beaumont inmate Carl Walker when he was transferred to a Mississippi federal prison. Larry Walker mentioned Prible's letters, and Carl Walker identified himself as the correct Mr. Walker. Pet. App. C at 86a-87a. Both Prible and Moore learned of Carl Walker after filing the initial state habeas application. Pet. App. A at 9a, Pet. App. C at 86a-87a. Carl Walker did not respond to inquiries about Prible's case until approximately 2010, during Prible's federal habeas proceedings, when he provided

information relating to the ring-of-informants conspiracy. Walker did not have specific information about Foreman and Beckcom's communications with Siegler. Pet. App. C at 52a-53a.

In 2009, Prible filed an amended federal habeas petition, raising unexhausted claims. The district court granted a stay for Prible to exhaust his claims in state court. Pet. App. C at 50a-51a. After Walker's interview in 2010, Prible's counsel filed a successive application in state court. *Id.* at 52a. The TCCA remanded for a hearing to determine if the claims were defaulted. Prible moved for an *in camera* inspection of the prosecutor's file. The State disclosed three letters from federal inmates, including Carl Walker, addressed to Siegler found in a sealed envelope labeled "attorney work product." *Id.* at 54a. The letters described Prible's alleged confessions and the men's prior conversations with Siegler. Moore provided an affidavit stating that he suspected that Beckcom and Foreman were in a conspiracy with each other to provide false testimony and insisted he took "extraordinary measures" to contact Foreman before filing the initial application. *Id.* at 53a-55a.

The state court found the factual basis for the prosecutorial misconduct claims was available at the time of the initial habeas application and found Walker's statement unpersuasive, consisting mostly of hearsay and speculation. Pet. App. C at 56a-57a. The court did not consider the letters to Siegler. The TCCA held the successive application was procedurally

barred. *Id.* at 57a (citing Tex. Code Crim. Proc. art. 11.071 § 5(a)).[3]

Prible returned to federal court and requested additional discovery, which the court granted. Pet. App. C at 57a. In 2018, a fourth amended federal habeas petition was filed. The district court ordered disclosure of Siegler's "work product" notes, which revealed that the State suppressed Siegler's multiple interactions with Foreman. *See* Pet. App. C at 57a, 65a, 84a. Those disclosures demonstrated that Siegler's statements during a pretrial hearing were incorrect. During the pretrial hearing, Siegler stated on the record that Foreman contacted her in October 2001 and that she met with him once in December 2001. The notes demonstrate that she met with Foreman in August 2001 about Prible, less than a month after Prible and Foreman were moved to the medium security unit. Records revealed that Foreman continued communications with Siegler after the August 8 meeting, and Siegler's notes documented that even Foreman's wife attempted to contact her. Siegler's investigator's notes, also placed in the work product file, show they met with Foreman in December 2001, after meeting with Beckcom. *Id.* at 69a-70a, 90a-92a.

---

[3] The TCCA has never published an explanation of "reasonable diligence" in the context of Article 11.071 § 5(a)(1). Because it cannot be determined whether this state procedural rule is the same as the federal "due diligence" standard to overcome procedural default, the Fifth Circuit should not have given the TCCA's findings deference under 28 U.S.C. § 2254(e)(1). *See* Pet. App. A at 20a-26a.

An evidentiary hearing was held in 2019. The district court heard live testimony from Foreman, Walker, Siegler, and trial counsel, and it viewed depositions of Beckcom, Siegler, Siegler's investigator, and Siegler's co-counsel. Pet. App. C at 60a. The district court found that Foreman and Walker credibly testified that Beckcom lied at Prible's trial and found Beckcom's deposition testimony affirming his trial testimony to be "dishonest when it suited his needs." *Id.* at 67a. The district court found Siegler not credible "on both minor and major points." *Id.* at 69a. In particular, it discounted Siegler's claim she did not disclose multiple interactions with Foreman because she did not find his story about Prible credible and her assertion the three letters were in the "open file."[4] *Id.* at 69a.

The district court, applying *Strickler* and *Banks*, held that while Prible's claims relating to the ring-of-informants were defaulted, he overcame the default

---

[4] In 2016, TCCA found Siegler's "misconception regarding her duty under *Brady* was 'of enormous significance.'" *Ex parte Temple*, 2016 WL 6903758, at *3 (Tex. Crim. App. Nov. 23, 2016) (unpublished). Based on her testimony, the TCCA explained Siegler's belief

> that she was not required to turn over favorable evidence if she did not believe it to be relevant, inconsistent, or credible. She testified that she did not have an obligation to turn over evidence that was, based on her assessment, 'ridiculous.' She claimed that, when it came to what constituted *Brady* evidence, her opinion is what mattered. [Siegler] stated, when asked, that if information does not amount to anything, the defense is not entitled to it.

Id.

because Siegler suppressed the evidence. *See* Pet. App. C at 83a-87a. Further, the court found while Siegler claimed she had an open file policy, and despite trial counsel's discovery requests, she maintained an undisclosed work product file containing the three letters, notes memorializing her meetings with Foreman and Beckcom, and notes undercutting the strength of the DNA evidence. Because of this suppression, the court determined Prible's "defense team had no knowledge of her contacts and communications with other FCI Beaumont informants, or even the full extent and nature of her contacts with Beckcom." *Id.* at 82a-96a.

The district court held Moore could not have discovered the ring-of-informants information despite his due diligence. Pet. App. C at 86a-87a. At the time the initial state application was filed, Moore only had the identities of Beckcom and Foreman and the suggestion that a man named Walker might have more information. Further, even though Moore tried to find "Walker," without any other identifying information, he could not. Importantly, the district court determined Walker was unwilling to assist Mr. Prible's defense until 2010. *Id.* at 87a.

Finding both cause and prejudice satisfied, the district court reviewed the *Brady* claims and related claim based on *Massiah v. United States*, 377 U.S. 201 (1964), and ultimately granted relief on the merits. Pet. App. C at 103a-104a. The Fifth Circuit reversed. Pet. App. A at 2a. The court held the factual basis for the ring-of-informants claims was available when Prible's 2004 initial state habeas application was filed, relying

on Prible's later *pro se* filings.[5] *Id.* at 20a. The court asserted even if the speculative allegations did not provide the factual basis, cause was not met because Moore could have discovered the ring-of-informants had he exercised due diligence by pursuing Walker. The court contended Moore should have called, visited, or sent an investigator to Beaumont and should have issued a subpoena or sought assistance from the state habeas court. *Id.* at 23a-24a. It disagreed with the district court's finding that Moore's efforts to find Walker would have been in vain, insisting, "we can't assume so." *Id.* at 25a. The court applied the same analysis to the *Massiah* claim. *Id.* at 27a-29a. Prible now seeks certiorari from the Fifth Circuit's judgment vacating the district court's grant of habeas relief.

B. The Fifth Circuit Ignored *Banks* and *Strickler's* Bright-Line Rule and Imposed a Maximum Diligence Requirement on State Habeas Counsel.

"A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696. The Fifth Circuit's opinion held that Prible could not establish cause to overcome his procedural default because it was, in that court's

[5] The cases the Fifth Circuit relied on do not support the proposition that notice of a factual basis can be properly based on uncorroborated speculation or unsubstantiated rumors. Instead, the cases cited involve substantiated information known either to the petitioner or his attorney.

opinion, possible for him to have discovered the factual basis for his claims prior to the initiation of his state court post-conviction proceedings. The court made the same error addressed by this Court in *Strickler* and *Banks* and created a requirement that state habeas counsel exert maximum diligence.[6]

Strickler involved a capital murder conviction where suppressed evidence might have affected the jury's conviction of capital murder. 527 U.S. 263, 267 (1999). In that trial, a witness named Stoltzfus was relied upon by the State to prove the key elements necessary to increase the conviction from murder to capital murder. *Id.* at 267-75. The prosecution and police suppressed vital evidence showing that Stoltzfus' memory was not as clear as she led the jury to believe. *Id.*

Strickler, like Prible, discovered the factual basis of his due process claims during federal court proceedings, when the district court entered an "order granting petitioner's counsel the right to examine and to copy all of the police and prosecution files in the case." *Id.* at 278. The district court granted relief, finding Strickler had both established cause for the procedural default and that the underlying claim was meritorious. *Id.* at 278-79. The Fourth Circuit reversed, concluding that Strickler's "*Brady* claim was procedurally defaulted because the factual basis for the claim was

---

[6] This Court rejected such a "maximum feasible diligence" requirement in the equitable tolling context in *Holland v. Florida*, 560 U.S. 631, 653 (2010).

available to him at the time he filed his state habeas petition." *Id.* at 279. The court claimed Strickler could have discovered the hidden evidence and held "a party 'cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.'" *Id.* The Fourth Circuit's reasoning mirrors the Fifth Circuit's in *Prible*.

This Court rejected the Fourth Circuit's argument that Strickler could have raised his claims in state court by exercising due diligence and pointed to three factors excusing the procedural default: "the documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy; and trial counsel were not aware of the factual basis for the claim." *Id.* at 283. Each factor applies to Prible's case. The Court noted if it was reasonable for trial counsel to rely upon the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials[,]" then "such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable." *Id.* at 284. This Court held mere suspicion of a *Brady* violation should not "suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support." *Id.* at 286. This was based, in part, on the well-established presumption that "prosecutors have fully discharged their official duties." *Id.* (quoting *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)).

In *Banks*, "[t]he State did not disclose that one of [its] witnesses was a paid police informant, nor did it disclose a pretrial transcript revealing that the other

witness' trial testimony had been intensively coached by prosecutors and law enforcement officers" and did not correct the false testimony about these matters when it arose. 540 U.S. 668, 675 (2004). This Court noted "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Id.* at 675-76.

Banks' first two state habeas petitions were denied, and in his third, "Banks alleged 'upon information and belief' that 'the prosecution knowingly failed to turn over exculpatory evidence as required by [*Brady v. Maryland*]'; the withheld evidence, Banks asserted, 'would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a set-up.'" *Id.* at 682. Banks' only proof was an unsworn declaration by his girlfriend suggesting there might be merit to his claims. *Id.* The prosecution denied this allegation, and the state habeas court rejected Banks' claims. *Id.* at 683.

Banks proceeded to federal court, where he was granted discovery and an evidentiary hearing which led to the production of the prosecutor's file. Disclosure of that file showed one key witness had been coached intensely before trial, and that another witness had received $200 for his involvement in the case. *Id.* at 685.

Despite the proof of suppressed evidence, the district court denied relief because Banks had not pleaded his claim with enough specificity, and the Fifth Circuit denied relief based upon the idea Banks was not

diligent enough in developing his claim in state court. *Id.* at 687-88. Just as in Prible's case, the Fifth Circuit held the petitioner was at fault for not discovering the State was hiding evidence sooner. *Id.* This Court reversed. *Id.* at 689.

Discussing cause, this Court again noted the three factors driving the analysis:

> (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government.

Id. at 692-93. The Court went on to hold that "because the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in full with its *Brady* disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, Farr's connections to Deputy Sheriff Huff." *Id.* at 693.

The State in *Banks*, like the Fifth Circuit here, suggested it was the petitioner's fault that he did not find the evidence the State was hiding. The Fifth Circuit faulted Banks for not having attempted to locate certain witnesses, for failing to interview police officers, and for failing to apply "to the state court for assistance." *Id.* at 688. The court held that Banks' claims

were defaulted because of his own "lack of diligence[.]" *Id.* This Court disagreed and explained it "lend[s] 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." *Id.* at 695. The Court found that Banks had shown cause for his failure to timely raise his *Brady* claims before the district court.

Banks reaffirmed the bright-line rule established in *Strickler*: federal courts should not fault habeas petitioners when their efforts to properly exhaust a constitutional claim have been thwarted by the prosecution. Both cases counsel that the relevant question is not whether a petitioner could have discovered the factual basis of his claim prior to filing his initial state habeas application, but whether it was " 'something external to the petitioner, something that cannot fairly be attributed to him,' that impeded compliance with the State's procedural rule . . . " *See Maples v. Thomas*, 565 U.S. 266, 293 (2012) (Scalia, J., with Thomas, J., dissenting) (citation omitted).

The Fifth Circuit failed to follow this Court's precedent. Instead of looking to the cause of the procedural default, the Court concluded that cause was not present because Prible "could have obtained" sufficient facts to raise his claim in his initial state habeas application. In creating its own rule, the Fifth Circuit places far too great of a burden on state habeas counsel, while also degrading the special role played by prosecutors in our criminal justice system.

Diligence depends on whether a reasonable attempt was made based on information available at the time. *See Williams v. Taylor*, 529 U.S. 420, 435 (2000). *Strickler* and *Banks* do not require defense lawyers to chase down every speculative lead to meet a reasonable diligence requirement.[7]

Prior to the filing of the initial habeas application, Moore's client told him that he was the victim of a prosecutorial conspiracy.[8] Moore suspected that Beckcom did not testify truthfully and may have banded with Foreman to snitch on Prible for favorable treatment. He tried to speak to Foreman. Foreman would not talk to him. Pet. App. C at 55a. Beckcom's attorney would not permit Moore to speak with him. Pet. at 9. Prior to

---

[7] *Cf. Knowles v. Mirzayance*, 556 U.S. 111, 121-23 (2009) (noting *Strickland*'s deficient performance standard does not require counsel to raise "a claim that stood almost no chance of success," even when "there was nothing to lose by pursuing it."); *Lema v. United States*, 987 F.2d 48, 55 (1st Cir. 1993) ("Counsel need not chase wild factual geese when it appears" to counsel "that a defense is implausible or insubstantial" as a matter of law, fact, or "the realities of proof, procedure, and trial tactics") (quotation omitted); *DeYoung v. Schofield*, 609 F.3d 1260, 1281-82 (11th Cir. 2010) (holding counsel not deficient for failing to present witness when attorney made reasonable efforts to contact the witness).

[8] The prevalence of paranoid delusions, psychosis, brain damage, mental illness, and intellectual disability in incarcerated and death-sentenced individuals counsels against a general rule that defense attorneys must thoroughly investigate every client's insistence that law enforcement committed misconduct to secure his or her conviction. *See*, *e.g.*, David Freeman & David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 SOC. SCI. & MED. 1757 (1982).

filing the initial state habeas application, the only information Moore had to follow was that, according to the jailhouse grapevine, a man named Walker who was in the federal prison system prior to Prible's trial might know something. He tried to find this Walker, but it "quickly became a fool's errand." Pet. App. C at 86a. He did not have any other leads. Siegler stated that she had an open file policy and made assurances on the record regarding the information and materials requested by trial counsel. Under this Court's bright-line rule, Moore reasonably relied on those statements even though later proceedings demonstrated that they were untrue. Moore was in an untenable position.

Moore could not, as the Fifth Circuit suggests, file the ring-of-informants claim in the initial state habeas application. Pet. App. A at 22a. An application for writ of habeas corpus in Texas "must allege specific facts so that anyone reading [it] would understand precisely the factual basis for the legal claim." *See Ex parte Medina*, 361 S.W.3d 633, 637-38 (Tex. Crim. App. 2011); *see also Ex parte Dutchover*, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989). Applications that do not allege specific facts to support claims asserted "intentionally jeopardiz[e] the applicant's 'one very well-represented run at a habeas corpus petition.'" *Ex parte Medina*, 361 S.W.3d at 636. A claim that is not presented in the initial state habeas is deemed waived and will not be considered in any subsequent application filed in state court, with limited exceptions. Tex. Code Crim. Proc. art. 11.071 § 5. Moore did not have specific facts to support the ring-of-informants claim when the initial

habeas application was filed because the State suppressed them. If he had pleaded the claim, it likely would have been dismissed.

Moore could not amend the initial application with newly discovered claims, as the Fifth Circuit asserts. Pet. App. A at 22a. Texas petitioners are unable to amend applications in capital cases once they are filed. *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) (citation omitted); *see also* Tex. Code Crim. Proc. art. 11.071 § 5. All material facts that are discoverable through reasonable diligence must be pleaded in the initial application because they cannot be added later.

There is no right to pre-application discovery in Texas capital state habeas. As a result, there is no right to access the prosecutor's file. To view the prosecution's file, counsel is wholly dependent on the benevolence of the district attorney's office. *See*, *generally*, Tex. Code Crim. Proc. art. 11.071. Moreover, because there is no right to the prosecutor's file, there is similarly no requirement that a privilege log be produced. Thus, even if inspection is permitted, counsel has no way to discern what is missing or has been removed from the file and limited ability to litigate the State's decision to withhold materials. Counsel must rely on the prosecution's good faith in determining what is true work product.

If counsel needs discovery, the habeas court must be persuaded. But because there is no statutory guidance and no appellate review of the habeas court's discretion, litigants are subject to widely variable results

by jurisdiction. Even when a court is willing to grant discovery, the petitioner must make a strong showing of necessity, the existence of the information requested, and its relevance to potential claims. Unsupported speculation arising from purported jailhouse conversations would likely not meet this threshold.

Post-application, a court may allow further factual development through affidavits, depositions, interrogatories, and evidentiary hearings, but only if it determines that controverted issues of material fact exist and only sufficiently pleaded claims are entitled to factual development post-application. Tex. Code Crim. Proc. art. 11.071 § 9(a). Unsupported allegations against a prosecutor arising from purported jailhouse conversations would likely not meet this threshold.

Moore could not have used subpoena power, as the Fifth Circuit asserts. Pet. App. A at 24a. In state habeas proceedings, only the district clerk has subpoena power. Tex. Code Crim. Proc. art. 24.01(a)(2)(D). Generally, use of this subpoena power is only permissible in capital state habeas proceedings in preparation for evidentiary hearings.

Moore or his investigator could not simply walk into a federal penitentiary to find the correct Mr. Walker. *See* Pet. App. A at 23a-24a. It would have been nearly impossible to track down the correct Walker with the limited information known at the

time.[9] Assuming the correct Walker was still at FCI Beaumont during Moore's post-conviction investigation, the Bureau of Prisons has a visiting procedure, which generally requires the first name of the inmate.[10] In the unlikely event the habeas court issued an order to assist in the identification of "Walker," it is complicated to serve a state court order on a federal employee and Moore had limited resources and a limited amount of time in which to file the initial state habeas application. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); Tex. Code Crim. Proc. art. 11.071 §§ 2(a), 4(a); *see also Comments in Opposition to Certification Submitted by Texas Defender Service, Federal Public Defender for the Northern District of Texas, and the Federal Public Defender for the Western District of Texas* (Feb. 26, 2010), 9-10, https://www.regulations.gov/comment/DOJ-OLP-2017-0010-0048 (discussing the presumptive $25,000 cap for attorney's fees and expenses for capital state habeas proceedings).

Carl Walker's identity was only discovered by happenstance. And Carl Walker's discovery did not provide the full basis for the ring-of-informants claims later asserted because he did not have specific details on the communications Beckcom and Foreman had with Siegler. The substantiation and corroboration of the

---

[9] Even the current Bureau of Prisons Inmate Locator requires the inmate's first name or BOP number. *See* Federal Bureau of Prisons, Find an Inmate, www.bop.gov/inmateloc/.

[10] *See*, *e.g.*, Federal Bureau of Prisons, General Visiting Information, www.bop.gov/inmates/visiting.jsp.

ring-of-informants conspiracy did not occur until after Prible had gone to federal court—through no fault of Moore's—because Siegler actively suppressed the information.

By imposing a maximum diligence standard that Moore could not have met, the Fifth Circuit shifted the burden of responsibility for State misconduct and leveled an untenable obligation on Texas attorneys: seek any and all evidence of prosecutorial misconduct—regardless of assurances from the State, tenuousness of the source, or procedural barriers—or egregious prosecutorial misconduct will go without remedy.

C. Erasing the Bright-Line Rule of *Strickler* and *Banks* Incentivizes Prosecutorial Misconduct.

By imposing an impossible burden on defense counsel without so much as considering the conduct of the prosecution, the Fifth Circuit creates a dangerous precedent. The ruling encourages those prosecutors inclined to commit misconduct: as long as a prosecutor can conceal misconduct until after the initial state habeas is filed, then any unlawfully obtained conviction will be insulated from review. No court should encourage prosecutors to suppress *Brady* material.

The Fifth Circuit's holding simply ignores the underlying current that produced the *Brady* line of cases and erodes the role of the prosecutor in our criminal justice system. *See Strickler*, 527 U.S. at 281. The prosecutor is "the representative not of an ordinary party

to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* (quotation omitted). It is this "special status" that explains "the prosecution's broad duty of disclosure." *Id.*

The Fifth Circuit's opinion erodes the foundations of the prosecutorial process by failing to even consider the effect of the prosecution's efforts to conceal evidence in this case. By looking only to whether it was possible for Prible's attorney to search for and discover some facts establishing a constitutional violation, the Fifth Circuit absolves the prosecution, though it was the party that concealed the evidence necessary to prove a constitutional violation. This holding flies in the face of the notion that a prosecutor should at all times seek justice, and therefore undermines faith in our criminal justice system.

The State should bear the burden of its own misconduct. It is untenable to place the burden of prosecutorial misconduct that is actively suppressed squarely on the shoulders of defense lawyers, who have less power under the law and fewer resources to discover and correct it. The Fifth Circuit was wrong in doing so. This Court should grant certiorari and reverse.

IV.

CONCLUSION

The Court should grant the petition and set the case for argument.

DATED: March 8, 2023

Respectfully submitted,

STACIE B. LIEBERMAN*
ASHLEY R. STEELE
NATASHA BAKER-BRADLEY
CAPITAL AREA PRIVATE DEFENDER SERVICE
910 Lavaca Street
Austin, TX 78701
(512) 774-4567
stacie@capds.org

JONATHAN D. LANDERS
917 Franklin Street
Suite 300
Houston, TX 77002
(713) 301-3153
jlanders.law@gmail.com

Counsel for Amicus Curiae
**Counsel of Record*