EVOLVING STANDARDS OF DECENCY: SUPPORT FOR THE DEATH PENALTY IS WANING AND HABEAS, FEDERAL COURT REVIEW OF NEW EVIDENCE PROCEDURALLY BARRED AS AN ABUSE OF THE WRIT BY THE COURT OF CRIMINAL APPEALS

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PRESIDENT'S MESSAGE

As I leave office another Supreme Court Justice has expressed concern that the death penalty is not being fairly administered in this country. Justice Stevens told a group of lawyers at dinner last month that the death penalty was "an unfortunate part of our judicial system" and remarked that he thought "this country would be much better off if we did not have capital punishment."[2]

> "Stevens said he 'would feel much, much better if more states would really consider whether they think the benefits outweigh the very serious potential injustice, because in these cases the emotions are very, very high on both sides and to have stakes as high as you do in these cases, there is potential for error.' " [3]

In the October 2002 term of the court, four justices opined that executing juveniles was the equivalent of executing the mentally retarded and is a practice that is "a relic of the past [that] is inconsistent with evolving standards of decency in a civilized society."[4] The Supreme court had just held that execution of the mentally retarded was cruel and unusual punishment based upon evolving standards of decency.[5] The court will decide this term whether the national consensus is that juvenile executions are cruel and unusual punishment in *Roper v. Simmons*.[6]

A recent gallup poll shows that the public is almost evenly divided on the death penalty while in the nation's capital punishment capitol, Houston, 56 percent of persons prefer life without parole over death as a punishment. Could it be that many of the 94 percent of Texans that believe an innocent person has been executed are willing to continue to risk doing so? People of reason are not.

In *Banks v. Dretke*,[7] the Supreme Court decided that it did not matter that Banks could have found evidence which the state withheld from him. The state has a continuing duty to correct false information that has been presented to courts. It has a continuing duty to provide exculpatory or impeaching evidence. And it has the duty to do so considering all of such information in cumulation, not on a piece meal basis. The high court heard the case because of the hard work over nineteen and a half years by my patron saints, Scrappy Holmes, lead counsel, Gerry Goldstein, an expert witness at the state habeas hearing and George Kendall, co-counsel on the federal leg of the litigation. These lawyers started doing death penalty work when you could get reversals on a fairly regular basis. They stuck with it when the work grew grisly, when reversals grew rare in Texas. Tough work for even tougher lawyers.

It was shameful that the state took the ridiculous position in *Banks* that it could lie to the courts about evidence and claims. I doubt the attorney general was aware its staff took the position that its lawyers could lie or stand mute while the courts and defendants stood ignorant. However, the lawyer arguing the case for the State took a beating from the justices at oral argument:

> "Question: But, in the -in the- face of the state's representation. In other words, if-if they asked for it, I assume the sate would have said, well, we've told them that there isn't anything to this. And-and- and you would - you're saying that they should have pursued it in the face of that for the purpose, among other things, of proving that state's counsel was lying to them?
>
> Ms. Bunn: Your Honor, they- there was an obligation from them to pursue the claim further, yes.
>
> Question: Why wasn't there an obligation on the part of the prosecutor, having deceived the jury and the court, to come clean? Why is the burden on the defendant, who was subjected to false testimony? Why is- and the prosecutor knows it- why isn't it the prosecutor's burden to come clean at any stage, rather then let this falsehood remain in this record?
>
> I just don't understand why it becomes the defendant's burden when the prosecutor is best situated to have the information, was this true or not, did we pay this informant or not. Why isn't that a continuing obligation on any lawyer who makes a representation that's false to a court?
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> Ms. Bunn: Your Honor, the first- first it is not- that's not the question. It is the habeas petitioner's burden to allege and prove -provide evidentiary support for his claim.
>
> Question: Well, but it is the question if- if Justice Ginsburg is right, that prosecutors have a continuing obligation.
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> Ms. Bunn: Well, that obligation is essentially triggered by materiality, so you have that working as well. But that does not -the- the state's continuing obligation does not basically preclude a finding of -of -of no cause in a case like this.
>
> Question: Well, if I were a defense counsel, I could think of a - of a- no more damaging material of cross-examination in this case than to show Farr was paid money to come up with the story.
>
> Ms. Bunn: Well, Your Honor, again, that- that was not the -those are not the facts of this case. There's no evidence and- and Farr has not said in post-conviction that he was paid for testimony.
>
> Question: Yeah, that's true, but I-I mean, what-
> Question: But I think it's even-
>
> Question: -what bothers me about your position is, if we were to say that a defense counsel behaves unreasonably when he relies upon an explicit statement of the prosecutor's, such as I deny the allegation, that's to say that the justice system lacks integrity, and indeed it might contribute to that lack of integrity to impose this kind of obligation and thereby excuse a prosecutor under circumstances like this.
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> Ms. Bunn: But to find cause in a case like this would essentially be to hold that a Brady claim can never be defaulted because-
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> Question: Of course it can. All that it requires is that a prosecutor who says, my files are open, who says that we do not, in fact, deny that we paid money for related purpose to the witness, all it requires is that he be telling the truth"[8]

The court also held that evidence that only went to one's death worthiness was material. So often courts considering writs of habeas corpus discount evidence that does not have a bearing on guilt or innocence. The Supreme Court in *Banks* emphasized the significance of evidence used to obtain a sentence of death. One of the witnesses in *Banks* testified that Banks was retrieving his gun to use in a future robbery when he was arrested. In fact, the police had employed the witness to create the future robbery story as a ruse to obtain a gun from Banks and arrest him. The Supreme Court reversed *Banks* because this evidence was material to the jury's determination of death as an appropriate sentence.

> " ... Had Farr not instigated, upon Deputy Sheriff Huff's request, the Dallas excursion to fetch Banks's gun, the prosecution would have had slim, if any, evidence that Banks planned to 'continue' committing violent acts. ... Farr's admission of his instigating role, moreover, would have dampened the prosecution's zeal in urging the jury to bear in mind Banks's 'planning and acquisition of a gun to commit robbery,' or Banks's 'planned violence.'...
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> ...
>
> Because Banks had no criminal record, Farr's testimony about Banks's propensity to commit violent acts was crucial to the prosecution. Without that testimony, the State could not have underscored, as it did three times in the penalty phase, that Banks would use the gun fetched in Dallas to 'take care' of trouble arising during the robberies. ....

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Farr's trial testimony, critical at the penalty phase, was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. ."[9]

Under circumstances such as those presented in the *Banks* case, a federal habeas review is not conducted under ADEPA's deferential scheme. A *de novo*[10] review is appropriate. Prior to *Banks v. Dretke*, 124 S.Ct. 1256 (2004), the Fifth Circuit assigned the failure for the discovery of suppressed evidence on petitioners, rendering the evidence procedurally barred. *Banks v. Dretke*.[11] The Supreme Court held that the fault for undisclosed *Brady*[12] evidence rests with the prosecution even though Banks did not request it.[13] The case is even stronger for petitioners who specifically sought the information in State court or who also sought it by separate means.

Where the state suppressed exculpatory evidence and it is not until a federal habeas hearing that the new evidence emerges often federal courts will send the matter back to state court. This is because the new evidence was *not* seen by a state court. But this practice created a catch-22 situation where the petitioner is then ushered to the nearest exit door for abusing the writ.

To determine whether a habeas petitioner has defaulted a claim by not presenting it in State post-conviction proceedings, a federal court must examine the entire state record to see if the state interfered with discovery or presentation of the relevant facts. *Banks*. In short, when the state persists in hiding exculpatory evidence, a petitioner has established "cause" for failing to discover it.[14] While the appropriate standard for reviewing claims from a state writ is usually deferential,[15] it is not appropriate when the claims were not afforded a full and fair hearing in State court.

Analysis Under AEDPA

Section 2254(d)(2)'s provision for habeas corpus relief when the state court's "determination of facts" is an "unreasonable determination of a factual issue" must be read in relation to the same subject contained in 2254(e)(1). Section 2254(e)(1) applies a presumption of correctness to the "determination[s] of a factual issue made by a State court." However, it also tells courts to "presume[] to be correct" only those determinations that survive section 2254(d)(2)'s culling out of "*unreasonable* determination[s]." Section 2254(d)(1) and 2254(e)(1) require determination of whether the record reveals an "adjudicat[ion of a factual issue] on the merits in state court proceedings" that "resulted in a decision" of historical fact[16] that can be subjected to federal court review. But in circumstances like *Banks*, the state court did not make a determination of a historical fact based upon "all of the evidence" and no court has held an evidentiary hearing to allow a petitioner to develop his claims. Claims in Banks' position do not get to this point because no qualifying State court fact finding or proceeding occurred.

Moreover, a federal court reaches these issues only after considering all the relevant evidence, including evidence that may have been adduced at a "federal hearing." Under the circumstances the issues in the federal writ should be afforded *de novo* review on the merits through a federal evidentiary hearing. This is because a claim that was not adjudicated on the merits is not subjected to AEDPA review, but is submitted to the pre-AEDPA *de novo* review of legal and mixed legal factual rulings. *See Miller v. Johnson*, 200 F.3d 274, 281 n. 4 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000). *See also Weeks v. Angelone*, 176 F.3d 249, 263 (4th Cir. 1999)[where Supreme Court of Virginia dismissed the claim without addressing the merits, the standards for review set forth in 28 U.S.C. §2254(d) post AEDPA do not apply].

In sum, courts must reach the merits of the federal writ under the pre-AEDPA *de novo* standard for mixed and legal questions without applying a presumption of correctness to the State court's factual determination. The courts do not look through to the State court's decision to dismiss the "second" state writ as the last "clear state court decision" because the last State court decision was one not based upon all the evidence.

When AEDPA Does Not Apply

In *Graham v. Johnson*, 168 F.3d 762, 775 (5th Cir. 1999), the Fifth Circuit applied AEDPA to Graham's "successive" or "second" writ.[17] Writs in the procedural position of Banks' writ or ones filed before the effective date of AEDPA that have been sent back to state court to exhaust the new evidence are not second or successive within the meaning of Section 2244(b)."

> "Moreover, it is clear in this Circuit that a subsequent federal habeas corpus petition filed after a previous petition has been dismissed without prejudice for want of exhaustion is <u>not</u> a 'second' or 'successive' petition within the meaning of Section 2244(b)." *Sosa v. Dretke*, Cause No. SA-00-CA-312-XR, slip op., p. 33, n. 63 (W.D. Tex. May 20, 2004).

Therefore, *Graham v. Johnson*'s[18] application of AEDPA review to a successor or second writ does not decide the issue whether AEDPA should be applied to a writ which has been filed before the effective date of AEDPA, dismissed without prejudice for exhaustion of evidence previously undiscovered through no fault of petitioner, and refiled after the effective date of AEDPA with the same claims.

Before Martinez-Villareal[19] filed his second petition, he asked the Circuit Court of Appeals for permission to do so. The Ninth Circuit held that even though AEDPA required this procedure, that he did not require permission. The Supreme Court agreed, equating a writ dismissed as premature with one that was dismissed without prejudice for exhaustion.

> "<u>There was only one application for habeas relief</u>, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was en-

titled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief. The Court of Appeals was therefore correct in holding that respondent was not required to get authorization to file a 'second or successive' application before his *Ford* claim could be heard. ... But none of our cases expounding this doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition. ... To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-645, 118 S.Ct. 1618, 1621-1622 (1998)[emphasis added]."

Therefore, AEDPA review does not apply. Otherwise, exhausted claims submitted to a federal court prior to AEDPA, without anything changing, would be subject to AEDPA review because the State withheld evidence and the state court refused to hear it regarding unrelated claims. And all of this would occur through no fault of the petitioner.

In *Banks*, the petitioner confessed.[20] The evidence found to be material went to whether or not Banks was a future danger of committing acts of violence, not whether he shot Richard Whitehead.[21] And, Cook (the witness in *Banks*), was coached, a fact not revealed to the jury even though the state was aware of this fact.[22]

The qualitative difference between death and imprisonment calls for a qualitative difference in the determinative process afforded a capital petition. In death cases, the Supreme Court has demanded heightened reliability, especially concerning the issue of whether death is the appropriate punishment. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

When a petitioner has unearthed material evidence in support of his claims, substantially strengthening them to the point that a court deems them to be new claims that need to be exhausted; and when neither the state court nor the federal court have afforded him an evidentiary hearing on these new claims he is entitled to a federal court evidentiary hearing since he had shown both cause for his failure to develop facts in state court, and actual prejudice resulting from that failure.

"In the federal habeas forum, Banks must show that he was not thereby barred from producing evidence to substantiate his Farr *Brady* claim. **Banks would be entitled to a federal-court evidentiary hearing if he could show both cause for his failure to develop facts in state court, and actual prejudice resulting from that failure.** ... A *Brady* prosecutorial misconduct claim has three essential elements. ... Beyond debate, the first such element — that the evidence at issue be favorable to the accused as exculpatory or impeaching — is satisfied here. ... Cause and prejudice in this case parallel the second and third of the three *Brady* components. Corresponding to the second *Brady* element — that the State suppressed the evidence at issue — a petitioner shows cause when the reason for the failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence. Coincident with the third *Brady* component– that prejudice ensued – prejudice within the compass of the 'cause and prejudice' requirement exists when suppressed evidence is 'material' for *Brady* purposes. ... Thus, if Banks succeeds in demonstrating cause and prejudice, he will also succeed in establishing the essential elements of his Farr *Brady* claim." *Banks v. Dretke*, 124 S.Ct. 1256, 1260 (2004)[emphasis added]."

This is true because such evidentiary hearings are mandatory under any of the below circumstances.

"[A]n evidentiary hearing is mandatory if three conditions are met: (1) A petitioner alleges facts that, if proved, entitle the party to relief; (2) the petitioner's factual allegations survive summary dismissal because they are not palpably incredible or patently frivolous or false; (3) for reasons beyond the control of the petitioner and the petitioner's attorney (assuming the attorney rendered constitutionally satisfactory assistance), the factual issues were not previously the subject of a full and fair hearing in the state courts or, if a full and fair state court hearing was held, the hearing did not result in fact findings that resolve all the controlling factual issues." [23]

"The presence of conflicting evidence, however, even if substantially weighted in favor of the state, generally denotes the existence of a genuine fact question requiring an evidentiary hearing."[24]

The United States Supreme Court has also defined six circumstances when a state prisoner has a right to an evidentiary hearing. That is, one is mandatory if (1) the merits of the factual dispute were not resolved in the State hearing; (2) the state's factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

Conclusion

28 U.S.C. §2254 is intended to provide a guarantee that un-

popular criminal defendants are afforded their constitutional rights. Federal habeas is not intended to constitute a procedural architecture of "tails I win, heads you lose" where a petitioner is obligated, to present in his initial petition, that which was hidden from him and what the Government, including the federal Government, jealously protects from disclosure in protracted litigation. *Kyles v. Whitley*, 115 S.Ct. 1555 (1995)[materiality test is whether the evidence reasonably undermines one's confidence in the verdict not whether the outcome would have been different], *Banks v. Dretke*, 124 S.Ct. 1256 (2004)[requiring federal evidentiary hearing to examine evidence the State withheld from habeas petitioner], and *Strickler v. Greene*, 119 S.Ct. 1936, 527 U.S. 263, 281-282 (1999)[cause established which evidence that prosecution withheld which is favorable to an accused whether it was inadvertent or in bad faith], and Fifth Circuit precedent in *Miller v. Johnson*, 200 F.3d 274, 281 n. 4 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000)[review is *de novo* for claims not adjudicated on the merits in state court], require that petitioners denied appropriate review of evidence and claims in state court are entitled to a federal court evidentiary hearing and *de novo* review.[25]

(Endnotes)

1 Roy Patrick Norris, a law student of South Texas College of Law, assisted in the preparation of this article. Roy will graduate in December of 2005.

2 Associated Press, Supreme Court Justice Says Country Can do Without Death Penalty, May 12, 2004.

3 Id.

4 Four justices dissenting from the denial of certiorari in In re Stanford, 124 S.Ct. 472 (2002). Because of the procedural posture of the case the Court required five votes to hear the case, while only four votes are needed to grant certiorari. The four dissenting justices said "We should put an end to this shameful practice." Two justices, O`Connor and Ginsberg, who joined the majority had previously held that execution of the mentally retarded constitutes cruel and unusual punishment. Atkins v. Virginia, 122 S.Ct. 2242 (2002).

5 Atkins v. Virginia, 122 S.Ct. 2242 (2002). "Thus, in cases involving a consensus, our own judgment is `brought to bear,` Coker, 433 U.S., at 597, 97 S.Ct. 2861, by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators. Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment."

6 Cause no. 03-0663. The Missouri Supreme Court held that juvenile executions violate the Eighth Amendment's prohibition of cruel and unusual punishment under the "evolving standards of decency" test and vacated Roper`s conviction.

7 124 S.Ct. 1256 (2004).

8 Transcript of Argument in Delma Banks v. Douglas Dretke, No. 02-8286, Washington, D.C., December 8, 2003.

9 Banks v. Dretke, 124 S.Ct. 1256, 1277-1278 (2004).

10 De novo review in the context of a federal habeas corpus practice is not the same as the de novoreview District Courts typically perform in bail and bond cases. In bail and bond cases, the Courts review the record and exhibits in the previous proceeding and make a quasi-de novo determination, based on the record review if the magistrate's determination was appropriate. The Courts are deferential to the magistrate's findings because the magistrate heard and saw live witnesses. The de novo review for a petition for writ of habeas corpus is composed of the Courts adjudication of the merits, which includes hearing witnesses, receiving briefing on the issues, and consideration of the entire record. This is true because no court has granted a hearing with respect to the newly revealed evidence.

11 124 S.Ct. 1256, 1270, 1274 (2004).

12 Brady v. Maryland, 373 U.S. 83 (1963).

13 Banks v. Dretke, 124 S.Ct. 1256, 1270-71, 1274 (2004).

14 Banks v. Dretke, 124 S.Ct. 1256, 157 L.Ed.2d 1166, 1275-1276, n. 16 (2004).

15 28 U.S.C. §§2254(d)(2) and 2254(e)(1):
"(d) 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 –
...
(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.
(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

16 A historical fact is a basic primary fact or a recital of external events and the credibility of their narrators but is not a mixed question of law and fact. *Bryson v. Ward*, 187 F.3d 1193, 1211 (10thCir. 1999)[Briscoe, J., concurring quoting Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963)].

17 "With respect to §2244(b), Graham concedes in his brief on appeal that his November 1988 application is second or successive to his 1988 application, which was fully adjudicated on the merits. [FN7] thus, if AEDPA applies to this latest application, he would be required to obtain an order from this court authorizing the district court to consider it. Graham admits that he cannot meet §2244(b)'s prerequisites for the issuance of such an order. He contends, however, that he need not obtain authorization from this court because AEDPA does not apply to his November 1998 application. This is the crucial issue before us." Graham v. Johnson, 168 F.3d 762, 773-74 (5th Cir. 1999).

18 168 F.3d 762 (5th Cir. 1999).

19 Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618 (1998).

20 Banks v. Dretke, 124 S.Ct. 1256, 157 L.Ed.2d 1166, 1264 (2004).

21 Id. at 157 L.Ed.2d 1166, 1277 (2004).

22 Id. At 157 L.Ed.2d 1166,k 1264-1265 (2004).

23 Hertz, Randy, and Liebman, James S.: Federal Habeas Corpus Practice and Procedure, Fourth Edition, 2001, p. 834.

24 Goodwin v. Johnson, 132 F.3d 162 (5th Cir. 1997).

25 See, e.g., Ford v. Wainwright, 477 U.S. 399 (1986), where State procedure in Florida prohibited review on the merits of a death petitioner's insanity after his incarceration. There, where the State refused to examine this claim, the Supreme Court held, that despite a process in State court, the federal court was obliged to determine the facts upon which such a claim was made independently of the State court's determination. Ford v. Wainwright, 477 U.S. 399 (1986).