

February 24, 2003

Members  
Texas Board of Pardons and Paroles  
Attn: Executive Clemency Section  
8610 Shoal Creek Blvd.  
Austin, Texas 78757

**Re:   *Application of Delma Banks, Jr.*  
      *For Relief from Capital Conviction & Sentence***

Honorable Members of the Texas Board of Pardons and Paroles:

This petition is submitted in support of clemency for Delma Banks, Jr. who is scheduled to be put to death by the State of Texas on March 12, 2003. There is substantial doubt about Mr. Banks' involvement in this crime, and there is a growing consensus in the United States and in Texas that such doubt warrants commutation of a capital sentence. We believe that because of the very substantial doubt that now exists as to the justness of his conviction, Mr. Banks is entitled to a full reprieve. At a minimum, we respectfully request that Mr. Banks' sentence be commuted to life in prison. In addition, we respectfully request a hearing on this petition and the opportunity to present testimony that will show that egregious prosecutorial misconduct occurred at jury selection, trial, and sentencing and that meaningful adversarial testing of the State's evidence was effectively forfeited by trial counsel's failure to mount a proper defense.

## **I.     INTRODUCTION**

Delma Banks, Jr., is a 43-year old African-American man. In 1980, at the age of 21, he was convicted and sentenced to death in Bowie County for the murder of sixteen year-old Richard Whitehead, a white male. From the moment of his arrest, Mr. Banks has protested that he did not kill Mr. Whitehead and is innocent of this crime.

Moreover, the evidence surrounding this case shows that there is very substantial doubt regarding Mr. Banks' guilt, much of which never came to light during his trial and was intentionally and illegally suppressed by the state.

Indeed, it is clear that the trial process was prevented from yielding a fair and just result for a number of reasons. It is now plain that the State's theory of how Mr. Banks allegedly killed Mr. Whitehead is, at best, highly improbable, and that the testimony of its two key witnesses, both of whom have now credibly recanted, is entirely unreliable. It is also clear that the State's efforts to convict and condemn Mr. Banks were greatly aided by (1) the suppression of evidence that would have undermined the credibility of these same two key witnesses and (2) incompetent legal representation provided by defense counsel who made next to no effort to challenge the State's weak case or demonstrate that a death sentence was entirely inappropriate and excessive. Moreover, it is also clear that the prosecution significantly increased its chance to wrongly convict Mr. Banks by manipulating the jury so that only white citizens would sit in judgment. The jury that convicted and death-sentenced Mr. Banks was all white.

This case also shows that the review process has failed to remedy these errors. The state courts never considered the suppression of evidence that reveals that the prosecution's two key witnesses were not credible and misled the jury. Indeed, when Mr. Banks raised these issues, the state courts held no hearing and did not even require the state to respond to one of them. The state courts also did not hold a hearing on the incompetent counsel claim, and utilized the wrong legal standard in denying relief on the meritorious jury race claim. While the federal district court granted sentencing relief on two claims, the court of appeals denied all relief. It blamed Mr. Banks for not uncovering the state's suppression of evidence earlier and concluded that trial counsel's utter lack of preparation for the penalty phase didn't matter because the jury surely would have sentenced Mr. Banks to death anyway, even though this was his first alleged offense. The court further opined that Mr. Banks was not harmed in any way by the removal of all blacks from his jury.

At bottom, the State's case against Mr. Banks relied upon evidence that has now been shown to be completely unreliable. Moreover, amid growing national and local consensus that the death penalty should not be carried out where there is significant doubt as to the guilt of the defendant, Mr. Banks' death sentence must not stand.

## **II. WHERE SUBSTANTIAL DOUBT EXISTS REGARDING THE DEFENDANT'S INNOCENCE THE DEATH SENTENCE MUST NOT STAND**

Both nationally and locally there is growing consensus that the execution of prisoners who can show significant doubt about their guilt undermines the integrity and credibility of the capital punishment system specifically and the criminal justice system as a whole. This concern has arisen as more and more innocent prisoners have been identified and removed from rows across the country.<sup>1</sup> The Board must vote for clemency if Mr. Banks establishes that significant doubt clouds his conviction.

### **1. National Support for Clemency in the Face of Doubt**

There is increasing bipartisan support for the notion that a death sentence must not stand where there is lingering doubt regarding the validity of the conviction or the sentence.

This growing concern has caused even strong supporters of the death penalty to declare that clemency must be available where doubt about guilt exists.

For example, a number of Governors who have had the responsibility of deciding clemency applications have determined that clemency is required where doubt remains. In a speech last year at the National Press Club, Former Oklahoma Governor Frank Keating, a strong death penalty supporter, former prosecutor, and Republican, rejected his state's former standard, and asserted that unless he was convinced of guilt by a "moral certainty," he would commute the capital sentence. Frank Keating, Governor of Oklahoma, Live Web cast, June 22, 2001, at <http://www.npr.org/programs/npc/2001/010622.fkeating.html> (visited Feb. 21, 2003). He did so in the case of Phillip Dewitt Smith. Former Illinois Governor George Ryan announced he would follow virtually the same standard after he almost authorized the execution of an inmate who was later exonerated. He declared, "[U]ntil I can be sure to a moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate." Ryan Radio Report, April 20, 2002, at <http://www.state.il.us/gov/press/report/transcripts/04-20-02.html> (visited Feb. 24, 2003). Similarly, former Maryland Governor Paris Glendening commuted the sentence of a death row inmate, stating: "It is not appropriate to proceed with an execution when there is any level of uncertainty, as the death penalty is final and irreversible." Capital

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<sup>1</sup> It is no secret that innocent citizens are sent to death row in this country. See Death Penalty Information Center, Innocence and the Death Penalty, <http://www.death-penalty.info.org-innoc.html> (visited February 23, 2003) ("Since 1973, 107 people have been released from death row with evidence of their innocence."). Seven exonerations have occurred in Texas. See id.

Punishment on Trial . . ., Maryland Life, June 12, 2000, at <http://www.mpt.org/newsworks/archives/mdlife/000612.shtml> (visited Feb. 23, 2003). And former Louisiana Governor Buddy Roemer, in commuting the death sentence of Ronald Monroe in 1989, likewise stated that “[i]n an execution in this country the test ought not be reasonable doubt; the test ought to be is there any doubt?” Louisiana Governor Buddy Roemer, quoted in, J. Wardlaw & J. Hodge, Execution Halted by Roemer, New Orleans Times-Picayune, Aug. 17, 1989. He commuted the Mr. Monroe’s sentence because of doubt about guilt.<sup>2</sup>

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<sup>2</sup> Clemency authorities have increasingly announced they would follow tougher standards because of increasing concern that the legal process does not adequately identify and remedy such cases. Former Missouri Supreme Court Justice Charles B. Blackmar recently concluded the death penalty is “fatally flawed.” Charles B. Blackmar, letter to the editor, St. Petersburg Times, February 15, 2003, (“The thought of executing an innocent person is repulsive. . . . [F]ew [indigent persons] have the benefit of diligent services. . . . The process is so fatally flawed that the only solution lies in abolishing capital punishment. Most nations with which we share a common heritage have already taken this step.”). Maryland Attorney General J. Joseph Curran, Jr. called for the abolition of his state’s death penalty in an open letter to state leaders and Maryland Governor Robert Ehrlich, stating his belief that Maryland’s death penalty system exacts “the intolerable cost of killing, every so often, the wrong person.” Letter from Attorney General Curran to Governor Ehrlich of 1/29/03. In addition, Former U.S. Attorney in New York Mary Jo White, who authorized more than twenty federal capital cases, stated recently that the death penalty “doesn’t work” from a law enforcement perspective and is appropriate only under a narrow set of circumstances “where you are certain that the person is guilty and the crime is such that it kind of rocks the foundations of civilized society.” Adam Liptak, The Death Penalty, N.Y. Times, Feb. 15, 2003. Indeed, as recently summarized by Senior Circuit Judge Jon O. Newman of the Second Circuit: “Experience has shown that in some cases juries have been persuaded beyond a reasonable doubt to convict and vote the death penalty even though the defendant is innocent.” Jon O. Newman, Make Judges Certify Guilt In Capital Cases, Newsday, July 5, 2000, at A25.

Additional respected public officials and prominent citizens have criticized the death penalty because of its failure to guarantee that death is imposed only on persons who are guilty include former Minnesota Reform Party Governor Jesse Ventura, see David Schaffer, Though Most in State Back Death Penalty, Support Is Decreasing, Minneapolis-St. Paul Star Trib., Mar. 20, 2000 (“Gov. Jesse Ventura, a one-time death penalty advocate, also has changed his mind. In February he said on ‘Meet the Press’ that he no longer supports it because the risk of putting an innocent person to death bothers his conscience.”); Connecticut Republican Governor John Rowland, see Gerald F. Seib, Bush’s Race Issue: What’s the Role of the Death Penalty, Wall St. J. Feb. 28 2001 (quoting Governor Rowland stating concerns about unfair use of the death penalty against racial minorities); former New Mexico Republican Governor Gary Johnson, see Facing Death, Santa Fe New Mexican, Oct. 28, 2001 (“Gov. Gary Johnson—for years a staunch

## 2. Significant Support in Texas for Clemency Where Doubt Is Established

These concerns are in evidence in Texas. The author of Texas's death penalty statute and death penalty supporter, Senior State District Judge C.C. "Kit" Cooke, acknowledged that there are "a lot of flaws" and questions the efficacy of Texas's capital punishment system, noting "We always think we've got the right person, but the system is not infallible . . . ." See Judge Questions Death Penalty, Fort Worth Star-Telegram, July 24, 2001. In addition, Representative Peter Gallego (West Texas Democrat) has argued that a claim of innocence should supercede procedural hurdles in the system. See Steve Mills, Texas Defies Drift Against Executions, Chicago Trib. (Feb. 23, 2003) (quoting Gallego as saying "[I]f you have a claim of innocence, I don't care about deadlines . . . . I think every Texan, whether they're Republican or Democrat is interested in justice."). Other noted local officials have taken action in recent years out of concern regarding the fairness of Texas's capital punishment system. See, e.g., Jim Yardley, Of All Places, Texas Wavering on Death Penalty, N.Y. Times, Aug. 19, 2001 ("Last month, the name of [Texas's] death row, the Terrell Unit, was changed after Charles Terrell, a former chairman of the Texas Board of Criminal Justice, asked that his name be removed. Mr. Terrell made the request in part because he questions the fairness of the capital punishment system in his home state.").

Most recently, the League of Women voters called for a temporary moratorium on executions in the state in order to permit a comprehensive review of the system. Melissa Drosjack, Women Call for Moratorium on Death Penalty, Houston Chron., Feb. 20, 2003. Last year, the Texas Baptist Christian Life Commission joined the call for a moratorium on the death penalty, declaring the state's capital punishment system "broken" and "unfair." Ken Kamp, quoting CLC's report in After Two-Year Study, Texas CLC Calls for Death Penalty Moratorium, Baptist Standard, Jan. 20, 2003. The

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advocate of the death penalty—now says that eliminating capital punishment might be good public policy."); Oliver North, see Robert Reno, Death Penalty Faith Falters, Times Union Albany, June 13, 2000 (quoting Oliver North as stating "I think capital punishment's day is done in this country. I don't think it's fairly applied."); conservative columnist George Will, see George Will, Innocent on Death Row, Wash. Post, Apr. 6, 2000 at A23, ("[M]any innocent people are in prison, and some innocent people have been executed."); Paul Craig Roberts, Justice System That is Short on Justice, Wash. Times, June 19, 2001 ("An ever-growing number of books, innocence projects and overturned convictions speak to the unreliability of conviction."); Rob Dreher, Feds Shake Faith in Death Penalty, N.Y. Post, May 15, 2001 ("At some point in this death penalty debate, the sanctity of innocent life demands that men and women of conservative conscience have to say: Enough."); and John J. DiIulio, Abolish the Death Penalty, Officially, Wall St. J., Dec. 15, 1997, at A23 ("Since we can't apply it fairly, we ought to consider abolishing it.").

Commission issued a report examining the state's capital punishment system which raised concerns about racial and socio-economic disparities in how Texas's death penalty is applied. See id. The Houston Chronicle editorialized that it also supports a review of Texas's capital punishment system "to ensure that the death penalty is applied without prejudice, that capital defendants have appropriate counsel and that no innocent person is ever executed." Editorial, Texans Want Justice in Administration of Death Penalty, Houston Chron., Feb. 12, 2001.

Thus, this Board has the power and the ultimate responsibility to ensure that the clemency process halts the execution of a prisoner who shows significant doubt about guilt of capital murder.

### **III. THERE IS SUBSTANTIAL DOUBT AS TO MR. BANKS' GUILT AS MUCH OF THE STATE'S EVIDENCE THAT LED TO HIS CONVICTION HAS BEEN CONCLUSIVELY SHOWN TO BE UNRELIABLE**

Much of the incriminating evidence against Mr. Banks came from two witnesses, Charles Cook and Robert Farr. Both have since credibly recanted their incriminating testimony. (We attached Mr. Farr's recanting declaration and Mr. Cook's recanting testimony as App. A and App. B). Moreover, the State's theory of guilt required that the crime take place by 4:00 a.m. on Saturday, April 12, and that Mr. Banks drive the victim's car to Dallas by 8:30 a.m. Unrebutted forensic evidence now shows that the victim was not shot until well after Mr. Banks was in Dallas and that the victim's car could not have made the 180 mile trip from Texarkana to Dallas without significant repair that was unavailable in the wee hours of the morning. Thus, there are substantial reasons, supported by unrebutted and reliable evidence, to doubt Mr. Banks' guilt.

#### **1. The Crime**

On Friday evening, April 11, 1980, Richard Whitehead, then 16, and a 14 year-old female friend, Patricia Hicks, agreed to provide Mr. Banks a ride home from a bowling alley in Texarkana. Mr. Whitehead and Mr. Banks were acquainted as they had briefly worked together at the same fast food restaurant. Instead of taking Mr. Banks directly home, the trio decided to purchase some beer and went to a park to drink. At 11:00 p.m., Ms. Hicks was driven home, a brief stop was made to the home of another female acquaintance of Mr. Whitehead, Patricia Bungardt, and then Mr. Whitehead drove Mr. Banks toward his home and let him out near Interstate I-20 so that Mr. Banks could hitch a ride to Dallas, 180 miles to the west.

Mr. Whitehead did not return home that evening, or on Saturday or Sunday. His body was found the following Monday, April 14, at roughly 10:00 a.m., in the park where he, Mr. Banks, and Ms. Hicks had earlier gone to drink. Even though Mr. Whitehead's Mustang car was missing, the police ruled out robbery after finding money in his pockets. He had been shot three times by a .25 caliber weapon.

## **2. Mr. Banks Becomes A Suspect**

The police investigation quickly determined that Mr. Whitehead had been with Mr. Banks on the Friday evening, the last time that he had been seen alive. The police also spoke to Mike Fisher, who had spent the night in a house near the park. He said that he had been awoken at roughly 4:00 a.m. on Saturday morning by two loud noises. These thin reeds of information led investigators to theorize that Mr. Banks was the likely assailant, that he and Mr. Whitehead had returned to the park during the early morning hours on Saturday, April 12, and that Mr. Banks shot Mr. Whitehead and took his car.

Subsequent investigation turned up no additional evidence to support this theory. Mr. Banks had no criminal record or reputation for violence. Mr. Whitehead's car was never located. Interviews with Ms. Hicks and Ms. Bungardt yielded no evidence of any hostility or trouble between the two. Moreover, both women reported that Mr. Whitehead's car had a serious electrical problem and likely could not travel far because it repeatedly had to be shut off and then jump-started.

## **3. Police Resort to Informant Robert Farr, A Known Drug Addict**

To jump start their investigation, the police retained the services of a long-time informant, Robert Farr. Farr was a known drug addict who had a reputation within the neighboring Arkansas law enforcement community for being unreliable. The chief investigator on this case, Bowie County Deputy Sheriff Willie Huff, approached Farr and told him he would pay Farr good money if he could obtain a pistol that belonged to Mr. Banks. He also told Farr that he would arrest Farr for drug violations if he did not assist. Under these circumstances, Farr "agreed" to help. Farr, twice Banks' age, knew Mr. Banks slightly. In order to obtain this information for Huff, Farr concocted a story about needing a pistol so that he (Farr) could commit robberies and obtain drugs to feed his habit. He approached Banks on several occasions and Banks wanted no part in aiding Farr. Finally, persistence paid off and the older con man persuaded the younger Mr. Banks to provide Farr a gun. Banks told Farr they would have to go to Dallas to get one.

#### **4. Police Identify Key Witness Charles Cook & Obtain Other Evidence**

On April 23, Farr called Deputy Sheriff Huff, reported his success, and told Huff he and Mr. Banks would be traveling to Dallas to get a gun. Late that evening, Mr. Banks, Farr and Marcus Jefferson drove to Dallas. Mr. Banks had to drive because Farr shot up drugs as they were leaving Texarkana. Huff and other law enforcement officials followed, and eventually, the car stopped in front of a house in south Dallas. Mr. Banks exited the car, spent several minutes at the front door, and then returned to the car. He presented a .22 caliber pistol to Farr. Shortly thereafter, Huff and Dallas authorities stopped the car and seized the pistol. Mr. Banks was taken to police headquarters separately from Farr and Jefferson.

Deputy Huff recognized immediately that the gun seized in the car could *not* be the murder weapon. He and three other officers, all white, returned to the south Dallas home. Although it was pre-dawn, they entered the home and confronted occupant Charles Cook. Cook was a twice convicted felon who was on probation. He was also a frequent drug user. Needless to say, this confrontation scared Cook to death. The police got right to the point, told Cook he was implicated in a capital murder in Texarkana, and that he had better provide information linking Mr. Banks to the murder or he would face charges. After speaking with Cook for nearly an hour, police drove Cook to police headquarters in Dallas where Cook gave police a written statement.

In this statement, Cook said that he met Mr. Banks for the first time on Saturday, April 12 at roughly 8:30 in the morning. He was standing outside his house with his wife and Mr. Banks drove up in a Mustang that resembled Mr. Whitehead's and asked for assistance. Cook and Mr. Banks thereafter spent the weekend together. Later that day, Cook said that Banks told him that he had killed a white boy in Texarkana. Cook also saw Mr. Banks had a gun. On the following Monday, Cook and his wife Rita loaned Mr. Banks bus fare so he could return to Texarkana. Mr. Banks left the car and gun with Cook. Cook sold the gun to a neighbor for \$25 dollars, sold other objects from the car as well – a radio and jumper cables – but abandoned the car in west Dallas.

The police then brought Cook back to his home and directed him to reacquire the weapon Mr. Banks had left with him. He went next door, and returned with a .25 caliber pistol. Subsequent review suggested that this weapon could have fired the bullets retrieved from Mr. Whitehead's body. However, the evidence was inconclusive. Moreover, Mr. Banks's fingerprints were not found on the gun nor was there any blood or DNA material linked to Mr. Whitehead detected.

## **5. Mr. Banks is Charged with Capital Murder**

With this evidence, the District Attorney in Bowie County indicted Mr. Banks for the murder of Richard Whitehead. The State's case for guilt would be based upon (1) the identification by Ms. Hicks and Ms. Bungardt of Mr. Banks as the person with Mr. Whitehead on Friday evening, April 11, (2) the time of death at 4:00 a.m. on Saturday, April 12, based upon Mike Fisher's account of being awakened by two loud noises coming from the park, (3) key witness Charles Cook's account that Mr. Banks appeared at his Dallas home at 8:30 a.m. on Saturday, April 12, driving a car that strongly resembled Mr. Whitehead's, "confessed" that he had killed "a white boy", and left with Cook the car and murder weapon, and (4) the gun recovered from Cook's neighbor was the one that fired the fatal shots. Its case for the death penalty would rest primarily upon informant Farr's testimony (which he later recanted) that Mr. Banks wanted to secure a gun in Dallas so that he (Banks) could participate in other crimes of violence and kill uncooperative victims, if necessary, and further, that one week prior to the Whitehead killing, he had threatened to kill another person.

## **6. The State's Case for Conviction and for the Death Penalty Is Weak**

As the prosecutors prepared their case for trial, it was apparent that they would have serious problems at each phase of trial. They had no custodial confession to present, nor any eyewitness who would say that Banks fired the fatal shots that killed Richard Whitehead, nor any physical evidence that directly linked Banks to the shooting. Nor did they have a straightforward motive; indeed, their evidence would show that during the hours leading up to the shooting, Mr. Banks and Mr. Whitehead behaved as young adults typically do all over Texas and throughout the country. They purchased some beer, and rode around their home town in Whitehead's unreliable car. By all accounts, there were no disputes. Everyone got along just fine.

In addition, when Whitehead's body was found three days later, the fact that his watch had not been removed and money remained in his pocket undercut the theory that he was killed during a robbery. Nor could prosecutors account for Whitehead's car—the only item it was prepared to ask the jury to find Mr. Banks stole. Indeed, it might strike some jurors as odd that Cook, who they would learn was then regularly using drugs and who made less than \$200 a week, would simply abandon something of such value. Additionally, while Charles Cook had told Deputy Huff that he had sold to neighbors several items he removed from the car he reported Banks had that weekend, police made no effort to recover such evidence and the prosecutors had none for trial.

Still other problems existed. Central to the state's case was the theory that Mr. Banks shot Mr. Whitehead at roughly 4:00 a.m. on Saturday, April 12, and then drove Whitehead's car to Dallas in time to arrive at Charles Cook's house by 8:30 a.m. They possessed more evidence that undercut than supported this theory. Time of death was based entirely upon Mike Fisher's sleepy account of being awakened by "loud noises." However, the events at that time failed to raise any strong suspicions in Fisher's mind that something was amiss. After hearing the noises, Fisher made no investigation, and did not even call police until after Mr. Whitehead's body was found. Moreover, the medical examiner was not prepared to testify that a 4:00 a.m. death was consistent with autopsy findings. Indeed, the findings he memorialized supported a time of death twelve to twenty-four hours later, when the State's evidence placed Mr. Banks in Dallas.

In addition, Ms. Bungardt and Ms. Hicks would describe Whitehead's car as untrustworthy and unable to either start without a jump or operate for long without the lights dimming. These statements could cause jurors to wonder how this same car could speed to Dallas (a three hour, 180 mile trip) and then run flawlessly for Cook until he abandoned it without a trace.

With regard to its case for the death penalty, the prosecutors' evidence was equally wanting. Banks had no prior conviction for any crime. Nor did the prosecutors possess any psychiatric evidence that Banks was a sociopath or otherwise dangerous. It had but two recent incidents, one involving a brief fight between Banks and his common-law brother-in-law, Vetrano Jefferson, and the more damaging evidence from paid informant Robert Farr, who would testify of boasts Banks made about wanting to commit armed robberies. In short, the prosecution was in no position to show that Banks was a hardened criminal or posed a certain danger in the future or deserved execution.

Yet the prosecutors' most daunting challenge was to overcome serious credibility problems with its two key witnesses. While they planned to call a dozen or so witnesses to the stand, all were bit players compared to Charles Cook and Robert Farr. Charles Cook's testimony—that he met Mr. Banks in Dallas on the morning after the state theorized that Mr. Whitehead was shot, that Mr. Banks was driving Whitehead's car, and that over the course of the following two days, Banks told Cook that he killed Whitehead and loaned Cook the alleged murder weapon and Whitehead's car—was the centerpiece of the State's case. As District Attorney Raffaelli would later candidly tell jurors in his opening statement, "I think the testimony of Charles Cook is critical . . . ."

Farr's testimony—that Mr. Banks initiated a subsequent trip to Dallas one week later so that Banks could retrieve his pistol from Cook and commit armed robberies and, if necessary, kill during those crimes—not only linked Banks with the murder weapon but was the linchpin of the State's case for the death penalty as, the prosecution would argue, it demonstrated that Mr. Banks would likely grievously harm or kill again.

The prosecutors had good reason to wonder whether jurors would believe Cook. He was a drug user, a twice convicted felon, and made little money from his city job. Jurors might find it hard to believe that he would simply abandon a car while selling far less valuable items from it. He was also facing another felony prosecution in Dallas for arson. Habitual offender papers were filed in that case one month prior to Banks's trial which meant, upon conviction, that he faced a very long prison sentence. Surely some members of the jury might seriously wonder whether Cook was testifying honestly, or whether he was shading the truth to please Bowie County authorities in the hope that they would prevail upon the Dallas authorities to dismiss the arson charge.

Moreover, over the weekend prior to trial, Deputy Huff and representatives of the District Attorneys' office interviewed Cook at length and rehearsed his testimony in anticipation of trial. On many contested points, Cook made statements that were wholly inconsistent with his April statement. Repeatedly, he was coached on how to respond to anticipated cross-examination, and how to deflect other questions. These sessions could not have encouraged prosecutors that their star witness would impress the jury.

Similarly, Farr possessed troubling credibility shortcomings. He too had a drug habit. Indeed, he had used drugs and was in a stupor on the very trip to Dallas that culminated in Mr. Banks's arrest. As with Cook, some jurors well might wonder whether he was telling the truth or was falsely aiding the state to help himself. Moreover, prosecutors knew he was a professional informant, had provided important services in this case, and had been paid for those services. If jurors heard this information, they could have easily become persuaded that Farr's testimony had been bought and paid for and was plainly unworthy of belief.<sup>3</sup>

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<sup>3</sup> The deficiencies in Mr. Banks's case mirror those in the case of, Steven Manning, one of the thirteen exonerated death row inmates from Illinois. There, a commission convened by the Governor to study and review Illinois's capital punishment process noted the following concerning the case of former death row inmate Steven Manning: "The murder conviction . . . was based almost completely upon uncorroborated testimony of an in-custody informer. No physical evidence linked Manning to the murder he was said to have committed, nor was there any solid corroboration of the alleged statements he made admitting to the murder." Report of the Illinois Governor's Comm. on Capital Punishment, April, 2002 at 7-8. The Commission described this case and the other 12 exonerations as cases "characterized by relatively little solid

**7. The Prosecutors Deliberately Suppressed Evidence That Showed Both Cook and Farr Were Not Credible Witnesses To Gain A Conviction And Death Sentence**

These shortcomings presented prosecutors with several fateful choices. Given the importance of Cook and Farr to the State's case at each phase of trial, the law obligated them to disclose to the defense Mr. Farr's informant status including that he was remunerated for his services. Additionally, given Cook's numerous recorded inconsistent statements, the law also required disclosure of both the April and September statements as well as any arrangements with Dallas prosecutors about not dismissing the arson charge and habitual offender papers until after Mr. Banks's trial. But such disclosure raised the clear peril that the jury would find the state's case insufficiently credible upon which to rest a capital murder conviction and death sentence. For reasons known only to them, they chose not to honor the law requiring full disclosure and to withhold all information about Mr. Farr, the September, 1980 Cook statement, and their arrangement that Mr. Cook's arson charge would be dismissed only if he performed "well" while on the stand. They also decided to forcefully and repeatedly assure jurors that these witnesses testified truthfully even after each knowingly lied to the jury.

**8. Counsel Made No Effort to Prevent the Prosecutors from Engaging in Racial Discrimination and Empaneling an All-White Jury**

The prosecutors took other actions to increase their chances of obtaining a capital conviction and sentence. At the time of Mr. Banks' trial, it had long been the custom of the District Attorney's office to strike all African-American citizens from the felony jury service, especially when the defendant was black. After the jury pool in this case was qualified, it contained four black jurors. Mr. Banks asked Cooksey to attempt to see that some of these jurors were selected on the jury. Mr. Cooksey responded that the State would strike each of the jurors. Indeed, during the selection of the all-white jury, trial prosecutors exercised four peremptory strikes to remove the four African American jurors. Cooksey made no objection to any of these strikes.

The record also leaves no doubt that purposeful racial discrimination was the reason why an all-white jury was assembled to try this mixed-race capital case. In post-

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evidence connecting the charged defendants to the crimes. In some cases, the evidence was so minimal that there was some question not only as to why the prosecutor sought the death penalty, but why the prosecution was even pursued against the particular defendant." *Id.* at 7. As stated above, not only has Banks never admitted to the murder and vehemently maintained his innocence throughout, he was convicted on similarly scant evidence.

trial proceedings, Mr. Banks showed that from 1975 through 1980, while prosecutors accepted more than 80% of white jurors who had qualified to serve on a felony jury, they peremptorily removed more than 90% of the qualified black jurors, and utilized race-coded jury strike sheets. Several attorneys who often tried criminal cases during those years testified that it was a foregone conclusion that prosecutor would strike blacks from felony juries, particularly when the defendant was African American. An expert witness concluded that the chances of this stark pattern of exclusion occurring by chance was the same as Tiger Woods hitting three consecutive holes in one. The State made no effort to dispute this showing but argued only that it had race-neutral reasons for removing the four African American jurors it struck from Mr. Banks' jury.

**9. Mr. Banks' Trial Counsel Was Wholly Unprepared to Demonstrate That Mr. Banks Was Not Guilty Nor Deserved the Death Penalty**

Shortly after his arrest, Mr. Banks' parents retained the former District Attorney of Bowie County, Lynn Cooksey, to represent their son. While Cooksey quoted a fee of \$10,000, they were able to pay him only \$1000 toward that fee and could provide only another \$1000 for investigative services. There is much evidence that Cooksey made little effort to prepare for either phase of trial.

Cooksey did not file any pretrial motions until a month prior to the scheduled trial date. He did not move for a hearing date on any motion prior to trial. Indeed, on the first day of jury selection, he commented repeatedly that he had prepared little for the case. Mr. Cooksey told the judge that "I'm not in possession of any information on any of the State's witnesses." In fact, even though it had been provided to him a week earlier, Cooksey had not even seen the State's witness list. At this hearing, he had to request another copy. After jury selection and just prior to the trial's commencement, he again complained that the State had not turned over prior convictions on its witnesses. He said "I don't have it yet and I cannot effectively cross-examine these people without it." Even after the trial began, he announced that he had "never been to the [crime scene]," nor viewed certain crime scene photographs. Moreover, he later reported that "I have not seen the ballistics report."

Even though Cooksey presented virtually no defense and failed to cross-examine some of the prosecution witnesses, the jury did not convict Mr. Banks until after several hours of deliberations. When the guilty verdict was announced at 11:00 p.m., Mr. Banks' mother fainted, and had to be taken to a hospital. Before she left the courtroom, however, Cooksey spoke to her and told her that she needed to get some ministers and witnesses to the courthouse for the penalty phase which would start at 9:00 a.m. the following day.

Mrs. Banks went to the hospital, but begged the staff to let her go home so she could find witnesses who would testify to help save her son's life. She checked herself out at 1:30 a.m., and once home, made calls until after 3:00 a.m. Later than morning, several witnesses she contacted appeared at the courthouse.

The prosecution presented two witnesses to show that Mr. Banks would be a danger in the future. Vetrano Jefferson testified (but later recanted) that Mr. Banks had beaten him with a pistol and threatened to kill him one week before the Whitehead shooting. Farr testified that Banks went to Dallas to reclaim his gun and planned to commit other violent crimes.

Without ever speaking to any of the witnesses Mrs. Banks had hastily assembled, Cooksey called several and asked each a few perfunctory questions. All described Delma to be a good, church-going young man. Each conceded they did not know Mr. Banks outside of that context.

After several of these witnesses testified, Cooksey asked the court for a meeting in chambers. There, in front of the judge and court reporter, he "met" with his client and asked what else Mr. Banks wanted to present. He told Mr. Banks that he did not know any of these witnesses and sought Mr. Banks' advice on who else to call. Thereafter, Mr. Banks and his parents testified briefly. Cooksey did not explain to them what they might say that would be helpful in this proceeding. Mr. Banks told jurors that he was innocent and that Farr lied when he said that Banks wanted to commit other crimes.

The jury found Mr. Banks would likely be a danger in the future and voted to impose the death penalty.

## **10. Trial Counsel Made no Effort to Challenge Guilt or Show Death Excessive**

Unfortunately for Mr. Banks, trial counsel made little effort at trial to show the jury that the state's case for conviction was weak and had huge holes, and that a capital sentence was excessive and not called for. In post-trial hearings, Mr. Banks, with new counsel, presented un rebutted evidence that shows the State's essential time line is unreliable, that Mr. Whitehead was killed when Mr. Banks was in Dallas, and that Mr. Whitehead's ailing car could not have made the early morning trip to Dallas without repairs that were not available in the early morning hours.

Moreover, Mr. Banks presented evidence about his life which show that despite growing up in a family in which his alcoholic father was repeatedly abusive and a humiliating medical skin condition that brought Mr. Banks constant irritation, pain and

cruel comments from peers, he had no prior convictions and was supporting his two young children at the time of his arrest. He was anything but a likely candidate for a capital sentence.

### **11. The State's Case for Guilt Depended Largely Upon Cook's Account**

At trial, the State's case for conviction contained no surprises. Charles Cook was the key witness and told the jury that he had spent the weekend with Mr. Banks and that Banks had confessed to killing Whitehead and had left Whitehead's car and the murder weapon with him. Mike Fisher testified about being awakened early on Saturday morning by loud noises and Ms. Bungardt and Ms. Hicks identified Mr. Banks as the man with Whitehead on Friday evening.

Cooksey barely challenged the State's case. He made no effort to show that the State's theory as to when Mr. Whitehead was shot was unreliable nor that Whitehead's crippled car could not have made the trip to Dallas without repair. His attempt to show that Cook's testimony was not believable because he had been coached and was afraid of spending the remainder of his life in prison went nowhere when Cook denied that he had rehearsed his testimony and denied a deal.

The prosecutors made no effort to correct Cook's lie about not having rehearsed his testimony. Moreover, in argument, they assured the jury that Cook had been completely honest with them. Additionally, they did not disclose to Cooksey or to the jury the pretrial statement Cook made days before trial which would have demonstrated that his testimony was both heavily rehearsed and that he could not keep straight even the basic details of his story.

### **III. EVIDENCE DISCOVERED POST-TRIAL EVISCERATES THE STATE'S CASE AGAINST BANKS AND UNRAVELS ANY BASIS FOR HIS CONVICTION AND SENTENCE**

In subsequent post-trial proceedings, the State's case for conviction and a capital sentence has been vigorously challenged, and much of that case has been shown to be entirely unreliable.

*Recall the State's case for conviction:*

\* Banks and Whitehead were together during evening of April 11 (we do not challenge that assertion)

\* Banks shot Whitehead at 4:00 a.m. on April 12 (we strongly challenge that assertion and show that *all* the available evidence points to a significantly later time of death)

\* Banks stole Whitehead's car and drove three hours to Dallas in time to meet Charles Cook at 8:30 a.m. (we dispute that Banks stole or drove the car to Dallas; we agree he did travel to Dallas during the early morning hours of April 12 but did so by hitchhiking a ride)

\* Banks confessed to Cook that he killed Whitehead (we strongly deny this assertion; Cook made that statement to police only after he was put under enormous pressure to implicate Delma to save himself; he has since forcefully and credibly recanted these assertions)

\* Banks left Whitehead's car with Cook to dispose of (we deny this assertion; Cook has given a number of different accounts about how and when he disposed of the car; his pretrial account of the car running "like a race car" is directly contradicted by the repeated electrical problems other state witnesses observed in Texarkana on April 11)

\* Banks left the gun with Cook to dispose of (we deny this; no one but Cook identified this gun as Banks'; the so-called expert matching of bullet to gun is entirely incomplete and defective; Vetrano Jefferson knew what Banks' gun looked like as he had seen it a week before the Whitehead killing and repeatedly told investigators the .25 they had was *not* Banks' gun)

### *Recall the State's case for the Death Penalty*

\* Banks viciously attacked Vetrano Jefferson with a pistol and threatened to kill him one week before the crime)(Banks did fight with Jefferson but Jefferson, not Banks, provoked the fight, when drunk, he was harassing his pregnant sister and Banks' common-law-wife)

\* Banks returned to Dallas to secure his gun so that he could commit armed robberies, and, if necessary, kill resisting victims (we concede that Banks did go to Dallas to get a gun but only after Farr, at police direction, had pestered him to get one so that Farr, not Banks, could commit crimes)(we further deny the .25 was Mr. Banks' gun)

#### **a. State's Key Witnesses Credibly Recant Most Prejudicial Testimony**

To win both a conviction and capital sentence, the trial prosecutors told jurors that the testimony of Charles Cook and Robert Farr was essential. The jury had to

believe what each witness told them for there to be sufficient evidence to convict and capitally sentence.

The record now contains overwhelming evidence that the key testimony from both witnesses was utterly unreliable and the product of pressure and overreaching by law enforcement officials.

### **Farr**

Farr has provided a Declaration (which the State has not contested and which the federal judge accepted as true) which shows conclusively his damning penalty phase testimony was a fiction. See Appendix A to this Petition.

1. On the important point whether Banks had any intent or desire to commit armed robberies and harm those victims, Farr has now made clear that Banks *never intended* to commit any such acts. This narrative was a story Farr concocted, at the request of investigating officers, to persuade Banks to provide a pistol to Farr so that Farr, not Banks, could commit such crimes to support his drug habit.

1. The prosecutors urged the jury to believe Farr's fictional account as truthful and as compelling evidence that Banks was exceedingly dangerous.
2. The prosecutors did not correct Farr's lie to the jury that he was not a paid informant.
3. The prosecutors urged the jury to conclude that Farr's duplicitous testimony had been entirely truthful.
4. The prosecutors continued to suppress these facts through state post-conviction proceedings and thus denied the state courts the opportunity to adjudicate these issues (Farr was located hiding away in California in the fall of 1996; he had fled Texas shortly after trial at the urging of his law enforcement handlers and would not have spoken to us prior to that time).

### **Cook**

There is overwhelming evidence that Charles Cook's incriminating trial testimony is untrue and was the product of fear of prosecution and a life sentence.

a. Cook courageously testified in federal court that nearly all of his trial testimony that incriminates Mr. Banks was a lie. See Appendix B.

1. In 1998, Cook made a lengthy declaration that made clear that he incriminated Banks in April, 1980, out of fear that he would be locked up and prosecuted, and then testified at the September, 1980 trial after being told by Deputy Huff that a pending arson charge in Dallas would keep him in prison for life if he got cold feet. He confirmed this account in sworn testimony in 1999.

- There is considerable corroboration for this account:

The record is clear that Cook gave his April, 1980 statement under considerable duress. He so testified and Deputy Huff agreed.

The contents of the September rehearsal interview between Cook and law enforcement officials show conclusively that Cook's April statement was full of improbable scenarios and that he could not keep straight this narrative. Even law enforcement handlers mocked his credibility.

2. Cook testified at trial to save himself from a life sentence and did so.

At the time of trial, Cook was facing trial in Dallas for an arson. Because he was a third offender, he also faced habitual offender papers that had been filed (1) only one month prior to trial and (2) after repeated attempts by the complainant in that case, Cook's sister, to drop the charges.

The person who kept Cook informed of the Dallas charges and who told him that the charges would be dismissed only after he testified in a way that pleased Bowie County authorities was Deputy Huff.

While in Texarkana waiting to testify at trial, Cook was given other incentives to please the State. He had daily conjugal visits with his wife prior to trial.

Immediately after the trial, *both* Deputy Huff and prosecutor Elliott drove Cook back to Dallas and spoke to the assistant prosecutor handling the arson case. It was dropped that same day.

The suppression of Cook's rehearsal statement through state proceedings kept the issue of Cook's credibility away from the jury and state courts.

It is now fact that prosecutors possessed at trial the lengthy pretrial rehearsal of Cook that contains all kinds of impeachment material and which would give any reasonable juror many reasons to disbelieve Cook.

The State disclosed a transcript of these rehearsal sessions only in March, 1999, under pain of contempt.

**b. The State's Essential Time Line is Shattered**

For the State's case against Mr. Banks to be credible, he had to kill Mr. Whitehead during the early morning hours of Saturday, April 12, and then drive Mr. Whitehead's ailing car 180 miles to south Dallas in time to meet Charles Cook at 8:30 a.m. New evidence shows both assertions to be highly unlikely if not impossible.

**1. All available forensic evidence undercuts a killing on Saturday morning and places its at Saturday evening or Sunday morning.**

Whitehead's body was found on Monday, April 14, at 10:00 a.m. Deputy Huff noted rigor mortis, the stiffening of the body that comes shortly after death and departs 36 hours thereafter. Pathologist DiMaio noted the same when he performed the autopsy on Tuesday morning.

Dr. DiMaio noted several other conditions about the body that are probative of time of death – the lack of presence of discoloration of the lower abdomen, the lack of clouding of the corneas, and lack of drying of fingertips. He was not asked at trial to give an opinion as to time of death.

Alabama state pathologist LeRoy Riddick studied all of Dr. DiMaio's findings, and found that individually and collectively, they ruled out a time of death prior to Saturday evening. He testified they showed a killing on Sunday morning, not Saturday morning, when Mr. Banks was in Dallas.

**2. The State's key trial witness on the time of death admitted he was not sure about what he heard.**

Mike Fisher testified in federal court that he was not sure what he heard when he awoke early on April 12. He knows little about guns and is not sure whether he heard gun shots or car backfire or fireworks. Nor is he sure about the time. Further, when he got up to explore the noises, he did not see or hear anything unusual, like at car starting or driving out of the park.

**c. The State's Theory that Banks Drove Whitehead's Car To Dallas is Highly Improbable**

Whitehead's car was never recovered. Cook claimed that he did dispose of a car but gave a number of different addresses. There is little evidence in the police files that any sustained effort was made to find the car. Moreover, while Cook said that he sold to neighbors jumper cables and a radio he took from the car, the police made no effort to find these items and none were ever recovered.

Moreover, it is highly doubtful the car could have been driven 180 miles to Dallas without significant repair. Witnesses with Whitehead on Friday evening described the car as having an alternator or electrical problem that (1) required a jump start, and (2) required that the car be shut off, or run without the lights on. On the other hand, Cook describes the car Banks possessed as like a "race car" that operated flawlessly before he disposed of it.

It is extremely doubtful that Cook saw Whitehead's car. A mechanic has studied the record and concluded that given the description of the car's problems, it is highly unlikely that car could have been driven to Dallas without significant repair that was unavailable during the early morning hours of April 12.

Additionally, Carol Cook, Charles Cook's sister, testified that she saw her brother in a car on Saturday, April 12. But the car she saw was green. When she was prepped for her testimony by Deputy Hicks, he insisted that she testify that the car was red, not green. She did so at trial but recanted this account in subsequent proceedings.

#### **d. The Matching of the Gun and the Bullets is Unreliable**

State witness Vetrano Jefferson testified at trial that he had been assaulted by Mr. Banks one week before the Whitehead crime and that he saw Mr. Banks' pistol. Prior to trial, Deputy Huff repeatedly urged Jefferson to testify that the .25 caliber pistol recovered in Dallas was the same gun Mr. Banks assaulted Jefferson with. Jefferson told Huff he was sure the .25 was *not* the same weapon and refused to identify that weapon as Mr. Banks'. The so-called match of this weapon to the projectiles recovered from Mr. Whitehead, is not credible.

#### **IV. CONCLUSION**

Repeated failings by the trial prosecutors – in suppressing important information that would have shown the State's two key witnesses to be wholly unreliable, and equally egregious lapses by defense counsel that failed to expose the gaping holes in the State's case – the victim was shot when Mr. Banks was in Dallas and his car could not have made the trip from Texarkana to Dallas – kept from the jury the most important

evidence that bears on whether Mr. Banks is guilty of this offense. A capital conviction and sentence surely should be based upon a much more reliable, certain, and complete record. Prior to Mr. Banks' execution, he respectfully requests the opportunity to demonstrate, at a hearing, that there is so little evidence that ties him to Mr. Whitehead's death that a commutation is appropriate.

Respectfully submitted,

Clifton L. Holmes  
P. O. Drawer 3267  
Longview, TX 75606

George H. Kendall  
Assistant Counsel

Janai S. Nelson  
Assistant Counsel

Counsel for Mr. Banks