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Banks v. Dretke
124 S. Ct. 1256 (2004)

I. Facts

Police discovered 16-year-old Richard Whitehead's body on April 14, 1980. Two witnesses reported seeing Whitehead in the company of Delma Banks on the night of April 11. On April 23 a confidential informant contacted lead investigator Deputy Sheriff Willie Huff and reported that Banks would be traveling to Dallas to meet an individual and to procure a weapon. That night, officers followed Banks to a South Dallas residence. On the return trip, police stopped Banks's car and discovered a handgun. Police arrested the occupants of the vehicle. Huff later returned to the South Dallas residence, where he met and interviewed Charles Cook, and recovered a second gun. Cook informed Huff that Banks had left the gun with him earlier in the week. Tests identified the second gun as the weapon used in Whitehead's murder.[1]

Following a pretrial hearing in May 1980, the prosecution advised Banks's counsel that "[the State] will, without necessity of motions provide you with all discovery to which you are entitled."[2] At trial, Cook testified for the prosecution.[3] On cross-examination, Cook stated three times that he had not talked to anyone about his trial testimony.[4] In fact, Cook had participated in at least one practice session, during which "prosecutors intensively coached" him regarding his testimony and appearance at trial.[5] Nonetheless, the prosecution "allowed Cook's misstatements to stand uncorrected" and told the jury in summation that "Cook brought you [the] absolute truth."[6]

The prosecution also called Robert Farr as a witness at trial. On cross-examination, Farr testified that he had not taken any money from police officers and had not given officers a statement. In truth, Farr was a paid informant, but again, the prosecution did not correct Farr's untrue statements. The prosecution called Farr to the stand during the penalty phase. Defense counsel twice asked Farr whether he had informed Huff of the Dallas trip. Each time Farr answered no, and the prosecution let the perjured testimony stand. Further, the prosecution emphasized the truthfulness and significance of Farr's testimony.[7]

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1. Banks v. Dretke, 124 S. Ct. 1256, 1263–64 (2004).
2. *Id.* at 1264 (alteration in original).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Banks*, 124 S. Ct. at 1263–67.

The jury sentenced Banks to death, and the Texas Court of Criminal Appeals denied Banks's direct appeal.[8] In state postconviction proceedings, Banks alleged that the prosecution suppressed exculpatory evidence in violation of *Brady v. Maryland*[9] by failing to reveal that Farr was, and lied about being, a paid informant and that Cook lied about his coached testimony.[10] The state postconviction court denied the petition.[11] On March 7, 1996, Banks filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Texas.[12] In February of 1999 Banks proffered affidavits from Farr and Cook in support of a request for discovery and hearing.[13] The magistrate judge ordered disclosure of the district attorney's files, and a 74-page transcript of one of Cook's interrogations surfaced.[14] The document provided compelling evidence that prosecutors had coached Cook in preparation for trial.[15]

The district court held that Banks had not properly pled a *Brady* claim with respect to the Cook transcript and, therefore, had procedurally defaulted the claim.[16] Accordingly, the district court dismissed the claim and also denied Banks a certificate of appealability ("COA").[17] With respect to the Farr claim, the district court adopted the Magistrate's report and recommendation that habeas corpus relief be granted with respect to Banks's death sentence but not his conviction.[18] The United States Court of Appeals for the Fifth Circuit reversed the district court's grant of relief on the Farr claim and affirmed the court's denial of the COA.[19] Faced with a March 12, 2003 execution date, Banks petitioned the

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8. *Id.* at 1267; Banks v. State, 643 S.W.2d 129, 135 (Tex. Crim. App. 1982).

9. 373 U.S. 83 (1963).

10. *Banks*, 124 S. Ct. at 1267; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment").

11. *Banks*, 124 S. Ct. at 1268.

12. *Id.* Because the petition was filed prior to the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), it was governed by pre-AEDPA procedural rules. Lindh v. Murphy, 521 U.S. 320, 326–27 (1997); *see* 28 U.S.C. § 2254(d) (2000) (setting out the guidelines for a federal court to hear a state claim on a petition for a writ of habeas corpus; part of AEDPA).

13. *Banks*, 124 S. Ct. at 1268. Farr explained his work as an informant. *Id.* He admitted setting up Banks's arrest because he feared arrest on drug charges if he did not help Huff. *Id.* at 1267–68. Cook recalled that in a practice session, "prosecutors told him to testify 'as they wanted [him] to, and that [he] would spend the rest of [his] life in prison if [he] did not.' " *Id.* at 1268. (alteration in original).

14. *Id.* at 1268–69.

15. *Id.* at 1269.

16. *Id.* at 1269–70.

17. *Id.* at 1270.

18. *Id.* at 1269.

19. *Banks*, 124 S. Ct. at 1270; Banks v. Cockrell, 48 Fed. Appx. 104 (5th Cir. 2002) (opinion not selected for publication).

United States Supreme Court for a writ of certiorari on four issues.[20] The Supreme Court stayed Banks's execution on March 12, 2003 and on April 21 granted his petition on three of the four claims.[21]

II. Holding

The Supreme Court reversed the Fifth Circuit and remanded the case for further proceedings.[22] The Court held that Banks satisfied the elements of *Brady* as to the Farr *Brady* claim.[23] The Court also concluded that a COA should have issued for the Cook *Brady* claim.[24] Thus, the Court granted relief and remanded the Cook *Brady* claim for further proceedings.[25]

III. Analysis

A. Farr Brady *Claim*

The Supreme Court first concluded that Banks satisfied the state court exhaustion requirement as to the legal ground for the Farr claim.[26] However, in the state habeas proceeding, Banks did not produce evidence that Farr served as a police informant.[27] As a result, the burden fell on Banks to show that he was not procedurally barred from presenting such evidence in federal habeas proceedings.[28] He was entitled to a federal evidentiary hearing only if he showed cause for his failure to develop the facts in the state proceeding and prejudice resulting from that failure.[29]

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20. *Banks*, 124 S. Ct. at 1271. Two of the four issues, the tenability of the Farr *Brady* claim and the question as to the Cook transcript suppression claim, are the focus of this case note. Banks also raised a penalty-phase ineffective assistance of counsel claim and a claim of improper exclusion of minority jurors. *Id.* The Court denied Banks's petition as to the improper juror exclusion claim. *Id.* Because the court concluded that a writ of habeas corpus should have issued with respect to Banks's Farr *Brady* claim, the Court did not address his claim of ineffective assistance of counsel. *Id.* Any relief would have been cumulative. *Id.* at 1271 n.10.

21. *Id.*; Banks v. Cockrell, 538 U.S. 977, 977 (2003).

22. *Banks*, 124 S. Ct. at 1280–81.

23. *Id.* at 1279.

24. *Id.* at 1280.

25. *Id.* at 1280–81.

26. *Id.* at 1271; *see* 28 U.S.C. § 2254(b) (1994) (stating that a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant").

27. *Banks*, 124 S. Ct. at 1272.

28. *Id.*

29. *Id.*; *see* Keeney v. Tamayo-Reyes, 504 U.S. 1, 11 (1992) (holding that in order to receive an evidentiary hearing a habeas petitioner must show cause for his failure to develop properly the factual basis of a claim in state court and actual prejudice resulting therefrom).

The Court conflated the test for cause and prejudice with two of the required elements of a meritorious *Brady* claim.[30] First, the Court discussed the three elements of a *Brady* prosecutorial misconduct claim as set forth in *Strickler v. Greene*.[31] The evidence must be favorable to the accused, must have been suppressed by the State, and as a result, prejudice must have ensued.[32]

Banks satisfied the "favorable" requirement because Farr's status as a paid informant clearly supported Banks's attack on his credibility.[33] Next, the Court determined that if Banks demonstrated "cause and prejudice," he would also succeed in establishing the remaining two elements of the Farr *Brady* claim.[34] Corresponding to the second *Brady* element, Banks could show cause if his reason for not producing factual support in the state proceeding was the State's suppression of the relevant evidence.[35] The Supreme Court analyzed the *Strickler* decision and found that three factors accounted for the Court's determination that the petitioner showed cause for his failure to raise a *Brady* claim in state court.[36] The prosecution withheld exculpatory evidence, the petitioner reasonably relied on the prosecution's open-file policy, and the State confirmed that reliance by asserting that the prosecution disclosed all information known to the government.[37]

The Supreme Court concluded that Banks's case was "congruent with *Strickler*" on all three counts.[38] The prosecution knew of Farr's paid informant status, asserted that it would disclose all *Brady* material, and confirmed Banks's reliance on that disclosure by denying Banks's specific assertion that Farr was a paid informant.[39] In addition, Farr repeatedly responded untruthfully at trial, and the prosecution knowingly allowed the false statements to stand.[40] Based on this record, the Court held that Banks's case was stronger than that in *Strickler* and that Banks therefore established cause for his failure to present the evidence in the state court.[41]

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30. *Banks*, 124 S. Ct. at 1272.

31. *Id.*; *see* Strickler v. Greene, 527 U.S. 263, 289 (1999) (holding that the petitioner did not procedurally default a *Brady* claim by failing to raise the claim until federal habeas proceedings when exculpatory evidence was not disclosed and when defense counsel reasonably relied on prosecution's open file policy).

32. *Strickler*, 527 U.S. at 281–82.

33. *Banks*, 124 S. Ct. at 1272.

34. *Id.*

35. *Id.*

36. *Id.* at 1273 (citing *Strickler*, 527 U.S. at 289).

37. *Id.*

38. *Id.*

39. *Banks*, 124 S. Ct. at 1267, 1273.

40. *Id.* at 1264–66, 1273–74.

41. *Id.* at 1273–74.

The Court then explained that Banks could establish prejudice if the suppressed evidence was "material" for *Brady* purposes.[42] The Court cited the standard for materiality set forth in *Kyles v. Whitley*.[43] A petitioner must show a " 'reasonable probability of a different result' " had the evidence been disclosed to the jury.[44] The Court applied this test to the facts underlying Banks's claim.[45] First, the prosecution itself acknowledged Farr's critical role.[46] Second, Farr instigated the South Dallas excursion that produced important evidence at both the guilt and sentencing phases.[47] Third, because Banks had no criminal record, Farr's testimony regarding Banks's propensity to commit future violent crimes was crucial in satisfying the prosecution's penalty phase burden to show Banks's dangerousness.[48] On these facts the Court easily concluded that had jurors known of Farr's interest in maintaining Huff's favor, they might have distrusted and possibly disregarded his testimony.[49] This conclusion was reinforced by the trial court's failure to give the cautionary jury instructions that normally accompany informant testimony.[50]

As a result, the Court determined that, at least in the penalty phase, "one [could] hardly be confident that Banks received a fair trial, given the jury's ignorance of Farr's true role in the investigation and trial of the case."[51] Because Banks established a meritorious *Brady* claim, he also established the cause and prejudice required to overcome a procedural default.[52] Accordingly, the Supreme Court held that he was entitled to habeas relief.[53]

B. Cook Brady *Claim*

The district court denied Banks's Cook *Brady* claim after it ruled that Banks should have amended his 1996 habeas petition to include the 1999 discovery of

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42. *Id.* at 1276–79; *see* United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that exculpatory evidence withheld by the prosecution "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

43. *Banks*, 124 S. Ct. at 1276; *see* Kyles v. Whitley, 514 U.S. 419, 421–22 (1995) (holding that the prosecutor is responsible for making sure that evidence that would create a reasonable probability of a different result is available to the defense).

44. *Banks*, 124 S. Ct. at 1276 (quoting *Kyles*, 514 U.S. at 434).

45. *Id.* at 1276–79.

46. *Id.* at 1277.

47. *Id.*

48. *Id.*

49. *Id.* at 1278.

50. *Banks*, 124 S. Ct. at 1278.

51. *Id.* at 1279.

52. *Id.*

53. *Id.*

the Cook transcript as grounds for relief.[54] In response, Banks urged that the *Brady* claim had been raised by implied consent pursuant to Federal Rule of Civil Procedure 15(b).[55] However, the district court and later the Fifth Circuit concluded that Rule 15(b) was inapplicable in habeas proceedings.[56]

The Supreme Court rejected this conclusion as contrary to its decision in *Harris v. Nelson*,[57] which stated that the use of Rule 15(b) in habeas proceedings is " 'noncontroversial.' "[58] The Court noted that Banks raised the issue of the undisclosed Cook transcript before the magistrate judge.[59] The Court then equated such an evidentiary hearing with a trial for the purposes of Rule 15(b).[60] Consistent with Rule 15(b), therefore, the issue had been "tried by express or implied consent of the parties" and should have been treated as if it had been raised in the pleadings.[61] Finally, the Supreme Court cited *Miller-El v. Cockrell*[62] for the proposition that in order for a COA to issue, a prisoner must demonstrate only that " 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' "[63] The Supreme Court held that Banks satisfied this standard with respect to the district court's Rule 15(b) ruling and that a COA should have issued.[64]

IV. Application in Virginia

Although the Supreme Court did not reach the merits of Banks's Cook *Brady* claim, the Court's discussion of that aspect of the case may have far

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54. *Id.* at 1269–70.

55. *Id.* at 1270; *see* FED. R. CIV. P. 15(b) (providing that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings").

56. *Banks*, 124 S. Ct. at 1279.

57. 394 U.S. 286 (1969).

58. *Banks*, 124 S. Ct. at 1279 (quoting Harris v. Nelson, 394 U.S. 286, 294 n.5 (1969)); *see Harris*, 394 U.S. at 300 (holding that, "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry").

59. *Banks*, 124 S. Ct. at 1280.

60. *Id.*

61. FED. R. CIV. P. 15(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

62. 537 U.S. 322 (2003).

63. *Banks*, 124 S. Ct. at 1280 (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)); *see Miller-El*, 537 U.S. at 336–37 (clarifying the procedure for determining whether to grant a COA).

64. *Banks*, 124 S. Ct. at 1280.

reaching implications for future *Brady* claims.[65] The Supreme Court strongly suggested that the suppressed evidence relating to *both* Farr and Cook was *Brady* material. In the opening paragraphs of *Banks*, Justice Ginsburg presented a walk-through of the opinion.[66] The State advised defense counsel that it would, without the need for a defense motion, provide the discovery to which the defense was entitled.[67] The State "did not disclose" Farr's paid informant status or the pretrial transcript that revealed Cook had been intensely coached.[68] Finally, the prosecution failed to correct false statements by both witnesses.[69] The Court concluded that "[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."[70]

This conclusion is unremarkable as applied to the Farr claim. However, when applied to the Cook claim, *Banks* suggests that the commonplace practice of coaching a witness prior to his trial testimony can produce exculpatory and impeachment evidence under *Brady*. The Court's emphasis on the prosecution's failure to turn over the Cook transcript and the failure to correct Cook's statements that he had not been coached strongly suggests that the Court found a duty to disclose under *Brady*.

For example, in the process of coaching a witness toward particular trial testimony, the prosecution may also deflect the witness from statements that do not fit comfortably with the prosecution's case. *Banks* strongly suggests that when such retooling of a witness's trial testimony occurs, the changes in the testimony must be disclosed to the defense. Taking the next logical step, *Banks* impliedly represents an expansion of *Brady* to include all exculpatory and impeachment evidence gathered during witness preparation.[71] Further, when a coached witness states at trial that his testimony was not rehearsed, the prosecution has a duty to correct the record.

Notably, the facts of *Banks* implicated the two interrelated doctrines of *Brady* and perjured testimony under *Napue v. Illinois*[72] and *Giglio v. United States*.[73]

65. *Id.* at 1279–80.

66. *Id.* at 1263.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Banks*, 124 S. Ct. at 1263.

71. Prosecutors may argue that preparation evidence is protected by the work product doctrine. However, transcripts of witness preparation, unlike the prosecution's interrogation notes, are unlikely to fall under work product. For a discussion of the work product doctrine in this context, see generally Jannice Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33 (2004).

72. 360 U.S. 264 (1959).

73. *Banks*, 124 S. Ct. at 1271 n.11; *see* Napue v. Illinois, 360 U.S. 264, 269 (1959) (stating that convictions obtained by soliciting false evidence, or failing to correct the erroneous impression false

Banks presents a clear case of prosecutorial misconduct.[74] The prosecution knowingly allowed Farr and Cook to testify untruthfully, and the State continued, through direct and collateral appeal proceedings, to suppress and deny the truth.[75] However, because the Court disposed of the case on the Farr *Brady* claim, the Supreme Court did not address the issue raised in the Fifth Circuit as to whether a perjury claim, to warrant adjudication, must be pleaded separately from a *Brady* claim.[76]

Banks provides a powerful caution for the prosecutors. At the same time, defense counsel should remember that positive reliance on the prosecution's open file policy does not necessarily ensure that the defendant will receive all *Brady* material to which he is entitled. Even when the prosecution volunteers *Brady* material, due diligence in investigation remains essential.[77]

V. Conclusion

Although the Court disposed of Banks's Cook *Brady* claim by remanding to the Fifth Circuit for further consideration, *Banks*'s effects on *Brady* may be far-reaching. *Banks* impliedly added witness preparation to the range of possible *Brady* material. This expansion of *Brady* suggests that the circumstances surrounding a witness's pretrial interrogation and trial preparation may constitute exculpatory material.

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evidence creates at trial, may not stand); Giglio v. United States, 405 U.S. 150, 153 (1972) (stating "that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice") (citation omitted).

74. *Banks*, 124 S. Ct. at 1263–67, 1273–79.

75. *Id.* at 1263–66.

76. *Id.* at 1271 n.11.

77. For a complete discussion of the effect of *Banks* on *Brady* claims, see generally Joseph, *supra* note 71.