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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BANKS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02–8286. Argued December 8, 2003—Decided February 24, 2004

After police found a gun-shot corpse near Texarkana, Texas, Deputy Sheriff Willie Huff learned that the decedent had been seen with petitioner Banks three days earlier. When a paid informant told Deputy Huff that Banks was driving to Dallas to fetch a weapon, Deputy Huff followed Banks to a residence there. On the return trip, police stopped Banks's vehicle, found a handgun, and arrested the car's occupants. Returning to the Dallas residence, Deputy Huff encountered Charles Cook and recovered a second gun, which Cook said Banks had left at the residence several days earlier. On testing, the second gun proved to be the murder weapon. Prior to Banks's trial, the State advised defense counsel that, without necessity of motions, the State would provide Banks with all discovery to which he was entitled. Nevertheless, the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. At the trial's guilt phase, Cook testified, *inter alia*, that Banks admitted "kill[ing a] white boy." On cross-examination, Cook thrice denied talking to anyone about his testimony. In fact, Deputy Huff and prosecutors intensively coached Cook about his testimony during at least one pretrial session. The prosecution allowed Cook's misstatements to stand uncorrected. After Banks's capital murder conviction, the penalty-phase jury found that Banks would probably commit criminal acts of violence that would constitute a continuing threat to society. One of the State's two penalty-phase witnesses, Robert Farr, testified that Banks had retrieved a gun from Dallas in order to commit robberies. According to Farr, Banks had said he would "take care of it" if trouble arose during those crimes. Two defense witnesses im-

peached Farr, but were, in turn, impeached. Banks testified, among other things, that, although he had traveled to Dallas to obtain a gun, he had no intent to participate in the robberies, which Farr alone planned to commit. In summation, the prosecution suggested that Banks had not traveled to Dallas only to supply Farr with a weapon. Stressing Farr's testimony that Banks said he would "take care" of trouble arising during the robberies, the prosecution urged the jury to find Farr credible. Farr's admission that he used narcotics, the prosecution suggested, indicated that he had been open and honest in every way. The State did not disclose that Farr was the paid informant who told Deputy Huff about the Dallas trip. The judge sentenced Banks to death.

Through Banks's direct appeal, the State continued to hold secret Farr's and Cook's links to the police. In a 1992 state-court postconviction motion, Banks alleged for the first time that the prosecution knowingly failed to turn over exculpatory evidence that would have revealed Farr as a police informant and Banks's arrest as a "set-up." Banks also alleged that during the trial's guilt phase, the State deliberately withheld information of a deal prosecutors made with Cook, which would have been critical to the jury's assessment of Cook's credibility. Banks asserted that the State's actions violated *Brady* v. *Maryland,* 373 U. S. 83, 87, which held that the prosecution's suppression of evidence requested by and favorable to an accused violates due process where the evidence is material to either guilt or punishment, irrespective of the prosecution's good or bad faith. The State denied Banks's allegations, and the state postconviction court rejected his claims.

In 1996, Banks filed the instant federal habeas petition, alleging, as relevant, that the State had withheld material exculpatory evidence revealing Farr to be a police informant and Banks' arrest as a "set-up." Banks further alleged that the State had concealed Cook's incentive to testify in a manner favorable to the prosecution. Banks attached affidavits from Farr and Cook to a February 1999 motion seeking discovery and an evidentiary hearing. Farr's declaration stated that he had agreed to help Deputy Huff with the murder investigation out of fear Huff would arrest him on drug charges; that Huff had paid him $200; and that Farr had "set [Banks] up" by convincing him to drive to Dallas to retrieve Banks's gun. Cook recalled that he had participated in practice sessions before the Banks trial at which prosecutors told him he must either testify as they wanted or spend the rest of his life in prison. In response to the Magistrate Judge's disclosure order in the federal habeas proceeding, the prosecution gave Banks a transcript of a September 1980 pretrial interrogation of Cook by police and prosecutors. This transcript provided

compelling evidence that Cook's testimony had been tutored, but did not bear on whether Cook had a deal with the prosecution. At the federal evidentiary hearing Huff acknowledged, for the first time, that Farr was an informant paid for his involvement in Banks's case. A Banks trial prosecutor testified, however, that no deal had been offered to gain Cook's testimony. The Magistrate Judge recommended a writ of habeas corpus with respect to Banks's death sentence based on, *inter alia*, the State's failure to disclose Farr's informant status. The judge did not recommend disturbing the guilt-phase verdict, concluding in this regard that Banks had not properly pleaded a *Brady* claim based on the September 1980 Cook interrogation transcript. The District Court adopted the Magistrate Judge's report and rejected Banks's argument that the Cook transcript claim be treated as if raised in the pleadings, under Federal Rule of Civil Procedure 15(b).

The Fifth Circuit reversed to the extent the District Court had granted relief on Banks's Farr *Brady* claim. The Court of Appeals recognized that, prior to federal habeas proceedings, the prosecution had suppressed Farr's informant status and his part in the Dallas trip. The Fifth Circuit nonetheless concluded that Banks did not act diligently to develop the facts underpinning his Farr *Brady* claim when he pursued his 1992 state-court postconviction application. That lack of diligence, the Court of Appeals held, rendered the evidence uncovered in the federal habeas proceeding procedurally barred. In any event, the Fifth Circuit ruled, Farr's status as an informant was not "material" for *Brady* purposes. That was so, in the Fifth Circuit's judgment, because Banks had impeached Farr at trial by bringing out that he had been an unreliable police informant in Arkansas, and because much of Farr's testimony was corroborated by other witnesses, including Banks himself, who had acknowledged his willingness to get a gun for Farr's use in robberies. The Fifth Circuit also denied a certificate of appealability on Banks's Cook *Brady* claim. In accord with the District Court, the Court of Appeals rejected Banks's assertion that, because his Cook *Brady* claim had been aired by implied consent, Rule 15(b) required it to be treated as if raised in the pleadings.

Held: The Fifth Circuit erred in dismissing Banks's Farr *Brady* claim and denying him a certificate of appealability on his Cook *Brady* claim. When 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. Pp. 17–34.

(a) Both of Banks's *Brady* claims arose under the regime in place prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). P. 17.

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(b) Banks's Farr *Brady* claim, as it trains on his death sentence, is not barred. All three elements of a *Brady* claim are satisfied as to the suppression of Farr's informant status and its bearing on the reliability of the jury's verdict regarding punishment. Because Banks has also demonstrated cause and prejudice, he is not precluded from gaining federal habeas relief by his failure to produce evidence in anterior state-court proceedings. Pp. 17–31.

(1) Pre-AEDPA habeas law required Banks to exhaust available state-court remedies in order to pursue federal-court relief. See, *e.g., Rose* v. *Lundy,* 455 U. S. 509. Banks satisfied this requirement by alleging in his 1992 state-court habeas application that the prosecution knowingly failed to turn over exculpatory evidence about Farr. Banks, however, failed to produce evidence in state postconviction court establishing that Farr had served as Deputy Sheriff Huff's informant. 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. *Keeney* v. *Tamayo-Reyes,* 504 U. S. 1, 11. A *Brady* prosecutorial misconduct claim has three essential elements. *Strickler* v. *Greene,* 527 U. S. 263, 281–282. Beyond debate, the first such element—that the evidence at issue be favorable to the accused as exculpatory or impeaching—is satisfied here. Farr's paid informant status plainly qualifies as evidence advantageous to Banks. 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. *Ibid.* Thus, if Banks succeeds in demonstrating cause and prejudice, he will also succeed in establishing the essential elements of his Farr *Brady* claim. Pp. 17–19.

(2) Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim. As *Strickler* instructs, 527 U. S., at 289, three inquiries underlie the "cause" determination: (1) whether the prosecution withheld exculpatory evidence; (2) whether the petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (3) whether the State confirmed the petitioner's reliance on that policy by asserting during the state habeas proceedings that the petitioner had already received everything known to the govern-

ment. This case is congruent with *Strickler* in all three respects. First, the State knew of, but kept back, Farr's arrangement with Deputy Huff. Cf. *Kyles* v. *Whitley,* 514 U. S. 419, 437. Second, the State asserted, on the eve of trial, that it would disclose all *Brady* material. Banks cannot be faulted for relying on that representation. See *Strickler,* 527 U. S., at 283–284. Third, in its answer to Banks's 1992 state habeas application, the State denied Banks's assertions that Farr was a police informant and Banks's arrest a "set-up." The State thereby confirmed Banks's reliance on the prosecution's representation that it had disclosed all *Brady* material. In this regard, Banks's case is stronger than was the *Strickler* petitioner's: Each time Farr misrepresented his dealings with police, the prosecution allowed that testimony to stand uncorrected. Cf. *Giglio* v. *United States,* 405 U. S. 150, 153. Banks appropriately assumed police would not engage in improper litigation conduct to obtain a conviction. None of the State's arguments for distinguishing *Strickler* on the "cause" issue accounts adequately for the State's concealment and misrepresentation of Farr's link to Huff. In light of those misrepresentations, Banks did not lack appropriate diligence in pursuing the Farr *Brady* claim in state court. Nor is Banks at fault for failing to move, in the 1992 state-court postconviction proceedings, for investigative assistance so that he could inquire into Farr's police connections, for state law entitled him to no such aid. Further, *Roviaro* v. *United States,* 353 U. S. 53, which concerned the Government's obligation to reveal the identity of an informant it does not call as a witness, does not support the State's position. Pp. 19–26.

(3) The State's suppression of Farr's informant status is "material" for *Brady* purposes. The materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U. S., at 435. Farr was paid for a critical role in the scenario that led to Banks's indictment. Farr's declaration, presented to the federal habeas court, asserts that Farr, not Banks, initiated the proposal to obtain a gun to facilitate robberies. Had Farr not instigated, upon Deputy 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 consider Banks's acquisition of a gun to commit robbery or his "planned violence." Because Banks had no criminal record, Farr's testimony about Banks's propensity to violence was crucial to the prosecution. Without that testimony, the State could not have underscored to the jury that Banks would use the gun fetched in Dallas to "take care" of trouble

arising during robberies. The stress placed by the prosecution on this part of Farr's testimony, uncorroborated by any other witness, belies the State's suggestion that Farr's testimony was adequately corroborated. The prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony. In contrast to *Strickler*, where the Court found "cause," 527 U. S., at 289, but no "prejudice," *id.*, at 292–296, the existence of "prejudice" in this case is marked. Farr's trial testimony was the centerpiece of the Banks prosecution's penalty-phase case. That testimony was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. Had jurors known of Farr's continuing interest in obtaining Deputy Huff's favor and his receipt of funds to set Banks up, they might well have distrusted Farr's testimony, and, insofar as it was uncorroborated, disregarded it. The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany informant testimony. Such testimony poses serious credibility questions. This Court, therefore, has long allowed defendants broad latitude to cross-examine informants and has counseled the use of careful instructions on submission of the credibility issue to the jury. See, *e.g., On Lee* v. *United States,* 343 U. S. 747, 757. The State's argument that Farr's informant status was rendered cumulative by his impeachment at trial is contradicted by the record. Neither witness called to impeach Farr gave evidence directly relevant to Farr's part in Banks's prosecution. The impeaching witnesses, moreover, were themselves impeached, as the prosecution stressed on summation. Further, the prosecution turned to its advantage remaining impeachment evidence by suggesting that Farr's admission of drug use demonstrated his openness and honesty. Pp. 26–31.

(c) The lower courts wrongly denied Banks a certificate of appealability with regard to his *Brady* claim resting on the prosecution's suppression of the September 1980 Cook interrogation transcript. The Court of Appeals rejected Banks's contention that Rule 15(b) required the claim to be treated as having been raised in the pleadings because the transcript substantiating the claim had been aired at an evidentiary hearing before the Magistrate Judge. The Fifth Circuit apparently relied on the debatable view that Rule 15(b) is inapplicable in habeas proceedings. This Court has twice assumed that Rule's application in such proceedings. *Harris* v. *Nelson,* 394 U. S. 286, 294, n. 5; *Withrow* v. *Williams,* 507 U. S. 680, 696, and n. 7. The *Withrow* District Court had granted habeas on a claim neither pleaded, considered at "an evidentiary hearing," nor "even argu[ed]" by the parties. *Id.*, at 695. This Court held that there had been no trial of the claim by implied consent; and manifestly, the respondent warden was prejudiced by

the lack of opportunity to present evidence bearing on the claim's resolution. *Id.,* at 696. Here, in contrast, the issue of the undisclosed Cook interrogation transcript was aired at a hearing before the Magistrate Judge, and the transcript was admitted into evidence without objection. The Fifth Circuit's view that an evidentiary hearing should not be aligned with a trial for Rule 15(b) purposes is not well grounded. Nor does this Court agree with the Court of Appeals that applying Rule 15(b) in habeas proceedings would undermine the State's exhaustion and procedural default defenses. *Ibid.* Under pre-AEDPA law, no inconsistency arose between Rule 15(b) and those defenses. Doubtless, that is why this Court's pre-AEDPA cases assumed Rule 15(b)'s application in habeas proceedings. See*, e.g., ibid.* While AEDPA forbids a finding that exhaustion has been waived absent an express waiver by the State, 28 U. S. C. §2254(b)(3), pre-AEDPA law allowed waiver of both defenses—exhaustion and procedural default—based on the State's litigation conduct, see, *e.g., Gray* v. *Netherland,* 518 U. S. 152, 166. To obtain a certificate of appealability, a prisoner must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further. *Miller-El* v. *Cockrell,* 537 U. S. 322, 327. This case fits that description as to the application of Rule 15(b). Pp. 31–34.

48 Fed. Appx. 104, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Part III. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined.