Brady v. Maryland

Supreme Court of the United States

March 18-19, 1963, Argued ; May 13, 1963, Decided

No. 490

Reporter
373 U.S. 83 *; 83 S. Ct. 1194 **; 10 L. Ed. 2d 215 ***; 1963 U.S. LEXIS 1615 ****

BRADY v. MARYLAND

Prior History: [**1]** CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

Disposition: *226 Md. 422, 174 A. 2d 167*, affirmed.

Core Terms

suppression, guilt, due process, confession, new trial, cases, murder, first degree, trial court, innocence

Case Summary

Procedural Posture

Certiorari was granted to a decision of the Court of Appeals of Maryland to consider whether petitioner was denied a federal right when the appeals court restricted its grant of a new murder trial to the question of punishment, leaving the determination of guilt undisturbed. The appeals court granted a retrial after holding that suppression of evidence by the state violated petitioner's rights under the *Due Process Clause, U.S. Const. amend. XIV*.

Overview

A judgment granting petitioner a new murder trial that was restricted to the issue of punishment was affirmed. After petitioner was convicted of murder and sentenced to death, he learned that the State withheld a statement in which another individual admitted the actual homicide. The Court held that suppression of evidence favorable to an accused upon request violated the *Due Process Clause, U.S. Const. amend. XIV*, where the evidence was material to guilt or punishment, regardless of the State's good or bad faith. The suppression of evidence violated petitioner's due process rights and required a retrial on the sentence. The Court held, however, that it could not assume that if the suppressed evidence had been used at the first trial, the ruling that the statement was inadmissible as to guilt might have been disregarded by the jury. In Maryland, it was the trial court, not the jury, which ruled on the admissibility of evidence relating to guilt. The appeals court's statement that nothing in the suppressed confession could have reduced petitioner's offense below a first degree murder was a ruling on the admissibility of the confession as to the issue of innocence or guilt.

Outcome

The judgment granting petitioner a new trial restricted to the issue of punishment was affirmed where the suppression of evidence by the state violated petitioner's right to due process of law and required a retrial on the sentence. The Court held, however, that the appeals court had ruled the suppressed confession was inadmissible as to the issue of petitioner's guilt.

Syllabus

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had **[****2]** been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held*: Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84-91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86-88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the *Fourteenth Amendment*, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88-91.

Counsel: E. Clinton Bamberger, **[****3]** Jr. argued the cause for petitioner. With him on the brief was John Martin Jones, Jr.

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were Thomas B. Finan, Attorney General, and Robert C. Murphy, Deputy Attorney General.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

Opinion by: DOUGLAS

Opinion

[*84] [*217] [**1195]** Opinion of the Court by MR. JUSTICE **DOUGLAS**, announced by MR. JUSTICE **BRENNAN**.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. *220 Md. 454, 154 A. 2d 434*. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow **[****4]** him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the *Maryland **[*85]** Post Conviction Procedure Act. 222 Md. 442, 160 A. 2d 912*. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. *226 Md. 422, 174 A. 2d 167*. The case is here on certiorari, *371 U.S. 812*. [1]

[**5]** The **[**1196]** crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a **[***218]** federal right when the Court of Appeals restricted the new trial to the question of punishment.

[*86] [2]We agree with the Court of Appeals that suppression of this confession was a violation of the *Due Process Clause of the Fourteenth Amendment*. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals -- *United States ex rel. Almeida v. Baldi, 195 F.2d 815*, and *United States ex rel. Thompson v. Dye, 221 F.2d 763* -- which, we agree, state the correct constitutional rule.

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[1] [1]

Neither party suggests that the decision below is not a "final judgment" within the meaning of *28 U. S. C. § 1257 (3)*, and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman v. United States, 302 U.S. 211, 212)* cannot be applied here. If in fact the *Fourteenth Amendment* entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen v. Beneficial Loan Corp., 337 U.S. 541, 547)* that "is fundamental to the further conduct of the case" (*United States v. General Motors Corp., 323 U.S. 373, 377)*. This question is "independent of, and unaffected by" (*Radio Station WOW v. Johnson, 326 U.S. 120, 126)* what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent v. Texas, 318 U.S. 418, 421-422*. Cf. *Local No. 438 v. Curry, 371 U.S. 542, 549*.

This ruling is an extension **[****6]** of *Mooney v. Holohan, 294 U.S. 103, 112*, where the Court ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In *Pyle v. Kansas, 317 U.S. 213, 215-216*, we phrased the rule in broader terms:

"Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if **[****7]** proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan, 294 U.S. 103*. "

[*87] The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. *195 F.2d, at 820*. In *Napue v. Illinois, 360 U.S. 264, 269*, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see *Alcorta v. Texas, 355 U.S. 28*; *Wilde v. Wyoming, 362 U.S. 607*. Cf. *Durley v. Mayo, 351 U.S. 277, 285* (dissenting opinion).

[3]We now hold that the suppression by the prosecution of evidence favorable to **[****8]** an accused upon request violates **[**1197]** due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins **[***219]** its point whenever justice is done its citizens in the courts." [2] A prosecution that withholds evidence on demand of an accused which, if made available, **[*88]** would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with

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[2] Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:

"The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. *226 Md., at 427, 174 A. 2d, at 169*. **[****9]**

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

"There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, **[****10]** Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady*.

"Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . .

"The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree*. We, therefore, see no occasion to retry that issue." *226 Md., at 429-430, 174 A. 2d, at 171*. (Italics added.)

[*89] If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of **[****11]** Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal **[**1198]** cases "the Judges of Law" does not mean precisely what it seems to say. [3] The present status of that provision was reviewed recently in *Giles v. State, 229 Md. 370, 183 A. 2d 359*, appeal dismissed, *372 U.S. 767*, where the several **[***220]** exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." *229 Md., at 383, 183 A. 2d, at 365*. The cases cited make up a long line going back nearly a century. *Wheeler v. State, 42 Md. 563, 570*, **[****12]** stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." *Bell v. State, 57 Md. 108, 120*. And see *Beard v. State, 71 Md. 275, 280, 17 A. 1044, 1045*; *Dick v. State, 107 Md. 11, 21, 68 A. 286, 290*. Cf. *Vogel v. State, 163 Md. 267, 162 A. 705*.

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[3] See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md. St. Bar Assn. Rept. 246, 253-254.

[*90] [4][5][6]We usually walk on treacherous **[****13]** ground when we explore state law, [4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." *Giles v. State, supra.*In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. [5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a **[*91]** bifurcated **[****14]** trial (cf. *Williams v. New York, 337 U.S. 241*) denies him due process or violates the *Equal Protection Clause of the Fourteenth Amendment*.

[**15]** *Affirmed*.

Separate opinion of MR. JUSTICE WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding **[***221]** by the State of material evidence exculpatory to an accused is a violation **[**1199]** of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause. [*] We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See *New York City v. Central Savings Bank, 306 U.S. 661*; *Minnesota v. National Tea Co., 309 U.S. 551*. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of **[****16]** petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. *Bell v. Hood, 327 U.S. 678*, **[*92]** wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, "The question presented is whether petitioner was denied a

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[4] For one unhappy incident of recent vintage see *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co., 309 U.S. 4*, that replaced an earlier opinion in the same case, ***309 U.S. 703***.

[5] "In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39. See also *Bell v. State, supra, at 120*; *Vogel v. State, 163 Md., at 272, 162 A., at 706-707*.

[*] Md. Const., Art. 23; *Home Utilities Co., Inc., v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A. 2d 109*; *Raymond v. State, 192 Md. 602, 65 A. 2d 285*; *County Comm'rs of Anne Arundel County v. English, 182 Md. 514, 35 A. 2d 135*; *Oursler v. Tawes, 178 Md. 471, 13 A. 2d 763*.

federal right when the Court of Appeals restricted the new trial to the question of punishment." After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: "The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment."

[**17]** The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rulemaking or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Dissent by: HARLAN

Dissent

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's *Fourteenth Amendment* right to equal protection? [1] In my opinion an affirmative answer would **[*93]** **[***222]** be required *if* the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

[**18]** The Court, however, holds that the *Fourteenth Amendment* was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases "the Judges of Law, as **[**1200]** well as of fact," as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under § 645G of the Maryland Post Conviction Procedure Act, Md. Code, Art. 27 (1960 Cum. Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case, [2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. *226 Md., at 430, 174 A. 2d, at 171*. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the

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[1] I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 86-88 of its opinion.

[2] Section 645G provides in part: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Rule 870 provides that the Court of Appeals "will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended."

admissibility of third-party **[****19]** confessions, which falls short of saying anything that is dispositive **[*94]** of the crucial issue here. *226 Md., at 427-429, 174 A. 2d, at 170*. [3]

[**20]** Nor do I find anything in any of the other Maryland cases cited by the Court (*ante*, p. 89) which bears on the admissibility *vel non* of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not "overrule" the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that "in the final analysis the jury are the judges of both the *law* and the facts, and the verdict in this case is *entirely* the jury's responsibility." (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement *would* have been admissible at the trial on the issue of guilt. [4]

[**21]** In **[***223]** this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms **[*95]** address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota v. National Tea Co., 309 U.S. 551*.

References

Annotation References:

1. Suppression of evidence by prosecution in criminal case as vitiating conviction. *33 ALR2d 1421*.

2. Conviction on testimony known to prosecution to be perjured as denial of due process. 2 L ed 2d 1575, 3 L ed 2d 1991.

3. Obtaining conviction on perjured testimony known to prosecuting authorities to be perjured, as denial of due process. 98 ALR 411.

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[3] It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of *Day v. State, 196 Md. 384, 76 A. 2d 729*. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

[4] In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: "It would have been, yes."

Banks v. Dretke

Supreme Court of the United States

December 8, 2003, Argued ; February 24, 2004, Decided

No. 02-8286

Reporter
540 U.S. 668 *; 124 S. Ct. 1256 **; 157 L. Ed. 2d 1166 ***; 2004 U.S. LEXIS 1621 ****; 72 U.S.L.W. 4193; 17 Fla. L. Weekly Fed. S 153

DELMA BANKS, Jr., Petitioner v. DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Subsequent History: On remand at, Remanded by *Banks v. Dretke, 383 F.3d 272, 2004 U.S. App. LEXIS 18053 (5th Cir. Tex., 2004)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Banks v. Cockrell, 48 Fed. Appx. 104, 2002 U.S. App. LEXIS 19381 (5th Cir. Tex., 2002)

Disposition: *48 Fed. Appx. 104*, reversed and remanded.

Core Terms

gun, informant, impeached, court of appeals, district court, evidentiary hearing, habeas proceeding, marks, state-court, quotation, robberies, murder, disclosure, witnesses, certificate, withheld, penalty phase, postconviction, suppression, discovery, sentence, police officer, proceedings, arrested, police informant, armed robbery, disclose, commit, weapon, guilt

Case Summary

Procedural Posture

Petitioner prison inmate was convicted in state court of felony murder and sentenced to death, but asserted that the prosecution failed to disclose that a key witness was a paid informant and knowingly allowed the witness to testify falsely. Upon the grant of a writ of certiorari, the inmate appealed the judgment of the United States Court of Appeals for the Fifth Circuit which reversed a grant of the inmate's habeas corpus petition.

Overview

It was conceded that the prosecution failed to disclose the informant's status and did not correct the informant's false testimony that he did not talk to police until shortly before trial. The lower appellate court found, however, that the issue of suppression of impeachment evidence concerning the informant was procedurally barred since the inmate failed to pursue the issue in state court proceedings, despite

indications of the prosecutorial misconduct. The United States Supreme Court held the inmate's claim was not barred since the inmate showed cause for failing to develop the claim in state court and the impeachment evidence was clearly material, at least with regard to the penalty proceedings. The inmate's failure to investigate the informant's status resulted from the prosecution's persistent misrepresentations and omissions concerning such status, and the inmate was entitled to credit the prosecution's statements. Further, the inmate was prejudiced from the lack of the evidence since the prosecution relied heavily on the informant's penalty phase testimony about the inmate's propensity to commit further crimes without disclosing the informant's active role in the case.

Outcome
The judgment reversing the grant of the inmate's habeas corpus petition was reversed, and the case was remanded for further proceedings.

Syllabus

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 **[****2]** 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 impeached Farr, but were, in turn, impeached. Banks testified, among other **[****3]** 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.

[*1175]** 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 **[****4]** 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, 10 L. Ed. 2d 215, 83 S. Ct. 1194*, 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 **[****5]** 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 **[****6]** 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 **[***1176]** 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 **[****7]** 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.

(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).

(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, **[****8]** he is not precluded from gaining federal habeas relief by his failure to produce evidence in anterior state-court proceedings.

(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, 71 L. Ed. 2d 379, 102 S. Ct. 1198*. 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, 118 L. Ed. 2d 318, 112 S. Ct. 1715*. A *Brady* prosecutorial misconduct claim has three essential elements. *Strickler v. Greene, 527 U.S. 263, 281-282, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. Beyond debate, the first such **[****9]** 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 **[***1177]** 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.

(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. 263 at 289, 144 L. Ed. 2d 286, 119 S. Ct. 1936*, three inquiries underlie the "cause" determination: (1) whether the prosecution **[****10]** 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 government. 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, 131 L. Ed. 2d 490, 115 S. Ct. 1555*. 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, 144 L. Ed. 2d 286, 119 S. Ct. 1936.* 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 **[****11]** dealings with police, the prosecution allowed that testimony to stand uncorrected. Cf. *Giglio v. United States, 405 U.S. 150, 153, 31 L. Ed. 2d 104, 92 S. Ct. 763*. 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, 1 L. Ed. 2d 639, 77 S. Ct. 623*, 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.

(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 **[****12]** could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***[***1178]*** *Kyles, 514 U.S. 419 at 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555*. 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, **[****13]** 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. 263 at 289, 144 L. Ed. 2d 286, 119 S. Ct. 1936*, but no "prejudice," *id., 527 U.S. 263 at 292-296, 144 L. Ed. 2d 286, 119 S. Ct. 1936*, 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 **[****14]** of the credibility issue to the jury. See, *e.g.*, *On Lee v. United States, 343 U.S. 747, 757, 96 L. Ed. 1270, 72 S. Ct. 967*. 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.

(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 **[***1179]** hearing before the Magistrate Judge. The Fifth Circuit apparently relied on the debatable view that *Rule 15(b)* is inapplicable in habeas **[****15]** proceedings. This Court has twice assumed that Rule's application in such proceedings. *Harris v. Nelson, 394 U.S. 286, 294, n. 5, 22 L. Ed. 2d 281, 89 S. Ct. 1082*; *Withrow v. Williams, 507 U.S. 680, 696, and n 7 123 L. Ed. 2d 407, 113 S. Ct. 1745*. 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., 508 U.S. 680 at 695, 123 L. Ed. 2d 407, 113 S. Ct. 1745*. 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., 507 U.S. 680 at 696, 123 L. Ed. 2d 407, 113 S. Ct. 1745*. 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 **[****16]** 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) [28 USCS § 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, 135 L. Ed. 2d 457, 116 S. Ct. 2074*. 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, 154 L. Ed. 2d 931, 123 S. Ct. 1029*. This case fits that description as to the application of *Rule 15(b)*.

48 Fed. Appx. 104, reversed and remanded.

Counsel: George H. Kendall argued the cause for petitioner.

Gena Bunn argued the cause for respondent.

Judges: 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 **[****17]** in part and dissenting in part, in which Scalia, J., joined.

Opinion by: GINSBURG

Opinion

[1263]** Justice **Ginsburg** delivered the opinion of the Court.

[*674] [1A] [2A] Petitioner Delma Banks, Jr., was convicted of capital murder and sentenced to death. Prior to trial, the State advised **[*675]** Banks's attorney there would be no need to litigate discovery issues, representing: "[W]e will, without the necessity of motions[,] provide you with all discovery to which you are entitled." App. 361, n 1; App. to Pet. for Cert. A4 (both sources' internal quotation marks omitted). Despite that undertaking, the State withheld evidence **[***1180]** that would have allowed Banks to discredit two essential prosecution witnesses. The State did not disclose that one of those witnesses was a paid police informant, nor did it disclose a pretrial transcript revealing that the other witness' trial testimony had been intensively coached by prosecutors and law enforcement officers.

Furthermore, the prosecution raised no red flag when the informant testified, untruthfully, that he never gave the police any statement and, indeed, had not talked to any police officer about the case until a few days before the trial. Instead of correcting the informant's false **[****18]** statements, the prosecutor told the jury that the witness "ha[d] been open and honest with you in every way," App. 140, and that his testimony was of the "utmost significance," *id.*, at 146. Similarly, the prosecution allowed the other key witness to convey, untruthfully, that his testimony was entirely unrehearsed. Through direct appeal and state collateral review proceedings, the State continued to hold secret the key witnesses' links to the police and allowed their false statements to stand uncorrected.

[1B] [2B] [3A] [4A] Ultimately, through discovery and an evidentiary hearing authorized in a federal habeas corpus proceeding, the long-suppressed evidence came to light. The District Court granted Banks relief from the death penalty, but the Court of Appeals reversed. In the latter court's judgment, Banks had documented his claims of prosecutorial misconduct too late and in the wrong forum; therefore he did not qualify for federal-court relief. We reverse that judgment. When police or prosecutors conceal significant exculpatory or impeaching **[*676]** material in the State's possession, it is ordinarily incumbent on the State to set the record straight.

I

On April 14, 1980, police found the **[****19]** corpse of 16-year-old Richard Whitehead in Pocket Park, east of Nash, Texas, a town in the vicinity of Texarkana. *Id.*, at 8, 141. [1] A preliminary autopsy revealed that Whitehead had been shot three times. *Id.*, at 10. Bowie County Deputy Sheriff Willie Huff, lead investigator of the death, learned from two witnesses that Whitehead had been in the company of petitioner, 21-year-old Delma Banks, Jr., late on the evening of April 11. *Id.*, at 11-15, 144; **[**1264]** *Banks v. State, 643 S.W.2d 129, 131 (Tex. Crim. App. 1982)* (en banc), cert denied, *464 U.S. 904, 78 L. Ed. 2d 244, 104 S. Ct. 259 (1983)*. On April 23, Huff received a call from a confidential informant reporting that "Banks was coming to Dallas to meet an individual and get a weapon." App. 15. That evening, Huff and other officers followed Banks to South Dallas, where Banks visited a residence. *Ibid.;* Brief for Petitioner 3. Police stopped Banks's vehicle en route from Dallas, found a handgun in the car, and arrested the car's occupants. App. 16. Returning to the Dallas residence Banks had visited, Huff encountered and interviewed Charles Cook and recovered a second gun, a weapon Cook said Banks had left with him several **[****20]** days earlier. *Ibid.* Tests later **[***1181]** identified the second gun as the Whitehead murder weapon. *Id.*, at 17.

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[1] Although a police officer testified Whitehead's body was found on April 14, App. 8, the Texas Court of Criminal Appeals stated the body was discovered on April 15. *Banks v. State, 643 S.W.2d 129, 131 (1982)* (en banc).

In a May 21, 1980, pretrial hearing, Banks's counsel sought information from Huff concerning the confidential informant who told Huff that Banks would be driving to Dallas. *Id.*, at 21. Huff was unresponsive. *Ibid.* Any information that might reveal the identity of the informant, the prosecution **[*677]** urged, was privileged. *Id.*, at 23. The trial court sustained the State's objection. *Id.*, at 24. Several weeks later, in a July 7, 1980, letter, the prosecution advised Banks's counsel that "[the State] will, without necessity of motions provide you with all discovery to which you are entitled." *Id.*, at 361, n 1; App. to Pet. for Cert. A4 (both sources' **[****21]** internal quotation marks omitted).

The guilt phase of Banks's trial spanned two days in September 1980. See Brief for Petitioner 2; App. to Pet. for Cert. C3. Witnesses testified to seeing Banks and Whitehead together on April 11 in Whitehead's green Mustang, and to hearing gunshots in Pocket Park at 4 a.m. on April 12. *Banks v. State, 643 S. W. 2d, at 131*. Charles Cook testified that Banks arrived in Dallas in a green Mustang at about 8:15 a.m. on April 12, and stayed with Cook until April 14. App. 42-43, 47-53. Cook gave the following account of Banks's visit. On the morning of his arrival, Banks had blood on his leg and told Cook "he [had] got into it on the highway with a white boy." *Id.*, at 44. That night, Banks confessed to having "kill[ed] the white boy for the hell of it and take[n] his car and come to Dallas." *Id.*, at 48. During their ensuing conversation, Cook first noticed that "[Banks] had a pistol." *Id.*, at 49. Two days later, Banks left Dallas by bus. *Id.*, at 52-53. The next day, Cook abandoned the Mustang in West Dallas and sold Banks's gun to a neighbor. *Id.*, at 54. Cook further testified that, shortly before the police arrived **[****22]** at his residence to question him, Banks had revisited him and requested the gun. *Id.*, at 57.

On cross-examination, Cook three times represented that he had not talked to anyone about his testimony. *Id.*, at 59. In fact, however, Cook had at least one "pretrial practice sessio[n]" at which Huff and prosecutors intensively coached Cook for his appearance on the stand at Banks's trial. *Id.*, at 325, P 10, 381-390; Joint Lodging Material 1-36 (transcript of pretrial preparatory session). The prosecution allowed Cook's misstatements to stand uncorrected. In its guilt- **[*678]** phase summation, the prosecution told the jury "Cook brought you absolute truth." App. 84.

In addition to Cook, Robert Farr was a key witness for the prosecution. Corroborating parts of Cook's account, Farr testified to traveling to Dallas with Banks to retrieve Banks's gun. *Id.*, at 34-35. On cross-examination, defense counsel asked Farr whether he had "ever taken any money from some police officers," or "give[n] any police officers a statement." *Id.*, at 37-38. Farr answered no to both questions; **[**1265]** he asserted emphatically that police officers had not promised him anything and that he had "talked to no one about **[****23]** this [case]" until a few days before trial. *Ibid.* These answers were untrue, but the State did not correct them. Farr was the paid informant who told Deputy Sheriff Huff that Banks would travel to Dallas in search of a gun. *Id.*, at 329; App. to Pet. for Cert. **[***1182]** A4, A9. In a 1999 affidavit, Farr explained:

> "I assumed that if I did not help [Huff] with his investigation of Delma that he would have me arrested for drug charges. That's why I agreed to help [Huff]. I was afraid that if I didn't help him, I would be arrested. . . .
>
> "Willie Huff asked me to help him find Delma's gun. I told [Huff] that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. . . .
>
> "In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma

this so that he would give me his gun. . . . I convinced Delma to drive to Dallas with me to get the gun." App. 442-443, PP 6-8. **[****24]**

[*679] The defense presented no evidence. App. to Pet. for Cert. A6. Banks was convicted of murder committed in the course of a robbery, in violation of *Tex. Penal Code Ann. § 19.03(a)(2)* (1974). See App. to Pet. for Cert. C3. [2]

The penalty phase ran its course the next day. *Ibid.* Governed by the Texas statutory capital murder scheme applicable in 1980, the jury decided Banks's sentence by answering three "special issues." App. 142-143. [3] "If the jury unanimously answer[ed] 'yes' to each issue submitted, the trial court [would be obliged to] sentence the defendant to death." *Penry v. Lynaugh, 492 U.S. 302, 310, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)* (construing Texas' sentencing scheme); *Tex. Code Crim. Proc. Ann., Arts. 37.071(c)-(e) (Vernon Supp. 1980)*. **[****25]** The critical question at the penalty phase in Banks's case was: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Delma Banks, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?" App. 143 (internal quotation marks omitted).

On this question, the State offered two witnesses, **[****26]** Vetrano Jefferson and Robert Farr. *Id.*, at 104-113. Jefferson testified that, in early April 1980, Banks had struck him across **[*680]** the face with a gun and threatened to kill him. *Id.*, at 104-106. **[**1266]** Farr's testimony focused once more on the trip to Dallas to fetch Banks's gun. The gun was needed, Farr asserted, because "[w]e [Farr and Banks] were going to pull some robberies." *Id.*, at **[***1183]** 108. According to Farr, Banks "said he would take care of it" if "there was any trouble during these burglaries." *Id.*, at 109. When the prosecution asked: "How did [Banks] say he would take care of it?", Farr responded: "[Banks] didn't go into any specifics, but he said it would be taken care of." *Ibid.*

On cross-examination, defense counsel twice asked whether Farr had told Deputy Sheriff Huff of the Dallas trip. *Ibid.* The State remained silent as Farr twice perjuriously testified: "No, I did not." *Ibid.* Banks's counsel also inquired whether Farr had previously attempted to obtain prescription drugs by fraud, and, "up tight over that," would "testify to anything anybody want[ed] to hear." *Id.*, at 110. Farr first responded: "Can you prove it?" *Ibid.* Instructed by **[****27]** the court to answer defense counsel's questions, Farr again said: "No, I did not . . . ." *Ibid.*

Two defense witnesses impeached Farr, but were, in turn, impeached themselves. James Kelley testified to Farr's attempts to obtain drugs by fraud; the prosecution impeached Kelley by eliciting his close relationship to Banks's girlfriend. *Id.*, at 124-129. Later, Kelley admitted to being drunk while on the

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[2] "A person commits an offense if he commits murder . . . and . . . the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson." *Tex. Penal Code Ann. § 19.03(a)(2)* (1974).

[3] As set forth in Texas law, the three special issues were:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *Tex. Code Crim. Proc. Ann., Arts. 37.071(b)(1)-(3) (Vernon Supp. 1980)*.

stand. App. to Pet. for Cert. A13. Former Arkansas police officer Gary Owen testified that Farr, as a police informant in Arkansas, had given false information; the prosecution impeached Owen by bringing out his pending application for employment by defense counsel's private investigator. App. 129-131.

Banks's parents and acquaintances testified that Banks was a "respectful, churchgoing young man." App. to Pet. for Cert. A7; App. 137-139. Thereafter, Banks took the stand. He affirmed that he "[h]ad never before been convicted **[*681]** of a felony." *Id.*, at 134. [4] Banks admitted striking Vetrano Jefferson in April 1980, and traveling to Dallas to obtain a gun in late April 1980. *Id.*, at 134-136. He denied, however, any intent to participate in robberies, asserting that Farr **[****28]** alone had planned to commit them. *Id.*, at 136-137. The prosecution suggested on cross-examination that Banks had been willing "to supply [Farr] the means and possible death weapon in an armed robbery case." *Id.*, at 137. Banks conceded as much. *Ibid.*

During summation, the prosecution intimated that Banks had not been wholly truthful in this regard, suggesting that "a man doesn't travel two hundred miles, or whatever the distance is from here [Texarkana] to Dallas, Texas, to supply a person with a weapon." *Id.*, at 143. The State homed in on Farr's testimony that Banks said he would "take care" of any trouble arising during the robbery:

> "[Farr] said, 'Man, you know, what i[f] there's trouble?' And [Banks] says, 'Don't worry about it. **[****29]** I'll take care of it.' I think that speaks for itself, and I think you know what that means. . . . I submit to you beyond a reasonable doubt that the State has again met its burden of proof, and that the answer to question number two [propensity to commit violent criminal acts] **[***1184]** should also be yes." *Id.*, at 140, 144. See also *id.*, at 146-147.

Urging Farr's credibility, the prosecution called the jury's attention to Farr's admission, at trial, that he used narcotics. **[**1267]** *Id.*, at 36, 140. Just as Farr had been truthful about his drug use, the prosecution suggested, he was also "open and honest with [the jury] in every way" in his penalty-phase testimony. *Id.*, at 140. Farr's testimony, the prosecution emphasized, was "of the utmost significance" because it **[*682]** showed "[Banks] is a danger to friends and strangers, alike." *Id.*, at 146. Banks's effort to impeach Farr was ineffective, the prosecution further urged, because defense witness "Kelley kn[ew] nothing about the murder," and defense witness Owen "wish[ed] to please his future employers." *Id.*, at 148.

The jury answered yes to the three special issues, and the judge sentenced Banks to death. The Texas Court of Criminal **[****30]** Appeals denied Banks's direct appeal. *643 S.W. 2d, at 135*. Banks's first two state postconviction motions raised issues not implicated here; both were denied. *Ex parte Banks,* No. 13568-01 (Tex Crim App 1984); *Ex parte Banks, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989)*.

Banks's third state postconviction motion, filed January 13, 1992, presented questions later advanced in federal court and reiterated in the petition now before us. App. 150. Banks alleged "upon information and belief" that "the prosecution knowingly failed to turn over exculpatory evidence as required by [*Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)]*"; [5] the withheld evidence, Banks

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[4] Banks, in fact, had no criminal record at all. App. 255, P 115; App. to Pet. for Cert. C23. He also "had no history of violence or alcohol abuse and seemed to possess a self-control that would suggest no particular risk of future violence." *Ibid.*

asserted, "would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a set-up." App. 180, P 114 (internal quotation marks omitted). In support of this third state-court postconviction plea, Banks attached an unsigned affidavit from his girlfriend, Farr's sister-in-law Demetra Jefferson, which stated that Farr "was well-connected to law enforcement people," and consequently managed to stay out of "trouble" for illegally obtaining prescription drugs. *Id.*, at 195, **[****31]** P 7. Banks alleged as well that during the guilt phase of his trial, the State deliberately withheld information "critical to the jury's assessment of Cook's credibility," including the "generous **[*683]** 'deal' [Cook had] cut with the prosecutors." *Id.*, at 152, P 2, 180, P 114. [6]

[**32]** The State's reply to Banks's pleading, filed October 6, 1992, "denie[d] each and every allegation of fact made by [Banks] except those supported by official court records and those specifically admitted." *Id.*, at 234; Tr. of Oral Arg. 32. "[N]othing was kept secret from the defense," **[***1185]** the State represented. App. 234. While the reply specifically asserted that the State had made "no deal with Cook," *ibid.*, the State said nothing specific about Farr. Affidavits from Deputy Sheriff Huff and prosecutors accompanied the reply. *Id.*, at 241-243. The affiants denied any "deal, secret or otherwise, with Charles Cook," but they, too, like the State's pleading they **[**1268]** supported, remained silent about Farr. *Ibid.*

In February and July 1993 orders, the state postconviction court rejected Banks's claims. App. to Pet. for Cert. E1-E10, G1-G7. The court found that "there was no agreement between the State and the witness Charles Cook," but made no findings concerning Farr. *Id.*, at G2. In a January 10, 1996, one-page *per curiam* order, the Texas Court of Criminal Appeals upheld the lower court's disposition of Banks's motion. *Id.*, at D1.

[3B] On March 7, 1996, Banks filed the **[****33]** instant petition for a writ of habeas corpus in the United States District Court for the Eastern District of Texas. App. 248. He alleged multiple violations of his federal constitutional rights. App. to Pet. for Cert. C5-C7. Relevant here, Banks reasserted that the State had withheld material exculpatory evidence **[*684]** "reveal[ing] Robert Farr as a police informant and Mr. Banks' arrest as a set-up." App. 260, P 152 (internal quotation marks omitted). Banks also asserted that the State had concealed "Cook's enormous incentive to testify in a manner favorable to the [prosecution]." *Id.*, at 260, P 153; App. to Pet. for Cert. C6-C7. [7] In June 1998, Banks moved for discovery and an evidentiary hearing to gain information from the State on the roles played and trial testimony provided by Farr and Cook. App. 262-266, 282-283, 286. The superintending Magistrate Judge allowed limited discovery regarding Cook, but found insufficient justification for inquiries concerning Farr. *Id.*, at 294-295.

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[5] *Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, held 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, irrespective of the good faith or bad faith of the prosecution."

[6] Banks also alleged ineffective assistance of counsel at both the guilt and penalty phases; insufficient evidence on the second penalty-phase special issue (Banks's propensity to commit violent criminal acts); and the exclusion of minority jurors in violation of *Swain v. Alabama, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965)*. App. to Pet. for Cert. C5-C7. Banks filed two further state postconviction motions; both were denied. Brief for Respondent 6-7, nn 6 and 7 (citing *Ex parte Banks*, No. 13568-03 (Tex Crim App 1993) *(per curiam)*, and *Ex parte Banks*, No. 13568-06 (Tex Crim App), cert denied, ***538 US 990, 538 U.S. 990, 155 L. Ed. 2d 688, 123 S. Ct. 1810(2003))***.

[7] We hereinafter refer to these claims as the Farr *Brady* and Cook *Brady* claims respectively. See *supra, at ____, n 5, 157 L. Ed. 2d, at 1184*.

[**34]** Banks renewed his discovery and evidentiary hearing requests in February 1999. *Id.*, at 2, 300-331. This time, he proffered affidavits from both Farr and Cook to back up his claims that, as to each of these two key witnesses, the prosecution had wrongly withheld crucial exculpatory and impeaching evidence. *Id.*, at 322-331. Farr's affidavit affirmed that Farr had "set Delma up" by proposing the drive to Dallas and informing Deputy Sheriff Huff of the trip. *Id.*, at 329, P 8, 442-443, P 8; *supra, at ____, 157 L. Ed. 2d, at 1182*. Accounting for his unavailability earlier, Farr stated that less than a year after the Banks trial, he had left Texarkana, first for Oklahoma, then for California, because his police-informant work endangered his life. App. 330-331, 444; Pet. for Cert. 27, n 12. Cook recalled that in preparation for his Banks trial testimony, he had participated in "three or four . . . practice sessions" at which 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." App. 325, PP 10-11.

On March 4, 1999, the Magistrate Judge issued an order establishing issues for an evidentiary hearing, *id.*, at 340, **[****35]** 346, at which she would consider Banks's claims that the State had withheld "crucial exculpatory **[***1186]** and impeaching evidence" **[*685]** concerning "two of the [S]tate's essential witnesses, Charles Cook and Robert Farr," *id.*, at 340, 345 (internal quotation marks omitted). In anticipation of the hearing, the Magistrate Judge ordered disclosure of the Bowie County District Attorney's files. Brief for Petitioner 37-38; Tr. of June 7-8, 1999, Federal Evidentiary Hearing (ED Tex), p 30 (hereinafter Federal Evidentiary Hearing).

One item lodged in the District Attorney's files, turned over to Banks pursuant to the Magistrate Judge's disclosure order, was a 74-page transcript of a Cook interrogation. **[**1269]** App. to Pet. for Cert. A10. The interrogation, conducted by Bowie County law enforcement officials and prosecutors, occurred in September 1980, shortly before the Banks trial. *Ibid.* The transcript revealed that the State's representatives had closely rehearsed Cook's testimony. In particular, the officials told Cook how to reconcile his testimony with affidavits to which he had earlier subscribed recounting Banks's visits to Dallas. See, *e.g.*, Joint Lodging Material 24 ("Your [April 1980] statement **[****36]** is obviously screwed up."); *id.*, at 26 ("[T]he way this statement should read is that . . . ."); *id.*, at 32 ("[L]et me tell you how this is going to work."); *id.*, at 36 ("That's not in your [earlier] statement."). Although the transcript did not bear on Banks's claim that the prosecution had a deal with Cook, it provided compelling evidence that Cook's testimony had been tutored by Banks's prosecutors. Without objection at the hearing, the Magistrate Judge admitted the September 1980 transcript into evidence. Brief for Petitioner 39; Federal Evidentiary Hearing 75-76.

Testifying at the evidentiary hearing, Deputy Sheriff Huff acknowledged, for the first time, that Farr was an informant and that he had been paid $200 for his involvement in the case. App. to Pet. for Cert. C43. As to Cook, a Banks trial prosecutor testified, in line with the State's consistent position, that no deal had been offered to gain Cook's trial testimony. *Id.*, at C45; Federal Evidentiary Hearing 52-53. **[*686]** Defense counsel questioned the prosecutor about the September 1980 transcript, calling attention to discrepancies between the transcript and Cook's statements at trial. *Id.*, at 65-68. In a **[****37]** posthearing brief and again in proposed findings of fact and conclusions of law, Banks emphasized the suppression of the September 1980 transcript, noting the prosecution's obligation to disclose material, exculpatory evidence, and the assurance in this case that Banks would receive "all [the] discovery to which [Banks was] entitled." App. 360-361, and n 1, 378-379 (internal quotation marks omitted); *supra, at ____, 157 L. Ed. 2d, at 1181*.

In a May 11, 2000, report and recommendation, the Magistrate Judge recommended a writ of habeas corpus with respect to Banks's death sentence, but not his conviction. App. to Pet. for Cert. C54. "[T]he State's failure to disclose Farr's informant status, coupled with trial counsel's dismal performance during the punishment phase," the Magistrate Judge concluded, "undermined the reliability of the jury's verdict regarding punishment." *Id.*, at C44. Finding no convincing evidence of a deal between the State and Cook, however, she recommended that the guilt-phase verdict remain undisturbed. *Id.*, at C46.

[*1187]** Banks moved to alter or amend the Magistrate Judge's report on the ground that it left unresolved a fully aired question, *i.e.*, whether Banks's rights were **[****38]** violated by the State's failure to disclose to the defense the prosecution's eve-of-trial interrogation of Cook. App. 398. That interrogation, Banks observed, could not be reconciled with Cook's insistence at trial that he had talked to no one about his testimony. *Id.*, at 400, n 17; see *supra, at ____, 157 L. Ed. 2d, at 1181*.

The District Court adopted the Magistrate Judge's report and denied Banks's motion to amend the report. App. to Pet. for Cert. B6; App. 421-424. Concerning the Cook *Brady* transcript-suppression claim, the District Court recognized that Banks had filed his federal petition in 1996, three years before he became aware of the September 1980 **[*687]** transcript. App. 422-423. When the transcript surfaced in response to the Magistrate Judge's 1999 disclosure order, Banks raised that newly discovered, long withheld document in his **[**1270]** proposed findings of fact and conclusions of law and, again, in his objections to the Magistrate Judge's report. *Id.*, at 423. The District Court concluded, however, that Banks had not properly pleaded a *Brady* claim predicated on the withheld Cook rehearsal transcript. App. 422. When that *Brady* claim came to light, the District Court reasoned, Banks should **[****39]** have moved to amend or supplement his 1996 federal habeas petition specifically to include the 1999 discovery as a basis for relief. App. 423. Banks urged that a *Brady* claim based on the September 1980 transcript had been aired by implied consent; under *Federal Rule of Civil Procedure 15(b)*, he contended, the claim should have been treated as if raised in the pleadings. App. 433. [8] Banks sought, and the District Court denied, a certificate of appealability on this question. *Id.*, at 433, 436.

[**40]** [3C] In an August 20, 2003, unpublished *per curiam* opinion, the Court of Appeals for the Fifth Circuit reversed the judgment of the District Court to the extent that it granted relief on the Farr *Brady* claim and denied a certificate of appealability on the Cook *Brady* claim. App. to Pet. for Cert. A2, Judgt. order reported at *48 Fed. Appx. 104 (2002)*. [9] The **[*688]** Court of Appeals observed that in his 1992 state-court postconviction application, Banks had not endeavored to develop the facts underpinning the Farr *Brady* claim. App. to Pet. for Cert. A19-A20. For that reason, the court held, the evidentiary proceeding ordered by the Magistrate Judge was unwarranted. *Ibid.*The Court of Appeals expressed no doubt that the prosecution had suppressed, prior to the federal habeas proceeding, Farr's informant status **[***1188]** and his part in the fateful trip to Dallas. But Banks was not appropriately diligent in pursuing

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[8] ***Federal Rule of Civil Procedure 15(b)*** provides: "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. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time . . . ." *Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts* provides that the Federal Rules of Civil Procedure apply "to the extent that they are not inconsistent with [habeas] rules."

[9] [3D] The Fifth Circuit noted correctly that under *Lindh v. Murphy, 521 U.S. 320, 336-337, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997)*, the standards of the ***Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214***, do not apply to Banks's petition. See App. to Pet. for Cert. A14-A15.

his state-court application, the Court of Appeals maintained. In the Fifth Circuit's view, Banks should have at that time attempted to locate Farr and question him; similarly, he should have asked to interview Deputy Sheriff Huff and other officers involved in investigating **[****41]** the crime. *Id.*, at A19, A22. If such efforts had proved unavailing, the Court of Appeals suggested, Banks might have applied to the state court for assistance. *Id.*, at A19. Banks's lack of diligence in pursuing his 1992 state-court plea, the Court of Appeals concluded, rendered the evidence uncovered in the federal habeas proceeding procedurally barred. *Id.*, at A22-A23.

In any event, the Fifth Circuit further concluded, Farr's status as an informant was not "materia[l]" for *Brady* purposes. App. to Pet. for Cert. A32-A33. Banks had impeached Farr at trial by bringing out that he had been a police informant in Arkansas, and an unreliable one at that. *Id.*, at A28, A32-A33; *supra, at ____, 157 L. Ed. 2d, at 1183*. Moreover, the Court of Appeals **[****42]** said, other witnesses had corroborated much of Farr's testimony against Banks. App. to Pet. for Cert. A32. Notably, Banks himself had acknowledged his willingness to get a gun **[**1271]** for Farr's use in robberies. *Ibid.* In addition, the Fifth Circuit observed, the Magistrate Judge had relied on the cumulative effect of *Brady* error and the ineffectiveness of Banks's counsel at the penalty phase. App. to Pet. for Cert. A44. Banks himself, however, had not urged that position; he had argued *Brady* and ineffective assistance of **[*689]** counsel discretely, not cumulatively. App. to Pet. for Cert. A46-A47. Finally, in accord with the District Court, the Court of Appeals apparently regarded *Rule 15(b)* as inapplicable in habeas proceedings. App. to Pet. for Cert. A51-A52. The Fifth Circuit accordingly denied a certificate of appealability on the Cook *Brady* transcript-suppression claim. App. to Pet. for Cert. A52, A78.

[1C] [2C] With an execution date set for March 12, 2003, Banks applied to this Court for a writ of certiorari, presenting four issues: the tenability of his Farr *Brady* claim; a penalty-phase ineffective-assistance-of-counsel claim; the question whether, as to the Cook *Brady* transcript-suppression **[****43]** claim, a certificate of appealability was wrongly denied; and a claim of improper exclusion of minority jurors in violation of *Swain v. Alabama, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965)*. Pet. for Cert. 23-24. We stayed Banks's execution on March 12, 2003, and, on April 21, 2003, granted his petition on all questions other than his *Swain* claim. *538 U.S. 977, 155 L. Ed. 2d 665, 123 S. Ct. 1784 (2003)*. We now reverse the Court of Appeals' judgment dismissing Banks's Farr *Brady* claim and that Court's denial of a certificate of appealability on his Cook *Brady* claim. [10]

II

[1E] [2D] [3E] We note, initially, that Banks's *Brady* claims arose under the **[***1189]** regime in place prior to the **[****44]** Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat 1214. Turning to the tenability of those claims, we consider first Banks's Farr *Brady* claim as it trains on his death sentence, see App. to Pet. for Cert. B6 (District Court granted habeas solely with respect to the capital sentence), and next, Banks's Cook *Brady* claim.

[*690] A

[1F] [5] To pursue habeas corpus relief in federal court, Banks first had to exhaust "the remedies available in the courts of the State." *28 U.S.C. § 2254(b) [28 USCS § 2254(b)] (1994 ed.)*; see *Rose v.*

[10] [1D] Our disposition of the Farr *Brady* claim, and our conclusion that a writ of habeas corpus should issue with respect to the death sentence, render it unnecessary to address Banks's claim of ineffective assistance of counsel at the penalty phase; any relief he could obtain on that claim would be cumulative.

Lundy, 455 U.S. 509, 520, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982). Banks alleged in his January 1992 state-court application for a writ of habeas corpus that the prosecution knowingly failed to turn over exculpatory evidence involving Farr in violation of Banks's due process rights. App. 180. Banks thus satisfied the exhaustion requirement as to the legal ground for his Farr *Brady* claim. [11]

[**45]** [1G] [4B] [6A] [7A] **[**1272]** In state postconviction court, however, Banks failed to produce evidence establishing that Farr had served as a police informant in this case. As support for his Farr *Brady* claim, Banks appended to his state-court application only Demetra Jefferson's hardly probative statement that Farr "was well-connected to law enforcement people." App. 195, P 7; see *supra, at ____, 157 L. Ed. 2d, at 1184*. In the federal habeas forum, therefore, it was incumbent on Banks to show that he was not barred, by reason of the anterior state proceedings, from producing evidence to substantiate his Farr *Brady* claim. Banks "[would be] entitled to an evidentiary hearing [in federal court] if he [could] show cause for his failure to develop the **[*691]** facts in state-court proceedings and actual prejudice resulting from that failure." *Keeney v. Tamayo-Reyes, 504 U.S. 1, 11, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992)*.

Brady, we reiterate, held 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, irrespective of the good faith or bad faith of the prosecution." *373 U.S. 83 at 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194*. We set out in *Strickler v. Greene, 527 U.S. 263, 281-282, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999),* **[****46]** the three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully **[***1190]** or inadvertently; and prejudice must have ensued." *527 U.S. 263 at 281-282, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. "[C]ause and prejudice" in this case "parallel two of the three components of the alleged *Brady* violation itself." *Id., 527 U.S. at 282, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material" for *Brady* purposes. *527 U.S. 263 at 282, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. As to the first *Brady* component (evidence favorable to the accused), beyond genuine debate, the suppressed evidence relevant here, Farr's paid informant status, qualifies as evidence advantageous to Banks. See **[****47]** App. to Pet. for Cert. A26 (Court of Appeals' recognition that "Farr's being a paid informant would certainly be favorable to Banks in attacking Farr's testimony"). Thus, if Banks succeeds in demonstrating "cause and prejudice," he will at the same time succeed in establishing the elements of his Farr *Brady* death penalty due process claim.

[*692] B

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[11] Banks's federal habeas petition, the Court of Appeals said, stated a claim, only under *Brady*, that material exculpatory or impeachment evidence had been suppressed, not a claim under *Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)*, and *Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)*, that the prosecution had failed to correct Farr's false testimony. App. to Pet. for Cert. A29-A32; App. 259-260. In its view, the Court of Appeals explained, a *Brady* claim is distinct from a *Giglio* claim, App. to Pet. for Cert. A30; thus the two did not fit under one umbrella. But cf. *United States v. Bagley, 473 U.S. 667, 679-680, n. 8, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*; *United States v. Agurs, 427 U.S. 97, 103-104, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*. On brief, the parties debate the issue. Brief for Petitioner 23-25; Brief for Respondent 21-22, n 21. Because we conclude that Banks qualifies for relief under *Brady*, we need not decide whether a *Giglio* claim, to warrant adjudication, must be separately pleaded.

[6B] Our determination as to "cause" for Banks's failure to develop the facts in state-court proceedings is informed by *Strickler*. [12] In that case, Virginia prosecutors told the petitioner, prior to trial, that "the prosecutor's files were open to the petitioner's counsel," thus "there was no need for a formal *[Brady]* motion." *527 U.S. 263 at 276, n. 14, 144 L. Ed. 2d 286, 119 S. Ct. 1936* (quoting **[**1273]** App. in *Strickler* v *Greene*, O. T. 1998, No. 98-5864, pp 212-213 (brackets in original)). The prosecution file given to the *Strickler* petitioner, however, did not include several documents prepared by an "importan[t]" prosecution witness, recounting the witness' initial difficulty recalling the events to which she testified at the petitioner's trial. *527 U.S. at 273-275, 290, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. Those absent-from-the-file documents could have been used to impeach **[****48]** the witness. *Id., 527 U.S. 263 at 273, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. In state-court postconviction proceedings, the *Strickler* petitioner had unsuccessfully urged ineffective assistance of trial counsel based on counsel's failure to move, pretrial, for *Brady* material. Answering that plea, the State asserted that a *Brady* motion would have been superfluous, for the prosecution had maintained an open file policy pursuant to which it had disclosed all *Brady* material. *527 U.S. 263 at 276, n. 14, 278, 144 L. Ed. 2d 286, 119 S. Ct. 1936*.

This Court determined that in the federal habeas proceedings, the *Strickler* petitioner had shown cause for his failure to raise a *Brady* claim in state court. *527 U.S. 263 at 289, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. Three factors accounted for that determination:

> "(a) the prosecution withheld exculpatory evidence; **[****49]** (b) petitioner reasonably relied on the prosecution's **[***1191]** open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy by asserting during state **[*693]** habeas proceedings that petitioner had already received everything known to the government." *Ibid.* (internal quotation marks and footnote omitted). [13]

This case is congruent with *Strickler* in all three respects. First, the State knew of, but kept back, Farr's arrangement with Deputy Sheriff Huff. App. to Pet. for Cert. C43; Tr. of Oral Arg. 33; cf. *Kyles v. Whitley, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)* (prosecutors are responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Second, the State **[****50]** asserted, on the eve of trial, that it would disclose all *Brady* material. App. 361, n 1; see *supra, at ____, 157 L. Ed. 2d, at 1181*. As *Strickler* instructs, Banks cannot be faulted for relying on that representation. See *527 U.S. 263 at 283-284, 144 L. Ed. 2d 286, 119 S. Ct. 1936* (an "open file policy" is one factor that "explain[s] why trial counsel did not advance [a *Brady*] claim").

Third, in his January 1992 state habeas application, Banks asserted that Farr was a police informant and Banks's arrest, "a set-up." App. 180, P 114 (internal quotation marks omitted). In its answer, the State denied Banks's assertion. *Id.*, at 234; see *supra, at ____, 157 L. Ed. 2d, at 1184*. The State thereby "confirmed" Banks's reliance on the prosecution's representation that it had fully disclosed all relevant information its file contained. *527 U.S. 263 at 289, 144 L. Ed. 2d 286, 119 S. Ct. 1936*; see *id., 527 U.S. 263 at 284, 144 L. Ed. 2d 286, 119 S. Ct. 1936* (state habeas counsel, as well as trial counsel, could

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[12] Surprisingly, the Court of Appeals' *per curiam* opinion did not refer to *Strickler v. Greene, 527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999)*, the controlling precedent on the issue of "cause." App. to Pet. for Cert. A15-A33.

[13] We left open the question "whether any one or two of these factors would be sufficient to constitute cause." *Strickler, 527 U.S. 263 at 289, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. We need not decide that question today.

reasonably rely on the State's representations). In short, because the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in full with its *Brady* disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, **[****51]** Farr's connections to Deputy Sheriff Huff.

[*694] [6C] [8A] On the question of "cause," moreover, Banks's case is stronger than was the petitioner's in *Strickler* in a notable respect. As a prosecution witness in the guilt and **[**1274]** penalty phases of Banks's trial, Farr repeatedly misrepresented his dealings with police; each time Farr responded untruthfully, the prosecution allowed his testimony to stand uncorrected. See *supra, at ____ - ____, 157 L. Ed. 2d, at 1181-1183*. Farr denied taking money from or being promised anything by police officers, App. 37; he twice denied speaking with police officers, *id.*, at 38, and twice denied informing Deputy Sheriff Huff about Banks's trip to Dallas, *id.*, at 109. It has long been established that the prosecution's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States, 405 U.S. 150, 153, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)* (quoting *Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935)* *(per curiam)*). If it was reasonable for Banks to rely on the prosecution's **[***1192]** full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop **[****52]** to improper litigation conduct to advance prospects for gaining a conviction. See *Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)*; *Strickler, 527 U.S. 263 at 284, 144 L. Ed. 2d 286 119 S. Ct. 1936*. [14]

[**53]** [6E] The State presents three main arguments for distinguishing *Strickler* on the issue of "cause," two of them endorsed **[*695]** by the Court of Appeals. Brief for Respondent 15-20; App. to Pet. for Cert. A19, A22-A23; see *supra, at ____, 157 L. Ed. 2d, at 1187-1188*. We conclude that none of these arguments accounts adequately for the State's concealment and misrepresentation regarding Farr's link to Deputy Sheriff Huff. The State first suggests that Banks's failure, during state postconviction proceedings, to "attempt to locate Farr and ascertain his true status," or to "interview the investigating officers, such as Deputy Huff, to ascertain Farr's status," undermines a finding of cause; the Fifth Circuit agreed. App. to Pet. for Cert. A22; Brief for Respondent 18-20. In the State's view, "[t]he question [of cause] revolves around Banks's conduct," particularly his lack of appropriate diligence in pursuing the Farr *Brady* claim before resorting to federal court. Brief for Respondent 14. [15]

[**54]** [4C] [6F] We rejected a similar argument in *Strickler* There, the State contended that examination of a witness' trial testimony, alongside a letter the witness published in a local newspaper, should have alerted the petitioner to the existence of undisclosed interviews of the witness by the police.

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[14] [6D] [8B] In addition, Banks could have expected disclosure of Farr's informant status as a matter of state law if Farr in fact acted in that capacity. Under Texas law applicable at the time of Banks's trial, the State had an obligation to disclose the identity of an informant when "the informant . . . was present at the time of the offense or arrest . . . [or] was otherwise shown to be a material witness to the transaction . . . ." ***Kemner v. State, 589 S.W.2d 403, 408 (Tex. Crim. App. 1979)*** (quoting *Carmouche v. State, 540 S.W.2d 701, 703 (Tex. Crim. App. 1976)*); cf. *Tex. Rule Evid. 508(c)(1) (2003)* ("No privilege exists [for the identity of an informer] . . . if the informer appears as a witness for the public entity."). Farr was present when Banks was arrested. App. 443, P 10. Further, as the prosecution noted in its penalty-phase summation, Farr's testimony was not only material, but "of the utmost significance." *Id.*, at 146.

[15] The Court of Appeals also stated that, because "the State did not respond" to Banks's "Farr-was-an-informant contention" in its answer to the January 1992 state habeas application, Banks should have "further investigate[d]." App. to Pet. for Cert. A22. The Fifth Circuit's error in this regard is apparent. As earlier recounted, see *supra, at ____, 157 L. Ed. 2d, at 1191-1192*, the State's answer indeed did deny Banks's allegation.

527 U.S. 263 at 284, 144 L. Ed. 2d 286, 119 S. Ct. 1936. We found this contention insubstantial. In light of the State's open file policy, we noted, "it is especially unlikely that counsel **[**1275]** would have suspected that additional impeaching evidence was being withheld." *Id., 527 U.S. 263 at 285, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial **[*696]** misstep may have occurred." *527 U.S. 263 at 286-287, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. The "cause" inquiry, we have also observed, turns on events or circumstances "external to the defense." ***[***1193]*** *Amadeo v. Zant, 486 U.S. 214, 222, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988)* (quoting *Murray v. Carrier, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986))*. **[****55]**

[4D] [6G] [9] [10] The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," Tr. of Oral Arg. 35, so long as the "potential existence" of a prosecutorial misconduct claim might have been detected, *id.*, at 36. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley, 520 U.S. 899, 909, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997)* (quoting *United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 71 L. Ed. 131, 47 S. Ct. 1 (1926))*. We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler, 527 U.S. 263 at 281, 144 L. Ed. 2d 286, 119 S. Ct. 1936*; accord *Kyles, 514 U.S. 419 at 439-440, 131 L. Ed. 2d 490, 115 S. Ct. 1555*; *United States v. Bagley, 473 U.S. 667, 675, n. 6, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*; *Berger, 295 U.S. 78 at 88, 79 L. Ed. 1314, 55 S. Ct. 629*. See also *Olmstead v. United States, 277 U.S. 438, 484, 72 L. Ed. 944, 48 S. Ct. 564 (1928)* (Brandeis, J., dissenting). Courts, litigants, and juries properly **[****56]** anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." *Berger, 295 U.S. 78 at 88, 79 L. Ed. 1314, 55 S. Ct. 629*. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. See *Kyles, 514 U.S. 419 at 440, 131 L. Ed. 2d 490, 115 S. Ct. 1555* ("The prudence of the careful prosecutor should not . . . be discouraged.").

[6H] The State's second argument is a variant of the first. Specifically, the State argues, and the Court of Appeals accepted, that Banks cannot show cause because in the 1992 state-court postconviction proceedings, he failed to move for investigative assistance enabling him to inquire into Farr's **[*697]** police connections, connections he then alleged, but failed to prove. Brief for Respondent 15-16; App. to Pet. for Cert. A19; see 1977 Tex. Gen. Laws ch. 789, § 1 (as amended) (instructing postconviction court to "designat[e] the issues of fact to be resolved," and giving the court discretion to "order affidavits, depositions, interrogatories, and hearings"). Armed in 1992 only with Demetra Jefferson's declaration that Farr was "well-connected to law enforcement people," **[****57]** App. 195, P 7; see *supra, at ____, 157 L. Ed. 2d, at 1184*, Banks had little to proffer in support of a request for assistance from the state postconviction court. We assign no overriding significance to Banks's failure to invoke state-court assistance to which he had no clear entitlement. Cf. *Strickler, 527 U.S. 263 at 286, 144 L. Ed. 2d 286, 119*

S. Ct. 1936 ("Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts **[**1276]** support them."). [16]

Finally, relying on *Roviaro v. [***1194] United States, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957)*, the State asserts **[****58]** that "disclosure [of an informant's identity] is not automatic," and, "[c]onsequently, it was Banks's duty to move for disclosure of otherwise privileged information." Brief for Respondent 17-18, n 15. We need not linger over this argument. The issue of evidentiary law in *Roviaro* was whether (or when) the Government is obliged to reveal the identity of an undercover informer the Government does *not* call as a trial witness. *353 U.S. 53 at 55-56, 1 L. Ed. 2d 639, 77 S. Ct. 623*. The Court there stated that no privilege obtains "[w]here the disclosure of an informer's identify, or of the contents of his communication, is relevant and helpful to the defense of an accused." *Id., 353 U.S. 53 at 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623*. Accordingly, even though the informer in *Roviaro* did not testify, we held that disclosure **[*698]** of his identity was necessary because he could have "amplif[ied] or contradict[ed] the testimony of government witnesses." *Id., 353 U.S. 53 at 64, 1 L. Ed. 2d 639, 77 S. Ct. 623*.

Here, the State elected to call Farr as a witness. Indeed, he was a key witness at both guilt and punishment phases of Banks's capital trial. Farr's status as a paid informant was unquestionably "relevant"; similarly beyond doubt, disclosure of Farr's status would **[****59]** have been "helpful to [Banks's] defense." *Id., 353 U.S. 53 at 60-61, 1 L. Ed 2d 639, 77 S. Ct. 623*. Nothing in *Roviaro*, or any other decision of this Court, suggests that the State can examine an informant at trial, withholding acknowledgment of his informant status in the hope that defendant will not catch on, so will make no disclosure motion.

[1H] [6I] [11] In summary, Banks's prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. App. 234; *supra, at ____, 157 L. Ed. 2d, at 1184-1185*. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim.

C

[12] Unless suppressed evidence is "material for *Brady* purposes, [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default." *Strickler, 527 U.S. 263 at 282, 144 L. Ed. 286, 119 S. Ct. 1936*. Our touchstone on materiality is *Kyles v. Whitley, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. *Kyles* instructed that **[****60]** 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." *514 U.S. 419 at 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555*. See also *id., 514 U.S. 419 at 434-435, 131 L. Ed. 2d 490, 115 S. Ct. 1555* ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left **[*699]** to convict."); accord *Strickler, 527 U.S. 263 [***1195] at 290, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. In short, Banks must show a "reasonable probability of a different result." *Kyles, 514*

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[16] Furthermore, rather than conceding the need for factual development of the Farr *Brady* claim in state postconviction court, the State asserted that Banks's prosecutorial misconduct claims were meritless and procedurally barred in that tribunal. App. 234, 240. Having taken that position in 1992, the State can hardly fault Banks now for failing earlier to request assistance the State certainly would have opposed.

U.S. 419 at 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (internal quotation marks omitted) (citing *Bagley, 473 U.S. 667 at 678, 87 L. Ed. 2d 481, 105 S. Ct. 3375*).

[7B] **[**1277]** As the State acknowledged at oral argument, Farr was "paid for a critical role in the scenario that led to the indictment." Tr. of Oral Arg. 34. Farr's declaration, presented to the federal habeas court, asserts that Farr, not Banks, initiated the proposal to obtain a gun to facilitate the commission of robberies. See App. 442-443, PP 7-8; *supra, at ____, 157 L. Ed. 2d, at 1182*. Had Farr not instigated, upon Deputy Sheriff Huff's request, the Dallas excursion to fetch Banks's gun, the prosecution would have had **[****61]** slim, if any, evidence that Banks planned to "continue" committing violent acts. App. 147. [17] **[****62]** Farr's admission of his instigating role, moreover, would have dampened the prosecution's zeal in urging the jury to bear in mind Banks's "planning and acquisition of a gun to commit robbery," or Banks's "planned violence." *Ibid.;* see Tr. of Oral Arg. 50. [18]

[**63]** **[*700]** Because Banks had no criminal record, Farr's testimony about Banks's propensity to commit violent acts was crucial to the prosecution. Without that testimony, the State could not have underscored, as it did three times in the penalty phase, that Banks would use the gun fetched in Dallas to "take care" of trouble arising during the robberies. App. 140, 144, 146-147; see *supra, at ____, 157 L. Ed. 2d, at 1183-1184*. 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." Brief for Respondent 22-25. **[***1196]** The prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony. What Farr told the jury, the prosecution urged, was "of the utmost significance" to show "[Banks] is a danger to friends and strangers, alike." App. 146.

In *Strickler, 527 U.S. 263 at 289, 144 L. Ed. 2d 286, 119 S. Ct. 1936*, although the Court found "cause" for **[**1278]** the petitioner's procedural default of a *Brady* claim, it found the requisite "prejudice" absent, *527 U.S. 263 at 292-296, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. Regarding "prejudice," the contrast between *Strickler* and Banks's case is marked. **[****64]** The witness whose impeachment was at issue in *Strickler* gave testimony that was in the main cumulative, *id., 527 U.S. 263 at 292, 144 L. Ed. 2d 286, 119 S. Ct.*

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[17] It bears reiteration here that Banks had no criminal record, App. 255, P 115, "no history of violence or alcohol abuse," nothing indicative of "[any] particular risk of future violence," App. to Pet. for Cert. C23.

It also appears that the remaining prosecution witness in the penalty phase, Vetrano Jefferson, had omitted crucial details from his 1980 testimony. In his September 1980 testimony, Vetrano Jefferson said that Banks had struck him with a pistol in early April 1980. App. 104-105; *supra, at ____, 157 L. Ed. 2d, at 1182*. In the federal habeas proceeding, Vetrano Jefferson elaborated that he, not Banks, had initiated that incident by making "disrespectful comments" about Demetra Jefferson, Banks's girlfriend. App. 337, P 4. Vetrano Jefferson recounted that he "grew angry" when Banks objected to the comments, and only then did a fight ensue, in the course of which Banks struck Vetrano Jefferson. *Ibid.*

[18] [7C] On brief and at oral argument, the State suggests that "the damaging evidence was Banks's willing abetment of Farr's commission of a violent crime, *not* Banks's own intent to commit such an act." Brief for Respondent 25 (emphasis in original); Tr. of Oral Arg. 50. See also *post, at ____ - ____, 157 L. Ed. 2d, at 1200-1201* (Thomas, J., concurring in part and dissenting in part). In the penalty-phase summation, however, the prosecution highlighted Banks's propensity to commit violent criminal acts, see App. 140, 144, 146-147, not his facilitation of others' criminal acts, see *id.*, at 141 ("[Banks] says, 'I thought I would give [the gun] to them so they could do the robberies.' I don't believe you [the jury] believe that."); *id.*, at 143 ("a man doesn't travel two hundred miles . . . to supply [another] person with a weapon"). The special issue the prosecution addressed focused on what acts Banks would commit, not what harms he might facilitate: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Delma Banks, Jr., would *commit* criminal acts of violence that would constitute a continuing threat to society?" *Ibid.* (internal quotation marks omitted and emphasis added). It is therefore unsurprising that the prosecution did not rest on Banks's facilitation of others' criminal acts in urging the jury to answer the second special issue (propensity to commit violent criminal acts) in the affirmative.

1936, and hardly significant **[*701]** to one of the "two predicates for capital murder: [armed] robbery," id., 527 U.S. 263 at 294, 144 L. Ed. 2d 286, 119 S. Ct. 1936. Other evidence in the record, the Court found, provided strong support for the conviction even if the witness' testimony had been excluded entirely: Unlike the Banks prosecution, in *Strickler*, "considerable forensic and other physical evidence link[ed] [the defendant] to the crime" and supported the capital murder conviction. Id., 527 U.S. 263 at 293, 144 L. Ed. 2d 286, 119 S. Ct. 1936. Most tellingly, the witness' testimony in *Strickler* "did not relate to [the petitioner's] eligibility for the death sentence"; it "was not relied upon by the prosecution at all during its closing argument at the penalty phase." Id., 527 U.S. 263 at 295, 144 L. Ed. 2d 286, 119 S. Ct. 1936. In contrast, Farr's testimony was the centerpiece of Banks's prosecution's penalty-phase case.

Farr's trial testimony, critical at the penalty phase, was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. See supra, at ____, ____, 157 L. Ed. 2d, at 1182, 1185. In the guilt **[****65]** phase of Banks's trial, Farr had acknowledged his narcotics use. App. 36. In the penalty phase, Banks's counsel asked Farr if, "drawn up tight over" previous drug-related activity, he would "testify to anything anybody want[ed] to hear"; Farr denied this. *Id.*, at 110; supra, at ____, 157 L. Ed. 2d, at 1183. Farr's declaration supporting Banks's federal habeas petition, however, vividly contradicts that denial: "I assumed that if I did not help [Huff] . . . he would have me arrested for drug charges." App. 442, P 6. Had jurors known of Farr's continuing interest in obtaining Deputy Sheriff Huff's favor, in addition to his receipt of funds to "set [Banks] up," *id.*, at 442, P 7, 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 the testimony of informants. This Court has long recognized the "serious questions of credibility" informers pose. On Lee v. United States, 343 U.S. 747, 757, 96 L. Ed. 1270, 72 S. Ct. 967 (1952). See also Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, **[*702]** 47 Hastings L. J. 1381, 1385 (1996) ("Jurors **[****66]** suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable . . . ."). We have therefore allowed defendants "broad latitude to probe [informants'] credibility **[***1197]** by cross-examination" and have counseled submission of the credibility issue to the jury "with careful instructions." On Lee, 343 U.S. 747 at 757, 96 L. Ed. 1270, 72 S. Ct. 967; accord Hoffa v. United States, 385 U.S. 293, 311-312, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966). See also 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed. 2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony).

The State argues that "Farr was heavily impeached [at trial]," rendering his informant status "merely cumulative." Tr. of Oral Arg. 49; see Brief for Respondent 26-28; post, at ____, n 3, 157 L. Ed. 2d, at 1201. The record suggests otherwise. Neither witness called to impeach Farr gave evidence directly relevant to Farr's part in Banks's trial. App. 124-133; *id.*, at 129 (prosecutor **[**1279]** noted that Kelley lacked "personal **[****67]** knowledge with regard to this case on trial"). The impeaching witnesses, Kelley and Owen, moreover, were themselves impeached, as the prosecution stressed on summation. See *id.*, at 141, 148; supra, at ____ - ____, 157 L. Ed. 2d, at 1183-1184. Further, the prosecution turned to its advantage remaining impeachment evidence concerning Farr's drug use. On summation, the prosecution suggested that Farr's admission "that he used dope, that he shot," demonstrated that Farr had been "open and honest with [the jury] in every way." App. 140; supra, at ____, 157 L. Ed. 2d, at 1184.

[1I] [7D] At least as to the penalty phase, in sum, one can 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. See *Kyles, 514 U.S. 419 at 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555* ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in **[*703]** its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."). On the record before us, one could not plausibly deny the existence of the requisite "reasonable probability of a different result" had the suppressed information been disclosed to the **[****68]** defense. *Ibid.* (internal quotation marks omitted) (citing *Bagley, 473 U.S. 667 at 678, 87 L. Ed. 2d 481, 105 S. Ct. 3375*); *Strickler, 527 U.S. 263 at 290, 144 L. Ed. 2d 286, 119 S. Ct. 1936*. Accordingly, as to the suppression of Farr's informant status and its bearing on "the reliability of the jury's verdict regarding punishment," App. to Pet. for Cert. C44; *supra, at ____, 157 L. Ed. 2d, at 1186*, all three elements of a *Brady* claim are satisfied.

III

[2E] Both the District Court and the Court of Appeals denied Banks a certificate of appealability with regard to his Cook *Brady* claim, which rested on the prosecution's suppression of the September 1980 Cook interrogation transcript. App. 422-423; App. to Pet. for Cert. A52, A78; *supra, at ____ - ____, ____, 157 L. Ed. 2d, at 1186-1188*. See also Joint Lodging Material 1-36. The District Court and the Fifth Circuit concluded that Banks had not properly pleaded this claim because he had not sought leave to amend his petition, but had stated the claim only in other submissions, *i.e.*, in his **[***1198]** proposed findings of fact and conclusions of law, and, again, in his objections to the Magistrate Judge's report. App. 422-423, 432-433; App. to Pet. for Cert. A51-A52; *supra, at ____ - ____, ____, 157 L. Ed. 2d, at 1186-1188*. Banks contended, unsuccessfully, that evidence **[****69]** substantiating the Cook *Brady* claim had been aired before the Magistrate Judge; therefore the claim should have been treated as if raised in the pleadings, as *Federal Rule of Civil Procedure 15(b)* instructs. See App. to Pet. for Cert. A51-A52; *supra, at ____, n 8, 157 L. Ed. 2d, at 1187* (setting out text of *Rule 15(b)*). The Fifth Circuit stated its position on this point somewhat obliquely, but appears to have viewed *Rule 15(b)* as inapplicable in habeas proceedings; the State now concedes, however, that the question whether *Rule 15(b)* extends to habeas proceedings is one "jurists of reason would **[*704]** find . . . debatable." Compare App. to Pet. for Cert. A52 (quoting *Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000)*), with Tr. of Oral Arg. 45-46. We conclude that a certificate of appealability should have issued.

We have twice before referenced *Rule 15(b)*'s application in federal habeas proceedings. In *Harris v. Nelson, 394 U.S. 286, 294, n. 5, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969)*, we noted that *Rule 15(b)*'s use in habeas proceedings is "noncontroversial." In *Withrow v. Williams, 507 U.S. 680, 696, 123 L. Ed. 2d 407, 113 S. Ct. 1745* (1993), we similarly assumed **[**1280]** *Rule 15(b)*'s application to habeas petitions. **[****70]** There, however, the District Court had granted a writ of habeas corpus on a claim neither pleaded, considered at "an evidentiary hearing," nor "even argu[ed]" by the parties. *Id., 507 U.S. 680 at 695, 123 L. Ed. 2d 407, 113 S. Ct. 1745*. Given those circumstances, we held that there had been no trial of the claim by implied consent; the respondent warden, we observed, "was manifestly prejudiced by the District Court's failure to afford her an opportunity **[*705]** to present evidence bearing on th[e] claim's resolution." *Id., 507 U.S. 680 at 696, 123 L. Ed. 2d 407, 113 S. Ct. 1745*. Here, in contrast, the issue of the undisclosed Cook interrogation transcript was indeed aired before the Magistrate Judge, and the

transcript itself was admitted into evidence without objection. See *supra, at ____ - ____, 157 L. Ed. 2d, at 1186-1187*. [19]

[**71]** The Court of Appeals found no authority for equating "an evidentiary hearing . . . with a trial" for *Rule 15(b)* purposes. App. to Pet. for Cert. A52. We see no reason why an evidentiary hearing should not qualify so long as the respondent gave "any sort of consent" and had a full and fair "opportunity to present evidence bearing on th[e] claim's resolution." *Withrow, 507 U.S., 680 at 696, 123 L. Ed. 2d 407, 113 S. Ct. 1745*. Nor do we find convincing the Fifth Circuit's view that applying *Rule 15(b)* **[***1199]** in habeas proceedings would undermine the State's exhaustion and procedural default defenses. *Ibid.* Under pre-AEDPA law, there was no inconsistency between *Rule 15(b)* and those defenses. That is doubtless why this Court's pre-AEDPA cases assumed *Rule 15(b)*'s application in habeas proceedings. See *ibid.; Harris, 394 U.S. 286 at 294, n. 5, 22 L. Ed. 2d 281, 89 S. Ct. 1082*. [20] We note in this regard that, while AEDPA forbids a finding that exhaustion has been waived unless the State expressly waives the requirement, *28 U.S.C. § 2254(b)(3) [28 USCS § 2254(b)(3)]*, under pre-AEDPA law, exhaustion and procedural default defenses could be waived based on the State's litigation conduct. See *Gray v. Netherland, 518 U.S. 152, 166, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996)* **[****72]** (failure to raise procedural default in federal habeas court means the defense is lost); *Granberry v. Greer, 481 U.S. 129, 135, 95 L. Ed. 2d 119, 107 S. Ct. 1671 (1987)* ("if a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may . . . be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived").

To obtain a certificate of appealability, a prisoner must "demonstrat[e] 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." *Miller-El v. Cockrell, 537 U.S. 322, 327, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003)*. At least as to the application of *Rule 15(b)*, this case surely fits that description. A certificate of appealability, therefore, should have issued.

* * *

For the reasons stated, the judgment **[****73]** of the United States Court of Appeals for the **[**1281]** Fifth Circuit is reversed, and the **[*706]** case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: THOMAS (In Part)

Dissent by: THOMAS (In Part)

Dissent

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[19] See Federal Evidentiary Hearing 56-73. Examining one of Banks's prosecutors, counsel for Banks twice asked if Cook had been "instructed . . . on how to testify." *Id.*, at 56. See also *id.*, at 63-64 ("Texarkana law enforcement did not instruct Mr. Cook how to testify in this case. Is that your testimony today?"). To show that Cook had been coached, Banks's counsel called attention to discrepancies between portions of the September 1980 transcript and Cook's trial testimony. *Id.*, at 65-68. Concluding his examination, Banks's counsel emphasized the prosecution's duty to disclose the September 1980 transcript once Cook, while on the stand, stated that he had not been coached. *Id.*, at 73-74; App. 59; *supra, at ____, 157 L. Ed. 2d, at 1181*.

[20] Banks's case provides no occasion to consider ***Rule 15(b)***'s application under the AEDPA regime.

Justice **Thomas,** with whom Justice **Scalia** joins, concurring in part and dissenting in part.

I join Part III of the Court's opinion, and respectfully dissent from Part II, which holds that Banks' claim under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, relating to the nondisclosure of evidence that Farr accepted money from a police officer during the course of the investigation, warrants habeas relief. Although I find it to be a very close question, I cannot conclude that the nondisclosure of Farr's informant status was prejudicial under *Kyles v. Whitley, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*, and *Brady*. [1]

[**74]** To demonstrate prejudice, Banks **[***1200]** must show that "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, supra, 514 U.S. 419 at 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555*. The undisclosed material consisted of evidence that "Willie Huff asked [Farr] to help him find [Banks'] gun," and that Huff "gave [Farr] about $200.00 for helping him." App. 442 (Farr Declaration). Banks contends that if Farr's receipt of $200 from Huff had been revealed to the defense, there would have been a "reasonable probability," *Kyles, supra, 514 U.S. 419 at 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555*, that the jury would not have found "beyond a reasonable doubt that there **[*707]** [was] a probability that the defendant, Delma Banks, Jr., would commit criminal acts of violence that would constitute a continuing threat to society." App. 143 (the second special issue presented to the jury) (internal quotation marks omitted).

I do not believe that there is a reasonable probability that the jury would have altered its finding. The jury was presented with the facts of a horrible crime. Banks, after meeting the victim, Richard Whitehead, a 16-year-old boy who had the misfortune of owning a car that Banks wanted, **[****75]** decided "to kill the person for the hell of it" and take his car. *Banks v. State, 643 S.W.2d 129, 131 (Tex. Crim. App. 1982)* (en banc), cert denied, *464 U.S. 904, 78 L. Ed. 2d 244, 104 S. Ct. 259, (1983)*. Banks proceeded to shoot Whitehead three times, twice in the head and once in the upper back. Banks fired one of the shots only 18 to 24 inches away from Whitehead. The jury was thus presented with evidence showing that Banks, apparently on a whim, executed Whitehead simply to get his car.

The jury was also presented with evidence, in the form of Banks' own testimony, that he was willing to abet another individual in obtaining a gun, with the full knowledge that this gun would aid future armed robberies. The colloquy between a prosecuting attorney and Banks makes it clear what Banks thought he was doing:

"Q: You were going to supply him [Farr] your gun so he could do armed robberies?
"A: No, not supply him my gun. A gun.

[1282]** "Q: In other words you didn't care if it was yours or whose, but you were going to be the man who got the gun to do armed robberies. Is that correct?
"A: He was going to do it.

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[1] I do not address the possible application of the standard enunciated in *Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)*, since I agree with the Court of Appeals that the issue was not properly raised below, and since addressing this issue would go beyond the question on which certiorari was granted. See Brief for Petitioner (i) (stating the question presented as whether "the Fifth Circuit commit[ted] legal error in rejecting Banks' *Brady* claim--that the prosecution suppressed material witness impeachment evidence that prejudiced him in the penalty phase of his trial--on the grounds that: . . . the suppressed evidence was immaterial to Banks' death sentence").

"Q: I understand, but you were going to supply him the means and possible death **[****76]** weapon in an armed robbery case. Is that correct?
"A: Yes." App. 137 (cross-examination of Banks).

[*708] Accordingly, the jury was also presented with Banks' willingness to assist others in committing deadly crimes. Indeed, the prosecution referenced this very fact at one point during its closing argument in its attempt to convince the jury that Banks posed a threat to commit violent acts in the future: **[***1201]**

"The testimony of Vetrano Jefferson and Robert Farr is of the utmost significance. Vetrano brought before you the scar on his face, put there by Delma Banks. . . . He also corroborates or supports the testimony of Robert Farr. You don't have to believe just Robert in order to find that Delma went to Dallas to get a pistol so that *somebody could do some robberies.* Marcus Jefferson told you that, too." *Id.*, at 146 (emphasis added). [2]

[**77]** The jury also heard testimony that Banks had violently pistol-whipped and threatened to kill his brother-in-law one week before the murder. Banks now claims that this evidence should be discounted because his trial counsel failed to uncover that the brother-in-law was "responsible for the fight." Brief for Petitioner 33. But even if it is appropriate to mix-and-match the prejudice analysis of the *Brady* claim and the claim under *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)* (rather than to evaluate them independently, as distinct potential constitutional violations), Banks' response was vastly disproportional to his brother-in-law's actions.

In sum, the jury knew that Banks had murdered a 16-year-old on a whim, had violently attacked and threatened a relative shortly before the murder, and was willing to assist another individual in committing armed robberies by providing the "means and possible death weapon" for these robberies. App. 137. Even if the jury were to discredit entirely Farr's testimony that Banks was planning more robberies, [3] in all likelihood the jury still would have found "beyond a reasonable doubt" that there "[was] a probability that **[****78]** [Banks] would commit criminal acts of violence that would constitute a continuing threat to society." *Id.*, at 143. The randomness and wantonness of the murder would perhaps, standing alone, mandate such a finding. **[**1283]** Accordingly, I cannot find that the nondisclosure of the evidence was prejudicial.

[**79]** Because Banks cannot show prejudice, I do not resolve whether he has cause to excuse his failure to present his Farr *Brady* evidence in state court, *Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-12, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992)*. But there are reasons to doubt the Court's conclusion that Banks can show cause. For instance, the Court concludes that "[t]his case is congruent with *Strickler [*v *Greene,*

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[2] Admittedly, the prosecution used more of its closing argument trying to convince the jury to believe **[*709]** Farr's testimony that Banks himself was planning more robberies. See *ante, at ____, n 18, 157 L. Ed. 2d, at 1195*. This fact is one of the reasons I find the materiality question to be a close one.

[3] It is quite possible that the jury already discredited this aspect of Farr's testimony. The jury knew, from the testimony of witnesses James Kelley and Officer Gary Owen, that Farr was generally dishonest, as it heard how he had lied about getting into an altercation with a doctor over false prescriptions, and had lied about his status as an informant for an Arkansas officer in other cases. The Court suggests that the witnesses providing this information were themselves "impeached." *Ante, at ____, 157 L. Ed. 2d, at 1197*. At best, though, they were only slightly impeached. The prosecution merely intimated that Owen was slanting his testimony in the hopes of being hired by the defense counsel's private investigator, App. 131, and that Kelley was doing the same as he was a "friend of [Banks'] family," *id.*, at 141.

527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999)," *ante, at ____, 157 L. Ed. 2d, at 1190-1191*, relying in part on the State's general denial of **[***1202]** all of Banks' factual allegations contained in his January 1992 state habeas application. But, in the relevant state postconviction proceeding in *Strickler*, the State alleged that the petitioner had already received "'*everything* known to the government,'" a statement that federal habeas proceedings established was clearly not true. *527 U.S. 263 at 289, 144 L. Ed. 2d 286, 119 S. Ct. 1936* (emphasis added). In the instant case, the particular allegation raised in Banks' state habeas application and denied by the State was that "the **[*710]** prosecution *knowingly* failed to turn over exculpatory evidence *as required by Brady v. Maryland, 363 U.S. 83, [10 L. Ed. 2d 215, 83 S. Ct. 1194] (1963)*." App. 180 (emphasis added). The State, **[****80]** then, could have been denying only that the prosecution *knowingly* failed to turn over the evidence (there is, incidentally, very little evidence in the record tending to show that any prosecutor had actual knowledge of Huff's payment to Farr). Or, the State could have been denying only that it had failed to turn over evidence *in violation of Brady*, *i.e.*, that any evidence the prosecution did not turn over was not material (a position advanced by the State throughout the federal habeas process), see *Strickler, supra, 527 U.S. 263 at 281, 144 L. Ed. 2d 286, 119 S. Ct. 1936* ("[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"). Either way, *Strickler* does not clearly control, and the Court's reliance on it is less than compelling.

Because of the Court's disposition of Banks' Farr *Brady* claim, it does not address his claim of ineffective assistance of counsel, concluding that "any relief he could obtain on that claim would be cumulative." *Ante, at ____, n 10, 157 L. Ed. 2d, at 1188*. As I would affirm the Court of Appeals on the Farr *Brady* claim, I briefly discuss this **[****81]** ineffective-assistance claim. Although I find the Farr *Brady* claim a close call, I do not find this to be so as to the ineffective-assistance claim. Banks comes nowhere close to satisfying the prejudice prong of *Strickland v Washington, supra.* The conclusory and uncorroborated claims of some level of physical abuse, the allegations that a bad skin condition negatively affected his childhood development, the evidence that he was a slow learner and possessed a willingness to please others, and the claim that Banks' brother-in-law was responsible for his own pistol-whipping and receipt of a death threat, are so unpersuasive that there is no reasonable probability that the jury would have come to the opposite conclusion with respect to the future **[*711]** dangerousness special issue, even if presented with this evidence.

I therefore conclude that the Court of Appeals did not err when it denied relief to Banks based on his Farr *Brady* claim and his *Strickland* claim. I would reverse the Court of Appeals only insofar as it did not grant a certificate of appealability on the Cook *Brady* claim.

References

[**82]**

21A Am Jur 2d, Criminal Law §§ 942, 1263, 1269-1274; 39 Am Jur 2d, Habeas Corpus and Postconviction Remedies §§ 53, 60, 67, 119, 133, 138

USCS, *Constitution, Amendment 14*; *28 USCS § 2254*; USCS Court Rules, *Federal Rules of Civil Procedure, Rule 15(b)*

L Ed Digest, Appeal § 1321; Constitutional Law § 840.2; Habeas Corpus §§ 35, 37

L Ed Index, Brady Claim; Capital Offenses and Punishment; Rules of Civil Procedure

Annotation References

Requirement, in federal habeas corpus proceedings, of showing of cause and prejudice with respect to relief from state criminal conviction or sentence--Supreme Court cases. *120 L Ed 2d 991*.

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence favorable to accused--Supreme Court cases. *87 L Ed 2d 802*.

Exhaustion **[****83]** of state remedies as condition of issuance by federal court of writ of habeas corpus for release of state prisoner--Supreme Court cases. *54 L Ed 2d 873*.

Conviction on testimony known to prosecution to be perjured as denial of due process--federal cases. *3 L Ed 2d 1991*.

Government's privilege to withhold disclosure of identity of informer--federal cases. *1 L Ed 2d 1998*.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. *34 ALR3d 16*.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. *7 ALR3d 181*.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. *7 ALR3d 8*.

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Kyles v. Whitley

Supreme Court of the United States

November 7, 1994, Argued ; April 19, 1995, Decided

No. 93-7927

Reporter
514 U.S. 419 *; 115 S. Ct. 1555 **; 131 L. Ed. 2d 490 ***; 1995 U.S. LEXIS 2845 ****; 63 U.S.L.W. 4303; 95 Cal. Daily Op. Service 2841; 95 Daily Journal DAR 4952; 8 Fla. L. Weekly Fed. S 686

CURTIS LEE KYLES, PETITIONER v. JOHN P. WHITLEY, WARDEN

Subsequent History: [**1]** As Amended May 1, 1995.

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: *5 F.3d 806*, reversed and remanded.

Core Terms

murder, eyewitnesses, apartment, gun, disclosure, purse, pet food, killer, hair, photograph, identification, planted, brands, picked, guilt, bags, impeachment, bought, kill, reasonable probability, favorable evidence, court of appeals, confidence, convicted, witnesses, shooting, courts, garbage, build, red

Case Summary

Procedural Posture

Petitioner challenged a first-degree murder conviction claiming that the State failed to disclose evidence favorable to him. The Fifth Circuit Court of Appeals affirmed the denial of petitioner's habeas corpus petition, and petitioner was granted certiorari.

Overview

Petitioner was convicted of first-degree murder. He appealed, claiming that the State knew of evidence favorable to him before and during trial that it failed to disclose. The State supreme court remanded the case for an evidentiary hearing on defendant's claims of newly discovered evidence. The trial court, after review, denied relief. The state supreme court denied petitioner's application for discretionary review. A petition for habeas corpus was then filed in district court, which denied the petition. The court of appeals affirmed by a divided vote. The Supreme Court granted certiorari and reversed and ordered a new trial, holding that the net effect of the evidence withheld by the State in this case raised a reasonable probability that its disclosure would have produced a different result.

Outcome

Petitioner's conviction was reversed and remanded for a new trial ordered because the omitted evidence favoring petitioner could have potentially resulted in a different verdict.

Syllabus

Petitioner Kyles was convicted of first-degree murder by a Louisiana jury and sentenced to death. Following the affirmance of his conviction and sentence on direct appeal, it was revealed on state collateral review that the State had never disclosed certain evidence favorable to him. That evidence included, *inter alia*, (1) contemporaneous eyewitness statements taken by the police following the murder; (2) various statements made to the police by an informant known as "Beanie," who was never called to testify; and (3) a computer print-out of license numbers of cars parked at the crime scene on the night of the murder, which did not list the number of Kyles's car. The state trial **[****2]** court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. He then sought relief on federal habeas, claiming, among other things, that his conviction was obtained in violation of *Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194*, which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. The Federal District Court denied relief, and the Fifth Circuit affirmed.

Held:

1. Under *United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375*, four aspects of materiality for *Brady* purposes bear emphasis. First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. **[****3]** *473 U.S. at 682, 685*. *United States v. Agurs, 427 U.S. 97, 112-113, 49 L. Ed. 2d 342, 96 S. Ct. 2392*, distinguished. Second, *Bagley* materiality is not a sufficiency of evidence test. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Third, contrary to the Fifth Circuit's assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materiality under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht v. Abrahamson, 507 U.S. 619, 623, 123 L. Ed. 2d 353, 113 S. Ct. 1710*. Fourth, the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. *473 U.S. at 675*, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the **[****4]** responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases. As the more likely reading of the Fifth Circuit's opinion shows a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, it is questionable whether that court evaluated the significance of the undisclosed evidence in this case under the correct standard. Pp. 432-441.

2. Because the net effect of the state-suppressed evidence favoring Kyles raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand, and Kyles is entitled to a new trial. Pp. 441-454.

(a) A review of the suppressed statements of eyewitnesses -- whose testimony identifying Kyles as the killer was the essence of the State's case -- reveals that their disclosure not only would have resulted in a markedly weaker case for the **[****5]** prosecution and a markedly stronger one for the defense, but also would have substantially reduced or destroyed the value of the State's two best witnesses. Pp. 441-445.

(b) Similarly, a recapitulation of the suppressed statements made to the police by Beanie -- who, by the State's own admission, was essential to its investigation and, indeed, "made the case" against Kyles -- reveals that they were replete with significant inconsistencies and affirmatively self-incriminating assertions, that Beanie was anxious to see Kyles arrested for the murder, and that the police had a remarkably uncritical attitude toward Beanie. Disclosure would therefore have raised opportunities for the defense to attack the thoroughness and even the good faith of the investigation, and would also have allowed the defense to question the probative value of certain crucial physical evidence. Pp. 445-449.

(c) While the suppression of the prosecution's list of the cars at the crime scene after the murder does not rank with the failure to disclose the other evidence herein discussed, the list would have had some value as exculpation of Kyles, whose license plate was not included thereon, and as impeachment **[****6]** of the prosecution's arguments to the jury that the killer left his car at the scene during the investigation and that a grainy photograph of the scene showed Kyles's car in the background. It would also have lent support to an argument that the police were irresponsible in relying on inconsistent statements made by Beanie. Pp. 450-451.

(d) Although not every item of the State's case would have been directly undercut if the foregoing *Brady* evidence had been disclosed, it is significant that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. While the inconclusiveness of that evidence does not prove Kyles's innocence, and the jury might have found the unimpeached eyewitness testimony sufficient to convict, confidence that the verdict would have been the same cannot survive a recap of the suppressed evidence and its significance for the prosecution. Pp. 451-454.

Counsel: James S. Liebman argued the cause for petitioner. On the briefs were George W. Healy III, Nicholas J. Trenticosta, Denise Leboeuf, and Gerard A. Rault, Jr.

Jack Peebles argued the cause for respondent. With **[****7]** him on the brief was Harry F. Connick.

Judges: SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, post, p. 454. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, post, p. 456.

Opinion by: SOUTER

Opinion

[*421] [1559] [***498]** JUSTICE SOUTER delivered the opinion of the Court.

[1A]After his first trial in 1984 ended in a hung jury, petitioner Curtis Lee Kyles was tried **[**1560]** again, convicted of first-degree murder, and sentenced to death. On habeas review, we follow the established rule that the state's obligation under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. Because the **[****8]** net effect of the evidence withheld by the State in this case raises **[*422]** a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial.

I

Following the mistrial when the jury was unable to reach a verdict, Kyles's subsequent conviction and sentence of death were affirmed on direct appeal. *State v. Kyles, 513 So. 2d 265 (La. 1987)*, cert. denied, *486 U.S. 1027, 100 L. Ed. 2d 236, 108 S. Ct. 2005 (1988)*. On state collateral review, the trial court denied relief, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence. During this state-court proceeding, the defense was first able to present certain evidence, favorable to Kyles, that the State had failed to disclose before or during trial. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. *State ex rel. Kyles v. Butler, 566 So. 2d 386 (La. 1990)*.

[2A]Kyles then filed a petition for habeas corpus in the United States District **[****9]** Court for the Eastern District of Louisiana, which denied the petition. The Court of Appeals for the Fifth Circuit affirmed by a divided vote. *5 F.3d 806 (1993)*. As we explain, *infra*, at 440-441, there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard. Because "our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," *Burger v. Kemp, 483 U.S. 776, 785, 97 **[***499]** L. Ed. 2d 638, 107 S. Ct. 3114 (1987)*, [1] we granted certiorari, *511 U.S. 1051 (1994)*, and now reverse.

[**10] [*423]** II

A

The record indicates that, at about 2:20 p.m. on Thursday, September 20, 1984, 60-year-old Dolores Dye left the Schwegmann Brothers' store (Schwegmann's) on Old Gentilly Road in New Orleans after doing some food shopping. As she put her grocery bags into the trunk of her red Ford LTD, a man accosted her and after a short struggle drew a revolver, fired into her left temple, and killed her. The gunman took Dye's keys and drove away in the LTD.

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[1] [2B]

The dissent suggests that *Burger* is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. *Post*, at 457. We explain, *infra*, at 440-441, that this is not a case of simple error correction. As for the significance of prior review, *Burger* cautions that this Court should not "substitute speculation" for the "considered opinions" of two lower courts. *483 U.S. at 785*. No one could disagree that "speculative" claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles's *Brady* claim.

New Orleans police took statements from six eyewitnesses, [2] who offered various descriptions of the gunman. They agreed that he was a black man, and four of them said that he had braided hair. The witnesses differed significantly, however, in their descriptions of height, age, weight, build, and hair length. Two reported seeing a man of 17 or 18, while another described the gunman as looking as old as 28. One witness described him as 5'4" or 5'5", medium build, 140-150 pounds; another described the man as slim and close to six feet. One witness **[**1561]** said he had a mustache; none of the others spoke of any facial hair at all. One witness said the murderer had shoulder-length hair; another described the hair as "short. **[****11]** "

Since the police believed the killer might have driven his own car to Schwegmann's and left it there when he drove off in Dye's LTD, they recorded the license numbers of the cars remaining in the parking lots around the store at 9:15 p.m. on the evening of the murder. Matching these numbers with registration records produced the names and addresses of the owners of the cars, with a notation of any owner's police **[*424]** record. Despite this list and the eyewitness descriptions, the police had no lead to the gunman until the Saturday evening after the shooting.

At 5:30 p.m., on September 22, a man identifying **[****12]** himself as James Joseph called the police and reported that on the day of the murder he had bought a red Thunderbird from a friend named Curtis, whom he later identified as petitioner, Curtis Kyles. He said that he had subsequently read about Dye's murder in the newspapers and feared that the car he purchased was the victim's. He agreed to meet with the police.

A few hours later, the informant met New Orleans Detective John Miller, who was wired with a hidden **[***500]** body microphone, through which the ensuing conversation was recorded. See App. 221-257 (transcript). The informant now said his name was Joseph Banks and that he was called Beanie. His actual name was Joseph Wallace. [3]

His story, as well as his name, had changed since his earlier call. In place of his original account of buying a Thunderbird from Kyles on Thursday, Beanie told Miller that he had **[****13]** not seen Kyles at all on Thursday, *id.*, at 249-250, and had bought a red LTD the previous day, Friday, *id.*, at 221-222, 225. Beanie led Miller to the parking lot of a nearby bar, where he had left the red LTD, later identified as Dye's.

Beanie told Miller that he lived with Kyles's brother-in-law (later identified as Johnny Burns), [4] whom Beanie repeatedly called his "partner." *Id., at 221*. Beanie described Kyles as slim, about 6-feet tall, 24 or 25 years old, with a "bush" hairstyle. *Id., at 226, 252*. When asked if Kyles ever wore **[*425]** his hair in plaits, Beanie said that he did but that he "had a bush" when Beanie bought the car. *Id., at 249*.

During the conversation, Beanie repeatedly expressed concern that he **[****14]** might himself be a suspect in the murder. He explained that he had been seen driving Dye's car on Friday evening in the

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[2] The record reveals that statements were taken from Edward Williams and Lionel Plick, both waiting for a bus nearby; Isaac Smallwood, Willie Jones, and Henry Williams, all working in the Schwegmann's parking lot at the time of the murder; and Robert Territo, driving a truck waiting at a nearby traffic light at the moment of the shooting, who gave a statement to police on Friday, the day after the murder.

[3] Because the informant had so many aliases, we will follow the convention of the court below and refer to him throughout this opinion as Beanie.

[4] Johnny Burns is the brother of a woman known as Pinky Burns. A number of trial witnesses referred to the relationship between Kyles and Pinky Burns as a common-law marriage (Louisiana's civil law notwithstanding). Kyles is the father of several of Pinky Burns's children.

French Quarter, admitted that he had changed its license plates, and worried that he "could have been charged" with the murder on the basis of his possession of the LTD. *Id.*, at 231, 246, 250. He asked if he would be put in jail. *Id., at 235, 246*. Miller acknowledged that Beanie's possession of the car would have looked suspicious, *id., at 247*, but reassured him that he "didn't do anything wrong," *id., at 235*.

Beanie seemed eager to cast suspicion on Kyles, who allegedly made his living by "robbing people," and had tried to kill Beanie at some prior time. *Id., at 228, 245, 251*. Beanie said that Kyles regularly carried two pistols, a .38 and a .32, and that if the police could "set him up good," they could "get that same gun" used to kill Dye. *Id.*, at 228-229. Beanie rode with Miller and Miller's supervisor, Sgt. James Eaton, in an unmarked squad car to Desire Street, where he pointed out the building containing Kyles's apartment. *Id., at 244-246*.

Beanie told the officers that after he bought the car, he and his "partner" (Burns) drove **[****15]** Kyles to Schwegmann's about 9 p.m. on Friday evening to pick up Kyles's car, described as an orange four-door *Ford.* [5] *Id., **[**1562]** at 221, 223, 231-232, 242*. When asked where Kyles's car had been parked, Beanie replied that it had been "on the same side [of the lot] where the woman was killed at." *Id., at 231*. The officers later drove Beanie to Schwegmann's, where he indicated the space where he claimed Kyles's car had been parked. Beanie went on to say that when he and Burns had **[***501]** brought Kyles to pick **[*426]** up the car, Kyles had gone to some nearby bushes to retrieve a brown purse, *id., at 253-255*, which Kyles subsequently hid in a wardrobe at his apartment. Beanie said that Kyles had "a lot of groceries" in Schwegmann's bags and a new baby's potty "in the car." *Id., at 254-255*. Beanie told Eaton that Kyles's garbage would go out the next day and that if Kyles was "smart" he would "put [the purse] in [the] garbage." *Id., at 257*. Beanie made it clear that he expected some reward for his help, saying at one point that he was not "doing all of this for nothing." *Id., at 246*. The police repeatedly assured Beanie that he would not lose **[****16]** the $ 400 he paid for the car. *Id., at 243, 246*.

After the visit to Schwegmann's, Eaton and Miller took Beanie to a police station where Miller interviewed him again on the record, which was transcribed and signed by Beanie, using his alias "Joseph Banks." See *id.*, at 214-220. This statement, Beanie's third (the telephone call being the first, then the recorded conversation), repeats some of the essentials of the second one: that Beanie had purchased a red Ford LTD from Kyles for $ 400 on Friday evening; that Kyles had his hair "combed out" at the time of the sale; and that Kyles carried a .32 and a .38 with him "all the time."

Portions of the third statement, however, embellished or contradicted Beanie's preceding story and were even internally inconsistent. Beanie reported that after the sale, he and Kyles unloaded Schwegmann's grocery **[****17]** bags from the trunk and back seat of the LTD and placed them in Kyles's own car. Beanie said that Kyles took a brown purse from the front seat of the LTD and that they then drove in separate cars to Kyles's apartment, where they unloaded the groceries. *Id., at 216-217*. Beanie also claimed that, a few hours later, he and his "partner" Burns went with Kyles to Schwegmann's, where they recovered Kyles's car and a "big brown pocket book" from "next to a building." *Id., at 218*. Beanie did not explain how Kyles could have picked up his car and recovered the purse at Schwegmann's, after Beanie **[*427]** had seen Kyles with both just a few hours earlier. The police neither noted the inconsistencies nor questioned Beanie about them.

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[5] According to photographs later introduced at trial, Kyles's car was actually a Mercury and, according to trial testimony, a two-door model. Tr. 210 (Dec. 7, 1984).

Although the police did not thereafter put Kyles under surveillance, Tr. 94 (Dec. 6, 1984), they learned about events at his apartment from Beanie, who went there twice on Sunday. According to a fourth statement by Beanie, this one given to the chief prosecutor in November (between the first and second trials), he first went to the apartment about 2 p.m., after a telephone conversation with a police officer who asked whether Kyles had the gun that was **[****18]** used to kill Dye. Beanie stayed in Kyles's apartment until about 5 p.m., when he left to call Detective John Miller. Then he returned about 7 p.m. and stayed until about 9:30 p.m., when he left to meet Miller, who also asked about the gun. According to this fourth statement, Beanie "rode around" with Miller until 3 a.m. on Monday, September 24. Sometime during those same early morning hours, detectives were sent at Sgt. Eaton's behest to pick up the rubbish outside Kyles's building. As Sgt. Eaton wrote in an interoffice memorandum, he had "reason to believe the victims *[sic]* personal papers and the Schwegmann's bags **[***502]** will be in the trash." Record, Defendant's Exh. 17.

At 10:40 a.m., Kyles was arrested as he left the apartment, which was then searched under a warrant. Behind the kitchen stove, the police found a .32-caliber revolver containing five live rounds and one spent cartridge. Ballistics tests later showed that this pistol was used to murder Dye. In a wardrobe in a hallway leading to the kitchen, the officers found a homemade shoulder holster that fit the murder weapon. In a bedroom dresser drawer, they discovered two boxes of ammunition, one containing several **[****19]** .32-caliber rounds of the same brand as those found in the pistol. Back in the kitchen, various cans of cat and dog food, some of them of the brands Dye typically purchased, were found in Schwegmann's sacks. No other groceries **[**1563]** were identified as **[*428]** possibly being Dye's, and no potty was found. Later that afternoon at the police station, police opened the rubbish bags and found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's sack.

The gun, the LTD, the purse, and the cans of pet food were dusted for fingerprints. The gun had been wiped clean. Several prints were found on the purse and on the LTD, but none was identified as Kyles's. Dye's prints were not found on any of the cans of pet food. Kyles's prints were found, however, on a small piece of paper taken from the front passenger-side floorboard of the LTD. The crime laboratory recorded the paper as a Schwegmann's sales slip, but without noting what had been printed on it, which was obliterated in the chemical process of lifting the fingerprints. A second Schwegmann's receipt was found in the trunk of the LTD, but Kyles's prints were not found on it. Beanie's fingerprints **[****20]** were not compared to any of the fingerprints found. Tr. 97 (Dec. 6, 1984).

The lead detective on the case, John Dillman, put together a photo lineup that included a photograph of Kyles (but not of Beanie) and showed the array to five of the six eyewitnesses who had given statements. Three of them picked the photograph of Kyles; the other two could not confidently identify Kyles as Dye's assailant.

B

Kyles was indicted for first-degree murder. Before trial, his counsel filed a lengthy motion for disclosure by the State of any exculpatory or impeachment evidence. The prosecution responded that there was "no exculpatory evidence of any nature," despite the government's knowledge of the following evidentiary items: (1) the six contemporaneous eyewitness statements taken by police following the murder; (2) records of Beanie's initial call to the police; (3) the tape recording of the Saturday conversation between Beanie and officers Eaton and Miller; (4) the typed and signed statement **[*429]** given by Beanie on Sunday morning; (5) the computer printout of license numbers of cars parked at Schwegmann's on the

night of the murder, which did not list the number of Kyles's car; (6) the **[****21]** internal police memorandum calling for the seizure of the rubbish after Beanie had suggested that the purse might be found there; and (7) evidence linking Beanie to other crimes at Schwegmann's and to the unrelated murder of one Patricia Leidenheimer, committed in January before the Dye murder.

At the first trial, in November, the **[***503]** heart of the State's case was eyewitness testimony from four people who were at the scene of the crime (three of whom had previously picked Kyles from the photo lineup). Kyles maintained his innocence, offered supporting witnesses, and supplied an alibi that he had been picking up his children from school at the time of the murder. The theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money. Beanie did not testify as a witness for either the defense or the prosecution.

Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested. Even so, after four hours of deliberation, **[****22]** the jury became deadlocked on the issue of guilt, and a mistrial was declared.

After the mistrial, the chief trial prosecutor, Cliff Strider, interviewed Beanie. See App. 258-262 (notes of interview). Strider's notes show that Beanie again changed important elements of his story. He said that he went with Kyles to retrieve Kyles's car from the Schwegmann's lot on Thursday, the day of the murder, at some time between 5 and 7:30 p.m., not on Friday, at 9 p.m., as he had said in his second and third statements. (Indeed, in his second statement, Beanie said that he had not seen Kyles at all on Thursday. *Id.*, at **[*430]** 249-250.) He also said, for the first time, that when they had picked up the car they were accompanied not only by Johnny Burns but also by Kevin Black, who had testified for the defense at the first trial. Beanie now claimed that after getting Kyles's **[**1564]** car they went to Black's house, retrieved a number of bags of groceries, a child's potty, and a brown purse, all of which they took to Kyles's apartment. Beanie also stated that on the Sunday after the murder he had been at Kyles's apartment two separate times. Notwithstanding the many inconsistencies **[****23]** and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.

In December 1984, Kyles was tried a second time. Again, the heart of the State's case was the testimony of four eyewitnesses who positively identified Kyles in front of the jury. The prosecution also offered a blown-up photograph taken at the crime scene soon after the murder, on the basis of which the prosecutors argued that a seemingly two-toned car in the background of the photograph was Kyles's. They repeatedly suggested during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann's on the day of the murder and had retrieved it later, a theory for which they offered no evidence beyond the blown-up photograph. Once again, Beanie did not testify.

As in the first trial, the defense contended that the eyewitnesses were mistaken. Kyles's counsel called several individuals, including Kevin Black, who testified to seeing Beanie, with his hair in plaits, driving a red car similar to the victim's about an hour after the killing. Tr. 209 (Dec. 7, 1984). Another witness testified that Beanie, with his hair in braids, had tried **[****24]** to sell him the car on Thursday evening, shortly after the murder. *Id., at 234-235*. Another **[***504]** witness testified that Beanie, with his hair in a "Jheri curl," had attempted to sell him the car on Friday. *Id.*, at 249-251. One witness, Beanie's "partner," Burns, testified that he had seen Beanie on Sunday at Kyles's apartment, stooping down near **[*431]** the stove where the gun was eventually found, and the defense presented testimony that Beanie

was romantically interested in Pinky Burns. To explain the pet food found in Kyles's apartment, there was testimony that Kyles's family kept a dog and cat and often fed stray animals in the neighborhood.

Finally, Kyles again took the stand. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt found in Dye's car by saying that Beanie had picked him up in a red car on Friday, September 21, and had taken him to Schwegmann's, where he purchased transmission fluid and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the cigarettes.

On rebuttal, the prosecutor had Beanie brought into the courtroom. All of the testifying eyewitnesses, **[****25]** after viewing Beanie standing next to Kyles, reaffirmed their previous identifications of Kyles as the murderer. Kyles was convicted of first-degree murder and sentenced to death. Beanie received a total of $ 1,600 in reward money. See Tr. of Hearing on Post-Conviction Relief 19-20 (Feb. 24, 1989); *id., at 114 (Feb. 20, 1989)*.

[3A]Following direct appeal, it was revealed in the course of state collateral review that the State had failed to disclose evidence favorable to the defense. After exhausting state remedies, Kyles sought relief on federal habeas, claiming, among other things, that the evidence withheld was material to his defense and that his conviction was thus obtained in violation of *Brady*. Although the United States District Court denied relief and the Fifth Circuit affirmed,[6] Judge **[*432]** King dissented, **[**1565]** writing that "for the first time in my fourteen years on this court . . . I have serious reservations about whether the **[***505]** State has sentenced to death the right man." *5 F.3d at 820*.

[**26]** III

[3C] [4A] [5A] [6A] [7A] [8A]The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. See *id., at 86* (relying on *Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935)*, and *Pyle v. Kansas, 317 U.S. 213, 215-216, 87 L. Ed. 214, 63 S. Ct. 177 (1942)*). *Brady* held "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, irrespective of

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[6] [3B]

Pending appeal, Kyles filed a motion under *Federal Rules of Civil Procedure 60(b)(2)* and *(6)* to reopen the District Court judgment. In that motion, he charged that one of the eyewitnesses who testified against him at trial committed perjury. In the witness's accompanying affidavit, Darlene Kersh (formerly Cahill), the only such witness who had not given a contemporaneous statement, swears that she told the prosecutors and detectives she did not have an opportunity to view the assailant's face and could not identify him. Nevertheless, Kersh identified Kyles untruthfully, she says, after being "told by some people . . . [who] I think . . . were district attorneys and police, that the murderer would be the guy seated at the table with the attorney and that that was the one I should identify as the murderer. One of the people there was at the D. A.'s table at the trial. To the best of my knowledge there was only one black man sitting at the counsel table and I pointed him out as the one I had seen shoot the lady." Kersh claims to have agreed to the State's wishes only after the police and district attorneys assured her that "all the other evidence pointed to [Kyles] as the killer." Affidavit of Darlene Kersh 5, 7.

The District Court denied the motion as an abuse of the writ, although its order was vacated by the Court of Appeals for the Fifth Circuit with instructions to deny the motion on the ground that a petitioner may not use a *Rule 60(b)* motion to raise constitutional claims not included in the original habeas petition. That ruling is not before us. After denial of his *Rule 60(b)* motion, Kyles again sought state collateral review on the basis of Kersh's affidavit. The Supreme Court of Louisiana granted discretionary review and ordered the trial court to conduct an evidentiary hearing; all state proceedings are currently stayed pending our review of Kyles's federal habeas petition.

the good faith or bad faith of the prosecution." *373 U.S. at 87*; see *Moore v. Illinois, 408 U.S. 786, 794-795, 33 L. Ed. 2d 706, 92 S. Ct. 2562 **[*433]** (1972)*. **[****27]** In *United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*, however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, *427 U.S. at 103-104*; [7] second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id., at 104-107*; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id., at 108*.

[**28]** In the third prominent case on the way to current *Brady* law, *United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*, the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i. e.*, the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." **[*434]** *473 U.S. at 682* (opinion of Blackmun, J.); *id., at 685* (White, J., concurring in part and concurring in judgment).

[*506]** [4B]Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance **[****29]** that disclosure of the suppressed evidence would have resulted ultimately **[**1566]** in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id., at 682* (opinion of Blackmun, J.) (adopting formulation announced in *Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*); *Bagley, supra, at 685* (White, J., concurring in part and concurring in judgment) (same); see *id., at 680* (opinion of Blackmun, J.) (*Agurs* "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal"); cf. *Strickland, supra, at 693* ("We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *Nix v. Whiteside, 475 U.S. 157, 175, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986)* ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice **[****30]** under *Strickland*"). *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of

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[7] [3D]

The Court noted that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs, 427 U.S. at 103* (footnote omitted). As the ruling pertaining to Kersh's affidavit is not before us, we do not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category. See n. 6, *supra*.

a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley, 473 U.S. at 678*.

[5B]The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory **[*435]** evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing **[****31]** that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. [8]

[**32]** [6B] Third, we note that, contrary to the assumption made by the Court **[***507]** of Appeals, 5 F.3d at 818, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *473 U.S. at 682* (opinion of Blackmun, J.); *id., at 685* (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht v. Abrahamson, 507 U.S. 619, 623, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*, quoting *Kotteakos v. United States, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)*. This is amply confirmed by the development of the respective governing standards. Although **[*436]** *Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)*, **[****33]** held that a conviction tainted by constitutional error must be set aside unless **[**1567]** the error complained of "was harmless beyond a reasonable doubt," we held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation (previously applicable only in reviewing nonconstitutional errors on direct appeal), *Brecht, supra, at 622-623*. Under *Kotteakos* a conviction may be set aside only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos, supra, at 776*. *Agurs*, however, had previously rejected *Kotteakos* as the standard governing constitutional disclosure claims, reasoning that "the constitutional standard of materiality must impose a higher burden on the defendant." *Agurs, 427 U.S. at 112*. *Agurs* thus opted for its formulation of materiality, later adopted as the test for prejudice in *Strickland*, only after expressly noting that this standard would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under *Kotteakos*. In **[****34]** sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht*. [9]

[7B]The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item. [10] As Justice Blackmun emphasized in the

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[8] This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed. See *post*, at 463 (possibility that Beanie planted evidence "is perfectly consistent" with Kyles's guilt), *ibid.* ("The jury could well have believed [portions of the defense theory] and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken"), *post*, at 468 (the *Brady* evidence would have left two prosecution witnesses "totally untouched"), 469 (*Brady* evidence "can be logically separated from the incriminating evidence that would have remained unaffected").

[9] See also *Hill v. Lockhart, 28 F.3d 832, 839 (CA8 1994)* ("It is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel").

[10] [7C]

portion of his opinion written for the Court, the Constitution is not violated every time the **[*437]** government fails or chooses not to disclose evidence that might prove helpful to the defense. *473 U.S. at 675*, and n. 7. We have never held that the Constitution demands an open file **[***508]** policy (however **[****35]** such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

[**36]** [8B]While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith **[*438]** or bad faith, see *Brady, 373 U.S. at 87*), the prosecution's responsibility for failing to disclose known, favorable **[**1568]** evidence rising to a material **[****37]** level of importance is inescapable.

The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. [11] To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)*. Since, then, the prosecutor has the means to discharge **[***509]** the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing **[****38]** what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

The dissent accuses us of overlooking this point and of assuming that the favorable significance of a given item of undisclosed evidence is enough to demonstrate a *Brady* violation. We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion, at Part IV-D, *infra*.

[11] The State's counsel retreated from this suggestion at oral argument, conceding that the State is "held to a disclosure standard based on what all State officers at the time knew." Tr. of Oral Arg. 40.

Short of doing that, we were asked at oral argument to raise the threshold of materiality because the *Bagley* standard "makes it difficult . . . to know" from the "perspective [of the prosecutor at] trial . . . exactly what might become important later on." Tr. of Oral Arg. 33. The State asks for "a certain amount of leeway in making a judgment call" as to the disclosure of any given piece of evidence. *Ibid.*

[*439] Uncertainty about the degree of further "leeway" that might satisfy the State's request for a "certain amount" of it is the least of the reasons to deny the request. At **[****39]** bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the **[****40]** government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs, 427 U.S. at 108* ("The prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)*. **[*440]** And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. **[**1569]** See *Rose v. Clark, 478 U.S. 570, 577-578, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986)*; *Estes v. Texas, 381 U.S. 532, 540, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965)*; **[****41]** *United States v. Leon, 468 U.S. 897, 900-901, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984)* (recognizing general goal of establishing "procedures under which **[***510]** criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'" (quoting *Alderman v. United States, 394 U.S. 165, 175, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969)*). The prudence of the careful prosecutor should not therefore be discouraged.

[1B]There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the undisclosed materials," *5 F.3d at 817*, the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone. See, *e. g.*, *id., at 812* ("We do **[****42]** not agree that this statement made the transcript material and so mandated disclosure . . . . Beanie's statement . . . is itself not decisive"), 814 ("The nondisclosure of this much of the transcript was insignificant"), 815 ("Kyles has not shown on this basis that the three statements were material"), 815

("In light of the entire record . . . we cannot conclude that [police reports relating to discovery of the purse in the trash] would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted"), 816 ("We are not persuaded that these notes [relating to discovery of the gun] were material"), 816 ("We are not persuaded that [the printout of the license plate numbers] would, in reasonable probability, have induced reasonable doubt where the jury did not find it. . . . the rebuttal of the photograph would have made no difference"). **[*441]** The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, as the ensuing discussion will show.

IV

[1C]In this case, disclosure of the **[****43]** suppressed evidence to competent counsel would have made a different result reasonably probable.

A

As the District Court put it, "the essence of the State's case" was the testimony of eyewitnesses, who identified Kyles as Dye's killer. *5 F.3d at 853* (Appendix A). Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed.

The State rated Henry Williams as its best witness, who testified that he had seen the struggle and the actual shooting by Kyles. The jury would have found it helpful to probe this conclusion in the light of Williams's contemporaneous statement, in which he told the police that the assailant was "a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 pounds, medium build" and that "his hair looked like it was platted." App. 197. If cross-examined on this description, Williams would have had trouble explaining how he could have described Kyles, 6-feet tall and thin, as a man more than half a foot shorter with a medium **[***511]** build. [12] Indeed, since **[****44]** Beanie was 22 years old, 5'5" tall, and 159 pounds, **[*442]** the defense would have had a compelling argument that Williams's description pointed to Beanie but not to Kyles. [13]

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[12] The record makes numerous references to Kyles being approximately six feet tall and slender; photographs in the record tend to confirm these descriptions. The description of Beanie in the text comes from his police file. Record photographs of Beanie also depict a man possessing a medium build.

[13] The defense could have further underscored the possibility that Beanie was Dye's killer through cross-examination of the police on their failure to direct any investigation against Beanie. If the police had disclosed Beanie's statements, they would have been forced to admit that their informant Beanie described Kyles as generally wearing his hair in a "bush" style (and so wearing it when he sold the car to Beanie), whereas Beanie wore his in plaits. There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy. The police failed to disclose that Beanie had charges pending against him for a theft at the same Schwegmann's store and was a primary suspect in the January 1984 murder of Patricia Leidenheimer, who, like Dye, was an older woman shot once in the head during an armed robbery. (Even though Beanie was a primary suspect in the Leidenheimer murder as early as September, he was not interviewed by the police about it until after Kyles's second trial in December. Beanie confessed his involvement in the murder, but was never charged in connection with it.) These were additional reasons for Beanie to ingratiate himself with the police and for the police to treat him with a suspicion they did not show. Indeed, notwithstanding JUSTICE SCALIA's suggestion that Beanie would have been "stupid" to inject himself into the investigation, *post*, at 461, the *Brady* evidence would have revealed at least two motives for Beanie to come forward: he was interested in reward money and he was worried that he was already a suspect in Dye's murder (indeed, he had been seen driving the victim's car, which had been the subject of newspaper and television reports). See ***supra, at 425-426***. For a discussion of further *Brady* evidence to attack the investigation, see especially Part IV-B, *infra*.

[**45]** **[**1570]** The trial testimony of a second eyewitness, Isaac Smallwood, was equally damning to Kyles. He testified that Kyles was the assailant, and that he saw him struggle with Dye. He said he saw Kyles take a ".32, a small black gun" out of his right pocket, shoot Dye in the head, and drive off in her LTD. When the prosecutor asked him whether he actually saw Kyles shoot Dye, Smallwood answered "Yeah." Tr. 41-48 (Dec. 6, 1984).

Smallwood's statement taken at the parking lot, however, was vastly different. Immediately after the crime, Smallwood **[*443]** claimed that he had not seen the actual murder and had not seen the assailant outside the vehicle. "I heard a lound [sic] pop," he said. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." App. 189. Smallwood said that he got a look at the culprit, a black teenage male with a mustache and shoulder-length braided hair, as the victim's red Thunderbird passed where he was standing. When a police investigator specifically asked him whether he had seen the assailant outside the car, Smallwood answered that he had not; the gunman "was already in the car and coming toward me." *Id. **[****46]** , at 188-190*.

A jury would reasonably have been troubled by the adjustments to Smallwood's original story by the time of the second trial. The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32-caliber pistol, which, of course, was the type of weapon used. His description of the victim's car had gone from a "Thunderbird" to **[***512]** an "LTD"; and he saw fit to say nothing about the assailant's shoulder-length hair and moustache, details noted by no other eyewitness. These developments would have fueled a withering cross-examination, destroying confidence in Smallwood's story and raising a substantial implication that the prosecutor had coached him to give it. [14]

[**47]** **[*444]** **[**1571]** Since the evolution over time of a given eyewitness's description can be fatal to its reliability, cf. *Manson v. Brathwaite, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977)* (reliability depends in part on the accuracy of prior description); *Neil v. Biggers, 409 U.S. 188, 199, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972)* (reliability of identification following impermissibly suggestive lineup depends in part on accuracy of witness's prior description), the Smallwood and Williams identifications

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[14] The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury. At the first trial, Smallwood testified that he looked around only after he heard something go off, that Dye was already on the ground, and that he "watched the guy get in the car." Tr. 50-51 (Nov. 26, 1984). When asked to describe the killer, Smallwood stated that he "just got a glance of him from the side" and "couldn't even get a look in the face." *Id., at 52, 54*.

The State contends that this change actually cuts in its favor under *Brady*, since it provided Kyles's defense with grounds for impeachment without any need to disclose Smallwood's statement. Brief for Respondent 17-18. This is true, but not true enough; inconsistencies between the two bodies of trial testimony provided opportunities for chipping away on cross-examination but not for the assault that was warranted. While Smallwood's testimony at the first trial was similar to his contemporaneous account in some respects (for example, he said he looked around only after he heard the gunshot and that Dye was already on the ground), it differed in one of the most important: Smallwood's version at the first trial already included his observation of the gunman outside the car. Defense counsel was not, therefore, clearly put on notice that Smallwood's capacity to identify the killer's body type was open to serious attack; even less was he informed that Smallwood had answered "no" when asked if he had seen the killer outside the car. If Smallwood had in fact seen the gunman only after the assailant had entered Dye's car, as he said in his original statement, it would have been difficult if not impossible for him to notice two key characteristics distinguishing Kyles from Beanie, their heights and builds. Moreover, in the first trial, Smallwood specifically stated that the killer's hair was "kind of like short . . . knotted up on his head." Tr. 60 (Nov. 26, 1984). This description was not inconsistent with his testimony at the second trial but directly contradicted his statement at the scene of the murder that the killer had shoulder-length hair. The dissent says that Smallwood's testimony would have been "barely affected" by the expected impeachment, *post*, at 468; that would have been a brave jury argument.

would have been severely undermined by use of their suppressed statements. The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses. See Tr. of Closing Arg. 49 (Dec. 7, 1984) (After discussing Territo's and Kersh's testimony: "Isaac Smallwood, have you ever seen a better witness[?] . . . What's better than that is Henry Williams. . . . Henry Williams was the closest of them all **[*445]** right here"). Nor, of course, would the harm to the State's case on identity have been confined to their testimony **[****48]** alone. The fact that neither Williams nor Smallwood could have provided a consistent eyewitness description pointing to Kyles would have undercut the prosecution all the more because the remaining eyewitnesses called to testify (Territo and Kersh) had their best views of the gunman only as he fled the scene with his body partly concealed in **[***513]** Dye's car. And even aside from such important details, the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before. See *Agurs, 427 U.S. at 112-113, n. 21*.

B

Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State's own admission, Beanie was essential to its investigation and, indeed, "made the case" against Kyles. Tr. of Closing Arg. 13 (Dec. 7, 1984). Contrary to what one might hope for from such a source, however, Beanie's statements **[****49]** to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police.

If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies. A short recapitulation of some of them will make the point. In Beanie's initial meeting with the police, and in his signed statement, he said he bought Dye's LTD and helped Kyles retrieve his car from the Schwegmann's lot on Friday. In his first call to the police, **[*446]** he said he bought the LTD on Thursday, and in his conversation with the prosecutor between trials it was again on Thursday that he said he helped Kyles retrieve Kyles's car. Although none of the first three versions of this story mentioned Kevin Black as taking part in the retrieval of the car and transfer of groceries, after Black implicated Beanie by his testimony for the defense at the first trial, Beanie changed his story to include Black as a participant. In Beanie's several accounts, Dye's purse first shows **[****50]** up variously next to a building, in some bushes, in Kyles's car, and at Black's house.

[9A]Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense **[**1572]** could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. See, *e. g.*, *Bowen v. Maynard, 799 F.2d 593, 613 (CA10 1986)* ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey v. King, 769 F.2d 1034, 1042 (CA5 1985)* (awarding new trial of prisoner convicted in Louisiana state court because

withheld *Brady* evidence "carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case"). [15] **[****51]**

[*447] **[***514]** By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence. In his initial meeting with police, Beanie admitted twice that he changed the license plates on the LTD. This admission enhanced the suspiciousness of his possession of the car; the defense could **[****52]** have argued persuasively that he was no bona fide purchaser. And when combined with his police record, evidence of prior criminal activity near Schwegmann's, and his status as a suspect in another murder, his devious behavior gave reason to believe that he had done more than buy a stolen car. There was further self-incrimination in Beanie's statement that Kyles's car was parked in the same part of the Schwegmann's lot where Dye was killed. Beanie's apparent awareness of the specific location of the murder could have been based, as the State contends, on television or newspaper reports, but perhaps it was not. Cf. App. 215 (Beanie saying that he knew about the murder because his brother-in-law had seen it "on T. V. and in the paper" and had told Beanie). Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified that Beanie was never a suspect, Tr. 103-105, 107 (Dec. 6, 1984), and that he had "no knowledge" that Beanie had changed the license plate, *id., at 95*.

The admitted failure of the police to pursue these **[****53]** pointers toward Beanie's possible guilt could only have magnified the effect on the jury of explaining how the purse and the gun happened to be recovered. In Beanie's original recorded statement, he told the police that "[Kyles's] garbage goes out tomorrow," and that "if he's smart he'll put [the purse] in [the] garbage." App. 257. These statements, along with the internal memorandum stating that the police had "reason to believe" Dye's personal effects and Schwegmann's bags **[*448]** would be in the garbage, would have supported the defense's theory that Beanie was no mere observer, but was determining the investigation's direction and success. The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed by the prosecutor's admission at one of Kyles's postconviction hearings, that he did not recall a single instance before this case when police had searched and seized garbage on the street in front of a residence, Tr. of Hearing on Post-Conviction Relief 113 (Feb. 20, 1989), and by Detective John Miller's admission at the same hearing that he thought at the time that it "was a possibility" that Beanie had **[****54]** planted the incriminating evidence in the garbage, Tr. of Hearing on Post-Conviction Relief 51 (Feb. 24, 1989). If a police officer thought so, a **[***515]** juror would have, too. [16]

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[15] [9B]

The dissent, *post*, at 464, suggests that for jurors to count the sloppiness of the investigation against the probative force of the State's evidence would have been irrational, but of course it would have been no such thing. When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. See discussion of purse and gun, *infra*, at 447-449.

[16] The dissent, rightly, does not contend that Beanie would have had a hard time planting the purse in Kyles's garbage. See *post*, at 471 (arguing that it would have been difficult for Beanie to plant the gun and homemade holster). All that would have been needed was for Beanie to put the purse into a trash bag out on the curb. See Tr. 97, 101 (Dec. 6, 1984) (testimony of Detective Dillman; garbage bags were seized from "a common garbage area" on the street in "the early morning hours when there wouldn't be anyone on the street").

[1573]** To the same effect would have been an enquiry based on Beanie's apparently revealing remark to police that "if you can set [Kyles] up good, you can get that same gun." [17] **[****56]** App. 228-229. While the jury might have understood that Beanie meant simply that if the police investigated Kyles, **[****55]** they would probably find the murder weapon, the jury could also have taken Beanie to have been making the more sinister **[*449]** suggestion that the police "set up" Kyles, and the defense could have argued that the police accepted the invitation. The prosecutor's notes of his interview with Beanie would have shown that police officers were asking Beanie the whereabouts of the gun all day Sunday, the very day when he was twice at Kyles's apartment and was allegedly seen by Johnny Burns lurking near the stove, where the gun was later found. [18] Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman, who testified on cross-examination that he did not know if Beanie had been at Kyles's apartment on Sunday. Tr. 93, 101 (Dec. 6, 1984). [19]

[**57]** **[*450]** **[***516]** C

[10]Next to be considered is the prosecution's list of the cars in the Schwegmann's parking lot at mid-evening after the murder. While its suppression does not rank with the failure to disclose the other evidence discussed here, it would have had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s standard of materiality is satisfied. On the police's assumption, argued to the jury, that the killer drove to the lot and left his car there during the heat of the investigation, the list without Kyles's registration would **[**1574]** obviously have helped Kyles and would have had some value in countering an argument by the prosecution that a grainy enlargement of a photograph of the crime scene showed Kyles's car in the background. The list would also have shown that the police either knew that it was inconsistent with their informant's second and third statements (in which

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[17] The dissent, *post*, at 461-462, argues that it would have been stupid for Beanie to have tantalized the police with the prospect of finding the gun one day before he may have planted it. It is odd that the dissent thinks the *Brady* reassessment requires the assumption that Beanie was shrewd and sophisticated: the suppressed evidence indicates that within a period of a few hours after he first called police Beanie gave three different accounts of Kyles's recovery of the purse (and gave yet another about a month later).

[18] The dissent would rule out any suspicion because Beanie was said to have worn a "tank-top" shirt during his visits to the apartment, *post*, at 17; we suppose that a small handgun could have been carried in a man's trousers, just as a witness for the State claimed the killer had carried it, Tr. 52 (Dec. 6, 1984) (Williams). Similarly, the record photograph of the homemade holster indicates that the jury could have found it to be constructed of insubstantial leather or cloth, duct tape, and string, concealable in a pocket.

[19] In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibers, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." Tr. 260, 262-263, 279, 280 (Dec. 7, 1984). On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

JUSTICE SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 471-472. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Beanie described retrieving Kyles's car after the time the list was compiled) or never even bothered to check the informant's story against known fact. Either way, the defense would have **[****58]** had further support for arguing that the police were irresponsible in relying on Beanie to tip them off to the location of evidence damaging to Kyles.

The State argues that the list was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does **[*451]** not purport to be a comprehensive listing of all the cars in the Schwegmann's lot. Such argument, however, confuses the weight of the evidence with its favorable tendency, and even if accepted would work against the State, not for it. If the police had testified that the list was incomplete, they would simply have underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat Beanie as a suspect and his statements with a presumption of fallibility. But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to Kyles.

D

[1D]In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the **[****59]** *Brady* evidence had been disclosed. It is significant, however, that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. See Tr. of Oral Arg. 56 ("The heart of the State's case was eye-witness identification"); see also Tr. of Hearing on Post-Conviction Relief 117 (Feb. 20, 1989) (testimony of chief prosecutor Strider) ("The crux of the case was the four eye-witnesses"). Ammunition and a holster were found in Kyles's apartment, but if the jury had suspected the gun had been planted the significance of these items might have been left in doubt. The fact that pet food was found in Kyles's apartment was **[***517]** consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id., at 188*. Although Kyles was wrong in describing the cat food as being on sale the day he said he **[****60]** bought it, he **[*452]** was right in describing the way it was priced at Schwegmann's market, where he commonly shopped. [20]

[**61]** Similarly undispositive is the small Schwegmann's receipt on the front passenger floorboard of the LTD, the only physical evidence that bore a fingerprint identified as Kyles's. Kyles explained that Beanie had driven him to Schwegmann's on Friday to **[**1575]** buy cigarettes and transmission fluid, and he theorized that the slip must have fallen out of the bag when he removed the cigarettes. This

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[20] Kyles testified that he believed the pet food to have been on sale because "they had a little sign there that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar." Tr. 341 (Dec. 7, 1984). When asked about the sign, Kyles said it "wasn't big . . . it was a little bitty piece of slip . . . on the shelf." *Id., at 342*. Subsequently, the prices were revealed as in fact being "three for 89 [cents]" and "two for 77 [cents]," *id., at 343*, which comported exactly with Kyles's earlier description. The director of advertising at Schwegmann's testified that the items purchased by Kyles had not been on sale, but also explained that the multiple pricing was thought to make the products "more attractive" to the customer. *Id., at 396*. The advertising director stated that store policy was to not have signs on the shelves, but he also admitted that salespeople sometimes disregarded the policy and put signs up anyway, and that he could not say for sure whether there were signs up on the day Kyles said he bought the pet food. *Id., at 398-399*. The dissent suggests, *post*, at 473, that Kyles must have been so "very poor" as to be unable to purchase the pet food. The total cost of the 15 cans of pet food found in Kyles's apartment would have been $ 5.67. See Tr. 188, 395 (Dec. 7, 1984). Rather than being "damning," *post*, at 472, the pet food evidence was thus equivocal and, in any event, was not the crux of the prosecution's case, as the State has conceded. See *supra, at 451* and this page.

explanation is consistent with the location of the slip when found and with its small size. The State cannot very well argue that the fingerprint ties Kyles to the killing without also explaining how the 2-inch-long register slip could have been the receipt for a week's worth of groceries, which Dye had gone to Schwegmann's to purchase. *Id., at 181-182*. [21]

[**62]** **[*453]** [1E] [11]The inconclusiveness of the physical evidence does not, to be sure, prove Kyles's innocence, and the jury might have found the eyewitness testimony of Territo and Kersh sufficient to convict, even though less damning to Kyles than that of Smallwood and Williams. [22] But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict **[***518]** would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution. The jury would have been entitled to find

(a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt;

(b) that the lead police detective who testified was either less than wholly candid **[****63]** or less than fully informed;

(c) that the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found;

(d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;

(e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he **[*454]** claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case;

(f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

[**64]** [1F]Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, "fairness" cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation

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[21] The State's counsel admitted at oral argument that its case depended on the facially implausible notion that Dye had not made her typical weekly grocery purchases on the day of the murder (if she had, the receipt would have been longer), but that she had indeed made her typical weekly purchases of pet food (hence the presence of the pet food in Kyles's apartment, which the State claimed were Dye's). Tr. of Oral Arg. 53-54.

[22] See *supra, at 445*. On remand, of course, the State's case will be weaker still, since the prosecution is unlikely to rely on Kersh, who now swears that she committed perjury at the two trials when she identified Kyles as the murderer. See n. 6, *supra*.

that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the "massive" case envisioned by the dissent, *post*, at 475; it is a significantly weaker **[****65]** case than the one heard by the first jury, which could not even reach a verdict.

[1576]** The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: STEVENS

Concur

[*519]** JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

As the Court has explained, this case presents an important legal issue. See *ante*, at 440-441. Because JUSTICE **[*455]** SCALIA so emphatically disagrees, I add this brief response to his criticism of the Court's decision to grant certiorari.

Proper management of our certiorari docket, as JUSTICE SCALIA notes, see *post*, at 456-460, precludes us from hearing argument on the merits of even a "substantial percentage" of the capital cases that confront us. Compare *Coleman v. Balkcom, 451 U.S. 949, 68 L. Ed. 2d 334, 101 S. Ct. 2031 (1981)* (STEVENS, J., concurring in denial of certiorari), with *id., at 956* (REHNQUIST, J., dissenting). Even aside from its legal importance, however, this case merits "favored treatment," cf. *post*, at 457, for at least three reasons. First, the fact that **[****66]** the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial. Second, cases in which the record reveals so many instances of the state's failure to disclose exculpatory evidence are extremely rare. Even if I shared JUSTICE SCALIA's appraisal of the evidence in this case -- which I do not -- I would still believe we should independently review the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial. Third, despite my high regard for the diligence and craftsmanship of the author of the majority opinion in the Court of Appeals, my independent review of the case left me with the same degree of doubt about petitioner's guilt expressed by the dissenting judge in that court.

Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this "generalizable principle, **[****67]** " *post*, at 460, especially important. Cf. *Harris v. Alabama, 513 U.S. 504, 519-520, 130 L. Ed. 2d 1004, 115 S. Ct. 1031, and n. 5 (1995)* (STEVENS, J., dissenting). I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an unpleasant **[*456]** duty conveys a message more significant than even the most penetrating legal analysis.

Dissent by: SCALIA

Dissent

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt) -- not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed. The defect of the latter system **[***520]** was described, with characteristic candor, by Justice Jackson:

> "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference **[****68]** in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done." *Brown v. Allen, 344 U.S. 443, 540, 97 L. Ed. 469, 73 S. Ct. 397 (1953)* (opinion concurring in result).

Since this Court has long shared Justice Jackson's view, today's opinion -- which considers a fact-bound claim of error rejected by every court, state and federal, that previously heard it -- is, so far as I can tell, wholly unprecedented. The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i. e.*, except in cases of the plainest error) be denied. *United States v. Johnston, 268 U.S. 220, 227, 69 L. Ed. 925, 45 S. Ct. 496 **[**1577]** (1925)*. That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, *Sumner v. Mata, 449 U.S. 539, 543, 66 L. Ed. 2d 722, 101 S. Ct. 764 (1981)*; and under what we have called the "two-court rule," the policy has been **[****69]** applied with particular rigor when district **[*457]** court and court of appeals are in agreement as to what conclusion the record requires. See, *e. g.*, *Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 93 L. Ed. 672, 69 S. Ct. 535 (1949)*. How much the more should the policy be honored in this case, a federal habeas proceeding where not only both lower federal courts but also the state courts on postconviction review have all reviewed and rejected precisely the fact-specific claim before us. Cf. *28 U.S.C. § 2254(d)* (requiring federal habeas courts to accord a presumption of correctness to state-court findings of fact); *Sumner, supra, at 550, n. 3*. Instead, however, the Court not only grants certiorari to consider whether the Court of Appeals (and all the previous courts that agreed with it) was correct as to what the facts showed in a case where the answer is far from clear, but in the process of such consideration renders new findings of fact and judgments of credibility appropriate to a trial court of original jurisdiction. See, *e. g.*, *ante*, at 425 ("Beanie seemed eager to cast suspicion on Kyles"); **[****70]** *ante*, at 441, n. 12 ("Record photographs of Beanie . . . depict a man possessing a medium build"); *ante*, at 449, n. 18 ("the record photograph of the homemade holster indicates . . .").

The Court says that we granted certiorari "because 'our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,' *Burger v. Kemp, 483 U.S. 776, 785, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987)*." *Ante*, at 422. The citation is perverse, for the reader who looks up the quoted opinion will discover that the very next sentence confirms the traditional practice from which the Court today glaringly departs: "Nevertheless, when the lower courts have found that [no constitutional error occurred], . . . deference to the shared conclusion of two reviewing courts **[***521]** prevent[s] us

from substituting speculation for their considered opinions." *Burger v. Kemp, 483 U.S. 776, 785, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987)*.

The greatest puzzle of today's decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol, **[****71]** **[*458]** to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. At, and during the week preceding, our February 24 Conference, for example, we considered and disposed of 10 petitions in capital cases, from seven States. We carefully considered whether the convictions and sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately*, to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere -- with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise.

Straining to suggest a legal error in the decision below that might warrant review, the Court asserts that "there is room to debate whether the two judges in the majority in the Court of Appeals made an **[****72]** assessment of the cumulative effect of the evidence," *ante*, at 440. In support of this it quotes isolated sentences of the opinion below that supposedly "dismissed particular items of evidence as immaterial," *ibid.* This claim of legal error does not withstand minimal scrutiny. The Court of Appeals employed *precisely* the same legal standard that the Court does. Compare *5 F.3d 806, 811 (CA5 1993)* ("We apply the [*United States* v.*] Bagley*[, *473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*,] standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different"), with *ante*, at 441 ("In this case, **[**1578]** disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"). Nor did the Court of Appeals announce a rule of law, that might have precedential force in later cases, to the effect that *Bagley* requires a series of independent materiality evaluations; in fact, the court said just the contrary. See *5 F.3d at 817* ("We are not persuaded that it is reasonably probable **[****73]** that the jury would have found in Kyles' favor if exposed to any *or all* of the undisclosed materials") (emphasis added). If the decision is read, shall we say, cumulatively, it is clear beyond cavil that the court assessed the cumulative effect of the *Brady* evidence in the context of the whole record. See *5 F.3d at 807* (basing its rejection of petitioner's claim on "a complete reading of the record"); *id., at 811* ("Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit"); *id., at 813* ("We must bear [the eyewitness testimony] in mind while assessing the probable effect of other undisclosed information"). It is, in other words, **[***522]** the Court itself which errs in the manner that it accuses the Court of Appeals of erring: failing to consider the material under review as a whole. The isolated snippets it quotes from the decision merely do what the Court's own opinion acknowledges must be done: to "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Ante*, at 436, n. 10. **[****74]** Finally, the Court falls back on this: "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley," ante*, at 441. In other words, even though the Fifth Circuit plainly enunciated the *correct* legal rule, since the outcome it reached would not properly follow from that rule, the Fifth Circuit must in fact (and unbeknownst to itself) have been applying an *incorrect* legal rule. This effectively eliminates all distinction between mistake in law and mistake in application.

What the Court granted certiorari to review, then, is not a decision on an issue of federal law that conflicts with a decision of another federal or state court; nor even a decision announcing a rule of federal law that because of its novelty **[*460]** or importance might warrant review despite the lack of a conflict; nor yet even a decision that *patently* errs in its application of an old rule. What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err -- precisely the type of case in which **[****75]** we are *most* inclined to deny certiorari. But despite all of that, I would not have dissented on the ground that the writ of certiorari should be dismissed as improvidently granted. Since the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case of this sort will often be repeated -- which is to say little fear that today's grant has any generalizable principle behind it. I am still forced to dissent, however, because, having improvidently decided to review the facts of this case, the Court goes on to get the facts wrong. Its findings are in my view clearly erroneous, cf. *Fed. Rule Civ. Proc. 52(a)*, and the Court's verdict would be reversed if there were somewhere further to appeal.

I

Before proceeding to detailed consideration of the evidence, a few general observations about the Court's methodology are appropriate. It is fundamental to the discovery rule of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, that the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States v. **[***523]** Agurs, 427 U.S. 97, 112, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*. **[****76]** It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to "destroy," *ante*, at 441, the *particular* prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates. It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt. See *United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 **[**1579]** (1985)*; *Agurs, **[*461]** supra, at 112-113*. The Court's opinion fails almost entirely to take this principle into account. Having spent many pages assessing the effect of the *Brady* material on two prosecution witnesses and a few items of prosecution evidence, *ante*, at 441-451, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante*, at 451-453. This partiality is confirmed in the Court's attempt to "recap . . . *the suppressed evidence* and its significance for the prosecution," *ante*, at 453 (emphasis added), which omits the **[****77]** required comparison between that evidence and the evidence that was disclosed. My discussion of the record will present the half of the analysis that the Court omits, emphasizing the evidence concededly unaffected by the *Brady* violation which demonstrates the immateriality of the violation.

In any analysis of this case, the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind. The first half of that theory -- designed to neutralize the physical evidence (Mrs. Dye's purse in his garbage, the murder weapon behind his stove) -- was that petitioner was the victim of a "frame-up" by the police informer and evil genius, Beanie. Now it is not unusual for a guilty person who knows that he is suspected of a crime to try to shift blame to someone else; and it is less common, but not unheard of, for a guilty person who is neither suspected nor subject to suspicion (because he has established a perfect alibi), to call attention to himself by coming forward to point the finger at an innocent person. But petitioner's theory is that the guilty Beanie, who *could* plausibly be accused of the crime (as petitioner's brief amply demonstrates), **[****78]** but who was *not* a suspect any more than Kyles was (the police as yet had no leads, see *ante*, at 424), injected both Kyles and himself

into the investigation in order to get the innocent Kyles convicted. [1] If this were not stupid enough, the **[*462]** wicked Beanie is supposed to have suggested that the police search his victim's premises *a full day before he got around to planting the incriminating evidence on the premises*.

[**79]** The second half of petitioner's theory was that he was the victim of a quadruple coincidence, in which four eyewitnesses to the crime mistakenly identified him as the murderer -- three picking him out of a photo array without hesitation, and all four affirming their identification in open court after comparing him with Beanie. The extraordinary mistake petitioner had to persuade the jury these four witnesses made was not simply to mistake the real killer, Beanie, for the very same innocent **[***524]** third party (hard enough to believe), but in addition to mistake him *for the very man Beanie had chosen to frame* -- the last and most incredible level of coincidence. However small the chance that the jury would believe any one of those improbable scenarios, the likelihood that it would believe them all together is far smaller. The Court concludes that it is "reasonably probable" the undisclosed witness interviews would have persuaded the jury of petitioner's implausible theory of mistaken eyewitness testimony, and then argues that it is "reasonably probable" the undisclosed information regarding Beanie would have persuaded the jury of petitioner's implausible theory regarding the **[****80]** incriminating physical evidence. I think neither of those conclusions is remotely true, but even if they were the Court would still be guilty of a fallacy in declaring victory on each implausibility in turn, and thus victory on the whole, **[*463]** without considering the infinitesimal probability of the jury's swallowing the entire concoction of implausibility squared.

This basic error of approaching the evidence piecemeal is also what accounts for the **[**1580]** Court's obsessive focus on the credibility or culpability of Beanie, who did not even testify at trial and whose credibility or innocence the State has never once avowed. The Court's opinion reads as if either petitioner or Beanie must be telling the truth, and any evidence tending to inculpate or undermine the credibility of the one would exculpate or enhance the credibility of the other. But the jury verdict in this case said only that petitioner was guilty of the murder. That is perfectly consistent with the possibilities that Beanie repeatedly lied, *ante*, at 445, that he was an accessory after the fact, cf. *ante*, at 445-446, or even that he planted evidence against petitioner, *ante*, at 448. Even if the **[****81]** undisclosed evidence would have allowed the defense to thoroughly impeach Beanie and to suggest the above possibilities, the jury could well have believed *all* of those things and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken. [2]

Of course even that much rests on the premise that competent counsel would run the terrible risk of calling Beanie, a witness whose "testimony almost certainly would have inculpated **[****82]** [petitioner]" and whom "any reasonable attorney would perceive . . . as a 'loose cannon.'" *5 F.3d at 818*. Perhaps

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[1] The Court tries to explain all this by saying that Beanie mistakenly thought that he had become a suspect. The only support it provides for this is the fact that, *after having come forward with the admission that he had driven the dead woman's car*, Beanie repeatedly inquired whether he himself was a suspect. See *ante*, at 442, n. 13. Of course at that point he well *should* have been worried about being a suspect. But there is no evidence that he erroneously considered himself a suspect beforehand. Moreover, even if he did, the notion that a guilty person would, on the basis of such an erroneous belief, come forward for the reward or in order to "frame" Kyles (rather than waiting for the police to approach him first) is quite simply implausible.

[2] There is no basis in anything I have said for the Court's charge that "the dissent appears to assume that Kyles must lose because there would still have been adequate [*i. e.* sufficient] evidence to convict even if the favorable evidence had been disclosed." *Ante*, at 435, n. 8. I do assume, indeed I expressly argue, that petitioner must lose because there was, is, and will be *overwhelming* evidence to convict, so much evidence that disclosure would not "have made a different result reasonably probable." *Ante*, at 441.

because that premise seems so implausible, the Court retreats to the possibility that petitioner's counsel, **[*464]** even if not calling Beanie to the stand, could have used the evidence relating to Beanie to attack "the reliability of the investigation." *Ante*, at 446. But that is distinctly less effective than substantive evidence bearing on the guilt or innocence of the accused. In evaluating *Brady* claims, we assume jury conduct that is both **[***525]** rational and obedient to the law. We do not assume that even though the whole mass of the evidence, both disclosed and undisclosed, shows petitioner guilty beyond a reasonable doubt, the jury will punish sloppy investigative techniques by setting the defendant free. Neither Beanie nor the police were on trial in this case. Petitioner was, and no amount of collateral evidence could have enabled his counsel to move the mountain of direct evidence against him.

II

The undisclosed evidence does not create a "'reasonable probability' of a different result." *Ante*, at 434 (quoting *United States v. Bagley, 473 U.S. at 682*). **[****83]** To begin with the eyewitness testimony: Petitioner's basic theory at trial was that the State's four eyewitnesses happened to mistake Beanie, the real killer, for petitioner, the man whom Beanie was simultaneously trying to frame. Police officers testified to the jury, and petitioner has never disputed, that three of the four eyewitnesses (Territo, Smallwood, and Williams) were shown a photo lineup of six young men four days after the shooting and, without aid or duress, identified petitioner as the murderer; and that all of them, plus the fourth eyewitness, Kersh, reaffirmed their identifications at trial after petitioner and Beanie were made to stand side by side.

Territo, the first eyewitness called by the State, was waiting at a red light in a truck 30 or 40 yards from the Schwegmann's parking lot. He saw petitioner shoot Mrs. Dye, start her car, drive out onto the road, and pull up just behind Territo's truck. When the light turned green petitioner pulled **[*465]** beside Territo and stopped while waiting to make a turn. Petitioner looked Territo full in the face. Territo testified, "I got a good look at him. If I had been in the passenger seat of the little truck, I could **[****84]** have reached out and not even stretched my arm out, I could have grabbed hold of him." Tr. 13-14 (Dec. 6, 1984). Territo also testified that a detective had shown him a picture of Beanie and asked him if the picture "could have been the guy that did it. I told him no." *Id., at 24*. The second eyewitness, Kersh, also saw petitioner shoot Mrs. Dye. When asked whether she **[**1581]** got "a good look" at him as he drove away, she answered "yes." *Id., at 32*. She also answered "yes" to the question whether she "got to see the side of his face," *id., at 31*, and said that while petitioner was stopped she had driven to within reaching distance of the driver's-side door of Mrs. Dye's car and stopped there. *Id., at 34*. The third eyewitness, Smallwood, testified that he saw petitioner shoot Mrs. Dye, walk to the car, and drive away. *Id., at 42*. Petitioner drove slowly by, within a distance of 15 or 25 feet, *id., at 43-45*, and Smallwood saw his face from the side. *Id., at 43*. The fourth eyewitness, Williams, who had been working outside the parking lot, testified that "the gentleman came up the side of the car," struggled with Mrs. Dye, shot her, walked around to the **[****85]** driver's side of the car, and drove away. *Id., at 52*. Williams not only "saw him before he shot her," *id., at 54*, but watched petitioner drive slowly by "within less than ten feet." *Ibid.* When asked "did you get an opportunity to look at him good?", Williams said, "I did." *Id., at 55*.

[*526]** The Court attempts to dispose of this direct, unqualified, and consistent eyewitness testimony in two ways. First, by relying on a theory so implausible that it was apparently not suggested by petitioner's counsel until the oral-argument-*cum*-evidentiary-hearing held before us, perhaps because it is a theory that only the most removed appellate court could **[*466]** love. This theory is that there is a reasonable probability that the jury would have changed its mind about the eyewitness identification because the *Brady* material would have permitted the defense to argue that the eyewitnesses only got a

good look at the killer when he was sitting in Mrs. Dye's car, and thus could identify him, not by his height and build, but *only by his face*. Never mind, for the moment, that this is factually false, since the *Brady* material showed that only *one* of the four **[****86]** eyewitnesses, Smallwood, did not see the killer outside the car. [3] And never mind, also, the dubious premise that the build of a man 6-feet tall (like petitioner) is indistinguishable, when seated behind the wheel, from that of a man less than 5 1/2-feet tall (like Beanie). To assert that unhesitant and categorical identification by four witnesses who viewed the killer, close-up and with the sun high in the sky, would not eliminate reasonable doubt if it were based *only* on *facial* characteristics, and not on height and build, is quite simply absurd. Facial features are *the primary means* by which human beings recognize one another. That is why police departments distribute "mug" shots of wanted felons, rather than Ivy-League-type posture pictures; it is why bank robbers wear stockings over their faces instead of floor-length capes over their shoulders; it is why the Lone Ranger wears a mask instead of a poncho; and it is why a criminal defense lawyer who seeks to destroy an **[*467]** identifying witness by asking "You admit that you saw only the killer's face?" will be laughed out of the courtroom.

[**87]** It would be different, of course, if there were evidence that Kyles's and Beanie's faces looked like twins, or at least bore an unusual degree of resemblance. That facial resemblance *would* explain why, if Beanie committed the crime, all four witnesses picked out Kyles at first (though not why they continued to pick him out when he and Beanie stood side-by-side in court), and would render their failure to observe the height and build of the killer relevant. But without evidence of facial similarity, the question "You admit that you saw only the killer's face?" draws no blood; it does not explain *any* witness's identification of petitioner as the killer. While the assumption of facial resemblance between Kyles and Beanie underlies all of the Court's repeated references **[**1582]** to the partial concealment of the killer's body from view, see, *e. g.*, *ante*, at 442-443, 443-444, **[***527]** n. 14, 445, the Court never actually says that such resemblance exists. That is because there is not the slightest basis for such a statement in the record. *No* court has found that Kyles and Beanie bear any facial resemblance. In fact, quite the opposite: *every* federal and state **[****88]** court that has reviewed the record photographs, or seen the two men, has found that they do not resemble each other in any respect. See *5 F.3d at 813* ("Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face"); App. 181 (District Court opinion) ("The court examined all of the pictures used in the photographic line-up and compared Kyles' and Beanie's pictures; it finds that they did not resemble one another"); *id., at 36* (state trial court findings on postconviction review) ("[Beanie] clearly and distinctly did *not resemble* the defendant in this case") (emphasis in original). The District Court's finding controls because it is not clearly erroneous, *Fed. Rule Civ. Proc. 52(a)*, and the state court's finding, because fairly supported by the record, must be presumed correct on habeas review. See *28 U.S.C. § 2254(d)*.

[*468] The Court's second means of seeking to neutralize the impressive and unanimous eyewitness testimony uses the same "build-is-everything" theory to exaggerate the effect of the State's failure to disclose the contemporaneous statement of Henry Williams. That **[****89]** statement would assuredly have permitted a sharp cross-examination, since it contained estimations of height and weight that fit

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[3] Smallwood and Williams were the only eyewitnesses whose testimony was affected by the *Brady* material, and Williams's was affected not because it showed he did not observe the killer standing up, but to the contrary because it showed that his estimates of height and weight based on that observation did not match Kyles. The other two witnesses did observe the killer in full. Territo testified that he saw the killer running up to Mrs. Dye before the struggle began, and that after the struggle he watched the killer bend down, stand back up, and then "strut" over to the car. Tr. 12 (Dec. 6, 1984). Kersh too had a clear opportunity to observe the killer's body type; she testified that she saw the killer and Mrs. Dye arguing, and that she watched him walk around the back of the car after Mrs. Dye had fallen. *Id., at 29-30*.

Beanie better than petitioner. *Ante*, at 441-442. But I think it is hyperbole to say that the statement would have "substantially reduced or destroyed" the value of Williams' testimony. *Ante*, at 441. Williams saw the murderer drive slowly by less than 10 feet away, Tr. 54 (Dec. 6, 1984), and unhesitatingly picked him out of the photo lineup. The jury might well choose to give greater credence to the simple fact of identification than to the difficult estimation of height and weight.

The Court spends considerable time, see *ante*, at 443, showing how Smallwood's testimony could have been discredited to such a degree as to "raise a substantial implication that the prosecutor had coached him to give it." *Ibid.* Perhaps so, but that is all irrelevant to this appeal, since *all* of that impeaching material (except the "facial identification" point I have discussed above) was available to the defense independently of the *Brady* material. See *ante*, at 443-444, n. 14. In sum, the undisclosed statements, credited with everything they could possibly **[****90]** have provided to the defense, leave two prosecution witnesses (Territo and Kersh) totally untouched; one prosecution witness (Smallwood) barely affected (he saw "only" the killer's face); and one prosecution witness (Williams) somewhat impaired (his description of the killer's height and weight did not match Kyles). We must keep all this in due perspective, remembering that the relevant question in the materiality inquiry is not how many points the defense could have scored off the prosecution witnesses, but whether it is reasonably probable that the new evidence would have caused the jury to accept **[***528]** the basic thesis that all four witnesses were mistaken. I think it plainly **[*469]** is not. *No* witness involved in the case ever identified *anyone* but petitioner as the murderer. Their views of the crime and the escaping criminal were obtained in bright day-light from close at hand; and their identifications were reaffirmed before the jury. After the side-by-side comparison between Beanie and Kyles, the jury heard Territo say that there was "no doubt in my mind" that petitioner was the murderer, Tr. 378 (Dec. 7, 1984); heard Kersh say "I know it was him. . . . I seen **[****91]** his face and I know the color of his skin. I know it. I know it's him, " *id., at 383*; heard Smallwood say "I'm positive . . . because that's the man who I seen kill that woman," *id., at 387*; and heard Williams say "no doubt in my mind," *id., at 391*. With or without the *Brady* evidence, there could be no doubt in the mind of the jury either.

There remains the argument that is the major contribution of today's opinion to *Brady* litigation; with our endorsement, it will surely be trolled past appellate courts in all future failure-to-disclose cases. The Court argues that "the effective impeachment of **[**1583]** one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Ante*, at 445 (citing *Agurs v. United States, 427 U.S. at 112-113, n. 21*). It would be startling if we *had* "said [this] before," since it assumes irrational jury conduct. The weakening of one witness's testimony does not weaken the unconnected testimony of another witness; and to entertain the possibility that the jury will give it such an effect is incompatible with the whole idea of a materiality standard, **[****92]** which presumes that the incriminating evidence that would have been destroyed by proper disclosure can be logically separated from the incriminating evidence that would have remained unaffected. In fact we have said nothing like what the Court suggests. The opinion's only authority for its theory, the cited footnote from *Agurs*, was appended to the proposition that "[a *Brady*] omission must be evaluated in the context of the entire record," *427 U.S. **[*470]** at 112*. In accordance with that proposition, the footnote recited a hypothetical that shows how a witness's testimony could have been destroyed by withheld evidence *that contradicts the*

witness. [4] That is worlds apart from having it destroyed by the corrosive effect of withheld evidence that impeaches (or, as here, merely weakens) *some other corroborating witness*.

[**93]** The physical evidence confirms the immateriality of the nondisclosures. In a garbage bag outside petitioner's home the police found Mrs. Dye's purse and other belongings. Inside his home they found, behind the **[***529]** kitchen stove, the .32-caliber revolver used to kill Mrs. Dye; hanging in a wardrobe, a homemade shoulder holster that was "a perfect fit" for the revolver, Tr. 74 (Dec. 6, 1984) (Detective Dillman); in a dresser drawer in the bedroom, two boxes of gun cartridges, one containing only .32-caliber rounds of the same brand found in the murder weapon, another containing .22, .32, and .38-caliber rounds; in a kitchen cabinet, eight empty Schwegmann's bags; and in a cupboard underneath that cabinet, one Schwegmann's bag containing 15 cans of pet food. Petitioner's account at trial was that Beanie planted the purse, gun, and holster, that petitioner received the ammunition from Beanie as collateral for a loan, and that petitioner had bought the pet food the day of the murder. That account strains credulity to the breaking point.

[*471] The Court is correct that the *Brady* material would have supported the claim that Beanie planted Mrs. Dye's belongings in petitioner's **[****94]** garbage and (to a lesser degree) that Beanie planted the gun behind petitioner's stove. *Ante*, at 448. But we must see the whole story that petitioner presented to the jury. Petitioner would have it that Beanie did not plant the incriminating evidence until the day *after* he incited the police to search petitioner's home. Moreover, he succeeded in surreptitiously placing the gun behind the stove, and the matching shoulder holster in the wardrobe, while *at least 10 and as many as 19 people* were present in petitioner's small apartment. [5] Beanie, who was wearing blue jeans and either a "tank-top" shirt, Tr. 302 (Dec. 7, 1984) (Cathora Brown), or a short-sleeved shirt, *id., at 351* (petitioner), would have had to be concealing about his person not only the shoulder holster and the murder weapon, but also a different gun with tape wrapped around the barrel that he showed to petitioner. *Id., at 352*. Only appellate judges could swallow such a tale. Petitioner's **[**1584]** only supporting evidence was Johnny Burns's testimony that he saw Beanie stooping behind the stove, presumably to plant the gun. *Id., at 262-263*. Burns's credibility on the stand can perhaps best **[****95]** be gauged by observing that the state judge who presided over petitioner's trial stated, in a postconviction proceeding, that "[I] have chosen to totally disregard everything that [Burns] has said," App. 35. See also *id., at 165 (District Court opinion)* ("Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of [Burns]"). Burns, by the way, who repeatedly stated at trial that Beanie was his "best friend," Tr. 279 (Dec. 7, 1984), has since been **[*472]** tried and convicted for killing Beanie. See *State v. Burnes, 533 So. 2d 1029 (La. App. 1988)*. [6]

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[4] "'If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only a brief glimpse, the result might well be different.'" *Agurs, 427 U.S. at 112-113, n. 21* (quoting Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 125 (1972)).

[5] The estimates varied. See Tr. 269 (Dec. 7, 1984) (Johnny Burns) (18 or 19 people); *id., at 298 (Cathora Brown)* (6 adults, 4 children); *id., at 326* (petitioner) ("about 16 . . . about 18 or 19"); *id., at 340* (petitioner) (13 people).

[6] The Court notes that "neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials." *Ante*, at 450, n. 19. That is obviously true. But it is just as obviously true that because we have no findings about Burns's credibility from the jury and no direct method of asking what they thought, the only way that *we* can assess the jury's appraisal of Burns's credibility is by asking

[**96]** **[***530]** Petitioner did not claim that the ammunition had been planted. The police found a .22-caliber rifle under petitioner's mattress and two boxes of ammunition, one containing .22, .32, and .38-caliber rounds, another containing only .32-caliber rounds of the same brand as those found loaded in the murder weapon. Petitioner's story was that Beanie gave him the rifle and the .32-caliber shells as security for a loan, but that he had taken the .22-caliber shells out of the box. Tr. 353, 355 (Dec. 7, 1984). Put aside that the latter detail was contradicted by the facts; but consider the inherent implausibility of Beanie's giving petitioner collateral in the form of a box containing *only* .32 shells, if it were true that petitioner did not own a .32-caliber gun. As the Fifth Circuit wrote, "the more likely inference, apparently chosen by the jury, is that [petitioner] possessed .32-caliber ammunition because he possessed a .32-caliber firearm." *5 F.3d at 817*.

We come to the evidence of the pet food, so mundane and yet so very damning. Petitioner's confused and changing explanations for the presence of 15 cans of pet food in a Schwegmann's bag under the sink **[****97]** must have fatally undermined his credibility before the jury. See App. 36 (trial judge finds that petitioner's "obvious lie" concerning the pet food "may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire defense **[*473]** in this case"). The Court disposes of the pet food evidence as follows:

> "The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id., at 188*. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he was right in describing the way it was priced at Schwegmann's market, where he commonly shopped." *Ante*, at 451-452; see also *ante*, at 452, n. 20.

The full story is this. Mr. and Mrs. Dye owned two cats and a dog, Tr. 178 (Dec. 7, 1984), for which she regularly bought varying brands **[****98]** of pet food, several different brands at a time. *Id., at 179, 180*. Found in Mrs. Dye's home after her murder were the brands Nine Lives, Kalkan, and Puss n' Boots. *Id.*, at 180. Found in petitioner's home were eight cans of Nine Lives, four cans of Kalkan, and three cans of Cozy Kitten. *Id.*, at 188. Since we know that Mrs. Dye had been shopping that day and that the murderer made off with her goods, petitioner's possession of these items was powerful evidence that he was the murderer. Assuredly the jury drew that obvious inference. Pressed to explain why he just happened to **[**1585]** buy *15 cans* of pet food that very day (keep in mind that petitioner was a very poor man, see *id., at 329*, who supported a common-law **[***531]** wife, a mistress, and four children), petitioner gave the reason that "it was on sale." *Id., at 341*. The State, however, introduced testimony from the Schwegmann's advertising director that the pet food was *not* on sale that day. *Id., at 395*. The dissenting judge below tried to rehabilitate petitioner's testimony **[*474]** by interpreting the "on sale" claim as meaning "for sale," a reference to the pricing of the pet food (**[****99]** *e. g.*, "3 for 89 cents"), which petitioner claimed to have read on a shelf sign in the store. *Id., at 343*. But unless petitioner was parodying George Leigh Mallory, "because it was *for* sale" would have been an irrational response to the question it was given in answer to: Why did you buy *so many* cans? In any event, the Schwegmann's employee also testified that store policy was not to put signs on the shelves at all. *Id., at 398-399*. The sum of it is that

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(1) whether the state trial judge, who saw Burns's testimony along with the jury, thought it was credible; and (2) whether Burns was in fact credible -- a question on which his later behavior towards his "best friend" is highly probative.

petitioner, far from explaining the presence of the pet food, doubled the force of the State's evidence by perjuring himself before the jury, as the state trial judge observed. See *supra, at 472-473*. [7]

[**100]** I will not address the list of cars in the Schwegmann's parking lot and the receipt, found in the victim's car, that bore petitioner's fingerprints. These were collateral matters that provided little evidence of either guilt or innocence. The list of cars, which did not contain petitioner's automobile, would only have served to rebut the State's introduction of a photograph purporting to show petitioner's car in the parking lot; but petitioner does not contest that the list was not comprehensive, and that the photograph was taken about six hours before the list was compiled. See *5 F.3d at 816*. **[*475]** Thus its rebuttal value would have been marginal at best. The receipt -- although it showed that petitioner must at some point have been both in Schwegmann's and in the murdered woman's car -- was as consistent with petitioner's story as with the State's. See *ante*, at 452.

* * *

The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that petitioner was guilty of murder, and that he lied about his guilt. The effect that the *Brady* materials would have had in chipping away at the edges of the State's case can only be called **[****101]** immaterial. For the same reasons I reject petitioner's claim that the *Brady* materials would have created a "residual doubt" sufficient to cause the sentencing jury to withhold capital punishment.

I respectfully dissent.

References

21A Am Jur 2d, Criminal Law 785, 785.5; 39 Am Jur 2d, Habeas Corpus 58.5; *63A Am Jur 2d, Prosecuting Attorneys 27*

9 Federal Procedure, L Ed, Criminal Procedure 22:1166-22:1182; 16 Federal Procedure, L Ed, Habeas Corpus 41:204

7 Federal Procedural Forms, L Ed, Criminal Procedure 20:465-20:468

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 281, 294, 295; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 132

5 Am Jur Trials 27, Pretrial Procedures and Motions in Criminal Cases; 7 Am Jur Trials 477, Homicide; 41 Am Jur Trials 349, Habeas Corpus: Pretrial Rulings

USCS, *Constitution, Amendment 14*

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[7] I have charitably assumed that petitioner had a pet or pets in the first place, although the evidence tended to show the contrary. Petitioner claimed that he owned a dog or puppy, that his son had a cat, and that there were "seven or eight more cats around there." Tr. 325 (Dec. 7, 1984). The dog, according to petitioner, had been kept "in the country" for a month and half, and was brought back just the week before petitioner was arrested. *Id., at 337-338*. Although petitioner claimed to have kept the dog tied up in a yard behind his house before it was taken to the country, *id., at 336-337*, two *defense* witnesses contradicted this story. Donald Powell stated that he had not seen a dog at petitioner's home since at least six months before the trial, *id., at 254*, while Cathora Brown said that although Pinky, petitioner's wife, sometimes fed stray pets, she had no dog tied up in the back yard. *Id., at 304-305*. The police found no evidence of any kind that any pets lived in petitioner's home at or near the time of the murder. *Id., at 75 (Dec. 6, 1984)*.

L Ed Digest, Constitutional Law 840.2; Habeas Corpus 39

L Ed Index, Disclosure; District and Prosecuting Attorneys; Exclusion **[****102]** or Suppression of Evidence; Habeas Corpus

ALR Index, Disclosure; Due Process; Exclusion and Suppression of Evidence; Habeas Corpus; Prosecuting Attorneys

Annotation References:

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence favorable to accused-- Supreme Court cases. *87 L Ed 2d 802*.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. *34 ALR3d 16*.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. *7 ALR3d 8*.

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McCann v. Mangialardi

United States Court of Appeals for the Seventh Circuit

February 10, 2003, Argued ; July 22, 2003, Decided

Nos. 02-2409 & 02-3021

Reporter
337 F.3d 782 *; 2003 U.S. App. LEXIS 14652 **

DEMETRIUS MCCANN, Plaintiff-Appellee/Cross-Appellant, v. SAM A. MANGIALARDI, Defendant-Appellant/Cross-Appellee.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *McCann v. Mangialardi, 2003 U.S. App. LEXIS 19364 (7th Cir. Ill., Sept. 17, 2003)*

Prior History: [1]** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 5156. Harry D. Leinenweber, Judge.

Disposition: Reversed in part and affirmed in part and remanded.

Core Terms

arrest, drugs, planted, guilty plea, district court, due process claim, false arrest, conversation, driving, due process, conspired, innocence, exculpatory evidence, qualified immunity, summary judgment, impeachment, disclose, malicious prosecution, take place, disclosures, cocaine, station

Case Summary

Procedural Posture

Appellee drug trafficking assistant sued appellants, city, police department, and deputy chief, and alleged violations of his *Fourth* and *Fourteenth Amendment* rights. The United States District Court for the Northern District of Illinois, Eastern Division granted the chief's motion to dismiss the *Fourth Amendment* false arrest claim and denied his summary judgment motion on the due process claim. The chief appealed. The assistant cross-appealed.

Overview

The chief was on the payroll of the cocaine trafficking business that the assistant worked for. The chief and the operator of the business suspected the assistant of being a federal informant, and they had cocaine planted in the assistant's car. The operator then notified the chief, who ordered police to stop, search, and arrest the assistant. The assistant pleaded guilty, was sentenced, and served time in prison. After his release on parole, the assistant discovered that the chief had been prosecuted and that the operator testified for the government and disclosed that he had planted cocaine in the car that the assistant was driving when arrested. The appellate court found that because the assistant could not demonstrate that the chief's

conduct violated his *Fourteenth Amendment* due process rights, the district court erred when it denied the chief's motion for summary judgment on qualified immunity grounds. The district court did not err when it dismissed the assistant's *Fourth Amendment* false arrest claim because his assertion that the deputy police chief conspired with the operator of the cocaine trafficking business to plant drugs in his car, was not supported by any evidence.

Outcome

The district court's denial of the chief's motion for summary judgment on the assistant's due process claims was reversed and the case was remanded to the district court with instructions to enter judgment in favor of the chief. The district court's dismissal of the assistant's *Fourth Amendment* false arrest claim was affirmed.

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For DEMETRIUS MCCANN, Plaintiff - Appellant (02-3021): Ardwin E. Boyer, NEWMAN & BOYER, Chicago, IL USA. Jeffrey J. Levine, Chicago, IL USA.

For CITY OF CHICAGO HEIGHTS, a municipality, DOUGLAS TROIANI, Chicago Heights Mayor, DOUGLAS BARGER, Defendants - Appellees (02-3021): Lawrence P. Gulotta, GULOTTA & KAWANNA, Calumet City, IL USA.

For ALLEN T. VEHRS, Chicago Heights Police Officers, Defendant - Appellee (02-3021): Robert P. Vogt, WELDON-LINNE & VOGT, Chicago, IL USA.

Judges: Before POSNER, MANION, and KANNE, Circuit Judges.

Opinion by: MANION

Opinion

[*783] MANION, *Circuit Judge*. Otis Moore operated a cocaine trafficking business in Chicago Heights, Illinois. One of his top assistants was Demetrius McCann. Also on the payroll was Sam Mangialardi, the deputy chief of the Chicago Heights police department, who not only protected Moore's operation but also investigated and arrested many of Moore's competitors. At some point, Mangialardi and Moore suspected McCann of being a federal informant, and they agreed that Moore should get rid of him. Moore set McCann up for arrest by having cocaine planted in a car McCann was driving, then notified Mangialardi of McCann's location. Mangialardi ordered police to stop, search and arrest McCann. After his arrest McCann pleaded guilty, was sentenced, and served time in prison. After his release **[*784]** on parole, McCann discovered that Mangialardi had been prosecuted and that Moore, testifying for the government, disclosed he had planted cocaine in the car McCann was driving when arrested. **[**2]** McCann filed suit against the City of Chicago Heights, its police department, and a number of government officials, including Mangialardi. Ultimately, the litigation boiled down to McCann's claims against Mangialardi for false arrest under the *Fourth Amendment* and a *Fourteenth Amendment* violation of his due process rights.

Mangialardi moved to dismiss McCann's *Fourth Amendment* claim on the pleadings, which the district court granted. Mangialardi then moved for summary judgment of McCann's due process claim on the ground that he was entitled to qualified immunity. The district court denied the motion, and Mangialardi appeals. McCann cross-appeals the district court's dismissal of his *Fourth Amendment* false arrest claim. We reverse in part and affirm in part.

I.

From 1988 until 1990, Demetrius ("Trent") McCann was a "lieutenant" in a narcotics trafficking organization operated by Otis Moore, holding the position of "overseer." During this time period, McCann sold cocaine for Moore's organization. As part of the operation, Moore paid protection money to Sam Mangialardi, who at that time was the deputy chief of the Chicago Heights police department. Mangialardi's "duties" were to protect **[**3]** Moore's operation from police interference and to arrest any drug competitors whom Moore wanted out of the way. At some point in 1990, Mangialardi told Moore that he suspected McCann might be working for the Federal Bureau of Investigation ("FBI") as an informant, and advised him to "get rid of that guy." In November of that same year, Ray Cooper, one of Moore's subordinates, found an FBI or IRS business card while searching through some of McCann's personal belongings. Cooper relayed this information to Moore, who in turn advised Mangialardi of the discovery.

Shortly thereafter, Moore and Mangialardi met to discuss how to best deal with McCann. During the meeting, Moore told Mangialardi that McCann "would have drugs in his car shortly," to which Mangialardi responded, "I will be at the station. Just give me a call." On November 20, 1990, Moore instructed another subordinate, Johnson Lee, to "bring his black Cutlass" so that he could plant "100 dime bags of cocaine . . . under the springs of the driver's side seat." After Moore planted the drugs, the black Cutlass was parked near McCann's residence. Moore then ordered Lee to direct Terrell Jones, yet another subordinate, to ask McCann **[**4]** to follow him in the black Cutlass under the pretense that Jones's car was about to run out of gas. Jones made the request, and McCann agreed to follow him in the Cutlass (unaware that Moore had planted the drugs). Upon seeing the two cars depart from McCann's house, Moore--who was carefully watching events transpire from a safe distance with binoculars--immediately called Mangialardi at the police station to tell him that "it was going down, that they were moving westbound on 14th street." Moore then followed Jones and McCann in his car, and, shortly thereafter, called Mangialardi back to advise him of "the location where they was [sic] and the direction they was [sic] moving in." Mangialardi advised police officers of the "tip," and in short order the police surrounded the car McCann was driving. When the police were unable to find any drugs, Moore called the police station again, this time speaking with Officer Tony Murphy. Moore advised Murphy that the drugs were "up under the driver's side seat," and **[*785]** Murphy relayed this information to the officers on the scene, who promptly found the planted drugs and arrested McCann.

On December 21, 1990, McCann was indicted for possession **[**5]** of a controlled substance and for possession of a controlled substance with the intent to distribute. Faced with the prospect of a 30-year prison sentence, McCann pleaded guilty on January 31, 1991, receiving a five-year term of imprisonment. In December 1991, Moore was arrested by federal law enforcement officers, and thereafter indicted for tax evasion, participating in a criminal enterprise, money laundering, and conspiracy. In return for a lighter sentence, Moore agreed to testify as part of the government's prosecution of Mangialardi, who had also been indicted for similar criminal acts. During Moore's testimony, which he gave on March 24, 1994, he admitted to orchestrating the arrest of McCann on November 20, 1990, and claimed that sometime

after the arrest he informed Mangialardi that McCann was not on a routine drug delivery at the time of his arrest, but instead Moore's people had planted drugs in the car McCann was driving. [1]

[6]** During Mangialardi's trial, McCann was apparently on parole and soon learned of Moore's admission to planting drugs in the car McCann was driving on the day of his arrest. On August 24, 1994, McCann filed a complaint against the City of Chicago Heights and numerous government officials and police officers (including Mangialardi), alleging, *inter alia*, that they violated his rights under the *Fourth* and *Fourteenth Amendments to the United States Constitution*. A great deal of procedural wrangling then ensued, but eventually the litigation was narrowed to two parties, McCann and Mangialardi, and two claims, a *Fourth Amendment* false arrest claim and a *Fourteenth Amendment* due process claim. [2] On February 16, 2001, the district court dismissed McCann's *Fourth Amendment* false arrest claim on the pleadings, holding that the claim was time-barred. On November 2, 2001, Mangialardi filed a motion for summary judgment on McCann's due process claim, asserting that he had not violated McCann's constitutional right to due process and that he was entitled to qualified immunity from the claim. The district court denied this motion on April 24, 2002, which Mangialardi appeals. McCann cross-appeals **[**7]** the district court's dismissal of his *Fourth Amendment* false arrest claim.

II.

The first question before us on appeal is whether the district court erred in concluding that Mangialardi was not entitled to qualified immunity from McCann's due process claim. Mangialardi is authorized to bring this interlocutory appeal because he is raising the question as to whether, based on the facts taken in the light most favorable to McCann, he should have prevailed on his defense of qualified immunity. *Mitchell v. Forsyth, 472 U.S. 511, 526-27, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)*; *Cavalieri v. Shepard, 321 F.3d 616, 618 (7th Cir. 2003)*. We must resolve a qualified immunity issue as early as possible in the proceedings because it is an "'*immunity from suit* rather **[**8]** than a mere defense to liability.'" *Saucier v. [*786] Katz, 533 U.S. 194, 200-01, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)* (emphasis in original) (citation omitted). In evaluating whether a claim for qualified immunity is well founded, a court must undertake a two-step inquiry. *Saucier, 533 U.S. at 201*. First, we must consider whether the facts alleged by the plaintiff demonstrate that the officer's conduct violated a constitutional right. *Id.* If the plaintiff cannot make such a showing, our inquiry is finished and summary judgment must be entered in favor of the government official. *Id.* If, on the other hand, the facts alleged by the plaintiff, viewed in their most favorable light, show the violation of a constitutional right, the next step is to determine whether that right was clearly established at the time the violation occurred. *Id.*

A. Procedural Due Process Claims

McCann argues that Mangialardi violated his right to procedural due process under the *Fourteenth Amendment* by: (1) "purposefully creating false evidence for the purpose of procuring [his] criminal conviction and imprisonment"; (2) depriving him of the right to a fair **[**9]** trial "even though he plead guilty and no trial occurred"; and (3) failing to disclose exculpatory evidence of his innocence to prosecutors, defense counsel, and the court before the entry of his guilty plea.

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[1] Mangialardi was subsequently convicted of racketeering, "conspiracy against rights," tax evasion, and intimidation of a witness.

[2] On April 30, 2002, pursuant to an agreement between McCann and the City of Chicago Heights to indemnify Mangialardi, McCann agreed to dismiss the City and all named defendants other than Mangialardi from the lawsuit.

McCann cites no authority to support his assertion that his right to procedural due process was violated by Mangialardi allegedly manufacturing evidence for the purpose of having him prosecuted, convicted and imprisoned, and, therefore, the claim is waived. *Gable v. City of Chicago, 296 F.3d 531, 538 (7th Cir. 2002)* (holding that arguments not developed on appeal are waived). Even in the absence of such a waiver, however, McCann's first "due process" claim still fails because it is nothing more than a recast of his *Fourth Amendment* false arrest claim--which we address in Section II (B)--in the guise of a substantive (rather than procedural) due process violation. The Supreme Court has made it clear that a substantive due process claim may not be maintained when a specific constitutional provision (here the *Fourth Amendment*) protects the right allegedly violated. *United States v. Lanier, 520 U.S. 259, 272 n.7, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997)*; **[**10]** *Graham v. Connor, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)*. Moreover, to the extent McCann maintains that Mangialardi denied him due process by causing him to suffer "[a] deprivation of liberty from a prosecution and a contrived conviction . . . deliberately obtained from the use of false evidence," his claim is, in essence, one for malicious prosecution, rather than a due process violation. As we emphasized in *Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001)*, "the existence of a tort claim under state law knocks out any constitutional theory of malicious prosecution," *id. at 750*, and Illinois has a common law tort action for malicious prosecution. *Miller v. Rosenberg, 196 Ill. 2d 50, 749 N.E.2d 946, 951-52, 255 Ill. Dec. 464 (Ill. 2001)*. Thus, any claim McCann had against Mangialardi for malicious prosecution should have been brought under Illinois law. *Newsome, 256 F.3d at 750*. In sum, McCann cannot do an end run around the foregoing precedent by combining what are essentially claims for false arrest under the *Fourth Amendment* and state law malicious prosecution into a sort of **[**11]** hybrid substantive due process claim under the *Fourteenth Amendment.*

McCann's second due process claim is that, notwithstanding his guilty plea, Mangialardi deprived him of the right to a fair trial. Aside from the fact that he did not have a trial, McCann waived this argument **[*787]** by failing to first present it to the district court for its consideration. *United States v. Shorty, 159 F.3d 312, 313 (7th Cir. 1998)* (holding that the " 'failure to raise an issue before the district court results in a waiver of that issue on appeal' ") (citation omitted).

Although waived, McCann's assertion that he was denied a fair trial is essentially subsumed into his third and final due process claim. McCann alleges that Mangialardi violated his right to procedural due process by failing to disclose to prosecutors, defense counsel, and the court, prior to the entry of his guilty plea, that the drugs found in the car he was driving on the day of his arrest were planted without his knowledge. In *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, the Supreme Court held that during trial the government is constitutionally obligated to disclose evidence **[**12]** favorable to the defense when the evidence is material to either the guilt or punishment of the defendant. *Id. at 87*. The Court has yet to address, however, whether the *Due Process Clause* requires such disclosures outside the context of a trial. *See* *United States v. Tadros, 310 F.3d 999, 1005 (7th Cir. 2002)* (holding that "[a] violation of the *Brady* rule occurs only when the government withholds evidence which, had it been disclosed, creates a reasonable probability that the result of the trial would have been different"); *United States v. Nash, 29 F.3d 1195, 1202-03 n.5 (7th Cir. 1994)* (refraining from addressing the issue of whether "*Brady* may be invoked to challenge the voluntariness of the plea where a defendant's (otherwise voluntary plea) was given without knowledge of . . . undisclosed exculpatory evidence").

A recent decision by the Supreme Court, however, indicates that such a claim might be viable in certain cases. In *United States v. Ruiz, 536 U.S. 622, 153 L. Ed. 2d 586, 122 S. Ct. 2450 (2002)*, the Court

addressed an issue similar to the one before us: "whether the Constitution requires . . . **[**13]** *preguilty plea disclosure* of impeachment information." *Id. at 629*. (emphasis added). *Ruiz* held that such disclosures were not mandated by the *Due Process Clause*, but in doing so noted that "impeachment information is special in relation to the *fairness of the trial*, not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficiently aware')." *Id*. (emphasis in original). In contrast, the exculpatory evidence at issue in this case--i.e., Mangialardi's alleged knowledge of McCann's factual innocence--is entirely different. Thus, we have a question not directly addressed by *Ruiz*: whether a criminal defendant's guilty plea can ever be "voluntary" when the government possesses evidence that would exonerate the defendant of any criminal wrongdoing but fails to disclose such evidence during plea negotiations or before the entry of the plea.

The Supreme Court's decision in *Ruiz* strongly suggests that a *Brady*- type disclosure might be required under the circumstances of this particular case. In holding that the *Due Process Clause* does not require the government to disclose impeachment information prior to the entry of a **[**14]** criminal defendant's guilty plea, the Court in *Ruiz* reasoned that it was "particularly difficult to characterize impeachment information *as critical information of which the defendant must always be aware prior to pleading guilty* . . . ." *536 U.S. at 630* (emphasis added). The Court also noted that "the proposed plea agreement at issue . . . specifies the Government will provide 'any information establishing the factual innocence of the defendant,'" *id. at 631*, and "that fact, along with **[*788]** other guilty-plea safeguards . . . diminishes the force of [defendant's] concern that, in the absence of the impeachment information, innocent individuals accused of crimes will plead guilty." *Id*. Thus, *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the *Due Process Clause* if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.

We need not resolve this **[**15]** question, however, because even if such disclosures of factual innocence are constitutionally required, McCann has not presented any evidence that Mangialardi knew about the drugs being planted in McCann's car prior to the entry of his guilty plea.

To begin with, during the proceedings in the district court, McCann failed to answer the following request for admission submitted by Mangialardi: "In regard to the November 20, 1990 arrest, Plaintiff has no evidence from any source that Sam Mangialardi or any other Chicago Heights police officer withheld any exculpatory evidence from Plaintiff, the state's attorneys, or Plaintiff's attorney prior to the date when Plaintiff pled guilty on January 31, 1991." This default admission is, in and of itself, fatal to McCann's final due process claim. *Fed. R. Civ. P. 36(a)* (a party who fails to respond to requests for admission within 30 days is deemed to have admitted those requests); *Walsh v. McCain Foods Ltd., 81 F.3d 722, 726 (7th Cir. 1996)* (same). We also note that McCann made no attempt to withdraw the admission by petitioning the court for such withdrawal under *Fed. R. Civ. P. 36(b)*, [3] and, therefore, it is

[3] *Federal Rule of Civil Procedure 36(b)* provides that:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

"conclusively **[**16]** established" for purposes of this litigation that he has no evidence that Mangialardi withheld exculpatory evidence from him prior to the entry of his guilty plea. *United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987)* (holding that "admissions made under *Rule 36*, even default admissions, can serve as the factual predicate for summary judgment"). The district court erred by not analyzing this admission and giving it preclusive effect.

[17]** Furthermore, even without the default admission, the record in this case does not support McCann's assertion that at the time he entered his guilty plea Mangialardi was aware that the drugs McCann was charged with possessing on the day of his arrest had been planted in the car without his knowledge. McCann's entire argument is premised on the testimony of Otis Moore at Mangialardi's criminal trial on March 24, 1994. According to McCann, this testimony supports his contention that Mangialardi knew that he was innocent of the charges brought against him by the government because: (1) Mangialardi conspired with Moore to "cause drugs to be planted" in the car he was driving and to **[*789]** have him falsely arrested; or (2) at the very least, Mangialardi learned that Moore planted the drugs in his car sometime after his arrest of November 20, 1990, but before he entered a guilty plea on January 31, 1991. The record supports neither of McCann's assertions.

First, Moore's testimony at Mangialardi's criminal trial conclusively demonstrates that Moore did not tell Mangialardi about planting drugs in McCann's car until after McCann had been arrested. Recall that McCann was a key player in Moore's drug **[**18]** operation, so drug deliveries were part of his routine. When Mangialardi suspected McCann was an FBI informant, he told Moore to get rid of him. At Mangialardi's criminal trial, Moore testified only that he told Mangialardi, prior to the arrest, that McCann "would be having drugs in his car shortly," to which Mangialardi replied, "I will be at the station. Just give me a call." Thus, although Moore's testimony shows that he and Mangialardi concocted a scheme to have McCann arrested, it does not demonstrate that Mangialardi conspired with Moore to have McCann *falsely* arrested. Indeed, with respect to the discussion Moore and Mangialardi had shortly after McCann's arrest, Moore testified that he could not recall when he informed Mangialardi of "how the drugs had gotten into the car," but "it was after the conversation" that took place "shortly after the incident." The plot was to catch McCann "dirty" with illegal drugs, but nothing in the record suggests that Mangialardi expected McCann to be caught during anything other than a routine drug delivery. In short, Mangialardi did not need to know how the drugs got there, and Moore's undisputed testimony shows that he did not know about **[**19]** the plant until sometime after the arrest. [4]

Second, Moore's testimony does not support McCann's contention that Mangialardi knew that Moore planted the drugs on McCann prior to the time he pleaded guilty on January 31, 1991. At Mangialardi's trial, Moore was asked by the government whether he recalled "at any time having a conversation with [Mangialardi] in which you informed him of how the drugs got into the car?" Although Moore answered this question in the affirmative, he could not recall when that conversation "took place." In the absence of evidence demonstrating that Mangialardi knew on or before January 31, 1991, that Moore planted drugs in the car McCann was driving, there is no factual basis upon which McCann can construct the novel due process claim he advocates on appeal. *Borcky v. Maytag Corp., 248 F.3d 691, 695 (7th Cir. 2001)* (holding that **[**20]** mere speculation is insufficient to withstand a motion for summary judgment).

McCann attempts to make up for this lack of evidentiary support by asserting that Moore's act (and thus knowledge) of planting drugs on him is imputed to Mangialardi because they were co-conspirators. In

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[4] The text of Moore's relevant testimony regarding when Mangialardi became aware of the plant is attached as an appendix to this opinion.

support of this argument, McCann relies heavily on our decision in *Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988)*, where we held that a government official is liable as a conspirator, for purposes of establishing liability under *§ 1983*, if he is "a voluntary participant in a common venture, although [he] need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are . . . [so long as he] understands the *general objectives of the scheme, accepts them, and agrees, either explicitly or implicitly, to do [his] part to further* ***[*790]*** *them*." *Id. at 992* (emphasis added). *Section 1983* claims, however, must be premised on the violation of a constitutional right. *Henderson v. Bolanda, 253 F.3d 928, 932 n.3 (7th Cir. 2001)*. Here, as previously noted, Moore testified that Mangialardi did not know before the arrest **[**21]** that the drugs were planted, so they obviously did not conspire to have McCann falsely arrested. The record shows only that Moore and Mangialardi schemed to have McCann, a drug dealer, arrested the next time he was traveling in a car with drugs, something he routinely did. Although this might constitute a criminal conspiracy to obstruct justice (i.e., interference with a federal drug investigation), there is simply no evidence that the general objective of Moore and Mangialardi's "conspiracy" was to have McCann falsely arrested, [5] which is the linchpin of McCann's third and final due process claim. For all of the foregoing reasons, McCann cannot demonstrate that Mangialardi violated his right to due process.

[22] B. *Fourth Amendment* False Arrest Claim**

Finally, we address McCann's cross appeal of the district court's dismissal of his *Fourth Amendment* (false arrest) claim on the ground that the claim was time-barred, which we review *de novo*. *Hernandez v. City of Goshen, Indiana, 324 F.3d 535, 537 (7th Cir. 2003)*. In conducting this review, we are required to accept all of the well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of McCann. *Id*.

On appeal, McCann argues that the district court erred in precluding him from asserting the equitable tolling doctrine with respect to his *Fourth Amendment* false arrest claim, and in dismissing the claim as time-barred. We need not address the merits of McCann's argument, however, because even if the district court did err in this regard, the nature of the record makes it unnecessary to remand the claim for further consideration. In reaching this conclusion, we recognize that a *12(b)(6)* dismissal is only appropriate when a court, after examining the complaint, concludes that the plaintiff can prove no set of facts that would entitle him to relief. *Hernandez, 324 F.3d at 537.* **[**23]** But here, we are not just dealing with a stand-alone claim dismissed under *12(b)(6)*; we also have before us McCann's due process claim, which: (1) has a fully developed record; (2) was briefed on the merits both below and on appeal; and (3) is premised upon the same factual allegations as his *Fourth Amendment* false arrest claim. It would, therefore, make little sense, or promote the interests of judicial economy, to remand the false arrest claim back to the district court for the purpose of allowing McCann to conduct a second round of discovery. McCann has already been given the opportunity to establish a record to support his allegation that Mangialardi conspired with Moore to have him falsely arrested by planting drugs in his car without his knowledge, but he failed to do so. [6] **[*791]** He is not entitled to another bite at the apple. Nor is there any reason to send

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[5] McCann also argues that Mangialardi violated his right to procedural due process by failing to disclose his knowledge of the planted drugs prior to sentencing. This argument, however, fails for the same reason as McCann's primary *Brady* argument; because there is no evidence that Mangialardi knew about the drug plant at the time of sentencing (which took place on January 31, 1999, the same day as the entry of the guilty plea). Moreover, McCann did not make this argument to the district court, and therefore may not raise it on appeal. *Shorty, 159 F.3d at 313*.

the claim back to the district court for further consideration on the merits, based on the record before us, when it is abundantly clear that McCann cannot prevail. As previously noted, McCann's assertion that Mangialardi conspired with Moore to plant drugs in his car, or otherwise sought to have him *falsely* arrested, is **[**24]** not supported by any evidence whatsoever. *Miller Aviation v. Milwaukee County Bd. of Supervisors, 273 F.3d 722, 731 (7th Cir. 2001)* (holding that "when a 'claim plainly lacks merit, it is better [for the Court of Appeals] to resolve it on the merits rather than remand for a determination by the district judge' . . . ."); *Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1138 (7th Cir. 1986)* (holding that interests of judicial economy weigh against sending a case back to the district court when "there is nothing to be gained from a remand"). Because Mangialardi would be entitled to judgment as a matter of law on remand, we see no reason to disturb the district court's dismissal of the claim.

[25]** III.

For the reasons outlined in this opinion, we REVERSE the district court's decision denying Mangialardi summary judgment on McCann's due process claim(s) and REMAND the case to the district court with instructions to enter judgment in favor of Mangialardi, and AFFIRM the court's dismissal of McCann's *Fourth Amendment* false arrest claim.

APPENDIX

At Sam Mangialardi's criminal trial, the following exchange took place between the federal prosecutor and Otis Moore:

> Q. What did you say to Sam Mangialardi at that time?
> A. I told him that Ray had did a search of Trent McCann and he found the card, either the IRS or the FBI card, on him.
> . . .
> Q. What did you say to him and what did he say to you?
> A. I told him that Trent would be having drugs in his car shortly. And he said, "I will be at the station. Just give me a call."
> . . .
> Q. After [McCann's arrest] did you have--ever have a conversation with [Mangialardi] about what happened?
> A. Yes, I did . . . .
> Q. Do you recall, was it that day or was it the next day?
> A. It wasn't that day.

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[6] We reach this conclusion even though McCann filed a motion for an extension of time to conduct discovery before the notice of appeal in this case was docketed. The appropriate time for McCann to have sought such an extension was *before* he decided to oppose Mangialardi's motion for summary judgment. ***Federal Rule of Civil Procedure 56(f)*** "authorizes a district court to refuse to grant a motion for summary judgment or to continue its ruling on such a motion pending further discovery *if the nonmovant submits an affidavit demonstrating why it cannot yet present facts sufficient to justify its opposition to the motion."* *Woods v. City of Chicago, 234 F.3d 979, 990 (7th Cir. 2000)* (emphasis added). McCann, however, failed to make such a request. Instead, he chose to oppose Mangialardi's motion for summary judgment based on the existing record. Thus, the fact that he subsequently requested a discovery continuance is of no consequence. *Id.* (rejecting party opponent's argument that district court's entry of summary judgment was erroneous because he had not been given "a fair opportunity to conduct such discovery" on the basis that the party opponent's failure to file a ***Rule 56(f)*** motion was sufficient, in and of itself, to affirm the district court's decision); *see also* *Wallace v. Tilley, 41 F.3d 296, 303 (7th Cir. 1994)*.

A. Do you recall how many days after it was?
A. It was shortly after the incident.

[*792] Q. **[**26]** Where did the conversation take place?
A. I don't recall the exact place.
Q. Was it in person or over the phone?
A. I don't recall.
Q. What did you say to him at that time, to Sam Mangialardi about Trent McCann?
A. He said, "Yeah, that guy finally got caught dirty, huh?" And I said, "Yeah." I said--I just--we just sort of laughed at it. It was funny between the both of us. It was sort of like just funny.
Q. During that conversation did you tell him how the drugs had gotten into the car?
A. I don't recall.
Q. Do you recall at any time having a conversation with [Mangialardi] in which you informed him of how the drugs got in the car?
A. Yes, I do.
Q. Do you recall when that took place.
A. No, I don't.
Q. Was it before or after the conversation you just referred to?
A. It was after the conversation.
Q. Do you recall who was present?
A. Me and Sam Mangialardi.
Q. What did you tell him at that time?
A. I just told him it was pretty smooth how I did that.
Q. Did you--what did you tell him then?

A. I told him that, you know, I just--I put it up under there [i.e., the driver's side seat] and **[**27]** I just basically said that Trent didn't know nothing. He was just--didn't even know.
Q. What did he do--what did Sam Mangialardi say or do at that time?
A. Nothing.

End of Document

Brady v. United States

Supreme Court of the United States

November 18, 1969, Argued ; May 4, 1970, Decided

No. 270

Reporter
397 U.S. 742 *; 90 S. Ct. 1463 **; 25 L. Ed. 2d 747 ***; 1970 U.S. LEXIS 45 ****

BRADY v. UNITED STATES

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Disposition: *404 F.2d 601*, affirmed.

Core Terms

guilty plea, death penalty, sentence, intelligently, confession, promises, invalid, lesser, jury trial, leniency, guilt, competent counsel, maximum penalty, trial judge, encouraged, kidnaping, cases, pleas

Case Summary

Procedural Posture

Defendant, who was convicted of kidnapping in violation of *18 U.S.C.S. § 1201(a)*, sought review of the judgment of the United States Court of Appeals for the Tenth Circuit, which affirmed the denial of defendant's requested relief under *28 U.S.C.S. § 2255* upon the finding that defendant's plea had been voluntarily and knowingly made.

Overview

Defendant was charged with kidnapping in violation of *18 U.S.C.S. § 1201(a)*. Since the victim had not been liberated unharmed, defendant faced a maximum penalty of death under the statute if a jury should so recommend. defendant pled guilty after learning that his codefendant would plead guilty and be available to testify against him. defendant subsequently sought relief pursuant to *28 U.S.C.S. § 2255* upon the claim that his plea was not voluntarily given because *18 U.S.C.S. § 1201(a)* operated to coerce his plea. Defendant's argument was based on a later decision, which found the death penalty provision of *§ 1201(a)* to be unconstitutional, and because the inevitable effect of that provision was said to needlessly encourage pleas of guilty and waivers of jury trial. However, that decision did not rule that all pleas of guilty encouraged by the fear of a possible death sentence were involuntary or invalid. The court considered all the relevant circumstances surrounding defendant's plea, determined that it was voluntarily and intelligently made, found that nothing in the record suggested that his admissions were anything but the truth, and affirmed the acceptance of the plea.

Outcome
The judgment was affirmed despite the fact that defendant's plea of guilty may have been motivated in part by a desire to avoid a possible death penalty because the court was convinced that the plea had been voluntarily and intelligently made and because the court had no reason to doubt that his solemn admission of guilt had been truthful.

Syllabus

Petitioner was indicted in 1959 for kidnaping and not liberating the victim unharmed in violation of *18 U. S. C. § 1201 (a)*, which imposed a maximum penalty of death if the jury's verdict so recommended. Upon learning that his codefendant, who had confessed, would plead guilty and testify against him, petitioner changed his plea from not guilty to guilty. The trial judge accepted the plea after twice questioning petitioner (who was represented throughout by competent counsel) as to the voluntariness of his plea, and imposed sentence. In 1967, petitioner sought post-conviction relief, in part on the ground that *§ 1201 (a)* operated to coerce his plea. The District Court, after hearing, denied relief, concluding that petitioner's plea was voluntary and had been induced, not by that statute, but by the development concerning his confederate. The Court of Appeals affirmed. Petitioner claims that *United States v. Jackson, 390 U.S. 570 (1968),* **[****2]** requires reversal of that holding. *Held*: On the record in this case there is no basis for disturbing the judgment of the courts below that petitioner's guilty plea was voluntary. Pp. 745-758.

(a) Though *United States v. Jackson, supra*, prohibits imposition of the death penalty under *§ 1201 (a)*, it does not hold that all guilty pleas encouraged by the fear of possible death are involuntary, nor does it invalidate such pleas whether involuntary or not. Pp. 745-748.

(b) A plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty, and here petitioner's plea of guilty met the standard of voluntariness as it was made "by one fully aware of the direct consequences" of that plea. Pp. 749-755.

(c) Petitioner's plea, made after advice by competent counsel, was intelligently made, and the fact that petitioner did not anticipate *United States v. Jackson, supra*, does not impugn the truth or reliability of that plea. Pp. 756-758.

Counsel: Peter J. Adang, by appointment of the *Court, 396 U.S. 809*, argued the cause and filed a brief for petitioner.

Joseph J. Connolly argued the cause for **[****3]** the United States. With him on the brief were Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit, and Marshall Tamor Golding.

Judges: Burger, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall

Opinion by: WHITE

Opinion

[*743] [*753] [**1466]** MR. JUSTICE WHITE delivered the opinion of the Court.

In 1959, petitioner was charged with kidnaping in violation of *18 U. S. C. § 1201 (a)*. [1] Since the indictment charged that the victim of the kidnaping was not liberated unharmed, petitioner faced a maximum penalty of death if the verdict of the jury should so recommend. Petitioner, represented by competent counsel throughout, first elected to plead not guilty. Apparently because the trial judge was unwilling to try the case without a jury, petitioner made no serious attempt to reduce the possibility of a death penalty by waiving a jury trial. Upon learning that his codefendant, who had confessed to the authorities, would plead guilty and be available to testify against him, petitioner changed his plea to guilty. His plea was accepted after the trial judge twice questioned him as to the voluntariness of his plea. [2] **[*744]** **[****4]** Petitioner **[***754]** was sentenced to 50 years' imprisonment, later reduced to 30.

[**5]** In 1967, petitioner sought relief under *28 U. S. C. § 2255*, claiming that his plea of guilty was not voluntarily given because *§ 1201 (a)* operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency. It was also alleged that the **[**1467]** trial judge had not fully complied with *Rule 11 of the Federal Rules of Criminal Procedure*. [3]

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[1] "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

[2] Eight days after petitioner pleaded guilty, he was brought before the court for sentencing. At that time, the court questioned petitioner for a second time about the voluntariness of his plea:

"THE COURT: . . . Having read the presentence report and the statement you made to the probation officer, I want to be certain that you know what you are doing and you did know when you entered a plea of guilty the other day. Do you want to let that plea of guilty stand, or do you want to withdraw it and plead not guilty?

"DEFENDANT BRADY: I want to let that plea stand, sir.

"THE COURT: You understand that in doing that you are admitting and confessing the truth of the charge contained in the indictment and that you enter a plea of guilty voluntarily, without persuasion, coercion of any kind? Is that right?

"DEFENDANT BRADY: Yes, your Honor.

"THE COURT: And you do do that?

"DEFENDANT BRADY: Yes, I do.

"THE COURT: You plead guilty to the charge?

"DEFENDANT BRADY: Yes, I do." App. 29-30.

[3] When petitioner pleaded guilty, *Rule 11* read as follows:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 11 was amended in 1966 and now reads as follows:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

[**6] [*745]** After a hearing, the District Court for the District of New Mexico denied relief. According to the District Court's findings, petitioner's counsel did not put impermissible pressure on petitioner to plead guilty and no representations were made with respect to a reduced sentence or clemency. The court held that *§ 1201 (a)* was constitutional and found that petitioner decided to plead guilty when he learned that his codefendant was going to plead guilty: petitioner pleaded guilty "by reason of other matters and not by reason of the statute" or because of any acts of the trial judge. The court concluded that "the plea was voluntarily and knowingly made."

[1A]The Court of Appeals for the Tenth Circuit affirmed, determining that the District Court's findings were supported by substantial evidence and specifically approving the finding that petitioner's plea of guilty was voluntary. *404 F.2d 601 (1968)*.We granted certiorari, *395 U.S. 976 (1969)*, to consider the claim that the Court of Appeals was in error in not reaching a contrary result on the authority of this **[****7]** Court's decision in *United States v. Jackson, 390 U.S. 570 (1968)*. We affirm.

[*755]** I

In *United States v. Jackson, supra*, the defendants were indicted under *§ 1201 (a)*. The District Court dismissed the *§ 1201 (a)* count of the indictment, holding **[*746]** the statute unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. This Court held the statute valid, except for the death penalty provision; with respect to the latter, the Court agreed with the trial court "that the death penalty provision . . . imposes an impermissible burden upon the exercise of a constitutional right . . . ." *390 U.S., at 572*. The problem was to determine "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." *390 U.S., at 581*. The inevitable effect of the provision was said to be to discourage assertion of the **[**1468]** *Fifth Amendment* right not to plead guilty and to deter exercise of the *Sixth Amendment* **[****8]** right to demand a jury trial. Because the legitimate goal of limiting the death penalty to cases in which a jury recommends it could be achieved without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision "needlessly penalize[d] the assertion of a constitutional right," *390 U.S., at 583*, and was therefore unconstitutional.

[2]Since the "inevitable effect" of the death penalty provision of *§ 1201 (a)* was said by the Court to be the needless encouragement of pleas of guilty and waivers of jury trial, Brady contends that *Jackson* requires the invalidation of every plea of guilty entered under that section, at least when the fear of death is shown to have been a factor in the plea. Petitioner, however, has read far too much into the *Jackson* opinion.

The Court made it clear in *Jackson* that it was not holding *§ 1201 (a)* inherently coercive of guilty pleas: "the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that **[*747]** every defendant **[****9]** who enters a guilty plea to a charge under the Act does so involuntarily." *390 U.S., at 583*. Cited in support of this

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In *McCarthy v. United States, 394 U.S. 459 (1969)*, we held that a failure to comply with *Rule 11* required that a defendant who had pleaded guilty be allowed to plead anew. In *Halliday v. United States, 394 U.S. 831 (1969)*, we held that the *McCarthy* rule should apply only in cases where the guilty plea was accepted after April 2, 1969, the date of the *McCarthy* decision.

statement, *390 U.S., at 583 n. 25*, was *Laboy v. New Jersey, 266 F.Supp. 581 (D. C. N. J. 1967)*, where a plea of guilty (non vult) under a similar statute was sustained as voluntary in spite of the fact, as found by the District Court, that the defendant was greatly upset by the possibility of receiving the death penalty.

Moreover, the Court in *Jackson* rejected a suggestion that the death penalty provision of *§ 1201 (a)* be saved by prohibiting in capital kidnaping cases all guilty pleas and jury waivers, "however clear [the defendants'] guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings." "That jury waivers and guilty pleas may occasionally be rejected" was no ground for automatically rejecting all guilty pleas under the statute, for such a rule "would rob the criminal process of much of its flexibility." *390 U.S., at 584*.

[*756]** [3A] **[****10]** Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under *§ 1201 (a)*, but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." See *Boykin v. Alabama, 395 U.S. 238, 242 (1969)*.[4]

[3B]

[**11]**

[*748] [4]

[5] [6] [7]That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the *Fifth Amendment* from being compelled to do **[**1469]** so -- hence the minimum requirement that his plea be the voluntary expression of his own choice. [5] But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or a judge. **[****12]** Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. [6] On neither score was Brady's plea of guilty invalid.

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[4] The requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized. See nn. 5 and 6, *infra*. The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily. This Court has not yet passed on the question of the retroactivity of this new requirement.

[5] *Machibroda v. United States, 368 U.S. 487, 493 (1962)*; *Waley v. Johnston, 316 U.S. 101, 104 (1942)*; *Walker v. Johnston, 312 U.S. 275, 286 (1941)*; *Chambers v. Florida, 309 U.S. 227 (1940)*; *Kercheval v. United States, 274 U.S. 220, 223 (1927)*.

[6] See *Brookhart v. Janis, 384 U.S. 1 (1966)*; *Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942)*; *Johnson v. Zerbst, 304 U.S. 458, 464 (1938)*; *Patton v. United States, 281 U.S. 276, 312 (1930)*.

[**13]** **[*749]** II

[*757]** [8]The trial judge in 1959 found the plea voluntary before accepting it; the District Court in 1968, after an evidentiary hearing, found that the plea was voluntarily made; the Court of Appeals specifically approved the finding of voluntariness. We see no reason on this record to disturb the judgment of those courts. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that the District Court found to have triggered Brady's guilty plea.

[9]The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. Cf. *Haynes v. Washington, 373 U.S. 503, 513 (1963)*; *Leyra v. Denno, 347 U.S. 556, 558 (1954)*.One of these circumstances was the possibility **[****14]** of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. [7] But **[*750]** even if we assume that Brady **[**1470]** would not have pleaded guilty except for the death penalty provision of *§ 1201 (a)*, this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

[10] **[****15]** The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

[11] [12]Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental **[****16]** coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to

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Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of the right to counsel. See *Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956)*; *Von Moltke v. Gillies, 332 U.S. 708* and 727 (1948) (opinions of BLACK and Frankfurter, JJ.); *Williams v. Kaiser, 323 U.S. 471 (1945)*. Since *Gideon v. Wainwright, 372 U.S. 335 (1963)*, it has been clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid. See *White v. Maryland, 373 U.S. 59 (1963)*; *Arsenault v. Massachusetts, 393 U.S. 5 (1968)*.

The importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea was at the heart of our recent decisions in *McCarthy v. United States, supra*, and *Boykin v. Alabama, 395 U.S. 238 (1969)*. See nn. 3 and 4, *supra*.

[7] Such a possibility seems to have been rejected by the District Court in the *§ 2255* proceedings. That court found that "the plea of guilty was made by the petitioner by reason of other matters and not by reason of the statute . . . ."

trial against the advantages of pleading guilty. Brady's claim is of a different sort: that it violates the *Fifth Amendment* to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly **[***758]** higher penalty for **[*751]** the crime charged if a conviction is obtained after the State is put to its proof.

[13]Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is **[****17]** advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, [8] as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the *Fifth Amendment* whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

[**18]** The **[**1471]** issue we deal with is inherent in the criminal law and its administration because guilty pleas are not **[*752]** constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious -- his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages -- the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. [9] It is this mutuality of advantage that perhaps explains the fact that **[****19]** at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, [10] a great many of them no **[***759]** doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

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[8] We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.

[9] For a more elaborate discussion of the factors that may justify a reduction in penalty upon a plea of guilty, see American Bar Association Project on Standards for Criminal Justice, Pleas of Guilty § 1.8 and commentary, pp. 37-52 (Approved Draft 1968).

[10] It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea. D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial 3 and n. 1 (1966).

[14]Of course, that the prevalence of guilty pleas is explainable does not necessarily **[****20]** validate those pleas or **[*753]** the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

[15]A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The *Fifth Amendment* does not reach so far.

[16] *Bram v. United States, 168 U.S. 532 (1897)*, **[****21]** held that the admissibility of a confession depended upon whether it was compelled within the meaning of the *Fifth Amendment*. To be admissible, a confession must be "'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" *168 U.S., at 542-543*. More recently, *Malloy v. Hogan, 378 U.S. 1 (1964)*, carried forward the *Bram* definition of compulsion in the course of holding applicable to the States the *Fifth Amendment* privilege **[**1472]** against compelled self-incrimination. [11]

[**22]** **[*754]** *Bram* is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. *Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But *Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda v. Arizona, 384 U.S. 436 (1966)*, held that the possibly coercive atmosphere of the police station could not be counteracted by the **[***760]** presence of counsel or other safeguards. [12]

[**23]** Brady's situation bears no resemblance to Bram's. Brady first pleaded not guilty; prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage. His plea of guilty was entered in open court and before a judge obviously sensitive to **[*755]** the requirements of the law with respect to guilty pleas. Brady's plea, unlike Bram's confession, was voluntary.

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[11] *Malloy v. Hogan, 378 U.S. 1, 7 (1964)*. See also *Haynes v. Washington, 373 U.S. 503, 513 (1963)*; *Lynumn v. Illinois, 372 U.S. 528 (1963)*; *Wilson v. United States, 162 U.S. 613, 622-623 (1896)*.

[12] "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against compelled self-incrimination]. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." *Miranda v. Arizona, 384 U.S. 436, 466 (1966)*.

[17] [18]The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

"'LBA] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments **[****24]** made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).' 242 F.2d at page 115." [13]

Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty. [14]

[**25]** **[*756]** III

[1473]** [19]The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there **[***761]** was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties; once his confederate had pleaded guilty and became available to testify, he chose to plead guilty, perhaps to ensure that he would face no more than life imprisonment or a term of years. Brady was aware of precisely what he was doing when he admitted that he had kidnaped the victim and had not released her unharmed.

It is true that Brady's counsel advised him that *§ 1201 (a)* empowered the jury to impose the death penalty and that nine years later in *United States v. Jackson, supra*, the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

[20]

[**26]** [21][22][23]Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable

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[13] *Shelton v. United States, 246 F.2d 571, 572 n. 2 (C. A. 5th Cir. 1957)* (*en banc*), rev'd on confession of error on other grounds, *356 U.S. 26 (1958)*.

[14] Our conclusion in this regard seems to coincide with the conclusions of most of the lower federal courts that have considered whether a guilty plea to avoid a possible death penalty is involuntary. See *United States ex rel. Brown v. LaVallee, 424 F.2d 457 (C. A. 2d Cir. 1970)*; *United States v. Thomas, 415 F.2d 1216 (C. A. 9th Cir. 1969)*; *Pindell v. United States, 296 F.Supp. 751 (D. C. Conn. 1969)*; *McFarland v. United States, 284 F.Supp. 969 (D. C. Md. 1968)*, aff'd, No. 13,146 (C. A. 4th Cir., May 1, 1969), cert. denied, *post*, p. 1077; *Laboy v. New Jersey, 266 F.Supp. 581 (D. C. N. J. 1967)*; *Gilmore v. California, 364 F.2d 916 (C. A. 9th Cir. 1966)*; *Busby v. Holman, 356 F.2d 75 (C. A. 5th Cir. 1966)*; *Cooper v. Holman, 356 F.2d 82* (C. A. 5th Cir.), cert. denied, ***385 U.S. 855 (1966)***; *Godlock v. Ross, 259 F.Supp. 659 (D. C. E. D. N. C. 1966)*; *United States ex rel. Robinson v. Fay, 348 F.2d 705 (C. A. 2d Cir. 1965)*, cert. denied, ***382 U.S. 997 (1966)***; *Overman v. United States, 281 F.2d 497 (C. A. 6th Cir. 1960)*, cert. denied, ***368 U.S. 993 (1962)***; *Martin v. United States, 256 F.2d 345* (C. A. 5th Cir.), cert. denied, ***358 U.S. 921 (1958)***. But see *Shaw v. United States, 299 F.Supp. 824 (D. C. S. D. Ga. 1969)*; *Alford v. North Carolina, 405 F.2d 340 (C. A. 4th Cir. 1968)*, prob. juris. noted, ***394 U.S. 956 (1969)***, restored to calendar for reargument, *post*, p. 1060.

questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly **[*757]** sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent **[****27]** misrepresentation or other impermissible conduct by state agents, cf. *Von Moltke v. Gillies, 332 U.S. 708 (1948)*, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

[24]The fact that Brady did not anticipate *United States v. Jackson, supra*, does not impugn the truth or reliability **[****28]** **[**1474]** of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are **[*758]** necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions **[***762]** against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves **[****29]** that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth.

[1B]

Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful.

Affirmed.

MR. JUSTICE BLACK, while adhering to his belief that *United States v. Jackson, 390 U.S. 570*, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.

[For opinion of MR. JUSTICE BRENNAN, concurring in the result, see *post*, p. 799.]

References

Validity of guilty pleas

21 Am Jur 2d, Criminal Law 484 et seq.

[**30]** 8 Am Jur Pl & Pr Forms (Rev ed), Criminal Procedure, Forms 134, 135

US L Ed Digest, Constitutional Law 835; Criminal Law 59; Witnesses 88

ALR Digests, Constitutional Law 626; Criminal Law 145

L Ed Index to Anno, Constitutional Law; Criminal Law

ALR Quick Index, Capital Cases; Constitutional Law; Guilty Plea

Federal Quick Index, Capital Offenses; Constitutional Law; Guilty Plea

Annotation References:

Validity of guilty pleas. *25 L Ed 2d 1025*.

United States Supreme Court's views as to retroactive effect of its own decisions announcing new rules. *22 L Ed 2d 821*.

Constitutionality, construction, and application of Federal statute relating to kidnapping. *80 L Ed 526*.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question. *9 ALR3d 990*.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. *97 ALR2d 549*.

Withdrawal of plea of guilty and substitution of plea of not guilty after conviction. 146 ALR 1430.

[**31]** Duty of court to accept tendered plea of guilt of lesser degree of crime where prosecuting officer has agreed to recommend acceptance of such plea if defendant will turn state's evidence. 96 ALR 1064.

Validity and effect of agreement by prosecuting officer to extend immunity as regards particular charge upon condition that defendant plead guilty to another charge. 85 ALR 1177.

Right to withdraw plea of guilty . 20 ALR 1445, 66 ALR 628.

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Strickler v. Greene

Supreme Court of the United States

March 3, 1999, Argued ; June 17, 1999, Decided

No. 98-5864

Reporter
527 U.S. 263 *; 119 S. Ct. 1936 **; 144 L. Ed. 2d 286 ***; 1999 U.S. LEXIS 4191 ****; 67 U.S.L.W. 4477; 99 Cal. Daily Op. Service 5186; 99 Daily Journal DAR 6091; 1999 Colo. J. C.A.R. 3465; 12 Fla. L. Weekly Fed. S 361

TOMMY DAVID STRICKLER, PETITIONER v. FRED W. GREENE, WARDEN

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Disposition: *149 F.3d 1170*, affirmed.

Core Terms

murder, abduction, reasonable probability, sentencing, Girl, mall, capital murder, suppression, jurors, documents, guilt, impeaching, Blonde, recommendation, interviews, withheld, driving, driver, cases, blue, procedural default, confidence, discovery, door, proceedings, daughter, disclose, factors, killed, knife

Case Summary

Procedural Posture

Petitioner's request for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit was granted for consideration of whether respondent violated Brady requirements, whether petitioner had cause for failing to raise his Brady claim in state court, and whether he suffered prejudice sufficient to excuse his procedural default.

Overview

Petitioner was convicted of capital murder and sentenced to death. Petitioner's habeas corpus application was granted by the federal trial court based on a finding that exculpatory evidence was not disclosed. The appellate court reversed, holding petitioner's Brady claim was procedurally defaulted. The court granted certiorari. After reviewing the record, the court found the evidence at issue was exculpatory and not disclosed. Although petitioner's Brady claim was procedurally defaulted, petitioner demonstrated cause for failing to timely raise his claim because respondent withheld exculpatory evidence, petitioner reasonably relied on respondent's open file policy, and respondent confirmed petitioner's reliance on the open file policy was reasonable during state habeas proceedings. Regardless, the court concluded petitioner did not show a reasonable probability that his conviction or sentence would have been different had the evidence been disclosed. Petitioner therefore could show materiality under Brady or prejudice

from his failure to timely raise the claim. The appellate court's judgment denying petitioner's application for writ of habeas corpus was thus affirmed.

Outcome
Application for writ of certiorari was granted and federal appellate court's judgment denying petitioner's application for writ of habeas corpus was affirmed; although petitioner proved exculpatory evidence was not disclosed by respondent, and demonstrated cause for failing to timely raise his Brady claim, he did not show a reasonable probability that his conviction or sentence would have been different had these materials been disclosed.

Syllabus

The Commonwealth of Virginia charged petitioner with capital murder and related crimes. Because an open file policy gave petitioner access to all of the evidence in the prosecutor's files, petitioner's counsel did not file a pretrial motion for discovery of possible exculpatory evidence. At the trial, Anne Stoltzfus gave detailed eyewitness testimony about the crimes and petitioner's **[****2]** role as one of the perpetrators. The prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with Stoltzfus, and letters written by Stoltzfus to the detective, that cast serious doubt on significant portions of her testimony. The jury found petitioner guilty, and he was sentenced to death. The Virginia Supreme Court affirmed. In subsequent state habeas corpus proceedings, petitioner advanced an ineffective assistance of counsel claim based, in part, on trial counsel's failure to file a motion under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194*, for disclosure of all exculpatory evidence known to the prosecution or in its possession. In response, the Commonwealth asserted that such a motion was unnecessary because of the prosecutor's open file policy. The trial court denied relief. The Virginia Supreme Court affirmed. Petitioner then filed a federal habeas petition and was granted access to the exculpatory Stoltzfus materials for the first time. The District Court vacated petitioner's capital murder conviction and death sentence on the grounds that the Commonwealth had **[****3]** failed to disclose those materials and that petitioner had not, in consequence, received a fair trial. The Fourth Circuit reversed because petitioner had procedurally defaulted his *Brady* claim by not raising it at his trial or in the state collateral proceedings. In addition, the Fourth Circuit concluded that the claim was, in any event, without merit.

Held: Although petitioner has demonstrated cause for failing to raise a *Brady* claim, Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to petitioner. Pp. 17-34.

(a) There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The record in this case unquestionably establishes two of those components. The contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial statement to the detective that the incident seemed a trivial episode suffices to establish the impeaching **[****4]** character of the undisclosed documents. Moreover, with respect to some of those documents, there is no dispute that they were known to the Commonwealth but not disclosed to trial counsel. It is the third component -- whether petitioner has established the necessary prejudice -- that is the most difficult element of the claimed *Brady* violation here. Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, this Court

must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were "material" for *Brady* purposes, see *373 U.S. at 87*, their suppression did not give rise to sufficient prejudice to overcome the procedural default. Pp. 17-19.

(b) Petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied **[****5]** on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government. See *Murray v. Carrier, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639*, and *Amadeo v. Zant, 486 U.S. 214, 222, 100 L. Ed. 2d 249, 108 S. Ct. 1771*. *Gray v. Netherland, 518 U.S. 152, 135 L. Ed. 2d 457, 116 S. Ct. 2074*, and *McCleskey v. Zant, 499 U.S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454*, distinguished. This Court need not decide whether any one or two of the foregoing factors would be sufficient to constitute cause, since the combination of all three surely suffices. Pp. 19-26.

(c) However, in order to obtain relief, petitioner must convince this Court that there is a reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense. The adjective is important. The question is not whether the defendant would more likely **[****6]** than not have received a different verdict with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555*. Here, other evidence in the record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached or her testimony excluded entirely. Notwithstanding the obvious significance of that testimony, therefore, petitioner cannot show prejudice sufficient to excuse his procedural default. Pp. 26-34.

149 F.3d 1170, affirmed.

Counsel: Miguel A. Estrada argued the cause for petitioner.

Pamela A. Rumpz argued the cause for respondent.

Judges: STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, GINSBURG, and BREYER, JJ., joined in full, in which KENNEDY and SOUTER, JJ., joined as to Part III, and in which THOMAS, J., joined as to Parts I and IV. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY, J. **[****7]** , joined as to Part II.

Opinion by: STEVENS

Opinion

[*265] [1941] [***292]** JUSTICE STEVENS delivered the opinion of the Court.

[1A] [2A]The District Court for the Eastern District of Virginia granted petitioner's application for a writ of habeas corpus and vacated his capital murder conviction and death sentence on the grounds that the Commonwealth had failed to disclose important exculpatory evidence and that petitioner had not, in consequence, received a fair trial. The Court of Appeals for the Fourth Circuit reversed because petitioner had not raised his constitutional claim at his trial or in state collateral proceedings. In addition, the Fourth Circuit concluded that petitioner's claim was, "in any event, without merit." App. 418, n. 8. [1] Finding the legal question presented by this **[*266]** case considerably more difficult than the Fourth Circuit, we granted certiorari, 525 U.S. __ (1998), to consider (1) whether the State violated *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, **[****8]** and its progeny; (2) whether there was an acceptable "cause" for petitioner's failure to raise this claim in state court; and (3), if so, whether he suffered prejudice sufficient to excuse his procedural default.

I

In the early evening of January 5, 1990, Leanne Whitlock, an African-American sophomore at James Madison University, was abducted from a local shopping center and robbed and murdered. In separate trials, both petitioner and Ronald Henderson were convicted of all three offenses. Henderson was convicted of first-degree murder, a noncapital offense, whereas petitioner was convicted of capital murder and sentenced to death. [2]

[**9]** At both trials, a woman named Anne Stoltzfus testified in vivid detail **[***293]** about Whitlock's abduction. The exculpatory material that petitioner claims should have been disclosed before trial includes documents prepared by Stoltzfus, and notes of interviews with her, that impeach significant portions of her testimony. We begin, however, by noting that, even without the Stoltzfus testimony, the evidence in the record was sufficient to establish petitioner's guilt on the murder charge. Whether petitioner would have been convicted of capital murder and received the death sentence if she had not testified, or if she had been sufficiently impeached, is less clear. To put the question in context, we review the trial testimony at some length.

The Testimony at Trial

At about 4:30 p.m. on January 5, 1990, Whitlock borrowed a 1986 blue Mercury Lynx from her boyfriend, John Dean, **[*267]** who worked in the Valley Shopping Mall in Harrisonburg, Virginia. At about 6:30 or 6:45 p.m., she left her apartment, intending to return the car to Dean at the mall. She did not return the car and was not again seen alive by any of her friends or family.

Petitioner's mother testified **[****10]** that she had driven petitioner and Henderson to Harrisonburg on January 5. She also testified that petitioner always carried a hunting knife that had belonged to his father. Two witnesses, a friend of Henderson's and a security guard, saw petitioner and Henderson at the mall that afternoon. The security guard was informed around 3:30 p.m. that two men, one of whom she identified at trial as petitioner, were attempting to steal a car in the parking lot. She had them under observation during the remainder of the afternoon but lost sight of them at about 6:45.

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[1] The opinion of the Court of Appeals is unreported. The judgment order is reported, ***Strickler v. Pruett, 149 F.3d 1170 (CA4 1998)***. The opinion of the District Court is also unreported.

[2] Petitioner was tried in May 1990. Henderson fled the State and was later apprehended in Oregon. He was tried in March 1991.

At approximately 7:30 p.m., a witness named Kurt Massie saw the blue Lynx at a location in Augusta County about 25 miles from Harrisonburg and a short distance from the cornfield where Whitlock's body was later found. Massie identified petitioner as the driver of the vehicle; he also saw a white woman in the front seat and another man in the back. Massie noticed that the car was muddy, and that it turned off Route 340 onto a dirt road.

[1942]** At about 8 p.m., another witness saw the Lynx at Buddy's Market, with two men sitting in the front seat. The witness did not see anyone else in the car. At approximately 9 p.m., petitioner **[****11]** and Henderson arrived at Dice's Inn, a bar in Staunton, Virginia, where they stayed for about four or five hours. They danced with several women, including four prosecution witnesses: Donna Kay Tudor, Nancy Simmons, Debra Sievers, and Carolyn Brown. While there, Henderson gave Nancy Simmons a watch that had belonged to Whitlock. Petitioner spent most of his time with Tudor, who was later arrested for grand larceny based on her possession of the blue Lynx.

[*268] These four women all testified that Tudor had arrived at Dice's at about 8 p.m. Three of them noticed nothing unusual about petitioner's appearance, but Tudor saw some blood on his jeans and a cut on his knuckle. Tudor also testified that she, Henderson, and petitioner left Dice's together after it closed to search for marijuana. Henderson was driving the blue Lynx, and petitioner and Tudor rode in back. Tudor related that petitioner was leaning toward Henderson and talking with him; she overheard a crude conversation that could reasonably be interpreted as **[***294]** describing the assault and murder of a black person with a "rock crusher." Tudor stated that petitioner made a statement that implied that he had killed **[****12]** someone, so they "wouldn't give him no more trouble." App. 99. Tudor testified that while she, petitioner, and Henderson were driving around, petitioner took out his knife and threatened to stab Henderson because he was driving recklessly. Petitioner then began driving.

At about 4:30 or 5 a.m. on January 6, petitioner drove Henderson to Kenneth Workman's apartment in Timberville. [3] Henderson went inside to get something, and petitioner and Tudor drove off without waiting for him. Workman testified that Henderson had blood on his pants and stated he had killed a black person.

Petitioner and Tudor then drove to a motel in Blue Ridge. A day or two later they went to Virginia Beach, where they spent the rest of the week. Petitioner gave Tudor pearl earrings that Whitlock had been wearing when she was last seen. Tudor saw Whitlock's driver's license and bank card in the glove compartment of the car. Tudor testified that petitioner unsuccessfully attempted to use Whitlock's **[****13]** bank card when they were in Virginia Beach.

When petitioner and Tudor returned to Augusta County, they abandoned the blue Lynx. On January 11, the police identified the car as Dean's, and found petitioner's and Tudor's **[*269]** fingerprints on both the inside and the outside of the car. They also found shoe impressions that matched the soles of shoes belonging to petitioner. Inside the car, they retrieved a jacket that contained identification papers belonging to Henderson.

The police also recovered a bag at petitioner's mother's house that Tudor testified she and petitioner had left when they returned from Virginia Beach. The bag contained, among other items, three identification

[3] Workman was called as a defense witness.

cards belonging to Whitlock and a black "tank top" shirt that was later found to have human blood and semen stains on it. Tr. 707.

On January 13, a farmer called the police to advise them that he had found Henderson's wallet; a search of the area led to the discovery of Whitlock's frozen, nude, and battered body. A 69-pound rock, spotted with blood, lay nearby. Forensic evidence indicated that Whitlock's death was caused by "multiple blunt force injuries to the head." App. 109. The location of the **[****14]** rock and the human blood on the rock suggested that it had been used to inflict these injuries. Based on the contents of Whitlock's stomach, the medical examiner determined that she died fewer than six hours after she had last eaten. [4]

A number of Caucasian hair samples were found at the scene, three of which were probably petitioner's. Given the weight of the rock, the prosecution argued that one of **[**1943]** the killers must have held the victim down while the other struck her with the murder weapon.

Donna Tudor's estranged husband, Jay Tudor, was called by the defense and testified that in March she had told him that she was present at the murder scene and that petitioner did **[***295]** not participate in the murder. Jay Tudor's testimony was inconsistent in several respects with that of other witnesses. For example, he testified that several days elapsed **[****15]** **[*270]** between the time that petitioner, Henderson, and Donna Tudor picked up Whitlock and the time of Whitlock's murder.

Anne Stoltzfus' Testimony

Anne Stoltzfus testified that on two occasions on January 5 she saw petitioner, Henderson, and a blonde girl inside the Harrisonburg mall, and that she later witnessed their abduction of Whitlock in the parking lot. She did not call the police, but a week and a half after the incident she discussed it with classmates at James Madison University, where both she and Whitlock were students. One of them called the police. The next night a detective visited her, and the following morning she went to the police station and told her story to Detective Claytor, a member of the Harrisonburg City Police Department. Detective Claytor showed her photographs of possible suspects, and she identified petitioner and Henderson "with absolute certainty" but stated that she had a slight reservation about her identification of the blonde woman. Id. at 56.

At trial, Stoltzfus testified that, at about 6 p.m. on January 5, she and her 14-year-old daughter were in the Music Land store in the mall looking for a compact disc. While she **[****16]** was waiting for assistance from a clerk, petitioner, whom she described as "Mountain Man," and the blonde girl entered. [5] **[*271]** Because petitioner was "revved up" and "very impatient," she was frightened and backed up, bumping into Henderson (whom she called "Shy Guy"), and thought she felt something hard in the pocket of his coat. Id. at 36-37.

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[4] Whitlock's roommate testified that Whitlock had dinner at 6 p.m. on January 5, 1990, just before she left for the mall to return Dean's car.

[5] She testified to their appearances in great detail. She stated that petitioner had "a kind of multi layer look." He wore a grey t-shirt with a Harley Davidson insignia on it. The prosecutor showed Stoltzfus the shirt, stained with blood and semen, that the police had discovered at petitioner's mother's house. He asked if it were the same shirt she saw petitioner wearing at the mall. She replied, "That could have been it." App. 37, 39. Henderson "had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren't just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort." Id. at 37. The woman "had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face." Id. at 60.

[**17]** Stoltzfus left the store, intending to return later. At about 6:45, while heading back toward Music Land, she again encountered the threesome: "Shy Guy" walking by himself, followed by the girl, and then "Mountain Man" yelling "Donna, Donna, Donna." The girl bumped into Stoltzfus and then asked for directions to the bus stop. [6] The three then left.

At first Stoltzfus tried to follow them because of her concern about petitioner's behavior, but she "lost him" and then headed back to Music Land. The clerk had not returned, so she and her daughter went to their car. While driving to another store, they saw a shiny dark blue car. The driver was "beautiful," "well dressed and she was happy, she was singing . . . ." Id. at 41. When the blue car was stopped behind a minivan at a stop sign, Stoltzfus saw petitioner for the third time.

She testified:

[*296]** "'Mountain Man' **[****18]** came tearing out of the Mall entrance door and went up to the driver of the van and . . . was just really mad and ran back and banged on back of the backside of the van and then went back to the Mall entrance wall where 'Shy Guy' and 'Blonde Girl' was standing . . . then we left [and before the van and a white-pickup truck could turn] 'Mountain Man' came out again . . . ." Id. at 42-43.

After first going to the passenger side of the pickup truck, petitioner came back to the black girl's car, "pounded on" the passenger **[**1944]** window, shook the car, yanked the door open and jumped in. When he motioned for "Blonde Girl" and "Shy **[*272]** Guy" to get in, the driver stepped on the gas and "just laid on the horn" but she could not go because there were people walking in front of the car. The horn "blew a long time" and petitioner

"started hitting her . . . on the left shoulder, her right shoulder and then it looked like to me that he started hitting her on the head and I was, I just became concerned and upset. So I beeped, honked my horn and then she stopped honking the horn and he stopped hitting her and opened the door again and the 'Blonde Girl' got in the back and 'Shy **[****19]** Guy' followed and got behind him." Id. at 44-45.

Stoltzfus pulled her car up parallel to the blue car, got out for a moment, got back in, and leaned over to ask repeatedly if the other driver was "O.K." The driver looked "frozen" and mouthed an inaudible response. Stoltzfus started to drive away and then realized "the only word that it could possibly be, was help." Id. at 47. The blue car then drove slowly around her, went over the curb with its horn honking, and headed out of the mall. Stoltzfus briefly followed, told her daughter to write the license number on a "3x4 [inch] index card," [7] and then left for home because she had an empty gas tank and "three kids at home waiting for supper." Id. at 48-49.

At trial Stoltzfus identified Whitlock from a picture as the driver **[****20]** of the car and pointed to petitioner as "Mountain Man." When asked if pretrial publicity about the murder had influenced her identification, Stoltzfus replied "absolutely not." She explained:

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[6] Stoltzfus stated that the girl caught a button in Soltzfus'"open weave sweater, which is why I remember her attire." Id. at 39.

[7] "I said to my fourteen[-year-]old daughter, write down the license number, you know, it was West Virginia, NKA 243 and I said help me to remember, 'No Kids Alone 243,' and I said remember, 243 is my age." Id. at 48.

"First of all, I have an exceptionally good memory. I had very close contact with [petitioner] and he made an **[*273]** emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification." Id. at 58.

The Commonwealth did not produce any other witnesses to the abduction. Stoltzfus' daughter did not testify.

The Stoltzfus Documents

The materials that provide the basis of petitioner's *Brady* claim consist of notes taken by Detective Claytor during his interviews with Stoltzfus, and letters written by Stoltzfus to Claytor. They cast serious doubt on Stoltzfus' confident assertion of her "exceptionally good **[***297]** memory." Because the content of the documents is critical to petitioner's procedural and substantive claims, we summarize their content.

Exhibit 1 [8] is a handwritten note prepared by Detective Claytor after his first interview with Stoltzfus on January 19, 1990, just two **[****21]** weeks after the crime. The note indicates that she could not identify the black female victim. The only person Stoltzfus apparently could identify at this time was the white female. *Id. at 306*.

[*274] Exhibit 2 is a document prepared by Detective Claytor some time after Febrary 1. It contains a summary of his interviews with Stoltzfus conducted on January 19 and January 20, 1990. [9] At that time "she was not sure whether she could identify the white males but felt sure she could identify the white female."

[**22]** Exhibit 3 is entitled "Observations" and includes a summary of the abduction.

Exhibit 4 is a letter written by Stoltzfus to Claytor three days after their first interview "to clarify some of my confusion for you." The letter states that she had not remembered being at the mall, but that her daughter had helped jog her memory. Her description of the abduction includes the **[**1945]** comment: "I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off . . . . Then the guy I saw came running up to the black girl's window.? Were those 2 memories the same person?" *Id. at 316*. In a postscript she noted that her daughter "doesn't remember seeing the 3 people get into the black girl's car . . . ." *Ibid.*

Exhibit 5 is a note to Claytor captioned "My Impressions of 'The Car,'" which contains three paragraphs describing the size of the car and comparing it with Stoltzfus' Volkswagen Rabbit, but not mentioning the license plate number that she vividly recalled at the trial. *Id. at 317-318*.

Exhibit 6 is a brief note from Stoltzfus to Claytor dated January 25, 1990, stating **[****23]** that after spending several hours with John Dean, Whitlock's boyfriend, "looking at current photos," she had identified Whitlock "beyond a shadow of a doubt." [10] *Id. at 318*. The District Court noted that by the time

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[8] These materials were originally attached to an affidavit submitted with petitioner's motion for summary judgment on his federal petition for habeas corpus. Because both the District Court and the Court of Appeals referred to the documents by their exhibit numbers, we have done the same.

[9] As the District Court pointed out, however, it omits reference to the fact that Stoltzfus originally said that she could not identify the victim -- a fact recorded in his handwritten notes. Id. at 387.

of trial her identification had been expanded to include a description of her clothing and her appearance as a college kid who was "singing" and "happy." Id. at 387-388.

Exhibit 7 is a letter from Stoltzfus to Detective Claytor, dated January 16, 1990, in which she thanks him for his "patience with my sometimes muddled memories." She states that if the student at school had not called the police, "I never would have made **[***298]** any of the associations that you helped me make." *Id. at 321*.

[*275] In Exhibit 8, which is undated and summarizes the events described in her trial testimony, Stoltzfus commented:

"So where is the 3x4 card? . . . It would have been very nice if I could have remembered all this **[****24]** at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU. . . . Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag." *Id. at 326*.

There is a dispute between the parties over whether petitioner's counsel saw Exhibits 2, 7, and 8 before trial. The prosecuting attorney conceded that he himself never saw Exhibits 1, 3, 4, 5, and 6 until long after petitioner's trial, and they were not in the file he made available to petitioner. [11] **[****25]** For purposes of this case, therefore, we assume that petitioner proceeded to trial without having seen Exhibits 1, 3, 4, 5, and 6. [12]

[*276] *State Proceedings*

Petitioner was tried in Augusta County, where Whitlock's body was found, on charges of capital murder, robbery, and abduction. Because the prosecutor maintained an open file policy, which gave petitioner's counsel access to all of the **[****26]** evidence in the Augusta County prosecutor's files, [13] **[****27]** petitioner's counsel **[**1946]** did not file a pretrial motion for discovery of possible exculpatory

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[10] Stoltzfus' trial testimony made no mention of her meeting with Dean.

[11] The prosecutor recalled that Exhibits 2, 7, and 8 had been in his open file, id. at 365-368, but the lawyer who represented Henderson at his trial swore that they were not in the file, *id. at 330*; the recollection of petitioner's trial counsel was somewhat equivocal. Lead defense counsel was sure he had not seen the documents, *ib*id. while petitioner's other lawyer signed an affidavit to the effect that he does "remember the information contained in [the documents]" but "cannot recall if I have seen these specific documents," id. at 371.

[12] Although the parties have not advanced an explanation for the non-disclosure of the documents, perhaps it was an inadvertent consequence of the fact that Harrisonburg is in Rockingham County and the trial was conducted by the Augusta County prosecutor. We note, however, that the prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. Thus, the Commonwealth, through its prosecutor, is charged with knowledge of the Stoltzfus materials for purposes of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*.

[13] In the federal habeas proceedings, the prosecutor gave the following sworn answer to an interrogatory requesting him to state what materials were disclosed by him to defense counsel pursuant to *Brady:* "I disclosed my entire prosecution file to Strickler's defense counsel prior to Strickler's trial by allowing him to inspect my entire prosecution file including, but not limited to, all police reports in the file and all witness statements in the file." App. 368. Petitioner's trial counsel had shared the prosecutor's understanding of the "open file" policy. In an affidavit filed in the state habeas proceeding, they stated that they "thoroughly investigated" petitioner's case. "In this we were aided by the prosecutor's office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files . . . . As a result of this cooperation, they introduced nothing at trial of which we were previously unaware." *Id. at 223*.

evidence. [14] In closing **[***299]** argument, petitioner's lawyer effectively conceded that the evidence was sufficient to support the robbery and abduction charges, as well as the lesser offense of first-degree murder, but argued that the evidence was insufficient to prove that petitioner was guilty of capital murder. *Id. at 192-193*.

The judge instructed the jury that petitioner could be found guilty of the capital charge if the evidence established beyond a reasonable doubt that he "jointly participated in the fatal beating" and "was an active and immediate participant **[*277]** in the act or acts that caused the victim's death." *Id. at 160-161*. The jury found petitioner guilty of abduction, robbery, and capital murder. *Id. at 200-201*. After listening to testimony and arguments presented during the sentencing phase, the jury made findings of "vileness" and "future dangerousness," and unanimously recommended the death sentence **[****28]** that the judge later imposed.

The Virginia Supreme Court affirmed the conviction and sentence. *Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227 (1991)*. It held that the trial court had properly instructed the jury on the "joint perpetrator" theory of capital murder and that the evidence, viewed most favorably in support of the verdict, amply supported the prosecution's theory that both petitioner and Henderson were active participants in the actual killing. [15]

[**29]** In December 1991, the Augusta County Circuit Court appointed new counsel to represent petitioner in state habeas corpus proceedings. State habeas counsel advanced an **[*278]** ineffective-assistance-of-counsel claim based, in part, on trial counsel's failure to file a motion under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, "to have the Commonwealth disclose to the defense all exculpatory evidence known to it -- or in its possession." App. 205-206. In answer to that claim, the Commonwealth asserted that such a motion was unnecessary because the prosecutor had maintained an open file policy. [16] The Circuit Court dismissed the petition, and the State Supreme Court affirmed. **[***300]** *Strickler v. Murray, 249 Va. 120, 452 S.E.2d 648 (1995)*.

Federal Habeas Corpus Proceedings

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[14] In its pleadings on state habeas, the Commonwealth explained: "From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed *all* the evidence the Commonwealth intended to present . . . Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal [*Brady*] motion." *Id. at 212-213*.

[15] "The Commonwealth's theory of the case was that Strickler and Henderson had acted jointly to accomplish the actual killing. It contended at trial, and argues on appeal, that the physical evidence points to a violent struggle between the assailants and the victim, in which Strickler's hair had actually been torn out by the roots. Although Leanne had been beaten and kicked, none of her injuries would have been sufficient to immobilize her until her skull was crushed with the 69-pound rock. Because, the Commonwealth's argument goes, the rock had been dropped on her head at least twice, while she was on the ground, leaving two bloodstained depressions in the frozen earth, it would have been necessary that she be held down by one assailant while the other lifted the rock and dropped it on her head.

"The weight and dimensions of the 69-pound bloodstained rock, which was introduced in evidence as an exhibit, made it apparent that a single person could not have lifted it and dropped or thrown it while simultaneously holding the victim down. The bloodstains on Henderson's jacket as well as on Strickler's clothing further tended to corroborate the Commonwealth's theory that the two men had been in the immediate presence of the victim's body when the fatal blows were struck and, hence, had jointly participated in the killing." *Strickler, 241 Va. at 494, 404 S.E.2d at 235*.

[16] See n. 14, *supra*.

In March 1996, petitioner filed a federal habeas corpus petition in the Eastern District **[**1947]** of Virginia. The District **[****30]** Court entered a sealed, *ex parte* order granting petitioner's counsel the right to examine and to copy all of the police and prosecution files in the case. District Court Record, Doc. No. 20. That order led to petitioner's counsel's first examination of the Stoltzfus materials, described above. *Supra*, at 11-15.

Based on the discovery of those exhibits, petitioner for the first time raised a direct claim that his conviction was invalid because the prosecution had failed to comply with the rule of *Brady* v. *Maryland*. The District Court granted the Commonwealth's motion to dismiss all claims except for petitioner's contention that the Commonwealth violated *Brady*, that he received ineffective assistance of counsel, [17] and that he was denied due process of law under the *Fifth* and *Fourteenth Amendments*. In its order denying the Commonwealth's motion to dismiss, the District Court found that petitioner had "demonstrated cause for his failure to raise this claim earlier [because] defense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceeding." App. 287.

[**31]** **[*279]** After reviewing the Stoltzfus materials, and making the assumption that the three disputed exhibits had been available to the defense, the District Court concluded that the failure to disclose the other five was sufficiently prejudicial to undermine confidence in the jury's verdict. Id. at 396. It granted summary judgment to petitioner and granted the writ.

The Court of Appeals vacated in part and remanded. It held that petitioner's *Brady* claim was procedurally defaulted because the factual basis for the claim was available to him at the time he filed his state habeas petition. Given that he knew that Stoltzfus had been interviewed by Harrisonburg police officers, the court opined that "reasonably competent counsel would have sought discovery in state court" of the police files, and that in response to this "simple request, it is likely the state court would have ordered the production of the files." *Id. at 421*. Therefore, the Court of Appeals reasoned, it could not address the *Brady* claim unless petitioner could demonstrate both cause and actual prejudice.

Under Fourth Circuit precedent a party "cannot establish cause to excuse his default if he should **[****32]** have known of such claims through the exercise of reasonable diligence." App. 423 (citing *Stockton v. Murray, 41 F.3d 920, 925 (CA4 1994))*. Having already decided that the claim was available to reasonably competent counsel, the Fourth Circuit stated that the basis for finding procedural default also foreclosed a finding of cause. Moreover, the Court of Appeals reasoned, petitioner could not fault his trial lawyers' failure to make a *Brady* claim because they **[***301]** reasonably relied on the prosecutor's open file policy. App. 423-424. [18]

As an alternative basis for decision, the Court of Appeals also held that petitioner could not establish prejudice because **[*280]** "the Stoltzfus materials would have provided little or no help . . . in either the guilt or **[****33]** sentencing phases of the trial." *Id. at 425*. With respect to guilt, the court noted that Stoltzfus' testimony was not relevant to petitioner's argument that he was only guilty of first-degree murder rather than capital murder because Henderson, rather than he, actually killed Whitlock. With respect to sentencing, the court concluded that her testimony "was of no import" because the findings of

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[17] Petitioner later voluntarily dismissed this claim. App. 384.

[18] For reasons we do not entirely understand, the Court of Appeals thus concluded that, while it was reasonable for trial counsel to rely on the open file policy, it was unreasonable for postconviction counsel to do so.

future dangerousness and vileness rested on other evidence. Finally, the court noted that even if it could get beyond the procedural default, the *Brady* claim would fail on the merits because of the absence of prejudice. App. 425, n. 11. The Court of Appeals, therefore, reversed the District Court's judgment and remanded the case with instructions to dismiss the petition.

[1948]** II

The first question that our order granting certiorari directed the parties to address is whether the State violated the *Brady* rule. We begin our analysis by identifying the essential components of a *Brady* violation.

[3]In *Brady* this Court held "that **[****34]** 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, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, 373 U.S. at 87*. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs, 427 U.S. 97, 107, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*, and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*. Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id. at 682*; see also *Kyles v. Whitley, 514 U.S. 419, 433-434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. Moreover, the rule encompasses evidence "known only to police **[*281]** investigators and not to the prosecutor." *Id. at 438*. In order to comply with **[****35]** *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles, 514 U.S. at 437*.

[4]These cases, together with earlier cases condemning the knowing use of perjured testimony, [19] illustrate the special role played by the American prosecutor in the search for truth **[***302]** in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)*.

[**36]** [1B] [5A]This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence [20] -- that is, to any suppression of so-called "*Brady* material" -- although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to

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[19] See, *e.g.*, *Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935)* *(per curiam)*; *Pyle v. Kansas, 317 U.S. 213, 216, 87 L. Ed. 214, 63 S. Ct. 177 (1942)*; *Napue v. Illinois, 360 U.S. 264, 269-270, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)*.

[20] Consider, for example, this comment in the dissenting opinion in *Kyles* v. *Whitley:* "It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt." *514 U.S. at 460* (SCALIA, J., dissenting).

the accused, **[*282]** either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

[**37]** [5B]Two of those components are unquestionably established by the record in this case. The contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial perception of that event "as a trivial episode of college kids carrying on" that her daughter did not even notice, suffices to establish the impeaching character of the undisclosed documents. [21] Moreover, with respect to at **[**1949]** least five of those documents, there is no dispute about the fact that they were known to the State but not disclosed to trial counsel. It is the third component -- whether petitioner has established the prejudice necessary to satisfy the "materiality" inquiry -- that is the most difficult element of the claimed *Brady* violation in this case.

[**38]** [1C] [2B]Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, we must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were "material" for *Brady* purposes, their suppression did not **[***303]** give rise to sufficient prejudice to overcome the procedural default.

III

The Commonwealth expressly disavows any reliance on the fact that petitioner's *Brady* claim was not raised at trial. Brief **[*283]** for Respondent 17-18, n. 6. It states that it has consistently argued "that the claim is defaulted because it could have been raised on state habeas corpus through the exercise of due diligence, but was not." *Ibid.* Despite this concession, it is appropriate to begin the analysis **[****39]** of the "cause" issue by explaining why petitioner's reasons for failing to raise his *Brady* claim at trial are acceptable under this Court's cases.

[6A]Three factors explain why trial counsel did not advance this claim: The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy; [22] **[****40]** and trial counsel were not aware of the factual basis for the claim. The first and second factors -- *i.e.*, the non-disclosure and the open file policy -- are both fairly characterized as conduct attributable to the State that impeded trial counsel's access to the factual basis for making a *Brady* claim. [23] As we explained in *Murray v. Carrier, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)*, it is just such factors that ordinarily establish the existence of cause for a procedural default. [24]

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[21] We reject the Commonwealth's contention that these documents do not fall under *Brady* because they were "inculpatory." Brief for Respondent 41. Our cases make clear that *Brady*'s disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness. *United States v. Bagley, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*.

[22] While the precise dimensions of an "open file policy" may vary from jurisdiction to jurisdiction, in this case it is clear that the prosecutor's use of the term meant that his entire prosecution file was made available to the defense. App. 368; see also n. 13, *supra.*

[23] *We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.

[24] [6B]

[**41]** **[*284]** [2C]If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable. Indeed, in *Murray* we expressly noted that "the standard for cause should not vary depending on the timing of a procedural default." *Id. at 491*.

[1950]** The Commonwealth contends, however, that the prosecution's maintenance of an open file policy that did not include all it was purported to contain is irrelevant because the factual basis for the assertion of a *Brady* claim was available **[***304]** to state habeas counsel. It presses two factors to support this assertion. First, it argues that an examination of Stoltzfus' trial testimony, [25] as well as a letter **[****42]** published in a local newspaper, [26] made it clear that she had had several interviews with Detective Claytor. Second, the fact that the Federal District Court entered an order allowing discovery of the Harrisonburg police files indicates that diligent counsel could **[*285]** have obtained a similar order from the state court. We find neither factor persuasive.

[**43]** Although it is true that petitioner's lawyers -- both at trial and in post-trial proceedings -- must have known that Stoltzfus had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that Stoltzfus sent to the detective, existed and had been suppressed. [27] Indeed, if the Commonwealth is correct that Exhibits 2, 7, and 8 were in the prosecutor's "open file," it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld. The prosecutor must have known about the newspaper articles and Stoltzfus' meetings with Claytor, yet he did not believe that his prosecution file was incomplete.

[7]Furthermore, the fact that the District **[****44]** Court entered a broad discovery order even before federal habeas counsel had advanced a *Brady* claim does not demonstrate that a state court also would have done so. [28] **[****46]** Indeed, as we understand Virginia law and the Commonwealth's position,

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"We think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed v. Ross, 468 U.S. 1 at 16, 82 L. Ed. 2d 1, 104 S. Ct. 2901*, or that 'some interference by officials,' *Brown v. Allen, 344 U.S. 443, 486, 97 L. Ed. 469, 73 S. Ct. 397 (1953)*, made compliance impracticable, would constitute cause under this standard." *Murray, 477 U.S. at 488*; see also *Amadeo v. Zant, 486 U.S. 214, 221-222, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988)*.

[25] Stoltzfus testified to meeting with Claytor at least three times. App. 55-56.

[26] In her letter, which appeared on July 18, 1990 (after petitioner's trial) in the Harrisonburg Daily News-Record, Stoltzfus stated: "It never occurred to me that I was witnessing an abduction. In fact, if it hadn't been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn't realize it. What sounded like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture." *Id. at 250*. Stoltzfus also gave a pretrial interview to a reporter with the Roanoke Times that conflicted in some respects with her trial testimony, principally because she identified the blonde woman at the mall as Tudor. Id. at 273.

[27] The defense could not discover copies of these notes from Stoltzfus herself, because she refused to speak with defense counsel before trial. *Id. at 370*.

[28] The parties have been unable to provide, and the record does not illuminate, the factual basis on which the District Court entered the discovery order. It was granted *ex parte* and under seal and furnished broad access to any records relating to petitioner. District Court Record, Doc. No. 20. The Fourth Circuit has since found that federal district courts do not possess the authority to issue *ex parte* discovery orders in habeas proceedings. *In re Pruett, 133 F.3d 275, 280 (CA4 1997)*. We express no opinion on the Fourth Circuit's decision on this question.

petitioner would not have been entitled to such discovery in state habeas **[*286]** proceedings without a showing of good cause. [29] Even pursuant to the broader discovery provisions afforded at trial, petitioner would not have **[***305]** had access to these materials under Virginia law, except as modified by *Brady*. [30] Mere speculation that **[**1951]** some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support. Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them. The presumption, well established by "'tradition and **[****45]** experience,'" that prosecutors have fully "'discharged their official duties,'" *United States v. Mezzanatto, 513 U.S. 196, 210, 130 L. Ed. 2d 697, 115 S. Ct. 797 (1995)*, is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional **[*287]** error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

[**47]** [2D]The Commonwealth's position on the "cause" issue is particularly weak in this case because the state habeas proceedings confirmed petitioner's justification for his failure to raise a *Brady* claim. As already noted, when he alleged that trial counsel had been incompetent because they had not advanced such a claim, the warden responded by pointing out that there was no need for counsel to do so because they "were voluntarily given full disclosure of everything known to the government." [31] **[****48]** Given that representation, petitioner had no basis for believing the Commonwealth had failed to comply with *Brady* at trial. [32]

However, we note that it is unlikely that petitioner would have been granted in state court the sweeping discovery that led to the Stoltzfus materials, since Virginia law limits discovery available during state habeas. Indeed, it is not even clear that he had a right to such discovery in federal court. See n. 29, *infra*.

[29] Virginia law provides that "no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding." Va. Sup. Ct. Rule 4:1(b)(5)(3)(b); see also *Yeatts v. Murray, 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995)*. The Commonwealth acknowledges that petitioner was not entitled to discovery under Virginia law. Brief for Respondent 25.

[30] See Va. Sup. Ct. R. 3A:11. This rule expressly excludes from defendants "the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except [for scientific reports of the accused or alleged victim]." The Virginia Supreme Court found that petitioner had been afforded all the discovery he was entitled to on direct review. "Limited discovery is permitted in criminal cases by the Rules of Court. . . . Strickler had the benefit of all the discovery to which he was entitled under the Rules. Those rights do not extend to general production of evidence, except in the limited areas prescribed by Rule 3A:11." *Strickler v. Commonwealth, 241 Va. 482, 491, 404 S.E.2d 227, 233 (1991)*.

[31] This statement is quoted in full at n. 14, *supra*. Respondent argues that this representation is not dispositive because it was made in the warden's motion to dismiss and therefore cannot excuse the failure to include a *Brady* claim in the petitioner's original state habeas pleading. We find the timing of the statement irrelevant, since the warden's response merely summarizes the State's "open file" policy, instituted by the prosecution at the inception of the case.

[32] Furthermore, in its opposition to petitioner's motion during state habeas review for funds for an investigator, the Commonwealth argued: "Strickler's Petition contains 139 separate habeas claims. By requesting appointment of an investigator 'to procure the necessary factual basis to support certain of Petitioner's claims' (Motion, p.1), Petitioner is implicitly conceding that he is not aware of factual support for the claims he has already made. Respondent agrees." App. 242.

In light of these assertions, we fail to see how the Commonwealth believes petitioner could have shown "good cause" sufficient to get discovery on a *Brady* claim in state habeas.

The Commonwealth also argues that our decisions in *Gray v. Netherland, 518 U.S. 152, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996)*, and *McCleskey v. Zant, 499 U.S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991)*, preclude the conclusion that the cause for petitioner's **[***306]** default was adequate. In both of those cases, however, the petitioner was previously aware of the factual basis for his **[****49]** claim but failed to raise it earlier. See *Gray, 518 U.S. at 161*; *McCleskey, 499 U.S. at 498-499*. In the context of a *Brady* claim, a defendant cannot conduct the "reasonable **[*288]** and diligent investigation" mandated by *McCleskey* to preclude a finding of procedural default when the evidence is in the hands of the State. [33]

The controlling precedents on "cause" are *Murray v. Carrier, 477 U.S. at 488* **[****50]** and *Amadeo v. Zant, 486 U.S. 214, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988)*. As we explained in the latter case:

"If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse **[**1952]** his procedural default under this Court's precedents." *Id. at 222*. [34]

[**51]** There is no suggestion that tactical considerations played any role in petitioner's failure to raise his *Brady* claim in state court. Moreover, under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs, 427 U.S. at 110*. **[*289]**

In summary, petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received "everything known to the government." [35] We need not decide in this case whether any one or two of these factors would be sufficient to constitute **[***307]** **[****52]** cause, since the combination of all three surely suffices.

IV

[1D]The differing judgments of the District Court and the Court of Appeals attest to the difficulty of resolving the issue of prejudice. Unlike the Fourth Circuit, we do not believe that "the Stolzfus *[sic]* materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the

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[33] We do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them. Although *Gray* involved a procedurally defaulted *Brady* claim, in that case, the Court found that the petitioner had made "no attempt to demonstrate cause or prejudice for his default." *Gray, 518 U.S. at 162*.

[34] It is noteworthy that both of the reasons on which we relied in *McCleskey* to distinguish *Amadeo* also apply to this case: "This case differs from *Amadeo* in two crucial respects. First, there is no finding that the State concealed evidence. And second, even if the State intentionally concealed the 21-page document, the concealment would not establish cause here because, in light of McCleskey's knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition." *499 U.S. at 501-502*.

[35] Since our opinion does not modify *Brady*, we reject the Commonwealth's contention that we announce a "new rule" today. See *Bousley v. United States, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998)*.

trial." App. 425. Without a doubt, Stoltzfus' testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial.

That, however, is not the standard that petitioner must satisfy in order to obtain relief. **[****53]** He must convince us that "there is a reasonable probability" that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles:* "The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence **[*290]** he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *514 U.S. at 434*.

The Court of Appeals' negative answer to that question rested on its conclusion that, without considering Stoltzfus' testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty. The standard used by that court was incorrect. As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after **[****54]** discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Id. at 434-435*. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id. at 435*.

The District Judge decided not to hold an evidentiary hearing to determine whether Exhibits 2, 7, and 8 had been disclosed to the defense, because he was satisfied that the "potentially devastating impeachment material" contained in the other five warranted the entry of summary judgment in petitioner's favor. App. 392. The District Court's **[**1953]** conclusion that the admittedly undisclosed documents were sufficiently important to establish a violation of the *Brady* rule was supported by the prosecutor's closing argument. That argument relied on Stoltzfus' testimony to demonstrate petitioner's violent propensities and to establish that he was the instigator and leader in Whitlock's abduction and, by inference, her murder. The prosecutor emphasized the importance of Stoltzfus' testimony in proving the abduction:

[**55]** "We are lucky enough to have an eyewitness who saw [what] happened out there in that parking lot. [In a] lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Mrs. Stoltzfus was **[***308]** there, she saw [what] happened." App. 169.

[*291] Given the record evidence involving Henderson, [36] the District Court concluded that, without Stoltzfus' testimony, the jury might have been persuaded that Henderson, rather than petitioner, was the ringleader. He reasoned that a "reasonable probability of conviction" of first-degree, rather than capital, murder sufficed to establish the materiality of the undisclosed Stoltzfus materials and, thus, a *Brady* violation. App. 396.

[**56]** The District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases. Petitioner did, for example, introduce substantial mitigating evidence about

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[36] The District Court summarized the evidence against Henderson. "Henderson's clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice's Inn. Tr. 541. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson's jeans." App. 395.

abuse he had suffered as a child at the hands of his stepfather. [37] As the District Court recognized, however, petitioner's burden is to establish a reasonable *probability* of a different result. *Kyles, 514 U.S. at 434*.

[**57]** **[*292]** Even if Stoltzfus and her testimony had been entirely discredited, the jury might still have concluded that petitioner was the leader of the criminal enterprise because he was the one seen driving the car by Kurt Massie near the location of the murder and the one who kept the car for the following week. [38] In addition, Tudor testified that petitioner threatened Henderson with a knife later in the evening.

More importantly, however, petitioner's guilt of capital murder did not depend on proof that he was the dominant partner: **[****58]** Proof that he was an equal participant with Henderson was sufficient under the judge's instructions. [39] Accordingly, the strong evidence **[**1954]** that Henderson was a killer **[***309]** is entirely consistent with the conclusion that petitioner was also an actual participant in the killing. [40]

[**59]** **[*293]** Furthermore, there was considerable forensic and other physical evidence linking petitioner to the crime. [41] The weight and size of the rock, [42] **[****60]** and the character of the fatal

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[37] At sentencing, the trial court discussed the mitigation evidence: "On the charge of capital murder . . . it is difficult . . . to sit here and listen to the testimony of [petitioner's mother] and Mr. Strickler's two sisters and not feel a great, great deal of sympathy for, for any person who has a childhood and a life like Mr. Strickler has had. He was in no way responsible for the circumstances of his birth. He was brutalized from the minute he's, almost from the minute he was born and certainly with his . . . limitations and his ability with which he was born, it would have been extremely difficult for him to, to help himself. And difficult, when you look at a case like that to feel but anything but sympathy for him." Sentencing Hearing, 20 Record 57-58.

[38] As the trial court stated at petitioner's sentencing hearing: "The facts in this case which support this jury verdict are one that Mr. Strickler was . . . in control of this situation. He was in control at the shopping center in Harrisonburg. He was in control when the car went into the field up here on the 340 north of Waynesboro. He was in control thereafter, he ended up with the car. There is no question who . . . was in control of this entire situation." *Id. at 22*.

[39] The judge gave the following instruction at petitioner's trial: "You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death." *Strickler v. Commonwealth, 241 Va. at 493-494, 404 S.E.2d at 234-235*. The Virginia Supreme Court affirmed the propriety of this instruction on petitioner's direct appeal. *Id. at 495, 404 S.E.2d at 235*.

[40] It is also consistent with the fact that Henderson was convicted of first-degree murder but acquitted of capital murder after his jury, unlike petitioner's, was instructed that they could convict him of capital murder only if they found that he had "'inflicted the fatal blows.'" Henderson's jury was instructed, "'One who is present aiding and abetting the actual killing, but who does not inflict the fatal blows that cause death is a principle [sic] in the second degree, and may not be found guilty of capital murder. Before you can find the defendant guilty of capital murder, the evidence must establish beyond a reasonable doubt that the defendant was an active and immediate participant in the acts that caused the death.'" 2 App. in No. 97-29 (CA4), p. 777.

Henderson's trial took place before the Virginia Supreme Court affirmed the trial instruction, and the "joint perpetrator" theory it embodied, given at petitioner's trial. *Strickler v. Commonwealth, 241 Va. at 494, 404 S.E.2d at 235*. Petitioner's trial judge rejected one of petitioner's proffered instructions, which would have required the Commonwealth to prove that "the defendant was the person who actually delivered the blow that killed Leanne Whitlock." *Ibid.* Petitioner's trial judge recused himself from presiding over Henderson's trial, indicating that he had already formed his own opinion about what had happened the night of Whitlock's murder. 21 Record 2.

[41] For example, the police recovered hairs on a bra and shirt found with Whitlock's body that "were microscopically alike in all identifiable characteristics" to petitioner's hair. App. 135. The shirt recovered from the car at Strickler's mother's house had human blood on it. Petitioner's fingerprints were found on the outside and inside of the car taken from Whitlock. Id. at 128-129. Tudor testified that petitioner's pants had blood on them, and he had a cut on his knuckle. Id. at 95.

injuries to the victim, [43] are powerful evidence supporting the conclusion that two people acted jointly to commit a brutal murder.

We recognize the importance of eyewitness testimony; Stoltzfus provided the only disinterested, narrative account of what transpired on January 5, 1990. However, Stoltzfus' vivid description of the events at the mall was not the only evidence that the jury had before it. Two other eyewitnesses, **[*294]** the security guard and Henderson's friend, placed petitioner and Henderson at the Harrisonburg Valley Shopping Mall on the afternoon of Whitlock's murder. One eyewitness later saw petitioner driving Dean's car near the scene of the murder.

The record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached. The jury was instructed on two predicates for capital murder: robbery with a deadly weapon and **[***310]** abduction with intent **[****61]** to defile. [44] On state habeas, the Virginia Supreme Court rejected as procedurally barred petitioner's challenge to this jury instruction on the ground that "abduction with intent to defile" was not a predicate for capital murder for a victim over the age of 12. [45] That issue is not before us. Even assuming, however, that this predicate was erroneous, armed robbery still would have supported the capital murder conviction.

[**62]** **[**1955]** Petitioner argues that the prosecution's evidence on armed robbery "flowed almost entirely from inferences from Stoltzfus' testimony," and especially from her statement that Henderson had a "hard object" under his coat at the mall. Brief for Petitioner 35. That argument, however, ignores the fact that petitioner's mother and Tudor provided direct evidence that petitioner had a knife with him on the day of the crime. **[*295]** In addition, the prosecution contended in its closing argument that the rock -- not the knife -- was the murder weapon. [46] The prosecution did advance the theory that petitioner had a knife when he got in the car with Whitlock, but it did not specifically argue that petitioner used the knife during the robbery. [47]

[**63]** Petitioner also maintains that he suffered prejudice from the failure to disclose the Stoltzfus documents because her testimony impacted on the jury's decision to impose the death penalty. Her

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[42] The trial judge thought the shape of the rock so significant to the jury's conclusion that he instructed the lawyers to have "detailed, high quality photographs taken of [the rock] . . . and I want it put in the record of the case." Sentencing Hearing, 20 Record 53.

[43] The Deputy Chief Medical Examiner, who performed the autopsy, testified that the object that produced the fractures in Whitlock's skull caused "severe lacerations to the brain," and any two of the four fractures would have been fatal. App. 112.

[44] The trial court instructed the jury that, to convict petitioner of capital murder, it must find beyond a reasonable doubt that (1) "the defendant killed Leanne Whitlock;" (2) "the killing was willful, deliberate and premeditated"; and (3) "the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape." *Strickler v. Murray, 249 Va. 120, 124-125, 452 S.E.2d 648, 650 (1995)*.

[45] In its motion to dismiss petitioner's state habeas petition, the Commonwealth conceded that the instruction on intent to defile was erroneously given in this case as a predicate for capital murder. App. 218.

[46] In his closing argument, the prosecutor stated that there was "really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn't a knife. It was this thing here, it is too big to be called a rock and too small to be called a boulder." *Id. at 167*.

[47] The instructions given to the jury defined a deadly weapon as "any object or instrument that is likely to cause death or great bodily injury because of the manner and under the circumstance in which it is used." *Id. at 160*.

testimony, however, did not relate to his eligibility for the death sentence and was not relied upon by the prosecution at all during its closing argument at the penalty phase. [48] With respect to the jury's discretionary decision to impose the death penalty, it is true that Stoltzfus described petitioner as a violent, aggressive person, but that portrayal surely was not as damaging **[***311]** as either the evidence that he spent the evening of the murder dancing and drinking at Dice's or the powerful message conveyed by the 69-pound **[*296]** rock that was part of the record before the jury. Notwithstanding the obvious significance of Stoltzfus' testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

[**64]** [1E] [2E] [5C]Petitioner has satisfied two of the three components of a constitutional violation under *Brady:* exculpatory evidence and nondisclosure of this evidence by the prosecution. Petitioner has also demonstrated cause for failing to raise this claim during trial or on state postconviction review. However, petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed. He therefore cannot show materiality under *Brady* or prejudice from his failure to raise the claim earlier. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Concur by: SOUTER (In Part)

Dissent by: SOUTER (In Part)

Dissent

JUSTICE SOUTER, with whom JUSTICE KENNEDY joins as to Part II, concurring in part and dissenting in part.

I look at this case much as the Court does, starting with its view in Part III (which I join) that Strickler has shown cause to excuse **[****65]** the procedural default of his *Brady* claim. Like the Court, I think it clear that the materials withheld were exculpatory as devastating ammunition for impeaching Stoltzfus. [1] **[****67]** See *ante*, at 19. Even on **[**1956]** the question of prejudice **[*297]** or materiality, [2] over

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[48] The jury recommended death after finding the predicates of "future dangerousness" and "vileness." Neither of these predicates depended on Stoltzfus' testimony. The trial court instructed the jury, "Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives. One, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing, continuing serious threat to society or two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman and that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." Tr. 899-900.

[1] The Court notes that the District Court did not resolve whether all eight of the Stoltzfus documents had been withheld, as Strickler claimed, or only five. For purposes of its decision granting summary judgment for Strickler, the District Court assumed that only five had not been disclosed. See *ante*, at 27, 15. The Court of Appeals also left the dispute unresolved, see App. 418, n. 8, though granting summary judgment for respondent based on a lack of prejudice would presumably have required that court to assume that all eight documents had been withheld. Because this Court affirms the grant of summary judgment for respondent based on lack of prejudice and because it relies on at least one of the disputed documents in its analysis, see *ante*, at 19, I understand it to have assumed that none of the eight documents was disclosed. I proceed based on that assumption as well. If one thought the difference between five and eight documents withheld would affect the determination of prejudice, a remand to resolve that factual question would be necessary.

which I ultimately part company with the majority, I am persuaded that Strickler has failed to establish a reasonable probability that, had the materials withheld been disclosed, he would not have been found guilty of capital murder. See *ante*, at 29-32. As the Court says, however, the prejudice enquiry does not stop at the conviction but goes to each step of the sentencing process: **[***312]** the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation. See *ante*, at 31-33. It is with respect to the penultimate step in determining the sentence that I think Strickler has carried his burden. I believe there is a reasonable probability (which I take to mean a significant possibility) that disclosure of the Stoltzfus **[****66]** materials would have led the jury to recommend life, not death, and I respectfully dissent.

I

Before I get to the analysis of prejudice I should say something about the standard for identifying it, and about the unfortunate phrasing of the shorthand version in which the standard is customarily couched. The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended **[*298]** by these words does not require defendants to show that a different outcome would have been more likely than not **[****68]** with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. See a*nte*, at 27; *Kyles v. Whitley, 514 U.S. 419, 434-435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. Instead, the Court restates the question (as I have done elsewhere) as whether "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence'" in the outcome. *Ante*, at 27 (quoting *Kyles, supra, at 435*).

Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "more likely than not." While any short phrases for what the cases are getting at will be "inevitably imprecise," *United States v. Agurs, 427 U.S. 97, 108, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*, I think "significant possibility" would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction **[****69]** or sentence.

To see that this is so, we need to recall *Brady*'s evolution since the appearance of the rule as originally stated, that "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, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. *Brady* itself did not explain what it meant by "material" (perhaps assuming the term would be given its usual meaning in the law of evidence, see *United States v. Bagley, 473 U.S. 667, 703, n. 5, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)* (Marshall, J., dissenting)). We first essayed a partial definition in *United States v. Agurs, **[**1957]** supra*, where we identified three situations arguably within the ambit of *Brady* and said that in the first, involving knowing use of perjured testimony, **[*299]** reversal **[***313]**

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[2] In keeping with suggestions in a number of our opinions, see *Schlup v. Delo, 513 U.S. 298, 327, n. 45, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995)*; *Sawyer v. Whitley, 505 U.S. 333, 345, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)*, the Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. See *ante*, at 19, 26-27, 34. I follow the Court's lead.

was required if there was "any reasonable likelihood" that the false testimony had affected the verdict. *Agurs, supra, at 103* (citing *Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)*, **[****70]** in turn quoting *Napue v. Illinois, 360 U.S. 264, 271, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959))*. We have treated "reasonable likelihood" as synonymous with "reasonable possibility" and thus have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt. *Bagley, supra, at 678-680*, and n. 9 (opinion of Blackmun, J.). See also *Brecht v. Abrahamson, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)* (defining harmless-beyond-a-reasonable-doubt standard as no "'reasonable possibility' that trial error contributed to the verdict"); *Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)* (same). In *Agurs*, we thought a less demanding standard appropriate when the prosecution fails to turn over materials in the absence of a specific request. Although we refrained from attaching a label to that standard, we explained it as falling between the more-likely-than-not level and yet another criterion, whether the reviewing court's "'conviction [was] sure that the error did not influence the jury, or had but **[****71]** very slight effect.'" *427 U.S. at 112* (quoting *Kotteakos v. United States, 328 U.S. 750, 764, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946))*. Finally, in *United States v. Bagley, supra*, we embraced "reasonable probability" as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first. *Bagley* took that phrase from *Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*, where it had been used for the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel. *Strickland* in turn cited two cases for its formulation, *Agurs* (which did not contain the expression "reasonable probability") and *United States v. Valenzuela-Bernal, 458 U.S. 858, 873-874, 73 L. Ed. 2d 1193, 102 S. Ct. 3440 (1982)* (which held that sanctions against the Government for deportation of a potential defense witness were appropriate only **[*300]** if there was a "reasonable likelihood" that the lost testimony "could have affected the judgment of the trier of fact").

[**72]** The circuitous path by which the Court came to adopt "reasonable probability" of a different result as the rule of *Brady* materiality suggests several things. First, while "reasonable possibility" or "reasonable likelihood," the *Kotteakos* standard, and "reasonable probability" express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers' reasoning, the differences among the standards are slight. Second, the gap between all three of those formulations and "more likely than not" is greater than any differences among them. Third, because of that larger gap, it is misleading in *Brady* cases to use the term "probability," which is naturally read as the cognate of "probably" and thus confused with "more likely than not," see *Morris v. Mathews, 475 U.S. 237, 247, 89 L. Ed. 2d 187, 106 S. Ct. 1032 (1986)* (apparently treating "reasonable probability" as synonymous with "probably"); **[***314]** *id. at 254, n. 3* (Blackmun, J., concurring in judgment) (cautioning against confusing "reasonable probability" with more likely than not). We would be better off speaking of a "significant possibility" of a different **[****73]** result to characterize the *Brady* materiality standard. Even then, given the soft edges of all these phrases, [3] the **[**1958]** touchstone of the enquiry **[*301]** must remain whether the evidentiary suppression "undermines our confidence" that the factfinder would have reached the same result.

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[3] Each of these phrases or standards has been used in a number of contexts. This Court has used "reasonable possibility," for example, in defining the level of threat of injury to competition needed to make out a claim under the Robinson-Patman Act, see, *e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*; the standard for judging whether a grand jury subpoena should be quashed under *Federal Rule of Criminal Procedure 17(c)*, see *United States v. R. Enterprises, Inc., 498 U.S. 292, 301, 112 L. Ed. 2d 795, 111 S. Ct. 722 (1991)*; and the debtor's burden in establishing that certain collateral is necessary to reorganization and thus exempt from the Bankruptcy Code's automatic stay provision, see *United Sav. Assn. of Tex v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375-376, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988)*. We have adopted the standard established in

[**74]** II

Even keeping in mind these caveats about the appropriate level of materiality, applying the standard to the facts of this case does not give the Court easy answers, as the Court candidly acknowledges. See *ante*, at 26. Indeed, the Court concedes that discrediting Stoltzfus's testimony "might have changed the outcome of the trial," *ante*, at 27, and that the District Court was "surely correct" to find a "reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases," *ante*, at 28-29.

In the end, however, the Court finds the undisclosed evidence inadequate to undermine confidence in the jury's sentencing **[*302]** recommendation, whereas I find it **[***315]** sufficient to do that. Since we apply the same standard to the same record, our differing conclusions largely reflect different assessments of the significance the jurors probably ascribed to the Stoltzfus testimony. My assessment turns on two points. First, I believe that in making the ultimate judgment about what should be done to one of several participants in a crime this appalling the **[****75]** jurors would very likely have given weight to the degree of initiative and leadership exercised by that particular defendant. Second, I believe that no other testimony comes close to the prominence and force of Stoltzfus's account in showing Strickler as the unquestionably dominant member of the trio involved in Whitlock's abduction and the aggressive and moving figure behind her murder.

Although Stoltzfus was not the prosecution's first witness, she was the first to describe Strickler in any detail, thus providing the frame for the remainder of the story the prosecution presented to the jury. From the start of Stoltzfus's testimony, Strickler was "Mountain Man" and his male companion "Shy Guy," labels whose repetition more than a dozen times (by the prosecutor as well as by Stoltzfus) must have left the jurors with a clear sense of the relative roles that Strickler and Henderson played in the crimes that followed Stoltzfus's observation. According to her, when she first saw Strickler she "just sort of instinctively backed up because I was frightened." App. 36. Unlike retiring "Shy Guy," Strickler was "revved up." *Id. at 39, 60*. Even in describing her first encounter with Strickler **[****76]** inside the mall, Stoltzfus spoke of him as domineering, a "very impatient" character yelling at his female companion, "Blonde Girl," to join him. *Id. at 36, 38-39*.

[1959]** After describing in detail how "Mountain Man" and "Blonde Girl" were dressed, Stoltzfus said that "'Mountain Man' came tearing out of the Mall entrance door and went up to the driver of [a] van and .

Kotteakos v. United States, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946), for determining the harmlessness of nonconstitutional errors on direct review as the criterion for the harmlessness enquiry concerning constitutional errors on collateral review. See *Brecht v. Abrahamson, 507 U.S. 619, 637-638, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*. We have used "reasonable probability" to define the plaintiff's burden in making out a claim under § 7 of the Clayton Act, see, *e.g.*, *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *FTC v. Morton Salt Co., 334 U.S. 37, 55-61, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)* (Jackson, J., dissenting in part) (contrasting "reasonable possibility" and "reasonable probability" and arguing for latter as appropriate standard under Robinson-Patman Act); the standard for granting certiorari, vacating, and remanding in light of intervening developments, see, *e.g.*, *Lawrence v. Chater, 516 U.S. 163, 167, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996) (per curiam);* and the standard for exempting organizations from otherwise valid disclosure requirements in light of threats or harassment resulting from the disclosure, see, *e.g.*, *Buckley v. Valeo, 424 U.S. 1, 74, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam)*. We have recently used "significant possibility" in explaining the circumstances under which nominal compensation is an appropriate award in a suit under the Longshore and Harbor Workers' Compensation Act, see *Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 123, 138 L. Ed. 2d 327, 117 S. Ct. 1953 (1997)*, but we most commonly use that term in defining one of the requirements for the granting of a stay pending certiorari. The three-part test requires a "reasonable probability" that the Court will grant certiorari or note probable jurisdiction, a "significant possibility" that the Court will reverse the decision below, and a likelihood of irreparable injury absent a stay. See, *e.g.*, *Barefoot v. Estelle, 463 U.S. 880, 895, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983)*; *Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 127 L. Ed. 2d 530, 114 S. Ct. 1036 (1994)* (REHNQUIST, C. J., in chambers).

. . was just really mad and ran back and banged on back of the backside of the van" **[*303]** while "Shy Guy" and "Blonde Girl" hung back. *Id. at 43*. "Mountain Man" approached a pickup truck, then "pounded on" the front passenger side window of Whitlock's car, "shook and shook the car door," "banging and banging on the window" while Whitlock checked to see if the door was locked. *Ibid*. Finally, "he just really shook it hard and you could tell he was mad. Shook it really hard and the door opened and he jumped in . . . and faced her." *Id. at 43-44*. While Whitlock tried to push him away, "Mountain Man" "motioned for 'Blonde Girl' and 'Shy Guy' to come" and the girl did as she was bidden. She "started to jump into the car," but "jumped back" when Whitlock stepped on the gas. *Id. at 44*. Then **[****77]** "Mountain Man" started "hitting [Whitlock] on the left shoulder, her right shoulder and then . . . the head," finally "opening the door again" so "the 'Blonde Girl' got in the back and 'Shy Guy' followed and got behind him." *Id. at 45*. "Shy Guy" passed "Mountain Man" his tan coat, which "Mountain Man" "fiddled with" for "what seemed like a long time," then "sat back up and . . . faced" Whitlock while "the other two in the back seat sat back and relaxed." *Ibid.* Stoltzfus then claimed that she got out of her car and went over to Whitlock's, whereupon unassertive "Shy Guy" **[***316]** "instinctively jumped, you know, laid over on the seat to hide from me." *Id. at 46*. Stoltzfus pulled up next to Whitlock's car and repeatedly asked, "Are you O.K.[?]," but Whitlock responded only with eye contact; "she didn't smile, there was no expression," and "just very serious, looked down to her right," suggesting Strickler was holding a weapon on her. *Id. at 46, 47*. Finally, Whitlock mouthed something, which Stoltzfus demonstrated for the jury and then explained she realized must have been the word, "help." *Id. at 47*.

Without rejecting the very notion that jurors with discretion **[****78]** in sentencing would be influenced by the relative dominance of one accomplice among others in a shocking crime, I could not regard Stoltzfus's colorful testimony as anything but significant on the matter of sentence. It was Stoltzfus **[*304]** alone who described Strickler as the initiator of the abduction, as the one who broke into Whitlock's car, who beckoned his companions to follow him, and who violently subdued the victim while "Shy Guy" sat in the back seat. The bare content of this testimony, important enough, was enhanced by one of the inherent hallmarks of reliability, as Stoltzfus confidently recalled detail after detail. The withheld documents would have shown, however, that many of the details Stoltzfus confidently mentioned on the stand (such as Strickler's appearance, Whitlock's appearance, the hour of day when the episode occurred, and her daughter's alleged notation of the license plate number of Whitlock's car) had apparently escaped her memory in her initial interviews with the police. Her persuasive account did not come, indeed, until after her recollection had been aided by further conversations with the police and with the victim's boyfriend. I therefore have **[****79]** to assess the likely havoc that an informed cross-examiner could have wreaked upon Stoltzfus as adequate to raise a significant possibility of a different recommendation, as sufficient to undermine confidence that the death recommendation would have been the choice. All it would have taken, after all, was one juror to hold out against death to preclude the recommendation actually given.

The Court does not, of course, deny that evidence of dominant role would probably have been considered by the jury; the Court, instead, doubts that this consideration, and the evidence bearing on it, would have figured so prominently in a juror's mind as to be a fulcrum of confidence. I am not convinced by the Court's reasons.

The Court emphasizes the brutal manner of the killing and Strickler's want of remorse, as jury considerations diminishing the relative importance of Strickler's position as ringleader. See *ante*, at 33. Without doubt the jurors considered these to be important factors, and without doubt they may have been

treated as sufficient to warrant **[**1960]** death. But as the Court says, sufficiency of other evidence and the **[*305]** facts it supports is not the *Brady* standard, **[****80]** and the significance of both brutality and sangfroid must surely have been complemented by a certainty that without Strickler there would have been no abduction and no ensuing murder.

The Court concludes that Stoltzfus's testimony is unlikely to have had significant influence on the jury's sentencing recommendation because **[***317]** the prosecutor made no mention of her testimony in his closing statement at the sentencing proceeding. See *ante*, at 33. But although the Court is entirely right that the prosecution gave no prominence to the Stoltzfus testimony at the sentencing stage, the State's closing actually did include two brief references to Strickler's behavior in "just grabbing a complete stranger and abducting her," 19 Record 919; see also *id. at 904*, as relevant to the jury's determination of future dangerousness. And since Strickler's criminal record had no convictions involving actual violence, a point defense counsel stressed in his closing argument, see *id. at 913*, the jurors may well have given weight to Stoltzfus's lively portrait of Strickler as the aggressive leader of the group, when they came to assess his future dangerousness.

What is **[****81]** more important, common experience, supported by at least one empirical study, see Bowers, Sandys, & Steiner, Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, *83 Cornell L. Rev. 1476, 1486-1496 (1998)*, tells us that the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence. True, Stoltzfus's testimony directly discussed only the circumstances of Whitlock's abduction, but its impact on the jury was almost certainly broader, as the prosecutor recognized. After the jury rendered its verdict on guilt, for example, the defense moved for a judgment of acquittal on the capital murder charge based on insufficiency of the evidence. In the prosecutor's argument to the court he replied that

[*306] "the evidence clearly shows that this man was the aggressor. He was the one that ran out. He was the one that grabbed Leanne Whitlock. When she struggled trying to get away from him . . . , he was the one that started beating her there in the car. And finally subdued her enough to make her drive away from the mall, **[****82]** so you start with the principle that he is the aggressor." 20 Record 15.

Stoltzfus's testimony helped establish the "principle," as the prosecutor put it, that Strickler was "the aggressor," the dominant figure, in the whole sequence of criminal events, including the murder, not just in the abduction. If the defense could have called Stoltzfus's credibility into question, the jurors' belief that Strickler was the chief aggressor might have been undermined to the point that at least one of them would have hesitated to recommend death.

The Court suggests that the jury might have concluded that Strickler was the leader based on three other pieces of evidence: Kurt Massie's identification of Strickler as the driver of Whitlock's car on its way toward the field where she was killed; Donna Tudor's testimony that Strickler kept the car the following week; and Tudor's testimony that Strickler threatened Henderson with a knife later on the evening of the murder. But if we are going to look at other testimony we cannot stop here. The accuracy of both Massie's and Tudor's testimony was open to question, [4] and all of it was subject to some evidence that Henderson

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[4] Massie's identification was open to some doubt because it occurred at night as one car passed another on a highway. Moreover, he testified that he first saw four people in the car, then only three, and that none of the occupants was black. App. 66-67, 70-73. Tudor, as defense

had **[***318]** **[****83]** taken a major role in the murder. The Court has quoted the District **[*307]** Court's summation of evidence against him, *ante*, at 28, n. 36: Henderson's wallet was found near the body, his clothes were bloody, he presented a woman friend with the victim's watch at a postmortem **[**1961]** celebration (which he left driving the victim's car), and he confessed to a friend that he had just killed an unidentified black person. Had this been the totality of the evidence, the jurors could well have had little certainty about who had been in charge. But they could have had no doubt about the leader if they believed Stoltzfus.

[**84]** Ultimately, I cannot accept the Court's discount of Stoltzfus in the *Brady* sentencing calculus for the reason I have repeatedly emphasized, the undeniable narrative force of what she said. Against this, it does not matter so much that other witnesses could have placed Strickler at the shopping mall on the afternoon of the murder, *ante*, at 31, or that the Stoltzfus testimony did not directly address the aggravating factors found, *ante*, at 33. What is important is that her evidence presented a gripping story, see E. Loftus & J. Doyle, Eyewitness Testimony: Civil and Criminal 5 (3d ed. 1997) ("Research redoundingly proves that the story format is a powerful key to juror decision making"). Its message was that Strickler was the madly energetic leader of two morally apathetic accomplices, who were passive but for his direction. One cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility of that story. I would accordingly vacate the sentence and remand for reconsideration, and to that extent I respectfully dissent.

References

21A Am **[****85]** Jur 2d, Criminal Law 1269-1274; 39 Am Jur 2d, Habeas Corpus and Postconviction Remedies 25

USCS, *Constitution, Amendment 14*

L Ed Digest, Constitutional Law 840.2; Habeas Corpus 37

L Ed Index, Exclusion or Suppression of Evidence; Habeas Corpus

Annotation References:

Requirement, in federal habeas corpus proceedings, of showing of cause and prejudice with respect to relief from state criminal conviction or sentence-- Supreme Court cases. *120 L Ed 2d 991*.

Prosecution's failure to preserve potentially exculpatory evidence as violating criminal defendant's' due process rights under Federal Constitution--Supreme Court cases. *102 L Ed 2d 1041*.

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence favorable to accused-- Supreme Court cases. *87 L Ed 2d 802* .

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counsel brought out on cross-examination, testified pursuant to a cooperation agreement with the government and admitted that the story she told on the stand was different from what she had told the defense investigator before trial. *Id. at 100-101, 103-104*.

United States v. Bagley

Supreme Court of the United States

March 20, 1985, Argued ; July 2, 1985, Decided

No. 84-48

Reporter
473 U.S. 667 *; 105 S. Ct. 3375 **; 87 L. Ed. 2d 481 ***; 1985 U.S. LEXIS 130 ****; 53 U.S.L.W. 5084

UNITED STATES v. BAGLEY

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *719 F.2d 1462*, reversed and remanded.

Core Terms

witnesses, disclosure, disclose, favorable evidence, trier of fact, cross-examination, nondisclosure, inducements, reward, cases, suppression, harmless, promises, failure to disclose, defense counsel, guilt, exculpatory evidence, discovery, charges, reasonable probability, impeaching evidence, specific request, reviewing court, new trial, prosecutorial, convictions, firearms, fail to disclose, contracts, sentence

Case Summary

Procedural Posture

The government sought review of an order of the United States Court of Appeals for the Ninth Circuit, which held that the government violated defendant's constitutional right to effective cross-examination on a finding that the government withheld information from discovery that trial witnesses were paid for testimony.

Overview

Defendant was indicted for violating federal narcotics and firearms statutes. Defendant filed a discovery motion regarding whether witnesses were paid to give testimony. The prosecutor failed to disclose that witnesses would be paid after testimony. Defendant was found guilty. Subsequently, defendant discovered that the witnesses had been paid, and he sought to vacate his sentences on the grounds that failure to disclose violated his right to due process and to impeach witnesses. The trial court denied defendant's motion to vacate, holding that impeachment evidence would not have affected the outcome of the trial. The appellate court reversed, holding that the denial of evidence was a violation of due process and defendant's right to confrontation. The Court reversed and remanded for a determination of whether the failure to disclose the evidence would have affected the trial outcome, thus comprising a constitutional error where such evidence was material.

Outcome

The Court reversed the order and remanded for a determination of whether the prosecutor's withholding of evidence was material in that it would have affected the outcome of the trial.

Syllabus

Respondent was indicted on charges of violating federal narcotics and firearms statutes. Before trial, he filed a discovery motion requesting, *inter alia*, "any deals, promises or inducements made to [Government] witnesses in exchange for their testimony." The Government's response did not disclose that any "deals, promises or inducements" had been made to its two principal witnesses, who had assisted the Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent. But the Government did produce signed affidavits by these witnesses recounting their undercover dealing with respondent and concluding with the statement that the affidavits were made without any threats or rewards or promises of reward. Respondent waived his right to a jury trial and was tried before the District Court. The two principal Government witnesses testified about both the firearms and narcotics charges, and the court found respondent guilty on the narcotics charges but not guilty on the firearms charges. Subsequently, in response to **[****2]** requests made pursuant to the Freedom of Information Act and the Privacy Act, respondent received copies of ATF contracts signed by the principal Government witnesses during the undercover investigation and stating that the Government would pay money to the witnesses commensurate with the information furnished. Respondent then moved to vacate his sentence, alleging that the Government's failure in response to the discovery motion to disclose these contracts, which he could have used to impeach the witnesses, violated his right to due process under *Brady v. Maryland, 373 U.S. 83*, which held that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. The District Court denied the motion, finding beyond a reasonable doubt that had the existence of the ATF contracts been disclosed to it during trial, the disclosure would not have affected the outcome, because the principal Government witnesses' testimony was primarily devoted to the firearms charges on which respondent was acquitted, and was exculpatory on the narcotics charges. The Court of Appeals reversed, **[****3]** holding that the Government's failure to disclose the requested impeachment evidence that respondent could have used to conduct an effective cross-examination of the Government's principal witnesses required automatic reversal. The Court of Appeals also stated that it "[disagreed]" with the District Court's conclusion that the nondisclosure was harmless beyond a reasonable doubt, noting that the witnesses' testimony was in fact inculpatory on the narcotics charges.

Held: The judgment is reversed, and the case is remanded.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I and II, concluding that the Court of Appeals erred in holding that the prosecutor's failure to disclose evidence that could have been used effectively to impeach important Government witnesses requires automatic reversal. Such nondisclosure constitutes constitutional error and requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the outcome of the trial. Pp. 674-678.

JUSTICE BLACKMUN, joined by JUSTICE O'CONNOR, delivered an opinion with respect to Part III, concluding that the nondisclosed evidence at issue is **[****4]** 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. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. This standard of materiality is sufficiently flexible to cover cases of prosecutorial failure to

disclose evidence favorable to the defense regardless of whether the defense makes no request, a general request, or a specific request. Although the prosecutor's failure to respond fully to a specific request may impair the adversary process by having the effect of representing to the defense that certain evidence does not exist, this possibility of impairment does not necessitate a different standard of materiality. Under the standard stated above, the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. Pp. 678-684.

JUSTICE WHITE, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, being of the view that there is no reason to elaborate on the relevance of the specificity of the defense's request for disclosure, **[****5]** either generally or with respect to this case, concluded that reversal was mandated simply because the Court of Appeals failed to apply the "reasonable probability" standard of materiality to the nondisclosed evidence in question. P. 685.

Counsel: David A. Strauss argued the cause for the United States. With him on the briefs were Solicitor General Lee, Assistant Attorney General Trott, and Deputy Solicitor General Frey.

Thomas W. Hillier II argued the cause and filed a brief for respondent. *

Judges: BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Part III, in which O'CONNOR, J., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, post, p. 685. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 685. **[****6]** STEVENS, J., filed a dissenting opinion, post, p. 709. POWELL, J., took no part in the decision of the case.

Opinion by: BLACKMUN

Opinion

[*669] **[***486]** **[**3377]** JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

[1A]In *Brady v. Maryland, 373 U.S. 83, 87 (1963)*, this Court held 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 punishment." The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

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* John K. Van de Kamp, Attorney General, and Karl S. Mayer, Thomas A. Brady, and Charles R. B. Kirk, Deputy Attorneys General, filed a brief for the State of California as amicus curiae urging reversal.

"The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, **[****7]** and any deals, promises or inducements **[*670]** made to witnesses in exchange for their testimony." App. 18. [1]

The Government's two principal witnesses at the trial were James F. O'Connor and Donald E. Mitchell. O'Connor and Mitchell were state law enforcement officers employed by the Milwaukee Railroad as private security guards. Between April and June 1977, they assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent.

The Government's response to the discovery motion did not disclose that any "deals, promises **[****8]** or inducements" had been made to O'Connor or Mitchell. In apparent reply to a request in the motion's ninth paragraph for "[copies] of all Jencks Act material," [2] the Government produced a series of affidavits that O'Connor and Mitchell had signed between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover dealings that O'Connor and Mitchell were having at the time with respondent. Each affidavit concluded with the statement, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." [3]

[**9]** Respondent waived his right to a **[***487]** jury trial and was tried before the court in December 1977. At the trial, O'Connor **[*671]** and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges.

In mid-1980, respondent filed requests for information pursuant to the Freedom of Information Act and to the Privacy Act of 1974, *5 U. S. C. §§ 552* and *552a*. He received in response copies of ATF form contracts that O'Connor and Mitchell had signed on May 3, 1977. Each form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor." The printed portion of the form stated that the vendor "will provide" information **[**3378]** to ATF and that "upon receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with services and information rendered." App. 22 and 23. Each form **[****10]** contained the following typewritten description of services:

"That he will provide information regarding T-I and other violations committed by Hughes A. Bagley, Jr.; that he will purchase evidence for ATF; that he will cut *[sic]* in an undercover capacity for ATF; that he will assist ATF in gathering of evidence and testify against the violator in federal court." *Ibid.*

The figure "$ 300.00" was handwritten in each form on a line entitled "Sum to Be Paid to Vendor."

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[1] In addition, para. 10(b) of the motion requested "[promises] or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity, lesser sentence, etc.," and para. 11 requested "[all] information which would establish the reliability of the Milwaukee Railroad Employees in this case, whose testimony formed the basis for the search warrant." App. 18-19.

[2] The Jencks Act, *18 U. S. C. § 3500*, requires the prosecutor to disclose, after direct examination of a Government witness and on the defendant's motion, any statement of the witness in the Government's possession that relates to the subject matter of the witness' testimony.

[3] Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80-3592-RJK(M) (CD Cal.) Exhibits 1-9.

Because these contracts had not been disclosed to respondent in response to his pretrial discovery motion, [4] respondent moved under *28 U. S. C. § 2255* to vacate his sentence. He **[*672]** alleged that the Government's failure to disclose the contracts, which he could have used to impeach O'Connor and Mitchell, violated his right to due process under *Brady v. Maryland, supra.*

[**11]** The motion came before the same District Judge who had presided at respondent's bench trial. An evidentiary hearing was held before a Magistrate. The Magistrate found that the printed form contracts were blank when O'Connor and Mitchell signed them and were not signed by an ATF representative until after the trial. He also found that on January 4, 1978, following the trial and decision in respondent's case, ATF made payments of $ 300 to both O'Connor and Mitchell pursuant to the contracts. [5] Although the ATF case agent who dealt with O'Connor and Mitchell testified that these payments were compensation for expenses, the Magistrate found that this **[***488]** characterization was not borne out by the record. There was no documentation for expenses in these amounts; Mitchell testified that his payment was not for expenses, and the ATF forms authorizing the payments treated them as rewards.

[**12]** The District Court adopted each of the Magistrate's findings except for the last one to the effect that "[neither] O'Connor nor Mitchell expected to receive the payment of $ 300 or any payment from the United States for their testimony." App. to Pet. for Cert. 7a, 12a, 14a. Instead, the court found that it was "probable" that O'Connor and Mitchell expected to receive compensation, in addition to their expenses, for their assistance, "though perhaps not for their testimony." *Id*., at 7a. The District Court also expressly rejected, *ibid*., the Magistrate's conclusion, *id*., at 14a, that:

[*673] "Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any 'deals, promises or inducements' to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady v. Maryland, 373 U.S. 83 (1963)*."

The District Court found beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during trial, the disclosure would have had no effect upon its finding that the Government **[**3379]** **[****13]** had proved beyond a reasonable doubt that respondent was guilty of the offenses for which he had been convicted. *Id*., at 8a. The District Court reasoned: Almost all of the testimony of both witnesses was devoted to the firearms charges in the indictment. Respondent, however, was acquitted on those charges. The testimony of O'Connor and Mitchell concerning the narcotics charges was relatively very brief. On cross-examination, respondent's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies that had been prescribed for respondent's personal use. The answers of O'Connor and Mitchell to this line of cross-examination tended to be favorable to respondent. Thus, the claimed impeachment evidence would not have been helpful to respondent and would not have affected the outcome of the trial. Accordingly, the District Court denied respondent's motion to vacate his sentence.

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[4] The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them. See App. to Pet. for Cert. 13a.

[5] The Magistrate found, too, that ATF paid O'Connor and Mitchell, respectively, $ 90 and $ 80 in April and May 1977 before trial, but concluded that these payments were intended to reimburse O'Connor and Mitchell for expenses, and would not have provided a basis for impeaching O'Connor's and Mitchell's trial testimony. The District Court adopted this finding and conclusion. *Id*., at 7a, 13a.

The United States Court of Appeals for the Ninth Circuit reversed. *Bagley v. Lumpkin, 719 F.2d 1462 (1983)*. The Court of Appeals began by noting that, according to precedent **[****14]** in the Circuit, prosecutorial failure to respond to a specific *Brady* request is properly analyzed as error, and a resulting conviction must be reversed unless the error is harmless beyond a reasonable doubt. The court noted that the District Judge who had presided over the bench trial **[*674]** concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected the outcome. The Court of Appeals, however, stated that it "[disagreed]" with this conclusion. *Id., at 1464*. In particular, it disagreed with the Government's -- and the District Court's -- premise that the testimony of O'Connor and Mitchell was exculpatory on the narcotics charges, and **[***489]** that respondent therefore would not have sought to impeach "his own witness." *Id., at 1464, n. 1*.

The Court of Appeals apparently based its reversal, however, on the theory that the Government's failure to disclose the requested *Brady* information that respondent could have used to conduct an effective cross-examination impaired respondent's right to confront adverse witnesses. The court noted: "In *Davis* v. *Alaska*, . . . the Supreme Court held **[****15]** that the denial of the 'right of *effective* cross-examination' was '"constitutional error of the first magnitude"' requiring automatic reversal." *719 F.2d, at 1464* (quoting *Davis v. Alaska, 415 U.S. 308, 318 (1974))* (emphasis added by Court of Appeals). In the last sentence of its opinion, the Court of Appeals concluded: "we hold that the government's failure to provide requested *Brady* information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal." *719 F.2d, at 1464*.

We granted certiorari, *469 U.S. 1016 (1984)*, and we now reverse.

II

The holding in *Brady* v. *Maryland* requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." *373 U.S., at 87*. See also *Moore v. Illinois, 408 U.S. 786, 794-795 (1972)*. The Court explained in *United States v. Agurs, 427 U.S. 97, 104 (1976)*: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed **[****16]** evidence might have affected the outcome of **[*675]** the trial." The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction. Accordingly, the Court affirmed the lower court's restriction of Brady's new trial to the issue of punishment.

The *Brady* rule is based on the requirement of due process. Its purpose is **[**3380]** not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. [6] Thus, the prosecutor is not required to deliver his entire file to defense counsel, [7]

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[6] By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States, 295 U.S. 78, 88 (1935)*. See *Brady v. Maryland, 373 U.S., at 87-88*.

[7] See *United States v. Agurs, 427 U.S. 97, 106, 111 (1976)*; *Moore v. Illinois, 408 U.S. 786, 795 (1972)*. See also *California v. Trombetta, 467 U.S. 479, 488, n. 8 (1984)*. An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles v. Maryland, 386 U.S. 66, 117 (1967)* (dissenting opinion). Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.

but only to disclose evidence favorable to the **[***490]** accused that, if suppressed, would deprive the defendant of a fair trial:

"For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . .

". . . But to reiterate a critical point, the prosecutor will not have violated his constitutional **[****17]** duty of disclosure **[*676]** unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *427 U.S., at 108*.

[**18]** [2]In *Brady* and *Agurs*, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States, 405 U.S. 150, 154 (1972)*. Such evidence is "evidence favorable to an accused," *Brady, 373 U.S., at 87*, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois, 360 U.S. 264, 269 (1959)* ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose **[****19]** exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses." *719 F.2d, at 1464*. Relying on *Davis v. Alaska, 415 U.S. 308 (1974)*, the Court of Appeals held that the Government's failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutues "'constitutional error of the first magnitude'" requiring automatic reversal. *719 F.2d, at 1464* (quoting *Davis v. Alaska, supra, at 318*).

This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In *Giglio v. United States, supra*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key Government **[*677]** **[**3381]** witness that he would not be prosecuted if he testified for the Government. This Court said:

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the] general rule [of *Brady* **[****20]**]. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed **[***491]** evidence possibly useful to the defense but not likely to have changed the verdict . . . .' A finding of materiality of the evidence is required under *Brady*. . . . A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" *405 U.S., at 154* (citations omitted).

Thus, the Court of Appeals' holding is inconsistent with our precedents.

[3]Moreover, the court's reliance on *Davis* v. *Alaska* for its "automatic reversal" rule is misplaced. In *Davis*, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. The defense intended by this cross-examination to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure **[****21]** and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis, 384 U.S. 1, 3*.'" *415 U.S., at 318* (quoting *Smith **[*678]** v. Illinois, 390 U.S. 129, 131 (1968)*). See also *United States v. Cronic, 466 U.S. 648, 659 (1984)*.

The present case, in contrast, does not involve any direct restriction on the scope of cross-examination. The defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government. The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such **[****22]** suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," *United States v. Agurs, 427 U.S., at 112*, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

III

A

It remains to determine the standard of materiality applicable to the nondisclosed evidence at issue in this case. Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States* v. *Agurs*. The Court in *Agurs* distinguished three situations involving the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation was the **[***492]** prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that "a conviction obtained by the knowing **[****23]** use of perjured testimony is fundamentally unfair, and must be set aside if there is any **[**3382]** reasonable likelihood that the false testimony could have affected the judgment of the jury." **[*679]** *427 U.S., at 103* (footnote omitted). [8] **[****24]** Although this rule is stated in terms that treat the knowing use

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[8] In fact, the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony. In *Mooney v. Holohan, 294 U.S. 103 (1935)*, the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id., at 112*. The Court reaffirmed this principle in broader terms in *Pyle v. Kansas, 317 U.S. 213 (1942)*, where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation.

of perjured testimony as error subject to harmless-error review, [9] it may as **[*680]** easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. The Court in *Agurs* justified this standard of materiality on the ground that the knowing use of **[***493]** perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id., at 104*.

[**25]** At the other extreme is the situation in *Agurs* itself, where the defendant does not make a *Brady* request and the prosecutor fails to disclose certain evidence favorable to the accused. The Court rejected a harmless-error rule in that situation, because under that rule every nondisclosure is treated as error, thus imposing on the prosecutor a constitutional duty to deliver his entire file to defense counsel. [10] *427 U.S., at 111-112*. At the same time, the Court rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably **[**3383]** would have resulted in acquittal. *Id., at 111*. The Court reasoned: "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ibid*. The **[*681]** standard of materiality applicable in the absence of a specific *Brady* request is therefore stricter than the harmless-error standard but more lenient to the defense than **[****26]** the newly-discovered-evidence standard.

The third situation identified by the Court in *Agurs* is where the defense makes a specific request and the prosecutor fails to disclose responsive evidence. [11] **[****27]** The Court did not define the standard of materiality applicable in this situation, [12] but suggested that the standard might be more lenient to the

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The Court again reaffirmed this principle in *Napue v. Illinois, 360 U.S. 264 (1959)*. In *Napue*, the principal witness for the prosecution falsely testified that he had been promised no consideration for his testimony. The Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction -- even false testimony that goes only to the credibility of the witness -- is "implicit in any concept of ordered liberty." *Id., at 269*. Finally, the Court held that it was not bound by the state court's determination that the false testimony "could not in any reasonable likelihood have affected the judgment of the jury." *Id., at 271*. The Court conducted its own independent examination of the record and concluded that the false testimony "may have had an effect on the outcome of the trial." *Id., at 272*. Accordingly, the Court reversed the judgment of conviction.

[9] The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue v. Illinois, 360 U.S., at 271*. See n. 8, *supra*. See also *Giglio v. United States, 405 U.S. 150, 154 (1972)* (quoting *Napue, 360 U.S., at 271*). *Napue* antedated *Chapman v. California, 386 U.S. 18 (1967)*, where the "harmless beyond a reasonable doubt" standard was established. The Court in *Chapman* noted that there was little, if any, difference between a rule formulated, as in *Napue*, in terms of "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,'" and a rule "'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *386 U.S., at 24* (quoting *Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)*). It is therefore clear, as indeed the Government concedes, see Brief for United States 20, and 36-38, that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard.

[10] This is true only if the nondisclosure is treated as error subject to harmless-error review, and not if the nondisclosure is treated as error only if the evidence is material under a not "harmless beyond a reasonable doubt" standard.

[11] The Court in *Agurs* identified *Brady* as a case in which specific information was requested by the defense. *427 U.S., at 106*. The request in *Brady* was for the extrajudicial statements of Brady's accomplice. See *373 U.S., at 84*.

[12] The Court in *Agurs* noted: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *427 U.S., at 104*. Since the *Agurs* Court identified *Brady* as a "specific

defense than in the situation in which the defense makes no request or only a general request. *427 U.S., at 106*. The Court also noted: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Ibid.*

The Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context. In neither case did the Court's discussion of the *Agurs* standard distinguish among the three situations described in *Agurs*. In **[***494]** *United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982)*, **[****28]** the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses "only if there is a reasonable likelihood that the testimony could have affected the judgment of the **[*682]** trier of fact." And in *Strickland v. Washington, 466 U.S. 668 (1984)*, the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 694*. [13] The *Strickland* Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ibid.*

[**29]** [1B]We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence 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. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Government suggests that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases. See Brief for United **[**3384]** States 31. The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. *Ibid.*

We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary **[****30]** process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the **[*683]** nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

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request" case, see n. 11, *supra*, this language might be taken as indicating the standard of materiality applicable in such a case. It is clear, however, that the language merely explains the meaning of the term "materiality." It does not establish a standard of materiality because it does not indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome.

[13] In particular, the Court explained in *Strickland*: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *466 U.S., at 695*.

[*495]** B

In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that **[****31]** O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government. Defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to O'Connor and Mitchell if the information they supplied led to "the accomplishment of the objective sought to be obtained . . . to the satisfaction of [the Government]." App. 22 and 23. This possibility of a reward gave O'Connor and Mitchell a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction. Moreover, the prosecutor disclosed affidavits that stated that O'Connor and Mitchell received no promises of reward in return for providing information in the affidavits implicating respondent in **[*684]** criminal activity. In fact, O'Connor and Mitchell signed the last of these affidavits the very day after they signed **[****32]** the ATF contracts. While the Government is technically correct that the blank contracts did not constitute a "promise of reward," the natural effect of these affidavits would be misleadingly to induce defense counsel to believe that O'Connor and Mitchell provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any "inducements."

The District Court, nonetheless, found beyond a reasonable doubt that, had the information that the Government held out the possibility of reward to its witnesses been disclosed, the result of the criminal prosecution would not have been different. If this finding were sustained by the Court of Appeals, the information would be immaterial even under the standard of materiality applicable to the prosecutor's knowing use of perjured testimony. Although the express holding of the Court of Appeals was that the nondisclosure in this case required automatic reversal, the Court of Appeals also stated that it "disagreed" with the District Court's finding of harmless error. In particular, the Court of Appeals appears to have disagreed with the factual premise on which this finding expressly was **[****33]** based. The District Court reasoned **[**3385]** that O'Connor's and Mitchell's testimony was exculpatory on the narcotics charges. The Court of Appeals, however, concluded, after reviewing the record, that O'Connor's and Mitchell's testimony was in fact inculpatory on those charges. *719 F.2d, at 1464, n. 1*. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

Concur by: WHITE (In Part)

Concur

[*685] **[***496]** JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

[1C]I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was "material," and I therefore join Parts I and II of the Court's opinion. I also agree with JUSTICE BLACKMUN that for purposes of this inquiry, "evidence is material **[****34]** 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." *Ante*, at 682. As the Justice correctly observes, this standard is "sufficiently flexible" to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. *Ibid*. Given the flexibility of the standard and the inherently fact-bound nature of the cases to which it will be applied, however, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case. I would hold simply that the proper standard is one of reasonable probability and that the Court of Appeals' failure to apply this standard necessitates reversal. I therefore concur in the judgment.

Dissent by: MARSHALL; STEVENS

Dissent

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

When the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose cannot be deemed harmless error. Because that is precisely the nature of the undisclosed evidence in this case, I would **[****35]** affirm the judgment of the Court of Appeals and would not remand for further proceedings.

I

The federal grand jury indicted the respondent, Hughes Anderson Bagley, on charges involving possession of firearms **[*686]** and controlled substances with intent to distribute. Following a bench trial, Bagley was found not guilty of the firearms charges, guilty of two counts of knowingly and intentionally distributing Valium, and guilty of several counts of a lesser included offense of possession of controlled substances. He was sentenced to six months' imprisonment and a special parole term of five years on the first count of distribution, and to three years of imprisonment, which were suspended, and five years' probation, on the second distribution count. He received a suspended sentence and five years' probation for the possession convictions.

The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Government's entire case hinged on the testimony of two private security guards who aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of Bagley. In 1977 the two guards, O'Connor and Mitchell, worked for the **[****36]** Milwaukee Railroad; for about three years, they had been social acquaintances of Bagley, with whom they often shared coffee breaks. 7 Tr. 2-3; 8 Tr. 2a-3a. At trial, they testified that on two separate occasions they had visited Bagley at his home, **[***497]** where Bagley had responded to O'Connor's complaint that he was extremely anxious by giving him Valium **[**3386]** pills. In total, Bagley received $ 8 from O'Connor, representing the cost of the pills. At trial, Bagley testified that he had a prescription for the Valium because he suffered from a bad back, 14 Tr. 963-964. No testimony to the contrary was introduced. O'Connor and Mitchell each testified that they

had worn concealed transmitters and body recorders at these meetings, but the tape recordings were insufficiently clear to be admitted at trial and corroborate their testimony.

Before trial, counsel for Bagley had filed a detailed discovery motion requesting, among other things, "any deals, promises or inducements made to witnesses in exchange for their testimony." App. 17-19. In response to the discovery request, the Government had provided affidavits sworn by **[*687]** O'Connor and Mitchell that had been prepared **[****37]** during their investigation of Bagley. Each affidavit recounted in detail the dealings the witnesses had had with Bagley and closed with the declaration, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80-3592-RJK(M) (CD Cal.) Exhibits 1-9. Both of these agents testified at trial thereafter, and the Government did not disclose the existence of any deals, promises, or inducements. Counsel for Bagley asked O'Connor on cross-examination whether he was testifying in response to pressure or threats from the Government about his job, and O'Connor said he was not. 7 Tr. 89-90. In light of the affidavits, as well as the prosecutor's silence as to the existence of any promises, deals, or inducements, counsel did not pursue the issue of bias of either guard.

As it turns out, however, in May 1977, seven months prior to trial, O'Connor and Mitchell each had signed an agreement providing that ATF would pay them for information they provided. The form was entitled "Contract for Purchase **[****38]** of Information and Payment of Lump Sum Therefor," and provided that the Bureau would, "upon the accomplishment of the objective sought to be obtained . . . pay to said vendor a sum commensurate with services and information rendered." App. 22-23. It further invited the Bureau's special agent in charge of the investigation, Agent Prins, to recommend an amount to be paid after the information received had proved "worthy of compensation." Agent Prins had personally presented these forms to O'Connor and Mitchell for their signatures. The two witnesses signed the last of their affidavits, which declared the absence of any promise of reward, *the day after they signed the ATF forms*. After trial, Agent Prins requested that O'Connor and Mitchell each be paid $ 500, but the Bureau reduced these "rewards" to $ 300 each. App. to **[*688]** Pet. for Cert. 14a. The District Court Judge concluded that "it appears probable to the Court that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony." *Id., at 7*a.

Upon discovering these ATF forms through a Freedom **[****39]** of Information Act request, Bagley sought **[***498]** relief from his conviction. The District Court Judge denied Bagley's motion to vacate his sentence stating that because he was the same judge who had been the original trier of fact, he was able to determine the effect the contracts would have had on his decision, more than four years earlier, to convict Bagley. The judge stated that beyond a reasonable doubt the contracts, if disclosed, would have had no effect upon the convictions:

"The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial . . . . Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against the defendant of distributing controlled substances and possessing **[**3387]** controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their **[****40]** testimony as to the facts of distribution but rather sought to show that the controlled substances in question came

from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant." *Id., at 8*a.

[*689] The foregoing statement, as to which the Court remands for further consideration, is seriously flawed on its face. First, the testimony that the court describes was in fact the *only inculpatory testimony in the case* as to the two counts for which Bagley received a sentence of imprisonment. If, as the judge claimed, the testimony of the two information "vendors" was "very brief" and in part favorable to the defendant, that fact shows the weakness of the prosecutor's case, not the harmlessness of the error. If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.

Second, **[****41]** the court's statement that Bagley did not attempt to discredit the witnesses' testimony, as if to suggest that impeachment evidence would not have been used by the defense, ignores the realities of trial preparation and strategy, and is factually erroneous as well. Initially, the Government's failure to disclose the existence of any inducements to its witnesses, coupled with its disclosure of affidavits stating that no promises had been made, would lead all but the most careless lawyer to step wide and clear of questions about promises or inducements. The combination of nondisclosure and disclosure would simply lead any reasonable attorney to believe that the witness could not be impeached on that basis. Thus, a firm avowal that no payment is being received in return for assistance and testimony, if offered at trial by a witness who is not even a Government employee, could be devastating to the defense. A wise attorney would, of necessity, seek an alternative defense strategy.

[*499]** Moreover, counsel for Bagley in fact did attempt to discredit O'Connor, by asking him whether two ATF agents had pressured him or had threatened that his job might be in **[*690]** jeopardy, in **[****42]** order to get him to cooperate. 7 Tr. 89-90. But when O'Connor answered in the negative, *ibid.*, counsel stopped this line of questioning. In addition, counsel for Bagley attempted to argue to the District Court, in his closing argument, that O'Connor and Mitchell had "fabricated" their accounts, 14 Tr. 1117, but the court rejected the proposition:

"Let me say this to you. I would find it hard to believe really that their testimony was fabricated. I think they might have been mistaken. You know, it is possible that they were mistaken. I really did not get the impression at all that either one or both of those men were trying at least in court here to make a case against the defendant." *Id.*, at 1117-1118. (Emphasis added.)

The District Court, in so saying, of course had seen no evidence to suggest that the two witnesses might have any motive for "[making] a case" against Bagley. Yet, as JUSTICE BLACKMUN points out, the possibility of a reward, the size of which is directly related to the Government's success at trial, gave the two witnesses a "personal stake" in the conviction and an "incentive to testify falsely in order to secure a conviction." *Ante*, at 683.

[**43]** Nor is this case unique. Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew. The failure to disclose evidence **[**3388]** affecting the overall credibility of witnesses corrupts the process to some degree in all instances, see *Giglio v. United States, 405 U.S. 150 (1972)*; *Napue v. Illinois, 360 U.S. 264 (1959)*; *United States v. Agurs, 427 U.S. 97, 121 (1976)*

(MARSHALL, J., dissenting), but when "the 'reliability of a given witness may well be determinative of guilt or innocence,'" *Giglio, supra, at 154* (quoting *Napue, supra, at 269*), and when "the Government's case [depends] almost entirely on" the testimony of a certain witness, *405 U.S., at 154*, evidence of that witness' possible **[*691]** bias simply may not be said to be irrelevant, or its omission harmless. As THE CHIEF JUSTICE said in *Giglio* v. *United States*, in which the Court ordered a new trial in a case in which a promise to a key witness **[****44]** was not disclosed to the jury:

"[Without] [Taliento's testimony] there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

"For these reasons, the due process requirements enunciated in *Napue* and other cases cited earlier require a new trial." *Id., at 154-155*.

[*500]** Here, too, witnesses O'Connor and Mitchell were crucial to the Government's case. Here, too, their personal credibility was potentially dispositive, particularly since the allegedly corroborating tape recordings were not audible. It simply cannot be denied that the existence of a contract signed by those witnesses, promising a reward whose size would depend "on the Government's satisfaction with the end result," *ante*, at 683, might sway the trier of fact, or cast doubt on the truth of all that the witnesses allege. In such a case, the trier of fact is absolutely entitled to know of the contract, and the defense counsel is absolutely **[****45]** entitled to develop his case with an awareness of it. Whatever the applicable standard of materiality, see *infra*, in this instance it undoubtedly is well met.

Indeed, *Giglio* essentially compels this result. The similarities between this case and that one are evident. In both cases, the triers of fact were left unaware of Government inducements to key witnesses. In both cases, the individual trial prosecutors acted in good faith when they failed to disclose the exculpatory evidence. See *Giglio, supra, at 151-153*; App. to Pet. for Cert. 13a (Magistrate's finding that **[*692]** Bagley prosecutor would have disclosed information had he known of it). The sole difference between the two cases lies in the fact that in *Giglio*, the prosecutor affirmatively stated *to the trier of fact* that no promises had been made. Here, silence in response to a defense request took the place of an affirmative error at trial -- although the prosecutor did make an affirmative misrepresentation to the defense in the affidavits. Thus, in each case, the trier of fact was left unaware of powerful reasons to question the credibility of the witnesses. "[The] truth-seeking **[****46]** process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution." *Agurs, supra, at 120* (MARSHALL, J., dissenting). In this case, as in *Giglio*, a new trial is in order, and the Court of Appeals correctly reversed the District Court's denial of such relief.

II

Instead of affirming, the Court today chooses to reverse and remand the case for application of its newly stated standard to the facts of this case. While I believe that the evidence at issue here, which remained undisclosed despite a particular request, undoubtedly was material under the Court's standard, I also have serious doubts whether the Court's definition of **[**3389]** the constitutional right at issue adequately

takes account of the interests this Court sought to protect in its decision in *Brady v. Maryland, 373 U.S. 83 (1963)*.

A

I begin from the fundamental premise, which hardly bears repeating, that "[the] purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one." *Application of Kapatos, 208 F.Supp. 883, 888 (SDNY 1962)*; **[****47]** see *Giles v. Maryland, 386 U.S. 66, 98 (1967)* (Fortas, J., concurring in judgment) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges"). When evidence **[***501]** favorable to the defendant is known to exist, **[*693]** disclosure only enhances the quest for truth; it takes no direct toll on that inquiry. Moreover, the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.

When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict. Unlike a situation in which exculpatory evidence exists but neither the defense nor the prosecutor has uncovered it, in this situation the state already has, resting in its files, material that would **[****48]** be of assistance to the defendant. With a minimum of effort, the state could improve the real and apparent fairness of the trial enormously, by assuring that the defendant may place before the trier of fact favorable evidence known to the government. This proposition is not new. We have long recognized that, within the limit of the state's ability to identify so-called exculpatory information, the state's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case in the prosecutor's files. See, *e. g.*, *Pyle v. Kansas, 317 U.S. 213, 215-216 (1942)* (allegation that imprisonment resulted from perjured testimony and deliberate suppression by authorities of evidence favorable to him "charge a deprivation of rights guaranteed by the Federal Constitution"). [1]

[**49]** **[*694]** This recognition no doubt stems in part from the frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices. Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the

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[1] As early as 1807, this Court made clear that prior to trial a defendant must have access to impeachment evidence in the Government's possession. Addressing defendant Aaron Burr's claim that he should have access to the letter of General Wilkinson, a key witness against Burr in his trial for treason, Chief Justice Marshall wrote:

"The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the accused made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed:

"First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial." *United States v. Burr, 25 F. Cas. 30, 36* (No. 14,692d) (CC Va. 1807).

government, **[***502]** defense counsel **[**3390]** is not in the position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision. This grim reality, of course, poses a direct challenge to the traditional model of the adversary criminal process, [2] **[****51]** and perhaps **[*695]** because this reality **[****50]** so directly questions the fairness of our longstanding processes, change has been cautious and halting. Thus, the Court has not gone the full road and expressly required that the state provide to the defendant access to the prosecutor's complete files, or investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence. But cf. *Ake v. Oklahoma, 470 U.S. 68 (1985)* (access to assistance of psychiatrist constitutionally required on proper showing of need). Instead, in acknowledgment of the fact that important interests are served when potentially favorable evidence is disclosed, the Court has fashioned a compromise, requiring that the prosecution identify and disclose to the defendant favorable material that it possesses. This requirement is but a small, albeit important, step toward equality of justice. [3]

B

Brady v. Maryland, 373 U.S. 83 (1963), of course, established this requirement of disclosure as a fundamental element of a fair trial by holding that a defendant was denied due process if he was not given access to favorable evidence that is material either to guilt or punishment. Since *Brady* was decided, this Court has struggled, in a series of decisions, to define how best **[****52]** to effectuate the right recognized. To my mind, the *Brady* decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn **[*696]** over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case. Formulation of this right, and imposition of this duty, are "the essence **[***503]** of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair." *Moore v. Illinois, 408 U.S. 786, 809-810 (1972)* (MARSHALL, J., concurring in part and dissenting in part). If that right is denied, or if that duty is shirked, however, I believe a reviewing court should not automatically reverse but instead should apply the harmless-error test the Court has developed for instances of error affecting constitutional rights. See *Chapman v. California, 386 U.S. 18 (1967)*.

My view is based in significant part on the reality of criminal practice and on the consequently inadequate protection **[****53]** to the defendant that a different rule would offer. **[**3391]** To implement *Brady*, courts must of course work within the confines of the criminal process. Our system of criminal justice is animated by two seemingly incompatible notions: the adversary model, and the state's primary concern

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[2] See Fortas, The *Fifth Amendment*: Nemo Tenetur Prodere Seipsum, 25 Clev. B.A.J. 91, 98 (1954) ("The state and [the defendant] could meet, as the law contemplates, in adversary trial, as equals -- strength against strength, resource against resource, argument against argument"); see also Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1142-1145 (1982) (discussing challenge *Brady* poses to traditional adversary model).

[3] Indeed, this Court's recent decision stating a stringent standard for demonstrating ineffective assistance of counsel makes an effective *Brady* right even more crucial. Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater. See *Strickland v. Washington, 466 U.S. 668 (1984)*; *id., at 712-715* (MARSHALL, J., dissenting); Babcock, *supra*, at 1163-1174 (discussing the interplay between the right to *Brady* material and the right to effective assistance of counsel).

with justice, not convictions. *Brady*, of course, reflects the latter goal of justice, and is in some ways at odds with the competing model of a sporting event. Our goal, then, must be to integrate the *Brady* right into the harsh, daily reality of this apparently discordant criminal process.

At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and **[****54]** pore through his files, as objectively as possible, to identify the **[*697]** material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the *Fourth Amendment's* requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor. One telling example, offered by Judge Newman when he was a United States Attorney, suffices:

"I recently had occasion to discuss *[Brady]* at a PLI Conference in New York City before a large group of State prosecutors. . . . I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, 'This is the man.' In the course of your investigation you also have found another customer who was in the bank that day, who **[****55]** viewed the suspect, and came back and said, 'This is *not* the man.'

"The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, **[***504]** when he viewed the suspect, said 'that is not the man'? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case -- the clearest case for disclosure of exculpatory information!" J. Newman, A Panel Discussion before the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), reprinted in Discovery in *Criminal Cases, 44 F.R.D. 481, 500-501 (1968)* (hereafter Newman).

[*698] While familiarity with *Brady* no doubt has increased since 1967, the dual role that the prosecutor must play, and the very real pressures that role creates, have not changed.

The prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether **[****56]** evidence is favorable, and must decide on which side to err when faced with doubt. In his role as advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary. Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact.

Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, **[**3392]** I see no reason why he

should not be required to disclose it. After all, favorable evidence indisputably enhances the truthseeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked. By requiring full disclosure of favorable evidence in this way, courts could begin to assure **[****57]** that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would facilitate the prosecutor's admittedly difficult task by removing a substantial amount of unguided discretion.

If a trial will thereby be more just, due process would seem to require such a rule absent a countervailing interest. I see little reason for the government to keep such information **[*699]** from the defendant. Its interest in nondisclosure at the trial stage is at best slight: the government apparently seeks to avoid the administrative hassle of disclosure, and to prevent disclosure of inculpatory evidence that might result in witness intimidation and manufactured rebuttal evidence. [4] Neither of these concerns, however, counsels in favor **[***505]** of a rule of nondisclosure in close or ambiguous cases. To the contrary, a rule simplifying the disclosure decision by definition does not make that decision more complex. Nor does disclosure of favorable evidence inevitably lead to disclosure of inculpatory evidence, as might an open **[****58]** file policy, or to the anticipated wrongdoings of defendants and their lawyers, if indeed such fears are warranted. We have other mechanisms for disciplining unscrupulous defense counsel; hamstringing their clients need not be one of them. I simply do not find any state interest that warrants withholding from a presumptively innocent defendant, whose liberty is at stake in the proceeding, information that bears on his case and that might enable him to defend himself.

Under the foregoing analysis, the prosecutor's duty is quite straightforward: he must divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure.

C

The Court, however, offers a complex alternative. **[****59]** It defines the right not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial. Thus, the Court holds that due process does not require the prosecutor to turn over evidence unless the evidence is "material," and the **[*700]** Court states that evidence 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." *Ante*, at 682. Although this looks like a post-trial standard of review, see, *e. g.*, *Strickland v. Washington, 466 U.S. 668 (1984)* (adopting this standard of review), it is not. Instead, the Court relies on this review standard to define the contours of the defendant's constitutional right to certain material prior to trial. By adhering to the view articulated in *United States v. Agurs, 427 U.S. 97 (1976)* -- that there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial -- the Court permits prosecutors **[****60]** to withhold with impunity large amounts of undeniably favorable evidence, and it

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[4] See Newman, 44 F.R.D., at 499 (describing the "serious" problem of witness intimidation that arises from prosecutor's disclosure of witnesses). But see Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U.L.Q. 279, 289-290 (disputing a similar argument).

imposes on prosecutors **[**3393]** the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition.

The standard for disclosure that the Court articulates today enables prosecutors to avoid disclosing obviously exculpatory evidence while acting well within the bounds of their constitutional obligation. Numerous lower court cases provide examples of evidence that is undoubtedly favorable but not necessarily "material" under the Court's definition, and that consequently would not have to be disclosed to the defendant under the Court's view. See, *e. g.*, *United States v. Sperling, 726 F.2d 69, 71-72 (CA2 1984)* (prior statement disclosing motive of key Government witness to testify), cert. denied, *467 U.S. 1243 (1984)*; *King v. Ponte, 717 F.2d 635 (CA1 1983)* (prior inconsistent statements of Government witness); see also *United States v. Oxman, 740 F.2d 1298, 1311 (CA3 1984)* (addressing "disturbing" prosecutorial tendency to withhold information **[***506]** because of later opportunity **[****61]** to argue, with the benefit of hindsight, that information was not "material"), cert. pending *sub nom. United States* v. *Pflaumer*, No. 84-1033. The result is to veer sharply away from the basic notion that the fairness of a trial increases **[*701]** with the amount of existing favorable evidence to which the defendant has access, and to disavow the ideal of full disclosure.

The Court's definition poses other, serious problems. Besides legitimizing the nondisclosure of clearly favorable evidence, the standard set out by the Court also asks the prosecutor to predict what effect various pieces of evidence will have on the trial. He must evaluate his case and the case of the defendant -- of which he presumably knows very little -- and perform the impossible task of deciding whether a certain piece of information will have a significant impact on the trial, bearing in mind that a defendant will later shoulder the heavy burden of proving how it would have affected the outcome. At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence **[****62]** the defense will find useful. At worst, the standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive. One Court of Appeals has recently vented its frustration at these unfortunate consequences:

"It seems clear that those tests [for materiality] have a tendency to encourage unilateral decision-making by prosecutors with respect to disclosure. . . . [The] root of the problem is the prosecutor's tendency to adopt a retrospective view of materiality. Before trial, the prosecutor cannot know whether, after trial, particular evidence will prove to have been material. . . . Following their adversarial instincts, some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it neither to defense counsel nor to the court. If and when the evidence emerges after trial, the prosecutor can always argue, **[*702]** with the benefit of hindsight, that it was not material." *United States v. Oxman, supra, at 1310*.

The Court's standard also encourages the prosecutor to assume the **[****63]** role of the jury, and to decide whether certain evidence will make a difference. In our system of justice, that decision properly and wholly belongs to the jury. The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question. Accordingly he will decide the evidence need not be disclosed. But the ideally neutral trier of fact, who approaches the case from a wholly different perspective, is by the prosecutor's decision denied the opportunity to consider the evidence. The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judgments, **[**3394]** is in little better position to review the withheld evidence than the prosecutor.

[*507]** I simply cannot agree with the Court that the due process right to favorable evidence recognized in *Brady* was intended to become entangled in prosecutorial determinations of the likelihood that particular information would affect the outcome of trial. Almost a decade of lower court practice with *Agurs* convinces me **[****64]** that courts and prosecutors have come to pay "too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants." *United States v. Oxman, supra, at 1310-1311*. Apparently anxious to assure that reversals are handed out sparingly, the Court has defined a rigorous test of materiality. Eager to apply the "materiality" standard at the pretrial stage, as the Court permits them to do, prosecutors lose sight of the basic principles underlying the doctrine. I would return to the original theory and promise of *Brady* and reassert the duty of the prosecutor to disclose all evidence in his files that might reasonably be considered favorable to the defendant's case. No **[*703]** prosecutor can know prior to trial whether such evidence *will* be of consequence at trial; the mere fact that it might be, however, suffices to mandate disclosure. [5]

[**65]** **[*704]** D

[*508]** **[**3395]** In so saying, I recognize that a failure to divulge favorable information should not result in reversal in all cases. It may be that a conviction should be affirmed on appeal despite the

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[5] *Brady* not only stated the rule that suppression by the prosecution of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment," *373 U.S., at 87*, but also observed that two decisions of the Court of Appeals for the Third Circuit "state the correct constitutional rule." *Id., at 86*. Neither of those decisions limited the right only to evidence that is "material" within the meaning that the Court today articulates. Instead, they provide strong evidence that *Brady* might have used the word in its evidentiary sense, to mean, essentially, germane to the points at issue.

In *United States ex rel. Almeida v. Baldi, 195 F.2d 815 (CA3 1952)*, cert. denied, ***345 U.S. 904 (1953)***, the appeals court granted a petition for habeas corpus in a case in which the State had withheld from the defendant evidence that might have mitigated his punishment. After describing the withheld evidence as "relevant" and "pertinent," *195 F.2d, at 819*, the court concluded: "We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process." *Id., at 820*. Similarly, in *United States ex rel. Thompson v. Dye, 221 F.2d 763, 765* (CA3), cert. denied, ***350 U.S. 875 (1955)***, the District Court had denied a petition for habeas corpus after finding that certain evidence of defendant's drunkenness at the time of the offense in question was not "vital" to the defense and did not require disclosure. *123 F.Supp. 759, 762 (WD Pa. 1954)*. The Court of Appeals reversed, observing that whether or not the jury ultimately would credit the evidence at issue, the evidence was substantial and the State's failure to disclose it cannot "be held as a matter of law to be unimportant to the defense here." *221 F.2d, at 767*.

It is clear that the term "material" has an evidentiary meaning quite distinct from that which the Court attributes to it. Judge Weinstein, for example, defines as synonymous the words "ultimate fact," "operative fact," "material fact," and "consequential fact," each of which, he states, means "a 'fact that is of consequence to the determination of the action.'" 1 J. Weinstein & M. Berger, Weinstein's Evidence para. 401[03], n. 1 (1982) (quoting *Fed. Rule Evid. 401*). Similarly, another treatise on evidence explains that there are two components to relevance -- materiality and probative value. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." E. Cleary, McCormick on Evidence § 185 (3d ed. 1984). "Probative value" addresses the tendency of the evidence to establish a "material" proposition. *Ibid.* See also 1 J. Wigmore, Evidence § 2 (P. Tillers rev. 1982). There is nothing in *Brady* to suggest that the Court intended anything other than a rule that favorable evidence need only relate to a proposition at issue in the case in order to merit disclosure.

Even if the Court did not use the term "material" simply to refer to favorable evidence that might be relevant, however, I still believe that due process requires that prosecutors have the duty to disclose all such evidence. The inherent difficulty in applying, prior to trial, a definition that relates to the outcome of the trial, and that is based on speculation and not knowledge, means that a considerable amount of potentially consequential material might slip through the Court's standard. Given the experience of the past decade with *Agurs*, and the practical problem that inevitably exists because the evidence must be disclosed prior to trial to be of any use, I can only conclude that all potentially favorable evidence must be disclosed. Of course, I agree with courts that have allowed exceptions to this rule on a showing of exigent circumstances based on security and law enforcement needs.

prosecutor's failure to disclose evidence that reasonably might have been deemed potentially favorable prior to trial. The state's interest in nondisclosure at trial is minimal, and should therefore yield to the readily apparent benefit that full disclosure would convey to the search for truth. After trial, however, the benefits of disclosure may at times be tempered by the state's legitimate desire to avoid retrial when error has been harmless. However, in making the determination of harmlessness, I would apply our normal constitutional error test and reverse unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial. See *Chapman v. California, 386 U.S. 18 (1967)*; see also *Agurs, 427 U.S., at 119-120* (MARSHALL, J., dissenting). [6]

[**66]** **[*705]** Any rule other than automatic reversal, of course, dilutes the *Brady* right to some extent and offers the prosecutor an incentive not to turn over all information. In practical effect, it might be argued, there is little difference between the rule I propose -- that a prosecutor must disclose all favorable evidence in his files, subject to harmless-error review -- and the rule the Court adopts -- that the prosecutor must disclose only the favorable information that might affect the outcome of the trial. According to this argument, if a constitutional right to all favorable evidence leads to reversal only when the withheld evidence might have affected the outcome of the trial, the result will be the same as with a constitutional right only to evidence that will affect the trial outcome. See Capra, Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review, *53 Ford. L. Rev. 391, 409-410, n. 117 (1984)*. For several reasons, however, I disagree. First, I have faith that a prosecutor would treat a rule requiring disclosure of all information of a certain kind differently from a rule requiring disclosure **[****67]** only of some of that information. Second, persistent or **[***509]** egregious failure to comply with the constitutional duty could lead to disciplinary actions by the courts. Third, the standard of harmlessness I adopt is more protective of the defendant than that chosen by the Court, placing the burden on the prosecutor, rather than the defendant, to prove the harmlessness of his actions. It would be a foolish prosecutor who gambled too glibly with that standard of review. And finally, it is unrealistic to ignore the fact that at the appellate stage the state has an interest in avoiding retrial where the error is harmless beyond a reasonable doubt. That interest counsels against requiring a new trial in every case.

[*706] Thus, while I believe that some review for harmlessness is in order, I disagree with the Court's standard, even were it merely a standard for review and not a definition of "materiality." First, I see no significant difference for truth-seeking purposes between the *Giglio* situation and this one; for the same reasons I believe the result must therefore be the same here as in *Giglio*, see *supra, at 691-692*, I also believe the standard for reversal **[****68]** should be the same. The defendant's entitlement to a new trial ought to be no different in the two cases, and the burden he faces on appeal should also be the same. *Giglio* remains the law for a class of cases, and I **[**3396]** reaffirm my belief that the same standard applies to this case as well. See *Agurs, supra, at 119-120* (MARSHALL, J., dissenting).

Second, only a strict appellate standard, which places on the prosecutor a burden to defend his decisions, will remove the incentive to gamble on a finding of harmlessness. Any lesser standard, and especially one in which the defendant bears the burden of proof, provides the prosecutor with ample room to withhold

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[6] In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. Certain kinds of constitutional error so infect the system of justice as to require reversal in all cases, such as discrimination in jury selection. See, *e. g.*, *Peters v. Kiff, 407 U.S. 493 (1972)*. A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process.

favorable evidence, and provides a reviewing court with a simple means to affirm whenever in its view the correct result was reached. This is especially true given the speculative nature of retrospective review:

"The appellate court's review of 'what might have been' is extremely difficult in the context of an adversarial system. Evidence is not introduced in a vacuum; rather, it is built upon. The absence of certain evidence may thus affect the usefulness, and hence the use, of other evidence **[****69]** to which defense counsel does have access. Indeed, the absence of a piece of evidence may affect the entire trial strategy of defense counsel." Capra, *supra*, at 412.

As a consequence, the appellate court no less than the prosecutor must substitute its judgment for that of the trier of fact under an inherently slippery test. Given such factors as a reviewing court's natural inclination to affirm a judgment **[*707]** that appears "correct" and that court's obvious inability to know what a jury ever will do, only a strict and narrow test that places the burden of proof on the prosecutor will begin to prevent affirmances in cases in which the withheld evidence might have had an impact.

Even under the most protective standard of review, however, courts must be careful to focus on the nature of the evidence that was not made available to the defendant and not simply on the quantity of the **[***510]** evidence against the defendant separate from the withheld evidence. Otherwise, as the Court today acknowledges, the reviewing court risks overlooking the fact that a failure to disclose has a direct effect on the entire course of trial.

Without doubt, defense counsel develops his trial **[****70]** strategy based on the available evidence. A missing piece of information may well preclude the attorney from pursuing a strategy that potentially would be effective. His client might consequently be convicted even though nondisclosed information might have offered an additional or alternative defense, if not pure exculpation. Under such circumstances, a reviewing court must be sure not to focus on the amount of evidence supporting the verdict to determine whether the trier of fact reasonably would reach the same conclusion. Instead, the court must decide whether the prosecution has shown beyond a reasonable doubt that the new evidence, if disclosed and developed by reasonably competent counsel, would not have affected the outcome of trial. [7]

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[7] For example, in *United States ex rel. Butler v. Maroney, 319 F.2d 622 (CA3 1963)*, the defendant was convicted of first-degree murder. Trial counsel based his defense on temporary insanity at the time of the murder. During trial, testimony suggested that the shooting might have been the accidental result of a struggle, but defense counsel did not develop that defense. It later turned out that an eyewitness to the shooting had given police a statement that the victim and Butler had struggled prior to the murder. If defense counsel had known before trial what the eyewitness had seen, he might have relied on an additional defense, and he might have emphasized the struggle. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 145 (1964). Unless the same information already was known to counsel before trial, the failure to disclose evidence of that kind simply cannot be harmless because reasonably competent counsel might have utilized it to yield a different outcome. No matter how overwhelming the evidence that Butler committed the murder, he had a right to go before a trier of fact and present his best available defense.

Similarly, in *Ashley v. Texas, 319 F.2d 80* (CA5), cert. denied, ***375 U.S. 931 (1963)***, the defendant was sentenced to death for murder. The prosecutor disclosed to the defense a psychiatrist's report indicating that the defendant was sane, but he failed to disclose the reports of a psychiatrist and a psychologist indicating that the defendant was insane. The nondisclosed information did not relate to the trial defense of self-defense. But the failure to disclose the evidence clearly prevented defense counsel from developing the possibly dispositive defense that he might have developed through further psychiatric examinations and presentation at trial. The nondisclosed evidence obviously threw off the entire course of trial preparation, and a new trial was in order. In such a case, there simply is no need to consider -- in light of the evidence that actually was presented and the quantity of evidence to support the verdict returned -- the possible effect of the information on the particular jury that heard the case. Indeed, to make such an evaluation would be to substitute the reviewing court's judgment of the facts, including the previously undisclosed evidence, for that of the jury, and to do so without the benefit of competent counsel's development of the information.

[**71]** **[*708]** In **[**3397]** this case, it is readily apparent that the undisclosed information would have had an impact on the defense presented at trial, and perhaps on the judgment. Counsel for Bagley argued to the trial judge that the Government's two key witnesses had fabricated their accounts of the drug distributions, but the trial judge rejected the argument for lack of any evidence of motive. See *supra, at 690*. These key witnesses, it turned out, were each to receive monetary rewards whose **[***511]** size was contingent on the usefulness of their assistance. These rewards "served only to strengthen any incentive to testify falsely in order to secure a conviction." *Ante*, at 683. To my mind, no more need be said; this nondisclosure **[*709]** could not have been harmless. I would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

This case involves a straightforward application of the rule announced in *Brady v. Maryland, 373 U.S. 83 (1963)*, a case involving nondisclosure of material evidence by the prosecution in response to a specific request from the defense. I agree that the Court of Appeals misdescribed that rule, **[****72]** see *ante*, at 674-678, but I respectfully dissent from the Court's unwarranted decision to rewrite the rule itself.

As the Court correctly notes at the outset of its opinion, *ante*, at 669, the holding in *Brady* was 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." *373 U.S., at 87*. We noted in *United States v. Agurs, 427 U.S. 97, 103 (1976)*, that the rule of *Brady* arguably might apply in three different situations involving the discovery, after trial, of evidence that had been known prior to trial to the prosecution but not to the defense. Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third.

The two situations in which the rule applies are those demonstrating the prosecution's knowing use of perjured testimony, exemplified by *Mooney v. Holohan, 294 U.S. 103 (1935)*, and the prosecution's suppression of favorable evidence specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's **[****73]** deliberate nondisclosure constitutes constitutional error -- the conviction must be set aside if the suppressed or perjured evidence was "material" and there was "any reasonable likelihood" that it "could have affected" the outcome of the trial. *427 U.S., at 103*. [1] **[****74]** **[**3398]** **[***512]** See *Brady, supra, at 88* ("would tend to exculpate"); **[*710]** accord, *United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982)* ("reasonable likelihood"); *Giglio v. United States, 405*

See also Field, Assessing the Harmlessness of Federal Constitutional Error -- A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15 (1976) (discussing application of harmless-error test).

[1] I do not agree with the Court's reference to the "constitutional error, *if any*, in this case," see *ante*, at 678 (emphasis added), because I believe a violation of the *Brady* rule is by definition constitutional error. Cf. *United States v. Agurs, 427 U.S., at 112* (rejecting rule making "every nondisclosure . . . automatic error" outside the *Brady* specific request or perjury contexts). As written, the *Brady* rule states that the Due Process Clause is violated when favorable evidence is not turned over "upon request" and "the evidence is material either to guilt or punishment." *Brady v. Maryland, 373 U.S., at 87*. As JUSTICE MARSHALL's explication of the record in this case demonstrates, *ante*, at 685-692, the suppressed evidence here was not only favorable to Bagley, but also unquestionably material to the issue of his guilt or innocence. The two witnesses who had signed the undisclosed "[Contracts] for Purchase of Information" were the only trial witnesses as to the two distribution counts on which Bagley was convicted. On cross-examination defense counsel attempted to undercut the witnesses' credibility, obviously a central issue, but had little factual basis for so doing. When defense counsel suggested a lack of credibility during final argument in the bench trial, the trial judge demurred, because "I really did not get the impression at all that either one or both of these men were trying at least in court here to make a case against the defendant." A finding that evidence showing that the witnesses in fact had a "direct, personal stake in respondent's conviction," *ante*, at 683, was nevertheless not "material" would be egregiously erroneous under any standard.

U.S. 150, 154 (1972) ("reasonable likelihood"); Napue v. Illinois, 360 U.S. 264, 272 (1959) ("may have had an effect on the outcome"). The combination of willful prosecutorial suppression of evidence and, "more importantly," the potential "corruption of the truth-seeking function of the trial process" requires that result. 427 U.S., at 104, 106. [2]

In *Brady*, the suppressed confession was *inadmissible* as to guilt and "could not have affected the outcome" on that issue. 427 U.S., at 106. However, the evidence "could have affected Brady's punishment," and was, therefore, "material on the latter issue but not on the former." *Ibid*. Materiality **[*711]** was thus used to describe admissible evidence that "could have affected" a dispositive issue in the trial.

The question in *Agurs* was whether the *Brady* rule should be *extended*, to cover a case in which there had been neither perjury nor a specific request -- that is, whether the prosecution has some constitutional duty to search its files and disclose automatically, or in response to a general **[****75]** request, all evidence that "might have helped the defense, or might have affected the outcome." 427 U.S., at 110. [3] Such evidence would, of course, be covered by the *Brady* formulation if it were specifically requested. We noted in *Agurs*, however, that because there had been no specific defense request for the later-discovered evidence, there was no notice to the prosecution that the defense did not already have that evidence or that it considered the evidence to be of particular value. 427 U.S., at 106-107. Consequently, we stated that in the absence of a request the prosecution has a constitutional duty to volunteer only "obviously exculpatory . . . evidence." Id., at 107. Because this constitutional duty to disclose is *different* from the duty described in *Brady*, it is not surprising that we developed a different standard of materiality in the *Agurs* context. Necessarily describing the "inevitably imprecise" standard in terms appropriate to post-trial review, **[***513]** we held that no constitutional violation occurs in the absence of a specific request unless "the omitted evidence creates a reasonable doubt **[****76]** that did not otherwise exist." Id., at 108, 112. [4]

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[2] "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ." Brady, supra, at 87-88.

[3] "[We] conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all . . . .

"We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." 427 U.S., at 107.

[4] "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." Id., at 112 (footnote omitted).

We also held in *Agurs* that when no request for particular information is made, post-trial determination of whether a failure voluntarily to disclose exculpatory evidence amounts to constitutional error depends on the "character of the evidence, not the character of the prosecutor." Id., at 110. Nevertheless, implicitly acknowledging the broad discretion that trial and appellate courts must have to ensure fairness in this area, we noted that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." Id., at 108. Finally, we noted that the post-trial determination of reasonable doubt will vary even in the no-request context, depending on all the circumstances of each case. For example, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." Id., at 113.

[**77]** **[*712]** What **[**3399]** the Court ignores with regard to *Agurs* is that its analysis was restricted entirely to the general or no-request context. [5] The "standard of materiality" we fashioned for the purpose of determining whether a prosecutor's failure to *volunteer* exculpatory evidence amounted to constitutional error was and is unnecessary with regard to the two categories of prosecutorial suppression already covered by the *Brady* rule. The specific situation in *Agurs*, as well as the circumstances of *United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)* and *Strickland v. Washington, 466 U.S. 668 (1984)*, simply falls "outside the *Brady* context." *Ante*, at 681.

[**78]** But, the *Brady* rule itself unquestionably applies to this case, because the Government failed to disclose favorable evidence that was clearly responsive to the defendant's specific **[*713]** request. Bagley's conviction therefore must be set aside if the suppressed evidence was "material" -- and it obviously was, see n. 1, *supra* -- and if there is "any reasonable likelihood" that it could have affected the judgment of the trier of fact. Our choice, therefore, should be merely whether to affirm for the reasons stated in Part I of JUSTICE MARSHALL's dissent, or to remand to the Court of Appeals for further review under the standard stated in *Brady*. I would follow the latter course, not because I disagree with JUSTICE MARSHALL's analysis of the record, but because I do not believe this Court should perform the task of reviewing trial transcripts in the first instance. See *United States v. [***514] Hasting, 461 U.S. 499, 516-517 (1983)* (STEVENS, J., concurring in judgment). I am confident that the Court of Appeals would reach the appropriate result if it applied the proper standard.

The Court, however, today sets out a reformulation of the **[****79]** *Brady* rule in which I have no such confidence. Even though the prosecution suppressed evidence that was specifically requested, apparently the Court of Appeals may now reverse only if there is a "reasonable probability" that the suppressed evidence "would" have altered "the result of the [trial]." *Ante*, at 682, 684. According to the Court this single rule is "sufficiently flexible" to cover specific as well as general or no-request instances of nondisclosure, *ante*, at 682, because, at least in the view of JUSTICE BLACKMUN and JUSTICE O'CONNOR, a reviewing court can "consider directly" under this standard the more threatening effect that nondisclosure in response to a specific defense request will generally have on the truth-seeking function of the adversary process. *Ante*, at 683 (opinion of **[**3400]** BLACKMUN, J.). [6]

[**80]** **[*714]** I cannot agree. The Court's approach stretches the concept of "materiality" beyond any recognizable scope, transforming it from merely an evidentiary concept as used in *Brady* and *Agurs*, which required that material evidence be admissible and probative of guilt or innocence in the context of a specific request, into a result-focused standard that seems to include an independent weight in favor of affirming convictions despite evidentiary suppression. Evidence favorable to an accused and relevant to the dispositive issue of guilt apparently may still be found not "material," and hence suppressible by

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[5] See *ante*, at 678 ("Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States* v. *Agurs*"); *ante*, at 681 (referring generally to "the *Agurs* standard for the materiality of undisclosed evidence"); *ante*, at 700 (MARSHALL, J., dissenting) (describing *Agurs* as stating a general rule that "there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial"). But see Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1148 (1982) (*Agurs* "distinguished" between no-request situations and the other two *Brady* contexts "where a pro-defense standard . . . would continue").

[6] I of course agree with JUSTICE BLACKMUN, *ante*, at 679-680, n. 9, and 684, and JUSTICE MARSHALL, *ante*, at 706, that our long line of precedents establishing the "reasonable likelihood" standard for use of perjured testimony remains intact. I also note that the Court plainly envisions that reversal of Bagley's conviction would be possible on remand even under the new standard formulated today for specific-request cases. See *ante*, at 684.

prosecutors prior to trial, unless there is a reasonable probability that its use would result in an acquittal. JUSTICE MARSHALL rightly criticizes the incentives such a standard creates for prosecutors "to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive." *Ante,* at 701.

Moreover, the Court's analysis reduces the significance of deliberate prosecutorial suppression of potentially exculpatory evidence to that merely of one of numerous factors that "may" be considered by a reviewing court. **[****81]** *Ante*, at 683 (opinion of BLACKMUN, J.). This is not faithful to our statement in *Agurs* that "[when] the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *427 U.S., at 106*. Such suppression is far more serious than mere nondisclosure of evidence in which the defense has expressed no particular interest. A reviewing court should attach great significance to silence in the face of a specific request, when responsive evidence is later **[***515]** shown to have been in the Government's possession. Such silence actively misleads in the same way as would an affirmative representation that exculpatory evidence does not exist when, in fact, it does (*i. e.*, perjury) -- indeed, the two situations are aptly described as "sides of a single coin." Babcock, Fair Play: Evidence Favorable to **[*715]** an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1151 (1982).

Accordingly, although the judgment of the Court of Appeals should be vacated and the case should be remanded for further proceedings, I disagree with the Court's statement of the correct standard to be applied. **[****82]** I therefore respectfully dissent from the judgment that the case be remanded for determination under the Court's new standard.

References

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence favorable to accused--Supreme Court cases

16A Am Jur 2d, Constitutional Law 847, *849*; *21A Am Jur 2d, Criminal Law 785*; *63A Am Jur 2d, Prosecuting Attorneys 27*

9 Federal Procedure, L Ed, Criminal Procedure 22:708, 22:209

7 Federal Procedural Forms, L Ed, Criminal Procedure 20:397, 20:398

USCS *Constitution, Fifth* and *Fourteenth Amendments*

US L Ed Digest, Constitutional Law 840.2; Criminal Law 50

L Ed Index to Annos, District Attorneys; Due Process of Law; Fair Trial

ALR Quick Index, District and Prosecuting Attorneys; Due Process of Law; Fair Trial

Federal Quick Index, District and Prosecuting Attorneys; Due Process of Law; Fair Trial; United States Attorneys

Annotation References:

Withholding **[****83]** or suppression of evidence by prosecution in criminal case as vitiating conviction. *34 ALR3d 16*.

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United States v. Agurs

Supreme Court of the United States

Argued April 28, 1976 ; June 24, 1976

No. 75-491

Reporter
427 U.S. 97 *; 96 S. Ct. 2392 **; 49 L. Ed. 2d 342 ***; 1976 U.S. LEXIS 72 ****

UNITED STATES *v.* AGURS

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Disposition: The court reversed a lower court's reversal of defendant's murder conviction because the prosecutor had no duty under the Due Process Clause of the Fifth Amendment to voluntarily disclose exculpatory matter absent a pretrial request for specific evidence.

Core Terms

cases, guilt, reasonable doubt, new trial, suppression, defense counsel, disclose, exculpatory, misconduct, perjury, fair trial, knife, constitutional duty, due process, confession, corruption, deliberate, discovery, innocence, witnesses, deprived, newly discovered evidence, exculpatory evidence, trial judge, no request, no duty, demonstrating, nondisclosure, truth-seeking, overriding

Case Summary

Procedural Posture

The United States appealed a judgment of the United States Court of Appeals for the District of Columbia Circuit that reversed defendant's murder conviction on the ground that the prosecutor's failure to disclose the victim's prior criminal record violated the Due Process Clause.

Overview

Defendant was convicted of murdering a man by stabbing him with his own knife. Defense counsel made no discovery request of the prosecutor. The prosecutor failed to voluntarily disclose the victim's past criminal record, which included offenses for assault and carrying a deadly weapon. The court reversed a lower court's reversal of defendant's murder conviction because the prosecutor had no duty, under the Due Process Clause of *U.S. Const. amend. V*, to voluntarily disclose exculpatory matter absent a pretrial request for specific evidence. In the context of the entire record the omitted evidence was not "material," i.e. it did not create a reasonable doubt that did not otherwise exist. The court held that the trial court employed the proper standard of "materiality," considered the omitted evidence in the context of the entire record, and properly ruled that the evidence supported a finding that defendant was guilty beyond a

reasonable doubt. Therefore, the prosecutor's failure to tender the evidence to the defense did not deprive defendant of a fair trial as guaranteed by the Due Process Clause.

Outcome

The court reversed a lower court's reversal of defendant's murder conviction because the prosecutor had no duty under the *Due Process Clause of the Fifth Amendment* to voluntarily disclose exculpatory matter absent a pretrial request for specific evidence.

Syllabus

Respondent was convicted of second-degree murder for killing one Sewell with a knife during a fight. Evidence at the trial disclosed, *inter alia*, that Sewell, just before the killing, had been carrying two knives, including the one with which respondent stabbed him, that he had been repeatedly stabbed, but that respondent herself was uninjured. Subsequently, respondent's counsel moved for a new trial, asserting that he had discovered that Sewell had a prior criminal record (including guilty pleas to charges of assault and carrying a deadly weapon, apparently a knife) that would have tended to support the argument that respondent acted in self-defense, and that the prosecutor had failed to disclose this information to the defense. The District Court denied the motion on the ground that the evidence of Sewell's criminal record was not material, because it shed no light on his character that was not already apparent from the uncontradicted evidence, particularly the fact that he had been carrying two knives, **[****2]** the court stressing the inconsistency between the self-defense claim and the fact that Sewell had been stabbed repeatedly while respondent was unscathed.

The Court of Appeals reversed, holding that the evidence of Sewell's criminal record was material and that its nondisclosure required a new trial because the jury might have returned a different verdict had the evidence been received. *Held:* The prosecutor's failure to tender Sewell's criminal record to the defense did not deprive respondent of a fair trial as guaranteed by the *Due Process Clause of the Fifth Amendment*, where it appears that the record was not requested by defense counsel and gave rise to no inference of perjury, that the trial judge remained convinced of respondent's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and that the judge's firsthand appraisal of the entire record was thorough and entirely reasonable. *Mooney v. Holohan, 294 U.S. 103*; *Brady v. Maryland, 373 U.S. 83*, distinguished. Pp. 103-114.

(a) A prosecutor does not violate the constitutional duty of disclosure unless his omission is **[****3]** sufficiently significant to result in the denial of the defendant's right to a fair trial. Pp. 107-109.

(b) Whether or not procedural rules authorizing discovery of everything that might influence a jury might be desirable, the Constitution does not demand such broad discovery; and the mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. Pp. 109-110.

(c) Nor is the prosecutor's constitutional duty of disclosure measured by his moral culpability or willfulness; if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. P. 110.

(d) The proper standard of materiality of undisclosed evidence, and the standard applied by the trial judge in this case, is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. Pp. 112-114.

167 U.S. App. D.C. 28, 510 F. 2d 1249, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, **[****4]** WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 114.

Counsel: *Deputy Solicitor General Frey* argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Thornburgh, John F. Cooney, Jerome M. Feit,* and *Robert H. Plaxico.*

Edwin J. Bradley argued the cause for respondent. With him on the brief were *Michael E. Geltner, William Greenhalgh,* and *Sherman L. Cohn.*

Judges: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens.

Opinion by: STEVENS

Opinion

[*98] [*347] [**2395]** MR. JUSTICE STEVENS delivered the opinion of the Court.

[1A]After a brief interlude in an inexpensive motel room, respondent repeatedly stabbed James Sewell, causing his death. She was convicted of second-degree murder. The question before us is whether the prosecutor's failure **[*99]** to provide defense counsel with certain background information about Sewell, which would have tended to support the argument that respondent **[****5]** acted in self-defense, deprived her of a fair trial under the rule of *Brady v. Maryland, 373 U.S. 83*.

The answer to the question depends on (1) a review of the facts, (2) the significance of the failure of defense counsel to request the material, and (3) the standard by which the prosecution's failure to volunteer exculpatory material should be judged.

I

At about 4:30 p.m. on September 24, 1971, respondent, who had been there before, and Sewell, registered in a motel as man and wife. They were assigned a room without a bath. Sewell was wearing a bowie knife in a sheath, and carried another knife in his pocket. Less than two hours earlier, according to the testimony of his estranged wife, he had had $ 360 in cash on his person.

About 15 minutes later three motel employees heard respondent screaming for help. A forced entry into their room disclosed Sewell on top of respondent struggling for possession of the bowie knife. She was holding the knife; his bleeding hand grasped the blade; according to one witness he was trying to jam the

blade into her chest. The employees separated the two and summoned the authorities. Respondent departed without **[****6]** comment before they arrived. Sewell was dead on arrival at the hospital.

Circumstantial evidence indicated that the parties had completed an act of intercourse, that Sewell had then gone to the bathroom down the hall, and that the struggle occurred upon his return. The contents of his pockets were in disarray on the dresser and no money was found; the jury may have inferred that respondent took Sewell's money and that the fight started when Sewell re-entered the room and saw what she was doing.

[*100] **[**2396]** On the following morning respondent surrendered to the police. She was given a physical examination which revealed no cuts or bruises of any kind, except needle marks on her upper arm. An autopsy of Sewell disclosed that he had several deep stab wounds in his chest and abdomen, and a number of slashes on his arms and hands, characterized by the pathologist as "defensive wounds." [1]

Respondent **[****7]** offered no evidence. Her sole defense was the argument made by her attorney that Sewell had initially attacked her with the knife, and that her actions had all been directed toward saving her own life. The support for this self-defense **[***348]** theory was based on the fact that she had screamed for help. Sewell was on top of her when help arrived, and his possession of two knives indicated that he was a violence-prone person. [2] It took the jury about 25 minutes to elect a foreman and return a verdict.

Three months later defense counsel filed a motion for a new trial asserting that he had discovered (1) that Sewell had a prior criminal record that would have further evidenced his violent character; (2) that the prosecutor had failed to disclose this information to the **[****8]** defense; and (3) that a recent opinion of the United States Court of Appeals for the District of Columbia Circuit made it clear that such evidence was admissible even if not known to the defendant. [3] Sewell's prior record included a plea of guilty to a charge of assault and carrying **[*101]** a deadly weapon in 1963, and another guilty plea to a charge of carrying a deadly weapon in 1971. Apparently both weapons were knives.

The Government opposed the motion, arguing that there was no duty to tender Sewell's prior record to the defense in the absence of an appropriate request; that the evidence was readily discoverable in advance of trial and hence was not the kind of "newly discovered" evidence justifying a new trial; and that, in all events, it was not material.

The District Court denied the motion. It rejected the Government's argument that there was no duty to disclose material evidence **[****9]** unless requested to do so, [4] **[*102]** assumed that the evidence was

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[1] The alcohol level in Sewell's blood was slightly below the legal definition of intoxication.

[2] Moreover, the motel clerk testified that Sewell's wife had said he "would use a knife"; however, Mrs. Sewell denied making this statement. There was no dispute about the fact that Sewell carried the bowie knife when he registered.

[3] See *United States v. Burks, 152 U.S. App. D.C. 284, 286, 470 F. 2d 432, 434 (1972)*.

[4] "THE COURT: What are you saying? How can you request that which you don't know exists. That is the very essence of Brady.

. . . . . .

"THE COURT: Are you arguing to the Court that the status of the law is that if you have a report indicating that fingerprints were taken and that the fingerprints on the item… which the defendant is alleged to have assaulted somebody turn out not to be the defendant's, that absent a specific request for that information, you do not have any obligation to defense counsel?

admissible, but held that it was not sufficiently material. The District Court expressed the opinion that the prior conviction shed no light on Sewell's character that was not already apparent from the uncontradicted evidence, particularly the fact that he carried two knives; the court stressed the inconsistency **[**2397]** between the claim of self-defense and the fact that Sewell had been stabbed repeatedly while respondent was unscathed.

[**10]** [2A]The **[***349]** Court of Appeals reversed. [5] **[****11]** The court found no lack of diligence on the part of the defense and no misconduct by the prosecutor in this case. It held, however, that the evidence was material, and that its nondisclosure required a new trial because the jury might have returned a different verdict if the evidence had been received. [6]

[2B]

The decision of the Court of Appeals represents a significant departure from this Court's prior holding; because we believe that that court has incorrectly interpreted the constitutional requirement of due process, we reverse.

[*103] II

The rule of *Brady v. Maryland, 373 U.S. 83*, arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.

In the first situation, typified by *Mooney v. Holohan, 294 U.S. 103*, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. [7] **[****13]** In a series of subsequent cases, the Court has consistently

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"MR. CLARKE: No, Your Honor. There is another aspect which comes to this, and that is whether or not the Government knowingly puts on perjured testimony. It has an obligation to correct that perjured testimony.

"THE COURT: I am not talking about perjured testimony. You don't do anything about it. You say nothing about it. You have got the report there. You know that possibly it could be exculpatory. Defense counsel doesn't know about it. He has been misinformed about it. Suppose he doesn't know about it. And because he has made no specific request for that information, you say that the status of the law under Brady is that you have no obligation as a prosecutor to open your mouth?

"MR. CLARKE: No. Your Honor….

"But as the materiality of the items becomes less to the point where it is not material, there has to be a request, or else the Government, just like the defense, is not on notice." App. 147-149.

[5] *167 U.S. App. D.C. 28, 510 F. 2d 1249 (1975)*. The opinion of the Court of Appeals disposed of the direct appeal filed after respondent was sentenced as well as the two additional appeals taken from the two orders denying motions for new trial. After the denial of the first motion, respondent's counsel requested leave to withdraw in order to enable substitute counsel to file a new motion for a new trial on the ground that trial counsel's representation had been ineffective because he did not request Sewell's criminal record for the reason that he incorrectly believed that it was inadmissible. The District Court denied that motion. Although that action was challenged on appeal, the Court of Appeals did not find it necessary to pass on the validity of that ground. We think it clear, however, that counsel's failure to obtain Sewell's prior criminal record does not demonstrate ineffectiveness.

[6] Although a majority of the active judges of the Circuit, as well as one of the members of the panel, expressed doubt about the validity of the panel's decision, the court refused to rehear the case en banc.

[7] In *Mooney* it was alleged that the petitioner's conviction was based on perjured testimony "which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." *294 U.S., at 110*.

held that a conviction obtained by the knowing use of perjured testimony is fundamentally **[****12]** unfair, [8] and must be set aside if there is any reasonable likelihood that the false testimony could have **[***350]** affected the judgment of the jury. [9] It is this line of cases on which the **[*104]** Court of Appeals placed primary reliance. In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. Since this case involves **[**2398]** no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the *Mooney* line of cases is not necessarily applicable to this case.

The second situation, illustrated by the *Brady* case itself, is characterized by a pretrial request for specific evidence. In that case defense counsel had requested the extrajudicial statements made by Brady's accomplice, one Boblit. This Court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was "material." [10] A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

[**14]** Brady was found guilty of murder in the first degree. Since the jury did not add the words "without capital punishment" to the verdict, he was sentenced to death. At his trial Brady did not deny his involvement in the deliberate killing, but testified that it was his accomplice, **[*105]** Boblit, rather than he, who had actually strangled the decedent. This version of the event was corroborated by one of several confessions made by Boblit but not given to Brady's counsel despite an admittedly adequate request.

After his conviction and sentence had been affirmed on appeal, [11] Brady filed a motion to set aside the judgment, and later a post-conviction proceeding, in which he alleged that the State had violated his constitutional rights by suppressing the Boblit confession. The trial judge denied relief largely because he felt that Boblit's confession would have been inadmissible at Brady's trial. The Maryland Court of Appeals disagreed; [12] it ordered a new trial on the issue of punishment. It held that the withholding of

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The Court held that such allegations, if true, would establish such fundamental unfairness as to justify a collateral attack on petitioner's conviction.

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id., at 112*.

[8] *Pyle v. Kansas, 317 U.S. 213*; *Alcorta v. Texas, 355 U.S. 28*; *Napue v. Illinois, 360 U.S. 264*; *Miller v. Pate, 386 U.S. 1*; *Giglio v. United States, 405 U.S. 150*; *Donnelly v. DeChristoforo, 416 U.S. 637*.

[9] See *Giglio, supra, at 154*, quoting from *Napue, supra, at 271*.

[10] "We now hold 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, irrespective of the good faith or bad faith of the prosecution." *373 U.S., at 87*. Although in *Mooney* the Court had been primarily concerned with the willful misbehavior of the prosecutor, in *Brady* the Court focused on the harm to the defendant resulting from nondisclosure. See discussions of this development in Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136 (1964); and Comment, *Brady* v. *Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112(1972).

[11] *220 Md. 454, 154 A. 2d 434 (1959)*.

[12] *226 Md. 422, 174 A. 2d. 167 (1961)*.

material evidence, even "without guile," was a denial of due process and that there were valid theories on which the confession might have been admissible **[****15]** in Brady's defense.

This Court granted certiorari to consider Brady's contention that the violation of his constitutional right to a fair trial vitiated the entire **[***351]** proceeding. [13] The holding that the suppression of exculpatory evidence violated Brady's right to due process was affirmed, as was the separate holding that he should receive a new trial on the issue of punishment but not on the issue of guilt or innocence. The Court interpreted the Maryland Court **[*106]** of Appeals opinion as ruling that the confession was inadmissible on that issue. For that reason, the confession could not have affected the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not the former. And since it was not material on the issue of guilt, the entire trial was not lacking in due process.

[**16]** The test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such **[**2399]** request has been made. [14] Indeed, this Court has not yet decided whether the prosecutor has any obligation to provide defense counsel with exculpatory information when no request has been made. Before addressing that question, a brief comment on the function of the request is appropriate.

[3]In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor **[****17]** to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is **[*107]** made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter **[****18]** and cases, like the one we must now decide, in which there has been no **[***352]** request at all. The third situation in which the *Brady* rule arguably applies, typified by this case, therefore embraces the case in which only a general request for *"Brady* material" has been made.

We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty.

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[13] "The petitioner was denied due process of law by the State's suppression of evidence before his trial began. The proceeding must commence again from the stage at which the petitioner was overreached. The denial of due process of law vitiated the verdict and the sentence. *Rogers v. Richmond, 365 U.S. 534, 545*. The verdict is not saved because other competent evidence would support it. *Culombe v. Connecticut, 367 U.S. 568, 621*." Brief for Petitioner in *Brady* v. *Maryland,* No. 490, O.T. 1962, p. 6.

[14] See Comment 40 U. Chi. L. Rev., *supra,* n. 10, at 115-117.

III

[4]We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial mandated by the *Due Process Clause of the Fifth Amendment to the Constitution*. Our construction of that Clause will apply equally to the comparable clause in the *Fourteenth Amendment* applicable to trials in state courts.

The problem arises in two principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, the prosecutor must decide what, if anything, **[****19]** he should voluntarily submit to defense counsel. **[*108]** Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.

Nevertheless, there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions **[**2400]** in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

The Court of Appeals appears to have assumed **[****20]** that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*. [15] For a **[***353]** jury's **[*109]** appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

[**21]** [5][6]Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. While expressing the opinion that representatives of the State may not "suppress substantial material evidence," former Chief Justice Traynor of the California Supreme Court has pointed out that "they are under no duty to report sua sponte to the defendant all that

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[15] "In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession 'could have reduced the appellant Brady's offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial (cf. *Williams v. New York, 337 U.S. 241*) denies him due process or violates the *Equal Protection Clause of the Fourteenth Amendment*." *373 U.S., at 90-91* (footnote omitted).

they learn about the case and about their witnesses." *In re Imbler, 60 Cal. 2d 554, 569, 387 P. 2d 6, 14 (1963)*. And this Court recently noted that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois, 408 U.S. 786, 795*.[16] The mere possibility that an item of undisclosed information **[*110]** might have helped the defense, or might have affected the outcome of the trial, **[****22]** does not establish "materiality" in the constitutional sense.

[7]Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. [17] If evidence highly probative of innocence is in his file, he should **[****23]** be presumed to recognize its significance even if he has actually overlooked it. Cf. *Giglio v. United States, [**2401] 405 U.S. 150, 154*. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

[**24]** [8][9]As the District Court recognized in this case, there are situations **[***354]** in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. [18] For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he **[*111]** must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States, 295 U.S. 78, 88*. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

[**25]** [10]On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. [19] If the

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[16] In his opinion concurring in the judgment in *Giles v. Maryland, 386 U.S. 66, 98*, Mr. Justice Fortas stated:

"This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information."

[17] In *Brady* this Court, as had the Maryland Court of Appeals, expressly rejected the good faith or the bad faith of the prosecutor as the controlling consideration: "We now hold 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, *irrespective of the good faith or bad faith of the prosecution.* The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *373 U.S., at 87*. (Emphasis added.) If the nature of the prosecutor's conduct is not controlling in a case like *Brady*, surely it should not be controlling when the prosecutor has not received a specific request for information.

[18] The hypothetical example given by the District Judge in this case was fingerprint evidence demonstrating that the defendant could not have fired the fatal shot.

standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

[**26]** [11][12]On the other hand, since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to **[*112]** characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his "conviction is sure that the error did not influence the jury, or had but very slight effect." *Kotteakos v. United States, 328 U.S. 750, 764*.Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

[13A] [14A] **[****27]** [15]The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. [20] **[****28]** **[**2402]** Such a finding is **[***355]** permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. [21] If there is no reasonable doubt about **[*113]** guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

[13B] [14B]

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[19] This is the standard generally applied by lower courts in evaluating motions for new trial under *Fed. Rule Crim. Proc. 33* based on newly discovered evidence. See, *e.g.*, *Ashe v. United States, 288 F. 2d 725, 733 (CA6 1961)*; *United States v. Thompson, 493 F. 2d 305, 310 (CA9 1974)*, cert. denied, ***419 U.S. 834***; *United States v. Houle, 490 F. 2d 167, 171 (CA2 1973)*, cert. denied, ***417 U.S. 970***; *United States v. Meyers, 484 F. 2d 113, 116 (CA3 1973)*; *Heald v. United States, 175 F. 2d 878, 883 (CA10 1949)*. See also 2 C. Wright, Federal Practice and Procedure § 557 (1969).

[20] It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as *"Brady* material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

[21] "If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glimpse, the result might well be different." Comment 40 U. Chi. L. Rev., *supra*, n. 10, at 125.

This statement of the standard of materiality describes the test which courts appear to have applied in actual cases although the standard has been phrased in different language. [22] It is also the standard which the trial judge applied in this case. He evaluated the significance of Sewell's prior criminal record in the context of the full trial which he recalled in detail. Stressing **[****29]** in particular the incongruity of a claim that Sewell was the aggressor with the evidence of his multiple wounds and respondent's unscathed condition, the trial judge indicated his unqualified opinion that respondent was guilty. He **[*114]** noted that Sewell's prior record did not contradict any evidence offered by the prosecutor, and was largely cumulative of the evidence that Sewell was wearing a bowie knife in a sheath and carrying a second knife in his pocket when he registered at the motel.

[**30]** [1B]Since the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable **[***356]** doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial as guaranteed by the *Due Process Clause of the Fifth Amendment*. Accordingly, the judgment of the Court of Appeals is

Reversed.

Dissent by: MARSHALL

Dissent

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that the prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. But once having recognized the existence of a duty to volunteer exculpatory evidence, the Court so narrowly **[**2403]** defines the category of "material" evidence embraced by the duty as to deprive **[****31]** it of all meaningful content.

In considering the appropriate standard of materiality governing the prosecutor's obligation to volunteer exculpatory evidence, the Court observes: S

"[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been **[*115]** discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly

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[22] See, *e.g.*, *Stout v. Cupp, 426 F. 2d 881, 882-883 (CA9 1970)*; *Peterson v. United States, 411 F. 2d 1074, 1079 (CA8 1969)*; *Lessard v. Dickson, 394 F. 2d 88, 90-92 (CA9 1968)*, cert. denied, ***393 U.S. 1004***; *United States v. Tomaiolo, 378 F. 2d 26, 28 (CA2 1967)*. One commentator has identified three different standards this way:

"As discussed previously, in earlier cases the following standards for determining materiality for disclosure purposes were enunciated: (1) evidence which may be merely helpful to the defense; (2) evidence which raised a reasonable doubt as to defendant's guilt; (3) evidence which is of such a character as to create a substantial likelihood of reversal." Comment, Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure, 59 Iowa L. Rev. 433, 445 (1973).

See also Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Col. L. Rev. 858 (1960).

discovered evidence probably would have resulted in acquittal [the standard generally applied to a motion under *Fed. Rule Crim. Proc. 33* based on newly discovered evidence [1]]. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ante,* at 111 (footnote omitted).I

I agree completely.

[**32]** The Court, however, seemingly forgets these precautionary words when it comes time to state the proper standard of materiality to be applied in cases involving neither the knowing use of perjury nor a specific defense request for an item of information. In such cases, the prosecutor commits constitutional error, the Court holds, "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Ante,* at 112. As the Court's subsequent discussion makes clear, the defendant challenging the prosecutor's failure to disclose evidence is entitled to relief, in the Court's view, only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. The burden thus imposed on the defendant is at least as "severe **[***357]** " as, if not more **[*116]** "severe" than, [2] the burden he generally faces on a *Rule 33* motion. Surely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence "probably would have resulted in acquittal" (the general *Rule 33* standard). In short, in spite of its own salutary precaution, the Court treats the case **[****33]** in which the prosecutor withholds evidence no differently from the case in which evidence is newly discovered from a neutral source. The "prosecutor's obligation to serve the cause of justice" is reduced to a status, to borrow the Court's words, of "no special significance." *Ante,* at 111.

Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him. See *Moore v. Illinois, 408 U.S. 786, 810 (1972)* (opinion of MARSHALL, J.). This fundamental **[****34]** notion of fairness does not pose any irreconcilable conflict for the prosecutor, for as the Court reminds us, the prosecutor "must always be faithful to his client's overriding interest that 'justice shall be done.'" *Ante,* at 111. No interest of the State is served, and no duty of the prosecutor advanced, by the suppression of evidence favorable to the defendant. On the contrary, the prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command.

[2404]** I recognize, of course, that the exculpatory value to the defense of an item of information will often not be apparent to the prosecutor in advance of trial. And **[*117]** while the general obligation to disclose exculpatory information no doubt continues during the trial, giving rise to a duty to disclose information whose significance becomes apparent as the case progresses, even a conscientious prosecutor will fail to appreciate the significance of some items of information. See *United States v. Keogh, 391 F.*

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[1] The burden generally imposed upon such a motion has also been described as a burden of demonstrating that the newly discovered evidence would probably produce a different verdict in the event of a retrial. See, *e.g.*, *United States v. Kahn, 472 F. 2d 272, 287 (CA2 1973)*; *United States v. Rodriguez, 437 F. 2d 940, 942 (CA5 1971)*; *United States v. Curran, 465 F. 2d 260, 264 (CA7 1972)*.

[2] See *United States v. Keogh, 391 F. 2d 138, 148 (CA2 1968)*, in which Judge Friendly implies that the standard the Court adopts is more severe than the standard the Court rejects.

2d 138, 147 (CA2 1968). I agree with the Court that these considerations, as well as the general interest in finality of judgments, preclude **[****35]** the granting of a new trial in every case in which the prosecutor has failed to disclose evidence of some value to the defense. But surely these considerations do not require the rigid rule the Court intends to be applied to all but a relatively small number of such cases.

Under today's ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence **[***358]** is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.

More fundamentally, the Court's rule usurps the function of the jury **[****36]** as the trier of fact in a criminal case. The Court's rule explicitly establishes the judge as the trier of fact with respect to evidence withheld by the prosecution. The defendant's fate is sealed so long as the evidence does not create a reasonable doubt as to guilt in the judge's mind, regardless of whether the **[*118]** evidence is such that reasonable men could disagree as to its import -- regardless, in other words, of how "close" the case may be. [3]

The Court asserts that this harsh standard of materiality is the standard that "courts appear to have applied in actual cases although **[****37]** the standard has been phrased in different language." *Ante,* at 113 (footnote omitted). There is no basis for this assertion. None of the cases cited by the Court in support of its statement suggests that a judgment of conviction should be sustained so long as the judge remains convinced beyond a reasonable doubt of the defendant's guilt. [4] **[****38]** The prevailing **[*119]** view in the federal courts of the **[**2405]** standard of materiality for cases involving neither a specific request for information nor other indications of deliberate misconduct -- a standard with which the cases cited by the Court are fully consistent -- is quite different. It is essentially the following: If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside. [5]

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[3] To emphasize the harshness of the Court's rule, the defendant's fate is determined finally by the judge only if the judge does not entertain a reasonable doubt as to guilt. If evidence withheld by the prosecution does create a reasonable doubt as to guilt in the judge's mind, that does not end the case -- rather, the defendant (one might more accurately say the prosecution) is "entitled" to have the case decided by a jury.

[4] In Stout v. Cupp, 426 F. 2d 881 (CA9 1970), a habeas proceeding, the court simply quoted the District Court's finding that if the suppressed evidence had been introduced, "the jury would not have reached a different result." Id., at 883. There is no indication that the quoted language was intended as anything more than a finding of fact, which would, quite obviously, dispose of the defendant's claim under any standard that might be suggested. In Peterson v. United States, 411 F. 2d. 1074 (CA8 1969), the court appeared to require a showing that the withheld evidence "was 'material' and would have aided the defense." Id., at 1079. The court in Lessard v. Dickson, 394 F. 2d 88 (CA9 1968), found it determinative that the withheld evidence "could hardly be regarded as being able to have much force against the inexorable array of incriminating circumstances with which [the defendant] was surrounded." Id., at 91. The jury, the court noted, would not have been "likely to have had any [difficulty]" with the argument defense counsel would have made with the withheld evidence. Id., at 92. Finally, United States v. Tomaiolo, 378 F. 2d 26 (CA2 1967), required the defendant to show that the evidence was "material and of some substantial use to the defendant." Id., at 28.

[5] See, *e.g.*, United States v. Morell, 524 F. 2d 550, 553 (CA2 1975); Ogden v. Wolff, 522 F. 2d 816, 822 (CA8 1975); Woodcock v. Amaral, 511 F. 2d 985, 991 (CA1 1974); United States v. Miller, 499 F. 2d 736, 744 (CA10 1974); Shuler v. Wainwright, 491 F. 2d 1213, 1223

This standard, unlike the **[***359]** Court's, reflects a recognition that the determination must be in terms of the impact of an item of evidence on the jury, and that this determination cannot always be made with certainty. [6]

[**39]** **[*120]** The Court approves -- but only for a limited category of cases -- a standard virtually identical to the one I have described as reflecting the prevailing view. In cases in which "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," *ante*, at 103, the judgment of conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Ibid.* This lesser burden on the defendant is appropriate, the Court states, primarily because the withholding of evidence contradicting testimony offered by witnesses called by the prosecution "involve[s] a corruption of the truth-seeking function of the trial process." *Ante*, at 104. But surely the truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution. An example offered by Mr. Justice Fortas serves to illustrate the point. "[L]et us assume that the State possesses information that blood was found on the **[****40]** victim, and that this blood is of a type which does not match that of the accused or of the victim. Let us assume that no related testimony was offered by the State." *Giles v. Maryland, 386 U.S. 66, 100 (1967)* (concurring in judgment). The suppression of the information unquestionably corrupts the truth-seeking process, and the burden on the defendant in establishing his entitlement to a new trial ought be no different from the burden he would face if related testimony had been elicited by the prosecution. See *id., at 99-101*.

The Court derives its "reasonable likelihood" standard for cases involving perjury from cases such as *Napue v. **[*121]** Illinois, 360 U.S. 264 **[***360]** (1959)*, and *Giglio v. United States, 405 U.S. 150 (1972)*. But surely the results in those cases, and the standards applied, would have been no **[**2406]** different if perjury had not been involved. In *Napue* and *Giglio*, co-conspirators testifying against the defendants testified falsely, in response to questioning by defense counsel, that they had not received promises from the prosecution. The prosecution **[****41]** failed to disclose that promises had in fact been made. The corruption of the truth-seeking process stemmed from the suppression of evidence affecting the overall credibility of the witnesses, see *Napue, supra, at 269*; *Giglio, supra, at 154*, and that corruption would have been present whether or not defense counsel had elicited statements from the witnesses denying that promises had been made.

(CA5 1974); *United States v. Kahn, 472 F. 2d, at 287*; *Clarke v. Burke, 440 F. 2d 853, 855 (CA7 1971)*; *Hamric v. Bailey, 386 F. 2d 390, 393 (CA4 1967)*.

[6] That there is a significant difference between the Court's standards and what has been described as the prevailing view is made clear by Judge Friendly, writing for the court in *United States v. Miller, 411 F. 2d 825 (CA2 1969)*. After stating the court's conclusion that a new trial was required because of the Government's failure to disclose to the defense the pretrial hypnosis of its principal witness, Judge Friendly observed:

"We have reached this conclusion with some reluctance, particularly in light of the considered belief of the able and conscientious district judge, who has lived with this case for years, that review of the record in light of all the defense new trial motions left him 'convinced of the correctness of the jury's verdict.' We, who also have had no small exposure to the facts, are by no means convinced otherwise. The test, however, is not how the newly discovered evidence concerning the hypnosis would affect the trial judge or ourselves but whether, with the Government's case against [the defendant] already subject to serious attack, there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. We cannot conscientiously say there was not." *Id., at 832* (footnote omitted).

It may be that, contrary to the Court's insistence, its treatment of perjury cases reflects simply a desire to deter deliberate prosecutorial misconduct. But if that were the case, we might reasonably expect a rule imposing a lower threshold of materiality than the Court imposes -- perhaps a harmless-error standard. And we would certainly expect the rule to apply to a broader category of misconduct than the failure to disclose evidence that contradicts testimony offered by witnesses called by the prosecution. For the prosecutor is guilty of misconduct when he deliberately suppresses evidence that is clearly relevant and favorable to the defense, regardless, once again, of whether the evidence relates directly to testimony given in the course of the Government's **[****42]** case.

This case, however, does not involve deliberate prosecutorial misconduct. Leaving open the question whether a different rule might appropriately be applied in cases involving deliberate misconduct, [7] I would hold that the **[*122]** defendant in this case had the burden of demonstrating that there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. This is essentially the standard applied by the Court of Appeals, and I would affirm its judgment.

[**43]**

References

16 Am Jur 2d, Constitutional Law 578; *21 Am Jur 2d, Criminal Law 225*; *63 Am Jur 2d, Prosecuting Attorneys 27*

8 Am Jur Pl & Pr Forms (Rev ed), Criminal Procedure, Forms 281 et seq.

7 Am Jur Trials 477, Homicide

USCS, Constitution, 5th and 14 Amendments

US L Ed Digest, Constitutional Law 840

ALR Digests, Constitutional Law 669.5

L Ed Index to Annos, District Attorneys; Due Process of Law; Fair Trial

ALR Quick Index, District and Prosecuting Attorneys; Due Process of Law; Fair Trial

Federal Quick Index, District and Prosecuting Attorneys; Fair Trial; United States Attorneys

Annotation References:

Accused's right to counsel under the *Federal Constitution. 93 L Ed 137 ,2 L Ed 2d 1644, 9 L Ed 2d 1260, 18 L Ed 2d 1420* .

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[7] It is the presence of deliberate prosecutorial misconduct and a desire to deter such misconduct, presumably, that leads the Court to recognize a rule more readily permitting new trials in cases involving a specific defense request for information. The significance of the defense request, the Court states, is simply that it gives the prosecutor notice of what is important to the defense; once such notice is received, the failure to disclose is "seldom, if ever, excusable." *Ante*, at 106. It would seem to follow that if an item of information is of such obvious importance to the defense that it could not have escaped the prosecutor's attention, its suppression should be treated in the same manner as if there had been a specific request. This is precisely the approach taken by some courts. See, *e.g.*, *United States v. Morell, 524 F. 2d, at 553*; *United States v. Miller, 499 F. 2d, at 744*; *United States v. Kahn, 472 F. 2d, at 287*; *United States v. Keogh, 391 F. 2d, at 146-147*.

Conviction on testimony known to prosecution to be perjured as denial of due process. *2 L Ed 2d 1575*; *3 L Ed 2d 1991*.

Withholding or suppression of evidence by prosecution **[****44]** in criminal case as vitiating conviction. *34 ALR3d 16*.

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United States v. Ruiz

Supreme Court of the United States

April 24, 2002, Argued ; June 24, 2002, Decided

No. 01-595

Reporter
536 U.S. 622 *; 122 S. Ct. 2450 **; 153 L. Ed. 2d 586 ***; 2002 U.S. LEXIS 4650 ****; 70 U.S.L.W. 4677; 2002 Cal. Daily Op. Service 5602; 2002 Daily Journal DAR 7067; 15 Fla. L. Weekly Fed. S 454

UNITED STATES, PETITIONER v. ANGELA RUIZ

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States v. Ruiz, 241 F.3d 1157, 2001 U.S. App. LEXIS 3357 (9th Cir. Cal. 2001)

Disposition: Reversed.

Core Terms

sentence, impeachment, guilty plea, plea agreement, disclosure, waive, witnesses, plea bargain, circumstances, Guideline, disclose, Appeals, cases

Case Summary

Procedural Posture
Respondent refused a plea bargain that required she waive her right to evidence that could potentially impeach witnesses. The Government withdrew the offer. Respondent later pleaded guilty to a drug offense without a plea agreement. Upon the grant of a writ of certiorari, petitioner Government appealed the United States Court of Appeals for the Ninth Circuit's decision, vacating respondent's sentence and finding the waiver unconstitutional.

Overview
Respondent contended that without disclosure of potential impeachment evidence her guilty plea under the proposed plea agreement would not be knowing and intelligent. The Government argued that providing such information to respondent would result in the premature disclosure of its case, which was not constitutionally required. The United States Supreme Court held that the United States Constitution did not require the Government to disclose material impeachment evidence prior to entering a plea agreement with respondent. The Government was not required to disclose its potential case, and thus the value of the evidence impeaching the Government's case was unknown. Further, respondent's guilty plea under the plea agreement, with its accompanying waiver of constitutional rights, could have been accepted as knowing and voluntary despite any misapprehension by respondent concerning the specific extent or nature of the impeachment evidence. Finally, requiring disclosure of the evidence would improperly force

the Government to disclose witness information and engage in substantial trial preparation prior to plea bargaining.

Outcome
The decision vacating respondent's sentence was reversed.

Syllabus

After immigration agents found marijuana in respondent Ruiz's luggage, federal prosecutors offered her a "fast track" plea bargain, whereby she would waive indictment, trial, and an appeal in exchange for a reduced sentence recommendation. Among other things, the prosecutors' standard "fast track" plea agreement acknowledges the Government's continuing duty to turn over information establishing the defendant's factual innocence, but requires that she waive the right to receive impeachment information relating to any informants or other witnesses, as well as information supporting any affirmative defense she raises if the case goes to **[****2]** trial. Because Ruiz would not agree to the latter waiver, the prosecutors withdrew their bargaining offer, and she was indicted for unlawful drug possession. Despite the absence of a plea agreement, Ruiz ultimately pleaded guilty. At sentencing, she asked the judge to grant her the same reduced sentence that the Government would have recommended had she accepted the plea bargain. The Government opposed her request, and the District Court denied it. In vacating the sentence, the Ninth Circuit took jurisdiction under *18 U.S.C. § 3742*; noted that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial; decided that this obligation entitles defendants to the information before they enter into a plea agreement; ruled that the Constitution prohibits defendants from waiving their right to the information; and held that the "fast track" agreement was unlawful because it insisted upon such a waiver.

Held:

1. Appellate jurisdiction was proper under § 3742(a)(1), which permits appellate review of a sentence "imposed in violation of law." Respondent's sentence would have been so imposed if her **[****3]** *constitutional claim were sound. Thus, if she had prevailed on the merits, her victory would also have confirmed the Ninth Circuit's jurisdiction. Although this Court ultimately concludes that respondent's sentence was not "imposed in violation of law" and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See United States v. Mine Workers, 330 U.S. 258, 291, 91 L. Ed. 884, 67 S. Ct. 677*. In order to make that determination, it was necessary for the Ninth Circuit to address the merits. Pp. 3-4.

2. The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. Although the *Fifth* and *Sixth Amendments* provide, as part of the Constitution's "fair trial" guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, see, *e.g.*, *Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194*, a defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees, *Boykin v. Alabama, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709.* **[****4]** As a result, the Constitution insists that the defendant enter a guilty plea that is "voluntary" and make related waivers "knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences." See, *e.g.*, *id., at 242*. The Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive his right to a fair

trial) unless the prosecutors first made the same disclosure of material impeachment information that they would have had to make had the defendant insisted upon a trial. Several considerations, taken together, demonstrate that holding's error. First, impeachment information is special in relation to *a trial's fairness*, not in respect to whether a plea is *voluntary*. It is particularly difficult to characterize such information as critical, given the random way in which it may, or may not, help a particular defendant. The degree of help will depend upon the defendant's own independent knowledge of the prosecution's potential case -- a matter that the Constitution does not require prosecutors to disclose. Second, there is no legal authority that provides **[****5]** significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See, *e.g.*, *Brady v. United States, 397 U.S. 742, 757, 25 L. Ed. 2d 747, 90 S. Ct. 1463*. Third, the very due process considerations that have led the Court to find trial-related rights to exculpatory and impeachment information -- *e.g.*, the nature of the private interest at stake, the value of the additional safeguard, and the requirement's adverse impact on the Government's interests, *Ake v. Oklahoma, 470 U.S. 68, 77, 84 L. Ed. 2d 53, 105 S. Ct. 1087* -- argue against the existence of the "right" the Ninth Circuit found. Here, that right's added value to the defendant is often limited, given that the Government will provide information establishing factual innocence under the proposed plea agreement, and that the defendant has other guilty-plea safeguards, see *Fed. Rule Crim. Proc. 11*. Moreover, the Ninth Circuit's **[****6]** rule could seriously interfere with the Government's interest in securing guilty pleas by disrupting ongoing investigations and exposing prospective witnesses to serious intimidation and harm, thereby forcing the Government to modify its current practice, devote substantially more resources to preplea trial preparation, or abandon its heavy reliance on plea bargaining. Due process cannot demand so radical a change in order to achieve so comparatively small a constitutional benefit. Pp. 4-9.

3. Although the "fast track" plea agreement requires a defendant to waive her right to affirmative defense information, the Court does not believe, for most of the foregoing reasons, that the Constitution requires provision of this information to the defendant prior to plea bargaining. Pp. 9-10.

241 F.3d 1157, reversed.

Counsel: Theodore B. Olson argued the cause for petitioner.

Steven F. Hubachek argued the cause for respondent.

Judges: BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment.

Opinion by: BREYER

Opinion

[2453]** **[***592]** **[*625]** JUSTICE BREYER delivered the opinion of the Court.

[1A]In this case we primarily consider whether the *Fifth* and *Sixth Amendments* require **[****7]** federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose

"impeachment information relating to any informants or other witnesses." App. to Pet. for Cert. 46a. We hold that the Constitution does not require that disclosure.

I

After immigration agents found 30 kilograms of marijuana in Angela Ruiz's luggage, federal prosecutors offered her what is known in the Southern District of California as a "fast track" plea bargain. That bargain -- standard in that district -- asks a defendant to waive indictment, trial, and an appeal. In return, the Government agrees to recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence. In Ruiz's case, a two- level departure downward would have shortened the ordinary Guidelines-specified 18-to-24-month sentencing range by 6 months, to 12-to-18 months. *241 F.3d 1157, 1161 (2001)*.

The prosecutors' proposed plea agreement contains a set of detailed terms. Among other things, it specifies that "any [known] information establishing the factual innocence of **[***593]** the defendant" "has been turned over to the defendant," **[****8]** and it acknowledges the Government's "continuing duty to provide such information." App. to Pet. for Cert. 45a-46a. At the same time it requires that the defendant "waive the right" to receive "impeachment information relating to any informants or other witnesses" as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. *Id.*, at 46a. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. And despite **[*626]** the absence of any agreement, Ruiz ultimately pleaded guilty.

At sentencing, Ruiz asked the judge to grant her the same two-level downward departure that the Government would have recommended had she accepted the "fast track" agreement. The Government opposed her request, and the District Court denied it, imposing a standard Guideline sentence instead. .

Relying on *18 U.S.C. § 3742*, see *infra*, at 4-6, Ruiz appealed her sentence to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit vacated the District Court's sentencing **[****9]** determination. The Ninth Circuit pointed out that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial. . It decided that this obligation entitles defendants to receive that same information before they enter into a plea agreement. *Id., at 1164*. The Ninth Circuit also decided that the Constitution prohibits defendants from waiving their right to that information. *Id., at 1165-1166*. And it held that the prosecutors' standard "fast track" plea agreement was unlawful because it insisted upon that waiver. *Id., at 1167*. The Ninth Circuit remanded the case so that the District Court could decide any related factual disputes **[**2454]** and determine an appropriate remedy. *Id., at 1169*.

The Government sought certiorari. It stressed what it considered serious adverse practical implications of the Ninth Circuit's constitutional holding. And it added that the holding is unique among courts of appeals. Pet. for Cert. 8. We granted the Government's petition. *151 L. Ed. 2d 689, 122 S. Ct. 803 (1992)*.

II

[2]At the outset, we note that a question of statutory **[****10]** jurisdiction potentially blocks our consideration of the Ninth Circuit's constitutional holding. The relevant statute says that a

[*627] "defendant may file a notice of appeal . . . for review . . . if the sentence

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

"(3) is greater than [the Guideline] specified [sentence] . . .; or

"(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." *18 U.S.C. § 3742*.

[*594]** Every Circuit has held that this statute does *not* authorize a defendant to appeal a sentence where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart. See, *e.g.*, *United States v. Conway, 81 F.3d 15, 16 (CA1 1996)*; *United States v. Lawal, 17 F.3d 560, 562 (CA2 1994)*; *United States v. Powell, 269 F.3d 175, 179 (CA3 2001)*; *United States v. Ivester, 75 F.3d 182, 183 (CA4 1996)*; *United States v. Cooper, 274 F.3d 230, 248 (CA5 2001)*; *United States v. Scott, 74 F.3d 107, 112 (CA6 1996)*; **[****11]** *United States v. Byrd, 263 F.3d 705, 707 (CA7 2001)*; *United States v. Mora-Higuera, 269 F.3d 905, 913 (CA8 2001)*; *United States v. Garcia-Garcia, 927 F.2d 489, 490 (CA9 1991)*; *United States v. Coddington, 118 F.3d 1439, 1441 (CA10 1997)*; *United States v. Calderon, 127 F.3d 1314, 1342 (CA11 1997)*; *In re Sealed Case No. 98-3116, 339 U.S. App. D.C. 275, 199 F.3d 488, 491-492 (CADC 1999)*.

The statute does, however, authorize an appeal from a sentence that "was imposed in violation of law." Two quite different theories might support appellate jurisdiction pursuant to that provision. First, as the Court of Appeals recognized, if the District Court's sentencing decision rested on a mistaken belief that it lacked the legal power to grant a departure, the quoted provision would apply. *241 F.3d at 1162, n. 2*. Our reading of the record, however, convinces us that the District Judge correctly understood that he had such discretion but decided not to exercise it. We therefore reject **[*628]** that basis for finding appellate jurisdiction. Second, if respondent's constitutional claim, discussed **[****12]** in Part III, *infra*, were sound, her sentence would have been "imposed in violation of law." Thus, if she had prevailed on the merits, her victory would also have confirmed the jurisdiction of the Court of Appeals.

[3]Although we ultimately conclude that respondent's sentence was not "imposed in violation of law" and therefore that *§ 3742(a)(1)* does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States v. Mine Workers, 330 U.S. 258, 291, 91 L. Ed. 884, 67 S. Ct. 677 (1947)*.In order to make that determination, it was necessary for the Ninth Circuit to address the merits. We therefore hold that appellate jurisdiction was proper.

III

[4]The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material -- a right that the Constitution provides as part of its basic "fair trial" guarantee. See U.S. Const., Amdts. 5, 6. See also *Brady v. [**2455] Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*(Due process requires prosecutors to "avoid . . . an unfair trial" by making available "upon request" evidence "favorable **[****13]** to an accused . . . where the evidence is material either to guilt or to punishment"); *United States v. Agurs, 427 U.S. 97, 112-113, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)* (defense request unnecessary); *Kyles v. Whitley, 514 U.S. 419, 435, 131 L. Ed.*

2d 490, 115 S. Ct. 1555 (1995) (exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)* (exculpatory evidence includes **[***595]** "evidence affecting" witness "credibility," where the witness'"reliability" is likely "determinative of guilt or innocence").

[5][6]When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional **[*629]** guarantees. *Boykin v. Alabama, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)* (pleading guilty implicates the *Fifth Amendment* privilege against self-incrimination, the *Sixth Amendment* right to confront one's accusers, and the *Sixth Amendment* right to trial by jury). Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowingly, intelligently, **[****14]** [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970)*; see also *Boykin, supra, at 242*.

[1B]In this case, the Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive his right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial. We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not.

[1C][7A][8]First, impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ("knowing," "intelligent," and "sufficient[ly] aware"). Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant. *Weatherford v. Bursey, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977)* **[****15]** ("There is no general constitutional right to discovery in a criminal case"). And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his **[*630]** right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide. Cf. *Colorado v. Spring, 479 U.S. 564, 573-575, 93 L. Ed. 2d 954, 107 S. Ct. 851 at 851 (1987)* (*Fifth Amendment* privilege against self-incrimination waived when defendant received standard *Miranda* warnings regarding the nature of the right but not told the specific interrogation questions to be asked).

[1D][7B]It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, **[****16]** help a particular defendant. The degree of help that impeachment information can **[***596]** provide will depend upon the defendant's own independent **[**2456]**

knowledge of the prosecution's potential case -- a matter that the Constitution does not require prosecutors to disclose.

[1E]Second, we have found no legal authority embodied either in this Court's past cases or in cases from other circuits that provide significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See *Brady v. United States, 397 U.S. at 757* (defendant "misapprehended the quality of the State's case"); *ibid.* (defendant misapprehended "the likely penalties"); *ibid.* (defendant failed to "anticipate a change in the law regarding" relevant "punishments"); *McMann v. Richardson, 397 U.S. 759, 770, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970)* (counsel "misjudged **[****17]** the admissibility" of a "confession"); *United States v. Broce, 488 U.S. 563, 573, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989)* (counsel failed to point out a potential defense); *Tollett v. Henderson, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 93 S. Ct. 1602 **[*631]** (1973)* (counsel failed to find a potential constitutional infirmity in grand jury proceedings). It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.

Third, due process considerations, the very considerations that led this Court to find trial-related rights to exculpatory and impeachment information in *Brady* and *Giglio*, argue against the existence of the "right" that the Ninth Circuit found here. This Court has said that due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests. *Ake v. Oklahoma, 470 U.S. 68, 77, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985)*. Here, as we have just pointed out, the added value of the Ninth Circuit's "right" to a **[****18]** defendant is often limited, for it depends upon the defendant's independent awareness of the details of the Government's case. And in any case, as the proposed plea agreement at issue here specifies, the Government will provide "any information establishing the factual innocence of the defendant" regardless. That fact, along with other guilty-plea safeguards, see *Fed. Rule Crim. Proc. 11*, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty. Cf. *McCarthy v. United States, 394 U.S. 459, 465-467, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969)* (discussing *Rule 11*'s role in protecting a defendant's constitutional rights).

At the same time, a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration **[***597]** of justice. The Ninth Circuit's rule risks premature disclosure of Government witness information, which, the Government tells us, could "disrupt ongoing **[*632]** investigations" and **[****19]** expose prospective witnesses to serious harm. Brief for United States 25. Cf. Amendments to Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 92 (1975) (statement of John C. Keney, Acting Assistant Attorney General, Criminal Div., Dept. of Justice) (opposing mandated witness disclosure three days before trial because of documented instances of witness intimidation). And the careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both

[2457]** Congress and the Federal Rules Committees that such concerns are valid. See, *e.g.*, *18 U.S.C. § 3432* (witness list disclosure required in capital cases three days before trial with exceptions); *§ 3500* (Government witness statements ordinarily subject to discovery only after testimony given); *Fed. Rule Crim. Proc. 16(a)(2)* (embodies limitations of *18 U.S.C. § 3500*). Compare 156 F.R.D. 327, 461-462 (1994) (congressional proposal to significantly broaden *§ 3500*) with 167 F.R.D. 221, 223, n. (judicial conference opposing **[****20]** congressional proposal).

Consequently, the Ninth Circuit's requirement could force the Government to abandon its "general practice" of not "disclosing to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses." Brief for United States 25. It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number -- 90% or more -- of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.

[*633] These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.

[9]In addition, we note that the "fast track" plea agreement requires a defendant to waive her **[****21]** right to receive information the Government has regarding any "affirmative defense" she raises at trial. Pet. for Cert. 46a. We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining -- for most (though not all) of the reasons previously stated. That is to say, in the context of this agreement, the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea; the value in terms of the defendant's added awareness of relevant circumstances is ordinarily limited; yet the added burden imposed upon the Government by requiring its provision well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering **[***598]** with the administration of the plea bargaining process.

For these reasons the decision of the Court of Appeals for the Ninth Circuit is

Reversed.

Concur

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Constitution does not require the Government to disclose either affirmative defense information or impeachment information relating to informants or other witnesses **[****22]** before entering into a binding plea agreement with a criminal defendant. The Court, however, suggests that the constitutional analysis turns in some part on the "degree of help" such information would provide to the defendant at the plea stage, see *ante*, at 6-7, 8, a distinction that is neither necessary nor accurate. To the extent that the Court is implicitly drawing a line based on a **[*634]** flawed characterization about the usefulness of certain types of information, I can only concur in the judgment. The principle supporting

Brady was "avoidance of an unfair trial to the accused." *Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. That concern is not implicated at the plea stage regardless.

References

21A Am Jur 2d, Criminal Law 977, 1270

L Ed Digest, Constitutional Law 840.2; Criminal Law 59

L Ed Index, Guilty Plea; Plea Bargaining

Annotation References:

Effect of *Rule 11 of Federal Rules of Criminal Procedure* on validity of federal criminal defendants' guilty pleas and plea agreements-- Supreme Court cases. *133 L Ed 2d 919*.

Supreme Court's views as to **[****23]** what constitutes valid waiver of accused's federal constitutional right to counsel. *101 L Ed 2d 1017*.

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence favorable to accused-- Supreme Court cases. *87 L Ed 2d 802*.

Supreme Court's views as to plea bargaining and its effects. *50 L Ed 2d 876*.

Validity of guilty pleas-- Supreme Court cases. *25 L Ed 2d 1025*.

Constitutional duty of federal prosecutor to disclose Brady evidence favorable to accused. *158 ALR Fed 401*.

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