63 S.Ct. 236
Supreme Court of the United States

ADAMS, Warden of City Prison of Manhattan, et al.
v.
UNITED STATES ex rel. McCANN.

No. 79.
|
Argued Nov. 17, 18, 1942.
|
Decided Dec. 21, 1942.
|
As Amended on Denial of Rehearing Jan. 18, 1943.

Synopsis
On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Habeas corpus proceeding by the United States on the relation of Gene McCann against William A. Adams, Warden of the City Prison of Manhattan and another To review an order of the Circuit Court of Appeals, 126 F.2d 774, discharging the relator, William A. Adams, Warden, and another bring certiorari.

Order set aside and cause remanded.

Mr. Justice DOUGLAS, Mr. Justice MURPHY, and Mr. Justice BLACK, dissenting.

West Headnotes (19)

[1] **Criminal Law** Felonies and misdemeanors
Under the Federal Criminal Code, all offenses punishable by death or imprisonment for more than a year are felonies but the word "felony" is a verbal survival which has been emptied of its historic contents. Cr.Code § 335, 18 U.S.C.A. § 1.

12 Cases that cite this headnote

[2] **Federal Courts** Writs in general
District Courts of the United States may issue all writs necessary or appropriate in aid of their respective jurisdictions, agreeable to the usages and principles of law. 28 U.S.C.A. § 1651.

21 Cases that cite this headnote

[3] **Habeas Corpus** Federal Courts
A Circuit Court of Appeals cannot issue writ of habeas corpus as an independent and original proceeding challenging in toto the validity of a judgment in another court, but the Circuit Court of Appeals has power to issue the writ of habeas corpus when it may be necessary for the exercise of a jurisdiction already existing. 28 U.S.C.A. § 1651.

4 Cases that cite this headnote

[4] **Habeas Corpus** Federal Courts
A Circuit Court of Appeals is not limited to issuing a writ of habeas corpus only when it finds that it is "necessary" in the sense that the court could not otherwise physically discharge its appellate duty.

56 Cases that cite this headnote

[5] **Federal Courts** Writs in general
Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.

48 Cases that cite this headnote

[6] **Habeas Corpus** Federal Courts
Where an appeal from conviction for using mails to defraud had been filed in the Circuit Court of Appeals, such court had "jurisdiction", in the

sense that it had power, to issue writ of habeas corpus as an incident to the appeal then pending before it. 18 U.S.C.A. § 1341; 28 U.S.C.A. § 1651.

18 Cases that cite this headnote

[7] **Habeas Corpus** Habeas corpus as substitute remedy

The writ of "habeas corpus" should not be used as a substitute for an appeal, and mere convenience cannot justify the substitution.

11 Cases that cite this headnote

[8] **Habeas Corpus** Federal Courts

Where, because of special circumstances, use of writ of habeas corpus as an aid to an appeal over which circuit court of appeals has jurisdiction may fairly be said to be reasonably necessary in the interests of justice, the writ is available to circuit courts of appeals.

20 Cases that cite this headnote

[9] **Habeas Corpus** Particular issues and problems

Where relator, who had been without money or counsel, had appealed urging a number of grounds for reversal of conviction for violation of mail fraud statute, and, being unable to procure bail, had been in custody since sentence without opportunity to prepare bill of exceptions, action of Circuit Court of Appeals in issuing writ of habeas corpus to review question of jurisdiction of District Court was not improper notwithstanding a bill of exceptions might have been prepared confined to a single point raised by the writ of habeas corpus. 18 U.S.C.A. § 1341; 28 U.S.C.A. § 1651.

36 Cases that cite this headnote

[10] **Jury** Right to waive jury in general

An accused in the exercise of a free and intelligent choice and with the considered approval of the court may waive trial by jury.

140 Cases that cite this headnote

[11] **Criminal Law** Right of Defendant to Counsel

Judges Nature and effect in general

To render criminal justice, the court must be uncoerced and it must have no interest other than the pursuit of justice, and the accused must have ample opportunity to meet the case of the prosecution. U.S.C.A. Const.Amend. 6.

88 Cases that cite this headnote

[12] **Fraud** Use of Mails or Telecommunications

Guilt under the mail fraud statute depends upon answers to questions of law raised by application of the statute to the particular facts. Cr.Code, § 215, 18 U.S.C.A. § 338.

4 Cases that cite this headnote

[13] **Jury** Form and sufficiency

Whether there is an intelligent, competent, self-protecting waiver of jury trial by accused depends upon the circumstances of each case.

266 Cases that cite this headnote

[14] **Jury** Right to waive jury in general

An accused should be permitted to forego the privileges of trial by jury when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

46 Cases that cite this headnote

[15] **Criminal Law** Capacity and requisites in general

An accused may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with open eyes. U.S.C.A.Const. Amend. 6.

1033 Cases that cite this headnote

[16] **Jury** Right to waive jury in general

An accused, who is not himself an attorney and who is without counsel, has the power at his own instance to surrender his right to jury trial where he is capable of weighing his own best interests. U.S.C.A. Const.Amend. 6.

18 Cases that cite this headnote

[17] **Habeas Corpus** Particular issues and problems

The burden of showing essential unfairness resulting from waiver of jury trial must be sustained by him who claims such injustice and seeks to have the result set aside, and it must be sustained not as a matter of speculation but as a demonstrable reality.

149 Cases that cite this headnote

[18] **Habeas Corpus** Particular issues and problems

Where record disclosed that defendant, charged with violating the Mail Fraud statute, waived right to assistance of counsel and demanded trial by judge without jury, and that the defendant reasonably deemed himself the best advisor for his own needs, action by the Circuit Court of Appeals in discharging defendant under a writ of habeas corpus on theory that a defendant cannot waive jury trial except on advice of counsel was improper. 18 U.S.C.A. § 1341; 28 U.S.C.A. § 1651; U.S.C.A. Const.Amend. 6.

127 Cases that cite this headnote

[19] **Criminal Law** Capacity and requisites in general

A defendant may waive the constitutional right to have counsel in his defense, provided it is waived intelligently, understandingly, and in a competent manner. U.S.C.A. Const.Amend. 6.

385 Cases that cite this headnote

Attorneys and Law Firms

****237** Mr. Chas. Fahy, Sol. Gen., for petitioners.

***269** Mr. Robert G. Page, of New York City, for respondent.

Opinion

***270** Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is a review of an order by the Circuit Court of Appeals for the Second Circuit discharging the relator McCann from custody. We accept as facts, as did the court below, those set forth in the untraversed return to the writ of habeas corpus in that court.

McCann was indicted on six counts for using the mails to defraud, in violation of Section 215 of the Criminal Code, 18 U.S.C. s 338, 18 U.S.C.A. s 338. From the time of his arraignment on February 18, 1941, to the prosecution of his appeal in the court below, McCann insisted on conducting his case without the assistance of a lawyer. When called upon to plead to the indictment, he refused to do so; a plea of not guilty was entered on his behalf. The district court at that time advised McCann to retain counsel. He refused, however, 'stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar ****238** with its details that no attorney would be able to give him as competent representation as he would be able to give himself'.

When the case came on for trial on July 7, 1941, McCann repeated, in reply to the judge's inquiry whether he had counsel, that he wished to represent himself. In response to the court's further inquiry whether he was admitted to the bar, McCann 'replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be.'[1] McCann 'then moved to have ***271** the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney', after which McCann submitted the following over his signature: 'I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.' The Assistant United States Attorney consented, and the judge

(one of long trial experience and tested solicitude for the civilized administration of criminal justice) entered an order approving this 'waiver'.

The trial then got under way. It lasted for two weeks and a half, and throughout the entire proceedings McCann represented himself. He was convicted on July 22, 1941, and was sentenced to imprisonment for six years and to pay a fine of $600. He took an appeal, and the trial judge fixed bail at $10,000. Being unable to procure this sum, he remained in custody. Then followed applications to the Circuit Court of Appeals, likewise pressed by McCann himself, for extending the time for filing a bill of exceptions. In these proceedings both the trial and appellate courts again suggested to McCann the advisability of being represented by counsel. After having personally made these numerous applications, McCann finally secured the assistance of an attorney. The latter applied to the Circuit Court of Appeals for reduction of bail. It was so reduced. But at the same time the court suggested that McCann take out a writ of habeas corpus, returnable to the court, to raise the question whether, in the circumstances of the case, 'the judge had jurisdiction to try him'.

[1] As is pointed out in the opinion of the Circuit Court of Appeals (126 F.2d 774, 775), 'At no time did he (McCann) indicate that ***272** he wished a jury or that he repented of his consent—either while the cause was in the district court or in this court—until the attorney, who now represents him, in March, 1942, raised the point' at the court's invitation. The 'point' thus projected into the case by the Circuit Court of Appeals was presented, in its own words, 'in the barest possible form; Has an accused, who is without counsel, the power at his own instance to surrender his right of trial by jury when indicted for felony?'[2] The Circuit Court of Appeals, with one judge dissenting, answered this question in the negative. It held that no person accused of a felony—who is himself not a lawyer—can waive trial by a jury, no matter how capable he is of making an intelligent, informed choice and how strenuously he insists upon such a choice, unless he does so upon the advice of an attorney. 2 Cir., 126 F.2d 774. The obvious importance of this question to the administration of criminal justice in the federal courts led us to bring the case here. 316 U.S. 655, 62 S.Ct. 1048, 86 L.Ed. 1735.

****239** **[2]** **[3]** A jurisdictional obstacle to a consideration of this issue is pressed before us. It is urged that the Circuit Court of Appeals had no jurisdiction to issue the writ of habeas corpus in this case. The discussion of this question took an extended range in the arguments at the bar, but in the circumstances of this case the matter lies within a narrow compass. Uninterruptedly from the first Judiciary Act (Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81), to the present day (Section 262 of the Judicial Code, 28 U.S.C. s 377, 28 U.S.C.A. s 377), the courts of the United States have had powers of an auxiliary nature 'to issue all writs not specifically provided for by statute, which may be necessary for the ***273** exercise of their respective jurisdictions, and agreeable to the usages and principles of law'. In Whitney v. Dick, 202 U.S. 132, 26 S.Ct. 584, 50 L.Ed. 963, this Court held that where no proceeding of an appellate character is pending in a circuit court of appeals, the authority to issue auxiliary writs does not come into operation. A circuit court of appeals cannot issue the writ of habeas corpus as 'an independent and original proceeding challenging in toto the validity of a judgment rendered in another court'. But the Court also recognized that there was power to issue the writ 'where it may be necessary for the exercise of a jurisdiction already existing'. 202 U.S. at pages 136, 137, 26 S.Ct. at page 586, 50 L.Ed. 963. In the case at bar a proceeding of an appellate character was pending in the Circuit Court of Appeals, for McCann had already filed an appeal from the judgment of conviction. There was, therefore, 'a jurisdiction already existing' in the Circuit Court of Appeals. But could the issuance of the writ be deemed 'necessary for the exercise' of that jurisdiction?

[4] **[5]** **[6]** Procedural instruments are means for achieving the rational ends of law. A circuit court of appeals is not limited to issuing a writ of habeas corpus only when it finds that it is 'necessary' in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. Undoubtedly therefore, the Circuit Court of Appeals had 'jurisdiction', in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it.

***274** **[7]** **[8]** Of course the writ of habeas corpus should not do service for an appeal. Glasgow v. Moyer, 225 U.S. 420, 428, 32 S.Ct. 753, 755, 56 L.Ed. 1147; Matter of Gregory, 219 U.S. 210, 213, 31 S.Ct. 143, 55 L.Ed. 184. This

rule must be strictly observed if orderly appellate procedure is to be maintained. Mere convenience cannot justify use of the writ as a substitute for an appeal. But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of habeas corpus is available to a circuit court of appeals.

[9] The circumstances that moved the court below to the exercise of its jurisdiction were the peculiar difficulties involved in preparing a bill of exceptions. The stenographic minutes had never been typed. The relator claimed that he was without funds. Since he was unable to raise the bail fixed by the trial judge, he had been in custody since sentence and therefore had no opportunity to prepare a bill of exceptions. The court doubted 'whether any (bill) can ever be made up on which the appeal can be heard. * * * In the particular circumstances of the case at bar, it seems to us that the writ is 'necessary to the complete exercise' of our appellate jurisdiction because * * * there is a danger that it cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered'.

The court below recognized, however, that a bill of exceptions might be prepared which would be confined to the single point raised by the writ of habeas corpus. This is the basis for the contention that the ****240** writ of habeas corpus in this case performs the function of an appeal. But inasmuch as McCann was urging a number of grounds for the reversal of his conviction, including the sufficiency of the evidence, the Circuit Court of Appeals was justified ***275** in concluding that it would not be fair to make him stake his whole appeal on the single point raised by this writ. We cannot say that the court was unreasonable in the view it took of the situation with which it was presented and with which it was more familiar than the printed record alone can reveal. The writ of habeas corpus was not a substitute for the pending appeal, and was therefore not improvidently entertained by the court below.

[10] This brings us to the merits. They are controlled in principle by Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer. In taking a contrary view, the court below appears to have been largely influenced by the radiations of this Court's opinion in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680. But Patton v. United States, supra, and Johnson v. Zerbst, supra, were left wholly unimpaired by the ruling in the Glasser case.

[11] Certain safeguards are essential to criminal justice. The court must be uncoerced, Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543, and it must have no interest other than the pursuit of justice, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243. The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with crime the assistance of counsel for his defense, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461. Such assistance 'in the particular situation' of 'ignorant defendants ***276** in a capital case' led to recognition that 'the benefit of counsel was essential to the substance of a hearing', as guaranteed by the Due Process Clause of the Fourteenth Amendment, in criminal prosecutions in the state courts. Palko v. Connecticut, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 153, 82 L.Ed. 288. Compare Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, and Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article III, Section 2, Clause 3; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived 'in many cases, of the benefits of Trial by Jury'. But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property'.

[12] It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings

of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. It is true, of course, that guilt under Section 215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the ***277** statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no ****241** less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice. The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

[13] **[14]** We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment ***278** of the trial court. Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263.[3] And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case. The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

But we are asked here to hold that an accused person cannot waive trial by jury, no matter how freely and understandingly he surrenders that right, unless he acts on a lawyer's advice. In other words, although a shrewd and experienced layman may, for his own sufficient reasons, conduct his own defense if he prefers to do so, nevertheless if he does do so the Constitution requires that he must defend himself before a jury and not before a judge. But we find nothing in the Constitution, or in the great historic events which gave rise to it, or the history to which it has given rise, to justify such interpolation into the Constitution ***279** and such restriction upon the rational administration of criminal justice.

[15] The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation ****242** and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. Johnson v. Zerbst, 304 U.S. 458, 468, 469, 58 S.Ct. 1019, 1024, 1025, 82 L.Ed. 1461.

[16] Referring to jury trials, Mr. Justice Cardozo, speaking for the Court, had occasion to say, ‘Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.’ Palko v. Connecticut, 302 U.S. at page 325, 58 S.Ct. at page 152, 82 L.Ed. 288. Putting this thought in more generalized form, the procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters.

To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience. Were we so to hold, we would impliedly condemn the administration of criminal justice in states deemed otherwise enlightened merely ***280** because in their courts the vast majority of criminal cases are tried before a judge without a jury. To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

Underlying such dogmatism is distrust of the ability of courts to accommodate judgment to the varying circumstances of individual cases. But this is to express want of faith in the very tribunals which are charged with enforcement of the Constitution. 'Universal distrust', Mr. Justice Holmes admonished us, 'creates universal incompetence.' Graham v. United States, 231 U.S. 474, 480, 34 S.Ct. 148, 151, 58 L.Ed. 319. When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards (when such surrenders are as jealously guarded as they are by our rulings in Patton v. United States, supra, and Johnson v. Zerbst, supra), and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense before a judge rather than a jury unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution. For it is neither obnoxious to humane standards for the administration of justice as these have been written into the Constitution, nor violative of the rights of any person accused of crime who is capable of weighing his own best interest, to permit him to conduct his own defense in a trial before a judge without a jury, subject as such trial is to public scrutiny and amenable as it is to the corrective oversight of an appellate tribunal and ultimately of the Supreme Court of the Nation.

***281** **[17]** **[18]** Once we reject such a doctrinaire view of criminal justice and of the Constitution, there is an end to this case. The Patton decision left no room for doubt that a determination of guilt by a court after waiver of jury trial could not be set aside and a new trial ordered except upon a plain showing that such waiver was not freely and intelligently made. If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. Simply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it. And if the record before us does not show an intelligent and competent waiver of the right to the assistance of counsel by a defendant who demanded again and again that the judge try him, and who in his persistence of such a choice knew what he was about, it would be difficult ****243** to conceive of a set of circumstances in which there was such a free choice by a self-determining individual.

The order of the Circuit Court of Appeals must therefore be set aside and the cause remanded to that court for such further proceedings, not inconsistent with this opinion, as may be appropriate.

So ordered.

Order set aside.

Mr. Justice DOUGLAS, dissenting.

The Patton case, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of only eleven. In view of the strictness of the constitutional mandates I am by no means convinced that it follows that an entire jury may be waived. But assuming ***282** arguendo that it may be, I think the respondent should have had the benefit of legal advice before his waiver of a jury trial was accepted by the District Court. For I do not believe that we can safely assume that in absence of legal advice a waiver by a layman of his constitutional right to a jury trial was intelligent and competent in such a case as this.

Respondent was indicted under the mail fraud statute. 35 Stat. 1130, 18 U.S.C. s 338, 18 U.S.C.A. s 338. It subjects to fine or imprisonment one who 'having devised or intending to devise any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office * * * or other letter box of the United States'. It would

be unlikely that a layman without the benefit of legal advice would understand the limited nature of the defenses available under that statute or the scope of the ultimate issues on which the question of guilt usually turns. Without that understanding I do not see how an intelligent choice between trial by judge or trial by jury could be made.

The broad sweep of the statute has not been restricted by judicial construction. What might appear to a layman as a complete defense has commonly been denied by the courts in keeping with the policy of Congress to draw tight the net around those who tax ingenuity in devising fraudulent schemes. Thus an indictment will be upheld or a conviction sustained though the defendant did not intend to use the mails at the time the scheme was designed,[1] though no one was defrauded or suffered any loss,[2] though ***283** the defendant did not intend to receive[3] or did not receive[4] any benefit from the scheme, though the defendant actually believed that his plan would in the end benefit the persons solicited,[5] though the means were ineffective for carrying out the scheme,[6] and perhaps, even though the mails were used not for solicitation but only in collection of checks received pursuant to the plan.[7] In other words, the defenses in law are few and far between. As a practical matter, if the mails were employed at any stage, the question of guilt turns on whether the defendant had a fraudulent intent. That is the significant fact. Durland v. United States, 161 U.S. 306, 313, 16 S.Ct. 508, 511, 40 L.Ed. 709.

I think a layman normally would need legal advice to know that much. And it seems to me unlikely that he would be capable of appraising his chances as between judge and jury without such advice. Without it he might well conclude that he had adequate defenses on which a judge could better pass than a jury. With such advice he might well pause to entrust the question ****244** of his intent to a particular judge, rather than to a jury of his peers drawn from the community where most of the transactions took place and instructed to acquit if they had a reasonable doubt. On the other hand if he had a full understanding of the issues, he might conceivably deem it a matter of large importance that he be tried by the judge rather than a jury. The point is that we should not leave to sheer speculation the question whether his waiver of a jury trial ***284** was intelligent and competent. Yet on this record we can only speculate, since all we know is that respondent professed to have 'studied law' and that he lost a civil suit which he had prosecuted pro se. McCann v. New York Stock Exchange, 2 Cir., 107 F.2d 908. Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is 'too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680. Moreover, as Judge Learned Hand stated in the court below, (126 F.2d 774, 776), the answer to the question whether the waiver was intelligent should hardly be made to depend on 'the outcome of a preliminary inquiry as to the competency' of the particular layman. If this constitutional right is to be jealously protected, there should be a reliable objective standard by which the trial court satisfies itself that the layman who waives trial by jury in a case like this has a full understanding of the consequences. Dillingham v. United States, 5 Cir., 76 F.2d 36, 39. At least where the trial judge fails to inform him the only safe and practical alternative in a case like the present one is to require the appointment of counsel. Only then should we say that the trial judge has exercised that 'sound and advised discretion' which the Patton case required even before a waiver of one juror was accepted. 281 U.S. page 312, 50 S.Ct. page 263, 74 L.Ed. 854, 70 A.L.R. 263.

The question for us is not whether a judge should be trusted as much as a jury to determine the question of guilt. We are dealing here with one of the great historic civil liberties—the right to trial by jury. Article III, Sec. 2 and the Sixth Amendment which grant that right contain no exception, though a few have been implied. See Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3. We should not permit the exceptions to be enlarged by waiver unless it is plain and beyond doubt that the waiver was freely and intelligently ***285** made. The Patton case surrounds such a waiver with numerous safeguards even where, as in that case, the waiver was made by one who was represented by counsel. We should be even more strict and exacting in case the waiver is made by a layman acting on his own. Then the reasons for indulging every reasonable presumption against a waiver of 'fundamental constitutional rights' (Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461) become even more compelling.

The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman's waiver of a jury trial. What the Constitution requires is that the 'trial' of a crime 'shall be by jury'. Art. III, Sec. 2. And it specifies the machinery which shall be employed if a plea of not guilty is entered and the prosecution is put to its proof. Moreover, we are not dealing here with absolutes. Normally

admission of guilt could properly be accepted without more since ordinarily a defendant would know whether or not he was guilty of the crime charged. But there might conceivably be an exception, where, for example, the issue of guilt turned not only on the admitted facts but upon the construction of a statute. Each case of necessity turns on its own facts. Nor is it a sufficient answer to say that if legal advice is required for a waiver of trial by jury, then by the same token a layman representing himself could not exercise his own judgment concerning any matter during the trial with respect to which a lawyer might have superior knowledge. Whether the waiver of counsel for purposes of the trial meets the exacting standards of Johnson v. Zerbst is one thing. Whether that dilution of constitutional rights may be compounded by a waiver of trial by jury is quite another. It is the cumulative effect of the several waivers of constitutional rights in a given case which must be gauged. Nor can I accede to the suggestion of ***286** the prosecution that a layman's right to waive trial by jury is such an important part of his high privilege to manage his own case that its exercise ****245** should be freely accorded. That argument is faintly reminiscent of those notions of freedom of choice and liberty of contract which long denied protection to the individual in other fields.

Mr. Justice BLACK and Mr. Justice MURPHY join in this dissent.

Mr. Justice MURPHY.

I join my brother DOUGLAS, but desire to add the following views in dissent.

The Constitution provides: 'The Trial of all Crimes, * * * shall be by Jury; * * *.' (Article III, s 2), and: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *' (Amendment VI). Because of these provisions, the fundamental nature of jury trial,[1] and its beneficial effects as a means of leavening justice with the spirit of the times,[2] I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts. Whatever may be the logic of the matter, there is a considerable practical difference between trial by eleven jurors, the situation in Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, and trial to the court, and practicality is a sturdy guide to the preservation of Constitutional guaranties.

But if it is assumed that jury trial, the prized product of the travail of the past, can be waived by an accused, ***287** there should be compliance with rigorous standards, adequately designed to insure that an accused fully understands his rights and intelligently appreciates the effects of his step, before a court should accept such a waiver. Among those requirements in the case of a layman defendant in a criminal proceeding where the punishment may be substantial, as in the instant case, should be the right to have the benefit of the advice of counsel on the desirability of waiver. Of course the capacity of individuals to appraise their interests varies, but such a uniform general rule will protect the rights of all much better than a rule depending upon the fluctuating factual variables of the individual case which are often difficult to evaluate on the basis of the cold record. In my opinion the Constitution requires this general rule as an absolute right if a jury is to be waived at all.

All Citations

317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435

Footnotes

1 McCann had brought suit in 1933 against the New York Stock Exchange, its officers and members, the Better Business Bureau of New York, and a large number of other persons, seeking thirty million dollars damages for conspiracy in restraint of trade. He represented himself in this extensive litigation, and personally brought appeals to the Circuit Court of Appeals and to this Court. See McCann v. New York Stock Exchange, 2 Cir., 80 F.2d 211; Id., 2 Cir., 107 F.2d 908; Id., 309 U.S. 684, 60 S.Ct. 807, 84 L.Ed. 1027.

2 Felony, it may not be irrelevant to note, is a verbal survival which has been emptied of its historic content. Under the federal Criminal Code all offenses punishable by death or imprisonment for more than a year are felonies. Section 335 of the Criminal Code, 18 U.S.C. s 541, 18 U.S.C.A. s 541.

3 The ruling of the Patton case, namely, that the provisions of the Constitution dealing with trial by jury in the federal courts were 'meant to confer a right upon the accused which he may forego at his election', 281 U.S. at page 298, 50 S.Ct. at page 258, 74 L.Ed. 854, 70 A.L.R. 263, was expressly recognized and acted upon by Congress in the Act of March 8, 1934, c. 49, 48 Stat. 399, 18 U.S.C.A. s 688, which empowered the Supreme Court to prescribe rules of practice and procedure with respect to 'proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States * * *.' (Italics added.) Compare H. Rep. No. 858, Sen. Rep. No. 257, 73d Cong., 2d Sess.

1 United States v. Young, 232 U.S. 155, 34 S.Ct. 303, 58 L.Ed. 548.

2 Cowl v. United States, 8 Cir., 35 F.2d 794; United States v. Rowe, 2 Cir., 56 F.2d 747.

3 Kellogg v. United States, 2 Cir., 126 F. 323.

4 Calnay v. United States, 9 Cir., 1 F.2d 926; Chew v. United States, 8 Cir., 9 F.2d 348.

5 Pandolfo v. United States, 7 Cir., 286 F. 8; Foshay v. United States, 8 Cir., 68 F.2d 205.

6 See Durland v. United States, 161 U.S. 306, 315, 16 S.Ct. 508, 511, 40 L.Ed. 709.

7 Tincher v. United States, 4 Cir., 11 F.2d 18; Bradford v. United States, 5 Cir., 129 F.2d 274.

But see Dyhre v. Hudspeth, 10 Cir., 106 F.2d 286; Stapp v. United States, 5 Cir., 120 F.2d 898.

1 Compare Glasser v. United States, 315 U.S. 60, 84, 85, 62 S.Ct. 457, 86 L.Ed. 680, and Jacob v. New York, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166.

2 This is admirably stated by Judge Learned Hand below, 126 F.2d at pages 775, 776.

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Dawkins v. Kirkpatrick, S.D.N.Y., January 27, 2016

124 S.Ct. 1256
Supreme Court of the United States

Delma BANKS, Jr., Petitioner,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No. 02–8286.
|
Argued Dec. 8, 2003.
|
Decided Feb. 24, 2004.

Synopsis

Background: Convicted capital murder defendant, 643 S.W.2d 129, petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Texas granted relief with respect to death sentence, but not with respect to underlying conviction. The United States Court of Appeals for the Fifth Circuit, 48 Fed.Appx. 104, reversed on death sentence issue. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:

[1] petitioner was entitled to present evidence in support of one *Brady* claim that had not been presented to state post-conviction court, and

[2] petitioner was entitled to certificate of appealability on question of whether he adequately raised second *Brady* claim.

Reversed and remanded.

Justice Thomas concurred in part and dissented in part, and filed opinion in which Justice Scalia joined.

West Headnotes (8)

[1] **Habeas Corpus** Exhaustion of State Remedies

Under pre-Antiterrorism and Effective Death Penalty Act (AEDPA) law, petitioner pursuing habeas corpus relief in federal court had to first exhaust remedies available in state courts. 28 U.S.C.(1994 Ed.) § 2254(b).

39 Cases that cite this headnote

[2] **Habeas Corpus** Coram nobis, post-conviction motion, or similar collateral proceedings

Habeas Corpus Cause and prejudice in general

Under pre-Antiterrorism and Effective Death Penalty Act (AEDPA) law, federal habeas petitioner could present evidence in support of his *Brady* claim, which had not been presented when claim was raised in state post-conviction proceeding, only upon showing of cause for such failure and prejudice resulting from such failure. 28 U.S.C.(1994 Ed.) § 2254(b).

108 Cases that cite this headnote

[3] **Criminal Law** Materiality and probable effect of information in general

Elements of *Brady* prosecutorial misconduct claim are: (1) evidence at issue must be favorable to accused, either because it is exculpatory or because it is impeaching; (2) evidence must have been suppressed by state, either willfully or inadvertently; and (3) prejudice must have ensued.

983 Cases that cite this headnote

[4] **Sentencing and Punishment** Other discovery and disclosure

Penalty phase witness's paid informant status qualified as evidence advantageous to capital murder defendant, for purpose of determining

whether state's concealment of that fact qualified as *Brady* violation.

28 Cases that cite this headnote

[5] **Habeas Corpus** Ignorance of law or fact; novelty and change in law

Under pre-Antiterrorism and Effective Death Penalty Act (AEDPA) law, state's suppression of evidence of witness's informant status constituted "cause" for federal habeas petitioner's failure to present such evidence in support of his *Brady* claim at state post-conviction proceeding, for purpose of determining whether he was entitled to present that evidence in support of same claim in federal court; petitioner had reasonably relied on prosecution's pre-trial promise to disclose all *Brady* material, and state had continued to deny that witness was informant at state post-conviction proceeding. 28 U.S.C.(1994 Ed.) § 2254(b).

278 Cases that cite this headnote

[6] **Criminal Law** Materiality and probable effect of information in general

Materiality standard for *Brady* claims is met when favorable evidence could reasonably be taken to put whole case in such different light as to undermine confidence in verdict.

259 Cases that cite this headnote

[7] **Habeas Corpus** Prejudice

Under pre-Antiterrorism and Effective Death Penalty Act (AEDPA) law, federal habeas petitioner suffered "prejudice" from state's continued suppression of evidence of trial witness's informant status at state post-conviction proceeding, for purpose of determining whether he was entitled to present that evidence in support of *Brady* claim in federal court; witness's testimony was key to state's claim of future dangerousness, in penalty phase of capital murder trial, and was not otherwise effectively impeached. 28 U.S.C.(1994 Ed.) § 2254(b).

197 Cases that cite this headnote

[8] **Habeas Corpus** Certificate of probable cause

Federal habeas petitioner, whose *Brady* claim was rejected by district court because he had not amended petition to claim withholding of exculpatory evidence discovered during proceeding, was entitled to certificate of appealability; under applicable pre-Antiterrorism and Effective Death Penalty Act (AEDPA) law, reasonable jurists could have disagreed as to applicability of civil rule treating issues tried by implied consent as if they had been raised in pleadings. Fed.Rules Civ.Proc.Rule 15(b), 28 U.S.C.A.; 28 U.S.C. (1994 Ed.) § 2254(b).

320 Cases that cite this headnote

****1257** ***668** *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 ****1258** residence several days earlier. On testing, the second gun proved to be the murder weapon. Prior to Banks's trial, the State advised defense counsel that, without necessity of motions, the State would provide Banks with all discovery to which he was entitled. Nevertheless, the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. At the trial's guilt phase, Cook testified, *inter alia,* that Banks admitted "kill[ing a] white boy." On cross-examination, Cook thrice denied talking to anyone about his testimony. In fact, Deputy Huff and prosecutors intensively coached Cook about his

testimony during at least one pretrial session. The prosecution allowed Cook's misstatements to stand uncorrected. After Banks's capital murder conviction, the penalty-phase jury found that Banks would probably commit criminal acts of violence that would constitute a continuing threat to society. One of the State's two penalty-phase witnesses, Robert Farr, testified that Banks had retrieved a gun from Dallas in order to commit robberies. According to Farr, Banks had said he would "take care of it" if trouble arose during those crimes. Two defense witnesses impeached Farr, but were, in turn, impeached. Banks testified, among other things, that, although he had traveled to Dallas to obtain a gun, he had no intent to participate in the robberies, which Farr alone planned to commit. In summation, the prosecution suggested that Banks had not traveled to Dallas only to supply Farr with a weapon. Stressing Farr's testimony that Banks said he would "take care" of trouble arising during the robberies, the prosecution urged the jury to find Farr credible. Farr's admission that he used narcotics, the prosecution ***669** suggested, indicated that he had been open and honest in every way. The State did not disclose that Farr was the paid informant who told Deputy Huff about the Dallas trip. The judge sentenced Banks to death.

Through Banks's direct appeal, the State continued to hold secret Farr's and Cook's links to the police. In a 1992 state-court postconviction motion, Banks alleged for the first time that the prosecution knowingly failed to turn over exculpatory evidence that would have revealed Farr as a police informant and Banks's arrest as a "set-up." Banks also alleged that during the trial's guilt phase, the State deliberately withheld information of a deal prosecutors made with Cook, which would have been critical to the jury's assessment of Cook's credibility. Banks asserted that the State's actions violated *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, which held that the prosecution's suppression of evidence requested by and favorable to an accused violates due process where the evidence is material to either guilt or punishment, irrespective of the prosecution's good or bad faith. The State denied Banks's allegations, and the state postconviction court rejected his claims.

In 1996, Banks filed the instant federal habeas petition, alleging, as relevant, that the State had withheld material exculpatory evidence revealing Farr to be a police informant and Banks' arrest as a "set-up." Banks further alleged that the State had concealed Cook's incentive to testify in a manner favorable to the prosecution. Banks attached affidavits from Farr and Cook to a February 1999 motion seeking discovery and an evidentiary hearing. Farr's declaration stated that he had agreed to help Deputy Huff with the murder investigation out of fear Huff would arrest him on drug charges; that Huff had paid him $200; and that Farr had "set [Banks] up" by convincing him to drive to Dallas to retrieve Banks's gun. Cook recalled that he had participated in practice ****1259** 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, ***670** concluding in this regard that Banks had not properly pleaded a *Brady* claim based on the September 1980 Cook interrogation transcript. The District Court adopted the Magistrate Judge's report and rejected Banks's argument that the Cook transcript claim be treated as if raised in the pleadings, under Federal Rule of Civil Procedure 15(b).

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

accord with the District Court, the Court of Appeals rejected Banks's assertion that, because his Cook *Brady* claim had been aired by implied consent, Rule 15(b) required it to be treated as if raised in the pleadings.

Held: The Fifth Circuit erred in dismissing Banks's Farr *Brady* claim and denying him a certificate of appealability on his Cook *Brady* claim. When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight. Pp. 1271–1281.

(a) Both of Banks's *Brady* claims arose under the regime in place prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). P. 1271.

(b) Banks's Farr *Brady* claim, as it trains on his death sentence, is not barred. All three elements of a *Brady* claim are satisfied as to the suppression of Farr's informant status and its bearing on the reliability of the jury's verdict regarding punishment. Because Banks has also demonstrated cause and prejudice, he is not precluded from gaining federal habeas relief by his failure to produce evidence in anterior state-court proceedings. Pp. 1271–1279.

****1260** (1) Pre–AEDPA habeas law required Banks to exhaust available state-court remedies in order to pursue federal-court relief. See, *e.g.,* ***671** *Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379. 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, 112 S.Ct. 1715, 118 L.Ed.2d 318. A *Brady* prosecutorial misconduct claim has three essential elements. *Strickler v. Greene,* 527 U.S. 263, 281–282, 119 S.Ct. 1936, 144 L.Ed.2d 286. Beyond debate, the first such element—that the evidence at issue be favorable to the accused as exculpatory or impeaching—is satisfied here. Farr's paid informant status plainly qualifies as evidence advantageous to Banks. Cause and prejudice in this case parallel the second and third of the three *Brady* components. Corresponding to the second *Brady* element—that the State suppressed the evidence at issue—a petitioner shows cause when the reason for the failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence. Coincident with the third *Brady* component—that prejudice ensued—prejudice within the compass of the "cause and prejudice" requirement exists when suppressed evidence is "material" for *Brady* purposes. *Ibid.* Thus, if Banks succeeds in demonstrating cause and prejudice, he will also succeed in establishing the essential elements of his Farr *Brady* claim. Pp. 1271–1272.

(2) Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim. As *Strickler* instructs, 527 U.S., at 289, 119 S.Ct. 1936, three inquiries underlie the "cause" determination: (1) whether the prosecution withheld exculpatory evidence; (2) whether the petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (3) whether the State confirmed the petitioner's reliance on that policy by asserting during the state habeas proceedings that the petitioner had already received everything known to the 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, 115 S.Ct. 1555, 131 L.Ed.2d 490. 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, 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 ***672** Banks's reliance on the prosecution's representation that it had disclosed all *Brady* material. In this regard, Banks's case is stronger than was the *Strickler* petitioner's: Each time Farr misrepresented his dealings with police, the prosecution allowed that testimony to stand uncorrected. Cf. *Giglio v. United States,* 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104. 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 ****1261** 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, 77 S.Ct. 623, 1 L.Ed.2d 639, which concerned the Government's obligation to reveal the identity of an informant it does not call as a witness, does not support the State's position. Pp. 1272–1276.

(3) The State's suppression of Farr's informant status is "material" for *Brady* purposes. The materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S., at 435, 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, belies the State's suggestion that Farr's testimony was adequately corroborated. The prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony. In contrast to *Strickler,* where the Court found "cause," 527 U.S., at 289, 119 S.Ct. 1936, but no "prejudice," *id.,* at 292–296, 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 ***673** testimony was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. Had jurors known of Farr's continuing interest in obtaining Deputy Huff's favor and his receipt of funds to set Banks up, they might well have distrusted Farr's testimony, and, insofar as it was uncorroborated, disregarded it. The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany informant testimony. Such testimony poses serious credibility questions. This Court, therefore, has long allowed defendants broad latitude to cross-examine informants and has counseled the use of careful instructions on submission of the credibility issue to the jury. See, *e.g.,* *On Lee v. United States,* 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270. 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. ****1262** Further, the prosecution turned to its advantage remaining impeachment evidence by suggesting that Farr's admission of drug use demonstrated his openness and honesty. Pp. 1276–1279.

(c) The lower courts wrongly denied Banks a certificate of appealability with regard to his *Brady* claim resting on the prosecution's suppression of the September 1980 Cook interrogation transcript. The Court of Appeals rejected Banks's contention that Rule 15(b) required the claim to be treated as having been raised in the pleadings because the transcript substantiating the claim had been aired at an evidentiary hearing before the Magistrate Judge. The Fifth Circuit apparently relied on the debatable view that Rule 15(b) is inapplicable in habeas proceedings. This Court has twice assumed that Rule's application in such proceedings. *Harris v. Nelson,* 394 U.S. 286, 294, n. 5, 89 S.Ct. 1082, 22 L.Ed.2d 281; *Withrow v. Williams,* 507 U.S. 680, 696, and n. 7, 113 S.Ct. 1745, 123 L.Ed.2d 407. The *Withrow* District Court had granted habeas on a claim neither pleaded, considered at "an evidentiary hearing," nor "even argu[ed]" by the parties. *Id.,* at 695, 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.,* at 696, 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 ***674** defenses. *Ibid.* Under pre-AEDPA law, no inconsistency arose between Rule 15(b) and those defenses.

Doubtless, that is why this Court's pre-AEDPA cases assumed Rule 15(b)'s application in habeas proceedings. See, *e.g., ibid.* While AEDPA forbids a finding that exhaustion has been waived absent an express waiver by the State, 28 U.S.C. § 2254(b)(3), pre-AEDPA law allowed waiver of both defenses—exhaustion and procedural default—based on the State's litigation conduct, see, *e.g., Gray v. Netherland,* 518 U.S. 152, 166, 116 S.Ct. 2074, 135 L.Ed.2d 457. 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, 123 S.Ct. 1029, 154 L.Ed.2d 931. This case fits that description as to the application of Rule 15(b). Pp. 1279–1281.

48 Fed.Appx. 104, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Part III. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, *post,* p. 1281.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

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 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 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.

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 impeachingmaterial ***676** 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 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, 104 S.Ct. 259, 78 L.Ed.2d 244 (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 days earlier. *Ibid.* Tests later identified the second gun as the Whitehead murder weapon. *Id.,* at 17.

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' 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 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, ¶ 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-phase ***678** 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 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. 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, ¶¶ 6–8.

***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, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (construing Texas' sentencing scheme); Tex.Code Crim. Proc. Ann., Arts. 37.071(c)–(e) (Vernon Supp.1980). 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, 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 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 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 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 had "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 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. 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] 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 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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)]";[5] the withheld evidence, Banks asserted, "would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a set-up." App. 180, ¶ 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, ¶ 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, ¶ 2, 180, ¶ 114.[6]

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," 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–E9, 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.

On March 7, 1996, Banks filed the 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, ¶ 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, ¶ 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.

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, ¶ 8, 442–443, ¶ 8; *supra,* at 1265. 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, ¶¶ 10–11.

On March 4, 1999, the Magistrate Judge issued an order establishing issues for an evidentiary hearing, *id.,* at 340, 346, at which she would consider Banks's claims that the State had withheld "crucial exculpatory 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 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 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 1264.

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.

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 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 1264.

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 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.

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 and his part in the fateful trip to Dallas. But Banks was not appropriately diligent in pursuing 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 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 1266. Moreover, the Court of Appeals 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.

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 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, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Pet. for Cert. 23–24. We stayed Banks's execution on March 12, 2003, 538 U.S. 917, 123 S.Ct. 1511, and, on April 21, 2003, granted his petition on all questions other than his *Swain* claim. 538 U.S. 977, 123 S.Ct. 1784. 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

We note, initially, that Banks's *Brady* claims arose under the regime in place prior to the 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

[1] 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) (1994 ed.); see *Rose v. Lundy,* 455 U.S. 509, 520, 102 S.Ct. 1198, 71 L.Ed.2d 379 (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]

****1272** **[2]** 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, ¶ 7; see *supra,* at 1267. 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, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

[3] **[4]** *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., at 87, 83 S.Ct. 1194. We set out in *Strickler v. Greene,* 527 U.S. 263, 281–282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), 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 or inadvertently; and prejudice must have ensued." 527 U.S., at 281–282, 119 S.Ct. 1936. "[C]ause and prejudice" in this case "parallel two of the three components of the alleged *Brady* violation itself." *Id.,* at 282, 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., at 282, 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 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

[5] 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., at 276, n. 14, 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, 119 S.Ct. 1936. Those absent-from-the-file documents could have been used to impeach the witness. *Id.,* at 273, 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., at 276, n. 14, 278, 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., at 289, 119 S.Ct. 1936. Three factors accounted for that determination:

> "(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 [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 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, 115 S.Ct. 1555, 131 L.Ed.2d 490 (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 asserted, on the eve of trial, that it would disclose all *Brady* material. App. 361, n. 1; see *supra,* at 1264. As *Strickler* instructs, Banks cannot be faulted for relying on that representation. See 527 U.S., at 283–284, 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, ¶ 114 (internal quotation marks omitted). In its answer, the State denied Banks's assertion. *Id.,* at 234; see *supra,* at 1267. 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., at 289, 119 S.Ct. 1936; see *id.,* at 284, 119 S.Ct. 1936 (state habeas counsel, as well as trial counsel, could 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, Farr's connections to Deputy Sheriff Huff.

***694** 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 1264–1266. 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, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) *(per curiam)* (internal quotation marks omitted)). If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction. See *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *Strickler,* 527 U.S., at 284, 119 S.Ct. 1936. [14]

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 1270. 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]

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. 527 U.S., at 284, and n. 26, 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.,* at 285, 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., at 286–287, 119 S.Ct. 1936. The "cause" inquiry, we have also observed, turns on events or circumstances "external to the defense." *Amadeo v. Zant,* 486 U.S. 214, 222, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988) (quoting *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

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, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (quoting *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131 (1926) (internal quotation marks omitted)). 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., at 281, 119 S.Ct. 1936; accord *Kyles,* 514 U.S., at 439–440, 115 S.Ct. 1555; *United States v. Bagley,* 473 U.S. 667, 675, n. 6, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Berger,* 295 U.S., at 88, 55 S.Ct. 629. See also *Olmstead v. United States,* 277 U.S. 438, 484, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Courts, litigants, and juries properly 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., at 88, 55 S.Ct. 629. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. See *Kyles,* 514 U.S., at 440, 115 S.Ct. 1555 ("The prudence of the careful prosecutor should not ... be discouraged.").

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, § 2(d) (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," App. 195, ¶ 7; see *supra,* at 1267, 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., at 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. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the State asserts 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 material." 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., at 55–56, 77 S.Ct. 623. The Court there stated that no privilege obtains "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused." *Id.,* at 60–61, 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.,* at 64, 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 have been "helpful to [Banks's] defense." *Id.,* at 60–61, 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.

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 1267. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful. Accordingly, Banks has

shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim.

C

[6] **[7]** 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., at 282, 119 S.Ct. 1936 (internal quotation marks omitted). Our touchstone on materiality is *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). *Kyles* instructed that 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., at 435, 115 S.Ct. 1555. See also *id.,* at 434–435, 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., at 290, 119 S.Ct. 1936. In short, Banks must show a "reasonable probability of a different result." *Kyles,* 514 U.S., at 434, 115 S.Ct. 1555 (internal quotation marks omitted) (citing *Bagley,* 473 U.S., at 678, 105 S.Ct. 3375).

****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, ¶¶ 7–8; *supra,* at 1265. Had Farr not instigated, upon Deputy Sheriff Huff's request, the Dallas excursion to fetch Banks's gun, the prosecution would have had slim, if any, evidence that Banks planned to "continue" committing violent acts. App. 147. [17] 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]

***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 1266. 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. 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., at 289, 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., at 292–296, 119 S.Ct. 1936. Regarding "prejudice," the contrast between *Strickler* and Banks's case is marked. The witness whose impeachment was at issue in *Strickler* gave testimony that was in the main cumulative, *id.,* at 292, 119 S.Ct. 1936, and hardly significant ***701** to one of the "two predicates for capital murder: [armed] robbery," *id.,* at 294, 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.,* at 293, 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.,* at 295, 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 1265, 1268. In the guilt 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 1266. 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, ¶ 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, ¶ 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, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). See also Trott, ***702** Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381, 1385 (1996) ("Jurors 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 by cross-examination" and have counseled submission of the credibility issue to the jury "with careful instructions." *On Lee,* 343 U.S., at 757, 72 S.Ct. 967; accord *Hoffa v. United States,* 385 U.S. 293, 311–312, 87 S.Ct. 408, 17 L.Ed.2d 374 (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 1282, n. 3. 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 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 1266, 1267. 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 1267.

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., at 434, 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 defense. *Ibid.* (internal quotation marks omitted) (citing *Bagley,* 473 U.S., at 678, 105 S.Ct. 3375); *Strickler,* 527 U.S., at 290, 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 1269, all three elements of a *Brady* claim are satisfied.

III

[8] 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 1270, 1271. 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 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 1270, 1271. Banks contended, unsuccessfully, that evidence 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 1270, n. 8 (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, 120 S.Ct. 1595, 146 L.Ed.2d 542 (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, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), we noted that Rule 15(b)'s use in habeas proceedings is "noncontroversial." In *Withrow v. Williams,* 507 U.S. 680, 696, and n. 7, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993), we similarly assumed **1280 Rule 15(b)'s application to habeas petitions. 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.,* at 695, 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 to present evidence bearing on th[e] claim's resolution." *Id.,* at 696, 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 1269. [19]

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 *705 to present evidence bearing on th[e] claim's resolution." *Withrow,* 507 U.S., at 696, 113 S.Ct. 1745. Nor do we find convincing the Fifth Circuit's view that applying Rule 15(b) 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., at 294, n. 5, 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), 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, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (failure to raise procedural default in federal habeas court means the defense is lost); *Granberry v. Greer,* 481 U.S. 129, 135, 107 S.Ct. 1671, 95 L.Ed.2d 119 (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, 123 S.Ct. 1029, 154 L.Ed.2d 931 (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 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.

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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and *Brady*. [1]

To demonstrate prejudice, Banks 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,* at 435, 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,* at 434, 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, 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, 104 S.Ct. 259, 78 L.Ed.2d 244 (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.
>
> "Q: I understand, but you were going to supply him the means and possible death 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:

> "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]

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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 ***709** 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 [Banks] would commit criminal acts of violence that would constitute a continuing threat to society." *Id.,* at 143 (internal quotation marks omitted). The randomness and wantonness of the murder would perhaps, standing alone, mandate such a ****1283** finding. Accordingly, I cannot find that the nondisclosure of the evidence was prejudicial.

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, 112 S.Ct. 1715, 118 L.Ed.2d 318 (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,* 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)]," *ante,* at 1273, relying in part on the State's general denial of 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., at 289, 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,* 373 U.S. 83, 83 S.Ct. 1194 (1963)." App. 180 (emphasis added). The State, 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,* at 281, 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 1271, n. 10. As I would affirm the Court of Appeals on the Farr *Brady* claim, I briefly discuss this 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.

All Citations

540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166, 72 USLW 4193, 04 Cal. Daily Op. Serv. 1501, 2004 Daily Journal D.A.R. 2293, 17 Fla. L. Weekly Fed. S 153

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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).

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).

4 Banks, in fact, had no criminal record at all. App. 255, ¶ 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.*

5 *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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, 85 S.Ct. 824, 13 L.Ed.2d 759 (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, 2003 WL 1962188 (Tex.Crim.App.), cert. denied, 538 U.S. 990, 123 S.Ct. 1810, 155 L.Ed.2d 688 (2003)).

7 We hereinafter refer to these claims as the Farr *Brady* and Cook *Brady* claims respectively. See *supra,* at 1267, n. 5.

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 The Fifth Circuit noted correctly that under *Lindh v. Murphy,* 521 U.S. 320, 336–337, 117 S.Ct. 2059, 138 L.Ed.2d 481 (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.

10 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.

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, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (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, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *United States v. Agurs,* 427 U.S. 97, 103–104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (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.

12 Surprisingly, the Court of Appeals' *per curiam* opinion did not refer to *Strickler v. Greene,* 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (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., at 289, 119 S.Ct. 1936. We need not decide that question today.

14 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, ¶ 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 1267, the State's answer indeed did deny Banks's allegation.

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.

17 It bears reiteration here that Banks had no criminal record, *id.,* at 255, ¶ 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 1265. 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, ¶ 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 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 1281–1282 (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.

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 1264.

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

1 I do not address the possible application of the standard enunciated in *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (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").

2 Admittedly, the prosecution used more of its closing argument trying to convince the jury to believe Farr's testimony that Banks himself was planning more robberies. See *ante,* at 1277, n. 18. 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 1278. 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.

83 S.Ct. 1194
Supreme Court of the United States

John L. BRADY, Petitioner,
v.
STATE OF MARYLAND.

No. 490.
|
Argued March 18 and 19, 1963.
|
Decided May 13, 1963.

Synopsis

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the Maryland Court of Appeals, 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

West Headnotes (6)

[1] **Federal Courts** Review of state courts

Decision of Maryland Court of Appeals on petitioner's appeal in post-conviction proceeding, remanding case for retrial on question of punishment but not on question of guilt was "final judgment" within statute relating to federal Supreme Court review of final judgments by certiorari. Code Md.1957, art. 27, § 413; Code Supp. Md. art. 27, § 645A et seq.; 28 U.S.C.A. § 1257(3); U.S.C.A.Const Amend. 14.

898 Cases that cite this headnote

[2] **Constitutional Law** Witnesses
Criminal Law Evidence incriminating others

Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

10712 Cases that cite this headnote

[3] **Constitutional Law** Evidence
Constitutional Law Notice; disclosure and discovery

Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A.Const. Amend. 14.

21734 Cases that cite this headnote

[4] **Criminal Law** Questions of Law or of Fact

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. Const.Md. art. 15, § 5.

325 Cases that cite this headnote

[5] **Federal Courts** Sources of Authority

State courts, state agencies and state legislatures are final expositors of state law under our federal regime. Const. Md. art 15, § 5.

29 Cases that cite this headnote

[6] **Constitutional Law** Determination and disposition

Criminal Law Sentence

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; Const.Md. art. 15, § 5; U.S.C.A.Const. Amend. 14.

8260 Cases that cite this headnote

Attorneys and Law Firms

**1195 *84 E. Clinton Bamberger, Jr., Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for respondent.

Opinion

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 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.

[1] 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, 83 S.Ct. 56, 9 L.Ed.2d 54. [1]

**1196 The 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, s 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, s 5. The question presented is whether petitioner was denied a 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, 33 A.L.R.2d 1407, and United States ex rel. Thompson v. Dye, 221 F.2d 763—which, we agree, state the correct constitutional rule.

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, 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, 63 S.Ct. 177, 178, 87 L.Ed. 214, 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 proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.'

***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, 79 S.Ct. 1173, 3 L.Ed.2d 1217, 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, 78 S.Ct. 103, 2 L.Ed.2d 9; Wilde v. Wyoming, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985. Cf. Durley v. Mayo, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).

[3] We now hold that the suppression by the prosecution of evidence favorable to 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 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 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.

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, 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. * * * (I)t 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 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.

[4] **[5]** **[6]** 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, 83 S.Ct. 1102, where the several 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 p. 365. The cases cited make up a long line going back nearly a century. Wheeler v. State, 42 Md. 563, 570, 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, 4 L.R.A. 675; Dick v. State, 107 Md. 11, 21, 68 A. 286, 290. Cf. Vogel v. State, 163 Md. 267, 162 A. 705.

***90** We usually walk on treacherous 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 trial (cf. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, 'The suppression or withholding 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, 59 S.Ct. 790, 83 L.Ed. 1058; Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920. But in any event, there is no cross-petiton 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 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, 66 S.Ct. 773, 90 L.Ed. 939, ***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 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.'

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 new, to the rule-making 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.

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** 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.

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 s 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 admissibility of third-party 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]

Nor do I find anything in any of the other Maryland cases cited by the Court (ante, p. 1197) 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]

In 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, 60 S.Ct. 676, 84 L.Ed. 920.

All Citations

373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215

Footnotes

1 Neither party suggests that the decision below is not a 'final judgment' within the meaning of 28 U.S.C. s 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, 58 S.Ct. 164, 166, 82 L.Ed. 204) 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 Industrial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528) that 'is fundamental to the further conduct of the case' (United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311). This question is 'independent of, and unaffected by' (Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) 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, 63 S.Ct. 667, 668—669, 87 L.Ed. 873. Cf. Local No. 438 Const. and General Laborers' Union v. Curry, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.

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.'

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.

4 For one unhappy incident of recent vintage see Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 447, 537, 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, 57 Md. 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 ex rel. Szydlouski, 192 Md. 602, 65 A.2d 285; County Com'rs of Anne Arundel County v. English, 182 Md. 514, 35 A.2d 135, 150 A.L.R. 842; Oursler v. Tawes, 178 Md. 471, 13 A.2d 763.

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. 1196—1197 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.'

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.'

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta In re Attorney C, Colo., May 13, 2002

115 S.Ct. 1555
Supreme Court of the United States

Curtis Lee KYLES, Petitioner,
v.
John P. WHITLEY, Warden.

No. 93–7927.
|
Argued Nov. 7, 1994.
|
Decided April 19, 1995.

Synopsis

Petitioner, whose capital murder conviction and death sentence had been affirmed on direct appeal, 513 So.2d 265, filed petition for habeas corpus. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., denied petition, and the Court of Appeals for the Fifth Circuit, 5 F.3d 806,affirmed. Certiorari was granted. The Supreme Court, Justice Souter, held that: (1) in determining whether evidence not disclosed by state was "material," in violation of *Brady*, cumulative effect of all suppressed evidence favorable to the defendant is considered, rather than considering each item of evidence individually, and (2) favorable evidence state failed to disclose to defendant would have made a different result "reasonably probable" in capital murder prosecution, and thus, nondisclosure of evidence was *Brady* violation.

Reversed and remanded.

Justice Stevens filed concurring opinion in which Justices Ginsburg and Breyer joined.

Justice Scalia filed dissenting opinion in which Chief Justice Rehnquist and Justices Kennedy and Thomas joined.

West Headnotes (17)

[1] Constitutional Law Evidence

Constitutional Law Notice; disclosure and discovery

Suppression by prosecution of evidence favorable to defendant upon request violates due process, where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A. Const.Amends. 5, 14.

1348 Cases that cite this headnote

[2] Criminal Law Constitutional obligations regarding disclosure

Defendant's failure to request favorable evidence does not leave government free of all obligation to disclose such evidence to defendant, under *Brady*. U.S.C.A. Const.Amends. 5, 14.

333 Cases that cite this headnote

[3] Criminal Law Particular Types of Information Subject to Disclosure

Three situations in which *Brady* claim might arise despite defendant's failure to request favorable evidence are: where previously undisclosed evidence revealed that prosecution introduced trial testimony that it knew or should have known was perjured; where government failed to accede to defense request for disclosure of some specific kind of exculpatory evidence; or where government failed to volunteer exculpatory evidence never requested or requested only in general way, if suppression of evidence would be of sufficient significance to result in denial of defendant's right to fair trial. U.S.C.A. Const.Amends. 5, 14.

327 Cases that cite this headnote

[4] Criminal Law Materiality and probable effect of information in general

Although constitutional duty of government to disclose favorable evidence to defendant is triggered by potential impact of favorable but undisclosed evidence, showing of "materiality" as required under *Brady* does not require demonstration by preponderance that disclosure of suppressed evidence would have resulted

ultimately in defendant's acquittal; rather, touchstone of materiality is "reasonable probability" of different result. U.S.C.A. Const.Amends. 5, 14.

2256 Cases that cite this headnote

[5] **Criminal Law** Materiality and probable effect of information in general

In determining whether evidence that government failed to disclose to defendant satisfied "materiality" test of *Brady*, question is not whether defendant would more likely than not have received different verdict with evidence, but whether in its absence he received "fair trial," understood as a trial resulting in verdict worthy of confidence; "reasonable probability" of different result is accordingly shown when government's evidentiary suppression undermines confidence in outcome of trial. U.S.C.A. Const.Amends. 5, 14.

4121 Cases that cite this headnote

[6] **Criminal Law** Materiality and probable effect of information in general

"Materiality" test for determining whether government's nondisclosure of favorable evidence to defendant violates *Brady* is not sufficiency of evidence test, and defendant need not demonstrate that, after discounting inculpatory evidence in light of undisclosed evidence, there would not have been enough left to convict; possibility of acquittal on criminal charge does not imply insufficient evidentiary basis to convict. U.S.C.A. Const.Amends. 5, 14.

212 Cases that cite this headnote

[7] **Criminal Law** Materiality and probable effect of information in general

One does not show *Brady* violation in withholding favorable evidence by demonstrating that some of inculpatory evidence should have been excluded, but by showing that favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in verdict. U.S.C.A. Const.Amends. 5, 14.

2198 Cases that cite this headnote

[8] **Criminal Law** Prejudice to rights of party as ground of review

Once reviewing court applying *Bagley* test, in determining whether nondisclosure of favorable evidence to defendant violates due process, has found constitutional error, there is no need for further harmless error review. U.S.C.A. Const.Amends. 5, 14.

200 Cases that cite this headnote

[9] **Criminal Law** Materiality and probable effect of information in general

Evidence that government failed to disclose to defendant is considered collectively, not item-by-item, in determining whether "materiality" requirement of *Brady* violation has been satisfied. U.S.C.A. Const.Amends. 5, 14; ABA Rules of Prof.Conduct, Rule 3.8(d).

238 Cases that cite this headnote

[10] **Constitutional Law** Evidence

Criminal Law Constitutional obligations regarding disclosure

It is not due process violation every time government fails or chooses not to disclose evidence that might prove helpful to defendant; *Brady* requires less of prosecution than ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. U.S.C.A. Const.Amends. 5, 14; ABA Rules of Prof.Conduct, Rule 3.8(d).

245 Cases that cite this headnote

[11] **Criminal Law** Materiality and probable effect of information in general

While definition of "materiality" for purpose of *Brady* violation in terms of cumulative effect of suppression leaves government with degree of

discretion, it also imposes corresponding burden; prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge likely net effect of all such evidence and make disclosure when point of "reasonable probability" is reached. U.S.C.A. Const.Amends. 5, 14.

214 Cases that cite this headnote

[12] **Criminal Law** Constitutional obligations regarding disclosure

Criminal Law Responsibility of and for police and other agencies

Individual prosecutor has duty to learn of any favorable evidence known to others acting on government's behalf in case, including police, in order to avoid *Brady* violation, but whether prosecutor succeeds or fails in meeting such obligation prosecution's responsibility for failing to disclose known, material evidence rising to material level of importance is inescapable. U.S.C.A. Const.Amends. 5, 14.

1709 Cases that cite this headnote

[13] **Criminal Law** Responsibility of and for police and other agencies

Prosecutor remains responsible for duty under *Brady* to disclose favorable evidence to defendant, regardless of whether police investigators failed to inform prosecutor of evidence, as prosecutor can establish procedures and regulations to insure communication of all relevant information on each case to every lawyer who deals with it. U.S.C.A. Const.Amends. 5, 14.

486 Cases that cite this headnote

[14] **Habeas Corpus** Record

Record on appeal in habeas proceeding, in which Court of Appeals found no *Brady* violation, was unclear as to whether majority of Court of Appeals properly assessed cumulative effect of evidence, in determining materiality, or made a series of independent materiality evaluations; although majority concluded by referring to "any or all of the undisclosed materials," opinion also contained repeated references dismissing particular items of evidence as immaterial. U.S.C.A. Const.Amends. 5, 14.

83 Cases that cite this headnote

[15] **Criminal Law** Materiality and probable effect of information in general

Criminal Law Other particular issues

Favorable evidence state failed to disclose to defendant was "material," as it would have made a different result "reasonably probable" in capital murder prosecution, and thus, nondisclosure of evidence was *Brady* violation; among undisclosed evidence was statement by prosecution's "best" witness that assailant was about five foot four or five foot five and medium build, matching description of key informer and not defendant, who was six feet tall and thin, statement by another eyewitness, who described struggle and shooting with clarity at trial, indicating that witness had not seen actual murder and had not seen assailant outside vehicle, and undisclosed statements by key informer that were inconsistent, implied that informer was anxious to see defendant arrested for victim's murder, and raised suspicions that informer planted both murder weapon and victim's purse in places where they were found. U.S.C.A. Const.Amends. 5, 14.

609 Cases that cite this headnote

[16] **Criminal Law** Other particular issues

When probative force of evidence depends on circumstances under which it was obtained and those circumstances raise possibility of fraud, indication of conscientious police work will enhance probative force and slovenly work will diminish it, for purpose of determining whether nondisclosed evidence of sloppiness of police investigation is material, as required for *Brady* violation. U.S.C.A. Const.Amends. 5, 14.

28 Cases that cite this headnote

[17] **Criminal Law** Impeaching evidence

Criminal Law Test results; demonstrative and documentary evidence

Although prosecution's list of cars in parking lot near scene of murder at midevening after murder did not rank with failure to disclose other evidence, such as eyewitnesses' statements, it would have had some value as exculpation and impeachment, and thus, nondisclosure of such list was required to be considered in determining whether "materiality" requirement for *Brady* violation was satisfied; on police assumption that killer drove to lot and left his car there during heat of investigation, list without defendant's registration would have helped defendant and would have had some value in countering prosecution's argument that grainy enlargement of photograph of crime scene showed defendant's car in background. U.S.C.A. Const.Amends. 5, 14.

80 Cases that cite this headnote

****1558** *Syllabus* [*]

***419** 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 printout 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 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, 83 S.Ct. 1194, 1196–1197, 10 L.Ed.2d 215, 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, 105 S.Ct. 3375, 87 L.Ed.2d 481, 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. 473 U.S., at 682, 685, 105 S.Ct., at 3383–3384, 3385. *United States v. Agurs,* 427 U.S. 97, 112–113, 96 S.Ct. 2392, 2401–2402, 49 L.Ed.2d 342, 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 ***420** under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S.Ct. 1710, 1715, 123 L.Ed.2d 353. 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, 105 S.Ct., at 3380, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. ****1559** 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. 1565–1569.

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. 1569–1576.

(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 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. 1569–1571.

(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. 1571–1573.

(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 of the prosecution's arguments to the jury that the killer left his car at the scene during the investigation and that a grainy ***421** 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. 1573–1574.

(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. 1574–1576.

5 F.3d 806 (CA5 1993), reversed and remanded.

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. 1576. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., joined, *post,* p. 1576.

Attorneys and Law Firms

James S. Liebman, New York City, for petitioner.

Jack Peebles, New Orleans, LA, for respondent.

Opinion

Justice SOUTER delivered the opinion of the Court.

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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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 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, 108 S.Ct. 2005, 100 L.Ed.2d 236 (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).

Kyles then filed a petition for habeas corpus in the United States District 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 (CA5 1993). As we explain, *infra,* at 1569, there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard. Because "[o]ur 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, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987),[1] we granted certiorari, 511 U.S. 1051, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994), and now reverse.

***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.

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."

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 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 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 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 might himself be a suspect in the murder. He explained that he had been seen driving Dye's car on Friday evening in the 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 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] ****1562** *Id.,* at 221, 223, 231–232, 242. When asked where Kyles's car had been parked, Beanie replied that it had been "[o]n 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 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 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 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.

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 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 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 .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 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 print-out 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 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 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, 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. ***430** *Id.,* at 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 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 to sell him the car on Thursday evening, shortly after the murder. *Id.,* at 234–235. Another 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, 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).

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 "[f]or the first time in my fourteen years on this court ... I have serious reservations about whether the State has sentenced to death the right man." 5 F.3d, at 820.

III

[1] **[2]** **[3]** 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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See *id.,* at 86, 83 S.Ct., at 1196 (relying on *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 341–342, 79 L.Ed. 791 (1935), and *Pyle v. Kansas,* 317 U.S. 213, 215–216, 63 S.Ct. 177, 178–179, 87 L.Ed. 214 (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 the good faith or bad faith of the prosecution." 373 U.S., at 87, 83 S.Ct., at 1196–1197; see ***433** *Moore v. Illinois,* 408 U.S. 786, 794–795, 92 S.Ct. 2562, 2567–2568, 33 L.Ed.2d 706 1972). In *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (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, 96 S.Ct., at 2397–2398; [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, 96 S.Ct., at 2398–2399; 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, 96 S.Ct., at 2400.

In the third prominent case on the way to current *Brady* law, *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (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, 105 S.Ct., at 3383 (opinion of Blackmun, J.); *id.,* at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment).

[4] **[5]** Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, ****1566** 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 (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, 105 S.Ct., at 3383–3384 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)); *Bagley, supra,* 473 U.S., at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment) (same); see 473 U.S., at 680, 105 S.Ct., at 3382–3383 (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,* 466 U.S., at 693, 104 S.Ct., at 2068 ("[W]e 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, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986) ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice 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 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, 105 S.Ct., at 3381.

[6] **[7]** 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 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]

[8] Third, we note that, contrary to the assumption made by the Court 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, 105 S.Ct., at 3383 (opinion of Blackmun, J.); *id.,* at 685, 105 S.Ct., at 3385 (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, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993), quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). This is amply confirmed by the development of the respective governing standards. Although ***436** *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), 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,* 507 U.S., at 622–623, 113 S.Ct., at 1713–1714. 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,* 328 U.S., at 776, 66 S.Ct., at 1253. *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, 96 S.Ct., at 2401. *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 sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht.* [9]

[9] **[10]** 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 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, 105 S.Ct., at 3380 and n. 7. We have never held that the Constitution demands an open file policy (however 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").

[11] **[12]** 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, 83 S.Ct., at 1196–1197), the prosecution's responsibility for failing to disclose known, favorable **1568 evidence rising to a material level of importance is inescapable.

[13] 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, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing 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.

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 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 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, 96 S.Ct., at 2399–2400 ("[T]he 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, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (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, 106 S.Ct. 3101, 3105–3106, 92 L.Ed.2d 460 (1986); *Estes v. Texas,* 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543 (1965); *United States v. Leon,* 468 U.S. 897, 900–901, 104 S.Ct. 3405, 3409, 82 L.Ed.2d 677 (1984) (recognizing general goal of establishing "procedures under which 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, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1969)). The prudence of the careful prosecutor should not therefore be discouraged.

[14] 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 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 ("[W]e 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

[15] In this case, disclosure of the 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 build. [12] Indeed, since 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]

****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.,* 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 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]

****1571** ***444** 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, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977) (reliability depends in part on the accuracy of prior description); *Neil v. Biggers,* 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) (reliability of identification following impermissibly suggestive line-up depends in part on accuracy of witness's prior description), the Smallwood and Williams identifications 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 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 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, 96 S.Ct., at 2401–2402, 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 Art. 13 (Dec. 7, 1984). Contrary to what one might hope for from such a source, however, Beanie's statements 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 up variously next to a building, in some bushes, in Kyles's car, and at Black's house.

[16] 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]

***447** 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 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 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 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 juror would have, too. [16]

****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] App. 228–229. While the jury might have understood that Beanie meant simply that if the police investigated Kyles, 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]

***450** C

[17] 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 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 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

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 *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 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 ***452** was right in describing the way it was priced at Schwegmann's market, where he commonly shopped. [20]

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 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]

***453** 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 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 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.

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 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 1585; it is a significantly weaker 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.

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 1569. 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 1576–1578, 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, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) (STEVENS, J., concurring in denial of certiorari), with *id.,* at 956, 101 S.Ct., at 2035 (REHNQUIST, C.J., dissenting). Even aside from its legal importance, however, this case merits "favored treatment," cf. *post,* at 1577, for at least three reasons. First, the fact that 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," *post,* at 1578, especially important. Cf. *Harris v. Alabama,* 513 U.S. 504, 519–520, 115 S.Ct. 1031, 1039, 130 L.Ed.2d 1004 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.

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 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 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, 73 S.Ct. 397, 427, 97 L.Ed. 469 (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. ****1577** *United States v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 496, 69 L.Ed. 925 (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, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1981); and under what we have called the "two-court rule," the policy has been 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, 69 S.Ct. 535, 537, 93 L.Ed. 672 (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, 101 S.Ct., at 770, 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 1561 ("Beanie seemed eager to cast suspicion on Kyles"); *ante,* at 1569, n. 12 ("Record photographs of Beanie ... depict a man possessing a medium build"); *ante,* at 1573, n. 18 ("the record photograph of the homemade holster indicates ...").

The Court says that we granted certiorari "[b]ecause '[o]ur 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, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987)." *Ante,* at 1560. 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 prevent[s] us from substituting speculation for their considered opinions." *Burger v. Kemp,* 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (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, ***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 "[t]here 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," *ante,* at 1569. In support of this it quotes isolated sentences of the opinion below that supposedly "dismiss[ed] 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 1569 ("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* ***459** requires a series of independent materiality evaluations; in fact, the court said just the contrary. See 5 F.3d, at 817 ("[w]e are not persuaded that it is reasonably probable 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, 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 1567, n. 10. 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 1569. 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 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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976). It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to "destro[y]," *ante,* at 1569, 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 ****1579** *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); *Agurs,* ***461** *supra,* at 112–113, 96 S.Ct., at 2401–2402. 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 1569–1574, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante,* at 1574–1575. This partiality is confirmed in the Court's attempt to "recap ... *the suppressed evidence* and its significance for the prosecution," *ante,* at 1575 (emphasis added), which omits the 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), but who was *not* a suspect any more than Kyles was (the police as yet had no leads, see *ante,* at 1561), 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.*

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 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 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 1571, that he was an accessory after the fact, cf. *ibid.,* or even that he planted evidence against petitioner, *ante,* at 1572–1573. Even if the 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 [petitioner]" and whom "any reasonable attorney would perceive ... as a 'loose cannon.' " 5 F.3d, at 818. Perhaps 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 1572. 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 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 1566 (quoting *United States v. Bagley,* 473 U.S., at 682, 105 S.Ct., at 3383). 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 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 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 "[d]id you get an opportunity to look at him good?", Williams said, "I did." *Id.,* at 55.

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 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 ½-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.

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 1570, 1570–1571, n. 14, 1571, 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 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 statement would assuredly have permitted a sharp cross-examination, since it contained estimations of height and weight that fit Beanie better than petitioner. *Ante,* at 1570. But I think it is hyperbole to say that the statement would have "substantially reduced or destroyed" the value of Williams' testimony. *Ante,* at 1569. 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 1570, showing how Smallwood's testimony could have been discredited to such a degree as to "rais [e] 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 1570–1571, n. 14. In sum, the undisclosed statements, credited with everything they could possibly 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 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 daylight 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 "[n]o doubt in my mind" that petitioner was the murderer, Tr. 378 (Dec. 7, 1984); heard Kersh say "I know it was him.... I seen 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 ... [b]ecause that's the man who I seen kill that woman," *id.,* at 387; and heard Williams say "[n]o 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 1571 (citing *Agurs v. United States,* 427 U.S., at 112–113, n. 21, 96 S.Ct., at 2401–2402, 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, 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," ***470** 427 U.S., at 112, 96 S.Ct., at 2401. 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.*

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 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 garbage and (to a lesser degree) that Beanie planted the gun behind petitioner's stove. *Ante,* at 1572. 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 be gauged by observing that the state judge who presided over petitioner's trial stated, in a postconviction proceeding, that "[I] ha[ve] 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]

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, "[t]he 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 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 1574–1575; see also *ante,* at 1574, 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 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 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 (*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 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 1584. [7]

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 1575.

* * *

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 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.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 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 1577. We explain, *infra,* at 1569, 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, 107 S.Ct., at 3121. 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.

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.

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).

6 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.

7 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, 96 S.Ct., at 2397 (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.*

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 1579–1580 (possibility that Beanie planted evidence "is perfectly consistent" with Kyles's guilt), 1580 ("[T]he 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"), 1582 (the *Brady* evidence would have left two prosecution witnesses "totally untouched"), 1583 (*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) ("[I]t 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 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.

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 1579, 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 1525–1526. For a discussion of further *Brady* evidence to attack the investigation, see especially Part IV–B, *infra.*

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 1582; that would have been a brave jury argument.

15 The dissent, *post,* at 1580, 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 1572–1573.

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 1583 (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").

17 The dissent, *post,* at 1579, 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 1583; 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 1583–1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

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 ... [i]t was a little bitty piece of slip ... on the shelf." *Id.,* at 342. Subsequently, the prices were revealed as in fact being "[t]hree 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 1584–1585, 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 1584, 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 1574.

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 1571. 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* at 1564.

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 1569, 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 1566, 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 1569.

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 "stru [t]" 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.

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, 96 S.Ct., at 2401, 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 1573, 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 (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.

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).

408 F.2d 1209
United States Court of Appeals
District of Columbia Circuit.

Milton M. LEVIN, Appellant,
v.
Ramsey CLARK, Attorney General
of the United States, Appellee.

No. 20682.
|
Argued April 20, 1967.
|
Decided Nov. 15, 1967, Petition for
Rehearing En Banc Denied Dec. 16, 1968.

Synopsis

Habeas corpus proceeding. The United States District Court for the District of Columbia, Burnita Shelton Matthews, J., denied relief and appeal was taken. The Court of Appeals, Bazelon, Chief Judge, held that where government's grand larceny case was based on testimony that defendant had received $35,000 from union in small bills obtained at bank after defendant had refused $1,000 bills, government's failure to reveal to defense a bank officer's statement which might have enabled defense to procure statements from bank personnel that no exchange of bills had taken place entitled defendant to new trial.

Reversed for new trial.

Burger, Circuit Judge, dissented.

West Headnotes (7)

[1] **Criminal Law** Constitutional Obligations Regarding Disclosure

Prosecutor has constitutional duty to reveal evidence to defendant.

1 Case that cites this headnote

[2] **Criminal Law** Duties and Obligations of Prosecuting Attorneys

Convictions must not be obtained through prosecutorial misconduct which violates civilized notion of fairness and thereby taints the entire criminal process.

4 Cases that cite this headnote

[3] **Criminal Law** Course and Conduct of Trial in General

Lawless law enforcement should not be tolerated.

[4] **Criminal Law** Constitutional Obligations Regarding Disclosure

When government fails to reveal evidence which would be helpful to defendant, Constitution has been violated.

[5] **Criminal Law** Materiality and Probable Effect of Information in General

Prosecution must reveal to defense evidence which might lead jury to entertain reasonable doubt about defendant's guilt, but standard cannot be applied harshly or dogmatically.

28 Cases that cite this headnote

[6] **Criminal Law** Discovery and Disclosure

Where there was no dispute about evidence which prosecutor had failed to reveal to defense, trial court's legal conclusion as to whether that evidence might have led jury to entertain reasonable doubt about defendant's guilt must be reviewed in same way that any other legal conclusion of trial court is reviewed and the clearly erroneous standard was not applicable.

19 Cases that cite this headnote

[7] **Habeas Corpus** Particular Issues and Problems

Where government's grand larceny case was based on testimony that defendant had received $35,000 from union in small bills obtained at bank after defendant had refused $1,000 bills, government's failure to reveal to defense a bank officer's statement which might have enabled defense to procure statements from bank personnel that no exchange of bills had taken place entitled defendant to new trial.

5 Cases that cite this headnote

Attorneys and Law Firms

***1210** ****7** Mr. Thurman Arnold, Washington, D.C., for appellant.

Mr. Theodore Wieseman, Asst. U.S. Atty., with whom Messrs. David G. Bress, U.S. Atty., Frank Q. Nebeker and Oscar Altshuler, Asst. U.S. Attys., were on the brief, for appellee.

Mr. James V. Siena, Washington, D.C., filed a brief on behalf of the National Capital Area Civil Liberties Union, as amicus curiae.

Before BAZELON, Chief Judge, EDGERTON, Senior Circuit Judge and BURGER, Circuit Judge.

BAZELON, Chief Judge.

After we affirmed Levin's grand larceny conviction,[1] he filed a petition for habeas corpus alleging that the prosecutor did not reveal evidence which would have been helpful. The District Court denied the petition, but we reversed and remanded so that the District Court could determine whether 'the government failed to disclose evidence which * * * might have led the jury to entertain a reasonable doubt about appellant's guilt. Such a failure may be classified as negligence.'[2] Levin is now appealing from the District Court's finding, on remand, that the evidence would not have led the jury to doubt his guilt.[3]

[1] **[2]** **[3]** The prosecutor's constitutional duty to reveal evidence to the defendant was recognized in Mooney v. Holohan[4] and Pyle v. State of Kansas.[5] In Pyle, the Supreme Court said:

Petitioner's papers * * * 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 ***1211** ****8** charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.[6]

From these cases two lines of decision emerged. The first line involved cases in which the prosecutor suborned perjury or knowingly used perjured testimony at trial.[7] The rationale of these cases seems to have been that convictions must not be obtained through prosecutorial misconduct which violates civilized notions of fairness and thereby taints the entire criminal process. Lawless law enforcement should not be tolerated.[8]

The second line of decisions, which involved the duty to reveal evidence, had the same beginning as the first. In early cases, the suppression was so clearly unfair that it tainted the criminal process as much as if the prosecutor had suborned perjury.

The methods employed by the prosecution * * * (represent) as shocking a situation as ever before presented before this court. A society cannot suppress lawlessness by an accused through the means of lawlessness of the prosecution. A society cannot inspire respect for the law by withholding its protection from those accused of crimes.[9] Soon, however, the courts began to recognize that even negligent suppression, though it was not 'shocking' or 'lawless,' could violate the constitution.[10] In Brady v. States of Maryland.[11] the Supreme Court confirmed this development.

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.[12]

[4] As the focus of the cases shifted away from the prosecutor's misconduct, of necessity the constitutional rationale changed also. If the prosecutor acted in good faith and was merely negligent, he did not taint the criminal process. The new rationale focused not on misconduct of the prosecutor but on harm to the defendant. The Government's facilities for discovering evidence are usually far superior to the defendant's. This imbalance is a weakness in our

adversary system which increases the possibility of erroneous convictions. When the Government aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant the constitution has been violated. [13] The concern is not that law enforcers are breaking the ***1212 **9** law but that innocent people may be convicted.

[5] The question is what kinds of evidence must the prosecutor reveal? Various courts have talked about 'favorable' evidence, [14] 'material' evidence, [15] 'pertinent facts relating to (the) defense,' [16] 'information impinging on a vital area in (the) defense,' [17] evidence vital 'to the accused persons in planning and conducting their defense,' [18] and 'evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful.' [19] Without excluding any of these relevant considerations, in the present case we focused upon the ultimate possibility of harm to the defendant- the possibility of erroneous conviction- and we stated the standard in terms of whether the evidence 'might have led the jury to entertain a reasonable doubt about (defendant's) guilt.' [20]

[6] This standard requires speculation because there is no sure way to know how the jury would have viewed any particular piece of evidence. Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial- whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. [21] Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically. In Griffin v. United States, [22] the Supreme Court directed us to consider 'whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.' [23] We think it would be too dogmatic here. [24]

***1213 **10** Levin was convicted on one count of grand larceny. The indictment charged that on or about February 13, 1959, he stole $35,000 from the Bakery and Confectionery Workers International Union of America. The money was supposed to have been embezzled by various members of the Union and given to Levin on or about the 13th of February so that he could fix the pending perjury trial of James Cross, the President of the Union. Levin was supposed to have taken the money without performing the services.

The Government's brief describes a strong case against Levin. James Landriscina, Vice President of the Union, provided most of the background. He testified that he met Levin in January, 1959. Levin said he could fix Cross's case for $35,000 or $40,000. Landriscina arranged for Levin to meet Cross in Washington. To pay for the trip, Levin received a check for $600. Landriscina was present at two meetings between Levin and Cross at which the price for the fix was set at $35,000. Levin also requested that he be hired by the Union as general counsel. After some dispute, Cross agreed to hire Levin as a lobbyist for $17,500 a year.

During both days of the Cross trial, February 16 and 17, Landriscina saw Levin standing around the corner from the courtroom. After the trial, Levin submitted a bill for 'Professional services rendered through February 28, 1959, $17,500,' but he received no money. On April 8, 1959, Landriscina made partial payment of $2,500 from the funds of his local union. Ultimately the Union did pay Levin more than $17,500 during 1959. The Government exhibits documented payments to Levin in 1959 of $600, $2,500, $2,500 and $15,000. Also, it was shown that Levin performed almost no services for the Union in 1959.

The Government's evidence outlined above may have shown that Levin was engaged in some shady dealings with the Union. But he was not tried for, or convicted of, fixing or attempting to fix a perjury case. Nor was he convicted of fraudulently representing himself to the Union as a lobbyist. He was convicted of stealing $35,000 from the Union on or about February 13, 1959. The evidence outlined above serves only to set the background and show the circumstances of the alleged larceny.

Landriscina was the only witness to the larceny itself. He gave a very detailed account of the transaction. He testified to the following: On Tuesday, February 10, Levin asked Landriscina for $10,000. Levin said he needed the money to pay some jurors and court attendants. On Thursday, February 12, Landriscina received an envelope with $1,000 bills from Olson, Secretary-Treasurer of the Union, and at 11:00 a.m. handed it to Levin on a park bench. At 12:00 Levin met Landriscina again and said that the $1,000 bills must be changed into smaller bills. Landriscina took the $1,000 bills, returned to his office, had someone exchange the $1,000

bills for smaller bills, and returned the smaller bills to Levin. The next day, Friday, February 13, Landriscina gave Lavin $25,000, the balance of the promised $35,000, in small bills.

Peter Olson and Richard Ashby told a different story. Olson testified that on Friday, February 13, he cashed a $35,000 check at the National Savings and Trust Company and received the money in $1,000 bills. [25] At 10:45 a.m. he gave ten $1,000 bills to Landriscina.

It was Ashby who supposedly exchanged the $1,000 bills for $20 bills at the bank. He testified that he was in the Union's office on Friday, February 13, when Olson returned from the bank with thirty-five $1,000 bills. [26] He saw Olson give ten of the bills to Landriscina. Olson left the other twenty-five $1,000 bills with Ashby. Later Landriscina returned ***1214 **11** to the Union's office and asked Ashby to exchange the entire $35,000. Ashby went to the bank, dealt with a Mr. McCeney, [27] exchanged the bills, and returned in a few minutes.

The two pieces of evidence which the Government failed to reveal bear directly upon this complicated transaction. The first was a check for $35,000, dated February 13, 1959, drawn on the Riggs National Bank by the National Savings & Trust Co. to enable National Savings to replace the thirty-five $1,000 bills which Olson withdrew. The argument is that it would not have been necessary to replenish the supply of $1,000 bills if they were returned. But, as we pointed out in our previous opinion, the bank's practice was to replenish the supply as soon as possible after a withdrawal, so National's check on Riggs might have been issued even if the $1,000 bills were afterwards returned.

[7] The second piece of evidence is more significant. The Government had in its possession a statement by Mr. McCeney, the bank officer with whom Ashby dealt when he exchanged the $1,000 bills.

I hereby recall Mr. Olson coming in with a $35,000 check, dated February 13, 1959 to be cashed but I do not recall a telephone call from Mr. Olson to arrange the cashing of this check. Mr. Olson came in and I took him to Mr. Hooper, who, at that time, was running one of the savings windows and handling the large cash, to cash this check which he did in thousand dollar bills. I do not recall Mr. Ashby coming in to change the thousand dollar bills to smaller ones. If he did I would have taken him back to Mr. Hooper because he was handling the large bills. Mr. Hooper says he does not recall cashing this money into smaller bills that day.

Ashby specifically testified before the Grand Jury that he dealt with Mr. McCeney when he exchanged the bills. Yet McCeney said that he did not remember the exchange, although he did remember Olson's cashing a $35,000 check earlier that same day. [28] Also, McCeney claimed that if he had been asked to exchange thirty-five $1,000 bills he would have gone directly to Mr. Hooper. According to the statement which was not revealed, Hooper did not remember cashing the money into smaller bills either. [29]

***1215 **12** If the jury had known of McCeney's statement and had taken it to indicate that there was no exchange into smaller bills, then Landriscina's description of the transaction would have fallen and with it the heart of the Government's case. Of course the jury might have disbelieved McCeney, or it might have decided that the exchange took place even though McCeney and Hooper did not remember it. [30] Or the jury might have convicted on the basis of the circumstantial evidence even though it believed that the exchange of bills and the transaction surrounding that exchange had not occurred. Yet it is clearly within the realm of possibility that the jury would have 'attached significance' [31] to McCeney's statement. [32]

We would be required to reverse, then, even if the statement's only significance were in the way a jury might have viewed it. However, the statement has another importance. With knowledge of McCeney's statement, defense counsel certainly would have probed deeper into what was the central aspect of the Government's case. For example, with some investigation, reconstruction of events, and discussions with Hooper and McCeney, defense counsel might have been able to transform their inability to remember the transaction into a positive statement that there was no exchange of bills.

In fact, at the habeas corpus hearing after the trial Hooper testified that to the best of his knowledge he had not exchanged the bills.

Mr. Olson contacted one of our officers, Assistant Treasurer, Mr. McCeney, and asked him to cash this $35,000 check, which I had the thousand dollar bills. We usually maintained a certain level, say around $50,000 in thousand dollar bills for these special requests. So I cashed this check and that is the last I saw of the transaction. Now, to my knowledge, that was the end of the transaction as far as I was concerned.

Apparently Olson's visit to the bank was the end of the transaction as far as McCeney was concerned also. Before the habeas corpus hearing he told petitioner's counsel that

To the best of (my) knowledge, these $1000 bills were never returned that day (or any reasonable time thereafter) for exchange into currency of smaller denominations.

At the hearing McCeney confirmed his statement

That is the knowledge that I have of it, that they never, they were not returned shortly or at any later date, the $1000 bills.

This testimony would have had great significance if it were brought out at trial because Ashby said he dealt with McCeney, and McCeney said if anyone had come to him to make the exchange, he would have gone directly to Hooper. So both McCeney and Hooper would have known of the exchange had it occurred. Of course, their subsequent testimony was not known to the prosecutor before trial, and we do not hold him responsible for not discovering and revealing it. However, its fortuitous discovery at the habeas corpus hearing adds credence to our speculation that, if defense counsel knew of McCeney's pre-trial statement, the course of the trial might have been quite different.

Reversed for a new trial.

BURGER, Circuit Judge (dissenting):

Again we have a holding of this Court reversing a conviction which was not only ***1216** ****13** fairly obtained in 1963 but affirmed on direct appeal to this Court, with certiorari denied by the Supreme Court, Levin v. United States, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), cert. denied 379 U.S. 999, 85 S.Ct. 716, 13 L.Ed.2d 701 (1965). This is but another of the long line of cases demonstrating this Court's chronic aversion to finality in criminal Cases. This holding is a grave abuse of the Great Writ of habeas corpus which was intended to correct injustice, not frustrate justice; it lays down an unworkable and totally specious requirement.

After failing to persuade this Court and the Supreme Court to disturb his conviction, Appellant sought release on a petition for habeas corpus claiming 'newly discovered evidence,' and arguing the Government had knowingly used perjured testimony; later he changed his petition to claim that the Government had concealed certain evidence. Both these claims were totally without basis and the majority agrees that this is so; the first claim was abandoned and this division of this Court rejected the second claim. [1] The majority now hints that perhaps we did not reject the second contention when we remanded the habeas corpus petition to the District Court, but even a cursory reading of our opinion, Levin v. Katzenbach, 124 U.S.App.D.C. 158, 162, 363 F.2d 287, 291 (1966), will show that at most the remand found only a possibility that the Government may have 'negligently' failed to disclose what had been stated by a potential witness interviewed by both sides.

This Court's remand to the District Court was for two purposes: first, to determine whether the Government was negligent in not advising the defense that a bank officer had said he could not remember the exchange of large bills into $20.00 bills and second, if there was negligence, to determine whether this non-recall 'might have led the jury to entertain a reasonable doubt about appellant's guilt.'

After a hearing and extended consideration on remand the trial judge found as a fact that the Government had not been negligent and that even had the jury been told of the bank officer's non-recall of the events, it would not have affected the result. Rule 52, FED.R.CIV.P. limits our review narrowly to determining whether the District Court findings were clearly erroneous.

Before reaching analysis of what was done and what the majority now does, it is important to make clear what is not in dispute in this case. The prosecutor's duty to disclose evidence favorable to the defense was defined by the Supreme Court in Brady v. State of Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), but the issues here presented are not governed by that holding. [2]

But that rule is not the issue in this case, notwithstanding the belated and the tortured effort of the majority to make it appear so. What is involved is this: in preparing the case for trial each side interviewed one McCeney, a bank officer, concerning the $35,000 check drawn on union funds; this was the $35,000 paid ***1217** ****14** to Levin on his fraudulent claim that he could 'fix' a case against one James G. Cross, then under indictment for embezzlement of union funds.

In light of this factual background the not-very-subtle quotation in the majority opinion from other cases which are inapposite, using such inflammatory terms as 'lawless' and 'shocking' to describe conduct of a prosecutor, is an affront to the facts of this case. That these lurid allusions purport to be part of tracing the development of the law of the

subject is a very thin excuse for this tactic and I suggest is a poorly veiled device to hint darkly at some nefarious act of Government which cannot be supported by reference to facts. The remand decision suggested only that the Government may have negligently failed to disclose information it had received; and even that claim rested on the fragile reed of an assumption that the Government had a duty to say in effect:

Now look, Mr. Defense Counsel, we interviewed Mr. McCeney and here is what he said to us: He remembers cashing the $35,000 check but cannot recall changing the bills into small denominations. We want to make sure he gives you the same information he gave us.

To apply any such remarkable standard, the Government must first surely have some reason to believe that the information of non-recall is relevant in some way so that it rises to the level of 'evidence.' To recite this proposition, which is simply to apply the majority's thesis, is to demonstrate that it has no basis in the realities of litigation.

It is, of course, too elementary to require citation of authority that there are two predicates of negligence: first, the existence of a duty and second, failure to meet that duty. Can it be possible- rationally possible- that the prosecutor has a duty to monitor or guide and oversee the defense counsel's preparation and conduct of his case to the extent of requiring an exchange of information on a statement of non-recall derived from an interview with a common witness? Can it be that defense lawyers want or expect this kind of 'Big Brother' treatment so long as they know of the existence and whereabouts of the witness and have access to him, as the defense did here? Even were civil pre-trial processes available, it is most unlikely that the bank officer's non-recall would have been noted.

Having previously registered mu dissent to the nebulous and novel 'negligence' concept relied on by the majority, but being bound by it as the law of this case, I shall try to demonstrate that, even assuming the validity of the wrongly conceived and undefined law-for-this-case guidelines of the majority, the District Court was not 'clearly erroneous' in finding that the 'new evidence' in question would not 'have led the jury to entertain a reasonable doubt about Appellant's guilt.'

To an utterly absurd legal standard of prosecutorial negligence-without-duty, the majority now applies a review standard which is ridiculous and anticlimatical in the extreme. The second aspect of the remand was to have the District Judge, after passing on the 'negligence' aspect, decide whether the alleged newly discovered detail would have had an impact on the jury had the defense called McCeney and developed his lack of recollection. We must remember this is a case tried more than three years ago on events now nine years in the past.

Having sent the case back for a factual determination the majority- perhaps because they do not relish the result- now makes the discovery that this is not a factual issue after all but a legal matter. I suggest this is a transparent device to avoid the impossible task of demonstrating that the District Judge was 'clearly erroneous' under Rule 52. In a most remarkable piece of judicial legerdemain, what was once a factual issue for the trial judge as fact trier, now emerges as a legal question for appellate judges. Of course, when this case is tried again- as ***1218 **15** it must- the issue will again be emeshed in the jury's fact-finding deliberations.

Just how a jury could have been 'influenced,' as the majority now decides, by a piece of peripheral non-recall 'evidence' available to and brushed aside by defense counsel is left dangling in midair. The action of the majority, ignoring firmly established concepts of appellate review and the Federal Rules of Civil Procedure as well, demonstrates the wisdom of the historic limitations imposed on reviewing courts. It was to hold in check undisciplined judicial action by remotely situated appellate judges that these rules were framed, but those concepts are cast aside today even if only to make a Rule-for-Levin's-Case.

The District Judge, whose trial experience vastly exceeds that of all three members of this panel and who lived with this case for many days, observing witnesses and jurors alike, was the bast, if not the only, person qualified to make the appraisal for which we remanded. Since that appraisal cannot be improved upon by paraphrasing, I quote:

If, as indicated by the Court of Appeals, significance attaches to the fact that neither of two Bank officers remembered exchanging the $1,000 bills for twenties but did recall the cashing of the Union check, such significance dwindles to the vanishing point in light of (1) the failure of the officers to remember the cashing of the Union check two years after the event when they were first asked about it; (2) the reconstruction or reviving of their recollections in this regard from bank records; (3) the time lapse of one and one-half years between inquiry of the officers as to the cashing of the check and inquiry of them as to the exchange of the bills; (4) the fact that this second inquiry was made nearly four years after the event in question; (5) the lack of bank records to

disprove the exchange of the $1,000 bills for smaller bills; (6) the possibility that one of the several tellers other than Hooper exchanged the thirty-five $1,000 bills into $20 bills for Ashby; (7) the fact that Hooper did not know Ashby; (8) the fact that two witnesses- Ashby and Landriscina- testified unequivocally that the $1,000 bills were exchanged for $20 bills; and (9) the obvious memory deficit of McCeney and Hooper.

Levin v. Katzenbach, 262 F.Supp. 951, 960 (D.D.C.1966).

The Government case, presented to the jury in 1964, satisfied 12 jurors-beyond a reasonable doubt- that Levin told Cross and Landriscina, officers of the Bakery and Confectionery Workers' Union, that he could 'fix' Cross' perjury trial at a cost of $35,000; that $35,000 was raised by Peter Olson, Secretary-Treasurer of the Union, by embezzling Union funds; that Landriscina delivered the money to Appellant in Washington and that Appellant kept the money; in short, the jury found that Levin's whole story was simply a confidence scheme concocted by him to bilk his victims out of $35,000.

A review of the evidence before the jury is called for by the majority's action since the central issue at Appellant's jury trial was whether Levin had received the $35,000. Landriscina testified that he gave Levin $10,000 at 11:00 o'clock on the morning of February 12, 1959, and $25,000 at 5:00 o'clock on the evening of Friday, February 13. Olson and his subordinate Ashby, disagreeing with Landriscina only in detail, also testified that they had given Landriscina the $35,000 in two installments- $10,000 on the morning of February 13 and $25,000 that same afternoon.

Although Landriscina's version as to the date of the $10,000 payment was contradicted by Ashby and Olson as to the particular day, the transaction was corroborated by them in all other details. Landriscina testified that he received from Olson an envelope containing ten $1000 bills and gave them to Levin at the first meeting. Shortly thereafter Landriscina said he was contacted by Levin, who reported that the 'fellow who was to take case of the jury' would not accept ***1219 **16** bills of such large denominations. Landriscina then took the ten $1000 bills back to the Union office and arranged to have the money changed. He thereafter delivered $10,000 to Levin in smaller bills. Then, at the second meeting, he transferred the remaining $25,000 in small bills.

Olson testified that he cashed a $35,000 Union check on February 13 and gave Landriscina $10,000 in $1,000 bills to 'fix the Cross trial.' Ashby testified that he saw the exchange of bills and that Olson then instructed Ashby to give Landriscina the remaining $25,000 when he asked for it. Ashby confirmed that Landriscina returned and said Levin claimed the bills were unacceptable because they were too large. Ashby then took the entire $35,000 to the National Savings and Trust Company, changed the bills into twenties and gave Landriscina $10,000 and put the rest in the safe. Later the same afternoon, Landriscina returned for the $25,000 which he gave Levin later on February 13.

The Government also introduced the check which Olson cashed to obtain the $35,000, dated February 12; bank markings on it indicate that it was cashed on February 13 thus supporting the view of those who said the currency passed on the 13th. Both Landriscina and Olson agreed that, whatever the day, the $35,000 was paid to Levin in two installments.

Levin denied receiving any of the money and claimed that he could not have been involved at all because as a diligent observer of the Jewish Sabbath he would have been home on Long Island by sundown on February 13, the time fixed by two witnesses of the delivery of the second payment of $25,000. Levin's denial on this score was the essence of his defense.

Taking full advantage of the one-day confusion in dates in the Government's case, i.e., whether the first delivery of money took place on February 12 or February 13, Levin sought to show that Ashby and Olson were telling the truth about cashing the $35,000 since bank records on this were undisputed, but that Landriscina was lying and had kept the money for himself or passed it on to someone else. Defense counsel hinted repeatedly to the jury in his cross-examination of Landriscina and later in his argument, that Landriscina stood in line to become President of the Union if Cross were convicted of perjury, indicating that Landriscina had more to gain than the $35,000 by not passing it on to Levin.[3] Levin also sought to impeach Landriscina by demonstrating his memory faults with respect to the events of February, 1959, including the fact that Landriscina had previously stated to Government investigators that the first delivery had been on February 9, and by showing that Landriscina had pled guilty to conspiracy to obstruct justice under another count of the same indictment on which Appellant was tried.[4]

Notwithstanding the great efforts of the defense to exploit the one-day discrepancy between the Landriscina and Olson-Ashby versions, the jury had little hesitancy about believing the essence of Landriscina's account of transferring the money to Levin. After an eight-day trial, the jury promptly found Levin guilty. The verdict indicates the jurors considered the

mistake of one day- a variance of a kind found in most lawsuits- was a natural result of the passage of time; the verdict also shows the jury rejected the various efforts made to impeach prosecution evidence.

The New 'evidence' which the majority professes to believe might have changed the jury verdict is a statement by Benjamin McCeney, Assistant Treasurer at the National Savings and Trust Company, ***1220 **17** that while he remembered Olson cashing the $35,000 check, he did 'not recall Mr. Ashby coming in to change the thousand dollar bills to smaller ones.' It must be emphasized that this piece of supposed 'new evidence' is not evidence in the sense that it tends to prove any fact but is really non-evidence. McCeney's statement was that he did not remember whether Ashby came in to exchange the bills; he did not say that he remembered that Ashby did not change the bills. It is simply a reflection of non-recall, made to Government investigators in September, 1962, three and one-half years after the transaction and long before the habeas corpus hearing on the 'new evidence' claim.

It is inconceivable to me- as it was to the presiding trial judge- that this nonrecall could now be said to have had any effect on the jury. A few reasons are immediately apparent:

(1) The jury could reasonably have concluded that it is not surprising that a bank officer of a large and busy bank could not remember changing some money three and one-half years after the event even with $1,000 bills involved. [5]

(2) The majority totally fails to give weight to the fact that Appellant's trial counsel, experienced in criminal matters, indicated that he did not regard McCeney's testimony as important when trial counsel testified at the habeas corpus hearing. The attorney testified in the habeas corpus hearing that he had learned from the Cross trial, in advance of the Levin trial, that the large bills had been changed into smaller ones. He had previously spoken to McCeney to determine if there would be any records of the cashing of the $32,000 check and learned that they had not been retained. After learning of the exchange of bills at the Cross trial, the attorney testified: 'I did not again go to the bank because I had no reason to. I had previously been told by two people that they had no records.' The logical inference is that he was aware that the bank officers could not remember and that without records he would not be inclined to want their testimony. Apparently trial counsel believed that any non-recollection would not seem significant to his defense tactics or to the jury. In other words, we now reverse for a new trial because 'evidence' was not available that would apparently not have been used if it were.

That Levin's trial counsel, when called at the habeas corpus hearing, believed that this so-called 'evidence' would not have influenced the jury undoubtedly flows from the fact that the jury believed Landriscina's testimony that he gave the money to Levin despite the fact that Landriscina was contradicted as to the details and time by his own associates and documentary evidence, and despite ***1221 **18** the fact that he was impeached by his role in the criminal conspiracy and by his possible motives for not delivering the money. Can there be any rational basis to believe that the jury might have changed the verdict if they had heard a statement of non-recall from a subsidiary participant about a tangential detail when the other, more important considerations did not sway them?

(3) There is nothing whatever, except hindsight, to suggest that the defense would have made any use of McCeney's statement, and indeed I can hardly imagine that any experienced trial lawyer, such as Levin had, would have wanted to indicate to the jury the weakness of its case by calling McCeney as its witness only to have him say he 'could not remember.' [6] Moreover, the thrust of any defense utilization of McCeney's non-recall would have been to argue that the exchange of bills never occurred. But to demonstrate that, Appellant would have had to argue that not only was Landriscina lying, but also Olson and Ashby, since all three testified that the $1,000 bills had been exchanged for smaller denominations. As I pointed out in my first dissent, it is more difficult to persuade a jury that three men are lying than, as Levin attempted to do at trial, that one is.

I regret the occasion to dissent in these terms, except that it becomes necessary to demonstrate the glib but fallacious assumptions which underlie the majority's action. Even more I regret this Court's repeated actions which plainly tell prisoners, 'jail-house' lawyers and the bar generally that if they can find a way to continue the warfare with society long enough they may finally reap the natural rewards of lost evidence and fading memories. New trials, long after the events occurred, place enormous obstacles in the way of just results. It is on this very basis that courts dismiss indictments for lack of speedy trial. Compare Williams v. United States, 102 U.S.App.D.C. 51, 250 F.2d 19 (1957). Here the prosecution must now re-try a case concerning events of February, 1959, and by the time of the new trial nearly nine years will have elapsed. On this record, I feel fully

warranted in charging the majority with another instance of appellate 'nit picking.' This kind of perversion of the judicial process has gravely hampered speedy and certain justice in this jurisdiction.

Before BAZELON, Chief Judge, DANAHER, BURGER, WRIGHT, McGOWAN, TAMM, LEVENTHAL and ROBINSON, Circuit Judges, in Chambers.

ORDER

Opinion

PER CURIAM.

On consideration of appellee's Petition for Rehearing, En Banc, and appellant's opposition thereto, it is

ORDERED by the Court, En Banc, that appellee's aforesaid petition is denied.

Circuit Judges DANAHER, BURGER and TAMM would grant appellee's petition for rehearing en banc.

A separate statement of Circuit Judge McGOWAN, concurred in by Circuit Judges LEVENTHAL and ROBINSON, as to why he voted against rehearing en banc is attached.

A separate statement of Circuit Judge WRIGHT as to why he voted against rehearing en banc is attached.

***1222 **19** A separate statement of Circuit Judge DANAHER as to why he voted for rehearing en banc is attached.

A separate statement of Circuit Judge BURGER as to why he voted for rehearing en banc is attached.

Separate Statement of Circuit Judge McGOWAN, concurred in by Circuit Judges LEVENTHAL and ROBINSON, on Votes to Deny Rehearing En Banc

McGOWAN, Circuit Judge:

In voting to deny rehearing en banc in this case, I remain equally unpersuaded of the accuracy of (1) the dissenting judge's characterization of the information in question as 'non-evidence', (2) the majority's generalization that there is a constitutional duty resting upon the prosecution to disclose voluntarily any and all 'evidence which would be helpful to defendant', or (3) the Government's representation in its petition for rehearing en banc that the panel's decision gives it no alternative but to turn over to the defense its complete investigation file in every criminal case.

I do not think it is possible in any one case to write a definitive demarcation between the Federal Criminal Rules relating to discovery, on the one hand, and those particular situations where a fair trial may have been significantly blurred by the Government's failure to comply with a request for information. Judge Frankel, in a singularly perceptive, useful, and recent discussion of this problem, United States v. Gleason et al., 265 F.Supp. 880 (S.D.N.Y.1967), has said that, although 'the dimensions of due process are not limited or fully defined by the Rules of Criminal Procedure * * * it makes obvious practical and doctrinal sense to consider the directly pertinent rules promulgated by the highest Court when appraising the meaning of the Constitution which is ultimately for that Court to expound.' Dealing with a motion to compel disclosure by the Government of any evidence favorable to the defense, he said that 'it seems safe to take as a starting point the proposition that the prosecution need not deliver up, either before or during trial, all that would be literally embraced' by such a demand. But he goes on to conclude that:

It seems doubtful, however, that there should be a blanket rule postponing to the trial all disclosures of the type in question (that is to say, disclosures beyond the scope of the Federal Rules). For example, where the prosecutor knows of witnesses potentially useful to the defense, does not intend to call such witnesses himself, and knows- or should reasonably be expected to suppose- that his knowledge is not shared by defense counsel, the information may come too late for effective preparation if it is not delivered until the case is on trial. Other kinds of instances will undoubtedly arise where the Government 'has in its exclusive possession specific, concrete evidence' of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense.

In other words, the prosecutor, like the rest of us, is going to have to learn how to live in the shadowy world between the Rules and the Fifth Amendment. I sympathize with his plight, but, contrary to the assumptions of his petition for rehearing, we cannot release him from it by a broad pronouncement in this or any other particular case. The panel decision may have been wrong, but we do not en banc every panel decision which might well have gone the other way. On the other hand, it may have been right. Its important characteristic for present purposes is not its individual rightness or wrongness, but whether it is simply one application of a general legal doctrine

which existed before this case was decided and which, after that event, continues to exist in essentially the same form.

The following chronology of this prosecution will, I believe, be helpful in weighing the question of whether the decision ***1223** ****20** is so far out on its facts as to constitute a departure from the doctrinal channel. These facts (as to who knew what, and when) are essential in my appraisal of the need to consider this case en banc.

The alleged theft occurred in 1959. In March of 1961, the Government investigators went to the bank to inquire about the cashing of the union check which generated the bribe money. They were first told by Mr. McCeney, an Assistant Treasurer, only that transactions of the kind about which they were inquiring were normally handled by Mr. Hooper, an Assistant Head Teller. Hooper told them that he remembered nothing about the cashing of the check, but he apparently agreed to take a further look because, when the investigators came back the next day, he said that Olson had cashed a $35,000 check and received $1000 bills.

The matter was presented to the grand jury in June of 1962. It was in this proceeding, and by means of the testimony of Ashby, that the Government apparently first learned of the exchange of the $1000 bills into $20 bills. It recognized the significance of this testimony of its own witness, because it made an earnest effort to corroborate it. In September of 1962, its investigators went to the bank again where they interviewed McCeney. They asked him if he could confirm what had been said to the grant jury about the $20 bills; and they took from him on this occasion a written statement in which he said in substance that (1) he did not recall any exchange for smaller bills, (2) Hooper would, in any event, have handled it, and (3) Hooper had told him that he did not recall any such exchange. Further emphasizing the importance which the Government attached to this matter, particularly in the light of this initial failure to corroborate its own witness, the Assistant United States Attorney in charge of the prosecution telephoned McCeney promptly after he read the written statement brought back to him by his investigators. This telephone call was a seeming further effort to elicit some corroboration. It failed because McCeney apparently said in response to this inquiry that he would not say that it did not happen but that he could not remember any such thing.

Thus it was that the Government knew as of the fall of 1962 that its key witnesses were going to testify at the trial that the defendant had made them exchange the $1000 bills for $20 bills, but that the bank officials who allegedly effected this exchange could not corroborate this testimony. The Government could not have been unaware of the danger this involved to its case, particularly one of this kind where the jury would immediately recognize the prosecution witnesses as operating in an atmosphere where cash floating around is as likely to end up in someone else's pocket as in that of the defendant. If any shadow of doubt could be thrown on the testimony of these men the Government said actually handled the cash eventually delivered to the defendant, the Government would be hurt. Certainly the failure of the bank officials to corroborate such a transaction as this one would have cast such a doubt.

In January, 1963, the defendant's counsel made his motions for discovery and a bill of particulars. Item 7 of the latter was as follows:

State the denomination of the $35,000 in money which was allegedly taken by the defendant, Levin. If the exact denominations are unknown, then give the approximate denominations.

The Government vigorously opposed the giving of this information. With regard to Item 7 in particular, the Government said:

Paragraph 7 is indicative of the nature of defendant's motion- to secure the Government's evidence in advance of trial. Proceeding from the fact that the denominations of the bills used in the larceny is evidentiary, defendant can suggest no good reason as to how such knowledge would aid him ***1224** ****21** in respect to the functions of a bill of particulars as enumerated above.

It is, of course, not surprising that the defendant could not, in the Government's phrase, ‘suggest (any) good reason as to how such knowledge would aid him,’ since as of that time the defense appears not to have known of the fact that the check was initially cashed in $1000 bills, much less that these were immediately changed into $20's. [1]

Active opposition to an innocent request for information as to the bill denominations would surely, under these circumstances, create some sensations of discomfort in the more knowledgeable party. Such instincts are perhaps as good a guide as any to the need for voluntary disclosure. If, however, such feelings are successfully resisted but the defense comes upon the information by other means, no harm may be done; and this is essentially the basis upon which the Government seeks to sustain this conviction. To do so, in my view, it should, in the light of its earlier affirmative

withholding, be able to demonstrate on the record that the defense did know of the $20 bill exchange in advance of trial.

Exactly when defense counsel first learned of these facts is far from clear. At the habeas corpus hearing, he testified that the Government did exhibit to him, apparently not long after the discovery hearing, the $35,000 check. His testimony also suggests that he may have first heard about the $1000 bills during the Cross trial, which took place in April, 1963. There is also a strong intimation that his first and only interview with McCeney came after the Cross trial, since the purpose of that interview was to inquire about records of 'big bills.'[2] ***1225 **22** The Cross trial preceded the trial of this case by about five weeks.

The dissenting opinion states that defense counsel 'testified in the habeas corpus hearing that he had learned from the Cross trial, in advance of the Levin trial, that the large bills had been changed into smaller ones.' The actual answer was:

Q. When did you first learn from any source that the thirty-five $1,000 bills, in which the check was originally cashed on February 13th of 1959, might have been returned to the National Savings and Trust Company to be changed into bills of smaller denominations?

A. I think I heard testimony during the Cross trial along those lines, but I am not sure of that. As I was saying before, I was in a trial before Judge Walsh during the time that James Cross was being tried and I came into the courtroom intermittently as I could, and I believe that I heard testimony about the cashing of this check during the Cross trial which preceded the Levin trial.

The prosecutor then sought to establish by his questions what is beyond dispute, namely, that the $20 bill exchange came out in the testimony at the Levin trial; and the prosecutor conducting this examination summed it in this wise: 'So you knew about it probably at the Cross trial, you certainly knew about it at the Levin trial * * *.' For me, that 'probably' is, because of the uncertainties in this record, at least at the outside limits of accurate characterization; and it is certainly short of the demonstration needed to retrieve the effect of the Government's initial denial of the request for the bill denominations.

It would be a reasonable evaluation of the habeas corpus record (and there is no express finding by the habeas corpus court to the contrary)[3] that defense counsel did not know of the $20 bill transaction until it first came out in the Government's case during the trial of his client. It is, of course, true that he made no request for a recess in order that he might investigate this matter, nor did he even telephone McCeney about it. He said at the habeas corpus trial that this was because he had already learned from McCeney that the bank had no records, but his testimony also was that his interview with McCeney, which arguably did not occur until after the Cross trial, was confined to asking whether the bank had any big bill transactions records. A teller at the bank might have remembered, even without records, an incident involving the changing of thirty-five $1000 bills into $20's. And, of course, Hooper, at the habeas corpus hearing, said for the first time not only that he would have been the one to have handled such a transaction but that, if it had occurred, he would have remembered it.

The scope of a defense investigation during the days preceding the trial is one thing. What, under the pressure of trial itself, counsel decides to do about new information is quite another.[4] For me, this is a case where, at the time the defense made a timely effort to get some ***1226 **23** information about the denominations of the bills allegedly given to the defendant, the Government opposed it, even though it must be charged with knowledge that the bill-exchanging testimony, uncorroborated by the bank, was pregnant with significance for the defense. In the special setting of this case, it is perhaps not enough to avoid the danger of injustice that the Government may be said to have taken a technically accurate position with respect to a bill of particulars.

This can be regarded, therefore, as a situation where, within the meaning of Brady v. State of Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the defense made an 'actual request' of the Government for information which the Government deliberately refused, conscious of its danger to the prosecution and of the inequality which then existed between prosecution and defense in terms of their relative knowledge. Falling back to the Government's next line of defense, it is literally impossible to glean from this record a clear showing that no harm was done because the information became known in any event to the defense prior to trial.

In its brief upon this appeal, the Government refers to a deposition of Ashby in a civil case, used by defense counsel in cross-examining Ashby at the Levin trial. That deposition, in pertinent part, is as follows:

BY MR. DICKSTEIN:

Q. Mr. Ashby, we were speaking yesterday of the check for $35,000 drawn to Peter Olson as paying officer of Local 3. Do you remember that check?

A. Yes, sir.

Q. Do you know whether Mr. Olson cashed that check?

A. Yes, he did cash it.

Q. How do you know?

A. He gave me the cash to put in the vault in the safe.

Q. Did you go to the bank with him when he cashed it?

A. I can't recall. I may have.

Q. You don't remember?

A. It is vague. I may have gone with him to cash the check. I just can't recall.

Q. What were the denominations of the currency which Mr. Olson received?

A. That I don't know.

Q. What were the denominations of the currency that he gave you to put in the vault?

A. I know they were small bills. I don't recall the denominations. They were relatively small bills.

Q. By 'small,' do you mean less than $100 bills?

A. As I recall, they were less than $100 bills.

Q. It was not 35 $1,000 bills, was it?

A. No, not to the best of my recollection.

Q. When, in relationship to the date of the check, did he give you this money to put in the vault?

A. I don't know if it was the same day the check was drawn or a day later or two days later. It was in close proximity of the date of the check.

Q. And did you count the money before you put it in the vault?

A. I counted- Yes.

Q. What was the highest denomination of bill that you noted while you were counting the money?

A. I can't recall the exact denominations of the bills.

Q. Approximately.

A. There were quite a few bills. There may have been hundred-dollar ***1227 **24** bills. I don't think there was anything larger than hundreds.

Q. Were most of them 20's and 10's?

A. Some of them were smaller than that; 20's I think. But I can't recall what the breakdown was.

Apart from the fact that the deponent is, in the light of his later testimony before the grand jury and at trial, being egregiously evasive, it can scarcely be said that pre-trial examination of this deposition would acquaint the defense with the fact that 35 one-thousand dollar bills were exchanged, at Levin's insistence, into $20 bills.

Neither is it clear beyond peradventure that the deposition was seen prior to the Levin trial. There was a day's interval at that trial between the direct examination of Ashby and his cross-examination. The record shows that defense counsel, while conducting that cross-examination, had only some written notes in his hand and not the deposition itself. When objection was made to this circumstance, the court recessed the trial so that the deposition could be obtained from the files of this court, where it was then reposing. Our Clerk's records do not show it as having been withdrawn earlier. It had doubtless been seen before by defense counsel, but no one can say when, or whether it might not have conceivably been after the Levin trial started. The Government did not introduce the deposition into evidence at the habeas corpus hearing, nor make any references to it in its effort to establish in that record exactly when trial counsel first learned of the $20 bill exchange.

Denial of rehearing en banc is not to be taken as indicating that the Government is required to honor a general request for any and all information helpful to a defendant- an approach expressly disavowed by Judge Frankel. I might have affirmed the habeas corpus judge in this instance, but on the facts the case would have been a close one. I think an en banc consideration would only embroil all of us in pondering the nuances of a record that can be read in more ways than one. In my view, the central inquiry here is whether affirmance on the facts of this case represents such a departure from established lines of legal doctrine as to justify en banc consideration. Applying that test here, I do not believe that rehearing en banc is warranted.

Separate Statement on Vote to Deny Rehearing En Banc

J. SKELLY WRIGHT, Circuit Judge:

After much initial and determined opposition from judges and practitioners who value form over fact, the sporting theory of justice is slowly being eliminated from the trial of civil cases. Liberal provision for discovery has made the search for truth a realistic enterprise rather than an obstacle course festooned with devices for denying evidence to the unwary and the unadvised. Much the same movement is apparent in the trial of criminal cases, although for some arcane reasons the air of secrecy and competitiveness still attends the criminal trial.

Both the majority and the dissent here recognize that the principles of discovery should be applied in criminal cases. See Rule 16, FED.R.CRIM.P. Indeed the dissent notes that the 'superiority of the prosecution's facilities for fact-gathering constitutes the basis for the duty to disclose exculpatory evidence and for the enforcement of it by setting aside convictions secured in part because of its violation.' Levin v. Katzenbach, 124 U.S.App.D.C. 158, 165, 363 F.2d 287, 294 (1966) (dissenting opinion). Thus the only difference between the two positions is in their reading of the facts in this case.

Since Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in making the judgment whether due proccess is violated when exculpatory evidence is denied the defense, the focus is on the materiality of the evidence rather than 'the good faith or bad faith ***1228** ****25** of the prosecution.' 373 U.S. at 87, 83 S.Ct. at 1196. If material evidence in the hands of the prosecution is denied the defense for whatever reason, the reviewing court must decide whether that denial might reasonably have affected the course and therefore the outcome of the trial. [1] That is what the panel tried to do here, and I see no reason why this court sitting en banc should upset the result it reached.

Separate State re Rehearing en Banc

DANAHER, Circuit Judge:

I had no idea of writing anything in this case despite my very real view that the Government should have been permitted to press its contentions before, and to explain its position to, the full court.

However, as various of my colleagues now have submitted separate statements in exposition of their denial of rehearing en banc, one, in particular, would impart a gloss respecting 'discovery' which impels my comment. I would not have silence taken as acquiescence in this area.

In the first place, writing separately in Ross v. Sirica, [1] I observed:

No amount of sophistry can obscure the ultimate fact that the sitting division had hoped to engraft upon our courts their own theory of discovery, notwithstanding that the Rules promulgated by the Supreme Court and approved by Congress, make no provision for any such result.

When Ross v. Sirica was cited to the Court of Appeals in the Second Circuit in Sciortino v. Zampano, [2] Judge Hays pointed out that the views of our court had not found favor in any other circuit. Indeed, he continued, the reasoning on which the Ross panel had relied even lacked the support of a majority of the judges of this Circuit. Judge Hays with appropriate citations quite correctly observed, as I had noted in Ross, that the subject of discovery in criminal cases had received a great deal of attention at the hands of those responsible for the original preparation of the Federal Rules and their recent amendment. Only a very limited discovery is available, and the principles agreed upon by the rule makers fall far short of the sweeping enlargement here asserted by one of our colleagues.

Again, and respecting another aspect of discovery, the Supreme Court in Brady v. Maryland [3] has stated its own holding thus:

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. (Emphasis added.) [4]

***1229** ****26** This is not to say that the rule makers may not some day go the gull way seemingly desired by some of my colleagues. I say only that the Supreme Court and the Advisory Committee have not yet done so. [5]

Separate Statement on Rehearing En Banc

BURGER, Circuit Judge:

I am satisfied that a majority of the entire court would never have reached the result decided by the majority of the present panel but at the same time less than five judges [1] believe the

panel has laid down a new rule or doctrine of such scope and importance that it merits en banc review. Viewed in this light, the holding in Levin v. Katzenbach, 124 U.S.App.D.C. 158, 163, 363 F.2d 287, 292 (1966), is therefore confined to its own peculiar facts.

However I cannot refrain from pointing out, again, as I have before,[2] that the record before us shows- conclusively and beyond dispute- that the information which the panel majority regards as 'newly discovered evidence' which Judges Bazelon and Edgerton held the prosecution should have revealed to the defense was in fact literally in the hands of defense counsel as he sat at counsel table and conducted examination of witnesses in the original trial. This is shown in Judge McGowan's opinion where he recites what Mr. Jacob Stein testified to at the remand hearing and also in the contents of the deposition which Stein utilized in this cross-examination.

It is not rationally possible to reconcile Mr. Stein's testimony with the notion that he was not aware of the transaction unless we are to assume that Mr. Stein was asleep or otherwise unaware of what was going on around him. Since Mr. Stein is one of the most experienced and able trial lawyers of our bar, I, of course, reject the idea that he did not grasp the facts. Moreover, Mr. Stein's appraisal of the situation was a sound one which any competent advocate would reasonably reach.

What is more important is that any tendency for anyone to read a 'new rule' into this case is dispelled by what Mr. Justice Fortas said in Giles v. Maryland:

> 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. But this is not that case

386 U.S. 66, 98, 87 S.Ct. 793, 809 (1967) (concurring opinion). The highest classification which can fairly be accorded to the 'information' which Judges Bazelon and Edgerton said the prosecution should have furnished is that it is 'speculative' in an ultimate degree.

Perhaps a 'footnote' to this case may not be out of order in relation to the time this court has taken to resolve issues which lead to commanding a new trial:

February, 1959- date of the alleged criminal acts; November 1, 1962-Appellant was indicted; May 10, 1963- conviction by jury for grand larceny; June 30, 1964- the conviction was affirmed per Judges Washington and ***1230 **27** Bastian (Bazelon dissenting), Levin v. United States, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964); February 1, 1965- a petition for writ of certiorari was denied by the Supreme Court, 379 U.S. 999, 85 S.Ct. 719, 13 L.Ed.2d 701 (1965); February 25, 1965- Appellant filed a petition for a writ of habeas corpus which was denied by the District Court on June 11, 1965, 249 F.Supp. 225 (D.D.C.1965); December 23, 1965- this court reversed and remanded the case, Levin v. Katzenbach, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966), and took the extraordinary step- one never taken before- of releasing him from prison while the habeas corpus claims were being reconsidered; October 25, 1966- the District Court resolved the remand question and the case returned here again, Levin v. Katzenbach, 262 F.Supp. 951 (D.C.C.1966); November 15, 1967- this court again reversed ordering a new trial and I dissented, Levin v. Clark, 133 U.S.App.D.C. 12, 408 F.2d 1215 (November 15, 1967).

The action of this court ordering a new trial was- and is- a gross miscarriage of justice which puts on the Government the burden of retrying a case on facts which occurred in February of 1959. Understandably the Government moved for rehearing en banc on January 10, 1968; this court's action on that petition alone has added approximately one year's delay.

The prosecution is now confronted with trying to reconstruct its case nearly 9 years after the event. The public should be pardoned if it loses confidence in the administration of criminal justice when it takes this long for the judicial process to dispose of a simple criminal case- and then only to order a new trial in circumstances where such trial will take place nearly a decade after the crime.

All Citations

408 F.2d 1209, 133 U.S.App.D.C. 6

Footnotes

1 Levin v. United States, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), cert. denied 379 U.S. 999, 85 S.Ct. 719, 13 L.Ed.2d 701 (1965).

2 Levin v. Katzenbach, 124 U.S.App.D.C. 158, 162, 363 F.2d 287, 291 (1966).

3 Levin v. Katzenbach, 262 F.Supp. 951 (1966).

4 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

5 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942).

6 317 U.S. at 215-216, 63 S.Ct. at 178.

7 Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957), Napue v. State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

8 People v. Savvides, 1 N.Y.2d 554, 556-557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854 (1956); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 YALE L.J. 136, 137-139 (1964). The dissenting judge has already indicated agreement with our analysis of this line of cases.

Presentation of perjured testimony and deliberate suppression of evidence are types of conduct which not only prejudice the defendant but also violate the law, the basic duty of the prosecutor as an officer of the Court, and the very integrity of the judicial process. Such conduct is impermissible. As a result, a showing that the prosecution knowingly suppressed revelant exculpatory evidence automatically entitles the defendant to a new trial, with little or no showing of prejudice. Levin v. Katzenbach, 124 U.S.App.D.C. at 165, 363 F.2d at 294 (dissenting opinion).

9 United States ex rel. Montgomery v. Ragan, 86 F.Supp. 382, 387 (N.D.Ill. 1949).

10 United States ex rel. Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955), Application of Kapatos, 208 F.Supp. 883 (S.D.N.Y.1962), 1962), Smallwood v. Warden, 205 F.Supp. 325 (D.Md.1962). Note, supra note 8 at 139-142.

11 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

12 373 U.S. at 87, 83 S.Ct. at 1196.

13 The dissenting judge has indicated agreement with this principle.

The genesis, the basic rationale of the duty of disclosure, placed only on the prosecution in criminal cases, lies in the belief that giving criminal defendants counsel and the opportunity to call witnesses has not completely eliminated the reasons which led the common law, before these protections were provided, to require that the prosecutor present in court all evidence about an alleged crime, whether it helped his case or not.

The presumed- and ordinarily well founded- superiority of the prosecution's facilities for fact-gathering constitutes the basis for the duty to disclose exculpatory evidence and for the enforcement of it by setting aside convictions secured in part because of its violation. Levin v. Katzenbach, 124 U.S.App.D.C. at 165, 363 F.2d at 294 (dissenting opinion).

See also Note supra note 8 at 142-145.

14 Pyle v. State of Kansas, 317 U.S. at 216, 63 S.Ct. 177, 87 L.Ed. 214.

15 United States ex rel. Thompson v. Dye, 221 F.2d at 765.

16 Curran v. State of Delaware, 259 F.2d 707, 711 (3d Cir. 1958).

17 United States ex rel. Butler v. Maroney, 319 F.2d 622, 627 (3d Cir. 1963).

18 Ashley v. State of Texas, 319 F.2d 80, 85 (5th Cir. 1963).

19 Griffin v. United States, 87 U.S.App.D.C. 172, 175, 183 F.2d 990, 993 (1950).

20 Levin v. Katzenbach, 124 U.S.App.D.C. at 162, 363 F.2d at 291.

21 Cf. Ashley v. State of Texas, supra note 18; United States ex rel. Butler v. Maroney, supra note 17; Note, supra note 8 at 145-147.

22 336 U.S. 704, 69 S.Ct. 814, 93 L.Ed. 993 (1949).

23 336 U.S. at 709, 69 S.Ct. at 816.

24 The Government suggests that the trial court's ruling must be 'clearly erroneous' before we reverse. Although, for reasons stated below, we think the trial court's error is clear, we do not think the 'clearly erroneous' standard is applicable. As we said in Jackson v. United States, 122 U.S.App.D.C. 324, 326, 353 F.2d 862, 864 (1965), we said 'in reviewing facts * * * courts apply the 'clearly erroneous' standard * * *.' Here, we are not reviewing facts. There is no dispute about what evidence the prosecutor failed to reveal. The only question is what legal conclusion follows from this failure. We must review the trial court's legal conclusion in the same way we review any other legal conclusion of a trial court.

25 Olson's testimony contradicted Landriscina's testimony that he made the first payment to Levin on February 12. The Union's cancelled check corroborated Olson's testimony.

26 Ashby's testimony about the date of this transaction also contradicted Landriscina's testimony.

27 This fact came out during Ashby's testimony before the Grand Jury.

28 The dissent states that McCeney and Hooper did not remember cashing the $35,000 check until they consulted bank records. But the evidence on this point is contradictory; at the habeas hearing McCeney and Hooper recalled details of the transaction which would not be contained in records.

> McCeney testified: Well, Mr. Olsen came into the bank and I contacted him there in the office and took him over to Mr. Hooper and he wanted large bills, I asked him how he wished the money and he said $1,000 bills and I took him to Mr. Hooper because he was handling the large denomination of bills at that time. * * * H.Tr. 131.
>
> Hooper testified: Mr. Olson contacted one of our officers, Assistant Treasurer, Mr. McCeney, and asked him to cash this $35,000 check, which I had the thousand dollars bills. H.Tr. 52.

The Witnesses seem to be describing a specific incident and not, as the dissent asserts, 'established bank procedures concerning large bill transactions.'

In any event, the bank officials would be far more likely to remember exchanging thirty-five $1,000 bills than cashing a $35,000 check, since the former transaction is 'very unusual' while the latter is not. Compare H.Tr. 63 with Government's exhibit No. 3, pages 6, 7 quoted at 262 F.Supp. at 958.

29 Although defense counsel also interviewed McCeney prior to trial, the interview was an informal one, and there is nothing in the record to suggest that the prosecutor knew about it. Moreover, even if the prosecutor did know about the interview, he had no reason to believe that, at this juncture, defense counsel was aware of the purported exchange of bills. (In fact, defense counsel did not know about the purported exchange when he interviewed McCeney.) Thus, the prosecutor had no reason to believe that the defense interview with McCeney touched on the crucial points covered in McCeney's statement to the Government.

30 McCeny's and Hooper's memory had been proved faulty in other matters. Levin v. Katzenbach, 262 F.Supp. at 958-959.

31 Griffin v. United States, supra note 23 at 709.

32 In part, the District Court's ruling below was based on the fact that the exchange could have taken place without Hooper's or McCeney's knowledge. This ruling apparently ignores Ashby's testimony before the Grand Jury that he dealt with McCeney when he exchanged the bills.

1 Indeed, the remand order recited 'the prosecution, no doubt in complete good faith, did not disclose to the defense at or before trial' the fact that a bank officer stated he 'could not recall' changing large bills into $20 denominations. Levin v. Katzenbach, 124 U.S.App.D.C. 158, 159, 363 F.2d 287, 288 (1966). Surely this made clear that no 'suppression' or 'concealment' of evidence was involved.

2 Brady decided that 'upon request' the prosecution must furnish evidence favorable to the accused, 373 U.S. at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. I would assume that where the government has positive exculpatory evidence which plainly would constitute a defense, the government has a duty to tender it without a request. But the majority here stretches the sound Brady concept to cover peripheral material which by no stretch of imagination could have been regarded as 'evidence.' It is for this reason the majority must spin out its fanciful theory of government 'negligence.'

3 Levin admitted later receiving fees from Landriscina for lobbying on behalf of the union.

4 Judge Bazelon in his dissent from the original affirmance of Levin's conviction stated:

(Landriscina's) testimony was thus subject to impeachment and was in fact impeached. His testimony as to date and times was contradicted by other prosecution witnesses.

119 U.S.App.D.C. at 158, 338 F.2d at 277.

5 The majority seems to attach some significance to the fact that McCeney could remember cashing the $35,000 check but could not remember changing the bills. It was in March of 1961 that government investigators first asked McCeney and Hooper about cashing the $35,000 check; this was two years after the event. They could not remember it. When the investigators returned to the bank the next day, McCeney and Hooper did recall cashing the check; the evidence adduced at the habeas corpus hearing showed that they recalled cashing the check upon consulting bank records. McCeney was not asked about changing bills until September of 1962- a year and a half after being asked about cashing the check and three and a half years after the event. The Bank's records of large bill transactions had been destroyed by that time. Is it any wonder, then, that three and one-half years after the event, the Bank officers could not remember the exchange when the only reason they could remember cashing the check two years after the event was that they had consulted their records? The majority's suggestion, therefore, that it is significant that McCeney remembered the cashing but not the exchange is baseless.

The majority in note 28 states that 'at the habeas hearing McCeney and Hooper recalled details of the transaction which would not be contained in records.' But the testimony which the majority relies upon is a description by bank officers of established bank procedures concerning large bill transactions. Of course, no records were needed to recall this.

6 One other aspect of the majority opinion deserves comment. It is hinted that the statement of Hooper at the 1966 habeas corpus hearing-two years after the trial- is somehow relevant to whether the Government should have told the defense in 1964 of the McCeney statement. But the Government did not learn about that fact until the 1966 hearing. Can the Government be expected to give the defense information it did not have at the time of trial? The majority's confusion is indicated by the statement in their first opinion that they 'do not suggest that the government is required to * * * disclose all its evidence, however insignificant, to the defense,' Levin v. Katzenbach, 124 U.S.App.D.C. 158, 162, 363 F.2d 287, 291 (1966), but they now act to the contrary.

1 The Government's position vis-a-vis this request makes it useful to quote the following comment by Judge Frankel in the opinion referred to hereinabove (at p. 886 of 265 F.Supp.):

Concluding that the Pitkin statements may be in part helpful to Karp, we have proceeded to inquire whether any 'respectable interest' of the Government's may be served by withholding this material. The prosecutor was asked to speak on this question. He responded with the observations that 'the defendants are engaging in a fishing expedition' and 'that anytime discovery of material is ordered in derogation of the Federal Rules of Criminal Procedure, the Government is injured.' We have not found enlightenment in these pronouncements.

2 In answer to questions by the Government seeking to establish his knowledge of Mr. McCeney and the latter's connection with the cashing of the $35,000 check, defense counsel testified as follows:

THE WITNESS: One. I had known Mr. McCeney before the trial and I knew that he held an office in the bank, I forget what it was, but I think it was an assistant vice president. Whether or not I referred to him in examining Mr. Olson is a matter of record and I do not recall it, because I have never read the record since the trial was completed. Thirdly, in the preparation of the case, I recall that I knew that this check was of some importance because I had heard the Cross trial which took place before the Levin trial and I believe this check was mentioned. It was my understanding that when a check is cashed where large bills are given, that

some record is kept by the bank and, in my mind, I had some vague notion of an Internal Revenue regulation to catch people who are cashing big checks.

MR. ARNOLD: Will you identify what check you mean when you say 'this check'?

THE WITNESS: I am thinking of the check bearing Mr. Olson's name in some way or other, the check which Mr. Ashby says he took to the bank, that is the check I have in mind.

BY MR. ALTSHULER:

Q. The $35,000 check?

A. Yes, the one that was introduced at trial, that is the check. One day in preparing myself for the trial, I went over to see Mr. McCeney and without telling him what I had in mind, I asked him, in what must have been to him a casual conversation, whether records are kept when large bills are given out by the bank and I believe he told me that some records are kept but that they are destroyed very shortly. I then asked another fellow, Mr. Fred Loops, who unfortunately is now dead, who was working at the Bank of Commerce- THE REPORTER: How do you spell that name?

THE WITNESS: L-o-o-p-s, Mr. Loops, in another casual conversation with Mr. Loops, I was attempting to check the information that I got from Mr. McCeney and I asked Mr. Loops whether they, at the Bank of Commerce where I was then banking, kept records of the disbursement of large bills and he told me the same thing Mr. McCeney did, that the records they keep are destroyed very quickly, and that was the sum and substance of my relationship with Mr. McCeney in this case.

3 The finding in terms is that trial counsel learned of the $20 bills 'at or prior to trial.' But whether it was 'at,' or 'prior', is critically important.

4 The difference lies in the loss of the invaluable privilege of pondering these matters reflectively in the course of preparing for trial, and not to have his client judged on the basis of his reaction to new information under the tensions and pressures of trial.

1 There is, of course, an affirmative duty on the part of the prosecution to disclose such evidence. The fact that the defense may not have moved for its production is irrelevant. Obviously the defense cannot move to have the Government produce what it does not know exists. Certainly if such evidence is not to be offered by the Government, it should be made available to the defense. In any event it should not be suppressed.

1 127 U.S.App.D.C. 10 at 19-20, 380 F.2d 557 at 566-567 (1967).

2 385 F.2d 132, 134 (1967).

3 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963).

4 The 'focus' mentioned by my colleague seems to have omitted 'upon request.'

One Justice speaking only for himself in Giles v. Maryland, 386 U.S. 66, 102, 87 S.Ct. 793, 811, 17 L.Ed.2d 737 (1967), noted that the Court had 'included in its statement of the controlling principle' in Brady v. Maryland a reference to counsel's request but added that he saw no reason to make the result turn upon a 'request.' Four Justices deemed the limitations of the Rules to fall far short of the standard urged by their colleague. 386 U.S. at 116-119, 87 S.Ct. 793.

5 Judges McGowan and Leventhal noted as much in Ross v. Sirica, supra note 1, 127 U.S.App.D.C. at 17, 380 F.2d at 562.

1 During consideration of the Government's motion for rehearing en banc this court has had only 8 active judges.

2 Levin v. Katzenbach, 124 U.S.App.D.C. 158, 163, 363 F.2d 287, 292 (1966); Levin v. Clark, 133 U.S.App.D.C. 6, 408 F.2d 1209, 1215, (Nov. 15, 1967).

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Collier v. Norris, E.D.Ark., May 12, 2006

119 S.Ct. 1936
Supreme Court of the United States

Tommy David STRICKLER, Petitioner,
v.
Fred W. GREENE, Warden.

No. 98–5864.
|
Argued March 3, 1999.
|
Decided June 17, 1999.

Synopsis
Following affirmance of capital murder conviction and death sentence, 241 Va. 482, 404 S.E.2d 227, and affirmance of denial of state habeas corpus petition, 249 Va. 120, 452 S.E.2d 648, state prisoner petitioned for habeas corpus. Writ was granted by the United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., Senior District Judge. The Court of Appeals for the Fourth Circuit, 149 F.3d 1170, vacated in part and remanded, and certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) undisclosed documents impeaching eyewitness testimony as to circumstances of abduction of victim were favorable to petitioner for purposes of *Brady;* (2) petitioner reasonably relied on prosecution's open file policy and established cause for procedural default in raising *Brady* claim; but (3) petitioner could not show either materiality under *Brady* or prejudice that would excuse petitioner's procedural default.

Affirmed.

Justice Thomas joined in part.

Justice Souter, with whom Justice Kennedy joined in part, filed an opinion concurring in part and dissenting in part.

West Headnotes (21)

[1] **Constitutional Law** Witnesses

Constitutional Law Requests for disclosure

Criminal Law Particular Types of Information Subject to Disclosure

Criminal Law Impeaching evidence

Criminal Law Request for disclosure; procedure

The due process duty of the prosecution under *Brady* to disclose evidence favorable to defendant is applicable even though there has been no request by defendant, and encompasses impeachment evidence as well as exculpatory evidence. U.S.C.A. Const.Amends. 5, 14.

1082 Cases that cite this headnote

[2] **Criminal Law** Materiality and probable effect of information in general

Evidence is "material" for purposes of *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

2391 Cases that cite this headnote

[3] **Criminal Law** Responsibility of and for police and other agencies

The *Brady* rule encompasses evidence known only to police investigators and not to the prosecutor, and thus the individual prosecutor has a duty to learn of any evidence favorable to the defense which is known to the others acting on the government's behalf in the case, including the police.

591 Cases that cite this headnote

[4] **Attorney General** Powers and Duties

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.

64 Cases that cite this headnote

[5] **Criminal Law** Materiality and probable effect of information in general

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.

926 Cases that cite this headnote

[6] **Criminal Law** Materiality and probable effect of information in general

There are three 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; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. U.S.C.A. Const.Amends. 5, 14.

4858 Cases that cite this headnote

[7] **Criminal Law** Impeaching evidence

The contrast between the terrifying incident that a witness confidently described in her testimony at trial on charges of abduction and capital murder and her initial perception of that event "as a trivial episode of college kids carrying on" sufficed to establish the impeaching character of the undisclosed documents conveying that initial perception, so that they were favorable to the accused for purposes of *Brady*, even if they were inculpatory.

90 Cases that cite this headnote

[8] **Criminal Law** Impeaching evidence

Brady's disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness.

18 Cases that cite this headnote

[9] **Criminal Law** Constitutional obligations regarding disclosure

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*. U.S.C.A. Const.Amends. 5, 14.

65 Cases that cite this headnote

[10] **Habeas Corpus** Ignorance of law or fact; novelty and change in law

Habeas corpus petitioner established cause for procedural default in failing to raise *Brady* claim either in trial court or in state habeas proceeding, where exculpatory material was withheld by the prosecution, petitioner reasonably relied on prosecution's open file policy, and state confirmed petitioner's reliance by asserting during state habeas proceedings that petitioner had already received "everything known to the government."

275 Cases that cite this headnote

[11] **Habeas Corpus** Ignorance of law or fact; novelty and change in law

Conduct attributable to the State that impedes trial counsel's access to the factual basis for making a claim is the type of factor that ordinarily establishes the existence of cause for a procedural default in making a claim later asserted in federal habeas corpus proceeding.

271 Cases that cite this headnote

[12] **Habeas Corpus** Cause or Excuse

In a habeas corpus proceeding, the standard for cause for a procedural default should not vary depending on the timing of the default.

69 Cases that cite this headnote

[13] **Habeas Corpus** Ignorance of law or fact; novelty and change in law

For purposes of establishing cause for procedural default in failing to raise *Brady* claim prior to federal habeas corpus proceeding, based on failure to disclose certain notes of detective's

interview with witness and letter by witness to detective, petitioner reasonably relied on prosecution's open file policy despite knowledge that detective had interviewed witness and though the federal district court entered an order allowing discovery of police files; knowledge of interviews did not establish knowledge that records pertaining to those interviews existed and had been suppressed, especially if some of them were in the prosecutor's open file, and fact that federal court granted discovery did not demonstrate that state court would have done so.

120 Cases that cite this headnote

[14] **Habeas Corpus** Discovery and disclosure; physical or mental examination

Under Virginia law, petitioner would not have been entitled to broad discovery of police files in state habeas proceedings without a showing of good cause. Va.Sup.Ct.Rules, Rule 4:1(b)(5)(3)(b).

7 Cases that cite this headnote

[15] **Habeas Corpus** Discovery and disclosure; physical or mental examination

Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review, nor should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support.

97 Cases that cite this headnote

[16] **Habeas Corpus** Cause or Excuse

Proper respect for state procedures counsels against a requirement that, to avoid finding lack of cause for procedural default for federal habeas corpus purposes, all possible claims be raised in state collateral proceedings, even when no known facts support them; the presumption that prosecutors have fully discharged their official duties is inconsistent with the suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

120 Cases that cite this headnote

[17] **Criminal Law** Records

Under Virginia law, except as modified by *Brady,* defendant would not have been entitled to discovery of police files. Va.Sup.Ct.Rules, Rule 3A:11.

3 Cases that cite this headnote

[18] **Criminal Law** Materiality and probable effect of information in general

Under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.

27 Cases that cite this headnote

[19] **Habeas Corpus** Prejudice

In order to establish prejudice excusing procedural default in failing to raise *Brady* claim in state court, petitioner had to convince the Supreme Court that there was a reasonable probability, and not mere possibility, that the result of the trial would have been different if the suppressed documents had been disclosed to the defense, and it was not enough that testimony of witness about whom impeaching evidence was withheld made petitioner's conviction more likely than if she had not testified, and that discrediting her testimony might have changed the outcome of the trial; the question was not whether the petitioner would more likely 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.

1886 Cases that cite this headnote

[20] **Criminal Law** Materiality and probable effect of information in general

The materiality inquiry under *Brady* is not just a matter of determining whether, after discounting the inculpatory evidence in light

of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions; 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.

596 Cases that cite this headnote

[22] Homicide Principals

Under Virginia law, defendant's guilt of capital murder did not depend on proof that he was the dominant partner in killing the victim; proof that he was an equal participant with another was sufficient.

1 Case that cites this headnote

****1939 *263** *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 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, 83 S.Ct. 1194, 10 L.Ed.2d 215, 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 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. 1948–1955.

(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 ****1940** 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 ***264** 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 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, 83 S.Ct. 1194, their suppression did not give rise to sufficient prejudice to overcome the procedural default. Pp. 1948–1949.

(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 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, 106 S.Ct. 2639, and *Amadeo v. Zant,* 486 U.S. 214, 222, 108 S.Ct. 1771, 100 L.Ed.2d 249. *Gray v. Netherland,* 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457, and *McCleskey v. Zant,* 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517, 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. 1949–1952.

(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 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, 115 S.Ct. 1555, 131 L.Ed.2d 490. 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 ***265** of that testimony, therefore, petitioner cannot show prejudice sufficient to excuse his procedural default. Pp. 1952–1955.

149 F.3d 1170, affirmed.

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., joined as to Part II, *post,* p. 1955.

Attorneys and Law Firms

Miguel A. Estrada, Washington, DC, for petitioner.

Pamela A. Rumpz, for respondent.

Opinion

****1941** Justice STEVENS delivered the opinion of the Court. †

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. 809, 119 S.Ct. 40, 142 L.Ed.2d 31 (1998), to consider (1) whether the Commonwealth violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), 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]

At both trials, a woman named Anne Stoltzfus testified in vivid detail 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 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.

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 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 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 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 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 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 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 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 ***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 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.

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:

> " 'Mountain Man' 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 .... [T]hen 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 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 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:

> "[F]irst 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 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 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.

Exhibit 2 is a document prepared by Detective Claytor some time after February 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."

***274** 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 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 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 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 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] 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 evidence in the Augusta County prosecutor's files, [13] petitioner's counsel ****1946** did not file a pretrial motion for discovery of possible exculpatory evidence. [14] In closing 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 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]

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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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. *Strickler v. Murray,* 249 Va. 120, 452 S.E.2d 648 (1995).

Federal Habeas Corpus Proceedings

In March 1996, petitioner filed a federal habeas corpus petition in the Eastern District ****1947** of Virginia. The District 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. Record, Doc. No. 20. That order led to petitioner's counsel's first examination of the Stoltzfus materials, described *supra,* at 1945–1947.

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] [d]efense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceeding." App. 287.

***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." App. 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 have known of such claims through the exercise of reasonable diligence." App. 423 (citing *Stockton v. Murray,* 41 F.3d 920, 925 (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 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 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 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 Commonwealth violated the *Brady* rule. We begin our analysis by identifying the essential components of a *Brady* violation.

[1] **[2]** **[3]** In *Brady,* 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 to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87, 83 S.Ct. 1194. 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, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (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, 105 S.Ct. 3375; see also *Kyles v. Whitley,* 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police ***281** investigators and not to the prosecutor." *Id.,* at 438, 115 S.Ct. 1555. In order to comply with *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, 115 S.Ct. 1555.

[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 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, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

[5] **[6]** 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 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.

[7] **[8]** 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 Commonwealth 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.

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 give rise to sufficient prejudice to overcome the procedural default.

III

Respondent 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. He states that the Commonwealth 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 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.

[9] **[10]** **[11]** 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] and trial counsel were not aware of the factual basis for the claim. The first and second factors—*i.e.,* the nondisclosure and the open file policy—are both fairly characterized as conduct attributable to the Commonwealth 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, 106 S.Ct. 2639 (1986), it is just such factors that ordinarily establish the existence of cause for a procedural default. [24]

[12] ***284** 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, 106 S.Ct. 2639.

****1950** **[13]** Respondent 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 to state habeas counsel. He presses two factors to support this assertion. First, he argues that an examination of Stoltzfus' trial testimony, [25] as well as a letter 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.

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 respondent 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.

[14] [15] [16] [17] Furthermore, the fact that the District 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] Indeed, as we understand Virginia law and respondent's position, 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 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 experience,' " that prosecutors have fully " 'discharged their official duties,' " *United States v. Mezzanatto,* 513 U.S. 196, 210, 115 S.Ct. 797, 130 L.Ed.2d 697 (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.

Respondent'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] Given that representation, petitioner had no basis for believing the Commonwealth had failed to comply with *Brady* at trial.[32]

Respondent also argues that our decisions in *Gray v. Netherland,* 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), and *McCleskey v. Zant,* 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), preclude the conclusion that the cause for petitioner's default was adequate. In both of those cases, however, the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier. See *Gray,* 518 U.S., at 161, 116 S.Ct. 2074; *McCleskey,* 499 U.S., at 498–499, 111 S.Ct. 1454. 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, 106 S.Ct. 2639, and *Amadeo v. Zant,* 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (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, 108 S.Ct. 1771.[34]

[18] 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, 96 S.Ct. 2392.

***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 cause, since the combination of all three surely suffices.

IV

[19] 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 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. 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:* "[T]he 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, 115 S.Ct. 1555.

[20] 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 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, 115 S.Ct. 1555. 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, 115 S.Ct. 1555.

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:

> "[W]e 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 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.

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 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, 115 S.Ct. 1555.

[21] ***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.

[22] More importantly, however, petitioner's guilt of capital murder did not depend on proof that he was the dominant partner: 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 is entirely consistent with the conclusion that petitioner was also an actual participant in the killing. [40]

***293** Furthermore, there was considerable forensic and other physical evidence linking petitioner to the crime. [41] The weight and size of the rock, [42] and the character of the fatal 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,the ***294** 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 abduction with intent 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.

****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]

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 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 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.

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.

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 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] See *ante,* at 1948–1949. Even on **1956 the question of prejudice *297 or materiality,[2] over 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 1953–1955. As the Court says, however, the prejudice enquiry does not stop at the conviction but goes to each step of the sentencing process: 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 1954–1955. 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 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 with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. See *ante,* at 1952–1953; *Kyles v. Whitley,* 514 U.S. 419, 434–435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (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 1952–1953 (quoting *Kyles, supra,* at 435, 115 S.Ct. 1555).

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, 96 S.Ct. 2392, 49 L.Ed.2d 342 (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 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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (Marshall, J., dissenting)). We first essayed a partial definition in **1957 *United States v. Agurs, 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 was required if there was "any reasonable likelihood" that the false testimony had affected the verdict. *Agurs, supra,* at 103, 96 S.Ct. 2392 (citing *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in turn quoting *Napue v. Illinois,* 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (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, 105 S.Ct. 3375 (opinion of Blackmun, J.). See also *Brecht v. Abrahamson,*

507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (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, 87 S.Ct. 824, 17 L.Ed.2d 705 (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 very slight effect.' " 427 U.S., at 112, 96 S.Ct. 2392 (quoting *Kotteakos v. United States,* 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (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").

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, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (apparently treating "reasonable probability" as synonymous with "probably"); *id.,* at 254, n. 3, 106 S.Ct. 1032 (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 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.

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 1952. Indeed, the Court concedes that discrediting Stoltzfus's testimony "might have changed the outcome of the trial," *ibid.,* 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 1953.

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 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 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 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 ... 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 "Mountain Man" started "hitting [Whitlock] on the left shoulder, her right shoulder and then ... the head," finally "open[ing] 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" "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, "[A]re you O.K.[?]," but Whitlock responded only with eye contact; "she didn't smile, there was no expression," and "[j]ust 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 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 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 1955. 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, 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 the prosecutor made no mention of her testimony in his closing statement at the sentencing proceeding. See *ante,* at 1955. But although the Court is entirely right that the prosecution gave no prominence to the Stoltzfus testimony at the sentencing stage, the Commonwealth'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 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, 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 had taken a major role in the murder. The Court has quoted the District ***307** Court's summation of evidence against him, *ante,* at 1953, 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.

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 1954, or that the Stoltzfus testimony did not directly address the aggravating factors found, *ante,* at 1955. 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) ("[R]esearch 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.

All Citations

527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286, 67 USLW 3683, 67 USLW 4477, 99 Cal. Daily Op. Serv. 4707, 99 Cal. Daily Op. Serv. 5186, 1999 Daily Journal D.A.R. 6091, 1999 CJ C.A.R. 3709, 12 Fla. L. Weekly Fed. S 361

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

† Justice THOMAS joins Parts I and IV of this opinion. Justice KENNEDY joins Part III.

1 The opinion of the Court of Appeals is unreported. The judgment order is reported, *Strickler* v. *Pruett,* 149 F.3d 1170 (C.A.4 1998). The opinion of the District Court is also unreported.

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

3 Workman was called as a defense witness.

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.

6 Stoltzfus stated that the girl caught a button in Stoltzfus' “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.

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.

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, *id.,* at 300, 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, 115 S.Ct. 1555, 131 L.Ed.2d 490 (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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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.

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, this page.

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.

19 See, *e.g.,* *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) *(per curiam);* *Pyle v. Kansas,* 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Napue v. Illinois,* 360 U.S. 264, 269–270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (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, 115 S.Ct. 1555 (opinion of SCALIA, J.).

21 We reject respondent'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, 105 S.Ct. 3375, 87 L.Ed.2d 481 (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 "[W]e 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., at 16, 104 S.Ct. 2901, or that 'some interference by officials,' *Brown v. Allen,* 344 U.S. 443, 486, 73 S.Ct. 397, 97 L.Ed. 469 (1953), made compliance impracticable, would constitute cause under this standard." *Murray,* 477 U.S., at 488, 106 S.Ct. 2639; see also *Amadeo v. Zant,* 486 U.S. 214, 221–222, 108 S.Ct. 1771, 100 L.Ed.2d 249 (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 373.

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 (1997). We express no opinion on the Fourth Circuit's decision on this question. 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, this page.

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) (1998); see also *Yeatts v. Murray,* 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995). Respondent acknowledges that petitioner was not entitled to discovery under Virginia law. Brief for Respondent 25.

30 See Va. Sup.Ct. Rule 3A:11 (1998). 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 his 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 Commonwealth'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.

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, 116 S.Ct. 2074.

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, 111 S.Ct. 1454.

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

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.

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 " 'inflict[ed] 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.

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 to[o] big to be called a rock and to[o] 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.

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 1952–1953, 1947. 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 1948–1949, 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.

2 In keeping with suggestions in a number of our opinions, see *Schlup v. Delo,* 513 U.S. 298, 327, n. 45, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley,* 505 U.S. 333, 345, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), the Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See *ante,* at 1948–1949, 1951–1952, 1955. I follow the Court's lead.

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, 113 S.Ct. 2578, 125 L.Ed.2d 168 (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, 111 S.Ct. 722, 112 L.Ed.2d 795 (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, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). We have adopted the standard established in *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (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, 113 S.Ct. 1710, 123 L.Ed.2d 353 (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, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *FTC v. Morton Salt Co.,* 334 U.S. 37, 55–61, 68 S.Ct. 822, 92 L.Ed. 1196 (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, 116 S.Ct. 604, 133 L.Ed.2d 545 (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, 96 S.Ct. 612, 46 L.Ed.2d 659 (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, 117 S.Ct. 1953, 138 L.Ed.2d 327 (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, 103

S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *Packwood v. Senate Select Comm. on Ethics,* 510 U.S. 1319, 114 S.Ct. 1036, 127 L.Ed.2d 530 (1994) (REHNQUIST, C.J., in chambers).

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 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.

96 S.Ct. 2392
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Linda AGURS.

No. 75-491.
|
Argued April 28, 1976.
|
Decided June 24, 1976.

Synopsis

Defendant's conviction of second-degree murder was reversed by the United States Court of Appeals for the District of Columbia Circuit, 167 U.S.App.D.C. 28, 510 F.2d 1249, rehearing en banc was denied, 171 U.S.App.D.C. 350, 520 F.2d 82, and certiorari was granted. The Supreme Court, Mr. Justic Stevens, held that the prosecutor's failure to tender the murder victim's criminal record to the defense did not deprive defendant of a fair trial where it appeared that the record was not requested by defense counsel and gave no rise to an inference of perjury, the trial judge remained convinced of defendant's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record and the trial judge's firsthand appraisal of the entire record was thorough and entirely reasonable.

Court of Appeals reversed.

Mr. Justice Marshall filed a dissenting opinion in which Mr. Justice Brennan joined. Although attorney for the sovereign must prosecute accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done.

****2394** Syllabus [*]

***97** 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, 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 ****2395** judge's firsthand appraisal of the entire record was thorough and entirely reasonable. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, distinguished. Pp. 2397-2402.

(a) A prosecutor does not violate the constitutional duty of ***98** disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. Pp. 2399-2400.

(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. P. 2400.

(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. Pp. 2400-2401.

(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. 2401-2402.

167 U.S.App.D.C. 28, 510 F.2d 1249, reversed.

West Headnotes (12)

[1] **Criminal Law** Discovery

In prosecution for second-degree murder, defense counsel's failure to obtain murder victim's prior criminal record, which contained convictions for carrying knives and would have arguably buttressed defendant's contention that she acted in self-defense, for reason that he believed that record was inadmissible, did not demonstrate ineffectiveness.

176 Cases that cite this headnote

[2] **Criminal Law** Proceedings to Obtain Disclosure

Although prosecutor has no duty to provide defense counsel with unlimited discovery of everything known by him, if subject matter of defense counsel's request for evidence is material, or indeed if substantial basis for claiming materiality exists, it is reasonable to require prosecutor to respond either by furnishing information or by submitting problem to trial judge; and when prosecutor receives specific and relevant request, failure to make any response is seldom, if ever, excusable. U.S.C.A.Const. Amends. 5, 14.

1128 Cases that cite this headnote

[3] **Criminal Law** Materiality and probable effect of information in general

If evidence is so clearly supportive of claim of innocence that it gives prosecution notice of duty to produce, duty should equally arise even if no request by defense counsel is made; and for such purposes, there is no significant difference between cases in which there has been merely general request for exculpatory matter and cases in which there has been no request at all. U.S.C.A.Const. Amends. 5, 14.

508 Cases that cite this headnote

[4] **Criminal Law** Materiality and probable effect of information in general

Prosecutor does not violate constitutional duty of disclosure unless his omission is of sufficient significance to result in denial of defendant's right to fair trial. U.S.C.A.Const. Amends. 5, 14.

508 Cases that cite this headnote

[5] **Criminal Law** Information or Things, Disclosure of

Whether or not procedural rules authorizing discovery of everything that might influence jury might be desirable, Constitution does not demand such broad discovery; and mere possibility that item of undisclosed information might have aided defense, or might have affected outcome of trial, does not establish "materiality" in constitutional sense. U.S.C.A.Const. Amends. 5, 14.

1136 Cases that cite this headnote

[6] **Criminal Law** Constitutional obligations regarding disclosure

Prosecutor's constitutional duty of disclosure is not measured by his moral culpability or willfulness, but if suppression of evidence results in constitutional error, it is because of character of evidence, not character of prosecutor. U.S.C.A.Const. Amends. 5, 14.

213 Cases that cite this headnote

[7] **Criminal Law** Constitutional obligations regarding disclosure

There are situations in which evidence is obviously of such substantial value to defense that elementary fairness requires that prosecutor disclose it to defendant even without specific request. U.S.C.A.Const. Amends. 5, 14.

1278 Cases that cite this headnote

[8] **Criminal Law** Duties and Obligations of Prosecuting Attorneys

Although attorney for the sovereign must prosecute accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done.

54 Cases that cite this headnote

[9] **Criminal Law** Grounds for New Trial in General

Criminal Law Materiality and probable effect of information in general

In determining whether prosecutor's failure to disclose evidence to defense denied defendant fair trial, proper standard of materiality of undisclosed evidence is that if omitted evidence creates reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed; defendant should not have to satisfy severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal, nor should trial judge order new trial every time he is unable to characterize nondisclosure as harmless under customary harmless error standard. U.S.C.A.Const. Amends. 5, 14.

2607 Cases that cite this headnote

[10] **Criminal Law** Reasonable Doubt

Finding of guilt is permissible only if supported by evidence establishing guilt beyond reasonable doubt.

60 Cases that cite this headnote

[11] **Criminal Law** Grounds for New Trial in General

In determining whether prosecutor's failure to disclose evidence to defense denied defendant fair trial, omission must be evaluated in context of entire record and, if there is no reasonable doubt about guilt whether or not additional evidence is considered, there is no justification for new trial; however, if verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt. U.S.C.A.Const. Amends. 5, 14.

909 Cases that cite this headnote

[12] **Criminal Law** Impeaching evidence

Prosecutor's failure to tender second-degree murder victim's criminal record to defense did not deprive defendant of fair trial where it appeared that record was not requested by defense counsel and gave no rise to inference of perjury, trial judge remained convinced of defendant's guilt beyond reasonable doubt after considering criminal record in context of entire record, and trial judge's firsthand appraisal of entire record was thorough and entirely reasonable. U.S.C.A.Const. Amends. 5, 14.

545 Cases that cite this headnote

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Opinion

Mr. Justice STEVENS delivered the opinion of the Court.

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 acted in self-defense, deprived her of a fair trial under the rule of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

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 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 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 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 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 unless requested to do so, [4] ***102** assumed that the evidence was 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.

[1] The Court of Appeals reversed. [5] 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]

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, 83 S.Ct. 1194, 10 L.Ed.2d 215, 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, 55 S.Ct. 340, 79 L.Ed. 791, 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] In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, [8] and must be set aside if there is any reasonable likelihood that the false testimony could have 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.

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, Boblit, ***105** 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 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 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 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.

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.

[2] 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 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.

[3] 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 made. ***107** 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 and cases, like the one we must now decide, in which there has been no 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.

III

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, 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.

[4] 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 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 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.

[5] 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 they learn about the case and about their witnesses." In re Imbler, 60 Cal.2d 554, 569, 35 Cal.Rptr. 293, 301, 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, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706. [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, does not establish "materiality" in the constitutional sense.

[6] 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 be presumed to recognize its significance even if he has actually overlooked it. Cf. ****2401** Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104. 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.

[7] **[8]** As the District Court recognized in this case, there are situations 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, 55 S.Ct. 629, 633, 79 L.Ed. 1314. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

[9] 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 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.

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, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557. Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

[10] **[11]** The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt.[20] ****2402** 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. 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 evince 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.

[12] 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 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.

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 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.

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 it of all meaningful content.

In considering the appropriate standard of materiality governing the prosecutor's obligation to volunteer exculpatory evidence, the Court observes:
"(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 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 2401 (footnote omitted).

I agree completely.

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 2401. 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" 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 saluty precaution, the Court treats the case 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 2401.

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, 92 S.Ct. 2562, 2575, 33 L.Ed.2d 706 (1972) (opinion of Marshall, J.). This fundamental 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 2401. 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 comes 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.2d 138, 147 (CA2 1968). I agree with the Court that these considerations, as well as the general interest in finality of judgments, preclude 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 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 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 the standard has been phrased in different language." Ante, at 2402 (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] 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] This standard, unlike the 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]

***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 2397, 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 2397. 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 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, 87 S.Ct. 793, 810, 17 L.Ed.2d 737 (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, 87 S.Ct. 809-810.

The Court derives its "reasonable likelihood" standard for cases involving perjury from cases such as ***121** Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (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 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, 360 U.S. at 269, 79 S.Ct. at 1177, Giglio, supra, 405 U.S.

at 154, 92 S.Ct. at 766, and that corruption would have been present whether or not defense counsel had elicited statements from the witnesses denying that promises had been made.

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 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 and 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.

All Citations

427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 449.

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?

“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, 55 S.Ct., at 341.

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, 55 S.Ct., at 342.

8 Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104; Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 273, 38 L.Ed.2d 216.

9 See Giglio, supra, at 154, 92 S.Ct. at 766, quoting from Napue, supra, at 271, 79 S.Ct. at 1178.

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, 83 S.Ct., at 1196. 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).

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, 81 S.Ct. 735, 5 L.Ed.2d 760. The verdict is not saved because other competent evidence would support it. Culombe v. Connecticut, 367 U.S. 568, 621, 81 S.Ct. 1860, 6 L.Ed.2d 1037." 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.

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, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment." 373 U.S., at 90-91, 83 S.Ct. at 1198 (footnote omitted).

16 In his opinion concurring in the judgment in Giles v. Maryland, 386 U.S. 66, 98, 87 S.Ct. 793, 809, 17 L.Ed.2d 737, 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, 83 S.Ct. at 1196. (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.

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, 95 S.Ct.

60, 42 L.Ed.2d 60; United States v. Houle, 490 F.2d 167, 171 (CA2 1973), cert. denied, 417 U.S. 970, 94 S.Ct. 3174, 41 L.Ed.2d 1141; 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 s 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.

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, 373 U.S. 1004, 89 S.Ct. 494, 21 L.Ed.2d 469; 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).

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.

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 (CA5 1974); United States v. Kahn, 472 F.2d, at 287; Clark 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).

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 2399. 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.

KeyCite Yellow Flag - Negative Treatment
Superseded by Constitutional Amendment as Stated in People v. Horton, Ill.App. 2 Dist., October 12, 2016

105 S.Ct. 3375
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Hughes Anderson BAGLEY.

No. 84–48
|
Argued March 20, 1985.
|
Decided July 2, 1985.

Synopsis
Defendant appealed from an order of the United States District Court for the Western District of Washington, Donald S. Voorhees, J., denying his motion to vacate, set aside, or correct sentence received for his narcotics convictions. The United States Court of Appeals for the Ninth Circuit, 719 F.2d 1462, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Blackmun, held that evidence withheld by government is "material," as would require reversal of conviction, only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

Reversed and remanded.

Justice White filed an opinion concurring in part and concurring in the judgment, in which Chief Justice Burger and Justice Rehnquist joined.

Justice Marshall filed a dissenting opinion in which Justice Brennan joined.

Justice Stevens filed a dissenting opinion.

West Headnotes (4)

[1] **Criminal Law** In general; examination of victim or witness

Criminal Law Materiality and probable effect of information in general

Brady rule does not require prosecutor to deliver his entire file to defense counsel, but only to disclose evidence favorable to accused that, if suppressed, would deprive him of fair trial.

4797 Cases that cite this headnote

[2] **Criminal Law** Materiality and probable effect of information in general

Criminal Law Impeaching evidence

Impeachment evidence, as well as exculpatory evidence, falls within *Brady* rule.

1969 Cases that cite this headnote

[3] **Criminal Law** In general; examination of victim or witness

Criminal Law Discovery and disclosure; transcripts of prior proceedings

Criminal Law Materiality and probable effect of information in general

Government's failure to assist defense by disclosing information that might have been helpful in conducting cross-examination amounts to constitutional violation only if it deprives defendant of fair trial; constitutional error occurs, and conviction must be reversed, only if evidence is material in sense that its suppression undermines confidence in outcome of trial.

4606 Cases that cite this headnote

[4] **Criminal Law** Conduct of counsel in general

Criminal Law Materiality and probable effect of information in general

Criminal Law Sanctions for failure to disclose

Evidence withheld by government is "material," as would require reversal of conviction, only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

7778 Cases that cite this headnote

****3375 *667** *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 requests ****3376** 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, 83 S.Ct. 1194, 10 L.Ed.2d 215, 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, 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 ***668** witnesses required automatic reversal. The Court of Appeals also stated that it "disagree[d]" 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.

719 F.2d 1462 (CA9 1983) reversed and 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. 3379–3381.

Justice BLACKMUN, joined by Justice O'CONNOR, delivered an opinion with respect to Part III, concluding that the nondisclosed evidence at issue 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. 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. 3381–3385.

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, 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. 3385.

Attorneys and Law Firms

***669** 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.

****3377** Thomas W. Hillier II argued the cause and filed a brief for respondent.*

* 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.

Opinion

Justice BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

In *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (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:

> "The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, 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 or inducements" had been made to O'Connor or Mitchell. In apparent reply to a request in the motion's ninth paragraph for "[c]opies 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]

Respondent waived his right to a 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 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."

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.*

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 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.

The District Court adopted each of the Magistrate's findings except for the last one to the effect that "[n]either 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 [83 S.Ct. 1194, 10 L.Ed.2d 215] (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** 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.

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 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 "disagree[d]" 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 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 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, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (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, 105 S.Ct. 427, 83 L.Ed.2d 354 (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, 83 S.Ct., at 1196. See also *Moore v. Illinois,* 408 U.S. 786, 794–795, 92 S.Ct. 2562, 2567–2568, 33 L.Ed.2d 706 (1972). The Court explained in *United States v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976): "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 ***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.

[1] 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] but only to disclose evidence favorable to the 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 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, 96 S.Ct., at 2399.

[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, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Such evidence is "evidence favorable to an accused," *Brady,* 373 U.S., at 87, 83 S.Ct., at 1196, 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, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (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 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, 94 S.Ct. 1105, 39 L.Ed.2d 347 (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 constitutes " 'constitutional error of the first magnitude' " requiring automatic reversal. 719 F.2d, at 1464 (quoting *Davis v. Alaska, supra,* 415 U.S., at 318, 94 S.Ct., at 1111).

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 **3381 *677 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 th [e] general rule [of *Brady*]. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed 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, 92 S.Ct., at 766 (citations omitted).

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

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 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" ' [86 S.Ct. 1245, 1246, 16 L.Ed.2d 314]." 415 U.S., at 318, 94 S.Ct., at 1111 (quoting *Smith v. Illinois,* 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968)). See also *United States v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984).

[3] 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 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, 96 S.Ct., at 2401, 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 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 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, 96 S.Ct., at 2397 (footnote omitted).[8] Although this rule is stated in terms that treat the knowing use 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 perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id.,* at 104, 96 S.Ct., at 2397.

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, 96 S.Ct., at 2401. 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, 96 S.Ct., at 2401. 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 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] 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 defense than in the situation in which the defense makes no request or only a general request. 427 U.S., at 106, 96 S.Ct., at 2398. 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 *United States v. Valenzuela-Bernal,* 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d 1193 (1982), 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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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, 104 S.Ct., at 2068. [13] The *Strickland* Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ibid.*

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 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.

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 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 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 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.

***685** Justice WHITE, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, concurring in part and concurring in the judgment.

[4] 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 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 3384. 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 factbound 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.

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 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 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, 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 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 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 7a.

Upon discovering these ATF forms through a Freedom of Information Act request, Bagley sought 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 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 8a.

***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, 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.

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 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 "mak[ing] 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 3384.

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, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *United States v. Agurs,* 427 U.S. 97, 121, 96 S.Ct. 2392, 2406, 49 L.Ed.2d 342 (1976) (MARSHALL, J., dissenting), but when "the 'reliability of a given witness may well be determinative of guilt or innocence,' " *Giglio, supra,* 405 U.S., at 154, 92 S.Ct., at 766 (quoting *Napue, supra,* 360 U.S., at 269, 79 S.Ct., at 1177), and when "the Government's case depend[s] almost entirely on" the testimony of a certain witness, 405 U.S., at 154, 92 S.Ct., at 766, 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 was not disclosed to the jury:

> "[W]ithout [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, 92 S.Ct., at 766.

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 3384, 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 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,* 405 U.S., at 151–153, 92 S.Ct., at 764–765; 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. "[T]he 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." *Agurs, supra,* 427 U.S., at 120, 96 S.Ct., at 2405 (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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A

I begin from the fundamental premise, which hardly bears repeating, that "[t]he 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); 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 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 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, 63 S.Ct. 177, 178–179, 87 L.Ed. 214 (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]

***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 government, 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] and perhaps ***695** because this reality 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, 105 S.Ct. 1087, 84 L.Ed.2d 53 (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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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 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 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, 92 S.Ct. 2562, 2575–2576, 33 L.Ed.2d 706 (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, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

My view is based in significant part on the reality of criminal practice and on the consequently inadequate protection 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 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 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 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, 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 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 truth-seeking 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 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 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 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. 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 3383. Although this looks like a post-trial standard of review, see, *e.g.,* *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)—that there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial—the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it 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, 104 S.Ct. 3516, 82 L.Ed.2d 824 (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 because of later opportunity 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 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.... [T]he 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 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.

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 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]

***704 **3395** D

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 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, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also *Agurs,* 427 U.S., at 119–120, 96 S.Ct., at 2405 (MARSHALL, J., dissenting). [6]

***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 only of some of that information. Second, persistent or 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 3388, I also believe the standard for reversal 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,* 427 U.S., at 119–120, 96 S.Ct., at 2405 (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 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 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 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 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]

***708** ****3397** In 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 ——. These key witnesses, it turned out, were each to receive monetary rewards whose 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 3384. 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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (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, see *ante,* at 3379–3381, 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 3379, 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, 83 S.Ct., at 1196.

We noted in *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (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, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and the prosecution's suppression of favorable evidence specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's 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, 96 S.Ct., at 2397.[1] See ****3398** *Brady, supra,* 373 U.S., at 88, 83 S.Ct., at 1197 ("would tend to exculpate"); ***710** accord, *United States v. Valenzuela-Bernal,* 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d 1193 (1982) ("reasonable likelihood"); *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) ("reasonable likelihood"); *Napue v. Illinois,* 360 U.S. 264, 272, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (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, 96 S.Ct., at 2397, 2398.[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, 96 S.Ct., at 2398. 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 request, all evidence that "might have helped the defense, or might have affected the outcome." 427 U.S., at 110, 96 S.Ct., at 2400.[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, 96 S.Ct., at 2398–2399. 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, 96 S.Ct., at 2399. 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, we held that no constitutional violation occurs in the absence of a specific request unless "the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.,* at 108, 112, 96 S.Ct., at 2399, 2401.[4]

***712** ****3399** What 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, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) and *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), simply falls "outside the *Brady* context." *Ante,* at 3383.

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. Hasting,* 461 U.S. 499, 516–517, 103 S.Ct. 1974, 1984–1985, 76 L.Ed.2d 96 (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 *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 3384, 3385. 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 3384, 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 3384 (opinion of ****3400** BLACKMUN, J.). [6]

***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 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 3393.

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. *Ante,* at 3384 (opinion of BLACKMUN, J.). This is not faithful to our statement in *Agurs* that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S., at 106, 96 S.Ct., at 2398. 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 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, ***715** Fair Play: Evidence Favorable to 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. I therefore respectfully dissent from the judgment that the case be remanded for determination under the Court's new standard.

All Citations

473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481, 53 USLW 5084

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 In addition, ¶ 10(b) of the motion requested "[p]romises 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 ¶ 11 requested "[a]ll 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, CV–3592–RJK(M) (CD Cal.) Exhibits 1–9.

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.

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, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). See *Brady v. Maryland,* 373 U.S., at 87–88, 83 S.Ct., at 1196–1197.

7 See *United States v. Agurs,* 427 U.S. 97, 106, 111, 96 S.Ct. 2392, 2398, 2401, 49 L.Ed.2d 342 (1976); *Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). See also *California v. Trombetta,* 467 U.S. 479, 488, n. 8, 104 S.Ct. 2528, 2534, n. 8, 81 L.Ed.2d 413 (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, 87 S.Ct. 793, 818, 17 L.Ed.2d 737 (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.

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, 55 S.Ct. 340, 79 L.Ed. 791 (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, 55 S.Ct., at 341. The Court reaffirmed this principle in broader terms in *Pyle v. Kansas,* 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (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.

The Court again reaffirmed this principle in *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (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, 79 S.Ct., at 1177. 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, 79 S.Ct., at 1178. 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, 79 S.Ct., at 1178. 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, 79 S.Ct., at 1178. See n. 8, *supra.* See also *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (quoting *Napue,* 360 U.S., at 271, 79 S.Ct., at 1178). *Napue* antedated *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (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, 87 S.Ct., at 828 (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86–87, 84 S.Ct. 229, 230–231, 11 L.Ed.2d 171 (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, 96 S.Ct., at 2398. The request in *Brady* was for the extrajudicial statements of Brady's accomplice. See 373 U.S., at 84, 83 S.Ct., at 1195.

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, 96 S.Ct., at 2397. Since the *Agurs* Court identified *Brady* as a "specific 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, 104 S.Ct., at 2068–2069.

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).

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *id.,* at 712–715, 104 S.Ct., at 2077–2079 (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).

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).

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, 83 S.Ct., at 1196, but also observed that two decisions of the Court of Appeals for the Third Circuit "state the correct constitutional rule." *Id.,* at 86, 83 S.Ct., at 1196. 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, 73 S.Ct. 639, 97 L.Ed. 1341 (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, 76 S.Ct. 120, 100 L.Ed. 773 (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 ¶ 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.

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, 92 S.Ct. 2163, 33 L.Ed.2d 83 (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.

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, 84 S.Ct. 331, 11 L.Ed.2d 263 (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.

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 3381 (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, 96 S.Ct., at 2401 (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, 83 S.Ct., at 1196. As JUSTICE MARSHALL's explication of the record in this case demonstrates, *ante,* at 3377–3379, 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 “Contract[s] 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 3384, was nevertheless not “material” would be egregiously erroneous under any standard.

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,* 373 U.S., at 87–88, 83 S.Ct., at 1196–1197.

3 "[W]e 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, 96 S.Ct., at 2399.

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, 96 S.Ct., at 2401 (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, 96 S.Ct., at 2400. 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, 96 S.Ct., at 2399. 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, 96 S.Ct., at 2402.

5 See *ante,* at 3382 ("Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States v. Agurs* "); *ante,* at 3383 (referring generally to "the *Agurs* standard for the materiality of undisclosed evidence"); *ante,* at 3393 (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 3382, n. 9, and 3385, and Justice MARSHALL, *ante,* at 3396, 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 3385.

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta In re Sealed Case, D.C.Cir., May 23, 2006

122 S.Ct. 2450
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Angela RUIZ.

No. 01–595.
|
Argued April 24, 2002.
|
Decided June 24, 2002.

Synopsis

After she refused to accept "fast track" plea bargain, under which government would recommend downward departure under Sentencing Guidelines if she pleaded guilty, because it contained waiver of *Brady* right to disclosure of impeachment evidence, defendant ultimately entered guilty plea, and was convicted in the United States District Court for the Southern District of California, Howard B. Turrentine, J., of importing marijuana. Defendant appealed, challenging government's refusal to recommend, and court's refusal to grant, downward departure. The Court of Appeals for the Ninth Circuit, 241 F.3d 1157,vacated sentence and remanded. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) Court had jurisdiction over appeal; (2) Constitution does not require government to disclose impeachment information prior to entering plea agreement with criminal defendant; and (3) plea agreement requiring defendant to waive her right to receive information the government had regarding any "affirmative defense" she would raise at trial did not violate the Constitution.

Reversed.

Justice Thomas filed an opinion concurring in the judgment.

West Headnotes (6)

[1] **Criminal Law** Requisites and sufficiency of judgment or sentence

Supreme Court had jurisdiction over defendant's appeal of her sentence, which alleged that conditioning plea agreement on waiver of defendant's right under *Brady* to disclosure of impeachment evidence violated her rights under the Fifth and Sixth Amendments, despite Court's ultimate finding that government was not required to disclose material impeachment evidence prior to entering a plea agreement with a defendant; defendant's claim alleged that her sentence was imposed "in violation of law," as required for appellate jurisdiction, and court had jurisdiction to determine its own jurisdiction. U.S.C.A. Const.Amends. 5, 6; 18 U.S.C.A. § 3742.

828 Cases that cite this headnote

[2] **Criminal Law** Appellate Jurisdiction

A federal court always has jurisdiction to determine its own jurisdiction.

269 Cases that cite this headnote

[3] **Criminal Law** Representations, promises, or coercion; plea bargaining

Criminal Law Impeaching evidence

Constitution does not require government to disclose impeachment information prior to entering plea agreement with criminal defendant; impeachment information is related to fairness of a trial rather than voluntariness of a plea, value of disclosure to defendant would be limited, and disclosure would place added burden on government, thereby significantly interfering with the plea bargaining process. U.S.C.A. Const.Amends. 5, 6.

576 Cases that cite this headnote

[4] **Criminal Law** Effect in General

When a defendant pleads guilty he or she forgoes not only a fair trial, but also other accompanying constitutional guarantees.

143 Cases that cite this headnote

[5] **Criminal Law** Voluntary Character

Criminal Law Waiver of Rights, Defenses, and Objections

Constitution insists that defendant enter a guilty plea that is "voluntary" and that defendant must make related waivers knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences.

685 Cases that cite this headnote

[6] **Criminal Law** Representations, promises, or coercion; plea bargaining

Plea agreement requiring defendant to waive her right to receive information the government had regarding any "affirmative defense" she would raise at trial did not violate the Constitution; need for such information was related to fairness of trial rather than voluntariness of plea, burden of disclosure to government outweighed value to defendant, and disclosure would interfere with administration of plea bargaining process. U.S.C.A. Const.Amends. 5, 6.

156 Cases that cite this headnote

****2451** ***622** *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 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 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, 67 S.Ct. 677, 91 L.Ed. 884. In order to make that determination, ***623** it was necessary for the Ninth Circuit to address the merits. P. 2454.

****2452** 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, 83 S.Ct. 1194, 10 L.Ed.2d 215, 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, 89 S.Ct. 1709, 23 L.Ed.2d 274. As a result, the Constitution insists that the defendant enter a guilty plea that is "voluntary" and make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." See, *e.g.,* *id.,* at 242, 89 S.Ct. 1709. 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 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, 90 S.Ct. 1463, 25 L.Ed.2d 747. 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, 105 S.Ct. 1087, 84 L.Ed.2d 53—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 rule could seriously ***624** 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. 2454–2457.

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. P. 2457.

241 F.3d 1157, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, ****2453** KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 2457.

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Opinion

***625** Justice BREYER delivered the opinion of the Court.

In this case we primarily consider whether the Fifth and Sixth Amendments require 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 (C.A.9 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 the defendant" "has been turned over to the defendant," 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 "waiv[e] 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. 241 F.3d, at 1161.

Relying on 18 U.S.C. § 3742, see *infra,* at 2454, 2455, Ruiz appealed her sentence to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit vacated the District Court's sentencing determination. The Ninth Circuit pointed out that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial. 241 F.3d, at 1166. 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. 534 U.S. 1074, 122 S.Ct. 803, 151 L.Ed.2d 689 (2002).

II

[1] At the outset, we note that a question of statutory 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(a).

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 (C.A.1 1996); *United States v. Lawal,* 17 F.3d 560, 562 (C.A.2 1994); *United States v. Powell,* 269 F.3d 175, 179 (C.A.3 2001); *United States v. Ivester,* 75 F.3d 182, 183 (C.A.4 1996); *United States v. Cooper,* 274 F.3d 230, 248 (C.A.5 2001); *United States v. Scott,* 74 F.3d 107, 112 (C.A.6 1996); *United States v. Byrd,* 263 F.3d 705, 707 (C.A.7 2001); *United States v. Mora–Higuera,* 269 F.3d 905, 913 (C.A.8 2001); *United States v. Garcia–Garcia,* 927 F.2d 489, 490 (C.A.9 1991); *United States v. Coddington,* 118 F.3d 1439, 1441 (C.A.10 1997); *United States v. Calderon,* 127 F.3d 1314, 1342 (C.A.11 1997); *In re Sealed Case No. 98–3116,* 199 F.3d 488, 491–492 (C.A.D.C.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 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.

[2] 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, 67 S.Ct. 677, 91 L.Ed. 884 (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

[3] 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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (Due process requires prosecutors to "avoi[d] ... an unfair trial" by making available "upon request" evidence "favorable to an accused ... where the evidence is material either to guilt or to punishment"); *United States v. Agurs,* 427 U.S. 97, 112–113, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (defense request unnecessary); *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence").

[4] **[5]** When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees. ***629** *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (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 "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); see also *Boykin, supra,* at 242, 89 S.Ct. 1709.

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 her 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.

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, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) ("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, 107 S.Ct. 851, 93 L.Ed.2d 954 (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).

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, help a particular defendant. The degree of help that impeachment information can 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.

Second, we have found no legal authority embodied either in this Court's past cases or in cases from other circuits that provides 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, 90 S.Ct. 1463 (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, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (counsel "misjudged the admissibility" of a "confession"); *United States v. Broce,* 488 U.S. 563, 573, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (counsel failed to point out a potential defense); ***631** *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (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, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Here, as we have just pointed out, the added value of the Ninth Circuit's "right" to a 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, 89 S.Ct. 1166, 22 L.Ed.2d 418 (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 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 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. Keeney, 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 ****2457** recognition by both 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. 460, 461–462 (1994) (congressional proposal to significantly broaden § 3500) with 167 F.R.D.

221, 223, n. (judicial conference opposing congressional proposal).

Consequently, the Ninth Circuit's requirement could force the Government to abandon its "general practice" of not "disclos[ing] 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.

[6] In addition, we note that the "fast track" plea agreement requires a defendant to waive her right to receive information the Government has regarding any "affirmative defense" she raises at trial. App. to 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 with the administration of the plea-bargaining process.

For these reasons the judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

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 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 2455, 2456, 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, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). That concern is not implicated at the plea stage regardless.

All Citations

536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586, 70 USLW 4677, 02 Cal. Daily Op. Serv. 5602, 2002 Daily Journal D.A.R. 7067, 2002 Daily Journal D.A.R. 7071, 15 Fla. L. Weekly Fed. S 454

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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310 F.3d 999
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Nazih TADROS, Defendant–Appellant.

No. 01–4242
|
Argued Sept. 26, 2002.
|
Decided Nov. 15, 2002.

Synopsis

Following a jury trial, defendant was convicted in the United States District Court for the Northern District of Illinois, James F. Holderman, J., of mail fraud and wire fraud, and defendant appealed. The Court of Appeals, Ilana Diamond Rovner, Circuit Judge, held that: (1) district court's finding that the government had not withheld audiotapes in violation of *Brady* was not an abuse of discretion; (2) evidence supported defendant's convictions for mail fraud and wire fraud; and (3) five-year statute of limitations for mail fraud and wire fraud did not begin to run the date defendant received final insurance payment.

Affirmed.

West Headnotes (11)

[1] **Criminal Law** Materiality and probable effect of information in general

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.

16 Cases that cite this headnote

[2] **Criminal Law** Materiality and probable effect of information in general

In order to establish a *Brady* violation, a defendant must show (1) that the government suppressed evidence, (2) that the evidence was favorable to his defense, and (3) that the evidence was material to an issue at trial.

29 Cases that cite this headnote

[3] **Criminal Law** Diligence on part of accused; availability of information

The *Brady* rule does not apply to evidence not in the possession of the government that a defendant would have been able to discover himself through reasonable diligence.

19 Cases that cite this headnote

[4] **Criminal Law** Test results; demonstrative and documentary evidence

District court's finding that the government had not withheld audiotapes in violation of *Brady* was not an abuse of discretion in defendant's prosecution for mail fraud and wire fraud for engaging in a scheme to defraud several insurance companies by submitting false information about a purported disability; the government did not have possession of the tapes at any point prior to trial, and the defendant offered no evidence that the information on the tapes would be helpful to defendant. 18 U.S.C.A. §§ 1341, 1343; 26 U.S.C.A. § 7206(1).

3 Cases that cite this headnote

[5] **Criminal Law** Construction in favor of government, state, or prosecution

In reviewing a claim for sufficiency of the evidence, the Court of Appeals court must view the evidence in the light most favorable to the prosecution.

1 Case that cites this headnote

[6] **Criminal Law** Verdict unsupported by evidence or contrary to evidence

Criminal Law Reasonable doubt

The Court of Appeals may reverse a conviction only when no rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt; the record must be devoid of any evidence, regardless of how it is weighed, from which a reasonable jury could find guilt beyond a reasonable doubt.

5 Cases that cite this headnote

[7] **Fraud** Nature and Elements of Offense

In order to establish a violation of the mail or wire fraud statutes, the government must prove (1) that the defendant participated in a scheme to defraud; (2) the defendant intended to defraud; and (3) the defendant used the mail or wires in furtherance of the fraudulent scheme. 18 U.S.C.A. §§ 1341, 1343.

11 Cases that cite this headnote

[8] **Fraud** False pretenses or representations

Fraud Knowledge and intent; foreseeability

Evidence was sufficient to support finding that defendant used, or knowingly caused others to use, the mail or wires in furtherance of the scheme to defraud insurance companies, supporting defendant's convictions for mail fraud and wire fraud; defendant altered the nature of his job duties when applying for disability benefits to claim that he performed manual labor when, in fact, he performed only office work, defendant exaggerated the nature of his injuries, claiming, for example, to be house-confined when he was, in fact, out of the house running errands, performing physically taxing household duties, and running his own business, and the information defendant presented to the doctors certifying his disability differed from the information he supplied to the doctors who treated him on a regular basis. 18 U.S.C.A. §§ 1341, 1343.

[9] **Fraud** Success of scheme

The government need not prove that a scheme to defraud was successful to prove a violation of the mail or wire fraud statutes. 18 U.S.C.A. §§ 1341, 1343.

4 Cases that cite this headnote

[10] **Criminal Law** Commencement of Period of Limitation

For purposes of mail fraud and wire fraud, the five-year statute of limitations begins to run from the date of mailing of the fraudulent information; each mailing constitutes a separate offense. 18 U.S.C.A. §§ 1341, 1343.

9 Cases that cite this headnote

[11] **Criminal Law** Continuing offenses

Five-year statute of limitations for mail fraud and wire fraud did not begin to run the date defendant received final insurance payment, which was procured through fraudulent means; even though defendant failed to elicit more money from the insurance companies, defendant continued to use the mail and wires to send fraudulent information to insurance companies long after the date of final payment. 18 U.S.C.A. §§ 1341, 1343.

11 Cases that cite this headnote

Attorneys and Law Firms

***1000** Eric Wilson (argued), Office of U.S. Atty., Chicago, IL, for Plaintiff–Appellee.

Anthony M. Montemurro (argued), Chicago, IL, for Defendant–Appellant.

Before BAUER, ROVNER, and WILLIAMS, Circuit Judges.

Opinion

ILANA DIAMOND ROVNER, Circuit Judge.

A jury found Nazih Tadros guilty of mail fraud and wire fraud for engaging in a scheme to defraud several insurance companies by submitting false information to them about a purported disability and his ability to work. The defendant

claims that the government failed to disclose information in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the government failed to prove the elements of the fraud beyond a reasonable doubt, and that the indictment was returned after the relevant statute of limitations had expired. We affirm.

I.

Over the course of several years, Tadros submitted applications for insurance policies with four different insurance companies and applied for benefits under the terms of those policies. The government indicted Tadros alleging that he used mail and wire services to knowingly supply false information both in the applications for insurance coverage and for benefits under those policies in violation of 18 U.S.C. §§ 1341 and 1343, and 26 U.S.C. § 7206(1).

***1001** The fraudulent scheme was fueled by an April 5, 1993 car accident in which Tadros was rear-ended by another vehicle. The reporting police officer did not note any physical injuries to either party and recorded the physical condition of both parties as normal. Tadros sought treatment for neck and back pain the following day at a local emergency room. An x-ray of his neck and back revealed some arthritis and an old compression fracture, but nothing more. After an uneventful visit, Tadros was released with a prescription for a pain reliever and a muscle relaxant.

The crux of the government's allegation is as follows: in an effort to collect money from various insurance agencies which insured the defendant, Tadros fraudulently represented that the injuries he sustained in the August 1993 car accident were greater than they actually were, that these and other health problems prohibited him from working, and that his occupation required physical labor that he could not perform. The government contended that Tadros transmitted this fraudulent information by mail and wire in violation of 18 U.S.C. §§ 1341, 1343. Because the defendant claims that the jury's verdict was not supported by the evidence, below we review the relevant evidence elicited at the trial.

The evidence produced at trial indicated that Tadros was the owner and president of "Super Jet," a small Chicago grocery store. The fraud scheme had a recurring pattern: when Tadros applied for insurance coverage he claimed he was the owner or manager of a grocery store who performed no manual labor. When applying for benefits under the policies, Tadros claimed he was a laborer in a grocery store —stocking shelves, unloading trucks, maintaining machinery, and working behind the meat counter. Tadros' employees testified that Tadros was the owner and boss who did the paper work in the store and did not perform manual labor. In addition, none of the testifying employees recalled that Tadros had missed work for any extended period of time other than for an occasional vacation.

The scheme to defraud involved four insurance companies: Mutual Trust Life Insurance Company ("Mutual Trust"), Fireman's Fund Insurance Company (Fireman's), New York Life Insurance Company ("New York Life"), and Prudential Insurance and Financial Services ("Prudential"). In November 1990, Tadros completed an application with Mutual Trust for a disability insurance policy describing his work duties as "office, traveling ... no labor." (Tr. 383). Shortly thereafter, Mutual issued him a disability policy.

On August 6, 1993, Tadros filed a claim with Mutual for total disability benefits, stating that he had sustained neck and back injuries and a concussion in a car accident. On the disability form he described his job title as that of a clerk or store maintenance worker. He alleged both on the claim form and in an interview with a Mutual employee that his duties included manual labor such as unloading merchandise, building displays, and stocking shelves, and that he had not been able to return to work since the accident.

Although it refused to accept liability, in December 1993, Mutual Trust made a partial payment to Tadros while it continued to investigate his claim. After negotiating with his attorney, Mutual Trust subsequently settled the remainder of his claim in May, 1994, for $94,050.

Around the same time that Tadros submitted his disability claim to Mutual, he also filed a Worker's Compensation claim against Super Jet with the Illinois Industrial Commission. Fireman's insured Super Jet against work-related injury claims and Tadros claimed that he had been injured ***1002** while on a work-related errand.[1] Fireman's required that Tadros see three different independent medical examiners regarding his claim of total disability. Each of the doctors came to varying conclusions about the condition of Tadros' back, neck, and shoulders, but all agreed on one thing—the defendant was not totally disabled and could perform the

types of office work required of a grocery store owner or manager.

During his visits to the various medical examiners, Tadros continued to present fraudulent information about the nature and extent of his injuries and the nature of his job duties. Tadros told the first doctor, Dr. Gireesan that he had worked as a clerk at a grocery store, but that he was not currently working. During his initial exam of Tadros on December 1, 1993, Dr. Gireesan found that the defendant had an injury to the disk area between the vertebrae in his back and a grinding sensation in his shoulder, but he advised Tadros that he could continue with light work such as office work. Dr. Gireesan recommended that Tadros see another doctor, Dr. Monaco, regarding his shoulder pain. Dr. Monaco recommended left shoulder surgery which the defendant never sought. During a second visit to Dr. Gireesan, on January 6, 1994, the doctor diagnosed Tadros as having impingement syndrome of the left shoulder. He advised Tadros to refrain from work until the pain was under control. During his final visit with Tadros, on May 17, 1994, Dr. Gireesan advised him that he could return to light duty work.

Next, Tadros saw Dr. Brackett. Dr. Brackett examined Tadros and some of his medical records and doubted the credibility of Tadros' reports of pain. He administered a few tests which indicated to Dr. Brackett that the defendant was malingering and exaggerating the extent of his pain. Dr. Brackett recommended that Tadros return to work without restriction.

The third independent medical examiner, Dr. Haskell, concluded, based on reviews of MRIs performed by other doctors, that although Tadros had some injury to his spine and shoulder, he was not totally and permanently disabled and could perform sedentary and light work, such as that of a store manager or clerk.

In 1993, Fireman's hired a company to conduct surveillance of Tadros in order to investigate his claim of disability. Over the course of several surveillance sessions, the private company observed Tadros leaving his house, driving, pumping gas, doing various errands, going to Super Jet for several hours at a time, and talking on the telephone at Super Jet.

Tadros' claim against Fireman's remained pending before the Illinois Industrial Commission until he voluntarily dismissed it in March, 2000.

Having successfully received $94,050 from Mutual on May 9, 1994, the very next day, Tadros signed a completed application for disability insurance with New York Life. The application consisted of several parts. On the first portion of the application, Tadros indicated that he was the manager of a grocery store. On the medical portion of the application, he indicated that the only prior medical treatment he had received in the ten previous years was for high blood pressure. He claimed he had not received "advice about any treatment, surgery or diagnostic testing which was not completed." (Tr. 566). On a third portion of the application he indicated that he had been treated for "back, spine, or ***1003** bone disorders" resulting from an accident on April 5, 1993, but that the condition had lasted for only "a few weeks." (Tr. at 564–65). New York Life issued Tadros a disability insurance policy in October 1994.

On February 10, 1997, Tadros made a claim against the New York Life disability policy alleging total disability. He claimed that he had been disabled since June 1996 from a combination of diabetes, high blood pressure, fatigue, and dizziness. Dr. George Georgelos, a chiropractor, certified his disability for this claim. Tadros did not ask his regular cardiologist, who he saw every few months, to certify his disability. Tadros also submitted a "Description of Occupation" form in May 1997 indicating that from 1994 until 1995 his primary job duties involved office work and bookkeeping and that from November 1995 through May 1996 his job duties changed to include maintenance, working as a meat man, some office work, stocking and loading.

After some investigation, New York Life refused to pay Tadros' claim, and instead rescinded his policy and returned his premiums.

The government also alleged that as part of the fraud scheme the defendant applied for and received a whole life insurance policy through Prudential Insurance and Financial Services ("Prudential"). The whole life policy allowed insureds to take loans against the accumulated cash value of the policy. It also included a provision which allowed the insured person to waive the insurance premiums if that person could demonstrate a disability. During any such waiver period, the policy continued to accrue cash value.

In the application for the whole life policy, Tadros described his occupation as "supermarket owner" with "general administrative and management" duties. (Tr. 498, 499). On October 29, 1993, Tadros applied for a waiver of his insurance

premiums from Prudential, claiming that he was disabled due to neck and back pain. As was the case with the Mutual claim, when applying for the benefit, Tadros changed his job description to indicate that he worked as a clerk in a grocery store doing manual labor such as unloading trucks, mopping floors, stocking shelves, and fixing air compressors. He then claimed that after the accident he had no job responsibilities at Super Jet.

During an investigation of Tadros' claim, in an unannounced visit to Super Jet, the Prudential investigator found Tadros in his office. The defendant told the investigator that he had no specific reason for being at the store, that he had been a cashier but could not perform those job functions any longer due to his back pain, and that he was at work five days a week for three to four hours a day, even though he had no specific responsibilities. Despite this odd response to the investigation, on January 17, 1994, Prudential granted the waiver of premiums on Tadros' policy.

After Prudential granted the waiver, it required Tadros to submit periodic documentation of his continuing disability. He submitted one such form in June 1995, indicating that his health condition remained the same, that he was house-confined, and that he worked part-time doing paperwork. A doctor R.F. Senno certified the disability in an attending physician's statement. On the second continuing disability form, submitted in February 1997, the defendant claimed that he continued to be house-confined, that he did not work at all, and that his daily activities consisted of eating, sleeping, and lying in bed. Dr. Georgelos, the same doctor who certified the defendant's disability on the New York Life disability form, certified his continuing disability on the 1997 Prudential form. In January 1998, Tadros submitted a third disability statement to Prudential to continue his premium waiver, again claiming ***1004** to be house-confined. In November 1998, he sent yet another disability statement and claimed that he was in constant pain in his shoulders and neck, was confined to his house, and had not been able to work for pay since the start of his disability in 1993.

After Prudential waived the premiums (and essentially began paying the premiums itself), the policy began to accumulate a cash value. Tadros took several loans against the cash value of his policy—in August 1997, December 1998, June 1999, and September 1999. By applying for these loans, Tadros caused Prudential to send him checks through the U.S. mail and by private express carrier. Tadros never repaid any of these loans.

During the time that Tadros claimed to be house-confined, in September 1996, surveillance experts observed the defendant leaving his house, driving to a bank, driving to Super Jet, and remaining inside Super Jet for extended periods of time. Surveillance videotape from June 1997, showed the defendant kneeling in front of his house and carrying brake rotors for a car. Surveillance from May 1998, showed the defendant driving to a hardware store, purchasing two forty-pound bags of cement, unloading the bags of cement from his car at his residence, laying a cement sidewalk, and smoothing the cement with a broom.

Despite Tadros' claim of total disability, the doctors upon whom Tadros relied for regular care during the time of his alleged home confinement had no record of such debilitating injury. For example, Dr. Jafar Al–Sadir, Tadros' cardiologist since 1995, testified that he treated Tadros for high blood pressure and high cholesterol and saw him approximately every three to four months during the relevant time period. During his initial visit in 1995, Dr. Al–Sadir gave Tadros a complete medical exam and found no abnormalities other than high blood pressure and obesity. Tadros never told the doctor that he was house-confined and from 1995 to 2000 never asked him to certify that he was disabled. Sometime around April or May, 2001, [2] Tadros asked Dr. Al–Sadir to certify that he was disabled. Dr. Al–Sadir declined to do so, as he believed that from a cardiac standpoint Tadros was doing well.

On August 19, 1993, Tadros had an appointment with Dr. Cohen, a cardiologist at the University of Chicago hospital. During that visit the doctor performed a physical examination of Tadros and found nothing remarkable other than the fact that Tadros had high blood pressure and had gained weight. Tadros never complained of neck or back pain despite the fact that it had been less than five months since the car accident which had allegedly left him completely disabled.

In October 1997, during the time that Tadros claimed to be house-confined and completely disabled, the defendant went to see Dr. James Curran, an expert in rheumatology at the University of Chicago. Based on a physical examination, the doctor concluded that, other than some arthritis in a big toe, some degenerative arthritis in the lumbar spine, and bursitis, Tadros' exam was unremarkable. Tadros had a normal range of motion in all of his joints. The defendant did not ask Dr. Curran for a certificate of disability and did not return for a routine follow-up appointment.

Finally, the jury heard evidence that during the time the defendant claimed to be disabled he conducted personal business at various businesses in the Chicago area on hundreds of dates.

On July 23, 2001, the jury returned a guilty verdict against the defendant on ten of the eleven counts sent to the jury. Tadros appeals.

***1005 II.**

[1] [2] Tadros' first claim of error is that the government, in violation of *Brady,* failed to turn over audiotapes that Prudential made during telephone conversations with him. The government, however, did not have possession of the tapes at any point prior to the trial. Under *Brady,* the government must disclose evidence favorable to the defense where the evidence is material to either the guilt or punishment of the defendant. *Brady,* 373 U.S. at 87, 83 S.Ct. 1194. 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. *Strickler v. Greene,* 527 U.S. 263, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). In order to establish a *Brady* violation, Tadros must show (1) that the government suppressed evidence, (2) that the evidence was favorable to his defense, and (3) that the evidence was material to an issue at trial. *United States v. Grintjes,* 237 F.3d 876, 880 (7th Cir.2001).

[3] [4] The *Brady* rule does not apply to evidence not in the possession of the government that a defendant would have been able to discover himself through reasonable diligence. *See, e.g., id., Grintjes,* 237 F.3d at 880; *Crivens v. Roth,* 172 F.3d 991, 996 (7th Cir.1999); *United States v. Dimas,* 3 F.3d 1015, 1018–19 (7th Cir.1993). This court has held many times that *Brady* does not require the government to gather information or conduct an investigation on the defendant's behalf. *See, e.g., United States v. Senn,* 129 F.3d 886, 893 (7th Cir.1997). The government did not suppress evidence in this case, and in fact, during pre-trial discovery tendered to Tadros a letter from a Prudential employee to the Federal Bureau of Investigation which disclosed, among other things, that Prudential had begun recording conversations with its insureds in late 1995. The government did not obtain any of these recordings for itself and did not have the duty to gather the tapes and tender them to the defendant. *Brady* prohibits suppression of evidence, it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel. *Senn,* 129 F.3d at 893. Tadros has offered no explanation for failing to procure the tapes himself and has never argued that he was somehow unable to obtain those recordings on his own.

Although the government's tender of the Prudential letter and the fact that the evidence was available to the defendant should resolve any issue regarding a potential *Brady* violation, we note that Tadros failed to meet any other of the requirements for a successful *Brady* claim. He has offered no evidence whatsoever to establish that the tapes would have been favorable to his defense. In fact, during oral argument, defense counsel conceded that the record was devoid of any evidence that would indicate that the tapes would be helpful to Tadros.[3] Nor did the defendant offer any evidence that the information on the tapes would be material to an issue at trial. The district court did not abuse its discretion in finding that the government had not withheld audiotapes in violation of *Brady.*

[5] [6] Next, Tadros asserts that the government failed to prove the elements of fraud beyond a reasonable doubt. On this claim, the defendant has a heavy burden to bear. In reviewing a claim for sufficiency of the evidence, this court must view the evidence in the light most favorable to the ***1006** prosecution. *United States v. Fleischli,* 305 F.3d 643, 657 (7th Cir.2002). We may reverse a conviction only when no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* The record must be devoid of any evidence, regardless of how it is weighed, from which a reasonable jury could find guilt beyond a reasonable doubt. *Id.*

[7] [8] In order to establish a violation of the mail or wire fraud statutes, the government must prove (1) that the defendant participated in a scheme to defraud; (2) the defendant intended to defraud; and (3) the defendant used the mail (for 18 U.S.C. § 1341) or wires (18 U.S.C. § 1343) in furtherance of the fraudulent scheme. *United States v. Davuluri,* 239 F.3d 902, 906 (7th Cir.2001). The government presented ample evidence that the defendant participated in an intentional scheme to defraud insurance companies by applying for disability benefits, exaggerating the extent, if

any, of his injury, and then making false representations about the nature of his job duties and his ability to work. Tadros altered the nature of his job duties when applying for disability benefits to claim that he performed manual labor when, in fact, he performed only office work. Similarly, he misled investigators who found him in his office at Super Jet, claiming that he had no official duties at the store. Tadros exaggerated the nature of his injuries, claiming, for example, to be house-confined when he was, in fact, out of the house running errands, visiting area businesses, performing physically taxing household duties, and running his own business. The information Tadros presented to the doctors certifying his disability differed from the information he supplied to the doctors who treated him on a regular basis. The government more than adequately established that the defendant used, or knowingly caused others to use the mail or wires in furtherance of the scheme. *See* *Schmuck v. United States,* 489 U.S. 705, 710–11, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989). In short, the record contains an abundance of evidence from which a reasonable jury could find guilt beyond a reasonable doubt and we cannot, therefore, disturb the conclusions of the jury.

[9] Finally, Tadros argued that any alleged scheme to defraud was complete when he received the final payments from Mutual Trust in May 1994, and consequently, the April 12, 2001 indictment came after the five-year statute of limitations for such crimes expired. *See* 18 U.S.C. § 3282. Tadros, however, continued to use the mail and wires to send fraudulent information to the victimized insurance companies long after May, 1994. The fact that the defendant failed to elicit more money from the insurance agencies is irrelevant; the government need not prove that the scheme to defraud was successful to prove a violation of the mail or wire fraud statutes. *United States v. Bach,* 172 F.3d 520, 522 (7th Cir.1999); *United States v. Briscoe,* 65 F.3d 576, 583 (7th Cir.1995).

[10] **[11]** For purposes of mail fraud and wire fraud, the five-year statute of limitations begins to run from the date of mailing of the fraudulent information. *United States v. Barger,* 178 F.3d 844, 847 (7th Cir.1999). Each mailing constitutes a separate offense. *Id.* at 847. The mailings in each of the counts on which Tadros was indicted occurred well within the five years prior to April 12, 2001. For example, the first count of the indictment alleges that Tadros sent a fraudulent statement of continuing disability to Prudential in February 1997. Tadros also sent fraudulent claims of continuing disability to Prudential in January 1998, and November 1998, and misrepresented his occupation on a form sent to Prudential in May, 1999. In response to the information sent by Tadros, ***1007** Prudential sent him checks through the mail on August 22, 1997, December 30, 1998, June 8, 1999, and September 1, 1999. [4] Furthermore, the government presented sufficient evidence that Tadros faxed a Description of Occupation letter with fraudulent information to New York Life on May 20 1999, and on July 9, 1997, sent further fraudulent information by mail to New York Life. These ten mailings form the bases of the ten counts on which Tadros was convicted. Each of the ten fell within the five-year statute of limitations. [5]

III.

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

All Citations

310 F.3d 999

Footnotes

1 While Tadros' claims were pending with Fireman's, he filed a claim with his health insurance provider, BlueCross Blueshield of Illinois, seeking reimbursement for medical expenses which he incurred as a result of the car accident. He indicated on the claim form that the injuries were not work-related and that he had no other insurance.

2 A grand jury indicted the defendant on April 12, 2001.

3 At oral argument, counsel for the defendant insinuated that it was possible that an imposter had made the phone calls to Prudential. The record is completely devoid of any evidence of this claim.

4 Tadros need not have mailed the items himself to fall within the scope of the mail fraud statute. The statute also applies to any person who "knowingly causes" the fraudulent material "to be delivered by mail" or private carrier. 18 U.S.C. § 1341. The government need only show that the defendant acted with knowledge that the use of the wires or mail could be reasonably foreseen or would follow in the ordinary course of business. *American Auto. Accessories, Inc. v. Fishman,* 175 F.3d 534, 542 (7th Cir.1999).

5 For clarity, we note that the evidence of fraudulent activity occurring prior to April 12, 1996, though not within the relevant statute of limitations, is relevant to the government's proof that the defendant participated in a scheme to defraud and that he intended to defraud by using the mail and wires.

217 F.3d 443
United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Deborah WALTON and Kenneth Marsalis, Defendants–Appellants.

Nos. 99–2638, 99–2640.
|
Argued April 12, 2000
|
Decided June 14, 2000

Synopsis

Two defendants were convicted in the United States District Court for the Northern District of Illinois, John F. Grady, J., of carrying and taking away a bank's automatic teller machine (ATM) with intent to steal and conspiracy to commit such offense. Defendants appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) government's exercise of peremptory strike based on juror's inattentiveness did not violate *Batson*; (2) evidence regarding prior unsolved theft from same ATM was irrelevant and, therefore, inadmissible; (3) government's failure to turn over phone records relating to investigation into such prior theft was not *Brady* violation; and (4) remand was required to reconsider restitution award.

Affirmed in part, reversed in part, and remanded.

West Headnotes (17)

[1] Jury Peremptory challenges

Government's peremptory strike of a prospective African-American juror in a federal criminal prosecution because of juror's inattentiveness did not violate *Batson*.

2 Cases that cite this headnote

[2] Jury Peremptory challenges

Under *Batson*, allegations of racially-based peremptory challenges are evaluated under a three-part analysis: (1) the defendant must make a prima facie showing that the government exercised the challenge because of race; (2) the government must next proceed to articulate a race-neutral reason for the challenge; and thereafter (3) the court must determine whether the defendant has carried his burden of proving purposeful discrimination.

[3] Jury Peremptory challenges

For purposes of analyzing a juror strike under *Batson*, in determining whether the defendant has carried his burden of proving purposeful race discrimination, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the defendant.

[4] Jury Peremptory challenges

For purposes of analyzing a juror strike under *Batson*, unless a discriminatory intent is inherent in the prosecutor's explanation for the strike, such explanation will be deemed race neutral.

[5] Criminal Law Other particular offenses

Evidence regarding prior unsolved theft from automatic teller machine (ATM) was irrelevant and, therefore, inadmissible in prosecution for subsequent theft from same ATM; prior theft occurred four months before charged theft and did not tend to prove or disprove the defendants' involvement in the charged theft. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] Criminal Law Reception and Admissibility of Evidence

Court of Appeals reviews a district court judge's determination of the admissibility of evidence under the abuse of discretion standard.

1 Case that cites this headnote

[7] **Criminal Law** Reception and Admissibility of Evidence

Court of Appeals affords great deference to the district court's determination of the admissibility of evidence because of the district court judge's first-hand exposure to the witnesses and the evidence as a whole, and because of the judge's familiarity with the case and ability to gauge the impact of the evidence in the context of the entire proceeding.

2 Cases that cite this headnote

[8] **Criminal Law** Reception and Admissibility of Evidence

Criminal Law Evidence wrongfully obtained

Court of Appeals will not reverse district court's evidentiary ruling unless the record contains no evidence on which the district court rationally could have based its decision, or where the supposed facts found are clearly erroneous.

6 Cases that cite this headnote

[9] **Criminal Law** Evidence in general

Criminal Law Exclusion of Evidence

If an error by the district court in the admission or exclusion of evidence was committed during trial, the Court of Appeals will grant a new trial only if the error had a substantial influence over the jury, and the result reached was inconsistent with substantial justice.

7 Cases that cite this headnote

[10] **Criminal Law** Purposes for Admitting Evidence of Other Misconduct

Evidence regarding other crimes is admissible in a federal criminal prosecution for defensive purposes if it tends, alone or with other evidence, to negate the defendant's guilt of the crime charged against him. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

1 Case that cites this headnote

[11] **Criminal Law** New Trial

Court of Appeals reviews district court's decision to deny a new trial after conviction for abuse of discretion. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

1 Case that cites this headnote

[12] **Criminal Law** Time and manner of required disclosure

In prosecution for theft from an automatic teller machine (ATM), government's failure to turn over telephone records relating to its investigation into prior theft at same ATM until second day of trial did not constitute *Brady* violation; judge excluded any evidence relating to prior ATM theft, and even if records were material, they were turned over well before the prosecution had finished presenting its case.

2 Cases that cite this headnote

[13] **Criminal Law** Misconduct of Counsel for Prosecution

In order for a defendant to be entitled to a new trial as a result of an alleged *Brady* violation, he must establish that: (1) the prosecution suppressed evidence; (2) the evidence allegedly suppressed was favorable to the defense; and (3) the evidence was material to an issue at trial. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

17 Cases that cite this headnote

[14] **Criminal Law** Materiality and probable effect of information in general

Evidence allegedly suppressed by the prosecution in a criminal trial is "material evidence," as required to establish a *Brady* violation, only if there is a reasonable probability that the disclosure of the evidence would have changed the result of the trial.

5 Cases that cite this headnote

[15] **Criminal Law** Materiality and probable effect of information in general

There is a "reasonable probability" that evidence allegedly suppressed by the government in a criminal prosecution would have changed the result of the trial, as required to establish a *Brady* violation, if suppression of the evidence undermines confidence in the outcome of the trial.

7 Cases that cite this headnote

[16] **Criminal Law** Remand for amplification of record

Criminal Law Sentence

Where district court ordered that defendant be jointly and severally liable with codefendant for restitution as part of her sentence for theft from an automatic teller machine (ATM) under mistaken impression that it was required to do so under the Mandatory Victim Restitution Act (MVRA), remand was required for findings in support of order, and to determine whether defendant's liability should be apportioned to reflect her economic circumstances and her contribution to victim's loss. 18 U.S.C.A. § 3664(f).

5 Cases that cite this headnote

[17] **Criminal Law** Remand for amplification of record

When a district court orders restitution under the Mandatory Victim Restitution Act (MVRA) but the record fails to sufficiently support the court's conclusions or clarify its reasoning, then Court of Appeals asks that the district court provide it with that information, including its specific findings of fact, to facilitate review. 18 U.S.C.A. § 3664(f).

3 Cases that cite this headnote

Attorneys and Law Firms

***445** Eric Wilson (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff–Appellee.

Nathanael M. Cousins (argued), Kirkland & Ellis, Chicago, IL, for Defendant–Appellant in No. 99–2638.

Erik W.A. Snapp (argued), Winston & Strawn, Chicago, IL, for Defendant–Appellant in No. 99–2640.

Before CUDAHY, COFFEY and KANNE, Circuit Judges.

Opinion

COFFEY, Circuit Judge.

On June 4, 1998, Defendants–Appellants Deborah Walton ("Walton") and Kenneth Marsalis ("Marsalis") were indicted and charged in a two count indictment, charging each of them with conspiring to carry and take away and carrying and taking away, with intent to steal, approximately $90,500.00 from a Citibank branch's automatic teller machine ("ATM"). [1] Walton and Marsalis were both ***446** convicted on each count by a jury, and their separate motions for a new trial were summarily denied. The court on June 17, 1999 sentenced Walton to ten months' imprisonment on each count and ordered each of her sentences to run concurrent with each other. The court sentenced Marsalis to twenty-seven months' imprisonment on each count, and also ordered each of his sentences to run concurrent with each other. Each of them were also sentenced to three years supervised release and ordered to pay restitution in the amount of $90,500.00. The court directed that the order of restitution be paid jointly and severally by Walton, Marsalis and Golliday.

Marsalis appeals, arguing that the judge: (1) erred when he found that the government's peremptory strike of a prospective juror was not based on racial discrimination; (2) abused his discretion when he excluded evidence regarding a similar ATM theft at the same location that occurred just four months prior to the instant offense and (3) abused his discretion when he denied his motion for a new trial based on the government's failure to produce the remaining telephone records that he requested until the second day of trial. Walton also appeals, arguing that the court committed error when in its restitution order, it directed that she be held jointly and severally liable for the full amount of restitution. We AFFIRM Marsalis' conviction and sentence, AFFIRM Walton's conviction, and REVERSE

AND REMAND Walton's sentence with respect to the order of restitution.

I. BACKGROUND

At approximately 10:32 p.m. on June 7, 1996, Marsalis, Walton and Golliday drove in separate cars to the Citibank branch located at 8650 South Stony Island in Chicago, Illinois, to commit a theft from the bank's drive-up ATM. Acting as the "look-out," Walton parked her car nearby so that she could flash her headlights as a warning should she observe anything that might interfere with the execution of the crime as planned. According to the plan, Golliday entered the bank's premises to access the bank's interior ATM and engaged the bank security guard in conversation and distracted him, claiming that she was having trouble retrieving money from the machine. With the guard's attention diverted to Golliday's problem, Marsalis drove-up to the ATM located outside the bank, gained entry into the machine and stole approximately $90,500.00.

The theft was not discovered until the next morning when a bank security guard noticed that the drive-up ATM door was open. The FBI and the company responsible for replenishing the ATM, Wells Fargo, discovered upon investigation that the evidence pointed to an "inside job" as there were no signs of forcible entry into the ATM and the ATM's burglar alarm system was turned off. Also, the bank's surveillance video tapes were reviewed and revealed that about the time of the theft, Golliday can be observed on the video in the interior ATM area occupying the attention of the bank security officer and focusing her eyes in the direction of the drive-up ATM. Still photos of Golliday were taken from the video tape and copies of her picture were distributed throughout the local Wells Fargo branch that was responsible for servicing the ATM. Thereafter, a secretary at Wells Fargo recognized Golliday as a former Wells Fargo employee, resulting in Golliday being arrested and charged with the theft.

When FBI agents questioned Golliday about the crime, she readily confessed to her involvement in the episode, agreed to cooperate and identified the other partners involved as Marsalis and Walton, both of whom were also former Wells Fargo employees. She went on to describe how ***447** they jointly planned and carried out the heist and based on this information, Marsalis and Walton were arrested. Prior to issuing the indictment and upon request by the government, the grand jury issued a subpoena for various telephone records, including the home phone records of Marsalis, Walton and Golliday which reflected an unusually high number of calls placed between the defendants on the day of the theft. Prior to trial, defense counsel requested and the government produced the subpoenaed telephone records, but neglected to produce the phone records relating to the government's investigation into a prior ATM theft at the same address that occurred just four months earlier. After another request by defense counsel for these particular records, the prosecution turned over the remaining phone records on the second day of trial.

During jury selection, the government exercised a peremptory strike upon a prospective African-American juror, explaining that they based their strike on her "inattentiveness" during the proceedings. In an attempt to ascertain whether the government's strike was race-neutral in light of the fact that both Marsalis and Walton are also African–American, the court *sua sponte* conducted a voir dire concerning the asserted reason given by the government in support of its strike. In response, the government offered the testimony of the FBI agent assigned to the case whose observations formed the basis of the government's strike. After hearing the case agent's testimony and the arguments of counsel, the court concluded that the government's peremptory strike of the juror was race-neutral.

At trial, Marsalis and Walton offered to introduce evidence relating to the February 1996 unsolved ATM theft but the court refused to admit the offer, ruling that it was irrelevant and might conceivably be prejudicial to the defendants as it might serve to suggest that the defendants also committed the unsolved ATM theft. Following their convictions, Marsalis filed a motion for a new trial based on the government's tardy production of the missing phone records, which was in turn denied by the court. As previously mentioned, the court proceeded to sentence Walton and Marsalis to ten and twenty-seven months' imprisonment respectively, and held Walton, Marsalis and Golliday each jointly and severally liable for restitution in the amount of $90,500.00. Marsalis and Walton appealed.

II. ISSUES

On appeal, Marsalis claims that: (1) the judge erred when he found that the government's peremptory strike of the African–American juror was not pre-textual for racial discrimination; (2) the court abused its discretion when it excluded evidence

of a prior ATM theft at the same location that occurred four months prior to the instant offense; and (3) the court abused its discretion when it denied the defendant's motion for a new trial despite the government's failure to produce the remaining telephone records until the second day of trial. Walton on appeal argues only that the court erred when it held her jointly and severally liable for the full amount of the restitution.

III. DISCUSSION

A. Marsalis' *Batson* Challenge

[1] **[2]** Marsalis initially argues that the court erred when it ruled that the government's peremptory strike of a prospective African–American juror based on her "inattentiveness" during the proceedings was proper. Specifically, Marsalis contends that the court "clearly erred by failing to perform a thorough analysis of whether [the] stricken juror ... was treated differently from similarly-situated prospective jurors," and thus, the prosecution's strike was actually based on race. Under *Batson v. Kentucky,* 476 U.S. 79, 96–98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), allegations of racially-based peremptory challenges are evaluated under a three-part analysis: (1) ***448** the defendant must make a prima facie showing that the government exercised the challenge because of race; (2) the government must next proceed to articulate a race-neutral reason for the challenge; and thereafter (3) the court must determine whether the defendant has carried his burden of proving purposeful discrimination. *See Morse v. Hanks,* 172 F.3d 983, 985 (7th Cir.), *cert. denied,* 528 U.S. 851, 120 S.Ct. 129, 145 L.Ed.2d 109 (1999). Because both Marsalis and the government concede that the first two steps were satisfied, we turn our focus to the third step. *United States v. Evans,* 192 F.3d 698, 699–700 (7th Cir.1999) ("[T]he trial judge's finding that the government offered a race-neutral explanation ... moots the preliminary question whether [the defendant] established a prima facie case of discrimination.")

[3] **[4]** Under the third step of the analysis (whether the defendant has carried his burden of proving purposeful discrimination), "the persuasiveness of the justification becomes relevant" and "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curium). Thus, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *United States v. Marin,* 7 F.3d 679, 686 (7th Cir.1993) (brackets in original) (citing *Hernandez v. New York,* 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion)).

The court *sua sponte* conducted a voir dire of the government's asserted reason for the strike and received the testimony of the assigned FBI case agent whose observation formed the basis of the government's peremptory strike. When asked to describe the "inattentiveness" of the stricken juror and compare her with the other jurors he had an opportunity to observe, the agent testified:

> THE FBI AGENT: Specifically what I noticed was her ... staring out ... [the] window and not looking back over at the Judge when he was speaking....
>
> ...
>
> THE COURT: Did this juror in terms of her attentiveness or inattentiveness strike you as acting differently from the other 13 jurors you could see in the box?
>
> THE FBI AGENT: Yes, sir. I think that is why I noticed her. I had nothing else to do at the time but observe what I could, and ... everyone else was slanted towards you even if they had to turn their chairs, and she was facing the other way, which is why I initially noticed her.

After considering the testimony of the case agent regarding his observations of the stricken juror and the other prospective jurors, as well as the arguments of counsel, the judge was convinced that the government's peremptory challenge was race-neutral:

> There can be no doubt that inattentiveness is a legitimate basis for challenging a juror. If anything is required of a juror aside from impartiality, it is the willingness and ability to pay attention and retain what is seen and heard during the trial. So inattentiveness is a major objection of the most legitimate kind to a juror who displays that characteristic.... Considering all the circumstances, I conclude that the defendants have failed to carry their burden of proving that the government's reason for

> challenging [the juror] is motivated in any degree by race.

Contrary to Marsalis' assertions, the record is clear that the judge engaged in an exhaustive inquiry into the government's peremptory strike of the African–American juror. *See* *Coulter v. Gilmore,* 155 F.3d 912, 921 (7th Cir.1998). We also are convinced that Marsalis failed to carry his burden of establishing that the government's peremptory strike was motivated ***449** by race because a juror's inattentiveness during the proceedings is a valid, race-neutral basis for executing a peremptory strike. *See, e.g.,* *United States v. Changco,* 1 F.3d 837, 840 (9th Cir.1993) (holding that inattentiveness is a proper race-neutral basis for striking a juror); *United States v. Garrison,* 849 F.2d 103, 106 (4th Cir.1988) (holding that striking a juror because she appeared "inattentive or uninterested" did not violate *Batson*). Thus, in light of the court's thorough review and fact-finding, our deference to "[t]he trial court's determination about the ultimate question of discriminatory intent," and the absence in the record of any evidence to support the defendant's claim, we conclude that there was no error, much less clear error, in the court's finding that the government's strike of the African–American juror was race-neutral. *See Evans,* 192 F.3d at 700.

B. Marsalis' Evidentiary Challenge

[5] **[6]** **[7]** **[8]** **[9]** We next turn to Marsalis' claim that the court abused its discretion when it excluded the reception of evidence dealing with an unsolved ATM theft from the same bank that occurred just four months prior to the date of the instant offense. We review a trial judge's determination of the admissibility of evidence under the abuse of discretion standard. *See United States v. Johnson,* 137 F.3d 970, 974 (7th Cir.1998). "We afford great deference to the trial court's determination of the admissibility of evidence because of the trial judge's first-hand exposure to the witnesses and the evidence as a whole, and because of the judge's familiarity with the case and ability to gauge the impact of the evidence in the context of the entire proceeding." *United States v. Van Dreel,* 155 F.3d 902, 905 (7th Cir.1998). Indeed,

> "[a]ppellants who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom: their prospects compare with those of camels who wish to pass through the eye of the needle." *United States v. Coleman,* 179 F.3d 1056, 1061 (7th Cir.1999) (internal quotations omitted) (brackets in original). Because we give "special deference" to the rulings of the trial judge[,] [a defendant] obviously "carries a heavy burden." *Palmquist v. Selvik,* 111 F.3d 1332, 1339 (7th Cir.1997). In this context, we will not reverse unless "the record contains no evidence on which [the district court] rationally could have based [its] decision, or where the supposed facts found are clearly erroneous." *Id.* (internal quotes omitted). Moreover, if an error in the admission or exclusion of evidence was committed during the trial, the court will grant a new trial only if the error had a "substantial influence over the jury," and the result reached was "inconsistent with substantial justice." *Id.* (internal quotes omitted).

Agushi v. Duerr, 196 F.3d 754, 759 (7th Cir.1999).

[10] Sometimes referred to as "reverse 404(b)" evidence, "[e]vidence regarding other crimes is admissible for defensive purposes if it 'tends, alone or with other evidence, to negate [the defendant's] guilt of the crime charged against him.' " *Agushi,* 196 F.3d at 760 (quoting *United States v. Stevens,* 935 F.2d 1380, 1404 (3d Cir.1991)). But of course, a court "should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and confusion of the issues under Rule 403." *Id.*

Here, the court concluded, and we agree, that the evidence regarding the unsolved February 1996 ATM theft was irrelevant because it was unsolved and occurred four months prior to the instant theft and neither tended to prove nor disprove the defendants' involvement in the charged offense, and also that the evidence might conceivably be interpreted as prejudicial to the defendants because it might have suggested to some that the defendants also committed the unsolved ATM theft:

> ***450** [U]nless there is evidence tending to show that [the defendants] were not involved in the February occurrence, all this evidence that you propose to offer *would suggest that somebody, including [the defendants] as a very real possibility, committed a similar offense back in February.* That

> doesn't tend to show that they are not guilty of the offense charged here.

(Emphasis added).

Because "we give great deference to the district court's evidentiary rulings" and because of the obvious lack of relevance and prejudicial nature of the evidence relating to the unsolved ATM theft, we are convinced that the trial judge did not abuse his discretion in excluding this evidence. *See United States v. Mancillas,* 183 F.3d 682, 705 (7th Cir.1999), *cert. denied,* 529 U.S. 1005, 120 S.Ct. 1271, 146 L.Ed.2d 221 (2000).

C. Marsalis' Motion for a New Trial

[11] Turning to Marsalis' claim that the court abused its discretion when it denied his motion for a new trial, Federal Rule of Criminal Procedure 33 provides that "[o]n a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." We review a court's decision to deny a new trial for abuse of discretion. *See* *United States v. Williams,* 81 F.3d 1434, 1437 (7th Cir.1996).

[12] **[13]** **[14]** **[15]** Specifically, Marsalis contends that he was entitled to a new trial because the prosecution violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to turn over all of the phone records that were subpoenaed in a timely fashion. In order for the defendant to be entitled to a new trial as a result of an alleged *Brady* violation, he must establish that: (1) the prosecution suppressed evidence; (2) the evidence allegedly suppressed was favorable to the defense; and (3) the evidence was material to an issue at trial. *See* *United States v. Hartbarger,* 148 F.3d 777, 786 (7th Cir.1998), *cert. denied,* 525 U.S. 1179, 119 S.Ct. 1117, 143 L.Ed.2d 112 (1999). Under the third prong, evidence is material only if there is a "reasonable probability" that the disclosure of the allegedly suppressed evidence would have changed the result of the trial. *United States v. Silva,* 71 F.3d 667, 670 (7th Cir.1995). A "reasonable probability" exists if the suppression of evidence undermines confidence in the outcome of the trial. *See id.* Because we conclude that the third step of the analysis is dispositive, we turn our attention to whether there is a "reasonable probability" that timely disclosure of the missing phone records would have changed the result of Marsalis' trial.

Here, Marsalis has failed to establish how the timely disclosure of the missing phone records relating to the unsolved ATM theft impacted his trial because the records became immaterial at the moment the judge excluded any evidence that related to the government's investigation into the unsolved ATM theft. But even if the missing phone records could properly be classified as material (i.e., exculpatory evidence), these records were turned over on the morning of the second day of trial, well before the prosecution had finished presenting its case. In spite of Marsalis' claim that he was harmed by the government's delayed production, it is interesting to note that he failed to move for either a continuance, an adjournment or a mistrial. *See, e.g.,* *United States v. Higgins,* 75 F.3d 332, 335 (7th Cir.1996) ("Disclosure even in mid-trial suffices if time remains for the defendant to make effective use of the exculpatory material.... If counsel needed more time, she had only to ask; yet she did not seek a continuance. Nothing more need be said."); *United States v. Williams,* 738 F.2d 172, 178 (7th Cir.1984) ("[O]ur standard of review limits us to determining whether the government's disclosure came so late as to prevent appellant from receiving a fair trial. We cannot say that disclosure came too late in this case. After appellant's counsel viewed the ***451** reports at trial, he could have asked for a continuance to contact the other owners and call them to testify, or he could have asked the court to make the reports part of the record.") (citations omitted). Thus, we are of the opinion that the government's delayed disclosure of the remaining phone records did not come so late as to deny Marsalis of the evidence's "effective use" at trial, had he chosen to do so.

Accordingly, we are not convinced that there is a "reasonable probability" that the outcome of his trial was prejudiced by the government's alleged delayed production of the immaterial phone records. We conclude that the trial judge did not abuse his discretion in denying Marsalis' motion for a new trial based on the alleged *Brady* violation.

D. Walton's Challenge to the Restitution Portion of her Sentence

[16] Lastly, the government concedes, as Walton has asserted, that the district court committed plain error because according to the transcript of the proceedings, the court was under the mistaken impression that it was "*required*" to order

her jointly and severally liable for the entire amount of the restitution of $90,500.00.[2] At the conclusion of Walton's sentencing hearing, the court ordered:

> THE COURT: A condition of the supervised release is that she make restitution. *I think I am required to impose the full amount these days; is that correct?*
>
> [Marsalis' Attorney]: Yes, your Honor.
>
> [The Government]: You are Judge.
>
> THE COURT: 90,000 and how many dollars?
>
> [The Government]: 500.
>
> THE COURT: $90,500 within the period of supervised release....

(Emphasis added). Walton contends that under the law, the court was not "required to impose the full amount," but instead, had the option of apportioning the restitution amount among the defendants and weighing factors into the fixed restitution figure, such as her "contribution to the victim's loss" and her "economic circumstances."

Under the Mandatory Victim Restitution Act ("MVRA"), enacted in 1996, a court must award the full amount of restitution to each *victim* of a property crime. *See* 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii); § 3664(f)(1)(A). The MVRA "does not permit a district court to exercise discretion as to whether it imposes restitution upon a defendant; the statutory language clearly states that it must." *See United States v. McIntosh,* 198 F.3d 995, 1004 (7th Cir.2000). The statute also provides that where more than one defendant has contributed to the victim's loss, the court *may* make each defendant liable in full or "apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h).[3]

Because the MVRA affords the sentencing court discretion in apportioning liability where multiple defendants are involved, ***452** our previous holdings interpreting the Victim Restitution Act remain instructive here. In *McIntosh,* we stated that because "the Victim Restitution Act provides district courts with discretion when ordering restitution," when a court "chooses to impose an order [of restitution] and simultaneously waives a fine because of the defendant's economic circumstances," an explanation of its reasoning is necessary. *McIntosh,* 198 F.3d at 1004.

[17] Thus, when a court orders restitution under 18 U.S.C. § 3664(h) but the record fails to "sufficiently support [the court's] conclusions or clarify its reasoning, then we ask that the court provide us with that information, including its specific findings of fact, to facilitate our review." *United States v. Menza,* 137 F.3d 533, 538 (7th Cir.1998); *cf. United States v. Boula,* 997 F.2d 263, 269 (7th Cir.1993).

Upon review of the judge's statements in the record, we are not convinced that the court was aware that it had the option of either ordering Walton liable for the full amount of the restitution or apportioning her liability to reflect the level of Walton's contribution to the victim's loss and her economic circumstances.[4] We also are left in limbo and can only speculate as to why the court waived Walton's fine and the interest "due to [her] financial inability to pay" and ordered her restitution payments to be made "in monthly installments equal to 10% of her monthly cash flow," but for reasons unexplained, chose not to apportion her liability based upon her economic circumstances as it had the authority to do so under 18 U.S.C. § 3664(h).

Thus, we vacate and remand the restitution portion of Walton's sentence and ask the court to make clear that it has considered whether Walton should be liable "for payment of the full amount of restitution" or for an apportioned amount "reflect[ing][her] level of contribution to the victim's loss and economic circumstances." 18 U.S.C. § 3664(h). We leave to the judgment of the court to determine whether our aforementioned conclusions warrant a reevaluation of the restitution portions of Marsalis' and Golliday's sentences as well.

In conclusion, we agree that the trial judge did not abuse his discretion when he found that the government struck the African–American juror for race-neutral reasons, precluded evidence of the unsolved February 1996 ATM theft and denied Marsalis' motion for a new trial. We vacate the restitution portion of Walton's sentence and remand the case to the trial court to make specific its findings in support of its order of restitution, while also considering whether or not she should be held liable for the full amount of restitution or for an amount reflecting her contribution to the victim's loss and her economic circumstances, and whether the restitution portion of Marsalis' and Golliday's sentences should also be

reevaluated. Accordingly, we AFFIRM Marsalis' conviction and sentence, AFFIRM Walton's conviction, and REVERSE only with respect to Walton's restitution order and Remand the sole issue of restitution to the district court for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

All Citations

217 F.3d 443, 55 Fed. R. Evid. Serv. 192

Footnotes

1 One Larita Golliday (“Golliday”) was also named and charged in both counts of the indictment, pled guilty pursuant to a plea agreement and cooperated with law enforcement authorities in the investigation and prosecution. The court sentenced Golliday to two years probation on Count one and found her, along with Marsalis and Walton, jointly and severally liable for the total amount of the restitution. On motion of the government, the court dismissed Count two of Golliday's indictment.

2 The government and Walton agree that Walton's attorney's forfeited this argument on appeal by failing to raise the issue to the court's attention at sentencing, but the respective parties also agree that the error is serious enough to constitute plain error and warrant remand of the restitution portion of Walton's sentence.

3 The MVRA also provides that upon determination of the amount of restitution owed to each victim, the court must specify in the restitution order the manner and schedule in which the restitution is to be paid, taking into consideration the “financial resources and other assets,” “projected earnings and other income” and “any financial obligations of the defendant.” 18 U.S.C. § 3664(f)(2). Indeed, the court may even “direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.” 18 U.S.C. § 3664(f)(3)(B).

4 But we also feel obligated to point out that the government and the respective counsel for each of the defendants contributed to the sentencing court's mis-apprehension. In response to the court's inquiry, “I think I am required to impose the full amount [of restitution] these days; is that correct?”, the government and Marsalis' attorney each replied in the affirmative, while Walton's attorney remained silent. Nonetheless, because both the government and Walton agree that the court's error was plain and the record reflects the same, we grant remand.