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Prosecutorial misconduct in death penalty cases

The U.S. Supreme Court rules that the state may not suppress evidence that is material to guilt or punishment.

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In April of 1980, police found the body of Richard Whitehead outside a small town in eastern Texas. Witnesses told police that they had seen Delma Banks in Whitehead's automobile several days earlier and had heard gunshots early in the morning shortly after the sighting. Informant Robert Farr told police that Banks was traveling back to his home in eastern Texas from Dallas, where he had visited Charles Cook, an associate of his, to secure a weapon. The sheriff stopped Banks' car and found a handgun. The sheriff then retrieved a second weapon from Mr. Cook's home and determined that it was the gun used in the Whitehead shooting.

Cook testified at trial that Banks admitted to him that he had "kill[ed] the white boy for the hell of it," stolen his car and driven it to Dallas (*Banks v. Dretke* 124 S.Ct. 1264 [2004]). Farr testified that he had never taken any money from the police in exchange for his testimony about Banks, and that he had never given the police a statement. Cook testified that he had not talked to anyone--namely police or prosecutors--about his testimony prior to giving it. The jury found Banks guilty of murder committed in the course of a robbery (more case details are covered in the December 2003 "Judicial Notebook" column).

During the penalty phase of the trial, the jury heard Farr testify that Banks wanted the gun so that he and Farr could commit some robberies. According to Farr, Banks said that he "would take care of it" if "there was any trouble in the burglaries" (*Banks v. Dretke* 124 S.Ct. 1264 [2004]). The jury concluded that "there was a probability that the defendant, Delma Banks Jr., would likely commit criminal acts of violence that would constitute a continuing threat to society" and sentenced him to death (*Banks v. Dretke* 124 S.Ct. 1267 [2004]).

Altering outcomes

Later at a post-conviction hearing, the sheriff testified that Farr was a paid informant. Farr admitted that he had set up Banks by suggesting the drive to Dallas to obtain the

second gun. After the trial judge issued a disclosure order, a 74-page transcript of Cook's interrogation by the state was found, which revealed that the prosecutor had carefully coached Cook's testimony. In a post-conviction motion, Banks claimed that the prosecution suppressed exculpatory evidence, but the state denied the allegations.

In the controlling case for suppressed evidence, *Brady v. Maryland* (373 U.S.83, 87), the U.S. Supreme 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." However, the Fifth Circuit Court of Appeals denied Banks relief under *Brady*.

Supreme Court's ruling

On the day of his execution, the U.S. Supreme Court issued a stay and agreed to hear Banks' *Brady* claims. The Court found that Banks' *Brady* claims met the materiality rule determined in *Kyles v. Whitley* (514 U.S. 434 [1995]) because "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." The Supreme Court overturned the Fifth Circuit, which denied a certificate of appealability for the state's suppression of Cook's interrogation transcript. The Supreme Court also found that, had the jury known of Farr's relationship with the police and of Cook's interrogation, there was a "reasonable probability of a different result" in the trial (*Banks* at 1279).

Testing reasonable probability

The question of reasonable probability of alternative outcomes can be addressed through trial simulations in which the availability of such evidence becomes an experimental condition to be compared to a control condition in which that evidence remains unavailable.

Testing the effects of suppressed evidence could offer the opportunity to advance our scientific understanding of the trial process and assist the courts to define materiality and determine the reasonable probability of different results if suppressed evidence became available to jurors. Studies demonstrating the limits of material evidence can contribute meaningfully to the Court's standards for suppressed evidence.