SUPREME COURT OF THE UNITED STATES

No. 02–8286

DELMA BANKS, JR., PETITIONER *v.* DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

[February 24, 2004]

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 (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 (1995), and *Brady*.[1]

To demonstrate prejudice, Banks must show that "the favorable evidence could reasonably be taken to put the

[1] I do not address the possible application of the standard enunciated in *Giglio* v. *United States,* 405 U. S. 150 (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").

whole case in such a different light as to undermine confidence in the verdict." *Kyles*, *supra*, at 435. 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, that the jury would not have found "beyond a reasonable doubt that there [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 (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.

"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).

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

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[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 27, n. 18. This fact is one of the reasons I find the materiality question to be a close one.

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 (1984) (rather than to evaluate them independently, as distinct potential constitutional violations), Banks' response was vastly disproportional to his brother-in-law's actions.

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

Because Banks cannot show prejudice, I do not resolve

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[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 30. 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.

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 (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 (1999)]," *ante,* at 20, 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 (emphasis added). In the instant case, the particular allegation raised in Banks' state habeas application and denied by the State was that "the prosecution *knowingly* failed to turn over exculpatory evidence *as required by Brady v. Maryland*, 363 U. S. 83 (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 ("[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 16, 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 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.