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IN THE SUPREME COURT OF THE UNITED STATES

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DELMA BANKS, JR., :
Petitioner :

v. : No. 02-8286

DOUGLAS DRETKE, DIRECTOR, :
TEXAS DEPARTMENT OF :
CRIMINAL JUSTICE, :
CORRECTIONAL INSTITUTIONS :
DIVISION :

- - - - -X

Washington, D.C.
Monday, December 8, 2003

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:03 a.m.

APPEARANCES:

GEORGE H. KENDALL, ESQ., New York, New York; on behalf of
the Petitioner.

GENA BUNN, ESQ., Assistant Attorney General, Austin,
Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-8286, Delma Banks v. Doug Dretke.

Mr. Kendall.

ORAL ARGUMENT OF GEORGE H. KENDALL

ON BEHALF OF THE PETITIONER

MR. KENDALL: Mr. Chief Justice, and may it please the Court:

This case presents three issues, two arising from purposeful and recurring misconduct by the trial prosecutors, and a third from constitutionally deficient defense counsel. Prior to trial, the prosecutors promised to disclose discoverable material to the defense. They knew that Robert Farr would testify as a key witness at each phase of trial, and they knew that he was an informant and had been paid for his services.

Mr. Farr did in fact take the stand at both phases of this trial. He denied he was an informant. He denied he received any consideration for his work. He denied tipping off the authorities that Mr. Banks would be taking a trip to Dallas. He denied setting up Mr. Banks for arrest. The prosecutors knew that when Mr. Farr gave his testimony it was not truthful. They did not rise to their feet and ask Mr. Farr to correct this testimony.

1 QUESTION: And it - is it your contention that
2 this is a basis simply for setting aside the sentencing
3 phase of the trial?

4 MR. KENDALL: We have asked this Court to affirm
5 the district court, who - who did grant relief on death
6 sentence. We're not asking for relief on guilt innocence
7 on - on the Mr. Farr claim.

8 QUESTION: All right. I'm - I'm - I'm somewhat
9 puzzled by that, but you have three different claims to
10 discuss here and I don't want to take too long. It - it
11 would seem to me that, if it - if - if this is the
12 evidence at trial, that - that there's no additional
13 obligation or special obligation at sentencing where that
14 becomes really a secondary matter.

15 MR. KENDALL: Your Honor, the reason why we take
16 that position is that his testimony at the punishment
17 phase is absolutely critical for the state to get the
18 death penalty in this case. The district court recognized
19 that. The Fifth Circuit in this case said that that
20 testimony was crucial. What he told the jury was that Mr.
21 Banks had returned to Dallas to get a gun so that Mr.
22 Banks could on the return trip commit armed robberies and
23 take care of and eliminate witnesses.

24 There was no other testimony that came close to
25 matching that at the punishment phase, and the state had

1 the burden to establish beyond a reasonable doubt that Mr.
2 Banks would be a danger in the future. If they didn't
3 satisfy that -

4 QUESTION: Well, but - but you - you have the
5 burden, don't you, to show that the outcome would have
6 been - would have been different had the - had the state
7 come clean at the beginning? And as I understand it, you
8 - you assert that - that he would not - a jury would not
9 have judged him as harshly if the jury had known that he
10 was going to get the gun in order that Farr could commit
11 robberies with - with apparently his assistance, rather
12 than what Farr had told them, namely that he had gotten
13 the gun in order that he would commit future robberies,
14 right? And you think that would have made the difference,
15 whether he's getting the gun to let somebody else kill or
16 getting the gun to kill himself?

17 MR. KENDALL: Your Honor, Mr. Banks denied at
18 trial that he had any intent to commit any crime
19 whatsoever with regard to this robbery. And Mr. Farr had
20 made it clear -

21 QUESTION: Understand. But - but - but you're
22 saying he admitted that - that he got the gun so that Farr
23 could commit robberies, right?

24 MR. KENDALL: We think there's a world of -

25 QUESTION: And that would have - would have -

1 would have tapped a wellspring of mercy in the - in the
2 jury's breast? I - I don't really see how it would make
3 that much difference.

4 MR. KENDALL: No, Your Honor. The point is - is
5 that the - the state could not ask the jury to impose the
6 death sentence unless it first found beyond a reasonable
7 doubt that Mr. - there was a strong likelihood that Mr.
8 Banks would commit acts of violence in the future. We
9 think there's a clear difference, and the trial
10 prosecutors recognized this, between Mr. Banks going to
11 get a gun so that Mr. Banks could rob and kill, as opposed
12 to providing instrumentality.

13 But more importantly, Your Honor, Mr. Farr
14 recanted that testimony at the Federal hearing and that
15 recantation was found credible by the district court.

16 QUESTION: Recanted what testimony?

17 MR. KENDALL: No one had the intent to rob
18 anybody. That was a ruse that Mr. Farr used -

19 QUESTION: Banks admitted that himself.

20 MR. KENDALL: No. Mr. Banks admitted on the
21 stand that he had finally agreed to accompany Mr. Farr to
22 Dallas to get a gun. But Mr. Farr denied - Mr. Banks
23 denied that he had any intent whatsoever to commit any
24 crime, and he flatly denied that assertion. Mr. Farr -
25 this was a ruse that Mr. -

1 QUESTION: What - what - what was - what was the
2 gun going to be obtained for? Self-defense?

3 MR. KENDALL: It was -

4 QUESTION: These people were being -

5 MR. KENDALL: - it was a ruse -

6 QUESTION: - threatened by somebody?

7 MR. KENDALL: Justice Scalia, it was a ruse that
8 Mr. Farr used that was not true -

9 QUESTION: Oh, that - that explains -

10 MR. KENDALL: - to -

11 QUESTION: - why Farr got it. It doesn't explain
12 why Banks got it.

13 MR. KENDALL: But that was not the theory that
14 the case - that the prosecutors asked the jury to conclude
15 beyond a reasonable doubt that Mr. Farr would - that Mr.
16 Banks would be dangerous in the future. The district
17 court granted relief on that and we think that clearly we
18 have shown materiality on that point.

19 QUESTION: As to materiality -

20 QUESTION: But he - I take it you do not agree
21 that you have to show that the result would have been
22 different?

23 MR. KENDALL: We - we do not agree with that. In
24 fact, we believe that this Court has not retired the
25 Alcorta and Napue standard, and - and it shouldn't use

1 this case. The - the standard in *Alcorta* and *Napue* that
2 says if the Government puts up perjured testimony, that if
3 there's a possibility that that testimony affected the
4 judgment or if the judgment is reversed. We do
5 acknowledge that this Court in *Brecht* did provide a rule
6 generally for habeas corpus that is different from that
7 rule. But it said in footnote 9 of that decision that
8 where there are cases where there was a pattern of
9 misconduct, that the *Brecht* rule might not apply. There
10 is clearly a pattern of misconduct by the Government in
11 this case.

12 QUESTION: Well, you have to show cause and
13 prejudice, and I thought that under *Strickler*, the - the
14 necessity of showing prejudice requires that you show that
15 there is a reasonable probability that the sentence would
16 have been different.

17 MR. KENDALL: Your Honor, we've not -

18 QUESTION: You - you don't think you have an
19 obligation to show reasonable probability -

20 MR. KENDALL: We do. We do, and - and -

21 QUESTION: - that the sentence would have been
22 different.

23 MR. KENDALL: We do, Your Honor, and the district
24 court -

25 QUESTION: You - you acknowledge that you have to

1 do that or?

2 MR. KENDALL: On - on cause, we do, Your Honor,
3 and we - we - we've met that clearly. So it's our
4 submission here that Mr. Farr's testimony was critical -

5 QUESTION: Alcorta was a case on direct review?

6 MR. KENDALL: It was a habeas case, Your Honor,
7 but the Court has not distinguished between -

8 QUESTION: But decided long before a lot of our
9 other habeas cases, which have somewhat limited the
10 relief?

11 MR. KENDALL: That's correct, Your Honor, but the
12 Court, since Brecht, in - in subsequent cases, in - in
13 Kyles and in Strickler, has continued to refer to the fact
14 that there's this category of misconduct that has always
15 been treated differently, and we do not see why it
16 shouldn't be applied here. However, we believe that,
17 given the importance of Farr in this case to the state's
18 case that we meet the reasonable probability standard, or
19 whatever the - other standard the Court would impose on
20 us.

21 The Fifth Circuit reversed the district court -

22 QUESTION: May I ask you whether the record shows
23 that counsel for Banks and Banks thought Farr was an
24 informant back in 1980?

25 MR. KENDALL: There was repeated effort by trial

1 counsel to answer that question. At a pre-trial hearing,
2 counsel specifically asked the chief investigator, who's
3 your informant? And the investigator said, I'm not going
4 to tell you. When Mr. Farr was on the stand, both at the
5 guilt phase and at the sentencing phase, counsel asked,
6 are you working for the state, are you an informant?

7 QUESTION: Well, so there was a suspicion of that
8 back in '80?

9 MR. KENDALL: And I think after trial, given the
10 -

11 QUESTION: But then 16 years went by.

12 MR. KENDALL: Yes, Your Honor, because there
13 were -

14 QUESTION: And - and this wasn't evidence that
15 was under lock and key. There were witnesses. They just
16 weren't easily available.

17 MR. KENDALL: Your - Your Honor, there was - it
18 was very difficult for us to obtain this proof. We - we
19 had every right to believe the - given the fact that the
20 prosecutors had said, Mr. Farr has been truthful with you
21 in every way, that whoever the informant was in this case,
22 it was not Robert Farr.

23 We only began to think differently about this
24 when we finally got access to another of the critical
25 state witnesses, Charles Cook, who told us in 1992 that

1 some of his testimony was not truthful.

2 QUESTION: Suppose we find that the - or - or
3 conclude that the defense counsel was not as diligent as
4 it ought to have been on this point. Is that somehow
5 excused by the prosecution's failure to present the Brady
6 material?

7 MR. KENDALL: Your Honor, we think that we acted
8 reasonably and diligently in post-conviction. We were
9 misled by the state, and in fact, we used that state
10 habeas - we filed in - in - in 1992 the claim on
11 information belief Farr was an informant in this case.

12 QUESTION: Well, it's - there's perhaps a slight
13 difference in being misled and simply a - a case in which
14 the prosecution does not come forward with Brady material.
15 There - they may be some distinction in the two. What is
16 the standard that you would have us apply in this case to
17 rule for you with reference - if - if we base that ruling
18 on the prosecution's failure? Is it just a standard
19 Brady?

20 MR. KENDALL: That would be under Strickler. Our
21 view is that because of the misrepresentations in this
22 case, we were - we were allowed to rely on those
23 misrepresentations. We wanted to litigate Farr's
24 informant status in the state habeas proceedings, but we
25 couldn't get the evidence to prove that.

1 QUESTION: What -

2 QUESTION: But specifically the
3 misrepresentations were what?

4 MR. KENDALL: Were that Farr had - had - had
5 denied that he was a paid informant. He was a paid
6 informant, and the prosecutors in their closing arguments
7 told the jury that he had been completely -

8 QUESTION: Okay.

9 MR. KENDALL: - truthful in every way with you.

10 QUESTION: Had they also not given, or - or
11 before trial had they not also said, we'll give you
12 everything in the file?

13 MR. KENDALL: They said, you don't have to file a
14 discovery motion, we will disclose to you material that is
15 discoverable, and this clearly was discoverable material -

16 QUESTION: Okay.

17 QUESTION: - when they put him on the witness -

18 QUESTION: But they didn't - the defendant didn't
19 ask to discover anything. The prosecutor said, you know,
20 everything is available to you.

21 MR. KENDALL: He -

22 QUESTION: What did - what - what did he ask for?
23 What did defendant ask for?

24 MR. KENDALL: He filed a standard discovery
25 motion, but the - the Government long before that said,

1 you don't have to file a motion, we'll provide material
2 that's discoverable to you. And there's no argument - the
3 - the state has tried to say that it, even by calling an
4 informant, it does not have to reveal -

5 QUESTION: Did - did -

6 MR. KENDALL: - that status.

7 QUESTION: - did - did the defendant get anything
8 after the prosecutor said, you don't have to file any
9 formal motion, we'll give you everything you're entitled
10 to?

11 MR. KENDALL: It - the prosecution revealed prior
12 convictions on its witnesses. It did not disclose Mr.
13 Farr's informant status or arrangement. It did not
14 disclose with regard to Charles Cook.

15 QUESTION: Were there documents -

16 QUESTION: Okay, but -

17 QUESTION: Were there documents or arrest reports
18 to show Farr's informant status, or was this just a - a -
19 a circumstance where the prosecution should have said
20 orally that this is his status?

21 MR. KENDALL: When we finally obtained what was
22 represented to us to be the full prosecution file in this
23 case, there was not one notation in there with regard to
24 Mr. Farr, identifying him as an informant. They were
25 obliged to -

1 QUESTION: So then there - you're not complaining
2 that documents weren't turned over?

3 MR. KENDALL: That's correct. They -

4 QUESTION: You're complaining that the - that -
5 that a statement was not made by the prosecution?

6 MR. KENDALL: That - that we believe the law
7 required them, once they decided to put this informant on
8 the stand, to disclose that factor to the defense.

9 QUESTION: Because it was Brady material?

10 MR. KENDALL: Because it was Brady material.

11 QUESTION: All right. Now, may I go back to
12 Justice Ginsburg's question? You - you - you gave us some
13 examples of - of material that was turned over to you
14 under this policy in - in which it was not necessary to
15 file a motion. Was that material turned over you in
16 response - to you in response to a specific request from
17 you, or did they simply come up with this and say, this is
18 the material that you could get if you moved for it?

19 MR. KENDALL: It was turned over after a general
20 discovery motion was filed, but that discovery motion was
21 never taken up at a hearing. This was disclosed -

22 QUESTION: All right. Did the general discovery
23 motion refer specifically to what they gave you, or was
24 the motion simply, give us everything we're entitled to?

25 MR. KENDALL: It - I believe it said give us

1 prior convictions. And -

2 QUESTION: Well, then that was what they gave
3 you.

4 MR. KENDALL: And that's all that they provided,
5 that's correct.

6 QUESTION: I mean, the problem that I'm - I'm
7 having with this is, I thought at - and - and I - I - I
8 got into this myself, I realize, but I thought they had
9 said, in effect, we'll give you everything you're entitled
10 to. Now we're getting down to greater detail, and I think
11 the problem is mine, but I want to follow it through.
12 They apparently said, you don't have to file a specific
13 motion. Justice Ginsburg raises the question, well, what
14 did you ask for even though you didn't have to file a
15 specific motion?

16 You say that you filed a general discovery
17 request that specifically did ask for prior convictions.
18 They gave you prior convictions. My concern is that the
19 understanding between counsel was, we'll give you what you
20 ask for, but we are not volunteering by our representation
21 to give you anything you don't ask for. If this is
22 correct, then the only reason you would be entitled to
23 this would be an affirmative Brady obligation, whether you
24 ask for it or not.

25 Is it the Brady obligation or do you think they

1 had undertaken something more extensive than Brady
2 required?

3 MR. KENDALL: I think that they assured counsel
4 that whether it was - whether they had to disclose
5 something under state law or under Brady, that there was
6 no need for litigation. They would provide Brady
7 material -

8 QUESTION: But did they assure counsel that
9 counsel would not have to ask for it?

10 MR. KENDALL: The letter - the letter says, you
11 do not have to file a motion, we'll provide you with
12 material that the law requires us to disclose -

13 QUESTION: That the law requires us to disclose?

14 MR. KENDALL: That's correct, Your Honor.

15 QUESTION: Material. I - I would take that to
16 mean documents that we have that you're entitled to, and
17 we don't know that there are any documents reflecting -
18 reflecting Farr's informer status, do we?

19 MR. KENDALL: But, Your Honor, it said in lieu of
20 a motion, and so I think it was fair for counsel to
21 include that there needed to be no litigation about
22 discovery -

23 QUESTION: Well -

24 MR. KENDALL: - that the Government understood
25 what state law and Federal law required.

1 QUESTION: But maybe there had to be a request,
2 not litigation, but say, tell me, was he an informant?

3 MR. KENDALL: Well, Your Honor -

4 QUESTION: Tell me. Did you ever ask that?

5 MR. KENDALL: I think after these assurances, I
6 think counsel -

7 QUESTION: Please answer that question.

8 MR. KENDALL: I'm sorry.

9 QUESTION: Did you ever ask the prosecution
10 whether Farr was an informant?

11 MR. KENDALL: At trial, there's nothing in the
12 record where the prosecution was specifically asked. It's
13 state habeas. We pled a - a claim on information belief
14 that he was a paid informant. That required the
15 government lawyer who was - who was one of the trial
16 prosecutors to respond, we believed, truthfully. He did
17 not respond to that, and that -

18 QUESTION: Now, when was this?

19 MR. KENDALL: That was in state post-conviction
20 proceedings, and the - and he has was required to respond
21 truthfully to that, and under state law that -

22 QUESTION: He didn't respond falsely. He just
23 didn't respond.

24 MR. KENDALL: But under state law that is a no,
25 that is a denial.

1 QUESTION: But -

2 MR. KENDALL: But he -

3 QUESTION: A failure to respond is a no, rather
4 than - than a yes?

5 MR. KENDALL: Any - any factual allegation of petition
6 that is not addressed specifically in the answer is
7 treated as -

8 QUESTION: So as a -

9 MR. KENDALL: - a denial.

10 QUESTION: And - and in addition -

11 QUESTION: It was more than that though, wasn't
12 it? It - they - in - in fact, the state put it in a
13 general denial. It denied each and every allegation of
14 the complaint, including the allegation that Farr was an
15 informer.

16 MR. KENDALL: Well, it's clear that when you read
17 their answer that the state had denied our allegation that
18 Mr. Farr was a paid informant in this case.

19 QUESTION: And they had in effect at trial in the
20 jury argument vouched for his truth, as I understand it.

21 MR. KENDALL: On - on both at the guilt innocence
22 phase and at the punishment phase.

23 QUESTION: Yeah.

24 QUESTION: That - that's the most shocking thing.
25 Do - do we know that - that counsel who allowed Farr to

1 lie on the stand, and indeed went on to argue to the jury
2 about Farr's testimony, do we know that counsel knew that
3 that was a lie?

4 MR. KENDALL: Your Honor, there aren't -

5 QUESTION: I mean, you - well, you can argue it
6 was his responsibility, you know, but I'm not talking
7 about whether it was his responsibility.

8 MR. KENDALL: Mr. Elliott gave an affidavit in
9 state post-conviction that said that he was aware of all
10 the facts pursuant to the investigation and the
11 presentation of evidence in this case. I would think
12 that, given Farr's important status in this case, there's
13 no doubt that he knew. At the Federal evidentiary
14 hearing, he did not in any way try to say that he did not
15 know that Farr's - was - had this informant status until
16 much later at the trial.

17 QUESTION: In 19 -

18 QUESTION: This is a bit of an aside, but do you
19 know whether any disciplinary proceedings were ever
20 brought against the prosecutors?

21 MR. KENDALL: There have been absolutely no
22 disciplinary proceedings whatsoever.

23 QUESTION: Can I ask you about -

24 QUESTION: But there's a - a number - you have
25 Banks and I take it - tell - you want to talk to us about

1 Cooksey in the - in - in the sentencing phase.

2 MR. KENDALL: Let - let me - we - let me go to
3 the Cook claim if I could. There was another very
4 troubling due process claim raised in this case, and that
5 was at the key guilt phase witness. Mr. Cook had
6 testified pursuant to a deal and that the state had
7 withheld impeachment material on him. Three months before
8 the evidentiary in the hearing in this case, we received
9 for the first time a lengthy pre-trial statement that had
10 all kinds of impeachment material in that and that showed
11 beyond any doubt that Mr. Cook had lied in his testimony
12 before the jury that he had not in any way, shape, or form
13 rehearsed his testimony with the state.

14 From the time of that disclosure until the
15 evidentiary hearing, it was clear that this transcript
16 would serve as evidence for us to prove up our claim that
17 the state had suppressed material, impeachment material,
18 on Mr. Cook. And Mr. Elliott, the trial prosecutor -

19 QUESTION: What - what did Cook testify to that
20 was - that was essential to the - to the sentence?

21 MR. KENDALL: This was the - the key guilt phase
22 witness, Your Honor. He was the - the entire narrative of
23 the crime in the -

24 QUESTION: Yeah, but you're - you're - you're not
25 asking for the guilt to be - to be overturned. You're

1 asking for the sentence to be.

2 MR. KENDALL: With regard to the - Mr. Farr,
3 we're asking only for sentence relief. With regard to
4 Cook, we're saying he was the crucial guilt phase witness.

5 QUESTION: So you're asking for reversal of the
6 conviction on the basis of Cook?

7 MR. KENDALL: That's correct, Your Honor.

8 QUESTION: Okay. What - now, what - what was
9 essential to the conviction that - that he testified to?

10 MR. KENDALL: He - he provided - he had to - the
11 - the prosecutor in his opening statement told the jury,
12 Mr. Cook is our critical witness, you have to believe him
13 for us to win this case. He said that over and over
14 again. Cook presented the confession -

15 QUESTION: Well, he testified that the defendant
16 confessed to him several times, didn't he?

17 MR. KENDALL: He - he was the only person who
18 provided information that Mr. Banks had confessed. He was
19 the only person that tied Mr. Cook to - Mr. Banks to any
20 other evidence in this case. The trial prosecutor
21 portrayed him accurately. He was the critical witness for
22 the Government at the - at the guilt phase of trial.

23 QUESTION: And - and what do you say the state
24 withheld with regard to Cook? That it had gone over his
25 testimony in - in advance?

1 MR. KENDALL: Well, what he was asked, the first
2 question on cross-examination was, who have you talked to
3 about your testimony? He said nobody. He said, you
4 haven't talked to any about this case? I haven't spoken
5 to anybody. That was a bald-faced lie.

6 QUESTION: Well, it's on its face incredible
7 anyway. You think the jury believed it?

8 MR. KENDALL: Well, Your Honor, the -

9 QUESTION: They think the prosecutors can just
10 put him on without even asking him what he was going to
11 testify about?

12 MR. KENDALL: Well, they certainly would - they
13 certainly would have believed that if the Government would
14 have disclosed this transcript that showed that three days
15 before trial Mr. Cook had a very difficult time keeping
16 his narrative about this crime straight.

17 QUESTION: How - how does that work? When this
18 occurs and - and this - these questions are set forth in
19 footnote 4 of your brief - when this occurs, does a Brady
20 obligation arise at that point?

21 MR. KENDALL: Your Honor, I think that -

22 QUESTION: I'm the - I'm the prosecutor, I'm
23 sitting there, I hear this guy say that he's never talked
24 to me and I know that he has and I know that I have 71 or
25 74 pages of notes. Do I now have a Brady obligation?

1 MR. KENDALL: Your Honor, for decades the Court
2 has said that when a government witness lies, the
3 government attorney has the obligation to correct that.
4 The Brady obligation continues, it's pre-trial and it's
5 during trial. It can arise during trial depending on - on
6 what the government witness says, and it's clear that
7 after Cook gave that answer, that the Government was
8 obligated, one, to have him correct his testimony, but
9 certainly not, after he'd given that testimony, to get up
10 in front of the jury and say, Mr. Cook was completely
11 truthful.

12 QUESTION: But my question is, is there a Brady
13 obligation?

14 MR. KENDALL: There is a Brady obligation,
15 absolutely.

16 QUESTION: Well, now, is your point - your point
17 is more than just that he said it, he didn't admit that he
18 had talked to other people before trial, is it?

19 MR. KENDALL: No, no, no, because it - it was
20 clear that what the defense was trying to show was that
21 Mr. Cook should not be believed because he's really been
22 worked over by the prosecutors to get his story together.
23 And that's exactly what the transcript that wasn't
24 disclosed demonstrated. He was mocked during this pre-
25 trial statement by the prosecutors who were preparing him

1 because he was making so many mistakes and getting things
2 all out of order.

3 They didn't believe he was a credible witness
4 three or four days before trial, and the only reason that
5 he was, or might have appeared credible, was because of
6 this session. This was classic impeachment material. The
7 Government had this in their briefcase at trial. They -
8 they disclosed the - the brief statement that Mr. Cook had
9 given four minutes before but not this one.

10 QUESTION: But you lost on this point in the - in
11 the Federal court?

12 MR. KENDALL: Unfortunately, Justice Ginsburg, we
13 did not lose on it. The district court did not adjudicate
14 that claim.

15 QUESTION: But your time - your - your light's
16 flashing, and I - when you come back, I'd appreciate your
17 asking - answering one factual question I have on this.
18 In 1996, you're in Federal court with five witnesses about
19 Farr being a - an informant. In 1992, you say you learned
20 from Cook information that led you to think you'd find
21 those witnesses. In 1992 and '93, you are in state
22 habeas. Why did you not either engage in that kind of
23 discovery in state habeas or find those witnesses for the
24 state habeas court?

25 MR. KENDALL: Because we - efforts were made, we

1 could not find Farr. But we - efforts were made, and we
2 could not find Farr, but we went right to the horse's
3 mouth. James Elliott, the prosecutor in this case, knew
4 that he was a paid informant. When we raised that claim
5 in our petition, he had an obligation then to - to tell us
6 honestly was he an informant or was he not, and he did not
7 do so.

8 We wanted to litigate his status, Farr's status
9 in the state court. We were prevented from doing so
10 because of the lack of candor and the lack of discovery
11 from the prosecutor. He could have made this very simple
12 and said, yes he's the guy, let's litigate this in state
13 court. He didn't do so.

14 Let me turn briefly to the ineffective
15 assistance claim. The district court granted relief on
16 that claim after hearing information that this Court has
17 said time and again is relevant to the capital sentencing
18 process. The Fifth Circuit overturned that grant of
19 relief by making a - two legal mistakes. First, unlike
20 the district court, and - and not following the decisions
21 from this Court, the - the Court vulcanized its review of
22 our mitigating evidence instead of looking at it in its
23 entirety and weighing that against the aggravation.

24 It broke this evidence up into three categories
25 and said, looking at each one, weighing these on the

1 scale, the panel found no reasonable likelihood of a
2 different result. That is clear -

3 QUESTION: What - what categories were -

4 MR. KENDALL: There was mental health evidence.
5 There was testimony about Mr. Vetrano Jefferson recanting
6 his testimony that - about who was the - who had been the
7 aggressor in a fight before this crime, and then the
8 testimony offered by the parents in this case.

9 QUESTION: All going to guilt or some going to
10 sentencing?

11 MR. KENDALL: All - all going to sentence, Your
12 Honor. This was -

13 QUESTION: All going to sentencing?

14 MR. KENDALL: This was only about sentence, Your
15 Honor, that's correct.

16 QUESTION: Of course, the parents had testified
17 in the - and I think he even said that they were good
18 parents, didn't he?

19 MR. KENDALL: Your Honor -

20 QUESTION: And - and - and the fact that they
21 were these horrible parents were - was going to be
22 testified to by a Dr. Pina, is that it?

23 MR. KENDALL: Your Honor, there was no claim that
24 these were horrible parents. They were loving parents,
25 but they was a very troubled family that Mr. Banks -

1 QUESTION: I see.

2 MR. KENDALL: - grew up in, and it's - there was
3 evidence that came out that was plainly relevant to the
4 sentencing decision in this case.

5 QUESTION: It came out of whose mouth?

6 MR. KENDALL: It came out of Mrs. Banks' mouth as
7 a -

8 QUESTION: Who -

9 MR. KENDALL: Mrs. Banks, the mother -

10 QUESTION: What did - what did she say?

11 MR. KENDALL: - in the state habeas proceedings.

12 QUESTION: What did she say?

13 MR. KENDALL: She said that, for example, her son
14 had been subjected to all kinds of problems because of his
15 very serious dermalogical ailment that he had from birth
16 all through his life.

17 QUESTION: He had a skin - a skin problem -

18 MR. KENDALL: A very serious -

19 QUESTION: - and you think that would have
20 altered the jury's -

21 MR. KENDALL: Well, that was one piece of the -
22 of the court -

23 QUESTION: All right. What - what - I - let -
24 what - what is all of it?

25 MR. KENDALL: That her - her husband

1 unfortunately had been an - a alcoholic and - and for
2 years when he became drunk would terrorize her, terrorize
3 the children. She often had to take the children and
4 leave the house to assure her safety and Mr. Bank's safety
5 and his siblings' safety.

6 QUESTION: She testified to that?

7 MR. KENDALL: She - she proffered that in state
8 court, that's correct, Your Honor. And then the experts,
9 Mr. Cunningham in Federal Court, testified about what all
10 this does to an individual in the formative years of life.
11 This is -

12 QUESTION: There was one specific incident of the
13 father tying the boy to a tree and whipping him. Were
14 there any other specific incidents or just general
15 allegations that when he - he - when the father became
16 drunk -

17 MR. KENDALL: It - it -

18 QUESTION: - he became violent.

19 MR. KENDALL: It was - it was Mrs. Banks'
20 testimony that there had been repeated instances where, to
21 avoid harm, they had to leave the home. In - there were
22 some problems that -

23 QUESTION: Did she testify about being tied to a
24 tree?

25 MR. KENDALL: Did -

1 QUESTION: Did - did Mrs. Banks provide the
2 testimony about his being a tied to a tree and whipped?

3 MR. KENDALL: No, she did not.

4 QUESTION: Who provided that?

5 MR. KENDALL: Mr. Banks provided that.

6 QUESTION: Mr. Banks provided that.

7 MR. KENDALL: Yes.

8 QUESTION: Not terribly credible if -

9 MR. KENDALL: Well, Your Honor, the state has
10 never - in state court they did not attempt to show that
11 any of this proffer was inaccurate or not true. Their
12 position in state court was simply that the trial lawyer
13 had done a good job, and so we'd failed to show prong one
14 of Strickland. In the Federal court -

15 QUESTION: Well, I'm - I'm just concerned whether
16 it would make any difference. One - once again, your
17 burden is to show that would have made a difference.

18 MR. KENDALL: And the - and -

19 QUESTION: Skin problems and an alcoholic father,
20 you know, who - who on the basis of Banks' mother's
21 testimony terrorized the child and Banks' testimony that
22 he was tied to a tree and whipped.

23 MR. KENDALL: Your -

24 QUESTION: I - I just -

25 MR. KENDALL: Well, Your Honor, the - the

1 testimony here was that these were very serious -

2 QUESTION: And this was -

3 MR. KENDALL: - things that plagued Mr. Banks'
4 life -

5 QUESTION: - and the jury would have thought that
6 this explains his - his - his cold-blooded murder of - of
7 the victim for his car?

8 MR. KENDALL: Well, Your Honor, it might not
9 fully explain it, but it would say that he's not the type
10 of offender for whom the death penalty needs to be carried
11 out against.

12 I'd like to reserve the rest of my time for
13 rebuttal.

14 QUESTION: Very well, Mr. Kendall.

15 Ms. Bunn, we'll hear from you.

16 ORAL ARGUMENT OF GENA BUNN

17 ON BEHALF OF THE RESPONDENT

18 MS. BUNN: Mr. Chief Justice, and may it please
19 the Court:

20 From 1983 to 1996, Banks filed three separate
21 state habeas applications raising numerous claims, but
22 Banks failed to diligently pursue his current Brady and
23 Strickland claims during these state proceedings. He
24 elected instead to expend his efforts pursuing other
25 claims. It wasn't until Federal habeas proceedings that

1 he turned his efforts to developing the instant claims.

2 QUESTION: Did - did the state deny in one of
3 these habeas applications, deny that Farr was an
4 informant?

5 MS. BUNN: No, Your Honor, the state never denied
6 it. It did fill -

7 QUESTION: Well, now wait a minute -

8 QUESTION: Then explain to me what was -

9 QUESTION: - in - in - in the state habeas
10 proceeding, the state submitted a response to the
11 petitioner's petition and denied all the allegations in
12 the petition, which included the assertion that Farr was a
13 paid informant and that the state had withheld that
14 information from Banks. The state denied that, did it
15 not?

16 MS. BUNN: No, Your Honor. It is not our
17 interpretation of the record that it did, because this
18 single sentence found in a 145-page petition was buried in
19 a - basically a laundry list of claims of prosecutorial
20 misconduct, at the end of that section containing a great
21 number of other allegations, which the state responded to
22 specifically by saying, first a number of them had been
23 addressed in other sections of the brief, including the
24 Swain claim, and another Brady claim that was fully
25 developed. And then it responded to the remaining claims

1 by saying that they were all procedural - procedurally
2 defaulted based on the lack of a contemporaneous
3 objection.

4 QUESTION: Ms. Bunn, did not the state say, we
5 deny each and every factual allegation in this complaint?

6 MS. BUNN: Yes. There was a general denial at
7 the beginning of the - the state's answer to the 145-page
8 brief. However, the context -

9 QUESTION: You better be careful what you deny,
10 don't you think? I mean, each and every would include
11 that, even if it's buried in, you know, if it's buried in
12 a lot of other stuff. I mean, you could have said, you
13 know, everything's so buried we can't tell what's what,
14 but you didn't say that. You said, we deny each and
15 every.

16 MS. BUNN: Yes, Your Honor, and it does appear
17 that -

18 QUESTION: Is it that the case that - do you now
19 concede that Farr was paid something for his information -

20 MS. BUNN: Yes.

21 QUESTION: - by the state.

22 MS. BUNN: Yes. Well, not for information. He
23 was paid to assist police in obtaining the murder weapon.

24 QUESTION: Yeah. And did the state prosecutor
25 ever disclose that during the trial, even though he said,

1 no, everything's perfectly truthful here?

2 MS. BUNN: No, Your Honor. The state never -

3 QUESTION: He knew - he knew that Farr was
4 testifying falsely and he - he let that testimony go, and
5 indeed relied on it in his summation to the jury?

6 MS. BUNN: What the trial prosecutor knew -
7 there's nothing in the record to indicate the trial
8 prosecutors actually knew about the money that Bank - that
9 - that Farr was paid several months before the trial in
10 this case by - by police investigators.

11 QUESTION: But isn't he charged with knowledge of
12 what the organization as a whole did?

13 MS. BUNN: In the - in the Brady disclosure
14 context, certainly he is.

15 QUESTION: Wasn't it representative of the police
16 there at the trial the whole time to assist the
17 prosecutor?

18 MS. BUNN: Not that - not that I'm aware of that
19 the police were at the - at - really have testified in the
20 trial. But I believe the rule was invoked in the trial,
21 so he did not sit in on - on Farr's testimony or any of
22 the other state's witnesses' testimony. But -

23 QUESTION: Well, I assume we have to take this
24 case on the - the premise that the state somehow knew that
25 the state had paid the money to Farr, and I guess also had

1 promised some kind of a break not making certain criminal
2 charges?

3 MS. BUNN: There is no evidence of any inducement
4 of that kind to Farr in this case, no evidence of any kind
5 of inducement whether financial or a break in - in any
6 convictions for his testimony, contingent upon his
7 testimony in this case. That's what distinguishes it from
8 cases like Bagley and Giglio.

9 QUESTION: But are you saying that because he was
10 paid to help get the gun back rather than to testify
11 falsely?

12 MS. BUNN: Yes, Your Honor. That is correct.

13 QUESTION: So that he was paid for a critical
14 role in the scenario that led to the indictment, rather
15 than post-indictment false testimony.

16 MS. BUNN: Yes, Your Honor. That is correct.
17 But again, as far as the cause issue goes, and there is no
18 dispute that the claim is procedurally defaulted to - due
19 to Banks' failure to develop it in - in the state court.
20 The dispute is whether he has established cause, and the -
21 the basis - the focus of the inquiry in cause is the
22 petitioner's conduct, and in this case, the state record
23 makes clear that Banks was aware of this claim and
24 actually alleged the claim in the petition itself.

25 QUESTION: Well, does the petitioner's awareness

1 that there is a - a claim supersede the prosecution's
2 obligation to disclose Brady material, and to disclose the
3 fact that one of its own witnesses lied on the stand?

4 MS. BUNN: Not that it supersedes the obligation
5 under Brady, but it does preclude a finding of cause in a
6 case like this where the nondisclosure -

7 QUESTION: So the prosecution can lie and conceal
8 and the prisoner still has the burden to - to discover the
9 evidence? That's your position?

10 MS. BUNN: Yes, Your Honor, because in a case
11 like this, unlike Strickler, unlike Amadeo, this is more
12 like - more like McCleskey, where the nondisclosure,
13 whether in trial court or in state habeas, did not prevent
14 the petitioner from developing the claim.

15 QUESTION: But it didn't prevent it absolutely,
16 but it made it pretty tough, didn't it? I mean, the -
17 sitting there in January, the prosecution has been not -
18 been denying nonstop that Farr has been paid anything,
19 they're beginning to get some information maybe that isn't
20 true. The prosecution is still denying it by denying the
21 allegation, and they think they're going to have to find
22 somebody who will prove - who will say that, and they
23 can't find Farr.

24 So what are - what were they supposed to be
25 doing? They were looking for witnesses. They couldn't

1 find Farr. The prosecution isn't telling them the truth
2 apparently. And so, what - what is it that they should
3 have done?

4 MS. BUNN: Well, Your Honor, this case does not
5 present a situation where there is a record developed on
6 what efforts Banks expended on this case. There's nothing
7 in the record to indicate that Banks' counsel pursued this
8 claim, that they sent investigators out to try to find
9 Farr. There's absolutely nothing -

10 QUESTION: I didn't say that. What I said was, I
11 was repeating what he said, that - and when they filed it
12 in January - I don't want to repeat it again, you heard
13 what he said too - and he said they're just learning from
14 Cook some time in 1992 that it might be possible to get
15 evidence that would show what the prosecution was saying
16 was false.

17 So I want your opinion. You say it's quite
18 clear that they should have investigated this further.
19 Really? Because?

20 MS. BUNN: Because they were obviously aware of
21 the claim, aware of the potential existence of the claim.
22 They requested no investigative assistance regarding the
23 claim. They investigated no discovery regarding the
24 claim. They - while they - what they did do was expend
25 what at that point were pretty extensive resources

1 pursuing and developing their Swain claim and another
2 Brady claim.

3 QUESTION: But you want us to say that the - that
4 the defendant relies on his peril, at his peril, on the
5 representations of the - of prosecution?

6 MS. BUNN: At - in - in a case like this where,
7 unlike Strickler, where the evidence, the - the
8 nondisclosed evidence was not in the sole possession of
9 the state. It was discoverable as - as actually
10 ultimately have it in habeas, in - in Federal habeas
11 proceedings. Banks was able to procure this evidence.

12 QUESTION: No, but you are - are - aren't you
13 arguing, just as Justice Kennedy suggested, that what they
14 should have done in this case is to go to the court and
15 say, we want further resources to investigate, and what
16 specifically we want to investigate is an issue which, if
17 we are correct, the state is affirmatively lying about.
18 We want investigative resources to prove that state's
19 counsel is lying. Isn't that your position?

20 MS. BUNN: Well, yes, Your Honor -

21 QUESTION: And for failure to do that -

22 MS. BUNN: - that would be -

23 QUESTION: - for failure to do that, they're out.
24 Isn't that your position?

25 MS. BUNN: That is part of our position, that

1 essentially the absence of that, the absence of a request
2 for investigative assistance, the absence of any -

3 QUESTION: But, in the - in the - in the face of
4 the state's representation. In other words, if - if they
5 asked for it, I assume the state would have said, well,
6 we've told them that there isn't anything to this. And -
7 and - and you would - you're saying that they should have
8 pursued it in the face of that for the purpose, among
9 other things, of proving that state's counsel was lying to
10 them?

11 MS. BUNN: Your Honor, they - there was an
12 obligation from them to pursue the claim further, yes.

13 QUESTION: Why wasn't there an obligation on the
14 part of the prosecutor, having deceived the jury and the
15 court, to come clean? Why is the burden on the defendant,
16 who was subjected to false testimony? Why is - and the
17 prosecutor knows it - why isn't it the prosecutor's burden
18 to come clean at any stage, rather than let this falsehood
19 remain in this record?

20 I just don't understand why it becomes the
21 defendant's burden when the prosecutor is best situated to
22 have the information, was this true or not, did we pay
23 this informant or not. Why isn't that a continuing
24 obligation on any lawyer who makes a representation that's
25 false to a court?

1 MS. BUNN: Your Honor, the first - first it is
2 not - that's not the question. It is the habeas
3 petitioner's burden to allege and prove - provide
4 evidentiary support for his claim.

5 QUESTION: Well, but it is the question if - if
6 Justice Ginsburg is right, that prosecutors have a
7 continuing obligation.

8 MS. BUNN: Well, that obligation is essentially
9 triggered by materiality, so you have that working as
10 well. But that does not - the - the state's continuing
11 obligation does not basically preclude a finding of - of -
12 of no cause in a case like this.

13 QUESTION: Well, if I were a defense counsel, I
14 could think of a - of a - no more damaging material of
15 cross-examination in this case than to show Farr was paid
16 money to come up with the story.

17 MS. BUNN: Well, Your Honor, again, that - that
18 was not the - those are not the facts of this case.
19 There's no evidence and - and Farr has not said in post-
20 conviction that he was paid for testimony.

21 QUESTION: Yeah, that's true, but I - I mean,
22 what -

23 QUESTION: But I think it's even -

24 QUESTION: - what bothers me about your position
25 is, if we were to say that a defense counsel behaves

1 unreasonably when he relies upon an explicit statement of
2 the prosecutor's, such as I deny the allegation, that's to
3 say that the justice system lacks integrity, and indeed it
4 might contribute to that lack of integrity to impose this
5 kind of obligation and thereby excuse a prosecutor under
6 circumstances like this.

7 MS. BUNN: But to find cause in a case like this
8 would essentially be to hold that a Brady claim can never
9 be defaulted because -

10 QUESTION: Of course it can. All that it
11 requires is that a prosecutor who says, my files are open,
12 who says that we do not, in fact, deny that we paid money
13 for a related purpose to the witness, all it requires is
14 that he be telling the truth.

15 MS. BUNN: And I want to focus also on the - on
16 the record itself and what Banks - Farr was never asked
17 specifically whether he was a police informant, so he
18 never denied that allegation. At the guilt innocence
19 phase, starting - it - it's in the joint appendix at page
20 37 - in the middle of questioning by defense counsel at
21 the guilt innocence phase about his drug - prior drug use
22 and his drug habit, he - Farr was asked the question, and
23 have you ever taken any money from some police officers?
24 And he answered no.

25 This was a false statement, but not to be

1 construed as necessarily as a denial that he was a police
2 informant, particularly given the context of the
3 questioning. Later in the guilt innocence, he was asked -

4 QUESTION: May I just interrupt with one
5 question? But isn't it even more significant that his
6 real role in the - in the whole story is that he was the
7 person used by the police as an excuse to go up and get
8 the gun back two weeks after Banks had left it there,
9 whereas the record left the impression that Banks himself
10 wanted that gun to commit future robberies, without any
11 explanation of the fact that the - that two weeks went by
12 without any such request?

13 And then when Farr gets in the picture, they go
14 up to get the gun, and then Farr says, because Banks
15 insisted on it, which is not only false, but improbable
16 and terribly prejudicial at the - at the sentencing
17 hearing.

18 MS. BUNN: Again, though, the - the materiality
19 of Farr's - of this nondisclosure has to be - there are
20 several factors that have to be assessed in that - in that
21 issue. First, the fact that Farr wasn't paid for his
22 testimony, and the impeachment value of the informant
23 status itself is limited to the mere fact that Farr had
24 acted as a police informant in this case and had assisted
25 police in obtaining the murder weapon. But that

1 impeachment did not extend to any inference that Farr had
2 testified favorably for the state because he had any
3 financial or any other kind of incentive to do so.

4 QUESTION: What - what -

5 QUESTION: But it - it was diametrically opposed
6 to the notion that he wanted to get the gun to commit
7 robbery, as whereas the real purpose of the whole venture
8 is to get the gun to give to the police.

9 MS. BUNN: But Farr's subjective intent did not
10 undermine Banks' intent, and Banks actually admitted at
11 the punishment phase -

12 QUESTION: Banks' intent as revealed in Farr's
13 testimony, which is the only evidence in supporting that
14 theory that Banks was dangerous for that reason.

15 MS. BUNN: The difference is, Farr's testimony
16 was - indicated that Banks was - had the intent himself to
17 participate in the robberies, and Banks limited that to
18 being willing essentially to - to abet Farr in - in
19 committing those robberies.

20 QUESTION: What - what page of the transcript
21 that you - you cited page 37. Is that in the joint
22 appendix?

23 MS. BUNN: Yes, joint appendix. That's the -

24 QUESTION: And that is the - that is the
25 confession of - I'm sorry - that - that is the perjury -

1 that's the only perjury that's supposedly -

2 MS. BUNN: That's the - that's one instance that
3 they - that - that's the only one dealing with money.

4 What police officers -

5 QUESTION: Of course, this doesn't - this doesn't
6 deal with whether he has - was a police informer. It - it
7 deals with whether the police officers promised you
8 anything.

9 MS. BUNN: Yes, yes, that's correct. And that -
10 the denial of that, of course, is - is not fault, because
11 there's nothing in subsequent testimony to indicate that's
12 - that's untrue.

13 QUESTION: Have you ever taken any money from
14 some police officers? No.

15 MS. BUNN: Yes. That is a false statement.
16 However, it can - it's - it is far afield to interpret
17 that as a denial of being a police informant.

18 QUESTION: Where - where - where is that? Have
19 you ever taken any money from police officers?

20 MS. BUNN: That is at joint appendix 37.

21 QUESTION: It's three lines down from the top.

22 MS. BUNN: In the middle of the questioning about
23 - about Farr's prior drug use, defense counsel asks, and -
24 and have you ever taken any money from some police
25 officers? There is further -

1 QUESTION: Thirty, thirty-seven, my God, reading
2 - oh, I got it, I got it, okay.

3 MS. BUNN: Further, he's asked, what police
4 officers did you talk to about this? I have talked to no
5 one about this outside of when they called us down
6 referring to the case -

7 QUESTION: Yeah. We got it.

8 MS. BUNN: - which again is a false test - is a
9 false statement, but does not specifically deny police
10 informant status.

11 QUESTION: Now, it does seem to me that the
12 Cooksey report that the - I think it - the Cook - the -

13 MS. BUNN: Cook.

14 QUESTION: - the witness Cook -

15 MS. BUNN: Yes, Charles Cook.

16 QUESTION: - that the - that the report of his
17 interviews with - with the police was - was very, very
18 strong and helpful impeachment material. Do you want to
19 comment on - on the claim that relates to his testimony?

20 MS. BUNN: Certainly, Your Honor. The lower
21 courts did not consider that claim to be properly before
22 the court because Banks failed to present it in his
23 Federal petition, failed to present it in any amended and
24 supplemental position, and the - and there's nothing in
25 this - in this record to indicate - that would support a

1 finding of implied consent, or the trial by consent.

2 QUESTION: Well, you said, I mean, the - the
3 Fifth Circuit didn't think that Federal Rule of Civil
4 Procedure 15(b) applies in habeas, right?

5 MS. BUNN: That was a basis of its holding, yes.
6 That's correct, on debatability.

7 QUESTION: Is - is that absolutely clear?

8 MS. BUNN: No, Your Honor, it's not, and it -

9 QUESTION: Well, if it's not absolutely clear,
10 then - then it seems to me they should have - they should
11 have granted the - the certificate of appealability.

12 MS. BUNN: The issue actually before the Fifth
13 Circuit, the issue that it resolved, was whether - whether
14 it was debatable - the district court - whether the
15 district court abused its discretion in denying the 59(e)
16 motion, because, in fact, the district court never
17 considered 15(b) because it was never raised to the
18 district court, that - that particular argument. So -

19 QUESTION: Well, that wasn't the basis that the
20 Fifth Circuit relied on. I thought it relied on the basis
21 that there's huge - there's just no question that 15(b)
22 doesn't apply in habeas.

23 MS. BUNN: That was part -

24 QUESTION: And there's a lot of question about
25 that, it seems to me.

1 MS. BUNN: Yes, Your Honor. That was part of the
2 holding. The stated -

3 QUESTION: So maybe we should remand at - at
4 least on the, you know, on the - on the Cook claim to have
5 the - the Fifth Circuit decide whether a COA - decide the
6 15(b) question and then decide the Cook claim.

7 MS. BUNN: I believe that would be an appropriate
8 course on this issue, and in this - we are not - we are
9 conceding the debatability of the general applicability of
10 15(b) in the habeas context. What we do not find to be -
11 what we do not believe to be debatable is the
12 applicability in this case, that essentially there's no
13 factual predicate for the application of 15(b) in this
14 case, given that there's - there's simply nothing in the
15 record to show that any party beside Bank himself,
16 including the judge - the lower court judges, had any
17 inkling that this issue was properly before them.

18 QUESTION: But the Fifth Circuit passed on it,
19 didn't it? Didn't the Fifth Circuit pass on the question
20 of whether 15(b) applied?

21 MS. BUNN: The Fifth Circuit, after - after
22 noting that what the Fifth - that - that the district
23 court's findings regarding the failure to raise the claim,
24 the failure to raise it in an amended petition, did hold
25 that it was - that it - that 15(b) did not apply in the

1 habeas context.

2 QUESTION: There was one position you took in
3 your brief and you said that - that the state is not
4 obliged to reveal the identity of an informer. That's not
5 correct, is it, if the informer is called as a witness?

6 MS. BUNN: No, Your Honor, that is our position
7 that essentially a prosecutor's duty to disclose whatever
8 information is triggered by the - the potential
9 materiality of that information. And particularly in a
10 case like this, where the informant is not - was not paid
11 for testimony, was not given any sort of break for his
12 testimony, that there's no specific inference that can be
13 drawn regarding an incentive for testifying favorably for
14 the state, that that is not -

15 QUESTION: What authority - what authority do you
16 have? What case holds that when the Government puts an
17 informant on the stand, it does not have to divulge that
18 capacity?

19 MS. BUNN: There - I know of no such authority
20 for that particular proposition, but there's also nothing
21 - there's also no opinion from this Court saying that a
22 witness' informant status is per se material, which is
23 essentially what - what that would -

24 QUESTION: Isn't there - isn't there a Texas rule
25 of evidence that says, this is 508(c)(1) of the Texas

1 rules, an informer's identity must be disclosed if he
2 appears as a witness for the public entity?

3 MS. BUNN: Well, Your Honor, again, even - even
4 assuming a breach of a Federal rule of - state rule of
5 evidence, that would not implicate the constitutional due
6 process concerns at issue here. And under Brady -

7 QUESTION: Well - well, it certainly goes to
8 whether or not the defendant is - is entitled to rely on
9 what the prosecution's course of conduct is with reference
10 to the informer.

11 MS. BUNN: But again, there's nothing in this
12 trial record to indicate that trial counsel specifically
13 requested that information prior to going to trial, that
14 he - that trial counsel himself didn't pursue -

15 QUESTION: So you say at the outset of the trial
16 the defense counsel has to say, now, will you comply with
17 all of the rules that are in the Texas statutes?

18 MS. BUNN: Well, there is an obligation from - on
19 - upon defense counsel to pursue the remedies he's
20 entitled to, and to - to specifically request the
21 informant status of any witness, yes, there is an
22 obligation in a case such as this. And the fact that
23 trial counsel did not do that, at least precludes a -

24 QUESTION: Why is there such an obligation if the
25 state rules require it? This - we supposed to say we want

1 to be sure you've complied with all the state rules that
2 govern prosecutions?

3 MS. BUNN: But even assuming that - that
4 violation, that is not - that does not support itself a
5 finding of cause to the procedural default of Banks'
6 failing to develop this claim for years even though
7 knowing of its existence.

8 QUESTION: Ms. Bunn, do you have any argument
9 that this might not have made any difference?

10 MS. BUNN: Yes, Your Honor, and again, several
11 factors -

12 QUESTION: I - I suggest you might train your
13 guns on that.

14 (Laughter.)

15 MS. BUNN: Several factors play into that issue.
16 Again, just - just the pure impeachment value itself was -
17 was weakened by the fact that there was no incentive. But
18 also the fact that Farr was heavily impeached already and
19 that the informant status, weak as it was, was - was
20 really merely cumulative. Defense counsel had brought
21 out, both on direct and then again on cross, his prior
22 drug abuse, track marks, his denials during cross-
23 examination, refuted by the defense witnesses, which
24 included a denial that he acted as a police informant in -
25 in another case for another jurisdiction.

1 QUESTION: This isn't - this isn't what the
2 prosecution told the jury, was it?

3 MS. BUNN: No, Your Honor. This is - this is
4 from defense counsel. And third, even without Farr's
5 testimony, the significant evidence of Banks' future
6 dangerousness. Banks admitted at punishment that he was
7 willing to abet Farr's commission of future armed
8 robberies by providing him with the weapon. In fact, he
9 was willing to drive.

10 QUESTION: But he did - is - is it correct that
11 but for Farr there would have been no testimony that Banks
12 would participate in those robberies, and there would have
13 been no testimony that Banks and his accomplices would use
14 the gun to eliminate any trouble that might come up during
15 that. Is that correct?

16 MS. BUNN: Yes. That is correct.

17 QUESTION: That's pretty damning testimony, isn't
18 it?

19 MS. BUNN: It is a piece of - of - of the state's
20 puzzle, but it - but given what is left, not material.
21 And again, the fact that he was -

22 QUESTION: It's not material because it would not
23 have, in effect, raised a serious question about the - the
24 integrity of the result or the fairness of the trial?

25 MS. BUNN: Yes. It would not have put the

1 state's punishment case in such a different light as to
2 undermine the verdict.

3 QUESTION: Well, but don't - didn't you have a
4 defendant here without a prior criminal record, and - and
5 the state is trying to prove future dangerousness and that
6 this is a really bad actor. I would have thought that
7 went rather to the heart of the sentencing question.

8 MS. BUNN: It was definitely favorable evidence
9 to the state's future dangerousness case, but it was not
10 all that was there.

11 QUESTION: Well, you have there as well Mr.
12 Jefferson, who said that Banks whacked him or hit him hard
13 and happened to omit that he himself, Mr. Jefferson, had
14 attacked Mr. Banks' sister, which could be a reason why he
15 had hit him.

16 MS. BUNN: Well, the - Vetrano Jefferson's
17 testimony, though he did amend his version of the incident
18 in post-conviction proceedings, he did not recant his
19 testimony that Banks hit him across the face with a gun,
20 but only that - and not that he had attacked Banks' wife,
21 but that he had - that he had had a verbal altercation
22 with her. And there was no physical - no physical threat
23 whatsoever that Banks responded to by hitting him across
24 the face with a gun, and this happened a week prior to the
25 murder.

1 And again, this testimony indicated that Banks
2 was known to carry a weapon on a regular basis in the
3 weeks before the murder. And the murder itself, the
4 unprovoked nature of it, the fact that Banks essentially
5 lured a 16-year-old kid to a - an abandoned and secluded
6 park near his home and shot him three times to steal his
7 car.

8 And then - and then the fact that though -
9 though Farr's testimony was - was crucial on the limited
10 issue of Banks' willingness to participate himself in the
11 armed robberies, it still - still the fact that Banks had
12 it - and himself admitted - admitted at punishment that he
13 was willing to abet Farr's commission of murder and had,
14 in fact, been willing to drive what would have been a six-
15 hour round trip to Dallas in the middle of the night to
16 procure that weapon to - to aid those -

17 QUESTION: He didn't admit that - that he was
18 willing to abet murder. He just admitted he was willing
19 to get the gun for robberies.

20 MS. BUNN: Yes.

21 QUESTION: Did he say specifically, in order that
22 somebody can be killed? He didn't say -

23 MS. BUNN: He did - he did testify in - in
24 response to cross-examination by the prosecutor that he
25 was willing to provide what could potentially be a death

1 weapon in a robbery case. And in the light of this future
2 dangerousness evidence that remains, as well as the
3 incremental impeachment value of Farr's informant status
4 within the context of the trial, former's informant -
5 Farr's informant status wouldn't have put the state's case
6 in such a different light as to undermine confidence in -
7 in the jury's verdict.

8 Again, the state's duty to - to disclose in
9 these cases is triggered by the materiality of the
10 evidence, and in this case, Farr's import - Farr's
11 informant status was not that kind of - of evidence. It
12 was not material evidence.

13 Unless there are no further questions. Thank
14 you.

15 QUESTION: Thank you, Ms. Bunn.

16 Mr. Kendall, you have two minutes remaining.

17 REBUTTAL ARGUMENT OF GEORGE H. KENDALL

18 ON BEHALF OF THE PETITIONER

19 MR. KENDALL: Thank you, Your Honor. Very
20 briefly, on the Charles Cook claim, I - Ms. Bunn has
21 conceded that jurors of reason would find debatable the
22 rule 15 issue. We would ask that if the Court agrees with
23 that, that we not go back just to the Fifth Circuit, that
24 the case be sent back to the court in Texarkana, the
25 district court, for fact-finding on the underlying claim.

1 There's not been any fact-finding whatsoever on that
2 claim, and we think that would be, if the case is going
3 back to the Fifth Circuit, that that would be entirely
4 useful.

5 Thank you very much.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kendall.
7 The case is submitted.

8 (Whereupon, at 11:59 a.m., the case in the
9 above-entitled matter was submitted.)

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