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COMMENTARY: *BRADY*, *BRADY*, WHEREFORE ART THOU *BRADY*?*

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A long time ago, in a social and political climate far, far away, the Supreme Court of the United States made a promise to the People. The promise was that prosecutors would place fairness and procedure over obtaining convictions. To ensure that criminal trials were both fair and just, the state would turn over to every defendant exculpatory, impeachment and mitigating evidence. This promise was made, not because it was a nice thing to do, but because the Constitution mandated such a promise. The problem has come, however, in giving fruit to that promise.

It has been over forty years since the Court announced its decision in *Brady v. Maryland*.[1] The Court proclaimed in sweeping terms that our "[s]ociety 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."[2] This was not a novel or ground-breaking proclamation. In fact, the Court previously and continually emphasized the special role prosecutors play in the criminal justice system. The public prosecutor:

> 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or

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* This article should be read in conjunction with Bennett L. Gershman's exploration of *Brady, Litigating* Brady v. Maryland: *Games Prosecutor's Play to Avoid Compliance*, presented and published in this symposium. This article is an attempt to present one real example of the trials and tribulations of giving effect to the promise of *Brady*.

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[1] 373 U.S. 83 (1963).

[2] *Id.* at 87.

> innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[3]

"The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."[4] It is this special role that mandates a duality of duty. Prosecutors must seek to convict the guilty while at the same time ensuring that the process of criminal proceedings remain fair.[5] Because of this unique role, fundamental fairness or due process requires that prosecutors disclose exculpatory, mitigation or impeachment evidence. While this is fine rhetoric and a noble concept, the reality of conformity with *Brady*, and hence, the Constitution, falls far short of these ideals.

The shortcomings are best seen through the Supreme Court's recent foray into applying *Brady: Banks v. Dretke*.[6] In *Banks*, Delma Banks was charged with capital murder in Texas. At trial, two key witnesses, Cook and Farr, gave testimony that connected Banks to the murder weapon and testified that Banks confessed to the murder.[7] Both of these key witnesses directly gave testimony bolstering their credibility. Defense counsel specifically cross-examined Cook and Farr about prior statements and benefits for testimony.[8] Cook, the witness who claimed Banks confessed to him and turned the murder weapon over to police, testified that he did not talk to anyone about his testimony.[9] Farr, who corroborated Cook's testimony about Banks's activities in the days after the murder, denied receiving money from police officers, being offered anything in exchange for his testimony, or giving prior statements about the *Banks* case.[10] Based primarily on this testimony, Banks was convicted and sentenced to death.[11] This appears to be a straight-forward trial and

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[3] United States v. Burger, 295 U.S. 78, 88 (1935).
[4] Donnelly v. DeChristoforo, 416 U.S. 637, 648–649 (1974) (Douglas, J., dissenting).
[5] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281 (1999); *Brady*, 540 U.S. at 87.
[6] 540 U.S. 668 (2004).
[7] *Id.* at 677.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 678.
[11] *Id.* at 674.

subsequent conviction. In fact, the defense presented no evidence to rebut the State's case.[12]

The problem is that the prosecutors failed to comply with their obligations under *Brady* and withheld evidence from the defense.[13] As the history of litigation in *Banks* demonstrates, enforcement of *Brady* obligations is virtually impossible and therefore results in a right without a remedy. The *Brady* violations in *Banks* began before trial and continued through habeas proceedings. Prior to trial, the prosecutor informed Banks's attorney that the State would "provide you with all discovery to which you are entitled."[14] In spite of being entitled to rely on this representation,[15] Banks's counsel specifically asked Cook and Farr about potential *Brady* material and was rebuffed.[16] Because the prosecutors failed to reveal the materials demonstrating that Cook and Farr were committing perjury, Banks was unable to challenge their testimony and the jury was deprived of critical evidence on which to make credibility and substantive factual decisions. The prosecutor vouched for Cook's and Farr's unchallenged testimony in closing argument, specifically stating that "Cook brought you absolute truth,"[17] and that Farr was truthful because he admitted to using drugs.[18]

The violation continued in state post-conviction proceedings. Banks's petition "alleged 'upon information and belief' that 'the prosecution knowingly failed to turn over exculpatory evidence as required by [*Brady*].'"[19] Banks directly challenged Farr's denial of being a police informant and suppression of a deal between the prosecutors and Cook.[20] In support of this petition Banks submitted an unsigned affidavit.[21]

The State responded to the petition with direct denials of the allegations, specifically stating "[n]othing was kept secret from the defense."[22] The prosecutors and lead investigating sheriff deputy submitted affidavits in support of this assertion.[23] In rejecting Banks's petition, the state court directly held that "'there was no agreement

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[12] *Banks*, 540 U.S. at 679.
[13] *Id.* at 675.
[14] *Id.* at 677.
[15] *See Strickler*, 527 U.S. at 289.
[16] *Banks*, 540 U.S. at 692.
[17] *Id.* at 678.
[18] *Id.* at 681.
[19] *Id.* at 682.
[20] *Id.*
[21] *Id.*
[22] *Banks*, 540 U.S. at 683.
[23] *Id.* The affidavits were noticeably silent about Farr but contained express denials about Cook. *Id.*

between the State and the witness Charles Cook' but made no findings concerning Farr."[24]

Banks then proceeded to federal court.[25] His initial discovery request was granted in part and he was allowed limited discovery into issues surrounding Cook, but no discovery was permitted as to Farr.[26] Banks then renewed his discovery motion after obtaining affidavits from Cook and Farr rebutting their trial testimony. Based on this newly discovered evidence, the federal court ordered disclosure of the prosecutors' files and set the matter for an evidentiary hearing.[27]

Through this disclosure, Banks discovered a seventy-four page transcript of a preparation session between the prosecutor and Cook.[28] Throughout the transcript the prosecutor directed Cook how to answer questions and shore up his credibility.[29] This clearly contradicted Cook's trial testimony that he never spoke with anyone about his testimony. At the evidentiary hearing, Deputy Sheriff Huff, for the first time, admitted that Farr was a police informant and had been paid for his work in the *Banks* case directly contrary to Farr's trial testimony.[30] Based on this material the Magistrate Judge recommended a granting of the Writ as to the death sentence because of evidence regarding Farr.[31] The Magistrate Judge denied relief as to the evidence regarding Cook because there was no evidence of a deal between Cook and the prosecutors.[32] The District Court concurred and the Writ was issued only as to the *Brady* violation relating to Farr.[33] The District Court determined that the issues surrounding Cook were different *Brady* violations than the ones raised in the habeas petition and were therefore unreviewable.[34]

If the case ended here it would simply be a "typical" *Brady* case demonstrating the difficulty, if not near impossibility, of giving proper force to *Brady*'s Constitutional mandate. After all, the prosecutors committed the initial *Brady* violation in pre-trial proceedings in 1980. The actual evidence of the violation was not discovered in 1980 during the trial, nor during the two years the case was on direct appeal, nor during the three state post-conviction

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[24] *Id.*
[25] *Id.*
[26] *Banks*, 540 U.S. at 684.
[27] *Id.* at 685.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 686.
[32] *Banks*, 540 U.S. at 686.
[33] *Id.*
[34] *Id.* at 687.

petitions litigated between 1984 and 1996, but rather, during habeas proceedings initiated in 1996.[35] Even then the material was not disclosed until 1999.[36] Had the Magistrate Judge not ordered discovery, had Delma Banks not been represented by George Kendall, with the resources of the law firm of Holland & Knight at his disposal, had the prosecutors not maintained evidence of their misconduct (or continued the misconduct by refusing to comply with the discovery order), had Deputy Sheriff Huff perjured himself by continuing to deny the relationship with Farr, or had any other random event that lead to disclosure of the evidence not happened, Delma Banks would have been executed and the world would be none the wiser of the errors that permeated the case.

But, the case did not end here. Instead, the matter proceeded on appeal to the Fifth Circuit.[37] The Fifth Circuit agreed that the prosecutors suppressed Farr's status as a police informant. However, the Court determined that Banks was not diligent in pursuing this claim and was not entitled to an evidentiary hearing in habeas.[38] Because he was not entitled to a hearing the evidence developed in habeas proceedings was procedurally barred.[39] That is, the federal courts were obliged to ignore its existence. As for the Cook training session transcript claim, the Circuit refused to even permit that issue to be appealed.[40] Had the case ended there it would still simply be a "typical" habeas case in which a death row inmate's failure to properly litigate his case was to blame for the denial of relief. In fact, because the Circuit reversed the grant of the Writ, the state of Texas set Banks's execution for March 12, 2003.[41] That day could easily have come to pass with barely a ripple caused by the execution of Delma Banks.

But, the case did not end there. On March 12, 2003, the day of the execution, and with Banks about ten minutes from execution, the Supreme Court of the United States issued a stay of execution to consider Banks's petition for a writ of certiorari.[42] The petition was

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[35] *Id.* at 683.
[36] *Id.* at 684.
[37] *Id.* at 687.
[38] *Banks*, 540 U.S. at 688.
[39] *Id.*
[40] *Id.* at 689.
[41] This date was set in spite of the fact that a petition for a writ of certiorari was pending before the Supreme Court of the United States. Petition for Writ of Certiorari, *Banks*, 540 U.S. 668 (No. 02-8286).
[42] Banks v. Cockrell, 538 U.S. 917 (2003).

subsequently granted and the Court agreed to review the *Brady* issues as to both Farr and Cook.[43]

The first issue the Court addressed was whether Banks could raise the claims in habeas proceedings.[44] During oral argument the following exchange took place:

> QUESTION: So the prosecution can lie and conceal and the prisoner still has the burden to - to discover the evidence? That's your position?
>
> MS. BUNN: Yes, Your Honor, because in a case like this, unlike Strickler, unlike Amadeo, this is more like - more like McCleskey, where the nondisclosure, whether in trial court or in state habeas, did not prevent the petitioner from developing the claim.[45]

The dialogue continued:

> QUESTION: No, but you are - are - aren't you arguing, just as Justice Kennedy suggested, that what they should have done in this case is to go to the court and say, we want further resources to investigate, and what specifically we want to investigate is an issue which, if we are correct, the state is affirmatively lying about. We want investigative resources to prove that state's counsel is lying. Isn't that your position?
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> MS. BUNN: Well, yes, Your Honor -
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> QUESTION: And for failure to do that -
>
> MS. BUNN: - that would be -
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> QUESTION: - for failure to do that, they're out. Isn't that your position?
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> MS. BUNN: That is part of our position.[46]

The Court ultimately rejected this argument and affirmed the duty of prosecutors to reveal *Brady* material.[47] However, what this dialogue demonstrates is the underlying flaws in applying *Brady*. *Brady* imposes a duty of disclosure, but the risks for failing this duty

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[43] *Id.*
[44] *Banks*, 540 U.S. at 690–698.
[45] Transcript of Oral Argument at 35. Banks v. Dretke, 540 U.S. 668 (No. 02-8286).
[46] *Id.* at 37.
[47] *Banks*, 540 U.S. at 695, 698.

are negligible and the risks of getting caught are even smaller. At trial, when the *Brady* violation has its greatest impact, a prosecutor simply asserts compliance with *Brady* and that presumptively demonstrates compliance.[48] Because of this presumption, there is no risk of discovery as defense counsel has no incentive, in fact, no grounds, to investigate for *Brady* material. The failure to disclose directly leads to a failure to investigate and therefore to discover and prove a *Brady* violation. The case then proceeds to trial and a conviction is obtained.

If the defendant is fortunate enough to have resources, or is sentenced to death and therefore has a greater likelihood of further review, the case may proceed to state post-conviction litigation. However, absent some fortuitous event leading to a good faith belief that a *Brady* violation occurred, the claim cannot be raised let alone developed. Unless evidence contrary to the prosecutor's trial declaration of compliance is discovered, a *Brady* claim would assert that a violation occurred because the prosecutor must have lied. When pressed for proof of this claim the defendant would simply shrug his shoulders and say "I can't prove it because the prosecutor continues to hide the evidence." The claim would be denied, as in *Banks*, if the prosecutor simply responded "Nothing was hidden." Since the presumption of compliance continues to hold sway, the court has no option but to deny the claim. To hold otherwise would require the court to find that, in spite of no evidence to support it, the prosecutors lied and continue to lie. Since no court is going to engage in that sort of logic, there is no real risk that the *Brady* violation will be discovered in state post-conviction.

If, after exhausting this avenue, the defendant still has resources, or is still under a sentence of death, the matter may proceed to habeas review. The defendant again has the uphill battle of arguing, let alone proving, a *Brady* violation in the face of the ongoing prosecutorial assertions of compliance. Not only must the defendant overcome the presumption of compliance, he must also satisfy the restrictive discovery procedures of Habeas Rule 6 and the standards of review in 28 U.S.C. § 2254(d) and (e)(1) and (2). Once again, this requires the habeas court to overcome the presumption of compliance, without any evidence, to support that conclusion.

This quagmire was exactly what Banks was forced to slog through. Throughout the proceedings, the State asserted compliance with the Constitution and *Brady*, denied the existence of any evidence, affirmatively mislead Banks and the courts and, when caught,

[48] *See Strickler*, 527 U.S. at 286–87; *Banks*, 540 U.S. at 698.

transferred the blame to Banks for failing to catch the misconduct earlier. For whatever reason, be it that the case dragged on long enough, the heretofore unknown cracks in the State's wall of deceit began to show, or as simple and blind luck would have it, the habeas court permitted discovery, the presumption of compliance was rebutted and the *Brady* violations were proved. If this is the path of a "typical" *Brady* claim, and I submit that the path is even though the ultimate outcome is not, prosecutors run a near zero risk of discovery of a *Brady* violation.

What is lost in the shuffle of this case is that, but for the Court granting review of Banks's case, Banks would have died on March 12, 2003, and the prosecutors would have obtained their objective: Banks's execution.[49] At that point, any interest in enforcing *Brady*, and any risk of repercussions to the prosecutors, would have died with him. As the tortured history of the case demonstrates, Delma Banks did not discover the *Brady* violation because the system worked, but found the violation in spite of the system. The real quest of *Brady*, and for the courts, prosecutors, defense attorneys, and society, is to give effect to the lofty promise the Constitution and the Court made so long ago. Until the courts take affirmative steps to seek out, review, and redress *Brady* violations, prosecutors bear almost no cost for failing their Constitutional obligations. And, as the Court so aptly recognized all those years ago, our society continues to lose so long as the process by which convictions are obtained is tainted by the specter of *Brady* violations. The questions really are: how many more Delma Banks are out there, and how are the courts going to reclaim criminal trials as quests for truth and repudiate the atmosphere of gamesmanship and victory at any cost that now permeates the criminal justice system? Until these questions are answered the promise of *Brady* remains empty, and "justice" becomes a prosecutor's game, one played fairly only if the prosecutor so chooses.

[49] Banks might now be a minor footnote in the history of the modern death penalty as the 300th execution. *See* Supreme Court Stays Texas 300 Execution, http://lmtonline.com/news/archive/031303/pagea6.pdf.