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# A Lie is a Lie: An Argument for Strict Protection Against a Prosecutor's Knowing Use of Perjured Testimony

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# COMMENTS

# A LIE IS A LIE: AN ARGUMENT FOR STRICT PROTECTION AGAINST A PROSECUTOR'S KNOWING USE OF PERJURED TESTIMONY

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> Nowhere in the Constitution or in the Declaration of Independence, nor for that matter in the Federalist or in any other writing of the Founding Fathers, can one find a single utterance that could justify a decision by any oath-beholden servant of the law to look the other way when confronted by the real possibility of being complicit in the wrongful use of false evidence to secure a conviction in court. [1]

## I. INTRODUCTION

A criminal prosecutor is simultaneously an adversary of the defense and an agent of the sovereign. In dealing with testimony or evidence favorable to a criminal defendant, these roles of the prosecutor have conflicting incentives. As an adversary, the prosecutor is interested in achieving a courtroom victory and convincing the fact-finder of the strength of his argument. As an agent of the sovereign, however, a prosecutor's interest must be steadfast, both in convicting the guilty and in acquitting the innocent. The Supreme Court has noted that "though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done."[2] The prosecutor is the servant of the law, which has the twofold aim that "guilt shall not escape or innocence suffer."[3]

A zeal for victory has, from time to time, led prosecutors to knowingly present false testimony in pursuit of criminal convictions. When a

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[1] Hayes v. Brown, 399 F.3d 972, 988 (9th Cir. 2002) (en banc).

[2] United States v. Agurs, 427 U.S. 97, 111 (1976) (internal quotation marks omitted).

[3] *Id.* at 111 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

prosecutor uses perjured testimony to convict a criminal defendant, that criminal defendant's right to due process of law under the Fourteenth Amendment to the U.S. Constitution has been violated.[4] However, a reviewing court must determine that the perjured testimony actually affected the defendant's trial in order to reverse the case.[5] A circuit split has developed around the issue of what test is appropriate to determine when the impact of a prosecutor's knowing use of perjured testimony is significant enough to warrant reversal of the conviction.

Both sides of the circuit split acknowledge that the perjured testimony must be material to the trial. The Supreme Court established the standard of materiality for a prosecutor's knowing use of perjured testimony in *Giglio v. United States*: "A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."[6] However, circuit courts disagree on what should be done after false testimony is found to be material under the *Giglio* standard. The Ninth Circuit has held that the finding of materiality under *Giglio* necessarily compels reversal.[7] The court foreclosed the idea of any further analysis after a finding of materiality by asserting that once the Supreme Court has declared a materiality standard for a particular type of constitutional error, there is no need to conduct further analysis.[8] The First and Sixth Circuits, however, have adopted a two-step analysis in determining whether a prosecutor's knowing presentation of false testimony compels reversal of a conviction. First, the court must find that the perjured testimony meets the *Giglio* materiality standard, and then the court must determine whether, despite a finding of materiality, the use of perjured testimony can be dismissed as harmless error.[9] The harmless error analysis is more restrictive and makes reversal less likely than under the Ninth Circuit's singular materiality test. This Comment argues that a two-step analysis is inappropriate because it has no foundation in Supreme Court jurisprudence, violates the due process rights of criminal defendants, and removes an incentive for prosecutors to be vigilant in ensuring that they do not present false testimony.

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[4] *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935) (stating that a "deliberate deception of [the] court" by the presentation of perjured testimony is a deprivation of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States).

[5] *See, e.g.*, Alcorta v. Texas, 355 U.S. 28, 31–32 (1957).

[6] 405 U.S. 150, 154 (1972) (internal quotation marks omitted).

[7] Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2002) (en banc).

[8] *Id.*

[9] *See* Rosencrantz v. Lafler, 568 F.3d 577, 588 (6th Cir. 2009); Gilday v. Callahan, 59 F.3d 257, 267 (1st Cir. 1995).

The Comment will begin in Part II with a discussion of the cases that established and developed the materiality standard for a prosecutor's knowing use of false testimony. Early cases addressing this topic held that a prosecutor's knowing use of perjured testimony was unconstitutional and thus appropriate grounds for reversal.[10] Later cases established and refined the materiality standard for knowing use of perjured testimony.[11] Part III analyzes the cases comprising the circuit split, including the differing factual scenarios and the adequacy of the justifications presented for the reasoning in each case. In Part IV, this Comment argues that the two-step analysis used by the First and Sixth Circuits is inappropriate. Subpart A asserts that the two-step test is not supported by Supreme Court jurisprudence and, further, that the test allows the more restrictive harmless error standard to swallow the carefully calculated materiality standard. Subpart B argues that the two-step test is not sufficiently protective of the due process rights of criminal defendants and that it diminishes the incentive for prosecutors to ensure that they do not present false testimony. This Comment concludes that the Supreme Court should resolve the circuit split and establish that where a prosecutor knowingly presented false testimony at trial and the false testimony was material, there should be no further harmless error analysis.

## II. DEVELOPING THE RULE AGAINST A PROSECUTOR'S KNOWING USE OF FALSE TESTIMONY

### A. THE SEMINAL CASES

The Supreme Court first addressed a prosecutor's knowing use of false testimony in *Mooney v. Holohan*.[12] There, the Supreme Court asserted that a prosecutor violates due process if he presents false testimony or deliberately suppresses evidence favorable to the accused.[13] The Court stated:

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[10] *See, e.g.*, *Alcorta*, 355 U.S. at 31 (*see infra* notes 16–23 and accompanying text); Pyle v. Kansas, 317 U.S. 213, 216 (1942) (*see infra* note 15); Mooney v. Holohan, 294 U.S. 103, 103 n.2 (1935) (*see infra* notes 12–15 and accompanying text).

[11] As mentioned above, in *Giglio* the Supreme Court established the materiality standard that still applies today. "A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1972) (internal quotation marks omitted).

[12] 294 U.S. 103 (1935). This case was before the Supreme Court on Mooney's petition for a writ of habeas corpus. The writ of habeas corpus allows a prisoner to obtain immediate relief from unlawful confinement by challenging the constitutionality of his or her conviction or sentence. *Id.*

[13] In *Mooney*, the Court was prompted to address the due process concerns to answer the California attorney general's claim that a prosecutor could only violate due process if he

> [Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[14]

In these two sentences, the Court laid the foundation for the argument that a prosecutor's knowing use of false testimony is a violation of the due process clause of the Fourteenth Amendment and is therefore unconstitutional.[15]

In *Alcorta v. Texas*, the Supreme Court advanced the jurisprudence regarding a prosecutor's knowing presentation of false testimony in two important ways.[16] First, the Court found that the prosecutor's failure to correct false testimony was tantamount to the knowing presentation of false testimony.[17] Second, the Court, for the first time, did what can accurately be described as a materiality analysis.[18] In *Alcorta*, the Supreme Court, relying on *Mooney* and *Pyle*, held that a prosecutor's knowing presentation of false testimony violated due process.[19] The prosecutor in this case artfully asked questions of the key witness to avoid revealing facts that would support the defense's theory that the defendant committed murder under the influence of sudden passion from adequate cause.[20] The Court held that the prosecutor's behavior at trial obscured the truth and was therefore equivalent to presenting false testimony. This holding reinforced the importance of protecting the criminal defendant from a prosecutor's use of false testimony. A violation was found not where a prosecutor presented false testimony but where he had artfully asked questions to obscure the truth. Further, the Court did a materiality analysis, though it did not ascribe

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deprived a defendant of notice or prevented a defendant from presenting "such evidence as he has," and that an allegation of a prosecutor's knowing use of perjured testimony therefore did not raise a federal question. *Id.* at 110–12.

[14] *Id.*

[15] The Supreme Court relied on *Mooney* seven years later in granting relief to the petitioner where a prosecutor had knowingly used perjured testimony. Pyle v. Kansas, 317 U.S. 213, 216 (1942) ("These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.").

[16] 355 U.S. 28 (1957).

[17] *See id.* at 31.

[18] *Id.* at 31–32.

[19] *Id.*

[20] Under Texas law at the time, sudden passion was a partial defense, and a killing in these circumstances would be considered murder without malice, punishable by a maximum of five years imprisonment. *Id.* at 29.

this label to the analysis. The Court held that the "petitioner was not accorded due process of law,"[21] and then went on to explore the prosecutor's withholding of information known to him, and the likely outcome if the truth had been revealed to the jury.[22] The Court concluded that had the prosecutor not presented false testimony, the offense would likely have been reduced to "murder without malice," and thus would have received a maximum penalty of five years imprisonment rather than the death penalty.[23]

The Court's materiality analysis in *Alcorta* foreshadowed scenarios in which a court could conceivably find that a due process violation was so minor as not to require reversal. The Court's analysis of the likely impact of revealing the truth to the jury, followed by an order reversing the case, indicates that the Court did not establish a rule of per se reversal, but rather a rule inviting some analysis of impact of a prosecutor's knowing presentation of perjured testimony.

### B. ESTABLISHING THE CIRCUMSTANCES THAT TRIGGER MATERIALITY

In *Napue v. Illinois*, the Supreme Court found that prosecutors are prohibited from using false testimony both when the false testimony applies to the defendant's guilt and when it applies to a witness's credibility.[24] In *Napue*, the key witness for the State testified falsely that he had not received any consideration or promise in return for his testimony.[25] The prosecutor failed to correct this testimony.[26]

The Supreme Court reiterated that where a conviction is obtained through the State's knowing presentation of false testimony, there has been a violation of the Fourteenth Amendment; further, this result is the same whether the State solicits the false testimony or allows false testimony to go uncorrected when it occurs.[27] The Court stressed that the prohibition on a prosecutor's knowing use of false testimony "does not cease to apply merely because the false testimony goes only to the credibility of the

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[21] *Id.* at 31.

[22] Alcorta v. Texas, 355 U.S. 28, 31–32 (1957).

[23] *Id*. at 32.

[24] 360 U.S. 264, 269 (1959).

[25] *Id.* at 265. At the time that the witness testified, he was serving a jail sentence of 199 years. The assistant state's attorney prosecuting the case felt that in order to obtain a conviction, he would need the testimony from the witness, who had aided in the crime that led to a murder. He promised the witness that he would do everything possible to reduce the witness's current sentence in exchange for the witness's testimony. *Id.* at 266–67.

[26] *Id.* at 265.

[27] *Id.* at 269.

witness."[28] Both evidence relating to a defendant's guilt and evidence relating to the credibility of a witness may be critical in a jury's determination of guilt or innocence: "it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[29] To adequately determine whether a witness is testifying truthfully, a jury must know whether the witness has received some consideration for his testimony. In underscoring the importance of evidence that relates to a witness's credibility, the Court stated:

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.[30]

In addition, the Court considered whether evidence of the false testimony was cumulative.[31] Lower courts asserted that the false testimony regarding consideration in exchange for testimony had a diminished impact because the jury had been presented with testimony that a lawyer from the public defender's office was "going to do what he could" for the witness.[32] Thus, lower courts reasoned, the jury had been presented with a potential motivation for the witness to testify falsely against the petitioner. The Supreme Court concluded, however, that the jury would likely attach more weight to the truth, that the State had made a promise of consideration and the witness was likely trying to "curry the favor" of the State by testifying.[33]

Though the Court in *Napue* mentioned the materiality standard of whether "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury,"[34] it failed to apply this standard or to establish a materiality standard for future cases involving a prosecutor's knowing use of false testimony. The Court found that the prosecutor violated Napue's due process rights under the Fourteenth Amendment by

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 269–70 (quoting People v. Savvides, 136 N.E.2d 853, 854–55 (N.Y. 1956)).

[31] "[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." *Napue*, 360 U.S. at 270.

[32] *Id.* at 265.

[33] *Id.* at 270.

[34] The Court mentioned this materiality standard in reference to the State's brief, which argued that the Court was bound by the Illinois Supreme Court's determination that the constitutional violation did not rise to this standard. *Id.* at 271.

holding that "the false testimony used by the State in securing the conviction of petitioner *may have had an effect on the outcome of the trial*."[35] This standard established that a determination of materiality was appropriate, i.e., that the prosecutor's use of false testimony must be significant enough to be deemed a violation of due process rights, but provided little guidance for evaluating materiality in future cases. The phrase "may have had an effect on the outcome of the trial" implies that some analysis must be done but provides no prospective standard for establishing whether a defendant's rights have been violated.

In *Brady v. Maryland*, the Court expanded and clarified constitutional prohibitions on a prosecutor's withholding of evidence favorable to a defendant and established that due process rights are violated where withheld evidence is material either to guilt or to punishment.[36] This case did not involve a prosecutor's knowing presentation of false testimony but rather a prosecutor who suppressed the confession of a defendant's confederate, Boblit. At trial, Brady had admitted to being involved in a murder but argued that his confederate delivered the fatal blow.[37] Thus, the petitioner conceded to being guilty of first-degree murder and asked the jury only to foreclose the possibility of capital punishment.[38] Despite the petitioner's trial counsel's specific request to examine Boblit's extrajudicial statements, the prosecutor withheld the statement that would have been most helpful to the defense.[39] Since the petitioner was charged with felony murder and admitted to being involved in the perpetration of the crime that ended in the killing, the suppressed confession was not relevant to guilt or innocence, but just to punishment.[40] On these grounds, the court of appeals held that there had been no constitutional violation, as the petitioner would have been found guilty regardless of the confession.[41]

Citing the cases detailed above, the Supreme Court ruled that the "suppression of this confession was a violation of the Due Process Clause

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[35] *Id.* at 272 (emphasis added).

[36] 373 U.S. 83, 87 (1963).

[37] *Id*. at 84.

[38] In Maryland at the time, the jury was responsible both for determining guilt and for noting on the verdict form whether capital punishment was recommended for a murder conviction. *Id.* at 89.

[39] "Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced." *Id.* at 84.

[40] Felony murder is "[m]urder that occurs during the commission of a dangerous felony." BLACK'S LAW DICTIONARY 1114 (9th ed. 2009). Since Brady admitted to being involved in the felony that led to the murder, under the felony-murder rule he was considered guilty of the murder as well.

[41] *Brady*, 373 U.S. at 88.

of the Fourteenth Amendment."[42] The Court expanded this due process protection which had been rooted in a violation involving a prosecutor's knowing presentation of false testimony, stating: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[43] The materiality analysis was initially conceived in the cases involving the knowing use of perjured testimony at trial, but in *Brady* the Court brought the concept to fruition in the context of a prosecutor withholding evidence at the discovery phase. The Court rooted this holding in the same principle that underlies the preceding decisions, namely that "[t]he United States wins its point whenever justice is done its citizens in the courts."[44] A prosecutor has simultaneous and potentially conflicting roles as an adversary of the defense and an agent of a sovereign. With *Brady* and those cases that precede it, the Court placed great emphasis on the prosecutor's role as a seeker of the truth, especially when that truth is exculpatory to a criminal defendant.[45] "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[46]

The Court was aware of the broad and far-reaching effects of the *Brady* decision in establishing a constitutional violation in the context of criminal discovery.[47] However, despite the Court's implicit recognition that it was creating a watershed constitutional rule relating to criminal trial practice, nothing in the *Brady* opinion indicates that the Court foresaw the controversy that would develop regarding the differences between the knowing presentation of false testimony and the withholding of evidence favorable to the accused at the discovery phase. These situations are analytically similar in that they both involve a prosecutor withholding evidence that is helpful to the accused, but they are procedurally quite

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[42] *Id.* at 86.

[43] *Id*. at 87.

[44] *Id.*

[45] For an interesting assessment of *Brady*'s disclosure rule in the context of plea bargaining, see John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437 (2001).

[46] *Brady*, 373 U.S. at 87; *see also* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 307 (2010) ("In *Brady*, the Court made clear that its paramount interest was the protection of an accused individual's right to a fair trial.").

[47] In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

*Brady*, 373 U.S. at 92 (White, J., concurring).

different. In the *Brady* context, the prosecutor has withheld evidence that would be helpful to the defendant, while in the perjured testimony context the prosecutor has either elicited or failed to correct statements in open court that he knew were false at the time they were uttered. Later opinions clarified the difficulties embedded in this difference.[48] It is more challenging to identify retrospectively what evidence a prosecutor should have turned over to the defense than it is to determine when a prosecutor should have corrected testimony he knew to be false at trial. Put another way, there is less ambiguity about whether a prosecutor has violated the due process rights of a criminal defendant where the prosecutor has knowingly presented false testimony in open court.[49]

Though the Court in *Brady* did not set a specific standard for materiality when a prosecutor has suppressed evidence favorable to the accused, it did establish that due process is violated where "evidence is material either to guilt or to punishment,"[50] leaving the question of a materiality standard to be established in future decisions.

### C. SETTING DIFFERING STANDARDS OF MATERIALITY FOR PERJURED TESTIMONY AND WITHHELD EVIDENCE CLAIMS

Nine years after the *Brady* decision, the Court established the materiality standard for determining a constitutional violation in the context of a prosecutor's knowing presentation of false testimony in *Giglio v. United States*.[51] In *Giglio*, a witness had been promised that he would not be prosecuted if he cooperated with the Government.[52] This promise was made by an Assistant United States Attorney (AUSA) who did not have the authority to make such a promise and who was not responsible for trying the case.[53] The AUSA who actually tried the case had no knowledge that such a promise had been made to the testifying witness.[54] The Court held that the promise was attributable to the Government, and thus the

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[48] *See* United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985) (*see infra* notes 84–90 and accompanying text).

[49] *Compare* Alcorta v. Texas, 355 U.S. 28 (1957) (*see supra* notes 16–23 and accompanying text) (finding an unconstitutional breach of due process for the knowing use of perjured testimony where a prosecutor artfully asked questions to avoid revealing a witness's sexual relationship with defendant's wife), *with Agurs*, 427 U.S. at 97 (*see infra* notes 62–83 and accompanying text) (finding no violation of due process where the prosecutor withheld pertinent parts of the victim's criminal record that would have supported the defense of self-defense).

[50] 373 U.S. at 87.

[51] 405 U.S. 150 (1972).

[52] *Id.* at 151.

[53] *Id.* at 152.

[54] *Id.*

prosecuting AUSA had "constructive knowledge" of the promise that had been made to the witness.[55] At trial, this prosecutor elicited testimony that the witness had not received any consideration in exchange for his testimony at trial.[56] Despite the fact that the prosecutor was not aware at the time that this testimony was in fact false, the Court held that the Government was responsible for knowledge of the unauthorized promise.[57] Constructively, the prosecutor had knowingly used false testimony.[58]

In *Giglio*, the Court articulated the standard of materiality for a prosecutor's knowing use of false testimony. The Court focused on the fundamental fairness of the trial of the accused by reiterating *Brady*'s rule that "suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'"[59] With this foundation, the Court established the standard for materiality in this context: "A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."[60] After articulating this materiality standard, the Court held that the knowing presentation of false testimony in *Giglio* met the standard.[61] The petitioner's due process rights had been violated, and a new trial was required.

In *United States v. Agurs*, the Court addressed some of the pragmatic concerns with the differing situations in which a prosecutor withholds information favorable to the accused.[62] The defendant in *Agurs* admitted to stabbing and killing the victim but argued that she had acted in self-defense. After conviction, the petitioner learned that the victim had a prior criminal

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[55] *Id.* at 154.

[56] *Id.* at 151–52.

[57] *Id.* at 154. The result of *Giglio*'s holding relating to inducements is that prosecutors now make "implied inducements" by indicating that there will likely be some reward for testifying, yet stopping short of making an explicit promise. This allows witnesses to testify honestly that they have not received any actual promises in exchange for testimony. Legal scholars argue that courts should limit this practice. *See* R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1130 (2004).

[58] [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government . . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

*Giglio*, 405 U.S. at 154.

[59] *Id.* at 153 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1962)).

[60] *Giglio*, 405 U.S. at 154 (internal quotation marks omitted).

[61] *Id.* at 155.

[62] 427 U.S. 97 (1976).

record that would tend to support the petitioner's self-defense theory.[63] The petitioner argued that the prosecutor's failure to disclose this information to the defense violated her due process rights.[64]

Ultimately, the Supreme Court held that there was no violation of due process because the trial judge remained convinced of the defendant's guilt beyond a reasonable doubt after considering the victim's criminal record in the context of the trial.[65] In reaching this holding, however, it provided an instructive analytical breakdown of due process violations possible under *Brady*. The Court observed that the rule established in *Brady* applies to three distinct situations, stating that "[e]ach involves the discovery, after trial of information which had been known to the prosecution but unknown to the defense."[66]

In the first situation, "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury."[67] In this scenario, the Court reiterated the materiality standard established in *Giglio*: that "a conviction obtained by knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[68] The Court recognized that this was a strict standard of materiality, i.e., one that cuts in favor of the accused, and that this was appropriate because it followed the *Mooney* line of cases and reflected the value placed on the sanctity of "the truth-seeking function of the trial process."[69]

In the second situation, a defendant makes a pretrial request for specific evidence. This is the situation "illustrated by the *Brady* case itself."[70] The Supreme Court highlighted the *Brady* decision's focus on the fact that the evidence had been requested by the defendant and that it was

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[63] "[The victim's] prior record included a plea of guilty to a charge of assault and carrying a deadly weapon in 1963 and another guilty plea to a charge of carrying a deadly weapon in 1997. Apparently both weapons were knives." *Id*. at 100–01.

[64] There was substantial confusion in the lower courts' opinions, demonstrating the need for some clarity and direction from the Supreme Court regarding due process violations in this context. The district court rejected the Government's argument that "there was no duty to disclose material evidence unless requested to do so," but held that the evidence was not material. *Id.* at 101–02. The court of appeals found no misconduct by the prosecutor but held that "the evidence was material and that its nondisclosure required a new trial because the jury might have returned a different verdict if the evidence had been received." *Id.*

[65] *Id*. at 114.

[66] *Id*. at 103.

[67] *Id.*

[68] *Id.*

[69] *Id*. at 104.

[70] *Id.*

material.[71] The Court noted that materiality was established in *Brady* because the withheld evidence very likely had an impact on the jury's punishment determination.

The Court then turned to the third situation in which a *Brady* violation might occur, which applied to the factual scenario of *Agurs*. In this situation, the defense made no request for exculpatory evidence at all, nor did it ask for "all *Brady* material" or "anything exculpatory."[72] The Court stated that under these circumstances, the mere possibility that a piece of withheld evidence might have helped the defense or impacted the outcome of the trial "does not establish 'materiality' in the constitutional sense."[73] However, the defendant "should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal."[74] Though this would be the standard if the evidence was discovered from a neutral source, the fact that the given piece of evidence was "available to the prosecutor and not submitted to the defense places it in a different category."[75] Therefore, the Court established the materiality standard for this situation as whether the undisclosed evidence "creates a reasonable doubt that did not otherwise exist."[76] The Court in *Agurs* held that the evidence of the victim's criminal record did not do so.

A comparison of the materiality standards for each of the three categories of *Brady* violations listed here illustrates the Supreme Court's interest in placing the highest protection against a prosecutor's knowing use of perjured testimony. First, where a prosecutor knowingly presents false testimony, the test of materiality is whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury."[77] Second, where a defendant has made a specific request for evidence and the prosecutor has suppressed this evidence, the test of materiality is whether the evidence has an impact on the determination of guilt or of punishment.[78] Third, where a defendant has not made a request at all, or has made only a general request for exculpatory evidence, the test

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[71] *Id.*

[72] *Id.* at 106 ("Such a request really gives the prosecutor no better notice than if no request is made.").

[73] *Id.* at 109–10.

[74] *Id.* at 111.

[75] *Id.* at 110–11 ("[T]he attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[76] 427 U.S. at 111.

[77] *Id.* at 103.

[78] *Id.* at 106.

of materiality is whether the "omitted evidence creates a reasonable doubt that did not otherwise exist."[79] These three tests of materiality sit on a continuum. The first is a "strict standard of materiality" that is not permissive of the prosecution's misconduct.[80] A strict standard is appropriate in this circumstance because such a violation "involve[s] a corruption of the truth-seeking function of the trial process."[81] The second and third tests are more permissive of the prosecution's withholding or suppression of evidence.[82] There is necessarily more ambiguity involved in the degree unfairness inherent in a prosecutor's withholding of a piece of evidence at the discovery phase. Evidence that is clearly and unquestionably exculpatory will give rise to an obligation to divulge the evidence to the defense, but the impact of other evidence on the case may be difficult to predict at discovery. As investigation proceeds and facts develop, the importance of a piece of evidence may increase or decrease. This ambiguity is compounded by a difficulty identified by Justice Marshall in his dissent to *Agurs*: if the evidence had been known to the defendant before the beginning of the trial, the defendant's trial strategy may have been altogether different.[83]

All of the ambiguity involved in the factual scenario of a prosecutor's withholding of evidence favorable to the accused during discovery necessitates a standard that is more flexible, or more permissive to the prosecutor's decision to withhold. Thus the Court requires reversal in these cases only when the withheld evidence would change the result of the trial or give rise to a reasonable doubt that did not otherwise exist. However, this ambiguity simply does not exist where a prosecutor knowingly uses perjured testimony during trial. Either a prosecutor knows that a falsehood has been uttered in open court or he does not. This allows for a materiality standard that is less flexible and permissive of a prosecutor's discretion and more protective of the defendant on trial.

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[79] *Id.* at 112.

[80] *Id.* at 104.

[81] *Id*. The Court also noted that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair," and quoted language from *Mooney*, which indicated that obtaining a conviction through the use of perjured testimony is "as inconsistent with the rudimentary demands of justice as is the obtaining of like result by intimidation." *Id.*

[82] It is not necessary to compare the relative "strictness" of the second and third scenarios. The Supreme Court, in *United States v. Bagley* (discussed *supra* at note 48), combined these scenarios and applied a single materiality standard to both. 473 U.S. 667 (1985).

[83] 427 U.S. at 117 (Marshall, J., dissenting).

In *United States v. Bagley*, the Court further clarified the materiality standard according to the categories outlined in *Agurs*.[84] The Court in *Bagley* developed the materiality standards used in assessing *Brady* violations by collapsing two of the *Agurs* categories into one.[85] Notably, the *Giglio* materiality standard for a prosecutor's knowing use of perjured testimony remained intact.[86] The Court created a new materiality test "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request'" scenarios relating to withholding of evidence claims.[87] The Court articulated the following standard for a prosecutor's withholding of evidence favorable to the defendant: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[88] The Court echoed Justice Marshall's concerns from his dissent in *Agurs* about a defendant making trial strategy decisions predicated on the assumption that evidence does not exist when the prosecution fails to respond to a request. However, the Court asserted that this materiality standard allows for consideration of alterations in the defendant's strategy:

> The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.[89]

The Court remanded the case to the court of appeals to apply the newly clarified standard and determine whether there was a reasonable probability

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[84] 473 U.S. 667 (1985). The petitioner, Bagley, had been convicted of narcotics violations based on testimony from two informants who were working with the Bureau of Alcohol, Tobacco, and Firearms. Although counsel for the defense had made specific requests for "deals, promises or inducements" offered to the informants, the Government did not disclose the fact that the informants had in fact received payment for their assistance with the case and that their payment would be paid "commensurate with services and information rendered." The petitioner eventually learned of these contracts for payment after the trial as a result of a request pursuant to the Freedom of Information Act. *Id.* at 671.

[85] *See* Paul G. Nofer, Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of* United States v. Bagley, 1986 DUKE L.J. 892 (1986) (asserting that the *Bagley* decision's combination of these two *Agurs* categories is appropriate because the harm to the defendant is the same in a nondisclosure following either a specific request or a general request).

[86] 473 U.S. at 682.

[87] *Id.* at 682.

[88] *Id.* (applying definition of "reasonable probability" from *Strickland v. Washington*, 466 U.S. 668 (1984)).

[89] 473 U.S. at 683.

that the result of the proceeding would have been different had the withheld evidence been disclosed to the defense.[90]

D. THE DICTA THAT LED TO THE CIRCUIT SPLIT

In *Kyles v. Whitley*, the Supreme Court compared the standard established under *Bagley* to harmless error analysis, and in so doing set out dicta that has led directly to the circuit split addressed in this Comment.[91] In this case, the State willfully withheld evidence tending to exculpate the accused and impeach witnesses, but the Court did not address this knowing presentation of false testimony.[92] After jettisoning any assessment of the first *Agurs* category of cases, the Court turned to the *Bagley* decision to elaborate on the rule and analysis that *Bagley* compels.

The Court applied the standard of materiality for withholding of evidence cases identified above: "[R]egardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[93] Critically, once a reviewing court has found constitutional error under *Bagley*, there is no need for further harmless error review.[94] The *Bagley* standard for materiality "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'"[95] Applying this framework, the *Kyles* Court held that, viewed together, the collective impact of the suppressed evidence required a new trial.[96]

The dicta set out by the Supreme Court in *Kyles* that has precipitated the circuit split regards the Court's assertion that a finding of materiality under *Bagley* forecloses any further harmless error review. The specific language used by the Court is as follows: "Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless."[97] The Court explained that where the *Bagley* standard applies, any harmless error analysis would be meaningless because an offense has to

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[90] *Id.* at 684.

[91] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[92] There was a question as to a prosecutor's knowing presentation of false testimony in this case regarding eyewitness testimony, but this issue was not before the Court. *Id.* at 433 n.7.

[93] *Id.* at 433.

[94] *Id.* at 436.

[95] *Id.* (quoting the harmless error review standard from *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

[96] *Kyles*, 514 U.S. at 454.

[97] *Id.* at 435.

rise beyond the harmless error standard to meet the *Bagley* materiality standard.[98] The standard for harmless error, established in *Brecht v. Abrahamson*, is whether the error "had substantial and injurious effect or influence in determining the jury's verdict,"[99] while the standard for materiality under *Bagley* is "whether, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[100]

The Court's illustration of the comparative strictness of these two standards has been interpreted by two circuit courts as an endorsement of the applicability of a *Brecht* harmless error analysis where a prosecutor has withheld evidence or presented perjured testimony. The First and Sixth Circuits have each reasoned that, since the Supreme Court stated that a withholding of evidence error could not be treated as harmless, it is appropriate to analyze whether a prosecutor's knowing presentation of perjured testimony could be treated as harmless.[101] These courts reasoned that it is possible to meet the materiality standard (whether the false testimony "could have affected the judgment of the jury") but fail to rise beyond the harmless error standard (whether the false testimony "had substantial and injurious effect in determining the jury's verdict"). Thus, relying on *Kyles*, these circuit courts have established a two-step analysis for a prosecutor's knowing use of false testimony. First, the court analyzes whether the standard of materiality has been met, and second, the court analyzes whether the constitutional violation is nonetheless harmless error.[102]

Whether or not this two-step test is appropriate, *Kyles* does not provide a principled justification for making such an analysis. In *Kyles*, the Supreme Court conspicuously refused to analyze the prosecutor's knowing use of false testimony, and only made a comparison between the *Bagley* materiality standard and harmless error analysis. It did not assert that harmless error analysis would be appropriate in this sort of case and preceded its analysis with the clause "[a]ssuming, *arguendo*, that a harmless-error enquiry were to apply."[103]

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[98] *Id.* at 435–36.

[99] 507 U.S. at 776 (1993).

[100] United States v. Bagley, 473 U.S. 667, 682 (1985).

[101] See discussion of Rosencrantz v. Lafler, 568 F.3d 577, 588 (6th Cir. 2009) and Gilday v. Callahan, 59 F.3d 257, 267 (1st Cir. 1995), *supra* note 9 and accompanying text.

[102] *See, e.g.*, *Gilday*, 59 F.3d at 268.

[103] *Kyles*, 514 U.S. at 435.

## III. THE CIRCUIT SPLIT

In the Ninth Circuit case *Hayes v. Brown*,[104] the prosecutor knowingly presented false testimony, and the defendant was convicted of first-degree murder.[105] In determining whether reversal was required, the *Hayes* court applied the materiality standard first articulated in *Giglio*, looking to see whether there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury."[106] The prosecutor in *Hayes* knowingly elicited testimony that made a false representation as to the key witness's motive to testify. The court found that the knowing presentation of perjured testimony cleared the bar of the materiality standard and required the case to be retried.[107]

In assessing this case in the context of the circuit split regarding a prosecutor's knowing presentation of false testimony, it is helpful to note that the Ninth Circuit relied on jurisprudence that strongly supports reversal under these circumstances. The *Hayes* court quoted language stating that where a perjured testimony violation is found, "the conviction must be set aside."[108] The court also quoted persuasive authority from the Second Circuit stating, "[i]ndeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is 'virtually automatic.'"[109] Reliance on this authority indicates that the court was particularly amenable to the idea of reversal and a finding of materiality. The court's attitude is meaningful since the materiality standard is abstract by nature and invites an exercise of judicial discretion.

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[104] 399 F.3d 972 (9th Cir. 2005) (en banc). For commentary on the Ninth Circuit's unique en banc practices, see Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317 (2006) (asserting that in the Ninth Circuit, a full en banc is not practicable given that there are twenty-eight active circuit judges, yet the limited en banc is based on the false premise that some limited number of judges can speak for the entire court).

[105] The prosecutor in *Hayes* took steps to simultaneously induce the key witness to testify and to bolster this witness's credibility. The prosecutor reached an agreement with the witness's attorney to dismiss felony charges in exchange for the testimony, but bound the attorney not to tell the witness about the agreement. This way the witness could testify honestly that he had not received any inducements and thus would appear more credible to the jury. The prosecutor then made statements to the court that "There has [sic] been absolutely no negotiations whatsoever in regard to [the witness's] testimony." Further, the prosecutor elicited testimony at trial that the witness had not been promised anything in exchange for his testimony. 399 F.3d at 979–80.

[106] *Id.* at 984.

[107] *Id.* at 985.

[108] *Id.* at 984 (quoting Belmontes v. Woodford, 350 F.3d 861, 866 (9th Cir. 2003)).

[109] *Hayes*, 399 F.3d at 978 (quoting United States v. Wallach, 935 F.2d 445 (2d Cir. 1991)).

The *Hayes* court then addressed directly whether a finding of materiality is sufficient to warrant reversal, or whether it is necessary to further determine whether the error was harmless under *Brecht*. The Ninth Circuit looked to *Kyles* for guidance and found that "for all errors that derived from the *Agurs* materiality standard, there was no need to conduct a separate *Brecht* analysis."[110] Where the Supreme Court has established a materiality standard, there is no further need for *Brecht* analysis.[111]

Diverging from the Ninth Circuit's interpretation, the First Circuit and, more recently, the Sixth Circuit have relied on *Kyles* as authority for establishing a two-step test for determining whether a prosecutor's knowing use of false testimony requires reversal. Both the First and Sixth Circuit tests first determine whether the violation satisfies the *Giglio* materiality standard, and second determine whether the violation is harmless error under *Brecht*. In the First Circuit decision, *Gilday v. Callahan*, the defendant's two co-conspirators testified erroneously at trial that they had not been offered deals in exchange for their testimony, and the prosecution failed to correct these perjured statements.[112] Further, the Government failed to disclose exculpatory evidence from three eyewitnesses.[113]

The framework used by the *Gilday* court in assessing these potential *Brady* violations is substantially different from the framework used by the Ninth Circuit in *Hayes*. The *Hayes* court viewed the application of a one-step test in *Kyles*, solely concerned with a finding of materiality, as requiring reversal no matter whether a prosecutor had withheld favorable evidence or presented perjured testimony. The *Gilday* court, however, saw an analytical difference between withholding evidence and presenting perjured testimony, allowing for different tests to determine whether reversal is necessary. The *Gilday* court noted that where a prosecutor has knowingly presented perjured testimony, "a petitioner is given the benefit of a friendly standard (hostile to the prosecution) to establish materiality."[114] The materiality standard for the knowing use of perjured testimony (whether the false testimony could reasonably be said to have impacted the judgment of the jury) is more "friendly" to the petitioner than is the *Brecht* harmless error standard (whether the perjured testimony in fact had a substantial and injurious effect or influence on the jury's verdict).

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[110] *Hayes*, 399 F.3d at 985 (relying on reasoning set out in *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)). For a more detailed discussion of *Brecht*'s interaction with the materiality standard for a prosecutor's knowing presentation of false testimony, see *infra* notes 152–56 and accompanying text.

[111] 399 F.3d at 985.

[112] Gilday v. Callahan, 59 F.3d 257, 260 (1st Cir. 1995).

[113] *Id.* at 267.

[114] *Id.* at 268.

Thus, in this situation, "it is quite possible to find a constitutional violation, but to conclude that it was harmless."[115]

In order to justify the application of a harmless error standard in this context, the *Gilday* court relied on the *Kyles* reasoning that "the [withholding of favorable evidence] materiality standard necessarily requires a court to find an impact on the jury verdict sufficiently substantial to satisfy the *Brecht* harmless error test." Yet, the *Gilday* court reasoned that the perjured testimony materiality standard, being more "friendly" to the petitioner, does not necessarily entail satisfaction of the *Brecht* harmless error test. Thus the *Gilday* court explained this new two-part test in the following way: "When faced with such a claim, therefore, our inquiry is necessarily two-pronged: was there failure to disclose material exculpatory evidence, and, if yes, was such a failure harmless?"[116] The *Gilday* court, in applying this new two-pronged analysis, found that the knowing presentation of false testimony claims passed the materiality test but failed the harmless error analysis. Thus, the court found "no remediable *Brady* violation."[117] The method in which the court disposed of the *Brady* violations established a completely new two-part analysis, purportedly rooted in the then-recent Supreme Court cases of *Brecht* and *Kyles*.[118]

The most recent case in the circuit split on this issue, *Rosencrantz v. Lafler*,[119] followed *Gilday*'s lead in applying a two-step test for a prosecutor's knowing presentation of false testimony. The sexual assault victim in *Rosencrantz* had erroneously denied going to the prosecutor's office in advance of the trial and denied sitting in the prosecutor's office on the day of the trial.[120] "The prosecutor remained silent during this colloquy and never reopened the topic during the trial."[121]

In analyzing this instance of knowing use of false testimony, the *Rosencrantz* court began by reiterating the materiality standard outlined in *Giglio*, that a "conviction obtained by the knowing use of perjured testimony must be set aside if the false testimony could . . . in any

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[115] *Id.*

[116] *Id.*

[117] *Id.* at 272.

[118] *Gilday* was decided in July 1995. *Id.* at 257. *Kyles* was decided in April 1995. 514 U.S. 419, 419 (1995). *Brecht* was decided in 1993. 507 U.S. 619, 619 (1993)

[119] Rosencrantz v. Lafler, 568 F.3d 577 (6th Cir. 2009).

[120] *Id.* at 580.

[121] *Id.* at 581. The district court conducted an evidentiary hearing at which the victim testified and admitted that she had met "with the prosecutor . . . and several police officers approximately three times prior to trial . . . ." *Id.* at 582. The district court found this to be credible and the state did not offer any evidence or testimony as rebuttal. Thus, the court "concluded that the prosecution allowed false testimony to stand uncorrected when [the victim] denied any pretrial meetings." *Id.* at 583.

reasonable likelihood have affected the judgment of the jury."[122] The court then drew a distinction between cases in which a prosecutor knowingly used perjured testimony (which the court called "*Brady/Giglio*" cases) and cases in which a prosecutor has withheld evidence favorable to the accused (which the court referred to as simply "*Brady* claims"). The court stated that "in these *Brady/Giglio* claims, the materiality assessment is less stringent than that for more general *Brady* withholding of evidence claims."[123] The court then drew a questionable conclusion, relying in part on the persuasive authority of the *Gilday* decision: "[W]hile a traditional *Brady* materiality analysis obviates a later harmless-error review under *Brecht v. Abrahamson*, courts may excuse *Brady/Giglio* violations involving known and materially false statements as harmless error."[124]

In addition to the *Gilday* framework, the court included a reference to *Carter v. Mitchell*[125] to support its decision.[126] The court's reference to *Carter* is suspect, given the court's statement on the previous page of the opinion that "*Carter* summarily cited harmless error as an alternative basis for denying a false-testimony claim, and this circuit has yet to explicitly hold that a knowing-presentation-of-false-testimony due process violation should be reviewed for harmless error."[127] Thus the *Carter* decision did not provide authority for the two-step analysis applied by the *Rosencrantz* court.

The *Rosencrantz* court also referenced *Kyles* to justify this rule. In a footnote, it quoted the *Kyles* analysis that meeting the traditional *Brady* materiality standard necessarily compels the conclusion that the error has met the harmless error standard.[128] The court made a significant leap in logic that is not warranted by the *Kyles* decision by implying that *Kyles* approved of a harmless error review for traditional *Brady* claims, and only

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[122] *Id.* (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)).

[123] 568 F.3d at 584.

[124] *Id.*

[125] 443 F.3d 517 (6th Cir. 2006). In *Carter*, the Sixth Circuit denied a habeas corpus petition on the grounds that the petitioner's trial counsel was not ineffective and there were independent and adequate state grounds to uphold the conviction. The court found that the prosecutor's failure to correct misleading statements by a key prosecution witness did not meet the *Giglio* materiality standard. *Id.* at 535–36.

[126] *Rosencrantz*, 568 F.3d at 584.

[127] *Id.* at 583. The *Rosencrantz* court's pincite reference includes an explanation in *Carter* that the knowing use of false testimony in that case did not meet the materiality standard articulated in *Giglio* and then goes on to say: "Moreover, for these same reasons, any constitutional error would have been harmless under *Brecht v. Abrahamson*." *Carter*, 443 F.3d at 537 (citation omitted).

[128] *Rosencrantz*, 568 F.3d at 584 n.1.

disregarded harmless error review in these circumstances because the *Brady* materiality standard surpasses the harmless error standard.[129]

Having established this framework, the *Rosencrantz* court went on to find that the prosecutor's knowing presentation of false evidence was material, and yet excusable as harmless error.[130] Interestingly, the court did not seem overly concerned with whether the knowing presentation of perjured testimony was material. In its introductory statements, the court stated, "[W]e affirm the district court's denial of Rosencrantz's petition because, even assuming the materiality of the testimony at issue, the prosecutorial misconduct qualifies as harmless under *Brecht v. Abrahamson*."[131] In addressing the materiality of this violation, the court observed that the perjury itself (the victim's assertion that she did not have pretrial meetings with the prosecutor regarding her testimony when in fact she did) was relatively minor in this case.[132] However, the jury could have been impacted if the victim had been confronted with her perjury in court. "[I]t is reasonable to infer that exposing [the victim] as untruthful—thereby tipping the jury to another of [her] inconsistencies and her willingness to lie under oath—would have affected the jury's view of [her] credibility."[133] Rather than making a finding of materiality, the court stated, "Here, we will *assume* that [the victim's] lie about the pretrial meeting is material."[134] The fact that the victim's perjury did not have an overwhelming impact on the result of the trial allowed the court to be flexible in its application of the materiality standard and establish a new Sixth Circuit rule of applying harmless error analysis to these types of cases.

Essentially, the *Rosencrantz* court applied a two-step test identical to the test set out in *Gilday*. However, the Sixth Circuit advanced the argument in favor of the two-step test by appealing to the policy concerns that underpin the *Brecht* decision. The court asserted that a stringent harmless error standard is appropriate as a second step because it "honors

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[129] See discussion of *Kyles v. Whitley*, *supra* notes 91–103 and accompanying text, pointing out that the *Kyles* comparison of the *Brady* standard and the harmless error standard was preceded by the clause, "Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless . . . ." 514 U.S. 419, 435 (1995). Thus, *Kyles* did not command that harmless error analysis applied under these circumstances.

[130] 568 F.3d at 591.

[131] *Id.* at 580.

[132] *Id*. at 588 ("Given the implausibility of the untruthful answer Lasky gave—jurors would *expect* the prosecuting witness to meet with the prosecution before trial—we might assess the impact as minimal.").

[133] *Id.*

[134] *Id.* (emphasis added). Further, the court begins its "Harmless Error" section with the words "Having assumed materiality and therefore assumed a constitutional error . . . ." *Id.*

*Brecht*'s weighty concerns," including the state's interest in finality, expenditure of time and resources of retrial, erosion of memory and dispersion of witnesses, and society's interest in the prompt administration of justice.[135] This rationale supports applying a stringent standard generally, but the *Rosencrantz* majority opinion did not endeavor to balance the policy concerns it identified against the due process protections set in place by the *Giglio* standard for materiality where a prosecutor has knowingly used false testimony.

The dissent in *Rosencrantz* argued that a finding of materiality necessarily forecloses any harmless error analysis, regardless of the relative comparison of the materiality and harmless error standards.[136] Cases involving certain prosecutorial misconduct "can so undermine confidence in a verdict and impact the fairness of a trial that a new trial is required."[137] Thus the majority's application of a harmless error standard was inappropriate. The Supreme Court has articulated and developed materiality standards for the *Brady* line of cases. Therefore, it is inappropriate to treat "*Brady* and its associated line of cases as providing merely a threshold test for *Brecht*'s harmless-error analysis."[138] The dissent argued that it is inappropriate to combine *Brady* and *Brecht* into a single analytical framework:

> Given the conceptual framework of *Brady* and *Brecht*, we should not shoehorn *Brady* into *Brecht*'s harmless-error analysis. Rather, *Brady* and *Brecht* remain consistent only so long as they stand apart. The Court's only task in the present case, then, is to apply the *Giglio* test. If the test is satisfied, a new trial is required.[139]

Since the Supreme Court has set out a specific materiality standard for a prosecutor's knowing use of perjured testimony, according to the dissent, it is inappropriate to apply an additional test that erodes the standard established by the Supreme Court.

## IV. *ROSENCRANTZ* AND *GILDAY* ARE DEAD (OR THEY SHOULD BE)

### A. SUPREME COURT JURISPRUDENCE IS UNAMBIGUOUS IN ITS REQUIREMENT OF A ONE-STEP MATERIALITY TEST FOR PERJURED TESTIMONY

The Supreme Court has never established or affirmed a two-part test for determining when reversal is appropriate in the case of a prosecutor's

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[135] *Id.* at 589–90.
[136] *Id.* at 592 (Cole, J., dissenting).
[137] *Id.*
[138] *Id.* at 593.
[139] *Id.* at 594 (internal quotations omitted).

knowing use of perjured testimony. A comprehensive look at the Supreme Court jurisprudence in this factual scenario shows the careful development of a materiality standard that best reflects the Court's desire to uphold the truthseeking process of a criminal trial. In the 1935 case of *Mooney v. Holohan*, the Supreme Court first asserted that a prosecutor's deliberate presentation of perjured testimony is "as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[140] For the next thirty-seven years, the Supreme Court endeavored to clarify the triggering circumstances that compel a new trial when the prosecutor has knowingly presented perjured testimony. In *Alcorta*, the Court's analysis indicated that there would be no per se rule of reversal, but rather a reviewing court must consider the impact of the falsehood on the jury.[141] The *Alcorta* majority also found that a prosecutor's failure to correct false testimony will be treated the same as a prosecutor's presentation of false testimony.[142] In *Napue*, the Court stated that this protection applies against false testimony that is presented whether it is material to the defendant's guilt or to the witness's credibility.[143] And in *Brady*, the Court applied this protection whether it would impact the fact-finder's finding of guilt, or only the determination of punishment.[144] After thirty-seven years of developing the doctrine in this area, the Supreme Court articulated the materiality standard for a prosecutor's knowing use of false testimony in the 1971 case *Giglio v. United States*. "A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."[145]

The materiality standard, carefully developed by the Court and set out in *Giglio*, has remained in force for the last thirty-nine years and is still good law today. In fact, both the *Gilday* and *Rosencrantz* courts recognized its authority and applied it in their analysis.[146] There is good authority for deploying the *Giglio* materiality standard for a prosecutor's knowing use of false testimony and using it as the standard for determining when the due process rights of a criminal defendant have been violated in a way that demands a new trial. However, there is no Supreme Court jurisprudence authorizing the second step of the test employed by *Gilday* and *Rosencrantz*. The harmless error analysis as applied in those decisions

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[140] 294 U.S. 103, 112 (1935).

[141] Alcorta v. Texas, 355 U.S. 28, 31–32 (1957).

[142] *Id.* at 30–31.

[143] Napue v. Illinois, 360 U.S. 264, 269 (1959).

[144] Brady v. Maryland, 373 U.S. 83, 87 (1962).

[145] Giglio v. United States, 405 U.S. 150, 154 (1972) (internal quotations omitted).

[146] *See* Rosencrantz v. Lafler, 568 F.3d 577, 583 (6th Cir. 2009); Gilday v. Callahan, 59 F.3d 257, 267 (1st Cir. 1995).

completely swallows the materiality standard that has been carefully considered by the Supreme Court and has withstood the test of time.

Both the *Gilday* and *Rosencrantz* decisions relied on the Supreme Court's reasoning in *Kyles* as authority for applying the second step of their test, the harmless error analysis. Two aspects of the *Kyles* decision undercut the validity of relying on it as authority for modifying the materiality test for a prosecutor's knowing use of false testimony. First, *Kyles* was not a case about a prosecutor's knowing use of false testimony. In *Kyles*, the prosecution withheld evidence that was favorable to the defendant, and the opinion clarified confusion in the lower court's opinion about applying the materiality standard for withheld evidence under *Brady* and *Bagley*.[147] Since *Kyles* was not a case about a prosecutor's knowing presentation of false testimony, it cannot be said to set out a rule for this context. In fact, the Supreme Court explicitly stated in the *Kyles* opinion that it was not addressing knowing use of perjured testimony.[148]

Secondly, in *Kyles* the Court compared the standard of materiality to the harmless error standard, but it did not assert that both of these standards should be used to analyze either withholding of evidence or knowing use of perjured testimony. It seems that there are two purposes for the Court's comparison of these standards. First, the court of appeals had applied both *Bagley* materiality and harmless error review, and the Supreme Court was illustrating that this was illogical. Since the *Bagley* materiality standard is stricter than the harmless error standard, any withholding of evidence that satisfied *Bagley* materiality would necessarily satisfy the harmless error standard.[149] Secondly, the Supreme Court had provided a new formulation of harmless error just two years before the *Kyles* decision in *Brecht*. The Supreme Court was likely trying to provide some guidance to courts applying each of these standards in the future. Materiality (and harmless error) standards are abstract by their nature. Comparison of two abstract standards provides some guideposts to lower courts in determining which standards are more or less strict. In *Kyles*, the Court demonstrated that it was merely providing instructive analysis through dicta rather than authorizing application with its statement, "Assuming, *arguendo*, that a harmless-error enquiry were to apply . . . ."[150]

The Sixth Circuit specifically endorsed the application of harmless error analysis in *Rosencrantz* because it honors "*Brecht*'s weighty

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[147] *See* Kyles v. Whitley, 514 U.S. 419, 435–38 (1995).

[148] *Id.* at 433 n.7. ("[W]e do not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category.").

[149] *Id.* at 435.

[150] *Id.*

concerns."[151] In *Brecht*, the harmless error standard articulated by the Court is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict."[152] The First and Sixth Circuit rely on the authority of *Brecht*. However, the factual scenario in *Brecht* is fundamentally different from cases in which a prosecutor has knowingly presented false testimony at trial. *Brecht* was a case in which the prosecutor used a defendant's post-*Miranda* silence to impeach the defendant's claim that a shooting was accidental.[153] This is significantly different from any sort of *Brady* violation in that the Supreme Court has not separately established a materiality standard for a *Miranda* violation, and therefore it was appropriate in *Brecht* for the Court to establish a general catch-all harmless error standard.[154]

As Justice O'Connor observed in her dissent to *Brecht*, "*Miranda* is a prophylactic rule that actually impedes the truthseeking function of criminal trials."[155] Setting aside for a moment the justifications for the *Miranda* protection, it is clear that without this rule more information would be known to authorities more quickly regarding a crime. Thus, *Miranda* sets up an impediment to truthseeking in the name of protection of the rights of arrestees. The *Brady* line of cases does just the opposite. That is, *Brady* affords for an enhancement to the truthseeking function of a criminal trial. When a prosecutor is aware of exculpatory evidence in a case, he is obligated to turn this evidence over to the accused. Where a prosecutor hears testimony that he knows to be perjured in open court, he is obligated to correct it. For these reasons, the application of *Brecht*'s standard is wholly inappropriate. Since the Supreme Court has articulated a specific materiality standard for a prosecutor's knowing presentation of false testimony, it is appropriate to apply only that materiality standard and not to erode it with an additional layer of harmless error review. Indeed, if not for the dicta from the *Kyles* case, circuit courts would not likely consider applying *Brecht*'s standard for harmless error in the first place.

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[151] *Rosencrantz*, 568 F.3d at 589.

[152] Brecht v. Abrahamson, 507 U.S. 619, 624 (1993) (internal quotations omitted).

[153] *Id.* at 624–26.

[154] Or, more accurately, it was appropriate for the Court to develop the then-existing harmless error standard to reflect policy concerns. For a summary of the development of the harmless error standard, see Ana M. Otero, *In Harm's Way—A Dismal State of Justice: The Legal Odyssey of Cesar Fierro*, 16 BERKELEY LA RAZA L.J. 119, 135–49 (2005).

[155] *Brecht*, 507 U.S. at 651 (O'Connor, J., dissenting).

## B. ANY AMBIGUITY IN THE JURISPRUDENCE SHOULD BE RESOLVED IN FAVOR OF A SINGULAR MATERIALITY STANDARD

The First and Sixth Circuits have read some ambiguity into the Supreme Court's comparison of the *Bagley* materiality standard and the *Brecht* harmless error standard in *Kyles*. They posit that since the standard for the prosecutor's knowing presentation of perjured testimony is more "friendly"[156] to the defendant than the materiality standard for withholding of evidence favorable to the accused, an additional layer of harmless error analysis is warranted. This Comment has argued that no such ambiguity exists in the jurisprudence. However, if any ambiguity can be found in the *Kyles* opinion, it should be resolved in favor of protecting the due process rights of the criminal defendant by refusing to apply a second layer of harmless error analysis after a finding of materiality.

### *1. Tests Should Be Compared on the Grounds of Protectiveness of Due Process and Not in Terms of Strictness*

The *Gilday* court refers to the materiality standard for a prosecutor's knowing use of false testimony as "more favorable to the defendant"[157] than the standard for a prosecutor's withholding of exculpatory evidence and further refers to the standard as a "lower materiality hurdle."[158] The *Rosencrantz* court refers to this materiality standard as "less stringent"[159] and as "friendly-to-the-accused."[160] This portrayal is an incomplete characterization of the materiality standard for perjured testimony. When compared to the materiality standard for withheld evidence, it is true that the standard for perjured testimony presents a lower bar for the accused to meet. But it is a lower bar because the Supreme Court has carefully considered the scenarios in which a violation of the materiality standard might occur and the constitutional protections at play, and determined that this standard is appropriately protective and practicable.[161]

The materiality standard for withheld evidence grew out of the protections that had been put in place against perjured testimony.[162] But the Supreme Court carefully analyzed and differentiated the two situations in *Agurs* and *Bagley* and articulated that because of practical considerations, a

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[156] Gilday v. Callahan, 59 F.3d 257, 268 (1st Cir. 1995).

[157] *Id.* at 267.

[158] *Id.* at 268.

[159] Rosencrantz v. Lafler, 568 F.3d 577, 584 (6th Cir. 2009).

[160] *Id.* at 587.

[161] See discussion of Supreme Court cases developing the materiality standard for a prosecutor's knowing use of perjured testimony, *supra* text at notes 141–46.

[162] Brady v. Maryland, 373 U.S. 83, 87 (1962).

more stringent standard should be applied in the case of withheld evidence. A prosecutor is not likely to know the worth of each piece of evidence to the defendant's case during the discovery phase and should not be asked to open his file to the defense.[163] Because of this consideration, a higher bar must be met to demonstrate the unfairness of the prosecutor's withholding of a piece of evidence. These practical considerations do not temper the protections in place against a prosecutor presenting false testimony in open court. If a witness lies on the stand, and the prosecutor knows it, he must correct the lie. Any other action would offend the truthseeking nature of the trial and the pursuit of justice. Or, put another way, it would not advance the prosecutor's "twofold aim . . . that guilt shall not escape [n]or innocence suffer."[164]

The Supreme Court has established that a prosecutor's knowing use of false testimony violates the Fourteenth Amendment due process rights of a criminal defendant. Therefore, couching the materiality standard on a scale of "strict" to "weak" obscures the reason that the materiality standard is in place. More appropriately, the materiality standard for a prosecutor's knowing use of perjured testimony should be considered on a scale of protectiveness of due process rights of the criminal defendant. The perjured testimony materiality standard is more protective of due process rights than the withheld evidence standard because of the difficulties inherent in determining the weight of evidence before the commencement of the trial. The fact that this carefully considered materiality standard is more protective of due process rights should not permit courts to undercut its protection by imposing an additional harmless error analysis.

### *2. A Singular Materiality Test Would Check the Trend of Eroding Habeas Relief*

All of the cases discussed in this Comment reached federal courts on habeas corpus petitions in which the petitioners alleged that their due process rights had been violated under the U.S. Constitution. The habeas process is a safeguard to a criminal defendant and allows federal courts to review state courts' analyses of due process violations and to command retrial if it is found that due process rights have been violated. Legal

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[163] *See* Bagley v. United States, 473 U.S. 667, 699 (1985) (asserting that the state should turn over any evidence that might allow a defendant "whose liberty as at stake" to defend himself but that an "open file policy" would be too broad to achieve this goal). *But see* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 492–98, 511–14 (2009) (arguing that the *Brady* rule should be replaced with an open file policy because the current disclosure requirements may result in even ethical prosecutors under-disclosing exculpatory evidence).

[164] United States v. Agurs, 427 U.S. 97, 111 (1976) (internal quotations omitted).

scholars have observed a recent trend of federal courts substantially limiting habeas review, largely motivated by the passing of Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996.[165] AEDPA, along with the 1989 case of *Teague v. Lane*,[166] favors judicial efficiency over the rights of the habeas petitioner.[167] *Teague* bars federal courts from hearing claims that rest on recent Supreme Court cases and additionally bars a court from announcing a new rule in a habeas case and then using it to resolve a prisoner's claim.[168] AEDPA further limits habeas review by creating a statute of limitations for habeas petitions (none existed before AEDPA was passed),[169] and substantially limiting a federal court from rehearing a claim in a successive petition for habeas corpus.[170]

Congress's aim in passing AEDPA was to "streamline the habeas corpus process and to reduce the number of frivolous petitions."[171] Scholar JoAnn Lee employed an empirical framework to analyze the impacts of *Teague* and AEDPA, using formulas to assess the habeas success rate, filing rate, and disposal time.[172] She found the real impact of AEDPA was that it decreased the probability of success in obtaining habeas relief.[173]

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[165] *See, e.g.*, Matthew K. Mulder, *Finding the "Eternal and Unremitting Force" of Habeas Corpus: § 2254(d) and the Need for De Novo Review*, 86 DENV. U. L. REV. 1179 (2009) (arguing that the federal courts do not currently sufficiently protect due process rights of habeas petitioners because of inconsistent application of de novo review under AEDPA §2254(d)); Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545 (2009) (arguing that the Supreme Court has limited habeas relief by curtailing equitable tolling available under AEDPA). *But see* John H. Blume, *AEDPA: the "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 260–64 (2006) (asserting that, to date, AEDPA has had very little impact on federal courts' review of habeas petitions; however, ambiguities in the Act could lead to increased impact).

[166] 489 U.S. 288 (1989).

[167] JoAnn Lee, *An Empirical Analysis of Habeas Corpus: The Impact of* Teague v. Lane *and the Anti-Terrorism and Death Penalty Act on Habeas Petition Success Rates and Judicial Efficiency*, 15 CORNELL J.L. & PUB. POL'Y 665 (2006).

[168] *See Teague*, 489 U.S. at 300–01 (establishing that a new rule should have a prospective, and not retrospective, impact). "Given the broad scope of constitutional issues cognizable on habeas, . . . it is sounder in adjudicating habeas petitions generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of the habeas case on the basis of intervening changes in constitutional interpretation." *Id.* at 306 (internal citations omitted).

[169] 28 U.S.C. § 2263(a) (2006).

[170] *Id.*

[171] Lee, *supra* note 167, at 669; *see also* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 506 (2007) (asserting that under AEDPA Congress intended, and federal courts have applied, limitations on habeas review).

[172] Lee, *supra* note 167, at 675.

[173] *Id.* at 684. Lee further found that *Teague* actually increased the burden of habeas litigation on federal courts by increasing the amount of time it takes to dispose of habeas petitions. *Id.*

Because of the trend of a decreasing likelihood of success through the habeas process, it is critical to strengthen the protection of due process rights. Habeas petitioners are becoming statistically less likely to succeed in obtaining habeas relief.[174] Therefore, it is important that the jurisprudence establishes a clear, consistent rule that protects the rights of criminal defendants at trial. It is not appropriate to erode the materiality standard in cases where prosecutors have violated Fourteenth Amendment due process rights of criminal defendants, regardless of whether the trend of limiting habeas review is appropriate.[175] The slippery slope toward a pure interest in judicial efficiency must be stopped where the constitutional rights of criminal defendants have been violated so flagrantly.

The cases overturned by the work of the Innocence Project also underscore the importance of protecting criminal defendants against this type of due process violation. The Innocence Project was founded eighteen years ago to assist prisoners who could be proven innocent through DNA testing.[176] According to the Innocence Project website, "[t]here have been 251 post-conviction DNA exonerations in United States history."[177] The scientific basis proving the innocence of these prisoners creates a unique opportunity to analyze and compare the cases of criminal defendants who were wrongfully convicted. In a survey of the first seventy-four DNA exonerations, the Innocence Project found that there had been knowing use of perjured testimony in a full 25% of those cases.[178] It is impossible to ascertain whether the sample set of defendants who have been exonerated through the work of the Innocence Project is representative of all prisoners who have been wrongfully convicted, but the numbers do show that a prosecutor's knowing use of false testimony is a significant problem, and that it can easily lead to a false conviction. Whether a defendant is innocent or guilty, it is unacceptable to tip the balance toward the prosecution by eroding the protection against the use of false testimony.

### *3. The Singular Materiality Standard Would Have a Prophylactic Effect on Prosecutorial Misconduct*

The jurisprudence surrounding *Brady* violations goes to great lengths to clarify that the reversal of a case for a *Brady* violation is not tied to a

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[174] *Id.* at 682–83.

[175] *See* Otero, *supra* note 154, at 161–69 (arguing that the application of additional harmless error analysis to constitutional error is ominous given that habeas relief is fast-eroding).

[176] INNOCENCE PROJECT, http://www.innocenceproject.org/about/ (last visited Mar. 9, 2010).

[177] *Id.*

[178] *Id.*

prosecutor's culpability but rather is measured in regard to its impact on the fairness of the trial.[179] However, where a prosecutor willfully exercised bad faith in withholding evidence, the *Brady* violation is likely more egregious. If evidence is particularly exculpatory, or if perjured testimony is critical on a key issue in a case, a prosecutor's misconduct with regard to these items will have a more extreme impact on the case.

A prosecutor who violates due process rights by presenting false testimony technically opens himself to ethical sanctions under the applicable state rule against prosecutorial misconduct. Most state ethics rules regulating prosecutors are based on the American Bar Association Model Rule 3.8, which includes the mandate that prosecutors "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[180] However, Professor Niki Kuckes[181] has argued that prosecutorial ethics are generally not well-regulated.[182] Professor Kuckes notes that enforcement and revision of rules governing prosecutorial ethics is problematic because these rules "tend to antagonize a powerful lobby, and because political sensitivity inevitably accompanies any efforts to regulate law enforcement."[183] Since there are inherent difficulties in regulating prosecutorial misconduct via ethics sanctions, the strict rule argued for in this Comment will provide a needed disincentive.

Additionally, disciplinary committees infrequently sanction prosecutors who violate *Brady* rules.[184] Professor Sara Gurwitch asserts that the lack of disciplinary committee action is unsurprising given that the

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[179] The initial articulation of the materiality standard in *Brady* included the phrase: "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1962).

[180] MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009).

[181] In 1999, the American Bar Association commissioned Professor Kuckes to complete a report on the effects and implementation of state ethics rules regulating prosecutorial ethics. In her report, Professor Kuckes suggested modifications to Rule 3.8 based on areas of prosecutorial conduct not covered by the rule, yet addressed by various state rules. Despite a thorough reform of the ABA Model Rules of Professional Conduct in 2000, Rule 3.8 remained unchanged. Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 430–31 (2009).

[182] *Id.*; *see also* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV., 1573 (2003) (arguing that Rule 3.8 is inadequate to regulate prosecutorial misconduct).

[183] Kuckes, *supra* note 181, at 433.

[184] Gurwitch, *supra* note 46, at 316. Richard Rosen and Joseph Weeks have completed exhaustive studies of the frequency of disciplinary sanctions in response to *Brady* violations, finding that "disciplinary committee action in response to *Brady* violations is uncommon and, when it occurs, mild." *Id.* at 317 (citing Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 883 (1997)); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

majority of disciplinary actions involve financial matters.[185] Those criminal defendants wronged by *Brady* violations will typically "seek to be vindicated by the courts" rather than by filing disciplinary actions.[186] Since disciplinary sanctions are mild and rare, it is appropriate for the courts to protect against prosecutorial misconduct by upholding a stringent standard against a prosecutor's use of perjured testimony.

In practical terms, the rule argued for in this Comment would not create a sea change in the treatment of cases where a prosecutor has knowingly used false testimony. The cases in which a prosecutor knowingly presents perjured testimony and the testimony is not overwhelmingly material or immaterial are a small subset of those cases in which it can be proven that a prosecutor knowingly presented false testimony.[187] There are relatively few cases in which a knowing use of perjury might meet the materiality standard yet fail harmless error review. Therefore, the rate of overturning individual cases would not change significantly with the enforcement of a singular materiality test for determining when a case should be overturned. However, the existence of this clarification would likely make prosecutors more careful, and result in their erring on the side of caution and ensuring that they do not present testimony that they know to be false, under threat of reversal.

The prophylactic effect of the clarification of this materiality standard would be far reaching. The threat of reversal would motivate prosecutors to pay careful attention to ensuring that they do not present perjury (or let perjury go uncorrected) at trial. It is inappropriate to follow the majority's analysis in *Rosencrantz*, which effectively sends a message to prosecutors that some conduct that is recognized as being unconstitutional will be forgiven in the pursuit of justice. Courts should not stand in as disciplinary committees, but they should apply a strict standard that prevents the knowing use of false testimony in pursuit of a criminal conviction.

## V. CONCLUSION

The results of *Rosencrantz* and *Gilday* are inappropriate. The Supreme Court should resolve the circuit split and establish that where a prosecutor knowingly presented false testimony at trial and the false testimony was material, there should be no further harmless error analysis.

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[185] Gurwitch, *supra* note 46, at 317.

[186] *Id.* at 317.

[187] For an alternative explanation of why the rule advocated in this Comment will not cause a radical change in the rate of reversals, see Gurwitch, *supra* note 46, at 306 ("The prosecution's *Brady* obligation is largely self-enforced . . . [a]s a result, the lack of compliance with the *Brady* rule will often go undetected, and it is fair to assume that most *Brady* violations go undiscovered.").

The Court has developed jurisprudence tailoring the materiality standard for a prosecutor's knowing use of perjury to best protect the due process rights of a criminal defendant. Applying harmless error analysis as a second step in considering this type of complaint swallows the carefully considered materiality standard. The Supreme Court jurisprudence in this area does not support the test established by the *Rosencrantz* and *Gilday* courts. Further, the two-step test violates the Fourteenth Amendment due process rights of criminal defendants, offends the fundamental fairness and truthseeking power of the criminal trial, and erodes the incentive for prosecutors to be vigilant in ensuring they do not present false testimony.

Eliminating the second step harmless error analysis is appropriate because it values the constitutional rights of the criminal defendant over judicial efficiency in this circumstance and it sends the appropriate message to prosecutors that knowing presentation of false testimony will not be tolerated.