CONSTITUTIONAL LAW—DUE PROCESS—PROSECUTORS MUST DISCLOSE EXCULPATORY INFORMATION WHEN THE NET EFFECT OF THE SUPPRESSED EVIDENCE MAKES IT REASONABLY PROBABLE THAT DISCLOSURE WOULD HAVE PRODUCED A DIFFERENT RESULT—*Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

Among the most essential and fundamental rights guaranteed by the United States Constitution is an individual's right to a fair trial.[1] The Due Process Clauses—incorporated in the Fifth and Fourteenth Amendments of the United States Constitution—preclude the government from depriving an individual of "life, liberty or property without due process of law."[2] The Fifth Amendment applies due process to federal government actions, while the due process requirements of the Fourteenth Amendment are directed to the states.[3]

---

[1] Nicholas A. Lambros, Note, *Conviction and Imprisonment Despite Nondisclosure of Evidence Favorable to the Accused by the Prosecution: Standard of Materiality Reconsidered*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 103, 103 (1993). Fundamental rights have "a value so essential to individual liberty in our society that they justify the justices reviewing the acts of other branches of government." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7, at 388 (4th ed. 1991); *see also* Willis C. Moore, Note, Arizona v. Youngblood: *Does the Criminal Defendant Lose His Right to Due Process When the State Loses Exculpatory Evidence?*, 5 TOURO L. REV. 309, 309 (1989) (stating that due process guarantees the right to a fair trial).

[2] Sarah M. Bernstein, Note, *Fourteenth Amendment—Police Failure to Preserve Evidence and Erosion of the Due Process Right to a Fair Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1256, 1262 (1990). The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V. The Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

U.S. CONST. amend. XIV, § 1.

[3] Bernstein, *supra* note 2, at 1263. The Fourteenth Amendment was first challenged in the mid-1870s when the Supreme Court decided the *Slaughter-House Cases*. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *see also* Bernstein, *supra* note 2,

The Due Process Clause consists of two distinct components: substantive[4] and procedural due process.[5] With respect to the

at 1263-64. The Supreme Court decided in the *Slaughter-House Cases* that the Privileges and Immunities Clause of the Fourteenth Amendment was not intended to protect an individual's rights from state interference or to alter relations between the federal and state government. *Slaughter-House Cases*, 83 U.S. at 78; *see also* Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1146 (1992). The Court refused to erase the distinction between national citizenship and state citizenship. *Slaughter-House Cases*, 83 U.S. at 73-74.

Between 1887 to 1934, the Court restricted state actions and recognized individual rights that were equivalent to the protections guaranteed by the Bill of Rights. Chemerinsky, *supra*, at 1146. During this period, the Court decided that due process rights of individuals were being violated because state activity was inhibiting the liberty interests of the people. *Id.* In 1897, the Court, after analogizing federal actions under the Fifth Amendment, held that it was a violation of due process under the Fourteenth Amendment for the states to take "private property for public use without just compensation." *Id.*; *see* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897) (stating that taking private property from an individual for public use without compensation is a violation of the Fourteenth Amendment).

The fundamental fairness doctrine was established in the late 19th century. Bernstein, *supra* note 2, at 1264. This doctrine is important in that "fundamental fairness has become the touchstone of due process." Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1300 (1988). This doctrine advocated that state action that invades individual fundamental rights is prohibited by the due process clause. Bernstein, *supra* note 2, at 1264-65. The doctrine further espoused that the Bill of Rights is separate from the Fourteenth Amendment Due Process Clause. *Id.* at 1265. The Court, however, expanded the scope of the Fourteenth Amendment by incorporating rights that were based on fundamental fairness. *Id.* During the 1920s, the Court, applying the fundamental fairness theory, altered the Fourteenth Amendment to include the protections of the Bill of Rights and implemented these rights to state criminal procedure. *Id.* In the 1960s, the Court strayed from the fundamental fairness doctrine and employed the selective incorporation doctrine. *Id.* In 1968, the Sixth Amendment right to a trial by jury was incorporated into the Fourteenth Amendment's Due Process Clause. *Id.* at 1265-66; *see infra* note 97 (setting forth the provisions of the Sixth Amendment). In *Duncan v. Louisiana*, the Court held that the right to a fair trial is "fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The "new test meant that the Court would be willing to enforce values which the justices saw as having a special importance in the development of individual liberty in American society, whether or not the value was one that was theoretically necessary in any system of democratic government." Bernstein, *supra* note 2, at 1266 (quoting 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.6, at 75 (1986)). To date, the Fourteenth Amendment has been refined to include most of the provisions of the Bill of Rights. *Id.* The protections guaranteed by the Bill of Rights are equally employed in both federal and state actions. *Id.*

[4] Chemerinsky, *supra* note 3, at 1149. Substantive due process centers on whether or not the government is warranted in enforcing actions which infringe on rights deemed by the Supreme Court to be protected by the Due Process Clause. *Id.* Moreover, by setting constitutional limits on legislative action, substantive due process preserves individual freedom from the limits imposed by legislation. Bernstein, *supra* note 2, at 1262.

[5] Chemerinsky, *supra* note 3, at 1149. Procedural due process "delineates the

criminal justice system,[6] due process[7] mandates that the procedures utilized in ascertaining the guilt or innocence of a defendant comply with notions of justice and fair play.[8] Also fundamental to the successful performance of the criminal justice system is the role of the prosecutor,[9] whose position must be executed in compliance

---

constitutional limits on judicial, executive, and administrative *enforcement* of legislative or other governmental dictates or decisions." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 (2d ed. 1988); *see* Bernstein, *supra* note 2, at 1263 (stating that procedural due process defines the limits on governmental actions). Traditionally, this has invoked procedural safeguards that are designed to afford individuals the opportunity to be heard before they are forced to withstand substantial loss of any kind resulting from governmental action. TRIBE, *supra*, § 10-7, at 664; *see* Chemerinsky, *supra* note 3, at 1151-52 (observing that procedural due process focuses on whether the government has complied with the appropriate procedures when taking away an individual's life, liberty, or property).

6 Fisher, *supra* note 3, at 1299-1301. The criminal justice system is designed to effectively enforce the law by detecting, apprehending, convicting, and punishing guilty persons. *Id.* at 1299 (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6, at 37 (1984)). This primary goal must be ascertained through the application of consistent and quality "process goals" in accomplishing this primary goal. *Id.* at 1299-1300. Among the pertinent process goals are "the maintenance of the adversarial and accusatorial systems, the assurance of respect for individual dignity, the minimization of erroneous convictions, the appearance of fairness, and the equal application of the law." *Id.* at 1300 (footnotes omitted).

7 *Id.* Due process is of significant importance to the criminal justice system's operation. *Id.* Due process encompasses fair procedures implemented to establish truth in accordance "with the process goals of the system." *Id.* It further requires that justice be served in criminal proceedings through a correct outcome and, more importantly, that this outcome is achieved through fair procedures. *Id.*

8 *Id.* at 1299. Justice strives to obtain a specific result. Stephen P. Jones, Note, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735, 740-41 (1995). A fair process, however, is the true mechanism in securing justice. *Id.*; *see* California v. Trombetta, 467 U.S. 479, 485 (1984) (stating that criminal prosecutions must comply with notions of fundamental fairness).

9 Fisher, *supra* note 3, at 1302. The ABA's Model Rules of Professional Conduct provides: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1988).

In *United States v. Bagley*, the Court reflected on a prosecutor's obligation of fairness and stated "the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) (alteration in original) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

"[D]ue process requires fairness, integrity and honor in the operation of the criminal justice system" and, therefore, standards of professional conduct for prosecutors may help in determining when a defendant's due process rights have been violated. Fisher, *supra* note 3, at 1314 (quoting Moran v. Burbine, 475 U.S. 412, 467 (1986) (Stevens, J., dissenting)). When a prosecutor intentionally defies the standards set forth to govern his or her behavior, such conduct cannot be tolerated because it undermines the integrity and honor encompassed within due process. *Id.*

with the standards of due process.[10]

At the very heart of this role is the prosecutor's constitutional duty to disclose[11] exculpatory evidence[12] that favors the defense.[13] Constitutional guarantees of due process[14] are violated when the prosecution suppresses[15] or withholds material evidence favorable

---

The protection that due process guarantees has evolved from notions of fair play and justice. *Id.* Therefore, society expects prosecutors to adhere to the standards set forth to govern their behavior when employing procedures required under the law. *Id.* at 1314-15. Departure from these standards indicates that a prosecutor has violated the due process rights of a criminal defendant. *Id.* at 1315.

10 Fisher, *supra* note 3, at 1302. A prosecutor's position as an advocate of the court is "tempered by an obligation of fairness." Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 695 (1987). A prosecutor has an obligation to ensure that the results of a trial have been accurately determined, especially when a guilty verdict is rendered. *Id.*

11 Rosen, *supra* note 10, at 695-96. The prosecutor's constitutional duty to disclose reveals the prevailing concern inherent in the Due Process Clause of the Constitution that justice is served. Jones, *supra* note 8, at 738-39. Fairness to the accused is the overriding theme dominating the criminal justice system and, therefore, it demands that the prosecutor disclose information that will facilitate the court in achieving justice. *Id.* at 739.

"Justice" appears to represent the notion that "the guilty will be punished and the innocent will go free." *Id.* at 740. Although ascertaining the truth is one of the fundamental objectives of the criminal justice system, due process ensures that proper procedures are taken rather than ensuring a truthful determination. *Id.* Therefore, truth may be sacrificed in order to protect an individual's rights. *Id.*

12 Rosen, *supra* note 10, at 695-96. "Exculpatory evidence" is defined as:

> A statement or other evidence which tends to justify, excuse or clear the defendant from alleged fault or guilt. Declarations against declarant's interest which indicate that defendant is not responsible for crimes charged. Evidence which extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which although favorable, is merely collateral or impeaching. For purposes of rule constraining State from disposing of potentially exculpatory evidence, is evidence which clears or tends to clear accused person from alleged guilt.

BLACK'S LAW DICTIONARY 392-93 (6th ed. abr. 1991).

13 Rosen, *supra* note 10, at 695-96. During the process of many criminal procedures, the State will discover evidence that is favorable to the accused. Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 391 (1984). It is usually unlikely that the defense will uncover the same evidence. *Id.* Therefore, in order to keep adversaries on a level playing field, the prosecutor has a constitutional duty to disclose this evidence to the defense. Jones, *supra* note 8, at 736.

14 *See* Emily D. Quinn, *Standards of Materiality Governing the Prosecutorial Duty to Disclose Evidence to the Defense*, 6 ALASKA L. REV. 147, 152 (1989) (stating that due process focuses on preventing unfair trials rather than condemning society for prosecutorial misconduct).

15 *See* United States v. Perdomo, 929 F.2d 967, 973 (3rd Cir. 1991) (stating that evidence will not be considered suppressed if the defendant either "knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence"). Suppression of material evidence undermines the integrity of the legal system and the accuracy of the proceedings. Rosen, *supra* note 10, at 694.

to the accused.[16] A prosecutor's duty to disclose evidence to the defense requires the prosecutor to use his or her discretion in determining whether or not evidence favorable to the accused should be disclosed.[17] Therefore, the prosecutor's position as an advocate for society is challenged by the demands of the justice system that require a fair trial.[18]

Recently, the United States Supreme Court ruled on the prosecutor's duty to disclose material evidence to the defense in *Kyles v. Whitley*.[19] Specifically, the Court held that the prosecutor is the only person with knowledge of what evidence remains undisclosed; therefore, she is responsible for determining the net effect of such information and disclosing the evidence when "reasonable probability" has been attained.[20] The Court further declared that had the suppressed evidence been disclosed at trial, reasonable probability suggests that a different result would have been reached.[21]

On September 20, 1984, Mrs. Dolores Dye was murdered in the parking lot of a Schwegmann Brothers' grocery store (Schwegmann's) while placing her groceries in her car.[22] The assailant took the keys to the vehicle and fled the scene.[23] Statements were

---

16 21A AM. JUR. 2D *Criminal Law* § 830 (1981). This rule applies if the suppressed evidence "is material to guilt or to punishment . . . irrespective of the good or bad faith of the prosecution." *Id.* (footnotes omitted); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963) (stating same). This rule also includes impeachment evidence. Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1402-03 (1987). Ordinarily, this controverted evidence relates to issues that either the accused has no knowledge of, or that which is unlikely to be discovered by the accused prior to trial. 21A AM. JUR. 2D *Criminal Law* § 830 (1981). The prosecutor is not obligated to disclose all evidence to the accused, nor bring forth evidence that is "well established, uncontroverted, or cumulative." *Id.* (footnotes omitted). Absent a showing of intentional suppression of evidence by the prosecution, courts have denied relief to an accused. *Id.* A number of cases, however, have reversed convictions due to the negligent failure of the prosecution to disclose material evidence. *Id.*

17 Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995).

18 Jones, *supra* note 8, at 764-65. Tension often arises due to the irony that a prosecutor cannot possibly believe that failure to disclose would discredit faith in the verdict while—as an advocate for society prosecuting the case in good faith—concurrently believing that a defendant is guilty. *Id.* at 765.

19 115 S. Ct. 1555, 1560 (1995).

20 *Id.* at 1567-68.

21 *Id.* at 1569.

22 *Id.* at 1560. Schwegmann's is located on Old Gentilly Road in New Orleans, Louisiana. *Id.* At approximately 2:20 p.m., Dye, a 60-year-old woman, was placing her groceries in the trunk of her car, a red Ford LTD, when she was accosted by a young black man. *Id.* Dye struggled with her assailant, who then drew a revolver and shot Dye in the left temple. *Id.* Dye was killed instantly. *Id.*; Kyles v. Whitley, 5 F.3d 806, 808 (5th Cir. 1993).

23 *Kyles*, 115 S. Ct. at 1560.

taken from six eyewitnesses.[24] These statements were similar in certain respects,[25] but differed significantly in terms of the physical characteristics of the assailant.[26]

At approximately 9:15 p.m. on the night of the murder, the New Orleans police recorded the license plate numbers of cars that were parked in lots near Schwegmann's.[27] On September 22,[28] Joseph "Beanie" Wallace called the police and reported that he had purchased a red car from petitioner, Curtis Kyles, on the day of the murder.[29] Detective John Miller met with Beanie a few hours later.[30] During his conversation with Detective Miller, Beanie changed his story.[31] Beanie also voiced concern that he was sus-

---

[24] *Id.* Statements were obtained from Lionel Plick and Edward Williams, both of whom observed the murder while waiting for a bus. *Id.* at 1560 n.2. Three witnesses—Willie Jones, Isaac Smallwood, and Henry Williams—were working in the Schwegmann's lot when the murder took place, and they gave statements to the police. *Id.* As the LTD exited the parking lot, it drove close to Smallwood, enabling him to view the driver's face. *Kyles*, 5 F.3d at 808. Henry Williams also observed the murderer's face as the LTD slowly passed him. *Id.* Williams was approximately 12 feet from the LTD. *Id.* Robert Territo was stopped at a nearby traffic light at the time of the murder and gave a statement to the police the following day. *Kyles*, 115 S. Ct. at 1560 n.2. Darlene Cahill also reported to the police that she had witnessed the murder. *Kyles*, 5 F.3d at 808.

[25] *Kyles*, 115 S. Ct. at 1560. All six of the witnesses stated that the assailant was a black man and four of them claimed that his hair was braided. *Id.*

[26] *Id.* Two of the witnesses claimed that the assailant was 17 or 18 years old, while another witness stated that the man could have been as old as 28. *Id.* One witness described the man as having a slender build and being close to six feet tall, while another witness described the assailant as having a medium build, approximately 140-150 pounds, and about five feet, four inches or five feet, five inches tall. *Id.* One witness described the man as having short hair, while another described the murderer as having shoulder-length hair. *Id.* at 1561. One of the witnesses stated that the assailant had a mustache, while no other witness mentioned anything about facial hair. *Id.* 1560-61.

[27] *Id.* at 1561. The police recorded the license plate numbers because they believed that the murderer could possibly have driven his car to Schwegmann's and parked it in the lot before fleeing the scene in Dye's red Ford LTD. *Id.* The police proceeded to match the plate numbers with registration records to uncover the car owners' names and addresses. *Id.* At this point, the police still had no clue as to who murdered Dye. *Id.*

[28] Kyles v. Whitley, 5 F.3d 806, 808 (5th Cir. 1993).

[29] *Kyles*, 115 S. Ct. at 1561. Beanie claimed that he read about the murder in the newspaper and was worried that he possibly purchased the victim's car. *Id.* Beanie agreed to speak with the police. *Id.*

[30] *Id.*

[31] *Id.* When Beanie originally called the police, he identified himself as James Joseph. *Id.* A few hours later, when he met with Miller, he identified himself as Joseph Banks. *Id.* Although Beanie's real name is Joseph Wallace, the Court refers to him throughout the opinion as "Beanie" to avoid confusion. *Id.* at 1561 & n.3.

Beanie also made various changes to his story when he met with Miller. *Id.* at 1561. During his phone conversation with the police, Beanie stated that he purchased a red Thunderbird from Kyles on Thursday, September 20. *Id.* A few

pected of Dye's murder.[32]

Beanie appeared anxious to focus the attention of the police on Kyles as the murderer.[33] Beanie informed the officers that after purchasing the car, he, his "partner" Burns, and Kyles went to Schwegmann's to retrieve Kyles's car.[34] After hearing this, the officers accompanied Beanie to Schwegmann's, so that Beanie could show the officers the exact location where Kyles had parked his car.[35] Beanie was then brought back to the police station, where Detective Miller questioned him on the record for a third time.[36]

The third statement contradicted Beanie's earlier assertions.[37]

---

hours later, however, Beanie informed Detective Miller that he did not see Kyles on Thursday and had purchased a red LTD on Friday. *Id.* Beanie then brought Detective Miller to a bar where Beanie had left the LTD. *Id.* The LTD was later identified as belonging to Dye. *Id.*

During their conversation, Beanie informed Detective Miller that he lived with Johnny Burns, Kyles's brother-in-law. *Id.* Beanie referred to Burns as his "partner." *Id.* Burns was the brother of Pinky Burns, who had a common-law marriage with Kyles and was the mother of several of Kyles's children. *Id.* at 1561 n.4. Beanie described Kyles as being approximately 25 years old, slim, approximately six feet tall, with a "bush" hair style. *Id.* at 1561. Beanie stated that although Kyles wore his hair in plaits, Kyles "had a bush" when Beanie purchased the LTD. *Id.*

[32] *Id.* Beanie told Detective Miller that people observed him driving the LTD in the French Quarter on Friday night. *Id.* Beanie further conceded that he had changed the license plates on the LTD and was concerned that because he was in possession of the car, he would be charged with the murder. *Id.* Detective Miller agreed that because Beanie had possession of the vehicle, it would appear a bit peculiar. *Id.* The detective assured Beanie, however, that he was not in trouble. *Id.*

[33] *Id.* Kyles allegedly attempted to kill Beanie on a previous occasion and, according to Beanie, Kyles made an occupation out of robbing people. *Id.* Beanie informed Miller that Kyles typically carried two guns, a .38 and a .32, and also made a reference to Miller that if the police "set [Kyles] up good," they would be able to obtain the actual gun that killed Dye. *Id.* Beanie led Detective Miller and Sgt. James Eaton to Kyles's apartment on Desire Street. *Id.*

[34] *Id.* Beanie stated that the three went to Schwegmann's at approximately 9:00 p.m. on Friday and further described Kyles's car as "an orange four-door Ford." *Id.* Photographs later introduced at trial, however, revealed that Kyles owned a two-door Mercury. *Id.* at 1561 n.5. Beanie explained that Kyles's car was located on the same side of the parking lot where Dye was murdered. *Id.* at 1562.

[35] *Id.* Beanie claimed that when he, Burns, and Kyles arrived at the parking lot, Kyles retrieved a brown purse from nearby bushes and later hid the purse in a wardrobe that was in his apartment. *Id.* Beanie also stated that a number of groceries were in the car, along with a new baby's potty. *Id.* Beanie informed Sgt. Eaton that Kyles would put his garbage out the next day and further told Sgt. Eaton that "if Kyles was 'smart' he would 'put [the purse] in [the] garbage.'" *Id.* Beanie made it obvious to the police that he expected to be compensated for his information, and the police further assured Beanie that he would be reimbursed the $400 that he had paid for the LTD. *Id.*

[36] *Id.*

[37] *Id.* Beanie stated that after he bought the car, he and Kyles unloaded the groceries that were in the LTD and put them in Kyles's car. *Id.* Beanie claimed that Kyles retrieved a brown purse from the car's front seat and then the two drove in their

The police neither noted nor inquired about the inconsistencies.[38] Beanie gave a fourth statement to the police that also contradicted his previous stories;[39] this statement recounted certain events that took place at Kyles's apartment on the Sunday following the murder.[40] On Monday, September 24, Kyles was arrested while attempting to leave his apartment.[41] Pursuant to a warrant, the police searched Kyles's apartment and retrieved evidence, including a purse, gun and holster, ammunition, and pet food.[42] John Dillman, the lead detective, arranged a photo lineup which in-

---

respective vehicles to Kyles's apartment and again unloaded the groceries. *Id.* Beanie also stated that later that evening, he, along with Burns and Kyles, went to Schwegmann's to retrieve Kyles's car and a large brown purse that was located near a building. *Id.* Beanie did not explain these inconsistent statements. *Id.*

38 *Id.*

39 *Id.* Beanie's fourth statement was taken in November between Kyles's first and second trials. *Id.*

40 *Id.* On that Sunday, Beanie had a telephone conversation with a police officer. *Id.* During that conversation, the officer asked Beanie whether Kyles had possession of the pistol that was used to murder Dye. *Id.* After the conversation, Beanie arrived at Kyles's apartment at approximately 2:00 p.m. *Id.* At 5:00 p.m., Beanie left the apartment to call Detective Miller. *Id.* Beanie returned to the apartment at approximately 7:00 p.m. and once again left around 9:30 p.m.; this time Beanie was meeting with Detective Miller. *Id.* Miller also inquired about the gun. *Id.* Beanie's fourth statement indicates that he and Detective Miller were together until approximately 3:00 a.m. on Monday, September 24. *Id.*

During the early morning hours that same day, Sgt. Eaton sent detectives to retrieve the debris that was outside Kyles's apartment building. *Id.* Sgt. Eaton indicated in an interoffice memorandum that he had "reason to believe the victims [sic] personal papers and the Schwegmann's bags will be in the trash." *Id.*

41 *Id.*

42 *Id.* The police recovered a .32 caliber revolver from behind the stove that contained five live rounds plus a spent cartridge. *Id.* Ballistics tests later confirmed that this weapon was the one used to murder Dye. *Id.* The police also discovered a homemade shoulder holster for the pistol and two boxes of ammunition. *Id.* One box contained the same brand of .32 caliber rounds that were found in the pistol. *Id.* Schwegmann's bags containing cans of cat and dog food were found in the kitchen; some of the brands were those typically purchased by Dye. *Id.* The police did not find any other groceries that could have possibly been linked to Dye, nor did they uncover a "potty." *Id.* at 1562-63. At the police station, the police opened the bags of debris they had collected from outside of Kyles's apartment building and discovered a Schwegmann's bag containing some of Dye's possessions, including her purse and identification. *Id.* at 1563.

The police dusted certain items for fingerprints. *Id.* The gun was clean. *Id.* Although prints were found on the LTD as well as the purse, none of them were identified as Kyles's. *Id.* Furthermore, Dye's prints were not identified on the cans of pet food. *Id.* A piece of paper was retrieved from the LTD's front passenger-side floorboard, which had Kyles's prints on it. *Id.* Although the paper was recorded as having been a Schwegmann's sales receipt, the contents of the receipt were destroyed by the chemicals used to lift Kyles's prints off of it. *Id.* The police discovered a second Schwegmann's sales slip in the trunk. *Id.* Kyles's prints were not on this slip. *Id.* Of all of the fingerprints found, Beanie's were never compared to any. *Id.*

cluded a picture of Kyles.[43] Dillman displayed the lineup to five out of six eyewitnesses who gave statements to the police; three of them identified Kyles as the person who murdered Dye, while the other two were unable to give a positive identification.[44]

In November 1984, Kyles was tried before a Louisiana jury for first-degree murder.[45] The jury, however, could not reach a verdict, resulting in a mistrial.[46] Kyles was retried in December 1994, and was subsequently convicted and sentenced to death.[47] On direct appeal, the Supreme Court of Louisiana considered the assign-

---

[43] *Id.* The photo lineup did not include a photograph of Beanie. *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* The State's case focused on the testimony of four eyewitnesses present at the crime. *Id.* Previously, three of these witnesses had identified Kyles in a photo lineup. *Id.* Kyles, however, maintained his innocence. *Id.* The heart of the defense's case was that Beanie framed Kyles. *Id.* The defense argued that Beanie's motive was to get rid of Kyles so that he could romance Pinky Burns and receive the reward money. *Id.* According to the defense theory, Beanie shifted the attention of the police to Kyles by planting evidence in Kyles's apartment. *Id.* The defense buttressed their argument by offering supporting witnesses and supplying an alibi that at the time of the murder, Kyles was picking his children up from school. *Id.* Beanie did not testify during the course of the trial. *Id.* Although the prosecution had a much stronger case than the defense as a result of the State's suppression of evidence, the case still resulted in a hung jury. *Id.*

[47] *Id.* at 1564. During Kyles's second trial, the State again focused on the four eyewitnesses who identified Kyles. *Id.* In addition to the witnesses, the prosecution produced a blown-up picture taken at the scene of the crime shortly after it occurred. *Id.* The State asserted that Kyles's car was in the background. *Id.* Although the State had no additional evidence to support this theory, the State consistently suggested during cross-examination of defense witnesses that Kyles left the car at Schwegmann's on the day of the crime and then picked the car up at a later time. *Id.* Beanie did not testify. *Id.*

The defense once again argued that the witnesses were mistaken. *Id.* Several witnesses, including Kevin Black, testified to observing Beanie, his hair in plaits, approximately one hour after the murder driving a red car that resembled Dye's. *Id.* One witness, who described Beanie's hair as being in braids, testified that Beanie attempted to sell him the car on Thursday. *Id.* Another witness testified that on Friday, Beanie, whose hair was in a "Jheri curl," tried to sell him the car also. *Id.* Burns testified that he had observed Beanie, on the Sunday after the murder, hunched down near the stove in Kyles's apartment where the police eventually found the pistol. *Id.* Testimony was also offered regarding Beanie's romantic interest in Pinky Burns. *Id.* The defense further presented testimony that Kyles's family had a dog and a cat to explain why pet food was discovered in Kyles's apartment. *Id.*

Kyles took the stand and denied being involved in the murder. *Id.* Kyles explained that on Friday, Beanie had taken him in a red car to Schwegmann's so that Kyles could purchase cigarettes and transmission fluid. *Id.* Kyles further explained that the sales receipt found in the vehicle must have fallen out of the bag when he was removing the contents from the bag. *Id.*

On rebuttal, the State had Beanie stand next to Kyles in the courtroom and the eyewitnesses reaffirmed that Kyles was the person they saw the day of the murder. *Id.* Beanie received a $1,600 reward following Kyles's conviction. *Id.*

ments of error.[48] The court found that the debris located within the vicinity of Kyles's home was abandoned and, therefore, Kyles was not entitled to an expectation of privacy when the police seized the debris without a warrant.[49] The court further declared that the search warrant that led to the discovery of the weapon satisfied the particularity requirement and that the defense witnesses were not intimidated to the point of adversely affecting Kyles's substantive rights.[50] Consequently, the court affirmed Kyles's conviction and sentence.[51]

State collateral review revealed that the State did not disclose evidence favorable to Kyles.[52] Upon exhaustion of his state appellate remedies, Kyles petitioned the United States District Court for the Eastern District of Louisiana for federal habeas corpus relief.[53] The district court denied Kyles's petition.[54]

On appeal, the Court of Appeals for the Fifth Circuit rejected Kyles's contention that the State had suppressed exculpatory evi-

---

48 State v. Kyles, 513 So. 2d 265, 267 (La. 1987), *cert. denied*, 486 U.S. 1027 (1988). The court considered four issues on appeal. *Id.* at 267. First, the court considered the trial court's denial to suppress evidence taken from the vicinity of the defendant's home. *Id.* Second, the court contemplated the prosecution's intimidation of defense witnesses by requesting the court to advise the witnesses of their Fifth Amendment rights against self-incrimination, and "notifying the court that the witnesses may be charged as accessories after the fact to the murder." *Id.* Third, the court pondered the issue regarding the trial judge's efforts to curtail the closing arguments of the defense. *Id.* Finally, the court considered whether the prosecutor's comments during closing arguments were inappropriate with regard to guilt and punishment. *Id.*

49 *Id.* at 269-70.

50 *Id.* at 270, 272.

51 *Id.* at 277. In affirming the lower court's decision, the Supreme Court of Louisiana noted that "such an unprovoked crime against an elderly person . . . is totally abhorrent to a civilized society." *Id.* at 276. The court concluded that Kyles acted according to a plan for which there was no moral justification, and because no mitigating circumstances existed, the jury was correct in their decision. *Id.* at 276, 277.

On direct appeal, the United States Supreme Court denied Kyles's petition for writ of certiorari. Kyles v. Louisiana, 486 U.S. 1027 (1988).

52 Kyles v. Whitley, 115 S. Ct. 1555, 1564 (1995).

53 *Id.* Among other things, Kyles alleged that because the prosecution had suppressed material evidence, his conviction constituted a violation of *Brady v. Maryland* because the suppressed evidence was favorable to his defense. *Id.* (citing Brady v. Maryland, 373 U.S. 83 (1963)); *see infra* notes 80-85 (discussing the *Brady* decision).

The purpose of the writ of habeas corpus is to afford an individual who has allegedly been restrained of his or her liberty a prompt hearing to determine the legality of his or her detention. 39 C.J.S. *Habeas Corpus* § 6 (1976). The writ serves as a procedural device created to release an individual who has been unlawfully detained. *Id.* Habeas corpus discharges individuals from conviction to protect them from illegal custody. *Id.* The right to utilize habeas corpus is vital and, therefore, takes precedence over factors such as maintaining procedural structure and conformity. *Id.*

54 *Kyles*, 115 S. Ct. at 1564.

dence.[55] The court found no reasonable probability that the result of the trial would have been different had the prosecution disclosed certain evidence to the defense.[56] The court further declared that neither prosecutorial misconduct nor insufficient representation inhibited Kyles's defense.[57] The Fifth Circuit consequently affirmed the decision of the district court.[58]

The United States Supreme Court granted certiorari.[59] Justice Souter, writing for the majority, pronounced that the state's obligation to disclose favorable evidence to the defense depends upon the cumulative effect that such suppressed evidence will have on the defense's case.[60] The Court stated that this obligation remains irrespective of the police's failure to bring such favorable evidence to the attention of the prosecutor.[61] The Court assessed the significance of the suppressed evidence and determined that the unscathed physical evidence would not have overwhelmingly proved that Kyles was guilty of murder.[62]

---

55 Kyles v. Whitley, 5 F.3d 806, 811, 820 (5th Cir. 1993). To support his claim, Kyles brought to the court's attention the following evidence that was not disclosed at trial: (1) A transcript of Beanie's first conversation with the police; (2) a written statement that Beanie had signed after his interviews with the police; (3) notes that the prosecuting attorney took while interviewing Beanie; (4) a police memorandum instructing the officers to retrieve garbage located at 2313 Desire Street; and (5) a list containing the license plate numbers of the cars that were in the Schwegmann's parking lot on Thursday, September 20. *Id.* at 811. Kyles also contended that the court could not use the reasonable probability analysis set forth in *United States v. Bagley* in deciding a capital case. *Id.* (citing United States v. Bagley, 473 U.S. 667 (1985)); *see infra* notes 102-07 (discussing the *Bagley* decision).

56 *Kyles*, 5 F.3d at 818. In determining the probable effect of the nondisclosure, the court first considered the ammunition found in Kyles's apartment. *Id.* at 816-17. The court found that the jury was reasonable in concluding that the ammunition was in Kyles's apartment because Kyles possessed the gun. *Id.* at 817. The court also decided that Kyles's explanation for keeping pet food in his apartment was inadequate. *Id.* Consequently, the court found that because Kyles failed to discount the evidence produced at trial, the outcome of the proceeding was fair and just. *Id.*

57 *Id.* at 820. The court stated that the jury rejected the defense's theory as a result of the overwhelmingly incriminating evidence pointing to Kyles's guilt. *Id.*

58 *Id.*

59 Kyles v. Whitley, 114 S. Ct. 1610 (1994).

60 Kyles v. Whitley, 115 S. Ct. 1555, 1559, 1560 (1995). In reaching its decision, the Supreme Court relied on the established rule of *Brady v. Maryland*, which states that due process is violated when the prosecution suppresses favorable evidence that is material to either the guilt or punishment of an accused, regardless of the prosecution's good or bad faith. *Id.* at 1565 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)); *see infra* notes 80-85 and accompanying text (discussing *Brady*).

61 *Kyles*, 115 S. Ct. at 1559.

62 *Id.* at 1574. The Court admitted that if the evidence had been disclosed, not every element of the State's case would have been undermined. *Id.* In rendering its decision, the Court looked to the suppressed statements of eyewitnesses, the suppressed statements and inconsistencies that Beanie made to the police, and the sup-

In a 1935 case, *Mooney v. Holohan*,[63] the United States Supreme Court recognized that a conviction procured by means of false evidence implicated the Fourteenth Amendment.[64] In *Mooney*, the petitioner contended that he was being held in confinement by the state without due process.[65] The Supreme Court held that a state prosecutor denies a defendant due process of law when he or she knowingly uses perjured testimony to obtain a conviction and intentionally suppresses the evidence that would have impeached and refuted the testimony.[66] The Court further noted that it is not the act or omission per se, but, rather, the effect upon the defendant's hearing that results in a denial of due process.[67]

Seven years later, in *Pyle v. Kansas*,[68] the United States Supreme Court reaffirmed the rule established in *Mooney*.[69] In *Pyle*, the petitioner alleged that his conviction resulted from the

---

pressed list of cars present at the murder scene shortly after the crime occurred. *See id.* at 1569-74.

63 294 U.S. 103 (1935).

64 *Id.* at 112-13; *see also* Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that a conviction secured through the use of false testimony violates the Due Process Clause of the Fourteenth Amendment). In *Mooney*, the petitioner had been convicted of first-degree murder and was sentenced to life imprisonment. *Mooney*, 294 U.S. at 109. He then sought leave to file a habeas corpus petition. *Id.*

65 *Id.* at 110. In charging the State, petitioner alleged that his conviction was based on perjured testimony. *Id.* Petitioner also stated that had the authorities not suppressed certain evidence, the testimony given against him would have been impeached and refuted. *Id.* Finally, petitioner asserted that his liberty interests were being denied by the State's failure "to provide any corrective judicial process by which a conviction so obtained may be set aside." *Id.*

The District Court for the Northern District of California dismissed petitioner's writ of habeas corpus. Mooney v. Holohan, 7 F. Supp. 385, 390 (N.D. Cal. 1934). The Court of Appeals for the Ninth Circuit also denied his appeal. *In re* Mooney, 72 F.2d 503, 508 (9th Cir. 1934).

66 *Mooney*, 294 U.S. at 112-13. The Court explicitly stated that "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." *Id.* at 112; *see also* Hughes v. Bowers, 711 F. Supp. 1574, 1580 (N.D. Ga. 1989) (demonstrating that in order to show a denial of due process, the prosecutor's misbehavior must have prejudiced the defendant), *aff'd*, 896 F.2d 558 (11th Cir. 1990).

67 *Mooney*, 294 U.S. at 107. The Supreme Court never ruled on the charges of prosecutorial misconduct in *Mooney*. Rosen, *supra* note 10, at 700 n. 37. Instead, the Court dismissed Mooney's habeas corpus petition without prejudice for failure to exhaust all available state remedies. *Mooney*, 294 U.S. at 115.

68 317 U.S. 213 (1942).

69 *Id.* at 216. Pyle had been convicted of murder and robbery. *Id.* at 213-14. Consequently, he received a life sentence for the murder conviction and a sentence of 10 to 21 years for the robbery conviction. *Id.* at 214. Pyle applied to the Supreme Court of Kansas for a writ of habeas corpus, which the court subsequently denied. Pyle v. Armine, 112 P.2d 354 (Kan. 1941), *rev'd*, Pyle v. Kansas, 317 U.S. 213 (1942). The United States Supreme Court granted the petitioner certiorari because of the due process issues involved. Pyle v. Kansas, 316 U.S. 364 (1942).

utilization of perjured testimony and the suppression of testimony favorable to his defense.[70] The Supreme Court noted that the petitioner's contentions strongly indicated that prosecutorial misconduct formed the basis for his conviction.[71] The Court stated that if these allegations were in fact proven, the petitioner would have been denied his right to a fair trial as guaranteed by the Constitution.[72]

The United States Supreme Court enunciated a standard for setting aside a verdict in habeas cases in *Kotteakos v. United States*.[73] In *Kotteakos*, petitioner and six other defendants were convicted of conspiracy to violate the National Housing Act.[74] Petitioner con-

---

The Court decided *Mooney v. Holoran* and *Pyle v. Kansas* in a procedural posture that rendered the question of materiality irrelevant. Rosen, *supra* note 10, at 705-06.

[70] *Pyle*, 317 U.S. at 214. Filed with petitioner's brief were documents specifically alleging that the State threatened and coerced a number of witnesses to falsely testify and suppressed favorable testimony of others. *Id.* Petitioner argued that the prosecutor's actions constituted a violation of his constitutional rights. *Id.* He demonstrated that, six months subsequent to his trial, the State convicted another individual in connection with the same murder and robbery of which petitioner had been convicted and that contradictory evidence from that trial exonerated him. *Id.* He further supplied the Court with an affidavit from one of the witnesses, which provided that the witness gave perjured testimony because the police had threatened him with a penitentiary sentence for burglary if he did not comply with their demands. *Id.* at 215.

[71] *Id.* at 215-16.

[72] *Id.* at 216. The Supreme Court noted that although petitioner's conviction seemed valid on its face, petitioner had a strong argument that his conviction was a result of perjured testimony and deliberate suppression of evidence by the authorities. *Id.* The Court therefore remanded the case for further proceedings. *Id.*

In 1959, the Supreme Court decided in *Napue v. Illinois* that allowing perjured testimony in a trial constitutes a violation of a defendant's due process rights. Napue v. Illinois, 360 U.S. 264, 269 (1959). In *Napue*, the prosecution's primary witness testified that the prosecution did not promise him compensation in exchange for his testimony. *Napue*, 360 U.S. at 265. The Illinois Supreme Court affirmed the defendant's conviction even though the court found that the primary witness lied with regard to his compensation. Napue v. People, 150 N.E.2d 613, 615 (Ill. 1958), *rev'd*, Napue v. Illinois, 360 U.S. 264 (1959). The United States Supreme Court reversed, holding that knowingly using perjured testimony or false evidence taints a conviction and therefore violates the Due Process Clause. *Napue*, 360 U.S. at 272; *see* Rosen, *supra* note 10, at 706-07 (stating that false evidence may affect the outcome of a trial by the likely effect it may have on the jury's judgment).

[73] 328 U.S. 750 (1946).

[74] *Kotteakos*, 328 U.S. at 752, 753. The defendants were convicted of using false information to coax lending institutions into administering loans to the Federal Housing Administration. *Id.* at 752. The evidence admitted at trial proved the existence of eight or more separate conspiracies by isolated groups of defendants that had no connection with one another. *Id.* at 754-55. The only common thread among the conspiracies was the use of the services of a common broker to maneuver their fraudulent applications. *Id.* at 754. Although the State only charged the defendants with one conspiracy, the Court held that the actions and declarations of one individual bound all of the others. *Id.* at 750, 755.

tended that charging him with one general conspiracy[75] substantially prejudiced his rights.[76] The Supreme Court found it highly probable that petitioner's rights were substantially affected and that the error influenced the jury's decision.[77]

The rule promulgated in *Mooney*[78] and *Pyle*[79]—that a prosecutor's nondisclosure of evidence violates due process—was extended by the United States Supreme Court in *Brady v. Maryland*.[80] Brady and his codefendant were tried separately for the same murder and were both sentenced to death.[81] Prior to trial, the defense requested from the prosecution all statements that were made by Brady's codefendant.[82] The prosecution withheld a statement containing the codefendant's confession.[83] The Supreme Court conse-

---

75 *Id.* at 752. The petitioners argued that the evidence presented by the government to convict him of one general conspiracy actually proved the existence of eight separate conspiracies that were all executed in a similar fashion through a common key individual. *Id.* Essentially, the Court faced a decision as to whether the charge of a single grand conspiracy prejudiced the trial more than a charge of eight separate conspiracies. *Id.* at 755.

76 *Id.* at 752. The Court relied on *Berger v. United States* in rendering its decision. *Id.* at 756 (citing Berger v. United States, 295 U.S. 78 (1935)). In *Berger*, the Court held that the variance of proof charging one conspiracy when actually two were proved did not prejudice the defendants. Berger v. United States, 295 U.S. 78, 83-84 (1935). The issue in *Berger* was whether or not this variance affected the substantial rights of the accused. *Id.* at 82. The *Berger* Court relied on the "harmless error statute." *Id.*

The *Kotteakos* Court held that the "harmless error statute" was controlling in that case. *Kotteakos*, 328 U.S. at 757. According to the Court, that statute provided that:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

Id.

77 *Kotteakos*, 328 U.S. at 776. The Court reversed the judgment and remanded the case for further proceedings. *Id.* at 777.

78 294 U.S. 103 (1935). The established principle of *Mooney* is not meant to punish society for a prosecutor's misconduct. Brady v. Maryland, 373 U.S. 83, 87 (1963). Rather, the principle is invoked to afford an accused a fair trial. *Id.* The United States Supreme Court stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." *Id.*

79 317 U.S. 213 (1942).

80 373 U.S. 83 (1963). *Brady v. Maryland* is considered the seminal case for imposing a duty on a prosecutor to disclose material evidence that is favorable to an accused upon the defense's request. Lambros, *supra* note 1, at 106.

81 *Brady*, 373 U.S. at 84. At the trial, Brady admitted to playing a part in the crime. *Id.* He testified, however, that his companion, Boblit, actually pulled the trigger. *Id.*

82 *Id.* Many of Boblit's extrajudicial statements were disclosed to the defense. *Id.*

83 *Id.* A statement dated July 9, 1958 included this confession. *Id.* This evidence did not come to the attention of the defense until after Brady's trial, conviction, and sentencing. *Id.* Furthermore, his conviction had already been affirmed. *Id.*

quently faced the issue of whether due process required that Brady be granted a new trial on the issue of punishment.[84] The Court held that the prosecutor's suppression of evidence constituted a due process violation and required that Brady be granted a new trial on this issue.[85]

Based on the recently discovered evidence that the prosecutor had withheld, Brady moved for a new trial. *Id.* The trial court denied the motion. *See id.* The court of appeals dismissed the appeal without prejudice in accordance with the Maryland Post Conviction Procedure Act. Brady v. State, 160 A.2d 912, 916 (Md. 1960). The trial court also dismissed Brady's petition for post-conviction relief. *See Brady*, 373 U.S. at 85. The court of appeals, however, determined that the prosecutor's suppression of the evidence violated Brady's due process rights and remanded for a new trial on the issue of punishment, but not of guilt. Brady v. State, 174 A.2d 167, 172 (Md. 1961), *aff'd*, Brady v. Maryland, 373 U.S. 83 (1963). The case came before the Supreme Court on certiorari. Brady v. Maryland, 371 U.S. 812 (1962).

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

[85] *Id.* at 86, 88. Regarding the issue of petitioner's guilt, the Court stated that "[t]he appellant's sole claim of prejudice goes to the punishment imposed" and, consequently a retrial on the issue of guilt was unnecessary. *Id.* at 88. The Court reasoned that had Boblit's confession been admitted into evidence, the outcome of the trial would not have been affected and, therefore, the confession was not admissible on the issue of guilt. *Id.* The Supreme Court found, however, that Boblit's confession was material as to the issue of punishment. *Id.*

This decision had a major impact on the rights of an accused as well as the obligations of the prosecution. Lambros, *supra* note 1, at 111. This was the first time that the United States Supreme Court imposed a constitutional obligation on a prosecutor to disclose exculpatory evidence to the defense upon request. *Id.* The *Brady* Court announced what is known as the *Brady* rule, which provides 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." *Brady*, 373 U.S. at 87; *cf.* Arizona v. Youngblood, 488 U.S. 51, 57, 58 (1988) (holding that the police's failure to preserve potentially exculpatory evidence does not constitute a *Brady* violation unless it is proven that the police acted in bad faith); Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995) (stating that a prosecutor must be careful in exercising discretion of evidence that must be disclosed); United States v. Jones, 34 F.3d 596, 599 (8th Cir. 1994) (recognizing that the *Brady* rule applies to impeachment and exculpatory evidence), *cert. denied*, Jones v. United States, 115 S Ct. 1701 (1995); United States v. Robinson, 39 F.3d 1115, 1118 (10th Cir. 1994) (stating that due process mandates that the prosecution disclose any evidence that is favorable to the accused); United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991) (discussing the three elements comprising a valid *Brady* complaint); United States v. Starusko, 729 F.2d 256, 260 (3d Cir. 1984) (stating that the evidence that could impeach a government witness's testimony is considered exculpatory if the witness's credibility may be determinative of the guilt or innocence of the accused).

The Court recognized that the issue is not whether the prosecution intentionally withheld the evidence, but whether the withholding denied the accused a fair trial. *See Brady*, 373 U.S. at 87 (stating that the focus should be to avoid an unfair trial rather than punish society for the prosecutor's misdeeds). This rule is premised on the Constitution's edict ensuring all criminal defendants a fair trial. Lambros, *supra* note 1, at 112; *see also* Quinn, *supra* note 14, at 150-52 (discussing *Brady*).

A decade later, the Supreme Court stated in *Giglio v. United States* that the *Brady* rule also included impeachment evidence. *See* Giglio v. United States, 405 U.S. 150,

The Supreme Court expanded on a prosecutor's constitutional duty to disclose thirteen years later by defining materiality in *United States v. Agurs*.[86] In *Agurs*, the defendant was convicted of second-degree murder and pled self-defense.[87] The defense made only a general request for the disclosure of exculpatory evidence.[88] Subsequent to the trial, however, the defense discovered suppressed evidence of the victim's criminal record that revealed past convictions for violent crimes.[89] The United States Supreme Court was forced to determine whether the *Brady* rule covered situations where the defense did not specifically request disclosure of evidence, and the evidence was not perjured.[90]

In formulating their conclusion, the Court in *Agurs* established three standards of materiality for courts to employ when determining retrospectively how a piece of evidence, if disclosed,

---

154-55 (1972) (stating that the failure to disclose evidence affecting credibility is included in the general rule if a witness's reliability may determine guilt or innocence). In *Giglio*, the prosecutor suppressed the fact that the state promised its key witness immunity from prosecution if he testified. *Id.* at 150-51. At trial, the witness denied that such an agreement existed. *Id.* at 151. The United States Supreme Court reversed Giglio's conviction, holding that suppression of this evidence required a new trial in accordance with standards of due process. *Id.* at 155; *cf.* Napue v. Illinois, 360 U.S. 264, 272 (1959) (holding that a conviction obtained through the use of false testimony violates due process because the testimony may have affected the outcome of the trial); *Jones*, 34 F.3d at 599 (noting that a prosecutor does not have a constitutional duty to engage in a fishing expedition in order to find impeachment evidence); United States v. Burroughs, 830 F.2d 1574, 1578 (11th Cir. 1987) (stating that a new trial is required if it is reasonably likely that false testimony could have affected the decision of the jury), *cert. denied sub nom.* Rogers v. United States, 485 U.S. 969 (1988).

86 427 U.S. 97, 112-13 (1976).

87 *Id.* at 98, 100. Although the defendant admitted killing the victim, she claimed that the victim attacked her with a knife and that she had acted in self-defense. *Id.* at 100. The defense did not present any evidence at trial. *Id.*

88 *Id.* at 107; *see infra* note 91 (discussing the three scenarios developed by the *Agurs* Court in which defense counsel seeks or finds exculpatory evidence).

89 *Id.* at 100-01. Defense counsel found the victim's criminal record in the prosecutor's file. Capra, *supra* note 13, at 399. Three months after the trial, the defendant alleged that the suppression of the victim's prior criminal record required a new trial. *Agurs*, 427 U.S. at 100. Evidence manifesting the victim's violent past, of which the jury was unaware, would have buttressed defendant's self-defense claim. Capra, *supra* note 13, at 399.

The district court denied defendant's motion for a new trial. *See Agurs*, 427 U.S. at 101. The Court of Appeals for the District of Columbia Circuit reversed the defendant's conviction based on the fact that had the evidence been disclosed, the verdict may have been different. United States v. Agurs, 510 F.2d 1249, 1254 (D.C. Cir. 1975), *rev'd* 427 U.S. 97 (1976). The United States Supreme Court granted certiorari. United States v. Agurs, 423 U.S. 983 (1975)..

90 *Id.* at 103, 104, 106, 107; *see* Pennsylvania v. Ritchie, 480 U.S. 39, 57, 59 (1987) (stating that although a prosecutor is constitutionally obligated to disclose all material exculpatory evidence, the defense does not have a right to examine the prosecutor's files to obtain information).

would have affected an outcome.[91] The Supreme Court found that if the withheld evidence "creates a reasonable doubt that did not otherwise exist,"[92] then the evidence is material and its nondisclosure violates due process.[93]

---

91 *Agurs*, 427 U.S. at 103, 104, 106-07; Capra, *supra* note 13, at 400. The *Brady* rule suggests that the rule applies regardless of the prosecutor's intention. *Agurs*, 427 U.S. at 110. The Court suggests in *Agurs*, however, that the obligations imposed on the prosecutor are dependent upon the defense's request being either general or specific. *Id.* at 106-07; *see also* Reiss, *supra* note 16, at 1405 (noting that the implications for the prosecution vary depending upon whether the defense has made a specific or a general request for disclosure).

The *Agurs* Court distinguished three different situations. *Agurs*, 427 U.S. at 103-13. The first category includes situations where the prosecutor knowingly uses perjured testimony. *Id.* at 103. This situation requires the lowest standard of materiality. Lambros, *supra* note 1, at 120. The Court stated that if a reasonable likelihood exists that the false testimony affected the jury's decision, then the conviction should be vitiated. *Agurs*, 427 U.S. at 103. In essence, the evidence would be considered "material" because it is perjured. *See id.* at 104 (stating that in cases involving knowing use of perjured testimony by the prosecution, a strict standard of materiality is applied "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process"); *see also* Lambros, *supra* note 1, at 120 (asserting that perjured evidence is by nature material).

The second situation of cases arise when the defense specifically requests the disclosure of evidence and the prosecution fails to do so. *Id.* at 104. In this situation, the Supreme Court did not define a particular standard of materiality. Lambros, *supra* note 1, at 120. The Court did, however, suggest a harmless error review standard, which would be pro-defense. *Id.* at 120-21. Compared to the third standard developed by the Court, this standard appears to be more lenient to a defendant. *Id.* at 121.

The third and final category encompasses those situations where there has been either a general request or no request by the defense for exculpatory evidence. *Agurs*, 427 U.S. at 107. The Supreme Court held that a constitutional violation results if the undisclosed evidence "creates a reasonable doubt that did not otherwise exist." *Id.* at 112. This standard is considered to be a pro-prosecutor standard. Lambros, *supra* note 1, at 121.

The Supreme Court described the *Brady* standard of materiality to be "an inevitably imprecise standard." *Agurs*, 427 U.S. at 108. The Court emphasized that prosecutors will err towards disclosing evidence when faced with a perplexing situation. *Id.* Nevertheless, a prosecutor only violates his or her duty if the withheld evidence is so significant that a defendant is denied the right to a fair trial. *Id.*

92 *Agurs*, 427 U.S. at 112.

93 *Id.* The Supreme Court reversed the decision of the court of appeals on the grounds that, in determining whether the evidence was material and subject to disclosure, the lower court applied the wrong legal standard. *See id.* at 112-14 (discussing the correct standard of materiality and concluding that suppression of the victim's record did not result in an unfair trial). The Court specifically stated that "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Id.* at 112.

In 1982, the Supreme Court elaborated on the materiality requirement in *United States v. Valenzuela-Bernal.* United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (9th Cir. 1982). In this case, the defendant was charged with illegally importing aliens into the United States. *Id.* at 860. Border Patrol agents arrested three aliens, and the

Almost a decade later, in *Strickland v. Washington*,[94] the Supreme Court confronted a case based on a claim of ineffective assistance of counsel rather than one involving prosecutorial misconduct.[95] In *Strickland*, the defendant pled guilty to three capital murder charges and was sentenced to death.[96] Defendant claimed that he received ineffective assistance of counsel, in violation of the Sixth Amendment.[97] The Court evaluated the proper standards in

---

government concluded that two of them did not possess evidence that would be material to the defense. *Id.* at 861. The defendant made a motion to dismiss his indictment and claimed that he was deprived of testimony from witnesses that could have been favorable to his defense. *Id.*

The Supreme Court declared that the government's conduct did not violate the defendant's Fifth or Sixth Amendment rights. *Id.* at 872-73. The Court stated that Congress requires illegal aliens to be deported immediately; thus, to justify its actions, the government only needs to demonstrate that the witnesses did not possess material evidence favorable to the accused. *Id.* at 872. The Court held that in order to prove a constitutional violation, the defense must establish that the lost evidence was "both material and favorable" to the accused. *Id.* at 873.

The United States Supreme Court, in *California v. Trombetta*, confronted the issue of whether the Fourteenth Amendment required the state to preserve evidence with possible exculpatory value. California v. Trombetta, 467 U.S. 479, 481 (1984). The defendants in *Trombetta* were charged with driving under the influence of alcohol. *Id.* at 482. The police did not, however, retain the results of the breath test that revealed defendants' blood alcohol to be at a level of intoxication. *Id.* The defendants filed motions to suppress the breath tests based on the failure of the police to preserve the evidence. *Id.*

The Supreme Court upheld the actions of the police and noted that it was unlikely that these test results would have exculpated the defendants. *Id.* at 488-89; *see also* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (holding that a criminal defendant's due process rights are not violated when the police fail to preserve possible exculpatory evidence absent a showing of bad faith). The Court held that although the duty to gather and preserve evidence was not subject to the *Brady-Agurs* materiality standard, prosecutors are obligated to preserve evidence if it was readily apparent prior to its destruction that the evidence had exculpatory value and is of a nature that it would not be readily obtainable through any other means. *Trombetta*, 467 U.S. at 489. Thus, the Court decided that due process did not mandate that this evidence be preserved. *Id.* at 491.

Hence, *Valenzuela-Bernal* and *Trombetta* imply that due process concerns arise when either evidence is deliberately destroyed by the prosecution, the defense lacks the ability to demonstrate either materiality or favorability, or when alternative evidence is unavailable to the defense. Richard J. Oparil, *Making the Defendant's Case: How Much Assistance Must the Prosecutor Provide?*, 23 AM. CRIM. L. REV. 447, 455 (1986).

94 466 U.S. 668 (1984).

95 *Id.* at 671.

96 *Id.* at 672, 675.

97 *Id.* at 671, 683. The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against

assessing a criminal defendant's allegations that the Constitution mandates that a verdict and death sentence be set aside when a defendant receives ineffective assistance of counsel.[98] The Supreme Court held that the defendant's failure to demonstrate the requisite showing of sufficient prejudice or deficient performance defeated his ineffectiveness claim.[99]

Applying the test drafted in *Strickland*[100] to *Brady*[101] situations, the United States Supreme Court formulated a new standard of materiality in *United States v. Bagley*.[102] In *Bagley*, the defendant

---

him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

The Florida Supreme Court affirmed the defendant's sentences and convictions. Washington v. State, 362 So.2d 658, 667 (Fla. 1978), *cert. denied*, Washington v. Florida, 441 U.S. 937 (1979). The defendant sought collateral review in state court. *See Strickland*, 466 U.S. at 675. Among the numerous allegations, the defendant alleged that he received ineffective assistance of counsel because his attorney never requested a psychiatric examination. *Id.* at 675. Defendant further alleged that he received ineffective assistance because counsel failed to call witnesses during the sentencing phase in order to mitigate the circumstances and influence the jury to decide on a life imprisonment sentence rather than the death penalty. *See id.* at 675-76. Both the trial court and the Florida Supreme Court denied relief. Washington v. State, 397 So.2d 285, 287 (Fla. 1981). Defendant then filed a federal habeas corpus petition, which the district court denied after an evidentiary hearing. *Id.* at 678, 679. The Court of Appeals partly affirmed and partly vacated the decision of the district court and remanded the case, stating that considering the totality of the circumstances, a criminal defendant has a right to reasonably effective assistance of counsel. Washington v. Strickland, 673 F.2d 879, 907 (5th Cir. 1982), *reh'g granted*, 679 F.2d 23 (5th Cir. 1982) *and rev'd*, 693 F.2d 1243 (5th Cir. 1982), *rev'd* Strickland v. Washington, 446 U.S. 668 (1984). Defendant then sought and received certiorari from the United States Supreme Court. Strickland v. Washington, 462 U.S. 1105 (1983).

98 *Strickland*, 466 U.S. at 671. The Court held that a two-part test must be invoked to determine whether a defendant is deprived of his Sixth Amendment right to effective assistance of counsel. *See id.* at 688, 692; Fisher, *supra* note 3, at 1306. First, the defendant must demonstrate "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Second, the defendant must show that counsel's assistance was so prejudicial that it denied him a fair trial. *Id.* at 691-92.

In order to demonstrate the requisite prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The court stated that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

99 *Strickland*, 466 U.S. at 700. The Court held that the defendant failed to make the requisite showings and, thus, his proceedings were not unfair. *Id.* The Supreme Court therefore reversed the judgment of the court of appeals. *Id.* at 701.

100 466 U.S. 668 (1984).

101 373 U.S. 83 (1963).

102 473 U.S. 667, 682-83 (1985). The *Bagley* Court significantly modified the standards of materiality established in *United States v. Agurs*, 427 U.S. 97 (1976). Lambros, *supra* note 1, at 122.

claimed that his right to due process, as enunciated in *Brady v. Maryland*,[103] was violated.[104] Defense counsel made a pretrial request for any evidence pertaining to compensation received by the state's witnesses in exchange for their testimony.[105] The task before the Supreme Court was to ascertain a standard of materiality to be implicated when determining whether a prosecutor's failure to disclose impeachment evidence upon the defense's request warrants the reversal of a conviction.[106] The Supreme Court held that the standard of materiality to be applied to the defendant's specific request of evidence is whether it is reasonably probable that the outcome of the case would have been different if the compensation contracts offered by the State had been disclosed at trial.[107]

In *Brecht v. Abrahamson*,[108] the Supreme Court's attention shifted from standards implicated when ascertaining materiality to those utilized in granting habeas relief.[109] Although he claimed that the killing was accidental,[110] the defendant in *Brecht* was convicted of murder in the Wisconsin state court system and received a sentence of life in prison.[111] During the trial, the state attempted

---

103 373 U.S. 83, 86-87 (1963); *see supra* notes 80-85 and accompanying text (discussing the *Brady* decision in detail).

104 *Bagley*, 473 U.S. at 671-72.

105 *Id.* at 669-70. The defense's request was timely and specific. *See id.* (stating that the defense's discovery motion was made 24 days prior to trial and setting forth the specific language of the motion). Nevertheless, the prosecution withheld contracts made between two principal state witnesses and a federal investigative agency which ensured that they would be compensated for their cooperation. *Id.* at 671. The prosecutor asserted that he had been unaware of the contracts and that had he known of their existence, they would have been furnished to the defendant. *Id.* at 671 n.4 The defendant contended that the witnesses could possibly have been impeached if the prosecution had disclosed this evidence to the defense. *Id.* at 672.

106 *Id.* at 669. The Supreme Court expanded the scope of the *Brady* rule to cover impeachment evidence. *Id.* at 676 (citing Giglio v. United States, 405 U.S. 150, 154 (1972)). Moreover, the Court promulgated a new definition of materiality. *Id.* at 682; *see also* Lambros, *supra* note 1, at 124 (describing and analyzing the new standard of materiality).

107 *Bagley*, 473 U.S. at 682. The Court held that "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." *Id.* The Court also renounced the distinctions articulated in *Agurs* between specific requests, general requests, and no requests at all. *Id.* The Court held that a reviewing court is to apply this one standard of materiality to all instances of nondisclosure. *Id.* at 683.

108 113 S. Ct. 1710 (1993). For further discussion of *Brecht*, see generally James A. Carey, Jr., Note, 24 SETON HALL L. REV. 1636 (1994).

109 *See Brecht*, 113 S. Ct. at 1716.

110 *Id.* at 1714.

111 *Id.* at 1715. In the state trial court, the jury convicted the defendant and gave him a life sentence. *Id.* In rendering its decision, the court applied the rule set forth

to impeach the defendant by making numerous references to his failure to inform anyone, before being read his *Miranda* warnings,[112] that the killing was in fact an accident.[113] Numerous allusions were also made to his silence after being read the *Miranda* warnings.[114]

The United States District Court for the Western District of Wisconsin set aside the conviction on habeas review.[115] The United States Court of Appeals for the Seventh Circuit reversed the district court and reinstated the conviction.[116] The Supreme Court granted certiorari to determine whether the harmless-error standard as set forth in *Chapman*[117] applies on collateral review.[118] The

---

in *Doyle v. Ohio*. *Id.* at 1716 (citing Doyle v. Ohio, 426 U.S. 610, 619 (1976)). The *Doyle* rule states that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Doyle*, 426 U.S. at 619. The Wisconsin Court of Appeals held that the error was prejudicial and substantiated a reversal of the conviction. State v. Brecht, 405 N.W.2d 718, 723 (Wis. Ct. App. 1987), *rev'd*, 421 N.W.2d 96 (Wis. 1988). The conviction was reinstated by the Wisconsin Supreme Court, which held that the standard established in *Chapman v. California* for trial errors is "harmless beyond a reasonable doubt." State v. Brecht, 421 N.W.2d 96, 104, 106 (Wis. 1988).

112 Miranda v. Arizona, 384 U.S. 436, 444 (1966). The following warnings are typically provided in a Miranda waiver:

> (1) You have the right to remain silent. (2) Anything you say can and will be used against you in a court of law. (3) You have the right to a lawyer and have him present with you while you are being questioned. (4) If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. (5) You can decide at any time to exercise these rights and not answer any questions or make any statements. (6) Do you understand each of these rights I have explained to you? (7) Having these rights in mind, do you wish to talk to us now?

W. Brian Stack, Note, 25 SETON HALL L. REV. 353, 358 n.24 (1994).

113 *Brecht*, 113 S. Ct. at 1714-15.

114 *Id.* at 1715.

115 Brecht v. Abrahamson, 759 F. Supp. 500, 510 (W.D. Wis. 1991), *rev'd*, 944 F.2d 1363 7th Cir. 1991), *aff'd*, 113 S. Ct. 1701 (1993). Although the district court conceded that the use of the defendant's post-*Miranda* silence constituted a violation of his rights under *Doyle*, it did not consider this error harmless beyond a reasonable doubt. *Id.*

116 Brecht v. Abrahamson, 944 F.2d 1363, 1376 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1701 (1993). The court of appeals decided that the references to the defendant's post-*Miranda* silence constituted a violation of due process. *Id.* at 1368, 1375-76. It determined, however, that in harmless-error review cases, the applicable standard is whether the error substantially influenced the jury when rendering their decision, as promulgated in *Kotteakos v. United States*. *Id.* at 1375 (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

117 Chapman v. California, 386 U.S. 18, 24 (1967); *see supra* note 111 (discussing the *Chapman* standard for trial errors).

118 *See Brecht*, 113 S. Ct. at 1716 (explaining the Court's reasons for granting certiorari).

Court held that the *Kotteakos* standard[119] is to be applied on collateral review and therefore denied habeas relief because the jury was not substantially influenced by the error that occurred at trial.[120]

The United States Supreme Court recently confronted the issue of a prosecutor's constitutional duty to disclose exculpatory evidence in *Kyles v. Whitley*.[121] Justice Souter, writing for the majority, traced the evolution of this duty from early twentieth-century decisions to the present day.[122] After addressing the importance of the materiality definition derived from *United States v. Bagley*,[123] the majority articulated that four aspects emanating from this definition warranted discussion.[124]

First, Justice Souter discussed the importance of the words "reasonable probability" in accurately comprehending and applying the materiality standard.[125] The majority posited that the inquiry lies in whether the accused received a fair trial despite the

---

119 *See supra* note 76 and accompanying text (discussing the harmless error statute relied on by the *Kotteakos* Court).

120 *Brecht*, 113 S. Ct. at 1722. The Court explained that the *Chapman* approach is used for direct review cases and, therefore, the standard set forth in *Kotteakos* is tailored to serve the purpose of collateral review. *Id.* at 1721-22.

121 115 S. Ct. 1555, 1560 (1995). The United States Supreme Court explained that certiorari had been granted in part because capital cases require exacting care. *Id.* at 1560 (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.")).

122 *Id.* at 1559, 1565. Justices Stevens, O'Connor, Ginsburg, and Breyer joined Justice Souter in the majority opinion. *Id.* at 1559. Justice Stevens, joined by Justices Ginsburg and Breyer, concurred, while Justice Scalia, joined by Justices Rehnquist, Kennedy, and Thomas, dissented. *Id.*

Justice Souter noted that cases involving a prosecutorial duty to disclose are most prominently identified with *Brady v. Maryland*, which was derived from its predecessors *Mooney v. Holohan* and *Pyle v. Kansas*. *Id.* at 1565; *see supra* notes 63-67 and accompanying text (discussing *Mooney*); notes 68-72 and accompanying text (discussing *Pyle*); notes 80-85 and accompanying text (discussing *Brady*). The Court restated the *Brady* rule and then proceeded to discuss the principles set forth in *United States v. Agurs*, which distinguished three possible situations where a *Brady* claim may arise. *Id.* at 1565; *see supra* notes 86-93 and accompanying text (discussing *Agurs*).

123 473 U.S. 667 (1985). The *Kyles* Court reiterated the principles of *Bagley*, emphasizing the "reasonable probability" test for defining materiality. *Kyles*, at 1565; *see supra* notes 107-08 and accompanying text (discussing the *Bagley* standard of materiality).

124 *Kyles*, 115 S. Ct. at 1565; *see supra* notes 107-08 and accompanying text (discussing *Bagley* materiality).

125 *Kyles*, 115 S. Ct. at 1565-66. The Court observed that a prosecutor's constitutional duty to disclose is dependant upon the potential effects the favorable but undisclosed evidence may have on trial proceedings. *Id.* The majority further noted that materiality does not require proof by a preponderance of evidence that the defendant would have been acquitted had the relevant information been disclosed. *Id.* at 1566.

lack of evidence.[126] Second, the Court stated that it is improper and misleading to perceive *Bagley* materiality as "a sufficiency of evidence test."[127] The proper standard, the Court instructed, addresses the nature of the suppressed evidence: A *Brady* violation exists if the inquiry leads to the conclusion that the evidence would conceivably cast doubt upon the credibility of the conviction.[128]

In analyzing the third aspect of materiality, the Court addressed and subsequently denounced the approach taken by the court of appeals.[129] Justice Souter instead opined that it is unnecessary to apply a harmless error review to a *Bagley* error.[130] The Court concluded by holding that a *Bagley* error cannot be deemed harmless pursuant to *Brecht*.[131]

Finally, the Justice discussed the fourth aspect of *Bagley* materiality, emphasizing that the definition was designed to pertain to the cumulative effect of the suppressed evidence.[132] The Court

---

126 *Id.* Justice Souter distinguished this concept from the faulty notion that, in making a materiality determination, the question is whether it is more likely that the verdict would have been different if the evidence had been disclosed to the jury. *Id.* The Court succinctly stated that applying the proper standard justifies faith in the verdict. *Id.*

127 *Id.* The majority declared that *Bagley* materiality does not mandate that the suppressed evidence be weighed to calculate whether or not it would have been sufficient to acquit the defendant. *Id.* Moreover, the Court pointed out that sufficiency of evidence is not the standard invoked in deciding criminal convictions. *Id.* Thus, the majority explained, when determining whether suppressed evidence is considered material under *Bagley*, it is completely erroneous to burden the defense with discounting the inculpatory evidence and then establishing that ample evidence does not exist to convict the defendant. *Id.*

128 *Id.*

129 *Id.* The court of appeals took the approach that, once a constitutional error has been detected under *Bagley*, the reviewing court must then proceed with a harmless error review. Kyles v. Whitley, 5 F.3d 806, 818 (5th Cir. 1993).

130 *Kyles*, 115 S. Ct. at 1566. In formulating this conclusion, the Justice stated that when a *Bagley* error is found, a reviewing court must use the standard set forth in *Brecht v. Abrahamson*. *Id.* (citing Brecht v. Abrahamson, 113 S. Ct. 1710, 1712 (1993)); *see supra* note 116 (discussing the applicable standard in harmless-error review cases). Justice Souter recognized that the *Brecht* Court adopted its harmlessness standard from *Kotteakos v. United States*. *Kyles*, 115 S. Ct. at 1566 (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

131 *Id.* at 1567. The Court reached this conclusion by essentially equating the "reasonable probability" standard in *Bagley* errors to the "substantial and injurious effect" prong of the *Brecht* harmlessness standard. *See id.* at 1566-67 (explaining the development of the various governing standards that lead to such a conclusion).

132 *Id.* at 1567. The Court clearly condemned the idea that the definition entailed an item-by-item evaluation. *Id.* Justice Souter pointed out that a *Brady* violation does not exist every time a prosecutor withholds a favorable piece of evidence; moreover, no provision of the Constitution has ever been interpreted to require an open file policy on behalf of the prosecution. *Id.*; *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 57, 59 (1987) (stating that although the prosecutor is constitutionally obligated to

recognized that a *Bagley* materiality determination is made at the prosecutor's discretion and should therefore be made carefully, because the prosecutor alone is responsible for measuring the net effect of all favorable evidence known by the government.[133]

The Supreme Court ultimately held that prosecutors must disclose exculpatory information when the net effect of the suppressed evidence makes it reasonably probable that disclosure would have produced a different result and decided in the present

---

disclose all material exculpatory evidence, the defense does not have a right to examine the prosecutor's files to obtain the information). Further, the Court recognized that the rule in *Bagley* is less demanding of a prosecutor than the ABA Standards for Criminal Justice. *Kyles*, 115 S. Ct. at 1567. On the topic of prosecutorial disclosures, the ABA states:

> A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION §3-3.11(a) (3d ed. 1993)).

The Court also referred to the ABA Model Rules of Professional Conduct. *Kyles*, 115 S. Ct. at 1567. Model Rule 3.8(d) provides: "The prosecutor in a criminal case shall . . . 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 . . . ." ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1988)).

[133] *Kyles*, 115 S. Ct. at 1567. The Court stated that the prosecutor is assigned this consequent responsibility because only the prosecutor "can know what is undisclosed." *Id.*; *see also* Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995) (stating that a prosecutor must be careful in exercising discretion of evidence that must be disclosed). The Court further observed that the prosecutor cannot escape his or her responsibility for failure to disclose favorable evidence that is deemed material. *Kyles*, 115 S. Ct. at 1567-68.

Justice Souter noted that the State of Louisiana requested a more lenient rule to apply when a prosecutor is unaware of information known to the police. *Id.* at 1568. The Justice considered the State's request that the threshold of materiality be raised in this situation to afford the prosecutor some leeway in making his or her decision. *Id.* The Court summarily denied this request, stating that, regardless of the stringency of the standard, the prosecutor will always be obligated to make a judgment call and therefore is assigned consequent responsibility for his or her actions. *Id.*

The Court further recognized that, when faced with a borderline case, the prosecutor will most likely disclose the piece of evidence, stating "[t]his is as it should be." *Id.* The Court advocated the prudence of the prosecutor to ensure that truth is ascertained and justice is served in criminal proceedings. *Id.* The Court relied on *Berger v. United States*, which proclaimed that the sovereignity's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

Justice Souter suggested that the court of appeals reviewed the evidence in question on an item-by-item basis rather than considering its cumulative effect. *Id.* at 1569. Expounding on this premise, the Justice recalled many statements contained in the opinion of the court of appeals which insinuate that its decision was in fact based on "a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*." *Id.*

case that such a different result would have been attained.[134] The Court began its analysis of the facts by noting that disclosure of statements made to the police by the State's two key witnesses, Henry Williams[135] and Isaac Smallwood,[136] would have bolstered the defense's case and weakened the prosecution.[137] Justice Souter observed that the suppressed statements would have revealed the inconsistencies in the contemporaneous statements and testimonies of these men and would have tremendously damaged the State's case.[138] The Court opined that the State's case would have been further undermined by the remaining eyewitnesses who

---

134 *Id.* at 1567, 1569.

135 *Id.* at 1569. The Court noted that the State considered Williams, who testified to actually seeing Kyles shoot Dye, its best witness. *Id.* The Justice also observed that in Williams's contemporaneous statement, he claimed that the murderer was "a black male, about 19 or 20 years old, about [five feet, four inches] or [five feet, five inches], 140 to 150 pounds, medium build" with "platted" hair. *Id.* The Court questioned how Williams, if cross-examined, would have explained the clear differences between the man Williams described as the assailant and Kyles, who is six feet tall and slender. *Id.* Furthermore, the Court noted that the identification given by Williams more accurately describes Beanie, who was 22 years old, 159 pounds, and five feet, five inches tall. *Id.*

136 *Id.* at 1570. The Court also examined the inconsistencies in Smallwood's testimony and his contemporaneous statement. *Id.* The Court recalled that, at the scene of the crime, Smallwood told police officers that he did not witness the actual murder nor did he observe the culprit outside the car. *Id.* Moreover, the Justice enunciated that, in Smallwood's statement, he described the assailant to be a black teenage male with shoulder-length braided hair and a mustache, although no other witness noted any facial hair. *Id.* The Court pointed out that Smallwood told the police that he watched the assailant pass him in a red Thunderbird. *Id.*

The Court observed that Smallwood's testimony at the second trial was quite different than his original story. *Id.* Justice Souter noted that Smallwood testified that he did in fact see Kyles "take a '.32, a small black gun' out of his right pocket, shoot Dye in the head, and drive off in her LTD." *Id.* The Court noted that Smallwood first stated that he did not see the incident, while at the second trial his story changed so much that he could not only describe the struggle that occurred, but he could precisely identify the murder weapon that was used. *Id.* The majority also reported that the description of the car in which Smallwood saw the culprit changed "from a 'Thunderbird' to an 'LTD.'" *Id.* The Court announced that these changes in Smallwood's stories strongly indicated that he was coached by the prosecutor. *Id.*

The Court further noted the differences in the testimony given by Smallwood at the first trial, which resulted in a hung jury. *Id.* Justice Souter noted that, at the first trial, Smallwood testified that he saw the assailant climb into the vehicle, which suggests that he saw the assailant outside of the car, and he also stated at the first trial that he did not see the culprit's face. *Id.* at 1570 n.14.

137 *Id.* at 1569.

138 *Id.* at 1571. The Court declared that the defense would also have had a stronger case if Beanie's statements were disclosed by the police. *Id.* at 1569-70 n.13. The Justice reported that, in Beanie's statement, Beanie described Kyles as having "bush" style hair, as contrasted to Beanie's hair, which was styled in plaits. *Id.* The Court further pointed out that the police did not disclose the Schwegmann's theft charges pending against Beanie, nor did they disclose the fact that Beanie was a primary sus-

merely observed the culprit as he was fleeing the scene in the victim's vehicle.[139]

The Supreme Court posited that in addition to the eyewitnesses' statements, disclosure of Beanie's statements would have had a two-fold impact on the defense's case.[140] The Court first emphasized that the probative value of the physical evidence would have been seriously undermined by Beanie's inconsistent statements.[141] Justice Souter then noted that Beanie's statements tend to cast doubt on the integrity of the investigation.[142] The Court observed that Beanie, in effect, navigated the course of the investigation.[143] Justice Souter then briefly addressed and discredited the

---

pect in a murder case involving "an older woman shot once in the head during an armed robbery." *Id.* at 1570 n.13.

139 *Id.* at 1571. The Court stressed that these remaining witnesses only observed that portion of the assailant's body not concealed by the vehicle. *Id.* The majority further stated that the impeachment of one eyewitness may warrant a new trial. *Id.* (citing United States v. Agurs, 427 U.S. 97, 112-13 n.21 (1976)).

140 *Id.*

141 *Id.* Justice Souter pointed out that the State considered Beanie to be an essential part of its investigation. *Id.* The Court, however, recalled the inconsistencies in Beanie's statements, which would permit the jury to infer that Beanie wanted Kyles arrested for murder. *Id.*

Justice Souter explained obvious inconsistencies with regard to the actual day that Beanie purchased the LTD. *See id.* The Court stated that when Beanie first called the police, he informed them that he had purchased the LTD on Thursday. *Id.* The Court, however, noted that during the initial meeting between Beanie and the police, as well as in his signed statement, Beanie claimed that he purchased the vehicle from Kyles on Friday and subsequently accompanied Kyles to Schwegmann's to retrieve Kyles's car. *Id.* Further, the Court reported that in the statement Beanie gave between trials, he stated that he had assisted Kyles in retrieving the car on Thursday. *Id.* Likewise, the majority recognized that Beanie did not claim that Kevin Black was also a participant until Black's testimony at the first trial (as a defense witness) implicated Beanie. *Id.* The Court also stated that, in Beanie's various statements, Dye's purse appears "next to a building, in some bushes, in Kyles's car, and at Black's house." *Id.*

142 *Id.* Justice Souter discredited the precision and good faith of the investigation by demonstrating that the defense could have questioned the police with regard to their awareness of the inconsistencies in Beanie's statements. *Id.* at 1571-72. The Court further noted that the defense could have used this knowledge to attack the investigatory proceedings and question why the police neglected to consider Beanie a suspect, or why they never looked into the possibilities that the evidence had been planted. *Id.* at 1572.

The Court centered its argument on different incriminating factors which, taken as a whole, would indicate that the police were negligent in their investigation. *Id.* To cast further doubt on the thoroughness of the investigation, the Court recalled Detective Dillman's testimony, which disavowed any knowledge that Beanie himself changed the license plates and further confirmed that Beanie was never even considered a suspect. *Id.*

143 *Id.* To substantiate the assertion that "Beanie was no mere observer," the Court recalled that Beanie evasively suggested to the police that they search Kyles's garbage for evidence. *Id.* Justice Souter also stressed an admission by the prosecutor in a post-

dissent's arguments in this regard.[144]

Next, the Court focused on the list of cars present at the scene of the crime, which the prosecution also suppressed.[145] After admitting that the suppression of this evidence was not as detrimental as the previous evidence, the Court stated that the list had probative impeachment and exculpatory value and could be of tremendous assistance in establishing *Bagley* materiality.[146] The Court emphasized that this list would have demonstrated further support for the defense that the police were negligent in allowing Beanie to navigate their investigation.[147]

The Court recognized that even if the *Brady* evidence were dis-

---

conviction hearing that he could not recall a situation where the police had ever searched and seized garbage prior to this case. *Id.* Furthermore, the Justice emphasized a statement made by Detective Miller conceding that he contemplated the possibility that Beanie could have planted the evidence. *Id.*

In accordance with this argument, the Court reiterated a statement made by Beanie to the police that "if you can set [Kyles] up good, you can get that same gun." *Id.* at 1573. The Court suggested that although this statement could have been interpreted by the jury in a number of ways, each variation, whether it pertained to the evidence or the precision of the investigation, proved favorable to the defense. *See id.* ("Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman . . . .").

144 *Id.* at 1572-73 nn.16-18. The Justice denounced the dissent's argument that Beanie would have had difficulty planting the evidence merely because he was wearing a "tank top" shirt while at Kyles's apartment. *Id.* at 1573 n.18. The Justice discerned that a small gun may be carried in a man's trousers. *Id.* The Court also countered the dissent's further argument that Beanie would not have incriminated himself if he had been involved in the murder by "tantaliz[ing] the police with the prospect of finding the gun one day before he may have planted it." *Id.* at 1573 n.17. Justice Souter rejected this argument, stating that "[i]t is odd that the dissent thinks the *Brady* reassessment requires the assumption that Beanie was shrewd and sophisticated." *Id.*

145 *Id.* at 1573.

146 *Id.* Justice Souter pronounced that this list did not contain Kyles's registration number. *Id.* at 1573-74. Therefore, the Court stated that this would not only have undermined the value of the prosecution's assertion that Kyles's car was in the background of the enlarged photograph that was presented to the jury, but the list would also serve to undermine the police's theory that the assailant's car remained in the parking lot "during the heat of the investigation." *Id.* at 1573-74.

147 *Id.* at 1574. Expounding on this premise, the Court articulated that the list could have facilitated the defense in revealing that the police were aware of the inconsistencies of Beanie's second and third statements, which indicated that Kyles's car was retrieved after the list was assembled. *Id.* The Court also declared that the defense could have used this list to demonstrate that the police never verified Beanie's story against the known facts. *Id.*

Justice Souter discredited the State's arguments that the evidence would not have had impeachment or exculpatory value because the list was not inclusive and because of the possibility that Kyles retrieved his car before the compilation of the list. *Id.* The Justice opined that this argument would have augmented the careless nature of the investigation. *Id.* The Court further stated that the evidence would have carried some weight and would have favored Kyles regardless of its use. *Id.*

closed, the State still would have had a case.[148] Nevertheless, Justice Souter emphasized that the weight of the sound evidence remaining, though not adequate to prove his innocence, may not have been sufficient to positively convict Kyles as the killer.[149] The Court reiterated that the central inquiry is whether, in light of the undisclosed evidence, it can positively be asserted that the jury would have returned with the same verdict.[150] The Court concluded that the prosecution's failure to disclose the favorable evidence precluded the jury from making justifiable inferences, which undermined the confidence of the verdict and denied Kyles a fair trial.[151]

Justice Stevens authored a concurrence proffering three reasons to support the rendering of "favorable treatment" to this capital case.[152] First, the Justice posited that substantial reason existed to believe that the errors committed at the second trial were in fact prejudicial.[153] Next, the concurrence distinguished the case at issue from others due to the numerous items of evidence suppressed by the State.[154] Finally, after independently reviewing the case, Justice Stevens stated that doubt still existed as to whether Kyles was guilty.[155] The concurrence articulated that it is the obligation of the Court to administer justice and, therefore, this capital case war-

---

148 *Id.*

149 *Id.* The Court discussed the impact the *Brady* evidence could have had on discounting the weight of specific pieces of physical evidence that were found in Kyles's apartment. *See id.* The Court elaborated specifically on the cans of pet food and the holster, explaining that the jury could have viewed this evidence in a different light had they been aware of the withheld evidence. *Id.* The Court further stated that, viewed in this respect, not only was the testimony of defense witnesses consistent with the discovered physical evidence, but Kyles's testimony appears to have been virtually credible. *Id.* at 1574 & n.20.

The Court further discussed the Schwegmann's receipt that was discovered in the LTD, which contained Kyles's fingerprints. *Id.* at 1574. The Court criticized the State's position that this receipt links Kyles to the killing, explaining that the two-inch-long sales receipt did not logically illustrate the purchase of "a week's worth of groceries" that Dye apparently set out to buy. *Id.* at 1575.

150 *Id.* The Court reaffirmed its belief that the verdict would not have remained the same and substantiated its position by reviewing the effects that the evidence could have had on the jury, and the inferences that the jury would have been justified in making. *Id.*

151 *Id.* Although the Court pondered the possibility that confidence in the verdict would not be defeated, the majority reasoned that this was doubtful in light of the overwhelming evidence in Kyles's favor. *Id.*

152 *Id.* at 1576 (Stevens, J., concurring).

153 *Id.* Justice Stevens premised this on the basis that the first trial resulted in a hung jury. *Id.*

154 *Id.*

155 *Id.*

ranted review.[156]

In dissent, Justice Scalia opined that it is not reasonably probable that a different outcome would have been attained had the suppressed evidence been disclosed.[157] The Justice commenced his dissent by proclaiming that certiorari should not have been granted.[158] The dissent questioned why this particular capital case received favored treatment.[159] Justice Scalia explained that the Court does not review capital cases for factual accuracy, but, rather, to ensure that the proper federal laws have been accurately applied.[160]

The dissent recognized the Supreme Court's assertion that the court of appeals erred by reviewing each piece of evidence independently rather than cumulatively.[161] Justice Scalia observed, however, that it was the Supreme Court that erred in this regard rather than the court of appeals.[162] The dissent stated that this case is specifically the type of case that should be denied certiorari because it does not involve a question of law.[163] Justice Scalia posited that the majority's findings of fact in the present case are

---

156 *Id.*

157 *Id.* at 1580 (Scalia, J., dissenting).

158 *See id.* at 1576-77 (Scalia, J., dissenting) (instructing that "[t]he Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i.e.*, except in cases of the plainest error) be denied"). Justice Scalia stressed that this doctrine should be adhered to in the present case, where the alleged fact-specific claim has repeatedly been reviewed and rejected by both lower federal courts and on post-conviction review by the state courts. *Id.* at 1577 (Scalia, J., dissenting). The Justice criticized the Court not only for granting certiorari, but for making its own factual inquiries and credibility judgments. *Id.* Justice Scalia recalled that the Court based its reasoning for granting certiorari on a quote taken from *Burger v. Kemp*. *Id.* (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)). The Justice, however, quoted the next sentence of the *Burger* text to insinuate that the Court deviated from the *Burger* Court's reasoning, which provides that "[n]evertheless, when the lower courts have found that [no constitutional error occurred] . . . deference to the shared conclusion of two reviewing courts prevent[s] us from substituting speculation for their considered opinions." *Id.* (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)).

159 *Id.* Justice Scalia suggested that perhaps the Court granted certiorari to send a message to Americans that the Court reviews capital convictions in search of factual error. *Id.* Justice Scalia stated that if this was the intent of the majority, then the majority conveyed a false message because the Court does not engage in such factual determinations. *Id.*

160 *Id.*

161 *Id.* at 1577-78 (Scalia, J., dissenting).

162 *Id.* at 1578 (Scalia, J., dissenting). Justice Scalia inferred from the language of the Court's opinion that, because the Court did not agree with the Fifth Circuit's decision, the Court discredited the outcome by suggesting that the Fifth Circuit applied the incorrect legal rule. *Id.*

163 *Id.*

"clearly erroneous."[164]

The dissent next addressed applicable standards of law.[165] Justice Scalia criticized the Court for overemphasizing the suppressed evidence and deemphasizing the disclosed evidence.[166] The Justice purported to demonstrate the immateriality of the *Brady* violation by elaborating on the untainted evidence.[167] Justice Scalia denounced the first portion of Kyles's theory that Beanie framed him.[168] The dissent further discredited the second part of Kyles's argument that the suppressed statements by the eyewitnesses would have indicated that he was mistakenly identified as the killer.[169]

Justice Scalia criticized the Court for advancing a "reasonable probability" argument for the witnesses' statements and then fostering an identical argument for Beanie's statements, suggesting that the Court independently evaluated the evidence.[170] The dissent declared that not only is it unlikely that the jury would be persuaded by these arguments individually, but it is even more unlikely to suggest that the jury would believe these contentions cumulatively.[171]

Justice Scalia recognized that the flaw in the Court's opinion is that the Court's major focus was on Beanie's credibility or culpability.[172] The dissent declared that it is still reasonably possible that Kyles would have been convicted even if the prosecution successfully impeached Beanie.[173] The Justice supported this theory by

---

164 *Id.* Justice Scalia suggested that if the case could be appealed further, it would be reversed. *Id.*

165 *Id.* at 1578-79 (Scalia, J., dissenting). The Justice reaffirmed that petitioner has the burden of demonstrating, "in light of all the evidence," both inculpatory and exculpatory, that there exists a reasonable probability that the verdict is constitutionally infirm. *Id.* at 1578 (Scalia, J., dissenting).

166 *Id.* at 1579 (Scalia, J., dissenting).

167 *Id.*

168 *Id.* The dissent repudiated the Court's position that Beanie was trying to shift the suspicion to Kyles. *Id.* at 1579 & n.1. Although the dissent stressed that Beanie was justified in thinking he might be suspected of murder because he was driving the LTD, it emphasized that it is preposterous to presume that Beanie, if guilty, would approach the police with information merely to obtain reward money and frame Kyles. *Id.* at 1579 n.1. Justice Scalia further denounced this presumption by noting that Beanie advised the police to inspect Kyles's apartment before he allegedly planted the evidence. *Id.* at 1579.

169 *Id.* Justice Scalia explained the implausibility of the jury believing that each eyewitness was mistaken, coupled with the fact that the misidentified person was the same individual that Beanie was trying to frame. *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 1579-80 (Scalia, J., dissenting). The Justice noted that Beanie did not testify. *Id.* at 180 (Scalia, J., dissenting).

173 *Id.*

reiterating that it was doubtful that the jury would believe that all four witnesses mistakenly identified Kyles.[174]

Next, Justice Scalia opined that petitioner's argument failed because of the undisputed testimony given by the police that three of the four witnesses presented with a photo lineup identified Kyles as the murderer.[175] The dissent continued to dispute the majority's opinion by suggesting that the majority's proposition that the effective impeachment of a single witness could justify a new trial contradicts the principle of the materiality standard.[176]

The dissent then focused on the physical evidence.[177] Justice Scalia emphasized the immateriality of the undisclosed facts pertaining to the physical evidence, including the purse, gun and holster, the ammunition, and the pet food retrieved from Kyles's apartment.[178] The Justice declined to address the significance of

---

174 *Id.* The dissent also denounced the concept of using Beanie's statements to attack the police investigation. *Id.* Justice Scalia noted that if an overwhelming amount of evidence exists to convict a criminal defendant, juries will not acquit the defendant in order to chastise the police for their careless investigation. *Id.*

175 *Id.* In support of this contention, the Justice also relied on the fourth witness, Kersh, who identified Kyles as the killer at the trial. *Id.* Justice Scalia noted that Kersh observed Kyles shoot Dye and was able to get "a good look" at Kyles while he drove away. *Id.* at 1580-81 (Scalia, J., dissenting).

Justice Scalia recalled that one of the eyewitnesses, named Territo, claimed that he watched the actual shooting from his truck and that Kyles pulled up next to him in the victim's vehicle, which enabled Territo to get "a good look at him." *Id.* at 1580 (Scalia, J., dissenting). The Justice also addressed the testimonies of Smallwood and Williams, claiming that they also were close enough to Kyles to positively identify him. *Id.* at 1581.

176 *Id.* at 1582-83 (Scalia, J., dissenting). Justice Scalia proffered that the Court's proposition was taken out of context and should therefore be disregarded. *Id.* at 1582 (Scalia, J., dissenting). The dissent once again instructed that, in assessing *Bagley* materiality, it is required that the disclosed evidence remain separate in the analysis from the undisclosed evidence. *Id.*

177 *Id.*

178 *Id.* at 1583-85 (Scalia, J., dissenting). After admitting that the *Brady* material would have buttressed Kyles's claim that Beanie planted the evidence, the dissent quickly discredited this argument. *Id.* at 1583 (Scalia, J., dissenting). Justice Scalia stressed that in order to make a valid materiality determination, one must look at Kyles's entire story. *Id.* In this regard, the Justice reemphasized that Kyles suggested that Beanie first provoked the police to search Kyles's apartment and then planted the evidence the following day. *Id.* The dissent posited that it is unfathomable to think that Beanie could have planted the evidence at the apartment without anyone observing his actions, considering that on the day in question, there were between 10 and 19 people at the apartment. *Id.* Although Burns testified at the trial to witnessing Beanie bending down behind the stove, Justice Scalia discounted this testimony by reporting that, subsequent to the trial, Burns, "who repeatedly stated at trial that Beanie was his 'best friend,'" was tried and convicted for Beanie's murder. *Id.* at 1584 (Scalia, J., dissenting) (citing State v. Burnes, 533 So. 2d 1029, 1032 (La. Ct. App. 1988) (other citations omitted)).

Justice Scalia stated that Kyles did not allege that the ammunition was planted.

other pieces of evidence.[179] Justice Scalia concluded that the State presented overwhelming evidence pointing to Kyles's guilt and, therefore, the *Brady* evidence is incapable of raising a reasonable probability of doubt sufficient to reverse the capital conviction.[180]

In *Kyles v. Whitley*, the United States Supreme Court was confronted with determining the existence of a *Brady* violation; in doing so, the Court faithfully applied the *Bagley* materiality standard in accordance with precedent.[181] While the disposition by the Court is fortunate, its rationale in rendering its decision is troublesome. Although it is evident that the Court's goal is to provide a defendant with a fair trial, it is unclear whether, in applying the *Bagley* standard, the Court is actually advancing this objective.

By implementing the "reasonable probability" standard, a due process violation is only established if the defendant can prove that the nondisclosure would have affected the outcome of the proceeding.[182] Rather, the focus of a due process violation in *Brady* cases should be on the fundamental unfairness of the prosecutor's nondisclosure, not on the guilt of the defendant.[183] Thus, the standard for materiality would be whether the undisclosed evidence

---

Id. The dissent undermined Kyles's story that, as collateral for a loan, Beanie gave Kyles the rifle and .32 caliber shells. *Id.* The dissent instructed that there would be no logical reason for Beanie to give Kyles .32 caliber shells unless Kyles owned a .32 caliber gun. *Id.*

Justice Scalia observed that Kyles's testimony with regard to the pet food was vague and confusing. *Id.* The dissent noted a comment given by the trial judge which referred to Kyles's testimony on this matter to be an "obvious lie." *Id.*

Justice Scalia emphasized that two of the three brands of cat food that Dye typically bought were found in Kyles's apartment. *Id.* Justice Scalia concluded that it is highly probable that the jury inferred from this evidence that Kyles was the killer. *Id.* The dissent further explained that, although Kyles testified that he purchased the pet food because it was on sale, Schwegmann's advertising director claimed that the items were not on sale on that particular day. *Id.* at 1584-85 (Scalia, J., dissenting). Justice Scalia also observed testimony given by other defense witnesses claiming that, although Kyles's family occasionally fed stray animals, the last time they saw a dog in Kyles's backyard was approximately six months prior to the trial. *Id.* at 1585 n.7 (Scalia, J., dissenting).

179 *Id.* The items that Justice Scalia declined to address were the list of cars that were in the Schwegmann's lot and the Schwegmann's receipt bearing Kyles's fingerprints. *Id.* The Justice dismissed these items as collateral matters bearing little probative value as to Kyles's guilt or innocence. *Id.*

180 *Id.*

181 *See id.* at 1565 (tracing the origins of the prosecutorial duty to disclose exculpatory evidence).

182 *Id.* When dealing with a *Brady* violation, the burden of proving the constitutional error is on the accused and is, in a sense, unfair because it forces the accused to prove his innocence, which contradicts the traditional concept that a person is innocent until proven guilty. Fisher, *supra* note 3, at 1308-09.

183 Lambros, *supra* note 1, at 135.

"might reasonably be considered favorable to the defendant's case."[184] This more lenient approach would allow the defendant to establish a due process violation irrespective of its effect on the trial outcome. The leniency of this standard also could serve as a deterrent for prosecutors who disregard the requirements of the *Brady* rule.[185] Further, this standard accords with the fair trial rationale of *Brady*. Additionally, had the Court used this lenient standard, perhaps Justice Scalia would not have so vehemently dissented and would have agreed that the suppressed evidence was in fact material.

Suppression of evidence by a prosecutor undermines the credibility of the verdict because it precludes the factfinder from being exposed to all of the evidence needed to make an accurate and fair determination.[186] Under the *Bagley* standard of materiality, the prosecutor is forced to decide what effect the evidence will have on the outcome of the trial; thus, it has long been the tradition of the criminal justice system to leave this decision to the factfinder.[187] Therefore, by shifting the focus in materiality determinations, the courts of the United States more efficiently advance the constitutional guarantee of affording a defendant a fair trial.

Additionally, the *Kyles* Court rejected the harmless error review approach of *Chapman* and stated that the applicable standard of review was the outcome-determinative standard of *Kotteakos*.[188] It seems, however, that the *Chapman* harmless error standard is more consistent with notions of fairness and justice.[189] Under this test, the defendant must first establish a constitutional error; the burden then shifts to the prosecutor to prove the error harmless,

---

184 United States v. Bagley, 473 U.S. 667, 702 (1985) (Marshall, J., dissenting).

185 Lambros, *supra* note 1, at 139. Moreover, the error would not mandate automatic reversal of the verdict. *Id.* at 132.

186 *Id.* at 133. By implementing this alternative standard for materiality, the prosecution would have an obligation that is more consistent with notions of fairness and ascertaining the truth. This proposition is justified because the jury will be exposed to a larger amount of evidence that is favorable to the defendant, therefore enhancing the fairness of the proceedings. *Id.*

Moreover, when the prosecution withholds material evidence, this taints trial proceedings because it affects the perspective of the defense, which may alter its strategies in reliance on the fact that the evidence is nonexistent. Capra, *supra* note 13, at 412; *see also* Lambros, *supra* note 1, at 133.

187 *See* Lambros, *supra* note 1, at 134-35. Moreover, according to Justice Marshall, the *Bagley* standard "enables prosecutors to avoid disclosing obviously exculpatory evidence while acting well within the bounds of their constitutional obligation." United States v. Bagley, 473 U.S. 667, 700 (1985) (Marshall, J., dissenting).

188 *See supra* notes 73-77 and accompanying text (discussing *Kotteakos*).

189 *See supra* note 111 (discussing the *Chapman* standard for trial errors).

utilizing a standard of "beyond a reasonable doubt."[190] It seems more appropriate for the prosecutor to bear the burden of proving that his or her mistake did not result in the conviction of the accused. The *Chapman* harmless error test fosters the disclosure of favorable evidence to the defense and simultaneously forces the State to prove each element of its case beyond a reasonable doubt. This requirement will undoubtedly deter prosecutors from engaging in misconduct.[191] While the *Chapman* standard seems to center more on the rights of the accused, it is worth mentioning that unless substantial rights of the accused have been affected, the conviction will not be reversed.[192] This furthers society's interest in conserving judicial resources and preserving the finality of judgments.[193]

By implementing the *Bagley* standard, the Court may actually be endangering society. As previously noted, this standard imposes a higher burden on the accused, therefore making it more difficult to actually get a conviction reversed. It is conceivable that this approach will often result in upholding the convictions of innocent people.[194]

The *Chapman* approach seems to more accurately represent what our criminal justice system stands for by protecting those values inherent in due process.[195] On one side, it serves society's interest in fairness and justice; on the other side, it balances society's interests in the "finality of judgments and conservation of judicial resources."[196]

Cynthia L. Corcoran

---

190 Lambros, *supra* note 1, at 137. Among the various reasons which have been given in support of placing the burden on the prosecutor to prove that his or her misconduct did not impact the verdict, two are worth noting: first, it "maintains symmetry with the placement of the burden of proof of guilt at trial"; second, because the prosecution is the party that is benefitting from the misconduct, it seems only fitting that the prosecution should have to prove that its conduct was harmless. Fisher, *supra* note 3, at 1317-18.

191 *See* Lambros, *supra* note 1, at 139 (asserting that such a standard serves as a sanction for *Brady* violations).

192 *Id.* at 137.

193 *Id.*

194 *Id.* at 139.

195 *See supra* notes 6-8 and accompanying text (discussing the principles of due process in relation to the goals of the criminal justice system).

196 Lambros, *supra* note 1, at 137 (footnote omitted).