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Melanie A. Johnson

Note

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INTRODUCTION

Early one December morning in 1994, a gunman walked into a bar in Erie, Pennsylvania, and opened fire, killing one patron and injuring another before fleeing the scene.[1] Three years later, with little evidence to go on, a man named Vance Haskell was formally charged as the shooter.[2] The charge was based exclusively on circumstantial evidence and eyewitness testimony.[3] By the time his trial rolled around, only a single witness, Antoinette Blue, was able to consistently identify Haskell as the shooter.[4]

Haskell was convicted of first-degree murder, with Blue's testimony serving as the primary evidence against him.[5] He was

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1. Haskell v. Superintendent Greene SCI, 866 F.3d 139, 141 (3d Cir. 2017).

2. *Id.* at 141.

3. *Id.* at 140.

4. Forty witnesses were called to testify at Haskell's trial. Of the four who ever claimed to be able to identify Haskell as the shooter, three were unable or unwilling to identify the shooter consistently. *Id.* The fourth, Antoinette Blue, provided a seemingly strong eyewitness identification, testifying that she had not only seen Haskell pull the trigger, she had met him in town several weeks before the shooting and smoked marijuana with him in the parking lot twenty minutes prior. *Id.* at 143. Blue came to police with this testimony three years after the shooting, after she had been picked up on two warrants and was awaiting charges in Erie County Jail. *Id.* at 143.

5. *See id.* at 145.

sentenced to life in prison, with an additional fifteen to thirty months tacked on for other charges.[6] More than twenty years later, Haskell challenged his conviction before the Third Circuit.[7] He posed one key question: If an incarcerated person learns that the state knowingly presented false testimony in order to secure a conviction against him, how likely does it have to be that knowledge of the truth could have affected the jury's verdict before a reviewing court will grant a new trial?[8]

Prosecutors are barred from falsifying evidence by both strict professional ethical standards[9] and more than eighty years of case law.[10] If such misconduct is discovered immediately after trial, the impact of this discovery can be dramatic.[11] On direct review, if the state is found to have suppressed evidence material

6. Haskell v. Folina, Civil Action No. 10-149 Erie, 2015 WL 5227855, at *8 (W.D. Pa. Sept. 8, 2015), *rev'd sub nom*. *Haskell*, 866 F.3d at 139.

7. *Haskell*, 866 F.3d at 145.

8. *See id.* Haskell argues, and the Third Circuit agrees, that he only needs to establish the existence of a reasonable likelihood that the false testimony could have affected the judgment of the jury. The State argues that such claims must meet the actual-prejudice standard, requiring Haskell to show that the "error had a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 152.

9. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-1.4(b), 3-6.6(c), 3-6.8(a). Prosecutors may face punishment from their own bar for some types of misconduct, but the rules differ from state to state. In Minnesota, prosecutors are often only required to "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." MINN. R. PROF'L CONDUCT 3.8(d).

10. *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 103 n.2 (1935) (asserting that the presentation of false testimony or suppression of evidence favorable to the accused by a prosecutor violates Due Process).

11. If misconduct is discovered during the time period for direct appeal, convictions can be reversed, reversed and remanded for retrial, or, if the prosecutor takes an action that causes the defendant to move for mistrial and results in the trial court granting the motion, barred for retrial under the principles of double jeopardy. *See* Commonwealth v. Anderson, 38 A.3d 828, 840 (Pa. Super. Ct. 2011) (finding that double jeopardy principles apply when a prosecutor acts intentionally to prejudice a defendant's right to fair retrial by defying court instructions intended to prevent taint of the complaining witness); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 815–16 (1999).

Prosecutors themselves may face punishment for unethical conduct, including possible criminal prosecution for intentional acts. However, it can be difficult to seek civil remedies against unethical prosecutors—the Supreme Court held that prosecutors are absolutely immune for any actions that were "intimately associated with the judicial phase of the criminal process." *Id.* at 815–19 (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)). While this "absolute immunity" has been dialed back in recent years, *Imbler* reflects reviewing courts' reluctance to cast judgment on the action of state prosecutors. *Id.* at 819.

to the defendant's case, including by obscuring the truth about a testifying witness, the defendant's conviction must be overturned.[12] But once the defendant has exhausted his state appellate remedies, and the conviction becomes final, correcting prosecutorial misconduct becomes more of a challenge.[13]

Historically, on both direct and collateral review, when a defendant claimed that the prosecutor in his case knowingly presented or failed to correct false testimony, his claims were analyzed under the materiality standard established by the Supreme Court in *United States v. Agurs*.[14] This standard simply asked whether it was reasonably likely that the jury's verdict could have been affected by knowledge of the truth.[15] But in the mid-1990s, the Supreme Court began making substantial changes to habeas jurisprudence.[16] Since then, many federal courts have argued that a second prong must be added to the materiality analysis of all constitutional trial errors raised on collateral review, including perjured-testimony claims.[17] This prong, sometimes called the *Brecht* hurdle, requires the trial error, already material under the reasonable-likelihood standard, to have caused "actual prejudice"—that is, substantial harm—to the petitioner's case.[18]

For twelve years, only one U.S. court of appeals diverged from this approach.[19] In 2005, the Ninth Circuit held that the existing materiality standard used on direct appeal was sufficient for perjured-testimony claims raised on collateral review, justifying its decision on grounds that a conviction obtained

12. *See* United States v. Agurs, 427 U.S. 97, 104 (1976); Giglio v. United States, 405 U.S. 150, 153 (1972); Brady v. Maryland, 373 U.S. 83, 86 (1963).

13. Even defining "prosecutorial misconduct" under law can be a challenge. The Supreme Court has said that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982).

14. *Agurs*, 427 U.S. at 104.

15. This standard is called the "reasonable likelihood" standard. *Agurs*, 427 U.S. at 120 (Marshall, J., dissenting).

16. *See generally* A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1 (2002) (explaining the changing landscape of habeas jurisprudence); Bennett L. Gershman, *The Gate Is Open but the Door Is Locked: Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115, 124–28 (1994) (analyzing changes to habeas jurisprudence in the Rehnquist Court contemporaneously in 1990s).

17. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

18. *Id.*

19. *See* Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

through "perjurious or deceptive means" weakens "the entire foundation of our system of justice."[20] In August 2017, the Third Circuit joined this minority view.[21] The Third Circuit found that knowledge of facts pertaining to a key witness's credibility posed a "reasonable, and significant, likelihood of affecting the judgment of the jury" and noted that even if the State had not solicited the false evidence, it had permitted the testimony to go uncorrected, therefore violating the defendant's due process rights and requiring the conviction to be set aside.[22]

This Note discusses a deepening circuit split over whether habeas petitioners, seeking freedom as a matter of constitutional right, must meet an added actual-prejudice hurdle when raising perjured-testimony claims on collateral review, or if the mere possibility that the suppressed truth could have affected the jury's verdict renders the claim sufficient for the court to grant relief.

Part I discusses the two standards currently used by federal courts to weigh the materiality of trial errors stemming from prosecutorial misconduct, analyzing the way these standards have changed over time, highlighting the classification of constitutional errors as "trial" or "structural," and detailing a fundamental shift in the way these errors were evaluated by appellate and post-conviction courts from 1963 to 1995.[23] It also addresses the difference between collateral and direct review, in order to explain in Part II why the Circuits continue to disagree on whether these procedures should be treated differently.

Part II discusses the circuit split, the courts' varying approaches to materiality analysis, and the differing fact patterns in each case that led petitioners to raise these perjured-testimony claims.[24]

Part III analyzes why the Third Circuit was right to join the Ninth in maintaining the reasonable-likelihood standard for perjured-testimony claims raised on collateral review and why the other Circuits, including those still undecided, should create a bright-line rule by abandoning actual-prejudice analysis for all

20. *Id.* at 988.

21. Haskell v. Superintendent Greene SCI, 866 F.3d 139, 146 (3d Cir. 2017) (describing the State's failure to correct false testimony as a "corruption of the truth-seeking function of the trial process" (quoting *Agurs*, 427 U.S. 97, 104 (1976))).

22. *Haskell*, 866 F.3d at 146 .

23. *Infra* notes 25–87.

24. *Infra* notes 89–175.

Brady claims. It argues that knowing abuse of prosecutorial discretion, including the introduction of perjured or false testimony, should be a grave enough concern to justify retaining the more defendant-friendly standard on collateral review, or even reclassifying such claims as structural errors subject to immediate reversal.

I. REVIEWING PERJURED TESTIMONY CLAIMS

This Part provides some background on the two standards at play in the deepening circuit split over materiality standards. The reasonable-likelihood standard, widely used to determine materiality of knowing-use-of-perjured-testimony claims on direct review, has been adopted by the Third and Ninth Circuits for habeas petitions on collateral review.[25] Meanwhile, the two-prong actual-prejudice standard, based on the *Brecht* approach to constitutional trial error, has been adopted by the First, Sixth, Eighth and Eleventh Circuits for all knowing-use-of-perjured-testimony claims on final review.[26] Section A delves into the writ of habeas corpus and how collateral review differs from direct review. Section B then addresses the type of judicial review afforded to various constitutional errors and how prosecutorial misconduct is generally characterized. Section C discusses the methods used by reviewing courts to determine the impact of such misconduct on the petitioner's trial, while Section D examines the shifting jurisprudence around prosecutorial suppression claims when raised on collateral review.

A. FEDERAL HABEAS RELIEF MAY BE SOUGHT ON COLLATERAL REVIEW

The writ of habeas corpus allows individuals to challenge the underlying legality of their incarceration by giving a court the ability to afford relief "to those grievously wronged."[27] Habeas relief for petitioners in state custody may be pursued in

25. *See, e.g.*, *Haskell*, 866 F.3d at 146; *Hayes*, 399 F.3d at 988.

26. *See, e.g.*, United States v. Roy, 855 F.3d 1133, 1231 (11th Cir. 2017); United States v. Clay, 720 F.3d 1021, 1026 (8th Cir. 2013); Rosencrantz v. Lafler 568 F.3d 577, 588 (6th Cir. 2009); Gilday v. Callahan, 59 F.3d 257, 267 (1st Cir. 1995).

27. Brecht v. Abrahamson, 507 U.S. 619, 621 (1993). Habeas petitioners seek immediate release as a remedy for these wrongs. Robin A. Colombo, Brecht v. Abrahamson*: Hard Justice for State Prisoners?*, 35 B.C. L. REV. 1103, 1115 n.120 (1994) ("[F]ederal courts have the power and duty to provide the remedy of release for those deprived of their freedom without due process." (citing Fay v. Noia, 372 U.S. 391, 426–27, 438 (1963))). "[T]he writ does not require a court

state court under local post-conviction statutes and in federal court under 28 U.S.C. § 2254.[28] Review of these petitions (called "collateral review") must be based on the factual record from state court, plus any newly discovered evidence "that could not have been previously discovered through the exercise of due diligence."[29]

Federal collateral review generally follows any direct appeals at the state level ("direct review"),[30] as well as state collateral review.[31] Generally speaking, direct review "afford[s] defendants the opportunity to challenge the merits of a judgment and allege errors of law or fact," while collateral review "provide[s] an independent and civil inquiry into the validity of a conviction and sentence, and as such [is] generally limited to challenges to constitutional, jurisdictional, or other fundamental violations that occurred at trial."[32] The burden of proof also shifts between direct and collateral review from the prosecution to the convicted petitioner.[33] This burden-shifting mechanism in-

to determine a prisoner's innocence or guilt, but . . . guards against illegal imprisonment." Mark R. Barr, *The Not-So-Great Writ: An Analysis of Recent Tenth Circuit Decisions Reflecting the Current Difficult in Obtaining Habeas Corpus Relief for State Prisoners*, 80 DENV. U. L. REV. 407, 407 (2003).

28. For state post-conviction relief, see, for example, MINN. STAT. § 589 (2017). For federal habeas relief, see 28 U.S.C. § 2254 (2012).

29. § 2254(e)(2).

30. Direct review is considered the "principal way to challenge a conviction." *Brecht*, 507 U.S. at 620. Defendants have an automatic right of appeal, subject to strict time limits. FED. R. APP. P. 4(b) (requiring defendant to file notice of appeal within fourteen days of entry of judgment or within fourteen days after filing of a timely appeal by the government). Although errors found after the timeline for appeal has passed may be corrected on collateral review, "[i]t is more appropriate, whenever possible, to correct errors reachable by appeal rather than remit the parties to a new collateral proceeding." Bartone v. United States, 375 U.S. 52, 54 (1963) (per curiam).

31. State post-conviction relief must be pursued first; a federal writ may only be granted if the applicant has "exhausted the remedies available" in state court or if the state lacks appropriate corrective processes. 28 U.S.C. § 2254(b)(1). Under the Antiterrorism and Effective Death Penalty Act of 1996, state inmates have one year from the date of conviction to petition for federal habeas relief. *Id.* § 2244(d); *see also* Wall v. Kholi, 562 U.S. 545 (2011). The timer on this statute of limitations is paused during pendency of any state post-conviction claim or motion. *Id.* at 549.

32. Graham v. Borgen, 483 F.3d 475, 479 (7th Cir. 2007) (citation omitted).

33. Before *Brecht v. Abrahamson*, the government bore the burden on collateral review of showing that a constitutional error in a petitioner's case was "harmless beyond a reasonable doubt." By requiring a showing of "actual prejudice" to the petitioner's case before a state conviction may be overturned on the basis of constitutional error, the *Brecht* Court shifted the burden from the state

creases the degree of challenge faced by petitioners seeking habeas relief.[34]

The writ of habeas corpus, in short, acts as the judicial equivalent of a Hail Mary pass for incarcerated individuals. In the habeas cases discussed below, the petitioners raised underlying due process concerns as the constitutional grounds for collateral review.

B. DEFENDANTS HAVE A DUE PROCESS RIGHT AGAINST PROSECUTORIAL MISCONDUCT

Criminal defendants are entitled to procedural due process in a court of law under the Fifth and Fourteenth Amendments.[35] This constitutional right is violated when the government knowingly presents or fails to correct false testimony in a criminal proceeding.[36] The state must disclose all material evidence relevant to the case to defense counsel;[37] failure to disclose such evidence, whether by negligence or design, is a responsibility borne by the prosecutor.[38]

When a defendant alleges that his constitutional rights have been violated, the violation is categorized either as a structural error or a trial error.[39] Trial errors occur during the presentation

to the prisoner. Linda Greenhouse, *Overview of the Term: The Court's Counterrevolution Comes in Fits and Starts*, N.Y. TIMES, July 4, 1993, at E4–E5; *see also* Haskell v. Superintendent Greene SCI, 866 F.3d 139, 148 (3d Cir. 2017).

34. *See* Eve Brensike Primus, *A Structural Vison of Habeas Corpus*, 98 CALIF. L. REV. 1, 29–31 (2010) (discussing petitioners' difficulty in meeting the burden of proof on collateral review).

35. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see also* Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

36. *See* Giglio v. United States, 405 U.S. 150, 153 (1972); Hayes v. Brown, 399 F.3d 972, 981 (9th Cir. 2005) ("Due process protects defendants against the knowing use of any false evidence by the State, whether it be by document, testimony, or any other form of admissible evidence." (citing Napue v. Illinois, 360 U.S. 264, 269 (1959))); Lambert v. Blackwell, 387 F.3d 210, 242 (3d Cir. 2004).

37. This standard was established in *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

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

39. An error violating a defendant's constitutional rights is considered a constitutional error. *See* Gavin R. Tisdale, *A New Look at Constitutional Errors in a Criminal Trial*, 48 CONN. L. REV. 1665, 1669–73 (2016). "To find structural error, a court must find that the error: (1) did not occur during the presentation of the case to the jury, (2) cannot be quantitatively assessed on appeal, or (3) affects the framework in which the trial proceeds." *Id.* at 1678 (examining the legal landscape after *Arizona v. Fulminante*, 499 U.S. 279 (1991) (explaining

of the case to the jury and are subject to harmless-error analysis;[40] these errors must be assessed in light of all evidence presented to the jury.[41] The harmless-error analysis applied to trial errors "represents an accommodation between a criminal defendant's interest in receiving a remedy for the violation of a constitutional right and the state's interest in preserving convictions where the error did not affect the outcome of the trial."[42]

Structural errors, on the other hand, affect the framework within which the trial proceeds, creating a fundamental defect in the courtroom environment so inherently unjust as to require immediate remedy.[43] Common structural errors include judicial bias, exclusion of jurors on racial grounds, failure to recognize the right to counsel, and violation of the right to a public trial.[44]

Prosecutorial misconduct was established as a form of constitutional trial error by *Brady v. Maryland*, which marked a shift in the jurisprudence surrounding discovery and evidentiary withholding.[45] The Supreme Court in *Brady* found that certain forms of evidentiary suppression[46] by the prosecution, whether made in good faith or bad, brought the substantive fairness of trial into question and were therefore automatically material to the case.[47] If an incident is material under *Brady*, it can never

that the use of perjured testimony by the state has not been deemed to "affect[] the framework within which the trial proceeds")).

40. Under harmless-error analysis, a new trial is required "only if the state can prove beyond a reasonable doubt that the error did not contribute to the verdict." Tisdale, *supra* note 39, at 1670.

41. *See* Rosencrantz v. Lafler, 568 F.3d 577, 589 (6th Cir. 2009) (citing Shih Wei Su v. Filion, 335 F.3d 119, 126 (2d Cir. 2003)).

42. John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163, 183 (1993).

43. *Rosencrantz*, 568 F.3d at 589 (citing *Shih Wei Su*, 335 F.3d at 126).

44. Johnson v. United States, 520 U.S. 461, 468–69 (1997).

45. Brady v. Maryland, 373 U.S. 83, 83 (1963); *see also* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 708–09 (2006).

46. The *Brady* rule arguably applies in three cases: (1) the government's failure to provide requested exculpatory evidence; (2) the government's failure to volunteer exculpatory evidence; and (3) the government's knowing presentation of or failure to correct false testimony. *See* United States v. Agurs, 427 U.S. 97, 103–07 (1976).

47. *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

be dismissed as harmless.[48] This was a game-changing shift in jurisprudence for prosecutors.[49] Under *Brady*, the State was required to share with defense counsel any exculpatory or impeaching evidence material to the guilt or innocence of a defendant.[50] Failing to correct testimony that the prosecutor knows at the time to be false, then, is a *Brady* violation.[51]

In the years since *Brady*, the knowing use of perjured testimony has continued to be treated as inherently more problematic than other *Brady* violations.[52] Courts describe such conduct as an abuse of prosecutorial discretion and trust, as well as a "corruption of the truth-seeking function of the trial process."[53] In *Giglio v. United States*, the Supreme Court found that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair" and should be set aside.[54] Yet, despite creating such fundamental procedural inequity, prosecutorial

48. "A finding of materiality of the evidence is required under Brady. . . . A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" Giglio v. United States, 405 U.S. 150, 154 (1972) (citations omitted)*; see also Brady*, 373 U.S. at 87. Harmless-error analysis asks whether the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson*,* 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

49. *Cf.* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 140 (Carol S. Steiker ed., 2006) (describing how the adversarial process encourages prosecutors and defense attorneys to conceal evidence that the jury might find helpful in establishing the truth).

50. *Brady*, 373 U.S. at 90–91.

51. *Giglio*, 405 U.S. at 155. It should be noted that most courts believe that the prosecution has no obligation to disclose exculpatory information acquired *after* the conviction. *See* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 68 (2009) ("A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man."). This, however, could change if more jurisdictions adopt a recent amendment to the Model Rules of Professional Conduct, requiring the prosecutor to "promptly disclose" any "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016).

52. United States v. Agurs, 427 U.S. 97, 103–04 (1976); *see, e.g.*, Browning v. Baker, 875 F.3d 444, 461–63 (9th Cir. 2017) (granting habeas relief on claim that prosecutors failed to correct witness's false testimony on the status of his plea bargain with the State); United States v. Barham, 595 F.2d 231, 242–43 (5th Cir. 1979) (granting habeas relief on claim that prosecutor failed to correct false testimony concerning promises of leniency made to state witnesses, despite defense counsel receiving a letter informing prosecutor of the promises).

53. *Agurs*, 427 U.S. at 104.

54. *Id.* at 103. "[T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Giglio*, 405

misconduct in the form of willfully-presented perjured testimony is not generally considered a structural error because it occurs only during the progress of trial.[55] It has been established that such misconduct can *become* structurally problematic if an incident is particularly egregious or can be identified as part of a larger pattern of misconduct.[56] However, while the argument could be made that prosecutorial dishonesty inherently "[infect[s] the integrity of the proceeding,"[57] this approach has not been widely adopted by courts addressing perjured-testimony claims on collateral review.

C. DETERMINING THE IMPACT OF PROSECUTORIAL MISCONDUCT ON PETITIONER'S CASE

A decade after *Brady v. Maryland*, the Supreme Court split potential *Brady* withholding violations into three categories: failing to disclose evidence, failing to disclose evidence after a defense request, and knowingly using false testimony.[58] These three categories were initially assigned the same materiality standard for determining their effect on the outcome of the trial: reasonable likelihood. In order to establish a due process claim under this materiality standard, a petitioner must show that there exists a reasonable likelihood that an instance of evidentiary withholding *could* have affected the judgment of the jury.[59]

U.S. at 153 (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)). This remains in line with the *Brady* rule that any violations found material could not be dismissed as harmless error. *Brady*, 373 U.S. at 87.

55. Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005); Shih Wei Su v. Filion, 335 F.3d 119, 126 (2d Cir. 2003).

56. The Court in *Brecht* reserved "the possibility that in an unusual case, a deliberate and especially egregious error of the trial type . . . might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993); *see, e.g.*, Watts v. Mahally, 247 F. Supp. 3d 605, 607, 614 n.3 (E.D. Pa. 2017) (finding *per se* reversible error in the trial judge's "decision to instruct the jury with an obviously irrelevant, inadmissible and highly prejudicial fact *dehors* the record, over defense counsel's objection")*; see also infra* note 79 and accompanying text.

The Sixth Circuit has also noted that perjured-testimony claims could be considered structural error, free from harmless-error analysis, if the U.S. Supreme Court ruled that they were. *See* Rosencrantz v. Lafler, 568 F.3d 577, 589 (6th Cir. 2009)*; infra* Part III.C.

57. *Brecht*, 507 U.S. at 638 n.9.

58. *Agurs*, 427 U.S. at 103–07 (finding that the rule in *Brady* applies in three "quite different" situations that might arise at trial).

59. A petitioner seeking to establish a due process claim under the *Agurs* standard must show that (1) a government witness committed perjury; (2) the prosecution knew or should have known that the testimony was false; (3) the

The reasonable-likelihood standard, sometimes called the *Agurs* standard, sets a strict course for prosecutors, recognizing the state's obligation not to deceive,[60] as well as its obligation to correct.[61]

Yet, despite assigning all three categories the same materiality standard, the *Agurs* Court was particularly troubled by perjured-testimony claims, which the Court felt lacked the potential innocence of intent inherent in the two evidentiary-withholding categories.[62]

Brady jurisprudence continued to evolve, and, nine years later, the Supreme Court created a new standard for any *Brady* claims alleging evidentiary withholding: "reasonable probability."[63] To determine whether a material error had occurred, this new standard required reviewing courts to find a reasonable probability that the suppressed evidence *would* have affected the jury's verdict.[64] Yet, the Court apparently had the same concerns in mind during *Bagley* as it did during *Agurs*, because perjured-testimony claims were expressly left under the reasonable-likelihood standard.[65]

While both materiality standards leave room for an alleged instance of prosecutorial misconduct to be overlooked as harmless error if it fails to meet the impact requirement of the standard,[66] the reasonable-likelihood standard is less discerning than

false testimony was not corrected; and (4) there is a reasonable possibility that the perjured testimony could have affected the judgment of the jury. Lambert v. Blackwell, 387 F.3d 210, 242 (3d Cir. 2004).

60. Giglio v. United States, 405 U.S. 150, 153 (1972).

61. *Agurs*, 427 U.S. at 108. By combining these standards, *Agurs* created an obligation to set aside convictions obtained following the state's failure to correct knowing or reckless deception by its prosecutors.

62. *Id.* at 109–12 (noting a prosecutor's duty and obligations to the overriding concepts and interests of justice).

63. This failure to disclose must have occurred after general or specific requests for information by defense counsel. For instance, defendants are permitted to ask prosecutors to provide information about any inducements offered to testifying government witnesses and, under *Brady* and *Bagley*, prosecutors must share this information or risk having the requested witnesses' testimony suppressed. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (discussing the impairment of the adversarial process if prosecutor fails to respond to *Brady* request).

64. *Bagley*, 473 U.S. at 682.

65. *Id.* at 713 n.6 (Stevens, J., dissenting).

66. Both standards also address the same threshold question: Has a constitutional error occurred? *See* Gilday v. Callahan, 59 F.3d 257, 267 (1st Cir. 1995). Again, according to *Giglio*, if an incident is found material under *Brady*, a constitutional error has occurred that can never be dismissed as harmless. Giglio v. United States, 405 U.S. 150, 154 (1972) (requiring a new trial if the false

the reasonable-probability standard, opting for a mere *possibility* of jury impact over a probability.[67] This difference means that the petitioner in a perjured-testimony case faces a lower materiality burden based on the nature of the claim. Yet no matter which materiality standard is used, once the requirements of either standard are met, the *Brady* rule remains: If a *Brady* violation is found material, it may never be dismissed as harmless.[68]

D. SHIFTING JURISPRUDENCE AROUND *BRADY* CLAIMS RAISED BY HABEAS PETITIONERS ON COLLATERAL REVIEW

On appeal, once a *Brady* violation meets its assigned materiality standard, *Agurs* states that the conviction in question "must be set aside" and a new trial ordered.[69] However, since 1993, constitutional trial errors asserted in a federal habeas petition, unlike those on direct review, must meet an added actual-prejudice hurdle.[70] This Section will discuss this actual-prejudice analysis and the rationale behind it, as well as address the controversy involved in applying the standard to *Brady* violations.

1. Adding an Actual-Prejudice Hurdle for Perjured-Testimony Claims on Collateral Review

The *Agurs* reasonable-likelihood standard initially applied to claims raised on both direct and collateral review. Then in 1993, a new line of jurisprudence came crashing in against *Agurs*. After years of decisions strongly limiting habeas relief,[71]

testimony could, with any reasonable likelihood, affect the judgment of the jury).

67. *Compare Bagley*, 473 U.S. at 683–84 (finding a reasonable likelihood that jury's verdict could have been different had the prosecutor not misleadingly induced defense counsel into believing that key government witnesses could not be impeached with inducements received from the State), *with* United States v. Kattar, 840 F.2d 118, 127–28 (1st Cir. 1988) (finding that the government's presentation of false testimony was not reasonably likely to have affected the jury's verdict where jurors found the defendant not guilty on the counts related to the testimony in question).

68. *See supra* note 48.

69. United States v. Agurs, 427 U.S. 97, 103 (1976) (citing *Giglio*, 405 U.S. at 154).

70. Cases on direct review at the state level may use the local standard, often the more defendant-friendly "harmless beyond a reasonable doubt" standard. *See* Chapman v. California, 386 U.S. 18, 24 (1967) (holding that before a federal constitutional error can be harmless, a court must declare the error was harmless beyond a reasonable doubt).

71. During this time, criminal convictions jumped, an increase credited to an expanding criminal code. *See* Eve Brensike Primus, *A Structural Vision of*

the Supreme Court in *Brecht v. Abrahamson* determined that due process violations raised on collateral review must pass one last obstacle: actual prejudice.[72] Actual prejudice, sometimes called the *Brecht* hurdle, added a second layer of harmless-error analysis to existing materiality standards, inquiring whether the material due process violation also had a "substantial and injurious effect or influence in determining the jury's verdict."[73] This secondary hurdle created a distinct possibility that a constitutional error previously found material to the defendant's case might ultimately be found "harmless" under *Brecht*.

The Court offered several reasons why existing materiality standards for constitutional trial errors should be elevated by this new prong of analysis on collateral review. First, courts possess a longstanding interest in maintaining the finality of convictions that survived direct review within the state court system.[74] The Court believed that assigning the government a less stringent materiality burden after direct review would help maintain that finality.[75] Furthermore, comity and a respect for federalism discourage federal courts from doing anything that might impede on a state's "sovereign power to punish offenders" and its "good-faith attempts to honor constitutional rights."[76]

The Court also noted a desire to avoid "encourag[ing] habeas petitioners to relitigate their claims."[77] This motivation highlights the final rationale: the fear that "liberal allowance" of the habeas writ will "degrade[] the prominence of the trial itself"—i.e., that trials will cease to be treated with respect if habeas relief is too easily granted.[78]

Habeas Corpus, 98 CALIF. L. REV. 1, 9–12 (2010) (detailing the history of the "Great Writ" from the Warren Court era to the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996). Meanwhile, federal habeas filings were limited in a number of ways, including eliminating most Fourth Amendment claims from habeas review and removing the right to counsel for habeas petitioners. *Id.* The Supreme Court also imposed the exhaustion and procedural default requirements and applied res judicata to create a one-shot rule for federal habeas claims. *Id.*

72. Brecht v. Abrahamson, 507 U.S. 619 (1993) (denying habeas claim raised by petitioner).

73. In other words, *Brecht* asks if a material rights violation caused any actual prejudice to the defendant's case at trial. *Id.* at 619.

74. *Id.* at 635.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 635 (quoting Engle v. Isaac, 456 U.S. 107, 127 (1982)).

However, even when the two-prong approach is applied to constitutional errors on collateral review, the possibility remains that a claim failing to reach the actual-prejudice threshold may still result in an overturned conviction. The Supreme Court has noted that a "deliberate and especially egregious" trial error could "combine[] with a pattern of prosecutorial misconduct [and] so infect the integrity of the proceeding as to warrant the grant of habeas relief, even it did not substantially influence the jury's verdict."[79] The First Circuit later explained this as the Supreme Court stressing "the importance of considering the cumulative effect of all suppressed evidence in determining whether a *Brady* violation occurred."[80] In other words, the supposed "harmlessness" of certain individual due process violations may not negate the overall impact at trial that a pattern of such misconduct and violations may have.

2. When Perjured Testimony Gets Left Behind: Dialing Back the Effect of *Brecht* on *Brady* Claims in *Kyles v. Whitley*

Almost immediately, *Brecht* received backlash as courts struggled to apply the actual-prejudice hurdle to *Brady* claims on collateral review.[81] Appellants argued that the hurdle was redundant, noting that material *Brady* claims, as a rule, could not be dismissed as harmless.[82] In 1995, the Court addressed the issue in *Kyles v. Whitley*,[83] creating an exemption from actual-prejudice analysis for *Brady* withholding claims analyzed under the existing reasonable-probability standard.

The Court reasoned that any claim meeting the reasonable-probability standard was automatically material and could not be dismissed as harmless error, even under *Brecht*.[84] The *Kyles*

79. *Id.* at 654 (O'Connor, J., dissenting); Chapman v. California, 386 U.S. 18, 18 (1967) (holding that the State failed to demonstrate beyond a reasonable doubt that repetitive comments and instructions to the jury focusing on the defendant's failure to testify did not contribute to the petitioner's conviction).

80. Gilday v. Callahan, 59 F.3d 257, 272 (1st Cir. 1995) (citing Kyles v. Whitley, 514 U.S. 419, 436 (1995)).

81. *See generally* Bennett L. Gershman, *The Gate Is Open but the Door Is Locked: Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115, 124–28 (1994) (describing various analytical and doctrinal critiques of the Court's analysis in *Brecht*).

82. *See supra* note 48 and accompanying text.

83. 514 U.S. 419 (1995).

84. In other words, a constitutional violation meeting the reasonable-probability standard requires automatic reversal. *Kyles*, 514 U.S. at 435; *see also* United States v. Bagley, 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

Court based its rationale on the history of the standard, explaining that while it had once adopted the "substantial and injurious effect or influence" standard for constitutional errors on collateral review, it later rejected that standard as not placing a high enough burden on the defendant.[85] The Court reasoned that, since the existing materiality standard for evidentiary-withholding claims already required "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,"[86] such a claim would automatically meet *Brecht*'s requirement that suppression must have had a "substantial and injurious effect or influence" on the jury's verdict.[87] Therefore, the Court reasoned, any claim meeting the reasonable-probability standard automatically surpassed the standard for materiality established by *Brecht* and could not be dismissed as harmless error.

However, the Court, perhaps sensing a rhetorical stalemate over the weight of "likelihood" versus "probability," declined to extend this reasoning to the knowing use of perjured testimony, explaining that the issue was not currently before them to decide.[88] The *Kyles* Court's reluctance to explicitly address the application of the *Brecht* hurdle to perjured-testimony claims raised by habeas petitioners on collateral review soon led to the Circuit split discussed in this Note.

II. THE CIRCUIT SPLIT

Following *Agurs*, federal courts initially agreed on the use of the reasonable-likelihood standard for federal and state perjured-testimony claims raised at all stages of the appeals and post-conviction process. However, a push for less permissive habeas guidelines rumbled beneath the surface. Many viewed the reasonable-likelihood standard as overly defendant-friendly, particularly for cases on collateral review that had survived a series of direct appeals and habeas petitions at the state level. Federal courts sought to avoid upsetting the balance of state and federal power.

85. *Kyles*, 514 U.S. at 435–36 (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)). *See generally* Brecht v. Abrahamson, 507 U.S. 619, 622–23 (1993) (re-assessing the "substantial and injurious effect" standard); United States v. Agurs, 427 U.S. 97, 112 (1976) (placing a higher burden on the defendant).

86. *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in judgment).

87. *Brecht*, 507 U.S. at 623.

88. *Kyles*, 514 U.S. at 433 n.7.

This Part will detail the progression of the Circuit split—how the Circuits, in a post-*Kyles* world, initially handled the issue of knowing-use-of-perjured-testimony claims on collateral review and why some courts chose to adopt a more challenging standard than the one faced on direct review. Section A explains how the circuit split over the added-prejudice hurdle initially began, and Section B explores how the split progressed, addressing the various defenses raised by each Circuit in dealing with facts before them. Finally, Section C delves into the most recent circuit case to take a side in the split, *Haskell v. Superintendent Greene SCI*,[89] and explores why the Third Circuit chose to side with the minority of courts on the issue of actual prejudice.

A. ESTABLISHING THE SPLIT: DETERMINING MATERIALITY OF PERJURED-TESTIMONY CLAIMS AFTER *KYLES V. WHITLEY*

Until *Brecht*, "reasonable likelihood" was commonly accepted as the standard for knowing-use-of-perjured-testimony claims at all points of litigation. But after *Brecht*, and then *Kyles*, courts began to question the continued applicability of the unmodified *Agurs* standard on collateral review.

1. The First Circuit: Challenging the Reasonable-Likelihood Standard

The First Circuit was the first to suggest that the Supreme Court had intended to make a change to the reasonable-likelihood standard for perjured-testimony claims raised by habeas petitioners. *Gilday v. Callahan*[90] built its argument based on the Supreme Court's findings in *Kyles v. Whitley* earlier that year.[91] The First Circuit interpreted *Brecht*'s newly-minted actual-prejudice hurdle as applying to all constitutional trial errors on collateral review, while accepting that *Kyles* removed the added hurdle from *Brady* withholding claims.[92] However, because *Kyles* declined to decide whether this exemption applied to the government's knowing use of perjured testimony, the First Circuit reasoned that the *Brecht* hurdle must still be applied in this particular category of *Brady* claims.[93] Under this logic, *Gilday*

89. 866 F.3d 139, 139 (3d Cir. 2017).

90. 59 F.3d 257 (1st Cir. 1995).

91. *Id.* at 267–68 (citing *Kyles*, 514 U.S. at 436).

92. In *Kyles*, the Court had found that harmless-error analysis could not be applied to *Brady* claims "arising in a habeas case outside the perjury-related context." *Gilday*, 59 F.3d at 267 (citing *Kyles*, 514 U.S. at 433 n.7).

93. *Id.*

proposed that perjured-testimony claims on collateral review face a two-pronged inquiry: "[W]as there a failure to disclose material exculpatory evidence, and, if yes, was such failure harmless?"[94]

The criminal offense at the heart of the *Gilday* case—an armed bank robbery (intended to "raise funds in support of radical political activities") and the murder of a responding police officer—was complex and politically sensitive.[95] The First Circuit, seeming uncomfortable with the notion that applying a more defendant-friendly standard might increase the likelihood of finding reversible error in this case, spotted a solution in the precedent set by *Brecht*.[96] Despite the prosecutor's "deliberate strategy to misrepresent [witness] credibility and the knowing acquiescence of [] false testimony," and despite the court's apparent contempt for these actions,[97] the First Circuit in *Gilday* held that it was prevented from overturning the conviction by the actual-prejudice analysis in *Brecht*.[98]

On direct review, the state court had determined that the prosecutors in *Gilday* had "improperly failed to disclose a deal made with the attorney" of Michael Fleischer, a key witness.[99] The Circuit, reviewing the issue de novo and applying the reasonable-likelihood standard, agreed that "the information withheld by the prosecutor would have provided the basis for powerful impeachment of Fleischer's testimony;"[100] however, upon reaching the actual-prejudice hurdle, the Circuit court found

94. *Id.* at 268. Despite the fact that *Kyles* only explicitly refers to the knowing use of *perjured* testimony, the First Circuit extends its interpretation to "equivalent" circumstances as noted in *Bagley*. *Id.* at 267. Rather than perjured testimony, *Gilday* involves a situation in which the prosecutor withheld evidence about a key eyewitness that might have cast his identification of the defendant into doubt. *Id.* at 267 n.10.

95. *Id.* at 260.

96. *Id.* at 268.

97. *Id.* at 269–70 (noting that the State, by taking steps to actively suppress information about the deal struck up with the testifying accomplice witnesses, appears to agree with the conclusion that disclosure could have affected the jurors' judgment).

98. Prosecutors are not relieved of disclosure duties by lack of a formal agreement or by the witness's lack of specific knowledge of the agreement. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 683–84 (1985) (finding prosecutors' failure to disclose key information in witness affidavits to be misleading and remanding the case to lower court to determine whether there existed a "reasonable probability" that the result of petitioner's trial would have been different with proper disclosure).

99. *Gilday*, 59 F.3d at 268.

100. *Id.* at 269.

that even if the jury had assigned no weight to Fleischer's testimony based on the suppressed impeachment evidence, "the substance of the case against Gilday would have remained the same."[101] Gilday faced a case built on considerable evidence, and Fleischer was a rebuttal witness tasked with "simply [restating] the earlier testimony of another witness."[102] Of the three essential *Brady* claims presented by the petitioner in *Gilday*,[103] the First Circuit found that "none of the asserted nondisclosures, nor all of them cumulatively constitute reversible error" under the new standard.[104]

2. The Ninth Circuit: Rejecting *Brecht's* Application to Perjured-Testimony Claims on Collateral Review

The issue of *Brecht* as it applied to knowing-use-of-perjured-testimony claims remained relatively unchallenged for the next decade, until the Ninth Circuit broke from the First Circuit's lead and concluded that when the applicable test for a constitutional violation is derived from the materiality standard set by *Agurs* in 1976, *Brecht* need not apply.[105]

Hayes v. Brown involved the prosecution of Blufford Hayes for the 1980 murder of a motel manager and burglary of the motel office.[106] An alleged accomplice to the crime, A.J. James, was flown in for the trial, with prosecutors promising James that he could return home after testifying.[107] However, without James's knowledge, the prosecutor in Hayes's case went further, promising James's attorney that the witness would receive transac-

101. *Id.* at 269–70.

102. *Id.*

103. Gilday claimed error in (1) the government's failure to disclose exculpatory statements from a non-testifying eyewitness; (2) the government's failure to disclose exculpatory statements by two trial witnesses; and (3) the government's failure to correct false testimony presented by two accomplice-witnesses who testified that no deals had been reached for their cooperation in trial. *Id.* at 271.

104. *Id.* at 267. Note that the First Circuit rejects these claims both under the *Brecht* actual-prejudice hurdle and *Brecht*'s exception for cumulatively egregious conduct. *See* Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993).

105. Violations requiring the *Agurs* standard under law include claims involving suppression, ineffective assistance of counsel, and perjured testimony. Hayes v. Brown, 399 F.3d 972, 984–85 (9th Cir. 2005) (discussing when *Brecht's* analysis does not apply).

106. For more information on the factual basis of *Hayes v. Brown*, see *id.* at 974–78.

107. *Id.* at 976–77.

tional immunity for the manager's murder and dismissal of unrelated felony charges in exchange for testifying.[108] The prosecutor hoped to circumvent any questions that might reveal that James had been offered a deal to testify, and so, to prevent this information from reaching the trial judge and jury, James's attorney agreed to keep the specifics of the deal from his client.[109] After the trial, the witness, unaware of the deal on his behalf, was returned to Florida on the prosecution's dime, despite believing that he still faced pending charges in California.[110] These charges were later dismissed.[111]

The Ninth Circuit, upon reviewing the facts of the case, found that it clearly showed that "the State knowingly presented false evidence to the jury and made false representations to the trial judge as to whether the State had agreed not to prosecute James on his pending felony charges."[112]

Much like the First Circuit in *Gilday*, the Ninth Circuit objected to the prosecutor's attempt to make a covert deal with a witness's attorney that was not disclosed to the witness or the court.[113] Both Circuits agreed that such a violation likely met the reasonable-likelihood standard, as disclosure of such a deal would have "reduced substantially, or even destroyed" the testifying witness's credibility on the stand.[114] But while *Gilday* interpreted the recent cases of *Brecht* and *Kyles* as combining to create a secondary hurdle for perjured-testimony claims,[115] the Ninth Circuit, reviewing such a claim for the first time under this particular jurisprudence, took a different approach.[116] The court found that "[a]pplication of the Agurs 'any reasonable likelihood' standard necessarily foreclose[d] a Brecht harmless error

108. *Id.* at 977.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 978.

113. *Id.* at 987–88 (finding that the State's failure to disclose information about "powerful incentive[s]" offered to testifying witnesses threatens the integrity of the criminal justice system).

114. Gilday v. Callahan, 59 F.3d 257, 269 (1st Cir. 1995).

115. *See supra* notes 90–94 and accompanying text.

116. *Hayes*, 399 F.3d at 984 ("[W]hen the Supreme Court has declared a materiality standard, as it has for this type of constitutional error, there is no need to conduct a separate harmless error analysis. As the Supreme Court explained in *Kyles*, when considering a similar question about applying the *Bagley* disclosure requirements, the required finding of materiality necessarily compels the conclusion that the error was not harmless.").

analysis" and concluded that *Kyles*'s refusal to decide on perjured-testimony claims was mere dicta.[117] "When the Supreme Court has declared a materiality standard, as it has for this type of constitutional error," the Ninth Circuit explained, "there is no need to conduct a separate harmless error analysis."[118]

At the heart of the Ninth Circuit's decision seemed to be its clear offense at the blatant deception engaged in by the prosecution team in *Hayes*.[119] Prosecutors are barred from presenting false evidence, including false testimony,[120] and the court sternly noted that tricking a witness into lying on the stand "does not . . . insulate the State from conforming its conduct to the requirements of due process."[121] The court called the State's behavior "reprehensible," noting that a witness's lack of apparent complicity in the falsehood "is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury."[122] The Ninth Circuit explained that the use of false evidence violates the Fourteenth Amendment, noting that "[o]ne of the bedrock principles of our democracy . . . is that the State may not use false evidence to obtain a criminal conviction."[123]

B. THE DEEPENING SPLIT: BUILDING SUPPORT FOR THE ADDED-PREJUDICE HURDLE

Despite the bold stance taken by the Ninth Circuit in *Hayes*, twelve years passed and the remaining Circuits, despite sometimes vocalizing serious reservations about excusing such poor prosecutorial behavior, fell in line behind the First Circuit and the *Brecht* hurdle.

117. *Id.*

118. *Id.*

119. *Id.* at 979–80 (noting that the prosecutor specifically represented to the trial judge that no deal had been made for James's testimony, eliciting sworn testimony from James on that issue both on direct and re-direct examination, and failing to correct the record at trial after doubling down on the witnesses' credibility in closing argument). The *Haskell* court, in joining the Ninth Circuit in this split, will be similarly irate about the prosecution's reliance at trial on testimony it knows to be false. Haskell v. Superintendent Greene SCI, 866 F.3d 139, 150 (3d Cir. 2017).

120. Napue v. Illinois, 360 U.S. 264, 269 (1959).

121. *Hayes*, 399 F.3d at 981 ("Few things are more repugnant to the constitutional expectations of our criminal system than covert perjury[.]" (quoting N. Mariana Islands v. Bowie, 243 F.3d 1109, 1114 (9th Cir. 2001))).

122. *Id.*

123. *Id.* at 978 (citing *Napue*, 360 U.S. at 269).

Their reasons varied. In 2009, the Sixth Circuit in *Rosencrantz v. Lafler*[124] became the first to join *Gilday* in applying the actual-prejudice hurdle to perjured-testimony claims on collateral review.[125] Although the court called the decision a "close call" case, it ultimately concluded that *Brecht*'s policy concerns weighed heavier than the Ninth Circuit's concerns about prosecutorial culpability.[126]

1. The Sixth Circuit in *Rosencrantz v. Lafler*

The knowing-use-of-perjured-testimony issue in *Rosencrantz v. Lafler*, a case involving sexual assault by a stranger, involved falsehoods told by the victim witness about pretrial communications she had had with the prosecutor in the case.[127] While the Sixth Circuit objected to the prosecutor's conduct in failing to correct testimony from the victim that it knew was false,[128] the court noted that defense counsel had managed, despite this misconduct, to successfully impeach the victim's testimony at several turns during cross-examination.[129]

Emphasizing that "most constitutional errors can be harmless,"[130] the Sixth Circuit drew a line in the sand on the topic of collateral review. The court asserted that *Brecht*'s actual-prejudice analysis must be applied to all constitutional trial errors raised by habeas petitioners, with the exception of those explicitly exempted by *Kyles*, and that the Supreme Court had not deemed knowing-use-of-perjured-testimony claims "to be 'structural' in the sense that they 'affect[] the framework within which

124. 568 F.3d 577 (6th Cir. 2009).

125. *Id.* at 587–90 (finding the State's failure to disclose victim's false testimony material but ultimately harmless to the outcome of trial).

126. *Id.* at 589–90 (emphasizing the importance of pursuing "the prompt administration of justice" and limiting habeas relief to those "grievously wronged") (citation omitted).

127. *Id.* at 591–92.

128. *Id.* at 589 ("Certainly, the prosecutor's behavior in this case constitutes misconduct that we condemn.").

129. Despite the witness and prosecution's silence on the matter of prior conversations with the State, the defense elicited admissions from the witness victim on her history of criminal fraud, prior lies made under oath about the case, and variations and inconsistencies in her testimony. *Id.* at 581. The Sixth Circuit in *Rosencrantz* found that after the defense had focused the jury on the inconsistencies in the victim's testimony, "it was up to the jury—not a federal court conducting collateral review. . .—to sort [it] out." *Id.* at 585–86 (citing Hayes v. Brown, 399 F.3d 972, 992 (9th Cir. 2005) (en banc) (Tallman, J., dissenting)).

130. *Id.* at 589 (quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991)).

the trial proceeds.'"[131] The Sixth Circuit explained that this interpretation of knowing use of perjured testimony as a trial error could explain *Brecht*'s creation of an "unusual case" exception for patterns of prosecutorial misconduct that "so infect the integrity of the proceeding."[132] The Sixth Circuit seemed to find that the Ninth Circuit's main error was the application of strict materiality to a perjured-testimony claim that it acknowledged was not structural.[133]

2. The Eleventh Circuit in *Trepal v. Secretary, Florida Department of Corrections*

In 2012, the Eleventh Circuit in *Trepal v. Secretary, Florida Department of Corrections*[134] followed the Sixth Circuit's lead, reasoning that the "more lenient . . . materiality standard leaves room for the possibility that perjured testimony may be material under [the reasonable-likelihood standard] but still be harmless under *Brecht*."[135]

Trepal involved a complicated poisoning murder and, unlike the other perjured-testimony cases in this split, the false testimony in question came from an expert witness who overextended his identification of the chemical evidence.[136] This perjury claim came to light about six years after the trial, when the Office of the Inspector General issued a report criticizing the expert's work.[137] Following the release of the report, the lower court in an evidentiary hearing found that there was no reasonable likelihood that the result of the petitioner's trial would have been different had the false testimony been corrected—in other words, the court found that no constitutional error had occurred at all.[138]

131. *Id.* (quoting Shih Wei Su v. Filion, 335 F.3d 119, 126 (2d Cir. 2003) (alteration in original)).

132. *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993)).

133. The Sixth Circuit acknowledges that *Giglio* could be read as saying that such error implicates structural concerns, but the Sixth Circuit seems to be awaiting direction from above, noting that "the Supreme Court has yet to explicitly hold [knowing-use-of-perjured-testimony] errors as structural." *Id.* at 589. The court explains that the Ninth Circuit in *Hayes* "erred in failing to distinguish false-testimony claims from *Brady* withholding claims." *Id.* at 589–90 (citing *Hayes*, 399 F.3d at 984).

134. Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088 (11th Cir. 2012).

135. *Id.* at 1113.

136. *Id.* at 1100 (citing the OIG Report as criticizing the expert in presenting testimony that was "stronger than his analytical results would support").

137. *Id.* at 1091.

138. *Id.* at 1119–20. This appears to be a case of the lower court mixing its

The Eleventh Circuit affirmed the lower court's decision and pointed to *Chapman v. California*, upon which the *Agurs* reasonable-likelihood standard was predicated.[139] *Chapman* "rejected the argument that the Constitution requires a blanket rule of automatic reversal in the case of constitutional error," concluding that some constitutional errors may be "so unimportant and insignificant" in the grand scheme of their case as to be deemed constitutionally harmless.[140] The court reasoned that this potential insignificance is exactly the reason why constitutional errors were later subdivided into "'structural defects,' which require automatic reversal," and "'trial errors,' which are subject to harmless[-]error analysis."[141]

The Eleventh Circuit's application of the *Brecht* hurdle to perjured-testimony claims raised on federal collateral review put the onus on state courts to identify alleged constitutional errors and evaluate their prejudicial effects early in the review process.[142] The court's greatest concern seemed not to be whether this use of a heightened standard was fair to defendants, but whether it was fair to the state courts that had previously ruled.[143] The Eleventh Circuit found that, after *Brecht*, the harmless-beyond-a-reasonable-doubt standard previously used by *Chapman* could not be applied to cases on collateral review.[144] Because habeas relief is supposed to be a last resort, the court

standards; the use of "would have" indicates a standard close to *Bagley*'s reasonable-probability standard for *Brady* withholding claims rather than the reasonable-likelihood "could have" standard used for the knowing use of perjured testimony. The Eleventh Circuit, however, shrugs off the difference: "As a matter of logic, when answering the question posed by the [*Agurs*] standard, saying that there is no reasonable likelihood that the verdict would have been different is the same as saying that there is no reasonable likelihood that the verdict could have been different." *Id.* at 1120.

139. *Id.* at 1110–14.

140. Brecht v. Abrahamson, 507 U.S. 619, 630 (1993) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)).

141. *Trepal*, 684 F.3d at 1110–11.

142. What this ignores is that state courts may have failed in this duty for any number of reasons: political pressure, tunnel vision, etc. The Eleventh Circuit's view of *Brecht* fails to acknowledge that the issue may not have had the opportunity to have been raised below under the lower standard.

143. *Trepal*, 684 F.3d at 1111 ("[S]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process . . . and [they] often occupy a superior vantage point from which to evaluate the effect of trial error . . . .").

144. *Id.* ("*Chapman* was a direct-appeal case, and until *Brecht*, the Supreme Court had not had occasion to squarely address whether the *Chapman* 'harmless[-]beyond[-]a[-]reasonable[-]doubt standard' applied to cases on collateral review." (citing *Brecht*, 507 U.S. at 623, 630–38))).

reasoned that it would be impractical for such a powerful remedy to be granted on a mere "likelihood" that the error affected the outcome of the trial.[145]

3. The Eighth Circuit in *United States v. Clay*

The next year, the Eighth Circuit in *United States v. Clay*[146] joined the split, agreeing with the Sixth Circuit that the use of false testimony qualifies as a trial error and is therefore amenable to actual-prejudice analysis under *Brecht*.[147] However, although it was quick to reach a decision on the materiality issue, the court was also quick to note, as in *Rosencrantz*, that the Supreme Court could easily change this calculus by deeming such errors structural due to "the fundamental nature of the injury to the justice system caused by the knowing use of perjured testimony by the state. . . ."[148]

The habeas petition in *Clay*, which centered on a money laundering and wire fraud scheme, claimed that the government had knowingly permitted a coconspirator witness to falsely testify about his professional background in contracting and real estate.[149] In applying the *Brecht* hurdle, the Eighth Circuit explained that any suppressed evidence under this standard must be analyzed cumulatively and found that, as one of forty witnesses during a weeklong trial, the perjuring witness was not significant enough to the prosecution to have a "substantial and injurious effect" on the verdict.[150]

C. THE THIRD CIRCUIT REJECTS *BRECHT* FOR PERJURED-TESTIMONY CLAIMS ON COLLATERAL REVIEW

The Ninth Circuit remained alone in its support of the unmodified reasonable-likelihood standard until 2017, when the

145. *See id.* at 1111, 1117; *see also* O'Neal v. McAninch, 513 U.S. 432, 437–38 (1995) ("If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." (alteration in original) (quoting Kotteakos v. United States, 328 U.S. 750, 764–65 (1946))).

146. 720 F.3d 1021 (8th Cir. 2013).

147. *Id.* at 1026–27.

148. *Id.* at 1026 (quoting Rosencrantz v. Lafler, 568 F.3d 577, 589 (6th Cir. 2009)).

149. Interestingly, the Eighth Circuit seemed to believe that the knowing-use-of-perjured-testimony claim had already been procedurally defaulted when the petitioner failed to raise the issue at the hearing on his motion for a new trial. The court resolved to address the claim on its merits only because the government failed to raise the issue. *Id.* at 1025 n.2.

150. *Id.* at 1028 (quoting *O'Neal*, 513 U.S. at 436).

Third Circuit stepped up to the plate. In *Haskell v. Superintendent Greene SCI*,[151] the Third Circuit was required to evaluate a perjured-testimony claim in which the prosecutor not only knowingly presented false testimony about consideration received by a key witness, but repeatedly emphasized these lies to the jury.[152]

This, of course, is the case of Vance Haskell and eyewitness Antoinette Blue described in the Introduction.[153] After Blue's performance at both the pretrial and trial hearings, the prosecutor in the Erie murder case, with the help of Erie police detectives and a district attorney from Mercer County, assisted Blue in securing more favorable outcomes on pending charges in Erie and Mercer Counties.[154] However, when questioned on the stand by defense counsel, Blue denied having any pending charges, or expecting or receiving any assistance or consideration for her testimony.[155] Despite having explicit knowledge to the contrary, the prosecutor not only failed to correct Blue's false statements, but also doubled down on her credibility in his closing argument, openly "ridicul[ing] the idea that [she] would benefit from her testimony."[156] Defense counsel only learned two decades after Haskell's conviction that Blue was facing charges in two counties when she came forward with her eyewitness account, four years after the crime, of the shooter's alleged identity.[157]

In its analysis, the Third Circuit emphasized that even if the perjured testimony only goes toward the credibility of the witness, credibility matters.[158] As the Supreme Court once put it: "Had the jury been apprised of the true facts . . . it might well

151. 866 F.3d 139 (3d Cir. 2017).

152. *See id.*

153. *See supra* Introduction.

154. *Haskell*, 866 F.3d at 143–45.

155. *Id.* at 143.

156. *Id.* at 144.

157. Brief of Petitioner-Appellant at 26–29, 39–40, Commonwealth v. Haskell, No. 809 WDA 2012, 2013 WL 11256405 (Pa. Super. Ct. Aug. 20, 2012).

158. *Haskell*, 866 F.3d at 147*ee also* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . ."). Other courts have found the same. *Compare* Shih Wei Su v. Filion, 335 F.3d 119, 129 (2d Cir. 2003) (finding materiality in false testimony where the lying witness was "[the] prosecution's chief witness" and the "conviction depended significantly on [the lying witness's] testimony") (first alteration in original), *with* Foley v. Parker, 488 F.3d 377, 392 (6th Cir. 2007) (denying habeas relief where perjured testimony was immaterial because the lying witness "was not a crucial link in the case against [the petitioner]").

have concluded that [the witness] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which [he] was testifying . . . ."[159] Analyzing the case under the unmodified *Agurs* standard, the Third Circuit found it reasonably likely that the jury's judgment could have been affected by such evidentiary suppression.[160] Blue was a key government witness presenting important testimony against the petitioner.[161] The State highlighted its own belief in her subjective importance to the case by vouching for her credibility at closing arguments, despite knowing that she had lied on the stand.[162] Relative to the rest of the evidence in the case, Blue's testimony was strong—she was the only eyewitness willing and able to consistently identify Haskell as the shooter.[163] These factors speak to the weight and significance of Blue's testimony and highlight how valuable impeachment evidence regarding her credibility in testifying would have been to defense counsel as they argued for reasonable doubt.

In assessing the current state of the law, the Third Circuit embraced the same interpretation of *Kyles v. Whitley* as the Ninth Circuit had a dozen years earlier, finding that additional actual-prejudice analysis is not needed for any materiality standard that already contains harmless-error analysis. The implication of *Bagley*, the Third Circuit explains, was that "for perjured-testimony claims raised in [habeas] proceedings, the materiality and harmless-error standards are one and the same;"[164] therefore actual prejudice does not apply to such claims, just as it did not apply to the evidentiary-withholding claims highlighted in *Kyles*.[165] For the three types of prosecutorial misconduct originally distinguished by *Agurs*, the materiality and harmless-error standards merge, meaning there is no need, nor room, to conduct a separate harmless-error test under *Brecht*—because it is already baked into the test for materiality.[166]

159. *Napue*, 360 U.S. at 270.
160. *Haskell*, 866 F.3d at 146.
161. *Id.* at 145–46.
162. *Id.* at 143–45.
163. *Id.* at 146.
164. *Id.* at 149.
165. *See id.* at 149–50; *see also* United States v. Bagley, 473 U.S. 667, 679 (1985).
166. Hayes v. Brown, 399 F.3d 972, 985 (9th Cir. 2005).

Furthermore, the Third Circuit explained, the policy concerns extrapolated in *Brecht* do not apply to knowing-use-of-perjured-testimony claims.[167] *Brecht* was motivated by the Court's concern about verdict finality, federal intrusion onto state decisions, and degradation of trial prominence and the rarity of habeas relief.[168] While federalism concerns loom large, the Third Circuit observed no pressing need to honor previous state court decisions when the knowing use of perjured testimony represents "a bad-faith effort to deprive the defendant of his right to due process and obtain a conviction through deceit"[169] and is considered "fundamentally unfair" by the Supreme Court.[170]

With regards to finality, the Third Circuit points out that the entire point of habeas relief ("an extraordinary remedy") is to protect and endorse the values of justice and fundamental fairness.[171] The Third Circuit disputes the argument that a lower materiality standard for federal habeas claims would degrade the prominence of trial, pointing out that this standard would only apply to a small percentage of perjured-testimony claims: those that did not or could not arise at trial or upon direct review.[172] The vast majority of perjured-testimony claims will continue to be litigated at the trial level, rather than years later upon collateral review. Meanwhile, direct review has a finite

167. *Haskell*, 866 F.3d at 151–52.

168. *Id.* (citing Brecht v. Abrahamson, 507 U.S. 19, 635 (1993)).

169. *Id.* at 151.

170. *Bagley*, 473 U.S. at 678–79 (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

171. *Haskell*, 866 F.3d at 151 (quoting *Brecht*, 507 U.S. at 633).

172. *Id.* (noting that "it is possible, even likely, that petitioners will not know of the prosecution's use of perjured testimony until after the opportunity for direct review has passed"). From a commonsense standpoint, most incarcerated petitioners would not wait decades to raise a knowing-use-of-perjured-testimony claim unless those elapsed years represented the time it took for defense counsel to learn of the error.

The *Brecht* Court is not alone in expressing anxiety over the degrading prominence of trial. *See* Wainwright v. Sykes, 433 U.S. 72, 88–90 (1977) (arguing that a state trial should be the "decisive event" in determining guilt); Forman v. Smith, 633 F.2d 634, 639 (2d Cir. 1980) (arguing that "all issues should be fully aired at the trial, with no inducement for the defendant . . . to withhold certain issues in the hope of later obtaining a more favorable ruling from a federal court"). However, as the number of jury trials continues to decline in the American judicial system, this argument perhaps holds less weight. For more on the diminishing prominence of the jury trial, see Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://nyti.ms/2aNeei4 (noting a fifty percent decrease in the number of jury verdicts in New York State Court between 1984 and 2015).

statute of limitations, making it much more likely that a petitioner will remain unaware of the occurrence of one of these errors until long after the period for direct review has tolled.[173]

Finally, there was no binding precedent holding the Third Circuit to the heightened *Brecht* standard. Although the Circuit had once before applied the *Brecht* standard to a habeas petition similar to the one in *Haskell*, that case resolved before *Kyles v. Whitley* and was later vacated under new law.[174] The Circuit's decision may have weighed policy heavier than precedent, but in light of the Ninth Circuit's decision in *Hayes v. Brown*, the Third Circuit was well within its discretion to join the minority split. The whole point of cases like *Napue* and *Giglio*, the Third Circuit argued, was to acknowledge the fundamental injustice created by the government's knowing presentation of false testimony at trial.[175] Because *Brady* violations bring the substantive fairness of trial into question, any violation found material can never be harmless under *Brecht*.

III. IN SUPPORT OF A MORE FLEXIBLE STANDARD FOR PERJURED-TESTIMONY CLAIMS

The Third Circuit was correct to reject the application of the *Brecht* actual-prejudice hurdle to knowing-use-of-perjured-testimony claims raised by habeas petitioners on collateral review. The other Circuits, including those presently undecided, should join the Third and Ninth Circuits in adopting the unmodified reasonable-likelihood materiality standard for such claims.

By adding a second prong to the materiality standard initially created by *Agurs*, courts take a bright-line exemption applicable to all *Brady* violations and destroy it by adding an ex post level of analysis to a small subsection of claims. Because habeas petitioners already bear the shifted burden of proof on collateral review,[176] adding an extra hurdle to the path faced by

173. *See supra* notes 30–31 and accompanying text.

174. Robinson v. Arvonio, 27 F.3d 877, 886 (3d Cir. 1994), *cert. granted*, *vacated*, 513 U.S. 1186 (1995).

175. *Haskell*, 866 F.3d at 145–46 ("A state violates the Fourteenth Amendment's due process guarantee when it knowingly presents or fails to correct false testimony in a criminal proceeding." (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)); *see* Giglio v. United States, 405 U.S. 150, 153 (1972); *see also* Rosencrantz v. Lafler, 568 F.3d 577, 593 (6th Cir. 2009) (Cole, J., dissenting) ("The whole purpose of the *Giglio*-materiality test is to identify those due process harms requiring post-conviction relief." (citing *Giglio*, 405 U.S. at 153–54)).

176. *Haskell*, 866 F.3d at 148; *see also* Blume & Garvey, *supra* note 42, at

habeas petitioners does nothing more than reward prosecutors for successfully obfuscating justice until the appeals period has tolled. By presenting false testimony, the government deprives defendants of any chance at a fair trial. The willful abuse of prosecutorial discretion, including through the knowing or negligent use of perjured testimony, should be a grave enough concern to justify the lower standard for such claims under habeas review.

This Part offers a solution to the ongoing Circuit split over the level of materiality analysis required for perjured-testimony claims raised on collateral review. Section A explains why the existing reasonable-likelihood standard offers a sufficient degree of protection for finality and federalism, and argues that a second level of actual-prejudice analysis need not be added to the standard materiality measure for perjured-testimony claims. Section B then argues that the Supreme Court should resolve the confusion left by *Kyles v. Whitley* by specifically exempting perjured-testimony claims from the *Brecht* actual-prejudice hurdle, while Section C examines an alternative solution posed by several of the Circuits that suggests that the Supreme Court step in and recategorize the knowing use of perjured testimony as a structural error subject to immediate reversal.

A. THE REASONABLE-LIKELIHOOD STANDARD SUFFICIENTLY MEETS THE NEEDS OF HARMLESS-ERROR ANALYSIS FOR PERJURED-TESTIMONY CLAIMS

Much of the confusion between the Circuits comes down to the Court's actions in *Kyles v. Whitley*.[177] Following an exhaustive analysis, the Court in *Kyles* concluded that the reasonable-probability standard used by the *Brady* evidentiary-withholding violations at bar fully satisfied the need for harmless-error analysis and that such claims were therefore exempt from added analysis under *Brecht*.[178] With no knowing-use-of-perjured-testimony claim before it, the Court declined to extend its holding to the last category of *Brady* trial errors.[179] However, even though "reasonable probability" is a narrower standard than "reasonable likelihood," the Court's arguments against *Brecht* could easily be extended to the knowing use of perjured testimony. The Court itself recognized that the reasonable-likelihood

169 ("[T]he burden of proof within the law of harmless error represents a probability of prejudice, or a probability of another probability.").

177. 514 U.S. 419 (1995).

178. *See id.* at 437.

179. *See id.* at n.7.

standard, when used for perjured-testimony claims, produces results equivalent to harmless-error analysis (in the form of another harmless-error test, *Chapman*'s "harmless beyond a reasonable doubt" standard).[180] In fact, the Court several years earlier recognized that this softer standard for perjured-testimony claims was justified by the level of prosecutorial misconduct and "corruption of the truth-seeking function" such claims presented.[181]

The Court in *United States v. Bagley* sought to retain the "less onerous" reasonable-likelihood standard for perjured-testimony claims for a reason.[182] Yet, after *Kyles*, a majority of decided Circuits would have petitioners believe that the only *Brady* claims facing added scrutiny on collateral review were perjured-testimony claims.[183] Despite the clear intent of the Supreme Court in *Agurs* and *Bagley* to wrangle the use of false testimony by unscrupulous prosecutors,[184] the pro-*Brecht* Circuits accept only the reluctant dicta put forth by the Court in *Kyles*,[185] arguing that because the *Kyles* Court declined to specifically extend its ruling to an issue not before it, the issue must by default be controlled by *Brecht*.[186] But the question is moot—*Kyles* states that the actual-prejudice hurdle need not apply if harmless-error analysis is already present in the existing standard.[187] Despite

180. In 1985, the Supreme Court observed that "this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard." United States v. Bagley, 473 U.S. 667, 680 n.9 (1985). *See generally* Blume & Garvey, *supra* note 42, at 164.

181. *Bagley*, 473 U.S. at 680 (quoting United States v. Agurs, 427 U.S. 97, 104 (1976)).

182. United States v. Clay, 720 F.3d 1021, 1026 (8th Cir. 2013).

183. *See supra* Part II.B.

184. *See Bagley*, 473 U.S. 667; *Agurs*, 427 U.S. 97.

185. *See* Kyles v. Whitley, 514 U.S. 419, 431–33 nn.6–7 (1995) (declining to "consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony" because the issue was not before the Court).

186. *See, e.g.*, Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1112–13 (11th Cir. 2012) ("We note that no *Brecht* analysis is needed for *Brady* violations, for the Supreme Court has held that a showing of materiality under *Brady* necessarily establishes actual prejudice under *Brecht*." (citing *Kyles*, 514 U.S. at 435)).

187. *See id.* at 435 ("Assuming . . . that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[]' . . . necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict[]' . . . ." (first quoting *Bagley*, 473 U.S. at 682; and then quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993))).

the Court's reluctance to explicitly extend this holding beyond the scope of the reasonable-probability standard, this logic holds true. The reasonable-likelihood standard is sufficiently capable of meeting the goals of harmless-error analysis on collateral review, and adding an unnecessary second prong to the materiality test laid out by *Agurs* fails to serve the intent of the Court.

B. THE SUPREME COURT SHOULD RESOLVE THE CONFUSION CREATED BY *KYLES V. WHITLEY*

There are several reasons why the Supreme Court should grant certiorari and resolve the issue left dangling by *Kyles v. Whitley* by exempting perjured-testimony claims raised by habeas petitioners from the added *Brecht* hurdle. First, as explained above, harmless-error analysis is already present in the existing materiality standard for perjured testimony.[188] In 1985, the Supreme Court found that the reasonable-likelihood standard for knowing-use-of-perjured-testimony claims was "equivalent to the *Chapman* harmless-error standard," containing built-in harmless-error analysis.[189] This confirms that there is no need to apply the *Brecht* hurdle to any claims with an existing harmless-error materiality standard.

Second, collateral review represents a last chance at liberty for petitioners who have exhausted all other appellate and post-conviction options.[190] The writ of habeas corpus has been under attack in federal courts since the mid-1980s.[191] Indeed, many scholars consider post-conviction habeas relief "all but a dead letter" in the modern jurisprudence.[192] This can be credited to a number of changes in the criminal justice system, including increasing criminalization of certain acts and creation of new requirements designed to limit federal habeas filings.[193]

188. *See supra* Part III.A.

189. *Bagley*, 473 U.S. at 680 n.9.

190. *Cf. Brecht*, 507 U.S. at 633 (calling habeas relief "an extraordinary remedy").

191. *See generally* Gershman, *supra* note 16 (describing the obstacles imposed by the Supreme Court which "block[ed]" habeas claims in cases from the 1980s).

192. Carlos M. Vazquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 906 (2017) ("For years, the prevailing academic and judicial wisdom has held that, between them, Congress and the Supreme Court have rendered post-conviction habeas review all but a dead letter.").

193. *See supra* note 71 and accompanying text.

If the prosecutor's knowing use of false testimony does not come to light early enough in the appeals process, the petitioner may lose all opportunities to raise the issue under the unmodified *Agurs* reasonable-likelihood standard. Habeas scholars John Blume and Stephen Garvey argue that "*Brecht* increases the incentive for prosecutors to ignore or willfully neglect constitutional limits and to commit constitutional error."[194] The government's failure to correct false testimony before a conviction is entered deprives these petitioners of both a fair trial and any chance at a productive appeal.

Third, while federalism and finality are real concerns, the Third Circuit rightly points out that the entire purpose of habeas relief is to protect and endorse the values of justice and fundamental fairness.[195] When petitioners do raise perjured-testimony claims later in the appeals process, it is often because that is when they first learn of the error. In *Rosencrantz*, for example, the petitioner was only alerted that the victim lied under oath, and that prosecutors knowingly permitted this false testimony, through an affidavit submitted by a former Sheriff's Department employee who interviewed the victim in jail before, during, and after her meetings with police detectives and an identified prosecutor.[196] In *Trepal*, an expert witness's act of perjury only became public knowledge after an investigative report was filed by the state attorney general.[197] In both cases, the likelihood of the state's misconduct coming to light on its own was next to nil, causing one to wonder exactly how many potential habeas petitioners face this precise situation and never learn of it.

Fourth, pro-*Brecht* Circuits interpret the Supreme Court's reluctance to act in *Kyles* as an implicit adoption of the actual-prejudice hurdle for perjured-testimony claims.[198] But reading *Kyles* in this way creates a bizarre world wherein, upon reaching the court of last resort, the discovery of an unintended nondisclosure will face a *lower* materiality hurdle than a *Brady* error caused by state deception.[199] In this world, a habeas petitioner

194. Blume & Garvey, *supra* note 42, at 188.

195. Haskell v. Superintendent Greene SCI, 866 F.3d 139, 151 (3d Cir. 2017).

196. Rosencrantz v. Lafler, 568 F.3d 577, 582 (6th Cir. 2009).

197. Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1100–01 (11th Cir. 2012).

198. *See, e.g.*, United States v. Clay, 720 F.3d 1021, 1026 (8th Cir. 2013); *Trepal*, 684 F.3d at 1112 n.29; *Rosencrantz*, 568 F.3d at 589; Gilday v. Callahan, 59 F.3d 257, 267–68 (1st Cir. 1995).

199. *Compare* Kyles v. Whitley, 514 U.S. 419, 432–40 (1995) (analyzing the

alleging inadvertent evidentiary withholding need only to show that a reasonable jury would hypothetically have been affected by the truth. Yet, this same interpretation would require a petitioner alleging acts of intentional deception by the state to show that a reasonable jury not only *could* have been affected by the truth, but that the false testimony presented caused actual prejudice in the petitioner's case.

Finally, the Supreme Court's decision in *Kyles* to limit the application of the actual-prejudice hurdle represented a sudden about-face by the Court just two years after it decided *Brecht*.[200] One reason for this shift might be found in the Court's makeup at that time. Despite the short time between the two cases, the Court's lineup had shifted by twenty-five percent, with Justice Blackmun and Justice White retiring and Justice Ginsburg and Justice Breyer joining the bench. Both *Kyles* and *Brecht* came down as 5–4 decisions, with Justice Stevens filing a concurring opinion on both.[201] In 2018, just one of the original five majority votes on *Brecht* (Justice Thomas) and two of the original five majority votes on *Kyles* (Justices Ginsburg and Breyer) remain.[202] Justice Stevens, the swing vote in both cases, retired in 2010.[203] As the Supreme Court continues to face questions about the treatment of perjured testimony discovered after conviction is entered, the time is right for the Court to readdress the issue of

prosecution's inadvertent failure to disclose evidence favorable to the defense under the "reasonable probability" standard of materiality when raised on federal collateral review), *and* Vaughn v. United States, 93 A.3d 1237, 1254 (D.C. 2014) (analyzing the prosecution's failure to disclose favorable impeachment evidence about a key State witness under the "reasonable probability" standard when raised on direct appeal), *with* Woodall v. United States, 842 A.2d 690, 696 (D.C. 2004) (analyzing appellant's claim that the prosecution knowingly presented false testimony under the "reasonable likelihood" standard when raised on direct appeal), *and* United States v. Clay, 720 F.3d 1021, 1026–27 (8th Cir. 2013) (analyzing the prosecution's knowing use of perjured testimony under the "actual prejudice" standard when raised by a habeas petitioner on federal collateral review).

200. *See supra* Part I.D.2.

201. *See Kyles*, 514 U.S. at 454–56 (Stevens, J., concurring); Brecht v. Abrahamson, 507 U.S. 619, 639–44 (1993) (Stevens, J., concurring).

202. *Current Members*, SUP. CT. U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 20, 2018); *see also Kyles*, 514 U.S. at 421–54 (majority opinion by J. Souter, J. Stevens, J. Ginsburg, J. Breyer, and J. O'Connor); *Brecht*, 507 U.S. at 621–39 (majority opinion by J. Rehnquist, J. Stevens, J. Scalia, J. Thomas, and J. Kennedy).

203. Nina Totenberg, *For Decades, Stevens Molded High Court Rulings*, NPR (Apr. 9, 2010), https://www.npr.org/templates/story/story.php?storyId=123075821.

prosecutorial misconduct on collateral review.[204] By moving to exempt perjured-testimony claims on collateral review from actual-prejudice analysis, the Court would resolve two decades of confusion left by the interaction between *Agurs*, *Brecht*, and *Kyles*. The Court has previously found that harmless-error analysis already exists in the reasonable-likelihood standard. By clarifying existing doctrine and expressly expanding the *Brecht* exemption to all *Brady* violations, the Court will act in support of long-standing policy concerns and take a hard stance against the imbalance of power and inherent unfairness created when the state withholds vital information about witness testimony from defendants.

C. ALTERNATELY, THE SUPREME COURT SHOULD RECATEGORIZE THE KNOWING USE OF PERJURED TESTIMONY AS A FORM OF STRUCTURAL ERROR

Several of the pro-*Brecht* Circuits, displaying sympathy over the injustice to criminal defendants presented by the state's knowing use of false testimony, have invited the Supreme Court to take up the issue and reclassify the knowing presentation of false testimony as a structural error, on par with judicial or racial bias.[205] Indeed, this would appear to present an elegant solution to the issue.

Structural errors, like denial of the right to counsel, are not subject to harmless-error review.[206] The rationale for this is

204. *See, e.g.*, Long v. Pfister, 874 F.3d 544 (7th Cir. 2017) (finding that the prosecution failed to correct false testimony by a witness but declining to grant collateral relief where the Supreme Court had not taken a firm stance on the issue), *cert. denied*, 138 S. Ct. 1593 (2018). The Third Circuit's decision and rationale in *Haskell* were heavily cited by the briefs in this petition for certiorari. *See* Petition for Writ of Certiorari, *Long*, 138 S. Ct. 1593 (mem.) (2018) (No. 17-991); Brief in Opposition, *Long*, 138 S. Ct. 1593 (2018) (No. 17-991).

205. *See, e.g.*, Rosencrantz v. Lafler, 568 F.3d 577, 589 (6th Cir. 2009) (declining to deem knowing-use-of-perjured-testimony claims as "structural" errors because the Supreme Court had not done so). *Brecht* even leaves the door open to this, acknowledging that certain scenarios ("deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct") run the risk of so direly "infect[ing] the integrity of the proceeding as to warrant . . . habeas relief, even if [the error] did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9. An example of such a pattern might be found in the extreme and repeated misconduct of Oklahoma County District Attorney Robert H. Macy in death penalty cases, yet the Tenth Circuit repeatedly found his conduct to only meet the level of harmless error. Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 423 (2007).

206. *Brecht*, 507 U.S. at 629–30.

structural errors present a far greater risk to the integrity of the court than constitutional trial errors: "[T]he distinction between trial error and structural error is based on the truth-seeking function of the trial process and the reliability of the result reached through that process."[207] In this sense, unlike the bulk of *Brady* violations, which address prosecutorial withholding of existing evidence, the state's knowing presentation of false testimony reflects concerns shared by structural errors. Structural errors "arise from the breach of rules that do not directly regulate the admission of evidence and that serve some purpose other than promoting reliability."[208] These constitutional rights protected by such structural errors are so inherent, yet so difficult to safeguard, that "[they] can only be protected and enforced . . . with a rule of automatic reversal."[209] When a prosecutor knowingly presents the fact-finding jury with testimony that he or she knows to be untrue, this casts the "truth-seeking function" of trial into question.[210] Without the safeguard of automatic reversal, violations of the rules against prosecutorial misconduct would have to be subjected to actual-prejudice analysis, "in essence convert[ing] the rights supported by these rules into rights without remedies."[211]

However, despite the strength of arguments that the state's knowing use of perjured testimony presents a risk to the ultimate fairness of trial on par with other structural errors, such a recategorization could have a dramatic impact on the landscape of post-conviction relief. The ability to find an alleged *Brady* violation immaterial and thus harmless makes sense when considering the Court's interest in finality and its expressed disinterest in seeing cases relitigated. The reasonable-likelihood standard maintains harmlessness as an option, while leaving ample room for petitioners to seek justice, and should therefore be preserved.

CONCLUSION

The writ of habeas corpus seeks to provide a last chance at freedom for incarcerated individuals; for this reason, the stakes

207. Blume & Garvey, *supra* note 42, at 185 (citing Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991)).

208. *Id.* at 186.

209. *Id.* at 186–87.

210. *See id.* at 185–88 (discussing the possibility of certain prosecutorial misconduct to be so egregious as to undermine the integrity of the proceeding).

211. *Id.*

for habeas petitioners are exceptionally high, and there is a substantial risk to liberty in placing an added hurdle in front of habeas petitioners attempting to raise a material claim of prosecutorial misconduct—particularly when these petitioners already face a shifted burden of proof.

Like the evidentiary-withholding claims in *Kyles v. Whitley*, the knowing use of perjured testimony should be exempt from actual-prejudice analysis on collateral review. *Brecht v. Abrahamson* attempted to change the game for habeas petitioners. Yet, the Court has repeatedly recognized that the knowing use of false testimony against criminal defendants deserves a harder look than most constitutional trial errors, and there remains little reason to diminish this standard on federal collateral review. By grouping all *Brady* prosecutorial misconduct violations under the same *Brecht* exemption, the Supreme Court will set a clear standard of conduct and review for prosecutors in criminal cases.

The Supreme Court should recognize the discrepancy created by *Kyles* and allow perjured-testimony claims to join the other *Brady* violations in discarding actual-prejudice analysis on collateral review.