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Ethics in Criminal Advocacy, Symposium, Perjury and False Testimony: Should the Difference Matter so Much?

Cover Page Footnote

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PERJURY AND FALSE TESTIMONY: SHOULD THE DIFFERENCE MATTER SO MUCH?

*Stephen A. Saltzburg**

INTRODUCTION

NOT long ago we witnessed an impeachment trial in which Senators debated, *inter alia*, whether the President of the United States committed perjury in grand jury testimony and whether he should be removed from office as a result. Reasonable people disagreed on both questions. In the end, fifty-five Senators voted to acquit President Clinton on the impeachment article alleging perjury, while forty-five Senators voted guilty.¹ Although the House of Representatives did not charge President Clinton with perjury in his deposition in the lawsuit filed against him by Paula Jones, Judge Susan Webber Wright held the President in contempt for deliberately giving false testimony and violating the judge's discovery orders in *Jones v. Clinton*.² Judge Wright thought she knew false statements when she saw them:

It is difficult to construe the President's sworn statements in this civil lawsuit concerning his relationship with Ms. Lewinsky as anything other than a willful refusal to obey this Court's discovery Orders. Given the President's admission that he was misleading with regard to the questions being posed to him and the clarity with which his falsehoods are revealed by the record, there is no need to engage in an extended analysis of the President's sworn statements in this lawsuit. Simply put, the President's deposition testimony regarding whether he had ever been alone with Ms. Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false, notwithstanding tortured definitions and interpretations of the term "sexual relations."³

Judge Wright eventually imposed a monetary sanction of \$79,999 to be paid to plaintiff's counsel and \$9485 to reimburse the costs of

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1. See 145 Cong. Rec. S1458 (daily ed. Feb. 12, 1999) (Senate vote on Impeachment Article I (perjury)).

2. 36 F. Supp. 2d 1118, 1125-26, 1131 (E.D. Ark. 1999).

3. *Id.* at 1130 (footnote omitted).

Judge Wright's travel to Washington to preside over the deposition.⁴

Putting aside the question of whether the President's testimony in the *Jones* case was material and thus qualifies as criminal perjury, it seems clear that there is a substantial basis for Judge Wright's conclusion that the President gave false testimony in his deposition. This troubled Judge Wright sufficiently to cause her to cite the President for contempt and sanction him.⁵ In my view, Judge Wright's action was clearly warranted. It is unfortunate, however, that the desire to maintain the appearance of judicial neutrality during the pending impeachment proceedings meant that the sanctions were not imposed sooner.

It is ironic that Judge Wright's message, that false testimony in any judicial proceeding, even a civil deposition, is intolerable in our judicial system, was rendered only a month and a half after the Supreme Court signaled its own lack of concern for false testimony—even in a capital case. That signal came in *Strickler v. Greene*.⁶ As I shall demonstrate, the seeds of *Strickler* were sown as early as 1976, when the Supreme Court decided *United States v. Agurs*.⁷ The majority in *Strickler* relied on its *Agurs* analysis, as developed in subsequent cases, and barely wavered at an earlier line of cases that demonstrated the Court's unwillingness to permit prosecutors to put on testimony that created a false impression of the truth, whether or not such testimony technically amounted to perjury. As a result, the *Strickler* Court indicated that it did not find false prosecutorial testimony shocking and demonstrated that it might not even know false testimony when such testimony stood naked before it.

Part I of this Article examines the facts of *Strickler* and scrutinizes the testimony of a key prosecution witness, Ann Stoltzfus. Part II evaluates the incongruity between Stoltzfus's trial testimony and other evidence not disclosed at trial that tended to cast doubt, at least in part, on the Stoltzfus testimony. Parts III and IV compare and contrast perjury and false testimony by chronicling Supreme Court cases that examine these concepts. Part V returns to the facts of *Strickler* and argues that the prosecutor created a false impression of the truth, which remained un-remedied because the Court did not find that it amounted to perjury, but which nonetheless could have affected the outcome of the trial and was thus intolerable. This Article concludes that the Supreme Court's line-drawing between perjury and false testimony perpetuates injustice and provides little incentive for prosecutors (and defense lawyers) to offer truthful

4. See *Jones v. Clinton*, 57 F. Supp. 2d 719, 729 (E.D. Ark. 1999).

5. See *id.* at 724-25; *Jones*, 36 F. Supp. 2d at 1131.

6. 119 S. Ct. 1936 (1999). The case was decided on June 17, 1999. Judge Wright's sanction of the President occurred on July 29, 1999. See *Jones*, 57 F. Supp. 2d at 719.

7. 427 U.S. 97 (1976).

testimony. This Article also concludes that false and misleading testimony produces the same distortion of the truth and likelihood of a wrong conviction as does perjury.

I. THE FACTS OF *STRICKLER*

A. *The Charge*

Thomas David Strickler was charged with capital murder in a Virginia state court. He was convicted and sentenced to death. The Virginia Supreme Court affirmed both the conviction and the sentence.⁸ Strickler sought habeas corpus relief in federal court, alleging that the prosecution had failed to disclose important exculpatory evidence. The district court granted Strickler's application for a writ of habeas corpus in an unreported opinion.⁹ The Fourth Circuit reversed and reinstated the conviction in another unreported opinion.¹⁰ The Supreme Court granted certiorari and ultimately affirmed the court of appeals in a 7-2 decision.¹¹

The homicide charge against Strickler was based on an incident that occurred in January 1990. Leanne Whitlock, an African American sophomore at James Madison University, was abducted from a local shopping center, robbed, and murdered.¹² Strickler and Ronald Henderson were both charged with the crimes, tried separately, and convicted of all three offenses.¹³ Henderson was convicted of first degree murder, a non-capital crime, whereas Strickler was convicted of capital murder and sentenced to death.¹⁴

B. *The Importance of Anne Stoltzfus—Sole Eyewitness to the Abduction*

At the trials of Strickler and Henderson, a prosecution witness, Anne Stoltzfus, testified in what Justice Stevens later described as "vivid detail" about Whitlock's abduction.¹⁵ Stoltzfus was the only witness to the abduction.

8. See *Strickler v. Commonwealth*, 404 S.E.2d 227, 237 (Va. 1991).

9. See *Strickler*, 119 S. Ct. at 1941 n.1.

10. See *id.*

11. See *id.* at 1940. Justice Stevens, viewed by many as the Court's most "liberal" Justice, wrote the majority opinion in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Ginsburg, and Breyer, joined in full. Justice Thomas joined in the holding. Justices Kennedy and Souter joined that part of the Court's opinion holding that the failure to disclose evidence did not affect the guilt/innocence determination, but dissented from the holding that the undisclosed evidence did not require a new sentencing hearing. See *id.*

12. See *id.* at 1941. The race of the victim was important because of witnesses who testified to seeing a woman in the car at a later time. That woman was white.

13. See *id.*

14. See *id.*

15. See *id.*

Justice Stevens described the Stoltzfus testimony at Strickler's trial at some length:¹⁶ "Anne Stoltzfus testified that on two occasions on January 5 she saw petitioner, Henderson, and a blonde girl inside the Harrisonburg mall, and that she later witnessed their abduction of Whitlock in the parking lot."¹⁷ Stoltzfus testified that she did not call the police immediately following the incident, but that a week and a half after the incident, she discussed the incident with classmates at James Madison University, where both she and Whitlock were students. One of these classmates called the police.¹⁸ Stoltzfus told the Virginia trial court that the next night a detective visited her. The following morning she went to the police station and told her story to Detective Claytor, who showed her photographs of possible suspects.¹⁹ Stoltzfus identified Strickler and Henderson "with absolute certainty" but stated that she had a "slight reservation about her identification of the blonde woman."²⁰

Stoltzfus testified that, at about 6 p.m. on January 5, she and her 14-year-old daughter were in the Music Land store in the mall to purchase a compact disc.²¹ She added that while she was waiting for assistance from a store clerk, Strickler, whom she described as "Mountain Man," and a blonde girl entered.²² According to Stoltzfus, Strickler seemed "revved up" and impatient, and this frightened Stoltzfus and caused her to back up, bump into Henderson (whom she called "Shy Guy"), and feel "something hard in the pocket of his coat."²³

Stoltzfus testified that she then left the store, but intended to return later. She said she again encountered the threesome at about 6:45 p.m., while she was heading back toward Music Land: "Shy Guy'

16. I include the entire description of her testimony because it is important in evaluating the potential importance of the evidence that was not disclosed to the defense.

17. *Id.* at 1943.

18. *See id.*

19. *See id.*

20. *Id.*

21. *See id.*

22. *See id.* In a footnote, the Court stated:

She testified to their appearances in great detail. She stated that [Stoltzfus] had "a kind of multi layer look." He wore a grey T-shirt with a Harley Davidson insignia on it. The prosecutor showed Stoltzfus the shirt, stained with blood and semen, that the police had discovered at petitioner's mother's house. He asked if it were the same shirt she saw petitioner wearing at the mall. She replied, "That could have been it." Henderson "had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren't just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort." The woman "had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face."

Id. at 1943 n.5 (citations omitted).

23. *Id.* at 1943.

walking by himself, followed by the girl, and then 'Mountain Man' yelling 'Donna, Donna, Donna.'²⁴ The girl allegedly bumped into Stoltzfus and then asked for directions to the bus stop.²⁵ The three then left.

Stoltzfus explained to the jury that she first tried to follow the trio because of her concern about Strickler's behavior, but she lost them and then headed back to Music Land.²⁶ When the clerk did not return, she and her daughter went to their car. While driving to another store, they saw a shiny dark blue car. Stoltzfus said the driver was "beautiful, well dressed and she was happy, she was singing."²⁷ When the blue car stopped behind a minivan at a stop sign, Stoltzfus allegedly saw petitioner for the third time. She testified:

'Mountain Man' came tearing out of the Mall entrance door and went up to the driver of the van and . . . was just really mad and ran back and banged on back of the backside of the van and then went back to the Mall entrance wall where 'Shy Guy' and 'Blonde Girl' was [sic] standing . . . then we left [and before the van and a white-pickup truck could turn] 'Mountain Man' came out again . . .²⁸

Stoltzfus then relayed facts about Strickler and his companions' encounter with the victim in the parking lot in explicit detail: "After first going to the passenger side of the pickup truck, [Strickler] came back to the black girl's car, 'pounded on' the passenger window, shook the car, yanked the door open and jumped in."²⁹ Stoltzfus further testified that "when Strickler motioned for 'Blonde Girl' and 'Shy Guy' to get in, the driver stepped on the gas and 'just laid on the horn' but she could not go because there were people walking in front of the car."³⁰ The horn "blew a long time" and Strickler "started hitting [Whitlock] . . . on the left shoulder, her right shoulder and then it looked like to [Stoltzfus] that [Strickler] started hitting [Whitlock] on the head and . . . [Stoltzfus] became concerned and upset."³¹ At that point, Stoltzfus said, she honked and beeped her horn and then the driver stopped honking her horn and Strickler "stopped hitting her and opened the [car] door again and the 'Blonde Girl' got in the back and 'Shy Guy' followed and got behind him."³²

Stoltzfus also testified that she "pulled her car up parallel to the blue car, got out for a moment, got back in, and leaned over to ask

24. *Id.*

25. *See id.* "Stoltzfus stated that the girl caught a button in Stoltzfus's 'open weave sweater, which is why I remember her attire.'" *Id.* at 1943 n.6.

26. *See id.* at 1943.

27. *Id.*

28. *Id.* (citation omitted).

29. *Id.* at 1943-44.

30. *Id.* at 1944.

31. *Id.*

32. *Id.*

repeatedly if the other driver was O.K. The driver looked 'frozen' and mouthed an inaudible response."³³ Stoltzfus claimed that she "started to drive away and then realized 'the only word that it could possibly be, was help.' The blue car then drove slowly around her, went over the curb with its horn honking, and headed out of the mall."³⁴ Stoltzfus testified that she "briefly followed, told her daughter to write the license number on a '3 x 4 [inch] index card,"³⁵ and then left for home because she had an empty gas tank and 'three kids at home waiting for supper.'"³⁶

While on the witness stand, Stoltzfus identified Whitlock from a picture as the driver of the car and pointed to Strickler as "Mountain Man." Stoltzfus emphatically denied that pretrial publicity about the murder had influenced her identification. She explained: "[F]irst of all, I have an exceptionally good memory. I had very close contact with [petitioner] and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification."³⁷

C. *Open File Discovery*

The capital charge against Strickler was brought in Augusta County, Virginia, where the prosecutor maintained an open file discovery policy.³⁸ As a result, Strickler's trial counsel had access to all of the evidence in the prosecutor's file. With such access available even without a discovery motion, defense counsel apparently saw no need for a motion and filed no motion seeking discovery of exculpatory evidence.³⁹

D. *Other Evidence of Guilt*

There was substantial evidence of Strickler's guilt. Whitlock had borrowed her boyfriend's blue Mercury Lynx and had planned to meet him and return the car at a shopping mall in Harrisonburg, Virginia, late in the afternoon of her abduction.⁴⁰ Strickler's mother testified that she drove Strickler and Henderson to Harrisonburg the same day and that Strickler always carried a hunting knife with him.⁴¹ A security guard saw Strickler and Henderson at the mall on the

33. *Id.*

34. *Id.*

35. *Id.* "I said to my fourteen[-year-]old daughter, write down the license number, you know, it was West Virginia, NKA 243 and I said help me to remember, 'No Kids Alone 243,' and I said remember, 243 is my age." *Id.* at 1944 n.7 (citations omitted).

36. *Id.*

37. *Id.* at 1944.

38. *See id.* at 1945.

39. *See id.* at 1945-46.

40. *See id.* at 1941.

41. *See id.*

afternoon of the abduction and kept the two men under observation, because someone had reported that they were trying to steal a car in the parking lot; but the guard lost sight of them at about 6:45 p.m.⁴² At approximately 7:30 p.m., a witness saw the blue Lynx in Augusta County about 25 miles from Harrisonburg and a short distance from where the victim's body was found.⁴³ This witness identified Strickler as the driver of the car, and said that he "saw a white woman in the front seat and another man in the back."⁴⁴

Later that evening, Strickler and Henderson arrived at a bar where they danced with several women. Henderson gave the victim's watch to one of them.⁴⁵ Four women from the bar testified at trial. Three testified that they noticed nothing unusual about Strickler's appearance, but one woman, Donna Kay Tudor, recalled seeing "blood on his jeans and a cut on his knuckle."⁴⁶ Tudor left the bar with the two men in search of marijuana, and Henderson was driving the blue Lynx.⁴⁷ Tudor testified to having "overheard a crude conversation that could reasonably be interpreted as describing the assault and murder of a black person with a 'rock crusher.'"⁴⁸

By four-thirty or five the next morning, Strickler and Tudor drove Henderson to the apartment of Kenneth Workman, who testified "that Henderson had blood on his pants and stated [that] he had killed a black person."⁴⁹ Strickler and Tudor drove to a motel and later went to Virginia Beach for the rest of the week.⁵⁰ Strickler gave Tudor pearl earrings that the victim had been wearing when last seen, and Tudor saw the victim's "driver's license and bank card in the glove compartment of the car."⁵¹ According to Tudor, Strickler unsuccessfully tried to use the bank card in Virginia Beach.⁵²

Strickler and Tudor returned to Augusta County and abandoned the car. The police found it and also found Strickler's and Henderson's fingerprints inside and outside the car.⁵³ They found shoeprints matching Strickler's shoes, and a jacket inside the car that contained identification papers belonging to Henderson.⁵⁴ At Strickler's mother's house, the police retrieved a bag that Tudor and Strickler left there, which contained identification cards belonging to

42. *See id.*

43. *See id.*

44. *Id.*

45. *See id.* at 1942.

46. *Id.*

47. *See id.*

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.*

52. *See id.*

53. *See id.*

54. *See id.*

the victim as well as a tank top that had blood and semen on it.⁵⁵

The police responded to a tip from a farmer who, eight days after the abduction, found Henderson's wallet and the victim's body near a 69-pound rock spotted with blood.⁵⁶ The "[f]orensic evidence indicated that Whitlock's death was caused by 'multiple blunt force injuries to the head'" and that the rock was the likely murder weapon.⁵⁷

E. *The Jury Instruction and Verdict*

The Augusta County Circuit Court judge instructed the jury that Strickler could be found guilty of capital murder if the evidence established beyond a reasonable doubt that he "jointly participated in the fatal beating and was an active and immediate participant in the act or acts that caused the victim's death."⁵⁸ Strickler was convicted and the court sentenced him to death.

F. *State Post-Conviction Proceedings*

Strickler unsuccessfully appealed his sentence and conviction to the Virginia Supreme Court.⁵⁹ The Augusta County Circuit Court appointed new counsel to represent him in state habeas proceedings.⁶⁰ This counsel argued ineffective assistance of counsel based in part on the trial counsel's failure to file a motion for production of exculpatory evidence. The prosecutor responded by relying on his open file policy and claimed that the motion was unnecessary.⁶¹ The Augusta County court agreed and dismissed the petition. The Virginia Supreme Court again affirmed.⁶²

G. *Federal Habeas Corpus and Discovery*

It was the filing of Strickler's federal habeas corpus petition in the Eastern District of Virginia that resulted in the entry of a sealed, *ex parte* order granting Strickler's counsel the right to examine and copy all of the police and prosecution files in the case.⁶³ Counsel examined

55. *See id.*

56. *See id.*

57. *Id.*

58. *Id.* at 1946.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See Strickler v. Murray*, 452 S.E.2d 648 (Va. 1995).

63. *See Strickler*, 119 S Ct. at 1947. The Supreme Court noted that the record contained no explanation and no party could explain why the district court entered this discovery order. The Fourth Circuit has held that district courts have no authority to issue *ex parte* discovery orders in habeas corpus cases. *See In re Pruett*, 133 F.3d 275, 280 (4th Cir. 1997). The Supreme Court noted that it expressed no opinion on the correctness of the Fourth Circuit's prior holding. *See Strickler*, 119 S. Ct. at 1950 n.28.

the files and discovered information regarding Anne Stoltzfus that previously had not been disclosed.⁶⁴

H. *The Stoltzfus Information*

The Stoltzfus information falls into two general categories: notes taken by Detective Claytor during his interviews with Stoltzfus and letters written by Stoltzfus to Claytor.

Because the contents of the newly disclosed information are critical to the analysis that will follow, each document that Strickler alleged had been withheld is described below.

Exhibit 1 is a note handwritten by Detective Claytor after his first interview with Stoltzfus on January 19, 1990, two weeks after the crime.⁶⁵ According to the note, Stoltzfus could not identify the black female victim. "The only person Stoltzfus could identify at this time was the white female."⁶⁶

Exhibit 2 is a document prepared by Detective Claytor after February 1. The document summarizes his interviews with Stoltzfus conducted on January 19 and January 20, 1990.⁶⁷ During those interviews "she was not sure whether she could identify the white males but felt sure she could identify the white female."⁶⁸

Exhibit 3 is entitled "Observations" and includes a summary of the abduction.⁶⁹

Exhibit 4 is a letter to Claytor from Stoltzfus "to clarify some of my confusion for you."⁷⁰ The letter, which is dated three days after their first interview, states that Stoltzfus had not remembered being at the mall, but that her daughter had helped stimulate her memory.⁷¹ Her description of the abduction includes the comment:

I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. . . . Then the guy I saw came running up to the black girl's window.? [sic] Were those 2 memories the same person?⁷²

In a postscript she noted that her daughter "doesn't remember seeing

64. See *Strickler*, 119 S. Ct. at 1950-51.

65. See *id.* at 1944.

66. *Id.*

67. See *id.* Justice Stevens observed that Exhibit 2 was consistent in part with Exhibit 1, but Exhibit 2 omitted one important detail: "As the District Court pointed out, however, [Exhibit 2] omits reference to the fact that Stoltzfus originally said that she could not identify the victim—a fact recorded in his handwritten notes." *Id.* at 1944 n.9.

68. *Id.* at 1944.

69. See *id.*

70. *Id.* at 1944-45.

71. See *id.*

72. *Id.*

the 3 people get into the black girl's car."⁷³

Exhibit 5 is a note to Claytor entitled "My Impressions of 'The Car.'"⁷⁴ This note contains three paragraphs describing the size of the car and comparing it with Stoltzfus's Volkswagen Rabbit, but it does not mention the license plate number that Stoltzfus vividly recalled at the trial.⁷⁵

Exhibit 6 is a note from Stoltzfus to Claytor dated January 25, 1990, which states that after spending several hours with John Dean, Whitlock's boyfriend, "looking at current photos," Stoltzfus had identified Whitlock "beyond a shadow of a doubt."⁷⁶ In her note, Stoltzfus did not claim any memory of details regarding the victim. It was not until trial, as the district court noted, that Stoltzfus's identification had expanded to include a description of Whitlock's clothing and appearance as a college kid who was "singing" and "happy."⁷⁷

Exhibit 7 is a letter from Stoltzfus to Claytor, dated January 16, 1990, in which she thanks him for his "patience with my sometimes muddled memories."⁷⁸ She states that if the student at school had not called the police, "I never would have made any of the associations that you helped me make."⁷⁹

In Exhibit 8, which is undated and summarizes the events described in her trial testimony, Stoltzfus commented:

So where is the 3 x 4 card[.] . . . It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU . . . Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag.⁸⁰

Justice Stevens observed that "[t]here is a dispute between the parties over whether petitioner's counsel saw Exhibits 2, 7, and 8 before trial," but "[t]he prosecuting attorney conceded that he himself never saw Exhibits 1, 3, 4, 5, and 6 until long after petitioner's trial, and they were not in the file he made available to petitioner."⁸¹ Even though Strickler's lead defense counsel was certain that he had not seen any of the documents, as was Henderson's trial counsel, the prosecutor testified that three exhibits were in the open file.⁸² A

73. *Id.*

74. *Id.* at 1945.

75. *See id.*

76. *Id.* Stoltzfus's trial testimony made no mention of her meeting with Dean.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.* at 1945 n.11.

second counsel for Strickler could not recall whether he had seen the documents.⁸³ Like the district court, Justice Stevens assumed that Strickler and his counsel had not seen Exhibits 1, 3, 4, 5, and 6 prior to or during his trial and that Exhibits 2, 7, and 8 had been disclosed.⁸⁴

II. SIGNIFICANCE OF THE DISCLOSED TESTIMONY

A. *The Doubts Raised by the Documents*

The importance of the documents regarding Stoltzfus is readily apparent. This can be illustrated by a simple chart.

<i>Stoltzfus Trial Testimony</i>	<i>Disclosed Documents</i>
1. The first time she went to the police she identified Strickler and Henderson "with absolute certainty."	1. Exhibit 1. Detective Claytor's note suggests that the first time Stoltzfus went to the police she did not identify either Strickler or Henderson.
2. The first time she went to the police she had a slight reservation about her identification of the blonde woman.	2. Exhibit 1. The first time she went to the police the only person she could identify was the white female.
3. She and her 14-year-old daughter were at the Music Land store in the mall. While waiting for a clerk, she saw Strickler (Mountain Man) with a blonde girl. Strickler frightened her, and she backed up and bumped into Henderson (Shy Guy) and thought she felt something hard in his coat pocket.	3. Exhibits 1 and 3. She did not identify either Strickler or Henderson when she first met with the police. It seems doubtful that she remembered this confrontation at the Music Land store, because she indicates in Exhibit 4 that she did not remember being in the mall. If she did not remember being in the mall, it is hard to understand how she could remember a specific event in the mall.

83. *See id.*

84. *See id.* at 1945.

<p>4. She saw a shiny dark blue car. The driver was "beautiful, well dressed and she was happy, she was singing."</p>	<p>4. Exhibit 1 and 6. The first time she went to the police she could not identify the black female victim, let alone testify about the victim's beauty or state of mind. Exhibit 6 indicates that she spent much time with the victim's boyfriend before offering testimony about the victim's state of mind.</p>
<p>5. Stoltzfus saw Strickler strike a van, bang on the door of a pickup, and then force his way into the victim's car and motion for his friends to enter the car.</p>	<p>5. Exhibit 4. Stoltzfus's note to Claytor states that her memory was vague, she has a recollection of seeing Strickler approach a bus, not a van or pickup, and was unsure whether he was the same man who approached the victim's car.</p>
<p>6. She saw Strickler striking the victim, heard a horn blow for some time, and then pulled her car up parallel to the blue car, got out for a moment, got back in, and leaned over to ask repeatedly if the other driver was "O.K." The driver looked "frozen" and mouthed an inaudible response.</p>	<p>6. Exhibits 1 and 4. Despite claiming to have leaned over toward the victim, Stoltzfus was unable to identify the victim at first and then wrote that her memory was vague.</p>
<p>7. She was so concerned about the victim as she realized that the victim had asked for help and saw the victim's car go over a curb that she told her daughter to write down the license number, "NKA 243," and said to help her remember, "No Kids Alone 243."</p>	<p>7. Exhibit 5. Her description of the car contained no reference to a license plate and no mention of telling her daughter to write anything down.</p>
<p>8. Stoltzfus claimed to have an exceptional memory, that pretrial publicity did not influence her testimony, and that she was certain of her identification.</p>	<p>8. Exhibits 1, 4, and 5. Stoltzfus's inability to identify Strickler when she first came to the police, her acknowledgment that she did not remember being in the mall, and her recognition that her memory was vague make this highly unlikely.</p>

This chart demonstrates that the undisclosed exhibits would cast doubt in the minds of reasonable people as to the reliability of much of what Stoltzfus relayed in her testimony in the Virginia trial court. Her reliability is further undermined by what was contained in Exhibits 7 and 8, which the district court and the Supreme Court assumed were in the prosecutor's file and available to defense counsel. Exhibit 7, Stoltzfus's January 16th letter to Detective Claytor, thanked the detective for his "patience with my sometimes muddled memories."⁸⁵ Stoltzfus candidly states that, if the student at school had not called the police, "I never would have made any of the associations that you helped me make."⁸⁶ This letter is a strong statement that Claytor influenced Stoltzfus's testimony as to "many of the associations" she testified to without hesitation.

The undated Exhibit 8 refers to a 3 x 4 card, which, although not definite, apparently is the first reference to the card on which she said she asked her daughter to write down the license number. Because of the absence of the date, it is not clear when Stoltzfus's recollection of asking the daughter to write something down occurred. One clue, however, is that the note stated the following: "Monday, January 15th. I was cleaning out my car and found the 3 x 4 card. I tore it into little pieces and put it in the bottom of a trash bag."⁸⁷ Putting Exhibits 7 and 8 together, we can fairly infer that by January 16th Stoltzfus had formed many of the associations about which she would testify at trial. At that time, she had found the 3 x 4 card, because she dated the discovery one day earlier. Because she destroyed the card when she found it, she must have believed that it was unimportant. Not only is there no indication that the card contained a license number, but it is also difficult to believe that Stoltzfus would have destroyed the card if it did contain a license number.

We can infer much more than this from Exhibit 8. For example, we can infer that, at the time she witnessed events, Stoltzfus did not immediately realize that the victim was in trouble and was asking for help. This seems readily apparent from Stoltzfus's written statement at the time: "I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU"⁸⁸ It is reasonable to infer that no one who witnessed the events to which Stoltzfus testified would have written the events off as a "trivial episode of college kids carrying on" and gone back to her routine. After all, Stoltzfus allegedly (1) saw a wild man force his way into a car driven by a young female, (2) saw the wild man strike the female, (3) heard a horn honking for a while, (4) stopped her car to inquire into the safety of the female, (5) leaned into the car, (6) saw a

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

“frozen” female who had been beaten by the wild man, (7) concluded that the female had asked for help, (8) saw the wild man’s friends get in the back of the car, (9) saw the car driven wildly off, and (10) was so concerned about what she had seen that she asked her daughter to write down the license number while she herself created a mnemonic device to remember the number.

B. *The Totality of the Doubts*

No one can know from reading the court opinions how the jurors reacted to Stoltzfus’s testimony. We cannot know if she appeared confident, if she presented herself well to the jury, and if she was the kind of witness that the jury would trust. We do know, however, that the story Stoltzfus told at trial was highlighted by her apparent clear recall of dramatic events. Her testimony refers to a wild man, to a “frozen” victim asking for help, and to her own close attention to the comings, goings, and actions of Strickler and his companions. Because she was with her daughter at the mall, Stoltzfus’s testimony might well have been understood to imply that she was paying careful attention to protect her own child. Because there was no other witness to contradict her, Stoltzfus’s apparent certainty and detailed recollection might well have been considered reliable.

Yet, the documents (Claytor’s notes and Stoltzfus’s writings) strongly suggest that when Stoltzfus first talked with Claytor, at the time closest to the events about which she would testify, Stoltzfus could not identify Strickler or Henderson and could identify only the white female with them. By the time of trial, Stoltzfus was certain about her identifications of the two men and less certain about the white female, the only person Stoltzfus originally could identify. The documents cast doubt on whether Stoltzfus really had any memory of a license plate as opposed to having learned of it in conversations with others as her memory was “refreshed.” The documents indicate that Stoltzfus herself understood that her memory had been a jumble that became transformed over time as she dealt with Claytor and the victim’s boyfriend.

I have no doubt that, if I were asked to compare Stoltzfus’s trial testimony with the eight exhibits described above, I would wonder whether the testimony was the product of genuine memory or implanted knowledge. It is hard for me to understand how anyone could feel comfortable accepting the testimony as genuine memory in view of the memory problems Stoltzfus had and her statements about events prior to meeting with Claytor and Dean, the victim’s boyfriend. Had any competent defense counsel actually understood the chain of events that led Stoltzfus to the witness stand, she or he would have explored the events and almost certainly would have raised doubts in the mind of jurors as to the reliability of Stoltzfus’s testimony. Assuming that documents 2, 7, and 8 were available to the defense at

trial, it nonetheless appears likely that the significance of these documents would have been clearer had the defense known of documents 1, 3, 4, 5, and 6.

C. *The Undisclosed Documents*

From the commencement of federal habeas corpus proceedings through the decision of the Supreme Court, no judge or justice appears to have doubted that at least five documents were not disclosed in the state trial and post-conviction proceeding. Furthermore, no judge or justice has quarreled with the legal standard to be used in a case like *Strickler*'s. Since *Brady v. Maryland*,⁸⁹ the Supreme Court has consistently ruled that suppressing or withholding exculpatory evidence by the prosecution violates due process where the evidence is material either to guilt or to punishment.⁹⁰ The Supreme Court has clearly stated that due process is violated if the material, exculpatory evidence is suppressed or withheld by a prosecutor or by a police officer who fails to share it with a prosecutor.⁹¹ The Court also has clearly indicated that due process can be violated when impeachment evidence is withheld.⁹²

In *Strickler*, the Court declined to criticize defense counsel for not finding the withheld documents. The Court found it reasonable for defense counsel to rely upon the prosecutor's open file policy and to assume that any documents there were the only documents that existed.⁹³ The Court rejected the Commonwealth's argument that, because a federal district judge entered a discovery order that ultimately forced disclosure of the withheld documents, this demonstrated that a state court also would have done so had it been asked. The Court reasoned that a state court might well be unreceptive to a discovery motion based upon "[m]ere speculation that some exculpatory material may have been withheld."⁹⁴ The Court also might have observed that the Commonwealth won the state post-conviction proceeding by defeating *Strickler*'s ineffective counsel claim with the argument that no discovery motion was needed. In the end, a majority of the Supreme Court held that *Strickler* "ha[d] satisfied two of the three components of a constitutional violation under *Brady*: exculpatory evidence and nondisclosure of this evidence by the prosecution."⁹⁵ The Court also

89. 373 U.S. 83 (1963).

90. See *id.* at 87; see also *Kyles v. Whitley*, 514 U.S. 419, 454 (1995) (holding that failure to disclose material exculpatory evidence results in a violation of a defendant's right to a fair trial); *United States v. Bagley*, 473 U.S. 667, 678 (1985) (same); *United States v. Agurs*, 427 U.S. 97, 103-07 (1976) (same).

91. See *Kyles*, 514 U.S. at 437-38.

92. See *Bagley*, 473 U.S. at 676.

93. See *Strickler*, 119 S. Ct. at 1949-50.

94. *Id.* at 1950-51.

95. *Id.* at 1955.

found cause for Strickler's failure to raise his claim regarding suppressed documents during trial or on state post-conviction review.⁹⁶ The Court concluded, however, that there was a missing ingredient of a successful *Brady* claim: to wit, "petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed."⁹⁷

Justice Souter, joined by Justice Kennedy, concurred in part and dissented in part.⁹⁸ Although he agreed with the majority that Strickler failed to establish a reasonable probability that he would not have been found guilty of capital murder had the material been introduced at trial,⁹⁹ Souter concluded that "there is a reasonable probability (which I take to mean a significant possibility) that disclosure of the Stoltzfus materials would have led the jury to recommend life, not death."¹⁰⁰

There is no doubt that the crime charged was horrific. There is also no doubt that there was substantial evidence that Strickler was guilty of some form of homicide. There is, however, at least some reason to doubt whether a jury would have convicted Strickler of capital murder but for the Stoltzfus testimony. The trial judge instructed the jury that it had to find not only that Strickler killed Leanne Whitlock, but that he did so during the commission of a robbery while armed with a deadly weapon, or during the commission of an abduction with intent to extort money or a pecuniary benefit, or with the intent to defile, or during the commission of or subsequent to a rape.¹⁰¹ The trial judge explained to the jury that it could convict Strickler as long as he was a joint participant in the fatal beating.¹⁰² The prosecutor's theory was that the physical evidence pointed to a violent struggle that included the victim and Strickler, but that none of her injuries would have immobilized her until she was struck with a rock by one person while being held down by another person.¹⁰³ It is readily apparent that this "theory" involves inferences that a jury might hesitate to make if it had doubts about the way in which events unfolded and the roles of the various participants. Assuming that Strickler struggled with the victim, a rational juror could conclude that any struggle might have resulted in her falling or being dazed. This would have enabled anyone to hit her with a rock. Indeed, Henderson confessed to a

96. *See id.*

97. *Id.*

98. *See id.* at 1955-61 (Souter, J., concurring in part and dissenting in part).

99. *See id.* at 1956.

100. *Id.*

101. *See id.* at 1954 n.44.

102. *See id.* at 1953 n.39.

103. *See id.* at 1946 n.15 (quoting *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991)).

friend that he killed the victim;¹⁰⁴ he did not say that he and Strickler did it. Donna Kay Tudor's husband testified that she told him that she was present at the murder scene and that Strickler did not participate in the murder.¹⁰⁵ Thus, the conclusion that Strickler was an actual participant in the murder was not the only one that the jury could have drawn.

It is equally true that a juror might have had doubts about whether other elements of capital murder were proved. Strickler's mother testified that he always carried a hunting knife. Although his mother could not know whether Strickler actually had the knife with him at any particular time, the fact that the victim was killed by being struck by a large object, probably a rock, might have caused the jury to wonder whether Strickler had a knife readily available to him at the time of the killing and whether Strickler was the actual assailant. There also was little testimony or evidence with respect to Strickler's intent at the time he and the others kidnapped the victim. There was evidence that the victim's tank top had semen stains and blood on it, but no evidence as to whose blood or semen it was. Thus, it is doubtful that rape by Strickler was proved.¹⁰⁶ Whether Strickler intended to extort money or to defile was not the subject of direct testimony.

This evidence helps to explain why a jury might have agreed with the prosecution's theory, but this evidence alone might have left the jury with a reasonable doubt about capital murder and doubts about the penalty the jurors should recommend. The more the jurors believed that Strickler was "in control" of events, the more likely they were to believe the prosecutor's theory. It was Stoltzfus more than any other witness who established for the prosecution the fact of Strickler's control. It was Stoltzfus who painted the picture of a wild man running amuck both inside and outside the mall, forcing his way into the victim's car, beating the victim, and inviting his companions into the car. It is no stretch of imagination to conclude that the jury relied upon Stoltzfus, because the trial judge clearly did in accepting the jury's recommendation as to sentencing. The judge said that, among the facts supporting the jury's verdict, the first was that Strickler was in control. The first evidence the judge cited was Strickler's "control at the shopping center in Harrisonburg."¹⁰⁷ Stoltzfus was the only witness who could have established this fact. Take it away and the remainder of the reasoning about control is questionable.

104. *See id.* at 1942.

105. *See id.* at 1943.

106. *See id.* at 1942. It is unclear from the evidence whether the government made any attempt to connect semen evidence to the kidnapping or assault, or to any particular person.

107. *Id.* at 1953 n.38.

Based on the foregoing analysis, I have little doubt that the suppression of the Stoltzfus evidence might well have affected the jury's decision to convict Strickler of capital murder as opposed to non-capital murder, and might well have resulted in the death sentence that the jury recommended and the trial judge imposed. But I write here not simply to disagree with the Supreme Court (all nine Justices) who found that Stoltzfus's testimony, even if it had been entirely discredited, would almost certainly have had no impact on the jury as it deliberated the charge of capital murder.¹⁰⁸ Nor do I write to disagree with the seven Justices who believed that the jury would not have found the withheld evidence important in deciding on the sentence to be imposed. Each reader of the Supreme Court opinion and this Article can reach his or her own opinion as to the likely affect upon a jury of discovering that Stoltzfus might not actually have remembered any of the important facts about which she testified. My goal is not to reargue the *Strickler* case. It is, rather, to talk about perjury, false testimony, and the Supreme Court's incredible willingness to distinguish the two and to perpetuate injustice rather than to require the government to offer truthful testimony.

III. PERJURY AND FALSE TESTIMONY

A. *Brady Violations Versus Use of False Testimony; Establishing a Rule for the Knowing Use of False or Perjured Testimony*

The most famous of the Supreme Court's cases concerning a prosecutor's duty to disclose exculpatory information is *Brady v. Maryland*.¹⁰⁹ Long before *Brady*, however, the Supreme Court established that a prosecutor who knowingly uses false or perjured testimony denies a defendant due process.

The first case to hold that a prosecutor who knowingly used false or perjured testimony denied a defendant due process was *Mooney v. Holohan*.¹¹⁰ In a habeas corpus regime that was very similar to today's,¹¹¹ Mooney sought federal habeas corpus relief from his murder conviction and death sentence. The district court dismissed Mooney's petition on the ground that he had not adequately exhausted state remedies.¹¹² The court of appeals denied leave to appeal.¹¹³ Mooney sought leave to file a habeas petition in the United States Supreme Court in order to raise his claim that the State of

108. *See id.* at 1953.

109. 373 U.S. 83 (1963).

110. 294 U.S. 103 (1935).

111. The new habeas corpus regime was established by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2261-2266 (Supp. II 1999) (habeas corpus provisions)).

112. *See Mooney v. Holohan*, 7 F. Supp. 385, 388 (N.D. Cal. 1934).

113. *See In re Mooney*, 72 F.2d 503, 509 (9th Cir. 1934).

California denied him due process by knowingly using perjured testimony to convict him and by suppressing evidence that would have impeached the perjured testimony.¹¹⁴ In response to an order to show cause issued by the Court, the Attorney General of California essentially demurred by failing to challenge Mooney's factual allegations and arguing as a matter of law that the actions or omissions of a prosecutor can never deprive a defendant of due process (a proposition that is startling to think about, but that was boldly put to the Court).¹¹⁵ The Supreme Court rejected the argument and set forth its own regard for the due process clause.

The Court reasoned that due process "is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial[.]" when the trial is simply the means through which the state deprives a defendant of liberty through a "deliberate deception of court and jury by the presentation of testimony known to be perjured."¹¹⁶ The Court further stated that such a contrivance by a state to procure the conviction and imprisonment of a defendant is as "inconsistent with the rudimentary demands of justice as is the obtaining of a similar result by intimidation."¹¹⁷ The Court ultimately denied Mooney leave to file his petition because he had not presented his claim to the California state courts, which, the Court found, would not have tolerated a violation like the one Mooney alleged.¹¹⁸

The Court cited *Mooney* seven years later in *Pyle v. Kansas*.¹¹⁹ Pyle was convicted in state court of murder and robbery and sentenced to life imprisonment for the murder. He made allegations similar to those made by Mooney, which included knowing use of perjured testimony and suppression of favorable defense evidence.¹²⁰ Pyle's suppression claim involved allegations that the state used coercion and threats to prevent witnesses from testifying for the defense. In remanding the case, the Supreme Court reasoned:

Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present

114. See *Mooney*, 294 U.S. at 109-10.

115. See *id.* at 111-12.

116. *Id.* at 112.

117. *Id.*

118. See *id.* at 113-15.

119. 317 U.S. 213 (1942).

120. See *id.* at 213-14.

custody.¹²¹

B. *Applying the Rule*

Mooney and *Pyle* stated legal principles, but they provided no relief to either habeas petitioner. *Alcorta v. Texas*¹²² demonstrated how these principles required the reversal of an improperly obtained conviction. Alcorta was charged with first degree murder in the killing of his wife. He admitted the murder but claimed heat of passion in an effort to reduce the degree of culpability, urging that the killing occurred when he found his wife kissing another man in a car at night.¹²³ The jury rejected the heat of passion claim and Alcorta was convicted and sentenced to death.¹²⁴

The key witness, the only eyewitness other than Alcorta, was Castilleja, the man who Alcorta claimed was kissing his wife. In response to inquiries by the prosecutor on direct examination about his relationship with the petitioner's wife, Castilleja said "that he had simply driven her home from work a couple of times, and in substance testified that his relationship with her had been nothing more than a casual friendship."¹²⁵ At the end of the direct examination, the prosecutor engaged in the following exchange with the witness:

Q. Natividad [Castilleja], were you in love with Herlinda?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes.¹²⁶

Castilleja was called to testify during a habeas corpus hearing. At the hearing, he confessed that he had sexual intercourse with Alcorta's wife five or six times shortly before her death. Moreover, Castilleja testified that he told the prosecutor about the intercourse before trial, and the prosecutor instructed him that he should not volunteer any information about such intercourse, but, if specifically asked about it, to answer truthfully.¹²⁷ The prosecutor confirmed

121. *Id.* at 215-16 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)).

122. 355 U.S. 28 (1957) (*per curiam*).

123. *See id.* at 28-29.

124. *See id.* at 29.

125. *Id.*

126. *Id.* at 30.

127. *See id.* at 30-31.

this.¹²⁸ Notwithstanding this testimony, the trial judge denied habeas corpus relief, and the Texas Court of Criminal Appeals affirmed.¹²⁹

The Supreme Court in a *per curiam* opinion found the case to be easily decided under *Mooney* and *Pyle*. After citing both cases, the Court reasoned as follows:

It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife.¹³⁰

The Court found that Castilleja's testimony was prejudicial to Alcorta because it tended to refute his claim that he had adequate cause for a surge of "sudden passion" in which he killed his wife. If Castilleja's relationship with Alcorta's wife had been truthfully portrayed to the jury, explained the Court, it would have impeached Castilleja's credibility and corroborated Alcorta's contention that he had found his wife embracing the other man. If the jury had accepted Alcorta's defense, as it could have "if Castilleja had not been allowed to testify falsely, to the knowledge of the prosecutor, [Alcorta's] offense would have been reduced to 'murder without malice' precluding the death penalty [that was then] imposed upon him."¹³¹

For me, the importance of the case is that the Supreme Court knew false testimony when it saw it. It did not analyze whether this was actually perjury. It did not focus on minor details. Did the intercourse occur on dates? Did Castilleja and Alcorta's wife go on real dates? The Court did not care about such questions or their answers because it understood that the prosecutor's questioning of the witness was plainly intended to mislead the jury. Castilleja might well have been truthful when he said he was not in love with Alcorta's wife, she was not in love with Castilleja, and they never talked about love. The thrust of the testimony, however, was intended to communicate that the relationship was not about sex, even though the word "love" was used. This testimony was false testimony according to nine Justices, and it required reversal of Alcorta's conviction.¹³²

Just two years later, the Court reversed another conviction in *Napue v. Illinois*.¹³³ This time, Chief Justice Warren wrote the opinion for another unanimous Court. Napue, like Alcorta, had been convicted of murder in state court. Napue and Hamer were two of four men charged with the attempted armed robbery of a cocktail lounge that led to a shootout in which one robber and an off-duty

128. *See id.* at 31.

129. *See id.*

130. *Id.*

131. *Id.* at 31-32.

132. *See id.* at 32.

133. 360 U.S. 264 (1959).

police officer were killed.¹³⁴ Hamer, who had been seriously wounded in the shootout, was charged with murdering the police officer, convicted, and sentenced to 199 years. Another participant, Poe, was tried separately, convicted, and sentenced to death.¹³⁵ Hamer did not testify in Poe's trial, but was the key witness against Napue. Eyewitness testimony was not strong, and that made Hamer's testimony critical.¹³⁶ The prosecutor elicited the following testimony from Hamer on direct examination:

Q. Did anybody give you a reward or promise you a reward for testifying?

A. There ain't nobody promised me anything.¹³⁷

On redirect examination the prosecutor elicited consistent testimony:

Q. [by the Assistant State's Attorney] Have I promised you that I would recommend any reduction of sentence to anybody?

A. You did not.¹³⁸

After another prosecutor convicted a fifth participant, the driver of the getaway car in the attempted robbery, the original prosecutor filed a petition for a writ of error *coram nobis* on Hamer's behalf. The prosecutor alleged that he had promised Hamer that a recommendation for a reduction of his sentence would be made if he testified against Napue and that such a reduction would be effectuated "if possible."¹³⁹

Napue learned of Hamer's *coram nobis* petition and filed his own post-conviction petition. A hearing was held in the state trial court, and the former prosecutor changed his version of the facts. This time, the former prosecutor testified that he had promised to help Hamer only if he determined that Hamer's story "about being a reluctant participant' in the robbery was borne out, and not merely if Hamer would testify at [Napue's] trial."¹⁴⁰ The former prosecutor testified that he probably had exaggerated his commitment to Hamer in filing the *coram nobis* petition on Hamer's behalf.¹⁴¹ The trial court denied Napue relief in reliance on the attorney's testimony.

Napue appealed to the Illinois Supreme Court. That court affirmed the denial of relief, but rejected the reasoning of the trial court.¹⁴² The state supreme court agreed with Napue that the former prosecuting attorney had promised Hamer consideration if he would testify at Napue's trial and that Hamer had lied in denying that he had been

134. *See id.* at 265-66.

135. *See id.* at 265.

136. *See id.* at 265-66.

137. *Id.* at 267 n.2.

138. *Id.*

139. *Id.* at 266-67.

140. *Id.*

141. *See id.*

142. *See Napue v. Illinois*, 150 N.E.2d 613, 615-16 (Ill. 1958).

promised consideration. The court held, however, that Napue was not prejudiced and was not entitled to relief because the jury had already been told that someone, whom Hamer had previously identified as a public defender, ““was going to do what he could”” to help Hamer and that this person ““was trying to get something did [sic]”” for Hamer.¹⁴³

In rejecting the state supreme court’s reasoning, Chief Justice Warren described the governing law as: “[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment,”¹⁴⁴ and “[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.”¹⁴⁵ The Chief Justice expanded the principle previously established as he wrote, “[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness[,]” and “[t]he jury’s estimate of the truthfulness and reliability

143. *Napue*, 360 U.S. at 268. The Illinois Supreme Court had relied upon the following testimony of Hamer at Napue’s trial:

Q. [on cross-examination] And didn’t you tell him [one of Napue’s attorneys] that you wouldn’t testify in this case unless you got some consideration for it?

A. . . . Yes, I did; I told him that.

* * *

Q. What are you sentenced for?

A. One Hundred and Ninety-Nine Years.

Q. You hope to have that reduced, don’t you?

A. Well, if anybody would help me or do anything for me, why certainly I would.

Q. Weren’t you expecting that when you came here today?

A. There haven’t no one told me anything, no more than the lawyer. The lawyer come in and talked to me a while ago and said he was going to do what he could.

Q. Which lawyer was that?

A. I don’t know; it was a Public Defender. I don’t see him in here.

Q. You mean he was from the Public Defender’s office?

A. I imagine that is where he was from, I don’t know.

Q. And he was the one who told you that?

A. Yes, he told me he was trying to get something did for me.

Q. . . . And he told you he was going to do something for you?

A. He said he was going to try to.

* * *

Q. And you told them [police officers] you would [testify at the trial of Napue] but you expected some consideration for it?

A. I asked them was there any chance of me getting any. The man told me he didn’t know, that he couldn’t promise me anything.

Q. Then you spoke to a lawyer today who said he would try to get your time cut?

A. That was this Public Defender. I don’t even know his name. . . .

Id. at 268 n.3.

144. *Id.* at 269 (citing *Mooney* and *Pyle* as well as other cases).

145. *Id.* (citing *Alcorta* as well as other cases).

of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."¹⁴⁶

The Chief Justice rejected the argument that Napue was not prejudiced because Hamer testified that he sought help from the public defender:

Had the jury been apprised of the true facts . . . it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration.¹⁴⁷

Chief Justice Warren found support for his reasoning in the prosecutor's redirect examination in which he ended by eliciting testimony that Hamer had not been promised anything by the prosecutor.¹⁴⁸

It is evident that no Justice believed it was necessary to determine whether Napue proved all elements of perjury or whether Hamer believed he was testifying falsely when he assisted the government in the Napue prosecution.¹⁴⁹ It was enough for the Court that the prosecutor elicited testimony that misled the jury about an important fact.¹⁵⁰ This was not tolerable under the Due Process Clause for any Justice in 1959.

C. *Expanding the Rule*

In *Giglio v. United States*, another Chief Justice, Warren Burger, wrote for a unanimous Court¹⁵¹ reversing a conviction for passing forged money orders.¹⁵² The key witness against Giglio was Robert Taliento, Giglio's alleged co-conspirator and the only witness who could link Giglio with the crime. Taliento worked at the Manufacturers Hanover Trust Co. as a teller and cashed several forged money orders.¹⁵³ When questioned by the FBI, Taliento confessed that he had provided Giglio with a signature card that Giglio used to forge \$2300 in money orders, which Taliento then

146. *Id.*

147. *Id.* at 270.

148. *See id.* at 270-71.

149. It is possible that Napue believed he was testifying honestly because he did not believe that this prosecutor made any promise or that any promise had been made to make a recommendation to "anyone in particular." In other words, there might have been a technical way of interpreting the questions and answers to make them misleading and thus a distortion of the truth without making them perjury.

150. *See Napue*, 360 U.S. at 269-70 (citation omitted).

151. Justices Powell and Rehnquist did not participate.

152. *See* 405 U.S. 150 (1972).

153. *See id.* at 151.

processed through the bank's regular channels.¹⁵⁴

Taliento claimed that Giglio was the instigator of the crime. Defense counsel vigorously cross-examined. Part of the examination proceeded as follows:

Q. [Counsel.] Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

A. [Taliento.] Nobody told me I wouldn't be prosecuted.

Q. They told you you might not be prosecuted?

A. I believe I still could be prosecuted.

....

Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

A. Not at that particular time.

Q. To this date, have you been charged with any crime?

A. Not that I know of, unless they are still going to prosecute.¹⁵⁵

The prosecutor relied upon this testimony in his closing argument.¹⁵⁶

Giglio filed a motion for a new trial based on newly discovered evidence. The government filed an affidavit opposing the motion in which it admitted that Taliento was promised by Assistant United States Attorney DiPaola, that he would not be prosecuted if he testified before the grand jury and at trial.¹⁵⁷ This particular assistant presented the evidence to the grand jury but did not try the case in the district court. Instead, another assistant, Golden, tried the case. Golden filed his own affidavit in response to the motion stating that DiPaola promised him before the trial that no offer of immunity had been extended to Taliento.¹⁵⁸ Thus, Golden could not dispute that DiPaola may have made a representation to Taliento, but Golden could swear that he had no knowledge of the representation. "The United States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial . . ."¹⁵⁹ Hoey's affidavit also could not rebut DiPaolo's evidence, but it emphasized that Taliento was told that he would be prosecuted unless he testified and that, if he did testify, he would have to rely on the "good judgment and conscience of the Government' as to whether he would be prosecuted."¹⁶⁰

Chief Justice Burger found that it did not matter that the prosecutor who made the promise to Taliento was not the prosecutor who tried the case or that the prosecutor who tried the case did not know of the

154. *See id.*

155. *Id.* at 151-52.

156. *See id.* at 152.

157. *See id.*

158. *See id.*

159. *Id.* at 152-53.

160. *Id.* at 153.

promise.¹⁶¹ It did not matter whether the prosecutor who made the promise deliberately or negligently failed to disclose it: “[N]either DiPaola’s authority nor his failure to inform his superiors or his associates is controlling. . . . [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor’s office is an entity and as such it is the spokesman for the Government.”¹⁶² Although the Chief Justice indicated that not every failure to disclose material in a prosecutor’s file required reversal of a conviction, this one did because the Government’s case depended almost entirely on Taliento’s testimony and “without it there could have been no indictment and no evidence to carry the case to the jury.”¹⁶³ According to the Court, an important issue in the case was Taliento’s credibility as a witness. Evidence of any agreement regarding future prosecution was relevant to Taliento’s credibility and “the jury was entitled to know of it.”¹⁶⁴ Based on the due process requirements enumerated in *Napue*, the Court reversed Giglio’s conviction and remanded the case.¹⁶⁵

The Chief Justice’s emphasis on *Napue* is telling. It indicates the view of seven Justices that the government presented false testimony. Chief Justice Burger did not find it necessary to decide whether this was perjury on Taliento’s part.¹⁶⁶ It could not have been subornation of perjury or knowing presentation of false testimony by the prosecutor who tried the case if his affidavit is taken as true. *Giglio* reinforces the notion that presentation of false testimony that creates a false impression of important facts violates due process.

The Court decided *Giglio* without a dissent. Yet, the same term, it held 5-4, in *Moore v. Illinois*,¹⁶⁷ that a defendant was not denied due process as a result of the prosecutor’s failure to disclose evidence or to correct testimony.¹⁶⁸ The facts of the case are complicated and need not be recited here. It should suffice to say that Moore was convicted of murder and sentenced to death.¹⁶⁹ Powell was one of the witnesses to the shooting that occurred in the victim’s bar.¹⁷⁰ Powell claimed to have seen Moore enter the bar, but the police had a statement by

161. *See id.*

162. *Id.* at 154.

163. *Id.*

164. *Id.* at 155.

165. *See id.* at 154-55.

166. *See id.* Taliento might have thought that the United States Attorney’s statement to him and to defense counsel overrode and negated any promise. He might have forgotten the original promise. Or, he might have understood the promise differently from the assistant who made it.

167. 408 U.S. 786 (1972).

168. *See id.* at 799-800.

169. The case was decided the same day as *Furman v. Georgia*, 408 U.S. 238 (1972), and the Court invalidated the death penalty imposed upon Moore. *See Moore*, 408 U.S. at 800.

170. *See Moore*, 408 U.S. at 790.

another witness that included a diagram that arguably placed Powell in a different position than he claimed to be.¹⁷¹ Another witness, Sanders, claimed to have been present with a man known as “Slick,” whom Sanders identified as Moore, and who, Sanders claimed, made mention of “open season on bartenders” or something to that effect.¹⁷² Sanders gave a statement to the police in which he stated that he met Slick some six months before the critical post-murder conversation.¹⁷³ This would not have been possible if Moore were actually the same person as Slick, because Moore was then in federal prison.¹⁷⁴ Moore alleged that the prosecution permitted false testimony at trial to go uncorrected.

Although the Justices divided 5-4, Justice Blackmun’s majority opinion and Justice Marshall’s opinion, concurring in part and dissenting in part, agreed on an important proposition: The government cannot permit false testimony to stand simply because police officers, rather than prosecutors, have possession of crucial facts. Justice Marshall was explicit on the matter: “When the State possesses information that might well exonerate a defendant in a criminal case, it has an affirmative duty to disclose that information. While frivolous information and useless leads can be ignored, if evidence is clearly relevant and helpful to the defense, it must be disclosed.”¹⁷⁵ Marshall explained that the prosecutor is responsible for those persons directly assisting him in bringing an accused to justice and that the burden of correcting false testimony and sharing exculpatory evidence is the essence of due process of law: “It is the State that tries a man, and it is the State that must insure that the trial is fair.”¹⁷⁶

Justice Blackmun’s majority opinion was less clear. He wrote that “[w]e know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.”¹⁷⁷ This might seem to indicate that the prosecutor is relieved from responsibility for the conduct of the police. However, Justice Blackmun emphasized that Sanders was wrong about the date, not about meeting with Moore and hearing Moore’s comment. It would have been relatively simple for Justice Blackmun to write that a prosecutor is not responsible for information in the hands of the police if that were the majority’s position. Rather than doing so, he analyzed the importance of the information that was not disclosed to Moore and determined that it was not material.¹⁷⁸

171. *See id.* at 796-97.

172. *Id.* at 789.

173. *See id.* at 791.

174. *See id.* at 791-92.

175. *Id.* at 809 (Marshall, J., concurring in part and dissenting in part).

176. *Id.* at 810 (Marshall, J., concurring in part and dissenting in part).

177. *Id.* at 795.

178. Justice Marshall and the other dissenters disagreed. *See id.* at 800-10. I was a

As for the diagram that supposedly showed that Powell's testimony was untrue, Justice Blackmun concluded that "[w]e are not persuaded that the diagram shows that Powell's testimony was false."¹⁷⁹ The majority reasoned that Powell could have been looking in the direction he said he was looking regardless of where he might have been seated.¹⁸⁰ A fair inference from the majority opinion is that the majority, like the dissenters, would have found a violation of *Napue* if the police had a record that showed that a witness's testimony was false with respect to something important like an eyewitness identification.

Although the Supreme Court later made it clear in *Kyles v. Whitley*¹⁸¹ that a prosecutor is responsible for disclosing to a defendant all exculpatory information known to government actors, including the police, the Court has never explicitly returned to the *Mooney* line of cases to analyze whether use by the government of testimony known to be false by the police is a due process violation even if the prosecutor does not know it is false. The *Mooney* line of cases has been "lost" for the most part since the Supreme Court's decision in *Brady v. Maryland*.¹⁸²

IV. BRADY AND ITS PROGENY

A. Brady v. Maryland

We now return to the most famous of the Supreme Court's cases on the duty of the prosecution to disclose evidence to the defense, *Brady v. Maryland*.¹⁸³ The defendants, Brady and Boblit, were both charged with murder and tried separately. Brady was tried first, conceded participation in the murder, and claimed that Boblit actually did the killing.¹⁸⁴ Defense counsel requested access to statements by Boblit. The prosecution provided the defense with some statements but withheld a statement in which Boblit admitted the killing.¹⁸⁵ In his summation, defense counsel admitted that Brady was guilty of murder in the first degree but asked the jury to return that verdict "without

law clerk for Justice Marshall when the case was decided, and I have not changed my view that the dissenters had the better of the argument. The majority seemed surprisingly confident that they knew that a witness who was wrong about a date and who indicated that Moore looked different from the man who had made the statement was undoubtedly correct in identifying Moore and wrong only about when he first met Moore.

179. *Id.* at 798.

180. *See id.*

181. 514 U.S. 419, 437-38 (1995).

182. 373 U.S. 83 (1963).

183. *Id.*

184. *See id.* at 84.

185. *See id.*

capital punishment.”¹⁸⁶

When Brady discovered the withheld statement, he filed a motion for a new trial based on newly discovered evidence. The Maryland Court of Appeals held that he had been denied due process and was entitled to a new trial.¹⁸⁷ The United States Supreme Court agreed. Justice Douglas¹⁸⁸ recognized that the Court’s ruling that failure to disclose Boblit’s confession was “an extension of *Mooney v. Holohan*, where the Court ruled on what nondisclosure by a prosecutor violates due process.”¹⁸⁹ The Court’s holding was as follows: “[T]he 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.”¹⁹⁰ Douglas continued, “The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair”¹⁹¹ *Mooney, Pyle, Alcorta*, and *Napue* were not sufficient to provide Brady relief, because there was no presentation of false testimony. Instead, the prosecution withheld evidence that might have caused the jury to return a different verdict with respect to punishment.¹⁹² Justice Douglas and the *Brady* Court understood that *Brady* expanded the legal principle that had been declared in *Mooney* in 1935.

The Supreme Court discussed *Brady* as well as *Napue* in *Giglio v. United States*¹⁹³ and *Moore v. Illinois*.¹⁹⁴ However, both of those cases involved allegations of the use of false testimony, albeit in a context in which it seemed that the prosecutor trying each case was unaware of

186. *Id.*

187. *See Brady v. State*, 174 A.2d 167, 172 (Md. 1961).

188. The opinion of the Court was written by Justice Douglas and announced by Justice Brennan.

189. *Brady*, 373 U.S. at 86 (citation omitted).

190. *Id.* at 87.

191. *Id.* Douglas further opined:

[O]ur system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ‘The United States wins its point whenever justice is done its citizens in the courts.’ A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not ‘the result of guile’

Id. at 87-88 (footnote omitted).

192. Justice White wrote a separate opinion. *See id.* at 91-92. Justice Harlan, joined by Justice Black, dissented. *See id.* at 92-95. All three believed it was not necessary to decide the broad due process question.

193. 405 U.S. 150 (1972).

194. 408 U.S. 786 (1972).

the possibility that the testimony was false. Thus, neither of these cases was a pure *Brady* case.

B. *Irreparably Confusing the State of the Law*

The Supreme Court decided a pure *Brady* case in *United States v. Agurs*.¹⁹⁵ Agurs was convicted of second degree murder as a result of stabbing to death a man with whom she had registered in a motel as husband and wife.¹⁹⁶ Agurs claimed self-defense, but the jury rejected the claim. Three months after the jury returned its verdict, Agurs sought a new trial on the ground that the victim had a criminal record that would have further evidenced his violent character and the prosecutor failed to disclose the record to the defense.¹⁹⁷ Agurs alleged that a recent decision of the United States Court of Appeals for the District of Columbia Circuit established that evidence of the victim's criminal record for violence was admissible even if not known to a defendant claiming self-defense.¹⁹⁸

Justice Stevens wrote the opinion for the Court and mischaracterized the Supreme Court's prior decisions discussed above. According to Stevens, "[t]he rule of *Brady v. Maryland* arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense."¹⁹⁹

Stevens's first *Brady* situation was "typified by *Mooney v. Holohan*²⁰⁰ [and occurs when] the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury."²⁰¹ Stevens rewrote the history of Supreme Court precedent in the realm of false testimony and perjury: "In a series of [cases following *Mooney*,] the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."²⁰²

We have already seen, however, that the Supreme Court's earlier decisions did not turn on the niceties of perjury law. Those decisions condemned the knowing use of false testimony, even where it was not clear that the witness knew the testimony was false or where the literal testimony technically might have been true, and also where the

195. 427 U.S. 97 (1976).

196. *See id.* at 98-99.

197. *See id.* at 100.

198. *See id.* at 100-01 (citing *United States v. Burks*, 470 F.2d 432, 434 (D.C. Cir. 1972)).

199. *Id.* at 103 (citation omitted).

200. 294 U.S. 103 (1935).

201. *Agurs*, 427 U.S. at 103 (citation omitted).

202. *Id.* (footnote omitted).

trial prosecutor was unaware that the testimony was false. *Agurs* reduced the *Mooney-Alcorta-Napue* line of cases to the “knowing use of perjured testimony,” which considerably narrowed those cases.²⁰³ Having done the narrowing, Justice Stevens then stated that in these cases “the Court ha[d] applied a strict standard of materiality, not just because they involve[d] prosecutorial misconduct, but more importantly because they involve[d] a corruption of the truth-seeking function of the trial process.”²⁰⁴

The statement is true but misleading: *Mooney* and *Pyle* initiated the line of cases that gave rise to *Alcorta* and *Napue*; the first two cases involved alleged perjury and withholding of evidence.²⁰⁵ The latter cases involved false testimony rather than perjury.²⁰⁶ No Justice overtly acknowledged the blow that Justice Stevens dealt to precedent in *Agurs*.

The second *Brady* situation that Justice Stevens identified in *Agurs* was illustrated by *Brady*, itself. Looking back at *Brady*, where the defense made a pretrial request for specific evidence, Justice Stevens observed that “[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.”²⁰⁷ Justice Stevens emphasized that *Brady* had specifically requested Boblit’s statements, leaving no doubt as to the discovery he sought and that, “[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.”²⁰⁸

Justice Stevens opined that a third *Brady* situation occurs when a defendant makes no specific request or makes a general request that does not indicate what specific material is being sought.²⁰⁹ Justice Stevens observed that “this Court has not yet decided whether the prosecutor has any obligation to provide defense counsel with exculpatory information when no request has been made.”²¹⁰ He then analyzed no request and general request cases.

In many cases, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation, a defense counsel may make no request at all, or ask for “all *Brady* material” or for “anything exculpatory.” In *Agurs*, Justice Stevens reasoned that any duty to respond to such a general request must “derive from the obviously exculpatory character” of certain evidence

203. *See id.* at 103-04.

204. *Id.* at 104.

205. *See supra* notes 110-21 and accompanying text.

206. *See supra* notes 122-50 and accompanying text.

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

208. *Id.* at 106.

209. *See id.*

210. *Id.*

possessed by the prosecutor.²¹¹ Stevens continued, however, that if the evidence is "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce," that duty should arise even if no request has been made.²¹² Stevens concluded that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, such as *Agurs*, in which there has been no request at all.²¹³

Justice Stevens further reasoned that a prosecutor is not constitutionally required to turn the government's entire file over to a defendant, but a prosecutor will deny a defendant due process by failing to make a disclosure under circumstances in which "his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."²¹⁴ Justice Stevens predicted that, "[b]ecause we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."²¹⁵ Departing from the earlier line of cases involving false testimony in which knowledge mattered greatly, Justice Stevens wrote in *Agurs* that the good or bad faith of the prosecutor is irrelevant:²¹⁶ "If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it."²¹⁷ Conversely, Stevens reasoned, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because "an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."²¹⁸

Justice Stevens cited *Giglio* as authority for this proposition. This is unfortunate because *Giglio* involved false testimony. There, the Court held the prosecutor responsible for false testimony notwithstanding that another prosecutor who made promises to a key witness did not reveal them.²¹⁹ In short, the *Giglio* Court held that the government's knowledge was to be examined as a whole, at least as

211. *Id.* at 107

212. *Id.*

213. *See id.* at 106-07. According to Stevens, the third situation in which the *Brady* rule arguably applies, typified by *Agurs*, therefore embraces the case in which only a general request for "*Brady* material" has been made. *See id.*

214. *Id.* at 108.

215. *Id.*

216. "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor." *Id.* at 110.

217. *Id.* (emphasis added) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

218. *Id.* at 110.

219. *See supra* notes 161-64 and accompanying text.

far as prosecutors were concerned. Thus, if the government presented testimony that any of its prosecutors knew was false, there was a due process violation.²²⁰ *Giglio* involved fault on the part of the government that resulted in the presentation of false testimony.²²¹ Thus, it did not support Justice Stevens's reasoning.

In *Agurs*, the Court held that prosecutors need not turn over their entire files to defendants, that some exculpatory evidence must be disclosed, and that prosecutorial culpability is unimportant.²²² Justice Stevens then created a test to assess whether a due process violation has occurred in his third *Brady* situation: If the omitted evidence, when evaluated in the context of the entire record, "creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."²²³

Justice Stevens applied this test to *Agur's* claim and found that the failure to disclose the victim's prior record did not deny her due process.²²⁴ Justice Marshall, joined by Justice Brennan, dissented. Justice Marshall argued that the majority's approach provided the wrong incentives for prosecutorial disclosure:

Under today's ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.²²⁵

Justice Marshall interpreted lower court opinions as adopting a standard preferable to the majority's: "If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside."²²⁶

Justice Marshall did not challenge the majority's treatment of earlier precedents. Although he argued with respect to *Napue* and

220. See *supra* notes 161-64 and accompanying text.

221. See *supra* notes 161-64 and accompanying text.

222. See *Agurs*, 427 U.S. at 112-13.

223. *Id.* (footnote omitted).

224. See *id.* at 113-14.

225. *Id.* at 117 (Marshall, J., dissenting).

226. *Id.* at 119 (Marshall, J., dissenting) (footnote omitted).

Giglio that “surely the results in those cases, and the standards applied, would have been no different if perjury had not been involved,”²²⁷ he failed completely to recognize that it is not clear that there was perjury in those cases. Nor did he look back to the cases that led to those decisions, which would have indicated that the *Agurs* majority had substantially narrowed the principle that *Alcorta* and *Napue* had established as they built upon the *Mooney* and *Pyle* foundation.

C. *Refining the Brady Test and Cutting Ties with the Past*

In *United States v. Bagley*,²²⁸ Justice Blackmun wrote for the Court and collapsed Justice Stevens’s three categories into two. Bagley was indicted on charges of violating federal narcotics and firearms statutes. He filed a pretrial discovery motion requesting, *inter alia*, “any deals, promises or inducements made to [Government] witnesses in exchange for their testimony.”²²⁹ In response, the government disclosed no arrangements with witnesses.²³⁰ The government knew that its two principal witnesses had assisted the Bureau of Alcohol, Tobacco and Firearms (“ATF”) in conducting an undercover investigation of Bagley.²³¹ It produced for the defense signed affidavits by these witnesses. These affidavits set forth their undercover dealing with Bagley and concluded with statements that the affidavits were made without any threats or rewards or promises of reward.²³² Bagley waived his right to a jury trial and was tried before a district judge. At trial, the two principal witnesses testified about both the firearms and narcotics charges.²³³ The court found Bagley guilty on the narcotics charges, but not guilty on the firearms charges.²³⁴

After the trial, Bagley filed a Freedom of Information and Privacy Act request for documents and discovered copies of contracts that the two principal witnesses signed with the ATF during the undercover investigation.²³⁵ These contracts obligated the Government to pay the witnesses money commensurate with the information furnished.²³⁶ Bagley unsuccessfully sought to set aside his conviction in the district court. The United States Court of Appeals for the Ninth Circuit disagreed with the district judge that the nondisclosure was harmless

227. *Id.* at 121 (Marshall, J., dissenting).

228. 473 U.S. 667 (1985).

229. *Id.* at 669-70.

230. *See id.*

231. *See id.*

232. *See id.*

233. *See id.* at 670-71.

234. *See id.* at 671.

235. *See id.*

236. *See id.*

and reversed Bagley's conviction.²³⁷ The Supreme Court reversed the Ninth Circuit.²³⁸

Justice Blackmun announced the judgment of the Court. Parts I and II of his opinion commanded a majority of the Justices. He was critical of the Ninth Circuit for distinguishing between failure to disclose exculpatory evidence and failure to disclose impeaching evidence: "This Court has rejected any such distinction between impeachment evidence and exculpatory evidence."²³⁹ This sentence is remarkable for its failure to address the false testimony line of cases. That line established that, when failure to disclose impeachment material known to the government resulted in false testimony being presented, a defendant was denied due process if the false testimony contributed to the conviction.²⁴⁰ Assuming that the two key witnesses took the stand and represented that they had no interest in whether or not Bagley was convicted, their testimony created a false impression. Because they were key witnesses, their false testimony would have been viewed with alarm in earlier cases.²⁴¹ To support this dramatic break with precedent, Justice Blackmun cited only *Giglio* for the proposition that nondisclosure of impeachment evidence does not always require reversal of a conviction.²⁴² *Giglio* is a weak reed on which to rest this assertion regarding impeachment evidence, however. *Giglio* involved both a *Napue* and a *Brady* analysis, but the Court did not separate these two analyses in its opinion.²⁴³ As a result of incorrectly analyzing *Giglio*, the *Bagley* opinion established that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'"²⁴⁴

Justice Blackmun effectively narrowed *Alcorta* and *Napue* without disclosing or recognizing the import of his opinion. Nowhere in his opinion does he offer any explanation for choosing to treat *Bagley* as a *Brady* case rather than as a false testimony case. Justice Blackmun simply assumed that the case was a *Brady* case. The likely explanation is that, once Justice Stevens stated in *Agurs* that there was a line of cases that involved perjured testimony and that it really was just a strand of *Brady*, the Court lost sight of the true nature of the

237. See *Bagley v. Lumpkin*, 719 F.2d 1462, 1463-64 (9th Cir. 1983).

238. See *Bagley*, 473 U.S. at 684.

239. *Id.* at 676.

240. See *supra* Parts III, IV.A-B.

241. Because *Bagley* was tried by a judge without a jury, it is arguable that the judge's findings that the undisclosed evidence would not have resulted in a different verdict should be given deference. But, it is somewhat unclear whether *Bagley* would have waived a jury had he been given the exculpatory material, or whether his strategy in dealing with the key witnesses would have changed had he possessed the impeachment material.

242. See *Bagley*, 473 U.S. at 676-77.

243. See *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

244. *Bagley*, 473 U.S. at 677 (quoting *Giglio*, 405 U.S. at 154).

prior cases.²⁴⁵

Once it decided that *Bagley* was not a false statement case, the Court was divided about how to deal with the nondisclosure. Justice Blackmun's opinion suggested a standard for all *Brady* cases except those involving the knowing use of perjured testimony: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."²⁴⁶ Justice White, joined by Chief Justice Burger and Justice Rehnquist, did not join this part of Justice Blackmun's opinion and did not elaborate on a general standard to be applied irrespective of the specificity of a defense request. Justice White agreed with Justice Blackmun that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."²⁴⁷ There were thus five votes to remand the case to the court of appeals to apply the standard set forth by Justice Blackmun to the facts.²⁴⁸

Justice Marshall, joined by Justice Brennan, dissented and argued that "[w]hen the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose cannot be deemed harmless error."²⁴⁹ Oddly, Justice Marshall cited *Napue* only in passing and focused most of his attention on *Giglio* and *Agurs*.²⁵⁰ Justice Marshall also cited *Pyle* in passing.²⁵¹ Justice Marshall would have reversed the conviction, but he never made the case that *Bagley* was the victim of false testimony and should have had the benefit of *Mooney* and *Pyle*, as developed in *Alcorta* and *Napue*.

Justice Stevens also dissented and, in the process, continued to refer to the *Mooney* line of cases as limited to perjured testimony.²⁵² Justice Stevens concluded that this was a "specific request" case and that the evidence was material.²⁵³ In a footnote, Justice Stevens indicated that

245. In Part III of his opinion, joined by Justice O'Connor, Justice Blackmun referred to the *Agurs* discussion of perjured testimony and treated the *Mooney* line of cases as had Justice Stevens in *Agurs*. In the second paragraph of footnote 8, however, Justice Blackmun recognized that *Napue* involved false testimony. *See id.* at 679 n.8. By footnote 9, though, Justice Blackmun returned to calling *Napue*, as well as other cases, perjury cases. *See id.* at 679-80 n.9.

246. *Id.* at 682.

247. *Id.* at 685 (White, J., concurring).

248. It appears from *Kyles v. Whitley*, 514 U.S. 419 (5th Cir. 1995), that the Court treats *Bagley* as having decided the standard for both specific and general or no request cases. *See id.* at 433-34.

249. *Bagley*, 473 U.S. at 685 (Marshall, J., dissenting).

250. *See id.* at 690-91 (Marshall, J., dissenting).

251. *See id.* at 693 (Marshall, J., dissenting).

252. *See id.* at 709-10 (Stevens, J., dissenting).

253. *See id.* at 712-13 (Stevens, J., dissenting).

the Court was indeed limiting *Mooney* et al. to perjured testimony: "I of course agree with Justice Blackmun . . . and Justice Marshall . . . that our long line of precedents establishing the 'reasonable likelihood' standard for use of perjured testimony remains intact."²⁵⁴

In *Bagley*, no Justice appeared concerned with false testimony unless it amounted to perjury.²⁵⁵ The Court's earlier concern that prosecutors not create false impressions of the truth disappeared without even an acknowledgement.

V. RETURNING TO *STRICKLER* AND ITS IMPLICATIONS

A. *Back to Stoltzfus*

The prosecution's use of Stoltzfus to convict Strickler and obtain the death penalty likely would have been classified as the use of false testimony by *Mooney* and *Pyle*, as developed in *Alcorta* and *Napue*. The prosecutor created the impression before the jury of a witness who was certain in her identifications, clear in her memory, and consistent in her recall. Nothing could have been further from the truth. Given how little Stoltzfus could recall before she met with the police and before she spent time with the victim's fiancé, there is reason to doubt whether her testimony was the product of memory or coaching. It is not easy to tell from the various opinions whether Detective Claytor was present during Stoltzfus's testimony, or whether he assisted the prosecutor in preparing her as a witness.²⁵⁶ It is difficult to believe, however, that Claytor lacked an understanding of how dramatically Stoltzfus's memory changed as she met with Claytor. It seems likely that, in an investigation of such a brutal crime, the detective would have discussed witnesses with the prosecutor as they were found and interviewed.

As I have explained above, it is not at all clear that in *Alcorta* the key prosecution witness lied.²⁵⁷ His answers created a false impression about his relationship with Alcorta's wife, but technically his answers might have been true. That was irrelevant to the Supreme Court, because the Court understood that a false impression had been created.²⁵⁸ In *Napue*, the argument that Hamer lied is stronger, although there is conflicting evidence of what the prosecutor told Hamer he would do for him and not much evidence about Hamer's understanding of what the prosecutor would do for him.²⁵⁹ Chief Justice Warren did not find remand necessary to determine whether

254. *Id.* at 713 n.6 (Stevens, J., dissenting) (citations omitted).

255. Justice Powell did not participate in the case.

256. *See supra* Parts I, II.

257. *See supra* Part III.C.

258. *See supra* notes 130-31 and accompanying text.

259. *See supra* notes 136-50 and accompanying text.

there was perjury.²⁶⁰ The Chief Justice had been a prosecutor. He surely was aware that the question and answer about promises or rewards might have resulted in truthful testimony, because Hamer might not have been promised anything that he would have viewed as a reward. Moreover, the question and answer about whether the trial prosecutor had promised that he would make a sentence recommendation might have resulted in technically truthful testimony, because the prosecutor may have said that a sentencing recommendation would be made without indicating who would make it.²⁶¹ Chief Justice Warren did not parse words, however. He viewed the testimony as a reasonable person would and found that it was false.²⁶² It created a false impression for the jury.

I submit that the impression created by the prosecutor's questioning of Stoltzfus was equally false. Stoltzfus was not a witness who had a clearly reliable memory, made identifications without hesitation, or was consistent in recalling facts. Yet, she appeared to be such a witness. The Supreme Court treated *Strickler* as a *Brady* case and held that Strickler "ha[d] not shown that there [was] a reasonable probability that his conviction or sentence would have been different had these materials been disclosed."²⁶³ Had the Court viewed the case as governed by the false testimony line, the question of materiality or prejudice would have been framed much differently. As Justice Stevens stated in *Agurs*, "the Court has consistently held that a conviction obtained by the knowing use of *perjured*²⁶⁴ testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."²⁶⁵ For reasons already stated, I believe that there is little doubt that the withheld evidence could have cast sufficient doubt on the events as related by Stoltzfus to make a jury reluctant to return a death sentence.

It is unfortunate that the Supreme Court no longer seems to recognize that there is something pernicious about a prosecutor creating false impressions about the truth. Whether or not a prosecutor is always able to appreciate how evidence might be exculpatory to a defendant,²⁶⁶ a prosecutor and his or her assistants know or ought to know when false testimony is being presented and that presentation of such testimony is unacceptable.²⁶⁷

260. See *supra* notes 144-49 and accompanying text.

261. As noted above, there are several explanations of Hamer's testimony that would disqualify it as perjury. See *supra* Part III.C.

262. See *supra* notes 144-46 and accompanying text.

263. *Strickler v. Greene*, 119 S. Ct. 1936, 1955 (1999).

264. Of course, I would substitute the word "false" here to be consistent with *Alcorta* and *Napue*.

265. *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added).

266. See *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

267. See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Alcorta v. Texas*, 355

B. *Examples that Cause Concern*

Suppose the following scenario occurred: (1) Stoltzfus had read in the newspaper details about the police investigation, went to the police, and said that she had been at the mall, but she could not remember what she saw; (2) Detective Claytor spent some time with her asking her whether she might have seen certain people and showed her pictures; (3) the police had Stoltzfus hypnotized; and (4) after being hypnotized and talking further with Detective Claytor, Stoltzfus had a strong memory of seeing Strickler in the mall and of some of his wild actions.

If the prosecutor calls Stoltzfus to testify, elicits from her the post-interview, post-hypnotic statements, and paints a picture of her as a witness who has a great memory, is confident about her memory, and has no doubt about what she saw, is this the presentation of false testimony?

I think it is, at least if the prosecutor has not disclosed the interviews and the hypnosis to the defendant. It is possible that defense counsel might ask a witness whether she has been hypnotized, but it is more plausible to think that no such question would be asked without a good faith basis to support it. The failure to disclose facts that would cause a reasonable person to doubt whether the testimony of a witness is what the prosecution claims is tantamount to the presentation of false testimony. At one time, it seems that the Supreme Court would have said so, but that is no longer necessarily true.

It is important to add at this point that my conclusion about the impermissibility of offering false testimony applies to defense counsel as well as to prosecutors. If a defense lawyer placed a witness with no memory or a poor memory under hypnosis and the witness's memory suddenly were outstanding, there would be a duty to disclose the hypnosis to the prosecution. The difference between the obligations of prosecutors and defense counsel is that only prosecutors may have a constitutional responsibility to disclose or not to use testimony that is false and misleading.²⁶⁸ At least, prosecutors bore this responsibility at one time. Today, there may be reason for doubt.

Another example may augment my point. Let us return to *Alcorta* and the testimony of Castilleja, but with a slight change in the facts. Suppose that Castilleja and Alcorta's wife had engaged frequently in oral sex but not sexual intercourse, and the prosecutor, fully aware of the extent of the oral sex, asked this question: "Have you ever had sex with Mrs. Alcorta, at any time or any place?" If Alcorta had defined sex the same way that President Clinton did when he was

U.S. 28, 31-32 (1957) (per curiam).

268. No corresponding duty is imposed upon defense counsel.

examined during his deposition in *Jones v. Clinton*,²⁶⁹ a “no” answer would have been truthful. If the prosecutor had been appointed by the President and shared this definition of sex, he or she would have been eliciting truthful testimony as he or she understood it. However, would any reasonable person say that this was something other than false testimony? I hope not.

Under the Supreme Court’s current jurisprudence, the deliberate elicitation of false and misleading evidence is not perjury, and the failure to disclose the oral sex apparently would amount to a *Brady* violation and be judged by a materiality standard that encourages the prosecutor to mislead the jury and leave it to a judge afterwards to assess materiality. I stated at the outset that Judge Wright was correct, in my opinion, to conclude that President Clinton testified falsely in his deposition. I believe that the testimony of the two key witnesses in *Bagley* and of Stoltzfus in *Strickler* were equally false and misleading. I see no reason to condemn witnesses in civil depositions who seek to create false impressions of actual facts, but to do nothing when government prosecutors create equally false impressions of actual facts at a criminal trial.

I do not draw a line between knowing elicitation of false testimony by a prosecutor and by a defense counsel in similar circumstances. False testimony is false testimony. Suppose, for example, in a self-defense homicide case, the defense calls a witness who will testify that he talked with the victim hours before the killing, the victim told the witness that he was planning to kill the defendant, and the witness saw the victim with a gun. Suppose also that the witness confessed to defense counsel prior to trial that he was involved in a long-standing affair with the victim’s wife, that the victim had threatened him, and that he was glad the victim was dead. Could a defense lawyer ask the witness on direct examination whether the witness had any reason to say something negative about the victim if the expected answer is “no?” I hope not. This would be deliberately eliciting false testimony, even if the witness had reached the subconscious conclusion that his affair with the victim’s wife did not matter. If defense counsel does not ask the witness anything about his relationship to the victim, but the prosecutor asks whether the witness had any relationship with the victim, a different question arises if the witness says “no,” although the answer to the question is the same as the previous one. Even if the witness defines “relationship” in some narrow manner, the answer “no” must be viewed as false by fair-minded people. Is it wrong for defense counsel to permit a false answer to stand, even if it arguably is not perjury? I prefer an affirmative answer to the question, notwithstanding the fact that it raises difficult questions of how defense counsel can deal with the

269. 57 F. Supp. 2d 719 (E.D. Ark. 1999).

witness's false testimony without becoming a witness in the case. I choose not to deal with this subject now, because I do not want to lose my focus on the burden once placed by the Supreme Court on prosecutors not to offer false testimony, which is not a burden the Court has placed on defense counsel.

C. *The Future*

Only time will tell whether the Supreme Court will breathe new life into the *Mooney* line of cases and say again what it said in *Alcorta* and *Napue*. I believe that the Court drifted away from the *Mooney* principle in *Agurs* without any apparent awareness of the movement that was occurring. It seems undeniable that, after it decided *Brady* and expanded upon the *Mooney* principle, the Court has tended to refer to most prosecutorial nondisclosure issues as *Brady* issues and limited the *Mooney* principle to perjury situations that rarely arise. The fundamental point of this Article is to emphasize that false and misleading testimony produces the same distortion of the truth and likelihood of a wrong conviction as does perjured testimony. There is no reason to limit the *Mooney* principle to clear perjury, and there is every reason to apply it, as in *Alcorta* and *Napue*, to testimony that is false, whether or not the prosecutor and/or witness harbored a subconscious belief that in some strained way the testimony could be taken as something other than perjury.

If the Supreme Court does not breathe new life into the *Mooney* principle as a matter of constitutional law, my hope is that state and federal courts will condemn, as Judge Wright did in *Jones v. Clinton*,²⁷⁰ the offer of false testimony. Most courts have authority to deal with ethical violations, as do state bars. The ethics rules that currently exist provide a basis for dealing with lawyers who offer false testimony, and the inherent power of courts to sanction wrongdoing should be sufficient to deal with witnesses who offer false testimony.

It is interesting to look at the American Bar Association's Model Rules of Professional Conduct and how they deal with presentation of false and misleading material. Although Rule 3.3(a)(1) states that "[a] lawyer shall not knowingly make a false statement of *material* fact or law to a tribunal,"²⁷¹ Rule 3.4(b) states that "[a] lawyer shall not . . . counsel or assist a witness to testify falsely."²⁷² There is no materiality provision in Rule 3.4(b). Lawyers cannot assist a witness in testifying falsely about anything. The rule covers prosecutors and defense counsel as well as lawyers in civil cases. Rule 3.8(d) imposes special responsibilities on a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that

270. *Id.*

271. Model Rules of Professional Conduct Rule 3.3(a)(1) (1998) (emphasis added).

272. *Id.* Rule 3.4(b).

tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."²⁷³ There is no materiality limitation. Any information that shows that prosecution testimony or evidence is false tends to negate the guilt of the accused and would be mitigating evidence at sentencing. These rules, therefore, should provide courts with authority to make the *Mooney* principle meaningful as a matter of professional responsibility, even if the Supreme Court abandons it as a matter of constitutional law.

The Model Rules state principles that also find support in the American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function. Standard 3-5.6(a) provides that "[a] prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity."²⁷⁴ This is a strong statement of the *Mooney* principle. The Defense Function Standard 4-7.5(a) imposes a similar obligation on defense counsel: "Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity."²⁷⁵ These rules are consistent with the Model Rules and with what most judges and lawyers would readily accept as part of a lawyer's professional obligations. If the courts use their inherent power to regulate lawyers who appear before them, these rules also suggest a non-constitutional basis for condemning the knowing use of false testimony.

CONCLUSION

There are substantial reasons to be concerned with the ways prosecutors and police handle evidence. They have a virtual monopoly in criminal cases on the use of the pretrial judicial process to gather evidence. They can use grand juries to gather testimony and evidence, something suspects and defendants cannot do. Aside from the use of formal process, uniformed or badge-carrying law enforcement officers have a cachet that often permits them entry to premises and access to evidence that suspects and defendants do not have. It is this superior access that helps to explain why the ABA Model Rule 3.8(d) as well as the Supreme Court's *Brady* decision impose an obligation on prosecutors to share evidence with defendants. In our adversary system, any limitation like "materiality"

273. *Id.* Rule 3.8(d).

274. ABA Standards Relating to the Administration of Criminal Justice: The Prosecution Function, Standard 3-5.6(a) (1998).

275. ABA Standards Relating to the Administration of Criminal Justice: The Defense Function, Standard 4-7.5(a) (1998).

invites prosecutors and their law enforcement assistants to make their own biased judgments about materiality. In many instances, withheld evidence will never see the light of day, and there will be no judicial review of the decision not to disclose. Even when there is judicial review, it almost always will come after a defendant is convicted and often after appeal rights are exhausted, so that courts know they must start the process over if they grant relief because of a suppression of evidence. It is not surprising that courts are reluctant to do so.

Brady violations are a serious problem in our justice system. As concerned as we should be about these violations and about the system that gives prosecutors the right to be the judge with respect to disclosure of evidence, it is another concern that animates this Article: that is, a concern about the increasing willingness of courts, including the Supreme Court, to ignore false testimony either because they cannot recognize it or do not care about it. If anyone who reads this Article thinks that the Stoltzfus testimony in the *Strickler* case was “true,” he or she need not worry about fairness in our criminal justice system. But, those who share my opinion that no one could regard the way that testimony was presented—at least as the Supreme Court described it—as a true presentation have every reason to worry. There is every reason to worry because the testimony was misleading in so many respects that, in my opinion, only someone who believes that truth and falsity are totally individual, relative concepts that do not exist, except as individuals choose to recognize them, would say that the Stoltzfus testimony was truthful and fair. The Supreme Court’s concern was whether material exculpatory evidence was hidden from Strickler. My concern is that the Supreme Court has so narrowed its focus with respect to violations once recognized as *Mooney*-type violations that it cares little about anything that is not obvious perjury. False testimony should worry us. Misleading testimony should worry us. Withholding evidence that would tend to make a reasonable person disbelieve what a witness says is the same as presenting a false version of the witness’s testimony. That is what I would like our courts to say. I hope they will say it as a matter of constitutional law. If they do not, I hope they and we will say it and mean it as we enforce rules of professional responsibility.

I began this Article with reference to Judge Wright’s sanction of President Clinton, and I end by recalling one unforgettable moment in the President’s grand jury testimony of August 17, 1998:

QUESTION: Mr. President, I want to go into a new subject area, briefly go over something you were talking about with Mr. Bittman. The statement of your attorney, Mr. Bennett, at the Paula Jones deposition—counsel is fully aware—it’s page 54, line 5. Counsel is fully aware that Ms. Lewinsky is filing, has an affidavit, which they were in possession of, saying that there was absolutely no sex of any kind in any manner, shape or form with President Clinton. That statement was made by your attorney in front of Judge Susan

Webber Wright.

CLINTON: That's correct.

QUESTION: Your—that statement is a completely false statement. Whether or not Mr. Bennett knew of your relationship with Ms. Lewinsky, the statement that there was no sex of any kind in any manner, shape or form with President Clinton was an utterly false statement. Is that correct?

CLINTON: It depends upon what the meaning of the word is means. If it means is, and never has been, that's one thing. If it means, there is none, that was a completely true statement.²⁷⁶

This is not the time or place to debate whether the last answer given by the President was technically correct or whether his silence in the face of his attorney's representation to Judge Wright during the deposition constitutes obstruction of justice. The debate over these matters is less important to me than the message being sent by the President, which is that false statements and false testimony do not matter. For me, it does not "depend[]" upon what the meaning of the word is means." The statement by attorney Bennett to the Court was false; it is almost impossible to believe that the President did not hear it and thus did not correct it, and the President's contention in his grand jury testimony that somehow the Bennett statement could be "a completely true statement" evinces an unwillingness or inability to separate truth from falsity in the way ordinary people do every day. We need our lawyers, especially our prosecutors, to be able to identify false testimony and abjure it. We need a Supreme Court that cares when false testimony is offered, not a Court whose efforts match the President's in tone deafness to falsity. We must return to *Alcorta* and *Napue* and give them their due.

276. President Clinton's Videotaped Grand Jury Testimony, Segment 3, Aug. 17, 1998, available in 1998 WL 644125.