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Strickler v. Greene: A Deadly Exercise in Legal Semantics and Judicial Speculation

Russel D. Francisco

STRICKLER v. GREENE: A DEADLY EXERCISE IN LEGAL SEMANTICS AND JUDICIAL SPECULATION

RUSSEL D. FRANCISCO*

INTRODUCTION

Over two thousand years ago, Sun-tzu[1] wrote that "a successful mission is based on comprehension prior to action."[2] Perhaps no other phrase better describes a criminal defense attorney's need to fully comprehend the prosecution's case against the defendant before the start of trial.[3] Consequently, the United States Supreme Court has upheld a criminal defendant's right to full prosecutorial disclosure of evidence favorable to the accused.[4] According to the Court, evidence

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* J.D. Candidate, June 2001, St. John's University School of Law; B.A., *cum laude*, New York University.

[1] Sun-tzu, whose given name was Sun Wu, served as a Chinese military strategist during the Fifth Century B.C. *See* SUN-TZU, THE ART OF WAR, THE NEW TRANSLATION 15–19 (J.H. Huang trans., Quill 1993). Sun-tzu was "appointed both to be in charge of troop discipline and also to assist [a Chinese general] . . . in designing [the army's] expansion strategy." *Id.* at 18. "*Sun-tzu* is the book's title, and it also is the author's name; labeling a book after its author was customary in China . . . ." *Id.* at 15.

[2] *Id.* at 112.

[3] *See* United States v. Agurs, 427 U.S. 97, 105 (1976) (stating that a prosecutor violates the constitutional duty of disclosure if the information withheld from defense counsel is of such sufficient significance that it denies the defendant's right to a fair trial).

[4] *See* Kyles v. Whitley, 514 U.S. 419, 422 (1995) (remanding for a new trial because the prosecution's failure to disclose certain evidence to the defense raised "a reasonable probability that its disclosure would have produced a different result"); United States v. Bagley, 473 U.S. 667, 678 (1985) (recognizing that the withholding of material evidence from the defense warrants reversal of the conviction if the suppression "undermines confidence in the outcome of the trial"); *Agurs*, 427 U.S. at 112 (declaring that omitted evidence that "creates a reasonable doubt that did not otherwise exist" constitutes reversible error); Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that the prosecution's failure to disclose an accomplice's confession to the homicide "was a violation of the Due Process Clause of the Fourteenth Amendment"); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 695–96 (1987)

favorable to a criminal defendant must be accorded great significance because such evidence implicates both Confrontation Clause[5] and Due Process[6] principles. The Court has been careful to safeguard the criminal defense attorney's right of access to evidence favorable to the accused because of the potential effects that the omitted evidence could have on the trial jury.[7] Moreover, the Court has been reluctant to take the place of the jury when faced with determining the potential effects that undisclosed evidence favorable to a criminal defendant would have had on jurors during trial.[8] In stark contrast to the United States Supreme Court's usual candor towards the trial jury and evidence favorable to the criminally accused[9] is the Court's recent decision in *Strickler v. Greene*.[10]

In *Strickler*, a capital murder case, the Court dealt with a Virginia prosecutor's failure to disclose documents that would

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("The prosecutor's role as an advocate is tempered by an obligation of fairness, a duty to ensure that each trial results in an accurate determination of guilt and punishment. At the very core of this duty are the . . . rules requiring the prosecutor to disclose evidence favorable to the defense . . . .") (footnote omitted).

[5] *See* Davis v. Alaska, 415 U.S. 308 (1974). In *Davis* the United States Supreme Court declared that the evidence withheld from defense counsel denied the defendant the opportunity to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318. By withholding the evidence in question from defense counsel, the prosecution accordingly denied the defendant "the right of effective cross–examination." *Id.* According to the Court, a "primary interest" secured by the Sixth Amendment's confrontation clause is "the right of cross–examination." *Id.* at 315.

[6] *See* Brookhart v. Janis, 384 U.S. 1, 4 (1966) (stating that "the confrontation guarantee of the Sixth Amendment including the right of cross-examination is to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment") (internal quotations and citations omitted).

[7] *See, e.g., Davis*, 415 U.S. at 318. In *Davis*, the Court characterized the jury as the "sole triers of fact and credibility" to whom the defendant was entitled to present his entire defense, free from omissions resulting from undisclosed evidence favorable to the defendant. *Id.*; *see also* Napue v. Illinois, 360 U.S. 264, 269 (1959) (noting that a jury's deliberations could often turn on "subtle factors," thereby entitling jurors to be privy to all the evidence that an accused would want to present in his defense).

[8] *See Davis*, 415 U.S. at 317 (declaring that the Court will not speculate as to how the jury would have interpreted the defendant's theory of the case had the prosecution disclosed the omitted evidence to defense counsel); *see also Brady*, 373 U.S. at 88 (1963) (stating that the Court is unwilling to put itself in the place of the jury).

[9] *See supra* notes 4-8.

[10] 527 U.S. 263 (1999).

have severely impeached a key prosecution witness.[11] The Court analyzed the effects of the prosecution's non-disclosure of the documents in light of *Brady v. Maryland*[12] and its progeny.[13] The majority held that the defendant failed to show that there was "a reasonable probability that his conviction or sentence would have been different had [the documents] been disclosed"[14] and affirmed the defendant's death sentence.[15] Speaking on behalf of the *Strickler* trial jury, the Court asserted, among other things, that the record provided "strong support for the conclusion that [the defendant] would have been convicted of capital murder and sentenced to death, even if [the witness in question] had been severely impeached" at trial.[16] The Court further determined that even if the undisclosed documents had been made available to defense counsel, causing the witness's testimony to be "entirely discredited," the *Strickler* trial jury "might still have concluded" that death was the proper punishment.[17] Justice Souter disagreed with the majority and penned a vigorous dissent.[18]

It is submitted that the *Strickler* decision is severely flawed. The United States Supreme Court inexplicably took the place of the trial jury and unilaterally sentenced the defendant to death—an act that is denounced by this Comment. It is essential to note that this Comment does not question the guilt phase of the *Strickler* case—the defendant's guilt is conceded. Rather, this Comment assaults the brazen conclusions reached by the Court in speculating about the trial jury's deliberations during *Strickler*'s sentencing phase. Moreover, this Comment urges that the non-disclosure of the documents in question cannot constitute harmless error under the standards previously set forth by the Court. This Comment also attacks the Court's futile exercise in legal semantics when determining how the

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[11] *See id.* at 265.

[12] 373 U.S. 83 (1963).

[13] *See supra* note 4. Collectively, *Brady v. Maryland* and its progeny are known as the "*Brady* doctrine" or the "*Brady* rule." *See Strickler*, 527 U.S. at 280–81; *see also* Rosen, *supra* note 4, at 696.

[14] *Strickler*, 527 U.S. at 296.

[15] *See id.*

[16] *Id.* at 294.

[17] *Id.* at 292.

[18] *See id.* at 296 (Souter, J., dissenting). Justice Souter was joined in part by Justice Kennedy. *See id.*

undisclosed evidence would have affected the results of the trial and the jury's sentence recommendation. The *Strickler* decision not only jeopardizes the trial jury's status as sole trier of fact, but also hangs the fate of capital defendants on the whims of capricious legal terminology.

The intricate facts of *Strickler* necessitate Part I of this Comment, which will summarize the crucial details of the case, as well as the specific findings of the majority. Part II will present the legal principles that were implicated by the prosecution's failure to disclose the documents in question. Part III will argue that the majority erred in affirming the defendant's death sentence. The United States Supreme Court cannot predict what the *Strickler* jury would have recommended at the sentencing phase had the damaging evidence been presented by the defense. Part III will also demonstrate how the Court failed to recognize and acknowledge the constitutional violations that resulted from the prosecution's failure to disclose the disputed evidence. Therefore, it will be argued that the prosecution's failure to turn over the documents cannot be classified as harmless constitutional error during the sentencing phase. This Comment will thus agree with Justice Souter's dissent and assert that, in the interests of justice, the Court should have ordered a new sentencing phase instead of reaching conclusions of fact on behalf of the trial jury.

I. BACKGROUND

A. *Circumstances of Leanne Whitlock's Murder*

Leanne Whitlock was a sophomore at James Madison University during the winter of 1990.[19] At approximately 6:30 or 6:45 p.m. on January 5, Leanne drove to the Valley Shopping Mall in Harrisonbourg, Virginia so that she could return her boyfriend's car.[20] Leanne never got the chance to "return the car and was not again seen alive by any of her friends or family."[21]

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[19] *See* Strickler v. Virginia, 404 S.E.2d 227, 230 (Va. 1991).

[20] *See Strickler*, 527 U.S. at 266–67. Leanne's boyfriend, John Dean, had lent her his blue 1986 Mercury Lynx. *See id.* Dean worked at the Valley Shopping Mall. *See id.*

[21] *Id.* at 267.

That same afternoon, Leanne was abducted, raped, robbed, and murdered.[22]

Over a week later, on January 13, a local farmer called the police to advise them that he had found a wallet that might belong to one of Leanne's murderers.[23] The police proceeded to search the area where the wallet was recovered: a cornfield twenty-five miles from the scene of Leanne's abduction.[24] The search led the police "to the discovery of Whitlock's frozen, nude, and battered body."[25] Leanne Whitlock "was found in a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs."[26] Leanne's body was found with her hands "extended over her head and crossed at the wrists."[27] The police also found a bloody sixty-nine pound rock nearby.[28] Forensic analysis of the body "indicated that Whitlock's death was caused by 'multiple blunt force injuries to the head.' "[29]

Shortly thereafter, the police arrested Thomas David Strickler[30] and his accomplice.[31] Strickler was eventually "convicted of capital murder and sentenced to death."[32] The trial jury then "recommended death after finding the predicates of 'future dangerousness' and 'vileness' "[33] in accordance with Virginia law.[34]

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[22] *See id.* at 266.

[23] *See id.* at 269.

[24] *See id.*

[25] *Id.*

[26] Strickler v. Virginia, 404 S.E.2d 227, 231 (Va. 1991).

[27] *Id.*

[28] *See Strickler*, 527 U.S. at 269.

[29] *Id.* at 267 (citation omitted). In particular, "[Leanne's] death was caused by four large, crushing, depressed skull fractures with lacerations of the brain." *Strickler*, 404 S.E.2d at 231.

[30] *See Strickler*, 404 S.E.2d at 227.

[31] Strickler's accomplice was Ronald Henderson. *See id.* at 230. Henderson was subsequently "convicted of first-degree murder but acquitted of capital murder." *Strickler*, 527 U.S. at 292 n.40.

[32] *Strickler*, 527 U.S. at 266.

[33] *Id.* at 295 n.48.

[34] *See* VA. CODE ANN. § 19.2-264.2 (Michie 1995). The statute states, in pertinent part:

> [A] sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he

B. *The Testimony of Anne Stoltzfus, the Prosecution's Star Witness*

Anne Stoltzfus was present during Leanne Whitlock's abduction at the Valley Shopping Mall.[35] Stoltzfus and her fourteen year-old daughter were shopping in a "Music Land" store when they first encountered Strickler and his entourage.[36] Stoltzfus and her daughter left the store, only to again encounter the threesome forty-five minutes later.[37] The two witnesses would see them for a third and final time in the parking lot while Stoltzfus and her daughter were driving to another part of the mall.[38]

Stoltzfus testified that, while driving, she and her daughter "saw [Leanne Whitlock's] shiny dark blue car," which had "stopped behind a minivan at a stop sign."[39] At this point, Strickler rushed out of the mall, into the parking lot area and began harassing the drivers of a van and a pickup truck before turning his attention to Leanne's car.[40] Upon approaching Leanne's car, Strickler " 'pounded on' the passenger window, shook the car, yanked the door open and jumped in."[41] Strickler

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stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Id. The Commonwealth of Virginia was required to prove the death-aggravating elements beyond a reasonable doubt. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 1995).

[35] *See Strickler*, 527 U.S. at 270.

[36] *See id.* Stoltzfus referred to Strickler as "Mountain Man" during the course of her testimony. *Id.* Strickler was accompanied in the store by his accomplice, Henderson (whom Stoltzfus referred to as "Shy Guy"), and by a blonde girl. *Id.* at 270–71. The "blonde girl" was a woman named Donna Kay Tudor. *Id.* Stoltzfus had testified to the physical appearances of the threesome "in great detail." *Id.* at 270 n.5. Strickler had made an impression on Stoltzfus because of his behavior at the store. *See id.* at 272–73. Stoltzfus testified that Strickler was "revved up" and "very impatient." *Id.* at 271. Strickler's demeanor "frightened" Stoltzfus. *Id.*

[37] *See id.* Donna Kay Tudor, "Blonde Girl," apparently asked Stoltzfus for directions to the bus stop. *Id.*

[38] *See id.*

[39] *Id.* Stoltzfus described the female driver of the blue car as being "beautiful," "well dressed," and "happy." *Id.* (internal quotations and citation omitted). Apparently, Leanne Whitlock was even "singing" as she drove her boyfriend's car. *Id.* (internal quotations and citation omitted).

[40] *See id.*

[41] *Id.* According to Stoltzfus, after forcing his way into Leanne's car, Strickler motioned for the rest of his entourage to get in the car. *See id.* at 270–71.

began hitting Leanne as he forced her to drive away.[42] Stoltzfus managed to pull her car "parallel to [Leanne's] blue car . . . and leaned over to ask repeatedly if [Leanne] was 'O.K.' "[43] Stoltzfus testified that Leanne "looked 'frozen' and mouthed an inaudible response" that Stoltzfus interpreted to be the word "help."[44] Leanne, however, slowly drove around Stoltzfus, "went over the curb with [the] horn honking, and headed out of the mall."[45] Stoltzfus further testified that she tried to follow Leanne's car, told her daughter to write down the license plate number, and then drove home.[46]

During her testimony, Stoltzfus positively identified Thomas Strickler.[47] While under cross-examination, Stoltzfus brashly claimed that she had "an exceptionally good memory."[48] Accordingly, the prosecutor "did not produce any other witnesses to the abduction,"[49] relying heavily on Stoltzfus's powerful testimony. In fact, the prosecutor's closing argument at the guilt phase "relied on Stoltzfus'[s] testimony to demonstrate [Strickler's] violent propensities and to establish that he was the instigator and leader in Whitlock's abduction and, by inference, her murder."[50]

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[42] *See id.* at 272. Strickler began hitting Leanne on her shoulder and then "started hitting her on the head." *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See id.* Stoltzfus's daughter allegedly wrote the license plate number on a three-by-four inch index card. *See id.* The license plate number allegedly written down was "West Virginia NKA 243." Strickler v. Virginia, 404 S.E.2d 227, 230 (Va. 1991).

[47] *See Strickler*, 527 U.S. at 272. Stoltzfus successfully identified Strickler as the "Mountain Man." *Id.*

[48] *Id.* (internal quotations and citation omitted). Stoltzfus further claimed: "I had very close contact with [Strickler] and he made an emotional impression with me [sic] because of his behavior [at the music store] and I, he caught my attention and I paid attention. So I have *absolutely no doubt of my identification.*" *Id.* at 272–73 (internal quotations and citation omitted) (emphasis added).

[49] *Id.* at 273. Stoltzfus's young daughter did not testify. *See id.*

[50] *Id.* at 290. The Commonwealth of Virginia "emphasized the importance of Stoltzfus'[s] testimony in proving the abduction." *Id.* The prosecutor told the jury: "[W]e are lucky enough to have an eyewitness who saw [what] happened out there in that parking lot. [In a] lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Mrs. Stoltzfus was there, she saw [what] happened." *Id.* (internal quotations and citation omitted) (alteration in original).

C. *The Stoltzfus Documents*[51]

Strickler's attorneys did not become aware of the crucial papers now known as the Stoltzfus documents until well after Strickler was sentenced to death.[52] The controversy centered on a series of notes taken by the lead detective "during his interviews with Stoltzfus, and letters written by Stoltzfus to [the detective]."[53] The documents "cast serious doubt on Stoltzfus'[s] confident assertion of her 'exceptionally good memory.' "[54]

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[51] *See id.* at 273–75.

[52] *See generally* Strickler v. Murray, 452 S.E.2d 648 (Va. 1995); Strickler v. Virginia, 404 S.E.2d 227 (Va. 1991). The case's prior history contains no mention of the documents in question. *See id.* The first references to the Stoltzfus documents were not made until the time of the appeal to the United States Supreme Court. *See Strickler*, 527 U.S. at 273–75.

[53] *Strickler*, 527 U.S. at 273. Stoltzfus spoke with Detective Claytor, a member of the Harrisonburg City Police Department. *See id.* The Stoltzfus documents were comprised of the following exhibits:

Exhibit 1: A handwritten note dated January 19, 1990, two weeks after the murder, prepared by the detective, indicating that the witness "could not identify the black female victim." *Id.* The sole person that the witness "apparently could identify at this time was [Donna Kay Tudor]." *Id.*

Exhibit 2: A document summarizing interviews with the witness conducted on January 19 and 20, 1990. *See id.* The detective noted that, at that point, the witness "was not sure whether she could identify [Strickler and Henderson] but felt sure she could identify [Donna Kay Tudor]." *Id.* (internal quotations and citation omitted).

Exhibit 3: "[A] summary of the abduction." *Id.* at 274.

Exhibit 4: A letter written by the witness to the detective three days after the first interview. *See id.* "The letter states that she had not remembered being at the mall. . . ." *Id.* The witness wrote: "*I have a very vague memory that I'm not sure of.*" *Id.* (internal quotations and citation omitted) (emphasis added). After indicating the possibility that she saw different individuals during the abduction, the witness lamented, "Were those 2 memories the same person?" *Id.* (internal quotations and citation omitted).

Exhibit 5: A note to the detective entitled "My Impressions of 'The Car.' " *Id.* (internal quotations and citation omitted). The witness did not mention "the license plate number that she vividly recalled at trial." *Id.*

Exhibit 6: A note from the witness to the detective dated January 25, 1990. *See id.* The note indicated that, "after spending several hours with John Dean, Whitlock's boyfriend, 'looking at current photos,' she had identified Whitlock 'beyond a shadow of a doubt.' " *Id.* (citation omitted). It is essential to point out that "by the time of trial her identification had been expanded to include a description of [Leanne Whitlock's] clothing and her appearance as a college kid who was 'singing' and 'happy.' " *Id.* (citation

The prosecution did not know that the Stoltzfus documents existed.[55] Moreover, despite the "broader discovery provisions afforded at trial,"[56] Strickler would not have had access to the Stoltzfus documents under Virginia law[57] "except as modified by *Brady*" and its progeny.[58] The Commonwealth of Virginia, however, was unaware of the Stoltzfus documents, so the prosecutor could not comply with *Brady*.[59] Nonetheless, the United States Supreme Court charged the Commonwealth with knowledge of the Stoltzfus documents[60] in accordance with the Court's prior decisions.[61]

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omitted). For Anne Stoltzfus's testimonial description of Leanne Whitlock, see *supra* note 39.

Exhibit 7: A letter written by the witness dated January 16, 1990. *See Strickler*, 527 U.S. at 274. In the letter, the witness thanked the detective "for his 'patience with my sometimes muddled memories.'" *Id.* (citation omitted). The witness also wrote that "I never would have made any of the associations that you helped me make." *Id.* (internal quotations and citation omitted).

Exhibit 8: A piece of paper detailing what happened to the three-by-four inch card that allegedly contained the license plate number of the victim's car. *See id.* at 275. The witness wrote: "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." *Id.* (internal quotations and citation omitted).

[54] *Id.* at 273.

[55] During the federal habeas corpus proceedings, the United States District Court for the Eastern District of Virginia "entered a sealed, *ex parte* order granting [Strickler's] counsel the right to examine and to copy all of the police and prosecution files in the case." *Id.* at 278. It was this order that "led to [defense] counsel's first examination of the Stoltzfus materials." *Id.*

[56] *Id.* at 286.

[57] *See* VA. SUP. CT. R. 3A:11(b)(2) ("This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case . . . .").

[58] *Strickler*, 527 U.S. at 286. For a synthesis of the *Brady* doctrine, see *supra* note 4 and accompanying text.

[59] The "open file" policy maintained by the Commonwealth of Virginia throughout the course of Strickler's trial was of no help. *Strickler*, 527 U.S. at 276 & n.13. The open file policy only "gave [defense]counsel access to all of the evidence in the . . . prosecutor's files," not the police files. *Id.* at 276.

[60] "[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Id.* at 288.

[61] "[T]he action of prosecuting officers on behalf of the State . . . may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.'" Mooney v. Holohan, 294 U.S. 103,

While the majority assumed that the prosecution withheld only five of the eight Stoltzfus documents, the dissent assumed that the prosecution withheld all eight documents.[62] The contents of the five Stoltzfus documents that both the majority and dissent agreed were not disclosed would have been sufficient to severely undermine the credibility of Anne Stoltzfus on the witness stand.[63] In fact, during Strickler's federal habeas corpus proceeding, the omission of the Stoltzfus documents compelled the United States District Court for the Eastern District of Virginia to grant the writ.[64] "[T]he District Court concluded that the failure to disclose the other five [Stoltzfus documents] was sufficiently prejudicial to undermine confidence in the jury's verdict."[65] Strickler's attorneys appealed to the United States Supreme Court after the United States Court of Appeals for the Fourth Circuit vacated the ruling in part.[66]

D. The Majority's Findings

In a majority decision, the United States Supreme Court affirmed Thomas Strickler's death sentence.[67] The Court first considered the Stoltzfus documents under the *Brady* doctrine.[68]

112–13 (1935) (citations omitted); *see also* Giglio v. United States, 405 U.S. 150, 154 (1972) (declaring that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor").

[62] The majority in *Strickler* stated that "[t]here is a dispute between the parties over whether [the defendant's attorneys] saw Exhibits 2, 7, and 8 before trial . . . . For purposes of this case, therefore, we assume that [Strickler] proceeded to trial without having seen Exhibits 1, 3, 4, 5, and 6." *Strickler*, 527 U.S. at 275. For a description of Exhibits 1, 3, 4, 5, and 6 see *supra* note 53. Justice Souter's dissent, on the other hand, assumed that defense counsel saw none of the Stoltzfus documents before trial. *See id.* at 296 n.1 (Souter, J., dissenting). The confusion concerning how many documents were withheld is evident in Justice Souter's dissent: "I understand [the Court] to have assumed that none of the eight documents was disclosed. I proceed based on that assumption as well." *Id.*

[63] Justice Souter noted that "[i]f one thought the difference between five and eight documents withheld would affect the determination of prejudice, a remand to resolve that factual question would be necessary." *Id.*

[64] "The District Judge . . . was satisfied that the 'potentially devastating impeachment material' contained in the other five [documents] warranted the entry of summary judgment in [Strickler's] favor." *Id.* at 290 (citation omitted).

[65] *Id.* at 279.

[66] *See id.*

[67] *See id.* at 296.

[68] *See supra* notes 12–13. According to *Brady v. Maryland*, 373 U.S. 83, 87 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request [by the defense] violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

The *Brady* doctrine requires that the withheld evidence be material to the case—that is, the suppression of the evidence must undermine confidence in the outcome of the trial.[69] According to the *Brady* rule, a prosecutor violates the "constitutional duty of disclosure" when the omission is of such "sufficient significance [as] to result in the denial of the defendant's right to a fair trial."[70]

The *Strickler* majority declared that there are "three components" to establishing "a true *Brady* violation."[71] First, the evidence in question "must be favorable to the accused, either because it is exculpatory, or because it is impeaching."[72] Second, the "evidence must have been suppressed by the State, either willfully or inadvertently."[73] Third, "prejudice must have ensued" as a result of the non-disclosure to the defendant.[74]

The majority determined that Strickler satisfied the first two components of the *Brady* doctrine.[75] Accordingly, the majority concluded that the Stoltzfus documents were favorable to Strickler, and that the Commonwealth of Virginia withheld those documents.[76] The Court declared, however, that Strickler

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prosecution." The Court later held that a formal request from defense counsel for the disclosure of favorable evidence is unnecessary for *Brady* purposes. *See* United States v. Agurs, 427 U.S. 97, 106–07 (1976).

Furthermore, in *United States v. Bagley*, 473 U.S. 667, 676 (1985), the Court declared that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." The Court has found that "the prosecutor remains responsible for gauging [the cumulative effect of all evidence suppressed by the government] regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Kyles v. Whitley, 514 U.S. 419, 421 (1995). Under this doctrine, "[every] prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437. "[W]hether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id.* at 437–38.

[69] *See Bagley*, 473 U.S. at 678 ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.").

[70] *Agurs*, 427 U.S. at 108.

[71] *Strickler*, 527 U.S. at 281.

[72] *Id.* at 281–82.

[73] *Id.* at 282; *see also supra* notes 60–61 and accompanying text.

[74] *Id.*

[75] *See id.* at 296 (noting that Strickler "satisfied two of the three components of a constitutional violation under *Brady*: exculpatory evidence and nondisclosure of this evidence by the prosecution").

[76] *See id.*

failed to establish the final component of the *Brady* doctrine.[77] According to the majority, Strickler did not show that there was "a reasonable probability that his conviction or sentence would have been different had [the Stoltzfus] materials been disclosed."[78] Strickler's death sentence was therefore affirmed.[79]

The majority admittedly believed that the Stoltzfus documents would have indeed helped Strickler "in either the guilt or sentencing phases of the trial."[80] The majority stated that "[w]ithout a doubt, Stoltzfus'[s] testimony was prejudicial in the sense that it made [Strickler's] conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial."[81] The majority, however, concluded that this was "not the standard that [Strickler] must satisfy in order to obtain relief."[82] Rather, Strickler needed to convince the Court that there was a "reasonable probability"[83] that "the result of the trial would have been different if the suppressed documents had been disclosed to the defense."[84]

The majority continued its exercise in legal semantics by opining that "[t]he District Court was surely correct that there [was] a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus'[s] testimony might have produced a different result, either at the guilt or sentencing phases."[85] Sadly, since Strickler could only demonstrate a possibility, and not a "reasonable probability" of a different

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[77] *See id.*

[78] *Id.*

[79] *See id.* The Court has denied Strickler's last-ditch efforts for a stay of execution. *See In re* Strickler, 527 U.S. 1051 (1999).

[80] *Strickler*, 527 U.S. at 289 (internal quotations and citation omitted).

[81] *Id.*

[82] *Id.*

[83] *Id.* In 1985 the Court defined "reasonable probability" to mean "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).

[84] *Strickler*, 527 U.S. at 289. The majority added: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. . . . [T]he question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 289-90 (internal quotations and citation omitted).

[85] *Id.* at 291 (emphasis added).

result at the trial,[86] Strickler would have to remain on death row.

The majority justified its findings by proclaiming that even if Stoltzfus's testimony were "entirely discredited" by the impeaching documents, the jury could have relied on other evidence to find that "[Strickler] was the leader of the criminal enterprise" and still have recommended the death penalty.[87] The majority reached this conclusion on behalf of the jury although it recognized the "importance of [Stoltzfus's] eyewitness testimony," which "provided the *only* disinterested, narrative account of what transpired on January 5, 1990."[88] The majority was certain that the record provided "strong support for the conclusion that [Strickler] would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached."[89] The majority denied that Stoltzfus's testimony impacted the sentencing phase because her testimony "did not relate to his eligibility for the death sentence"[90] and the prosecution did not rely upon Stoltzfus's testimony "at all during

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[86] *See supra* notes 84–85.

[87] *Strickler*, 527 U.S. at 292.

[88] *Id.* at 293 (emphasis added).

[89] *Id.* at 294. The Court, however, seemed to emphasize evidence that would have been crucial at the *guilt* phase of the trial, as opposed to the sentencing phase. *See id.* at 292–96. The Court noted that "there was considerable forensic and other physical evidence linking [Strickler] to the crime." *Id.* at 293. The majority stressed that "the police recovered hairs on a bra and shirt found with Whitlock's body that 'were microscopically alike in all identifiable characteristics' to [Strickler's] hair." *Id.* at 293 n.41 (citation omitted). Moreover, blood was found on the shirt recovered from Strickler's mother's house, and Strickler's "fingerprints were found on the outside and inside of the car taken from [the victim]." *Id.* "The weight and size of the rock, and the character of the fatal injuries to the victim, are powerful evidence supporting the conclusion that two people acted jointly to commit a brutal murder." *Id.* at 293 (footnotes omitted).

[90] *Id.* at 295. Justice Souter, in his dissent, proclaimed: "I could not regard Stoltzfus's colorful testimony as anything but significant on the matter of sentence." *Id.* at 303 (Souter, J., dissenting). The dissent argued:

> It was Stoltzfus alone who described Strickler as the initiator of the abduction, as the one who broke into Whitlock's car, who beckoned his companions to follow him, and who violently subdued the victim while "Shy Guy" sat in the back seat. The bare content of this testimony, important enough, was enhanced by one of the inherent hallmarks of reliability, as Stoltzfus confidently recalled detail after detail. The withheld documents would have shown, however, that many of the details Stoltzfus confidently mentioned on the stand . . . had apparently escaped her memory in her initial interviews with the police.

Id. at 303–04.

its closing argument at the penalty phase."[91] While admitting that Stoltzfus was the only witness with the ability to describe Strickler as a "violent, aggressive person,"[92] the majority maintained that her "portrayal surely was not as damaging" as the other pieces of evidence before the trial jury.[93]

II. LEGAL PRINCIPLES IMPLICATED BY THE *STRICKLER* DECISION

A. The Right of Effective Cross-Examination[94]

The Sixth Amendment to the United States Constitution guarantees a criminal defendant, among other things, the right to confront his or her accusers.[95] The United States Supreme Court has made the Sixth Amendment applicable to the individual states[96] through the Fourteenth Amendment.[97] The

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[91] *Id.* at 295. Justice Souter agreed that "the prosecution gave no prominence to the Stoltzfus testimony" during the sentencing phase. *Id.* at 305 (Souter, J., dissenting). Justice Souter, however, emphasized that:

> [T]he State's closing actually did include two brief references to Strickler's behavior in "just grabbing a complete stranger and abducting her," as relevant to the jury's determination of future dangerousness. And since Strickler's criminal record had no convictions involving actual violence . . . the jurors may well have given weight to Stoltzfus's lively portrait of Strickler as the aggressive leader of the group, when they came to assess his future dangerousness.

Id. (citations omitted). For an outline of Virginia's death penalty guidelines, see *supra* notes 33–34 and accompanying text.

[92] *Strickler*, 527 U.S. at 295.

[93] *Id.*

[94] *See* Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

[95] The Sixth Amendment to the United States Constitution states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

[96] *See* Brookhart v. Janis, 384 U.S. 1, 4 (1966). According to the Court, the Sixth Amendment "is to be enforced against the States under the Fourteenth Amendment." *Id.* (internal quotations and citations omitted); *see also Davis*, 415 U.S. at 315 (stating that a criminal defendant's Sixth Amendment rights are "secured for defendants in state as well as federal criminal proceedings") (citation omitted).

Court has recognized that among the several rights protected by the Sixth Amendment umbrella is "the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' "[98] The Court explained that "[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*"[99] The criminal defendant "demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by [the witness], but for the purpose of cross-examin[ing that witness]."[100] The Court proclaimed that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."[101] The criminal defendant has a constitutionally protected right "to delve into the witness'[s] story to test the witness'[s] perceptions and memory . . . [and] to impeach, *i.e.*, discredit, the witness."[102]

The criminal defendant has a per se right under the Federal Constitution to *fully* cross-examine adverse witnesses.[103] A criminal defendant's Sixth Amendment rights are thus violated when defense counsel is either deprived of the chance to cross-

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[97] The Fourteenth Amendment to the United States Constitution states that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[98] *Davis*, 415 U.S. at 315. The Court declared that "a primary interest secured by [the Sixth Amendment] is the right of cross-examination." *Id.* (internal quotations and citation omitted); *see also Brookhart*, 384 U.S. at 4 (recognizing that "the confrontation guarantee of the Sixth Amendment include[s] the right of cross-examination").

"Cross examination is considered so fundamental to the adversary system of trial that it has assumed the status of a right. Furthermore, in criminal cases, cross-examination is a key ingredient of the defendant's sixth amendment right to confront the witnesses against him." ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS 468–69 (West's New York Practice Series No. 5, 1996) (footnote omitted).

[99] *Davis*, 415 U.S. at 315–16 (internal quotations and citation omitted).

[100] *Id.* at 316 (internal quotations and citation omitted).

[101] *Id.*

[102] *Id.*

[103] *See id.* at 318 (stating that defense counsel should have been allowed to expose to the jury all the facts that could bear on the witness's reliability and credibility); *see also* Smith v. Illinois, 390 U.S. 129, 131 (1968) (stating that a defendant must be able to fully cross-examine prosecution witnesses). In *Smith*, "there was not, to be sure, a complete denial of all right of cross-examination." *Id.* The defendant, however, "was denied the right to ask the principal prosecution witness" all the questions necessary to fully cross-examine that witness. *Id.*

examine a witness outright, or when defense counsel is deprived of the ability to fully and effectively cross-examine that witness.[104]

The right of effective cross-examination, according to the Court, is most important when credibility is at issue.[105] When the "credibility of a witness is in issue," defense counsel has a right to "expos[e] falsehood and bring[] out the truth."[106] "To forbid this most rudimentary inquiry," said the Court, "is effectively to emasculate the right of cross-examination itself."[107] The criminal defendant suffers prejudice "from a denial of the opportunity to place the witness in his proper setting and put the weight of [the] testimony and [the witness's] credibility to a test, without which the jury cannot fairly appraise" the witness.[108] Denying a criminal defendant the right of effective cross-examination "would be *constitutional error of the first magnitude* and no amount of showing of want of prejudice would cure it."[109]

B. Harmless Error

In *Chapman v. California*,[110] the United States Supreme Court noted that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[111] The Court was referring to the concept of harmless constitutional error.[112] The Court declared

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[104] *See supra* note 103.

[105] *See Smith*, 390 U.S. at 131 (stating that when the witness's credibility is the issue, the defense must be able to ask the witness's name and address).

[106] *Id.* (internal quotations and citation omitted).

[107] *Id.*

[108] *Id.* at 132 (internal quotations and citation omitted). The Court continued: "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . . ." *Id.* (internal quotations and citation omitted). There is "no obligation imposed on [a trial court] . . . to protect a witness from being discredited on cross-examination." *Id.* at 132–33 (internal quotations and citation omitted).

[109] Davis v. Alaska, 415 U.S. 308, 318 (1974) (internal quotations and citation omitted) (emphasis added).

[110] 386 U.S. 18 (1967).

[111] *Id.* at 22.

[112] *See id.* at 23–24 (explaining that all trial errors which violate the Constitution do not automatically require reversal).

that "before a federal constitutional error can be held harmless, [a] court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt."[113]

Two decades after *Chapman*, the Court in *Rose v. Clark*[114] provided further guidelines for harmless error determinations. In *Clark*, the Court held that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis."[115] If an appellate court finds that the trial record "establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."[116] The Court proclaimed that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."[117] The *Clark* Court thus seems to provide license for the widespread use of the harmless constitutional error doctrine.

C. *The Trial Jury as the Sole Trier of Fact*

The United States Supreme Court has been reluctant to take the place of the jury when called upon to assess the potential effects of disputed evidence on a trial.[118] In *Brady v. Maryland*,[119] the defendant was found guilty of murder and sentenced to death.[120] Unbeknownst to defense counsel, the defendant's accomplice in the felony-murder had confessed to the

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[113] *Id.* at 24; *see also* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 80 (1988) (stating that "constitutional error generally does not necessitate automatic reversal of a criminal conviction: error is harmless and the conviction must be upheld when an appellate court concludes beyond a reasonable doubt that the error had no impact on the ultimate finding of guilt").

[114] 478 U.S. 570 (1986).

[115] *Id.* at 579.

[116] *Id.*

[117] *Id.* (internal quotations and citations omitted).

[118] *See* Davis v. Alaska, 415 U.S. 308, 317 (1974) (stating that the Court is not willing to speculate as to whether the jury would have accepted a possible defense theory in light of undisclosed evidence); Brady v. Maryland, 373 U.S. 83, 88 (1963) (maintaining that the Court cannot put itself in the jury's place and make assumptions about their views).

[119] 373 U.S. 83 (1963).

[120] *See id.* at 84.

actual killing.[121] The prosecution had willfully suppressed the accomplice's confession.[122] In overturning the defendant's death sentence, the Court declined to speculate about how the accomplice's confession could have affected the trial jury's deliberations.[123] The Court reasoned:

> We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or [his accomplice's] hands that twisted the shirt about the victim's neck.... [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady*.[124]

In *Davis v. Alaska*,[125] defense counsel was precluded from cross-examining a witness about his juvenile record.[126] The Court refused to theorize about how the jury would have deliberated had defense counsel been able to expose the witness's juvenile record: "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted [the defendant's] line of reasoning had counsel been permitted to fully present it."[127]

Legal scholars have generally agreed with the Court's reluctance to step into the shoes of a jury, especially a capital jury.[128] A court simply "cannot know how a jury would have resolved questions of fact over which reasonable persons can

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[121] *See id.* "The issue in *Brady* involved evidence relevant only to the determination whether defendant would receive life in prison or the death sentence for a murder...." Rosen, *supra* note 4, at 699.

[122] *See Brady*, 373 U.S. at 84.

[123] *See id.* at 88.

[124] *Id.* (internal quotations and citation omitted) (second and third alterations in original) (emphasis added).

[125] 415 U.S. 308 (1974).

[126] *See id.* at 312. Defense counsel sought to call into question Richard Green's credibility—Green provided the sole identification testimony against the defendant. *See id.* at 309–10.

[127] *Id.* at 317.

[128] *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1549 (1998) (stating that "capital jurors are not like other jurors"); Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1233 (1995) ("[T]here are gaps in our knowledge of how the jury confronts the problem of deciding death.") (internal quotations and citation omitted) (alteration in original); Stacy & Dayton, *supra* note 113, at 127 (stating that courts are unable to know how jurors resolve factual issues).

disagree."[129] Since a trial jury's deliberations are held in secret, the "courts have no way to determine whether [any] error [at trial] actually influenced the jury except to rely upon [the court's] own perceptions of the weight and credibility of the evidence."[130] It would be impermissible for a court "to imagine the result it would have reached had it been the trier of fact, thereby substituting its own judgment for that of the jury."[131] Courts, therefore, cannot "usurp the jury's role" as the sole trier of fact in a case.[132]

III. APPLICATION TO THE *STRICKLER* DECISION

A. *Rethinking the Stoltzfus Documents—Denial of Effective Cross-Examination*

The United States Supreme Court has declared that "reliability is the linchpin" of identification testimony.[133] Reliability includes "the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of [the] prior description of the criminal, [and] the level of certainty demonstrated" by the witness.[134] The Commonwealth of Virginia's *Brady* violation[135] prevented the trial jury from fully assessing the reliability of Anne Stoltzfus's testimony. The "*Brady*-type misconduct" attributed to the prosecution kept "relevant evidence away from" the trial jury.[136]

The Court has recognized the significance of a witness's reliability as it relates to a trial jury's deliberations. In *Napue v. Illinois*,[137] the Court opined that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence."[138] The Court correctly stated that the jury's assessment of the reliability of a witness is

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[129] Stacy & Dayton, *supra* note 113, at 127.

[130] *Id.* at 130.

[131] *Id.* at 127.

[132] *Id.* at 128.

[133] Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

[134] *Id.*

[135] *See supra* notes 75–76 and accompanying text.

[136] Rosen, *supra* note 4, at 731. This is "misconduct by the representative of the state . . . [and it] also calls into question the accuracy of the mechanism by which our society deprives individuals of their freedom and their lives." *Id.*

[137] 360 U.S. 264 (1959).

[138] *Id.* at 269.

comprised of "subtle factors" on which "a defendant's life or liberty may depend."[139] In *Napue*, the Court concluded that it was "of no consequence that the falsehood [at issue in the case] bore upon the witness'[s] credibility rather than directly upon defendant's guilt," because "[a] lie is a lie, no matter what its subject."[140]

Anne Stoltzfus lied about her "exceptionally good memory" while testifying for the prosecution.[141] Furthermore, Stoltzfus's infraction in *Strickler* is more severe than that of the witness in *Napue*[142] because Stoltzfus's trial testimony had a far greater impact on the trial jury.[143] In his dissent, Justice Souter wrote: "I believe that no other testimony comes close to the prominence and force of Stoltzfus's account in showing Strickler as the unquestionably dominant member of the trio involved in Whitlock's abduction and the aggressive and moving figure behind her murder."[144] Anne Stoltzfus's testimony apparently left a stunning impression that was significant at both the guilt and sentencing phases of *Strickler*. According to Justice Souter, Stoltzfus "was the first to describe Strickler in any detail, thus providing the frame for the remainder of the story the prosecution presented to the jury."[145] Moreover, Stoltzfus gave the players in the story "labels whose repetition more than a dozen times (by the prosecutor as well as by Stoltzfus) must have left the jurors with a clear sense of the relative roles that Strickler and Henderson played in the crimes that followed Stoltzfus's observation."[146]

Justice Souter acknowledged that "the prosecution gave no prominence to the Stoltzfus testimony at the sentencing stage."[147] The prosecution's closing argument at the guilt phase, however, did include references to incidents that Anne Stoltzfus

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[139] *Id.*

[140] *Id.* at 269–70 (internal quotations and citation omitted).

[141] Strickler v. Greene, 527 U.S. 263, 272 (1999) (internal quotations and citation omitted); *see also supra* note 48 and accompanying text.

[142] *See supra* note 140 and accompanying text.

[143] "True, Stoltzfus'[s] testimony directly discussed only the circumstances of Whitlock's abduction, but its impact on the jury was almost certainly broader, as the prosecutor recognized." *Strickler*, 527 U.S. at 305 (Souter, J., dissenting).

[144] *Id.* at 302.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 305.

described on the witness stand.[148] The prosecutor referred to "Strickler's behavior in 'just grabbing a complete stranger and abducting her,' " a statement that Justice Souter found "relevant to the jury's determination of future dangerousness."[149] The dissent thus postulates that the evidence and the prosecutor's argument at Strickler's guilt phase had a direct impact on the trial jury's ultimate recommendation at the sentencing phase, a theory that is empirically supported by expert studies.[150]

The dissent reasoned that "since [Thomas] Strickler's criminal record had no convictions involving actual violence . . . the jurors may well have given weight to Stoltzfus's lively portrait of Strickler as the aggressive leader of the group, when they came to assess his future dangerousness" during the sentencing phase.[151] Justice Souter's dissent thus undertakes its

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[148] *See id.*

[149] *Id.* (citation omitted); *see also supra* note 33 and accompanying text. For the relevant provisions of Virginia law governing the sentencing phases of capital murder trials, see *supra* note 34.

[150] See Hans *supra* note 128, at 1237, concluding that "[m]any jurors have reached their decisions regarding whether the defendant deserves capital punishment before the penalty phase." Furthermore, "[m]ost jurors have formed strong impressions about the defendant's candidacy for death before they have even begun the penalty phase." *Id.*

In another study, "[i]nterviews with 916 capital jurors in eleven states reveal[ed] . . . that many jurors reached a personal decision concerning punishment before the sentencing stage of the trial." William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1477 (1998). "Virtually half of the capital jurors [surveyed] . . . indicated that they thought they knew what the punishment should be during the guilt phase of the trial." *Id.* at 1488. The data show that "sizable proportions of jurors . . . took a stand on punishment before the penalty stage of the trial." *Id.* The study "suggests that these early punishment stands may dominate jurors' subsequent thinking about punishment and that jurors are apt to hold tenaciously to their early punishment stands thereafter." *Id.* at 1490. Most significantly, the data indicate that "many jurors seem to reach a decision about the defendant's punishment on the basis of what they learn during the guilt stage of the trial, rendering the evidence, the arguments, and the instructions of the penalty phase irrelevant." *Id.* at 1493. Capital jurors thus tend "to give effect to the *same considerations in sentencing as in guilt*." *Id.* (emphasis added).

[151] *Strickler*, 527 U.S. at 305 (Souter, J., dissenting); *see also supra* notes 33–34 and accompanying text. Stephen Garvey's study characterizes "future dangerousness" of a defendant as "highly aggravating." Garvey, *supra* note 128, at 1559. Future dangerousness plays a "pervasive role . . . in and on the minds of capital sentencing jurors." *Id.* at 1560. According to the study, "[w]hen the question of the defendant's future dangerousness was put more directly—the 'defendant might be a danger to society in the future'—57.9% [of the jurors surveyed] reported that they would be more likely to vote for death." *Id.* at 1559 (footnote omitted). In accord with Justice Souter's analysis, the jurors surveyed in the study "tended to

own brand of judicial speculation as to what evidentiary elements factored into the trial jury's deliberations at both phases of the trial. Unlike the majority, however, the dissent recognizes the dangers of reaching a decision by speculating about the trial jury's deliberations.[152]

At the center of the uncertainty surrounding the *Strickler* jury deliberations are the Stoltzfus documents.[153] The dissent thought it clear that the Stoltzfus documents "were exculpatory as devastating ammunition for impeaching Stoltzfus."[154] Justice Souter urged that "the likely havoc that an informed cross-examiner could have wreaked upon Stoltzfus [was] adequate to raise a significant possibility of a different [sentence] recommendation."[155] Further, the potential consequences of a severe impeachment of Stoltzfus were also "sufficient to undermine confidence that the death recommendation would have been the choice."[156]

Justice Souter argued that, by withholding the Stoltzfus documents, the Commonwealth of Virginia denied Thomas Strickler his right to a full and effective cross-examination of Anne Stoltzfus under the Sixth Amendment.[157] Stoltzfus's testimony at trial "helped establish the 'principle' . . . that Strickler was 'the aggressor,' the dominant figure, in the whole sequence of criminal events, including the murder, not just in the abduction."[158] Had defense counsel been able to call Stoltzfus's testimony into question using the Stoltzfus documents, "the jurors' belief that Strickler was the chief aggressor might have been undermined to the point that at least one of them would have hesitated to recommend death."[159] The

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attach little mitigating weight to the *absence* of any previous criminal history." *Id.* at 1560. "In short, while future dangerousness is highly aggravating, lack of future dangerousness is only moderately mitigating." *Id.*

[152] *See Strickler*, 527 U.S. at 307 (Souter, J., dissenting) (stating that since "[o]ne cannot be reasonably confident that not a single juror would have had a different perspective" the proper solution is to "vacate the sentence and remand for reconsideration").

[153] For a comprehensive inventory of the Stoltzfus documents, see *supra* note 53.

[154] *Strickler*, 527 U.S. at 296 (Souter, J., dissenting).

[155] *Id.* at 304.

[156] *Id.*

[157] *See supra* notes 98–99, 103–04 and accompanying text.

[158] *Strickler*, 527 U.S. at 306 (Souter, J., dissenting).

[159] *Id.*

dissent sharply noted that "[a]ll it would have taken, after all, was one juror to hold out against death to preclude the recommendation actually given."[160] Although the dissent indeed speculated about the potential effects of Anne Stoltzfus's impeachment on the trial jury's deliberations, Justice Souter, unlike the majority, was not willing to let his speculative conclusions dispose of the issue. Instead, in the interests of justice, the dissent would have opted for the proper solution in a close case such as *Strickler*—Justice Souter would have "vacate[d] the sentence and remand[ed] for reconsideration" the question of whether Thomas Strickler should be put to death.[161]

Additionally, Justice Souter correctly concluded that had the Stoltzfus documents been a part of Strickler's trial, there would have been lingering doubt[162] whether Strickler deserved the death penalty recommendation. Justice Souter reasoned that

> the jurors could well have had little certainty about who had been in charge [of the crime]. But they could have had no doubt about the leader if they believed Stoltzfus.... One cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility of that story.[163]

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[160] *Id.* at 304.

[161] *Id.* at 307.

[162] *See* Bowers et al., *supra* note 150, at 1533. "The heaviest counterweight to [the capital juror's early preference for a recommendation of death] is a nagging concern or lingering doubt... about the defendant's guilt of *capital* murder." *Id.* (emphasis added). Such "lingering doubt crystallizes into a pro-life stand for many [capital jurors] during the guilt phase of the trial; it becomes an affirmative commitment to *life [imprisonment] as the appropriate punishment.*" *Id.* (emphasis added). The life sentence recommendation "is a moral response to remaining doubts they have about the evidence of guilt, sufficient, they often reluctantly agree, for a *capital murder verdict, but not for a death sentence.*" *Id.* (emphasis added). Lingering doubt "is the strongest influence in support of a final life punishment vote." *Id.* at 1536. Furthermore, when lingering doubt is present, the data indicate that it "is an integral element in forming a reasoned moral judgment about punishment." *Id.*

The Garvey study refers to this doctrine as "[r]esidual doubt." Garvey, *supra* note 128, at 1563. According to this study, "the best thing a capital defendant can do to improve his chances of receiving a life sentence... is to raise doubt about his guilt." *Id.* (footnote omitted). The surveyed jurors reported that "if they had lingering doubts about the defendant's guilt, 60.4% said they would be much less likely to impose death, and 77.2% said they would be at least slightly less likely [to recommend death]." *Id.*

[163] *Strickler*, 527 U.S. at 307 (Souter, J., dissenting).

As the *Strickler* majority demonstrated, "[t]he [United States] Supreme Court so far has failed to grant or to recognize the place of lingering doubt as an essential ingredient of a reasoned moral judgment" in capital cases.[164]

B. Rethinking the Stoltzfus Documents—Harmless Error?

Having demonstrated that Thomas Strickler's right to a full and effective cross-examination under the Sixth Amendment was violated at trial,[165] and that the withholding of the Stoltzfus documents would have provided lingering doubt over the trial jury's sentencing phase deliberations,[166] can it be said that the withholding of the Stoltzfus documents was harmless constitutional error?[167] Recall that in order for a constitutional error to qualify as "harmless," the error must be "so unimportant and insignificant that [it] may, consistent with the Federal Constitution, be deemed harmless."[168] The harmless error rule calls for a reviewing court to determine, beyond a reasonable doubt,[169] "whether there is a *reasonable possibility* that the evidence complained of might have contributed to" the result of the trial.[170] The United States Supreme Court has demonstrated its preference for the use of the harmless error doctrine.[171] The current Rehnquist Court, especially, has been criticized for its "increasingly widespread use of the doctrine of harmless constitutional error."[172]

A *Brady* infraction that ultimately leads to a Sixth Amendment violation, as well as lingering doubt over a trial jury's recommendation of the death penalty, cannot simply be deemed harmless constitutional error. The Court had previously labeled the deprivation of the right of effective cross-examination under the Sixth Amendment as a "constitutional error of the first magnitude," with "no amount of showing of want of prejudice"

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164 Bowers et al., *supra* note 150, at 1546.
165 *See supra* note 157 and accompanying text.
166 *See supra* notes 162–64 and accompanying text.
167 *See supra* Part II.B.
168 Chapman v. California, 386 U.S. 18, 22 (1967).
169 *See id.* at 24.
170 *Id.* at 23 (internal quotations and citation omitted) (emphasis added).
171 *See supra* notes 114–17 and accompanying text.
172 Stacy & Dayton, *supra* note 113, at 79.

being able to cure it.[173] Moreover, the Court has historically been unwilling to put itself "in the place of the jury and assume what their views would have been" in light of disputed evidence.[174] Consequently, the majority's conclusions regarding the Stoltzfus documents, which, in effect, declared the non-disclosure to be harmless constitutional error, are wholly inconsistent with the past jurisprudence of the United States Supreme Court.[175]

C. *Legal Semantics Gymnastics*

The majority held that Thomas Strickler failed to show that there was "a reasonable *probability* that his conviction or sentence would have been different had [the Stoltzfus] materials been disclosed."[176] "[S]urely," the majority wrote, there was "a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus'[s] testimony might have produced a different result, either at the guilt or sentencing phases," but this showing was not enough to warrant a new sentencing phase for Strickler.[177] Swinging on the vines of the legal semantics jungle, the majority has perhaps doomed the *Strickler* opinion to a tormented existence in the annals of legal commentary.

Justice Souter's dissent referred to the "reasonable probability" standard as "familiarly deceptive."[178] According to Justice Souter, "the continued use of the term 'probability' raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not.' "[179] Like the majority, the dissenting opinion was admittedly persuaded that Strickler "failed to establish a reasonable probability that, had the materials withheld been disclosed, he would not have

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[173] Davis v. Alaska, 415 U.S. 308, 318 (1974) (internal quotations and citations omitted).

[174] Brady v. Maryland, 373 U.S. 83, 88 (1963) (internal quotations and citation omitted); *see also supra* Part II.C (discussing the Court's hesitancy to speculate about the trial jury's deliberations).

[175] For the complete evidentiary findings of the *Strickler* majority, see *supra* Part I.D.

[176] Strickler v. Greene, 527 U.S. 263, 296 (1999) (emphasis added).

[177] *Id.* at 291.

[178] *Id.* at 297 (Souter, J., dissenting).

[179] *Id.* at 298. Justice Souter went on to propose an alternative standard—a "significant possibility" standard—that "would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence." *Id.*

been found guilty of capital murder."[180] Justice Souter, however, believed that there was "a reasonable probability . . . that disclosure of the Stoltzfus materials would have led the jury to recommend life, not death."[181] For the dissent, "the touchstone of the enquiry must remain whether the evidentiary suppression 'undermines our confidence' that the factfinder would have reached the same result."[182]

The "reasonable probability" standard has also come under attack by legal experts who have conducted exhaustive studies on capital juries.[183] It has been argued that the "reasonable probability" standard "interfere[s] with a jury's prerogatives."[184] That is, appellate courts that seek to determine the potential effects of disputed evidence on a trial jury "usurp[] the jury's constitutional prerogatives" as the sole triers of fact in a case.[185] The "reasonable probability" standard "would be unobjectionable [only] if courts had information that would allow them to draw reliable inferences about how a particular jury resolved disputes about the weight and credibility of the evidence" at issue.[186] Unfortunately, "[b]ecause the jury's deliberations are secret, courts have no way to determine whether the error [at trial] actually influenced the jury except to *rely upon their own perceptions of the weight and credibility of the evidence*."[187]

Finally, the *Strickler* majority is guilty of ignoring precedent. The harmless constitutional error rule announced in *Chapman* succinctly framed the inquiry as "whether there is a reasonable *possibility* that the evidence complained of might have contributed to" produce a different result.[188] Having found that there was "surely" a "reasonable *possibility*" that the Stoltzfus documents "might have produced a different result, either at the guilt or sentencing phases,"[189] it was inconceivable

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[180] *Id.* at 297. The dissent's view here is in accord with the overwhelming forensic evidence that was recovered which tended to implicate Strickler beyond a reasonable doubt. *See supra* note 89.

[181] *Strickler*, 527 U.S. at 297 (Souter, J., dissenting).

[182] *Id.* at 300–01.

[183] *See* Stacy & Dayton, *supra* note 113, at 127.

[184] *Id.* at 128.

[185] *Id.* at 127.

[186] *Id.* at 129.

[187] *Id.* at 129–30 (emphasis added).

[188] Chapman v. California, 386 U.S. 18, 23 (1967) (internal quotations and citation omitted) (emphasis added).

[189] Strickler v. Greene, 527 U.S. 263, 291 (1999) (emphasis added).

for the *Strickler* majority to hold that Thomas Strickler failed to demonstrate that prejudice ensued from the Commonwealth's *Brady* violation. The majority's approach to Thomas Strickler's burden of proof was undeniably inconsistent with the standard announced in *Chapman*.

Under the combined analyses above, there are compelling grounds strongly mitigating against affirming Strickler's death sentence. It was erroneous for the majority to conclude that confidence in the result at the *Strickler* sentencing phase was not undermined beyond a reasonable doubt. Therefore, the majority erred in denying a new sentencing phase for Thomas Strickler.

CONCLUSION

The United States Supreme Court clearly erred when it denied Thomas Strickler a new sentencing phase and affirmed his death sentence. The Constitution, the Court's own case law, and expert studies of capital juries all vehemently denounce attempts by a court of law to substitute its own views for that of the trial jury. In *Strickler*, the majority brazenly spoke for the trial jury and came to speculative conclusions of fact on behalf of the *Strickler* jurors. Unless the majority possessed transcripts of the trial jury's deliberations during the *Strickler* sentencing phase, the Court could not have possibly concluded, beyond a reasonable doubt, that the non-disclosure of the Stoltzfus documents did not prejudice Thomas Strickler. The prophetic words of Sun-tzu seem to ring true in light of the majority's erroneous decision in *Strickler*. Sun-tzu warned, "[f]or, those enraged may be happy again, and those infuriated may be cheerful again, but annihilated countries may never exist again, *nor may the dead ever live again.*"[190]

[190] SUN-TZU, *supra* note 1, at 110 (emphasis added).