University of Baltimore Law Review

Volume 14
Issue 3 *Spring 1985*

Article 8

1985

Casenotes: New Trials — Criminal Procedure — Constitutional Law — New Trial Not Warranted Unless Newly Discovered Evidence Satisfies Threshold Requirement of Materiality to the Outcome of the Case. Stevenson v. State, 299 Md. 297, 473 A.2d 450 (1984)

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NEW TRIALS — CRIMINAL PROCEDURE — CONSTITUTIONAL LAW — NEW TRIAL NOT WARRANTED UNLESS NEWLY DISCOVERED EVIDENCE SATISFIES THRESHOLD REQUIREMENT OF MATERIALITY TO THE OUTCOME OF THE CASE. *Stevenson v. State*, 299 Md. 297, 473 A.2d 450 (1984).

Nearly two years after the defendant's conviction for first degree murder and related offenses,[1] the prosecutor discovered that one of the state's expert witnesses had testified falsely about his academic credentials.[2] When the defendant became aware of this perjury, she promptly filed a motion for a new trial.[3] The trial judge, who had heard the original case, denied the motion because of the overwhelming evidence of the defendant's guilt, independent of the perjured testimony.[4] The Court of Special Appeals of Maryland affirmed in an unreported opinion.[5] On further appeal, the court of appeals chose to enlarge the scope of review to include an additional claim that the state's use of perjured testimony violated the defendant's due process right to a fair trial.[6] A unanimous court held that a new trial was not warranted because the new evidence failed to meet a threshold requirement of materiality to the outcome of the case.[7]

It is undisputed that a trial court has the authority to grant a new trial because of newly discovered evidence.[8] Courts, however, have been reluctant to exercise this power,[9] citing the need to avoid the time and expense of retrials[10] and the desire to advance the public policy associ-

1. Prior to the discovery of the perjury, the convictions were affirmed on appeal. Stevenson v. State, 289 Md. 167, 423 A.2d 558 (1980).
2. The expert in question testified that he had graduated *cum laude* from the Illinois School of Technology. The state's attorney was informed by the Illinois Department of Law Enforcement's Division of Criminal Investigation that the expert had not graduated from the school. Stevenson v. State, 299 Md. 297, 300, 473 A.2d 450, 451 (1984).
3. Md. R. Crim. P. 770(b) (Supp. 1983) (current version at MD. R. CRIM. P. § 4-331(c)) states that a court may grant a new trial on the basis of newly discovered evidence that, in the exercise of due diligence by the moving party, could not have been discovered within three days of the verdict.
4. Stevenson v. State, 299 Md. 297, 301, 473 A.2d 450, 451 (1984).
5. Stevenson v. State, No. 82-726, slip op. (Md. Ct. Spec. App. March 7, 1983) (per curiam), *aff'd*, 299 Md. 297, 473 A.2d 450 (1984).
6. The due process issue was not raised in the trial court or the court of special appeals. The defendant filed a motion on August 5, 1983 to enlarge the scope of review upon writ of certiorari. Brief of Appellant Stevenson at 2 n.1, Stevenson v. State, 299 Md. 297, 473 A.2d 450 (1984).
7. Stevenson v. State, 299 Md. 297, 302, 308, 473 A.2d 450, 452, 455 (1984).
8. *See generally* 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 59.05 (2d ed. 1983) (a discussion of the origin and power to grant a new trial).
9. *See, e.g.*, United States v. Johnson, 713 F.2d 654, 661 (11th Cir. 1983); United States v. Metz, 652 F.2d 478, 479 (5th Cir. 1981); United States v. Costello, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); Gehner v. McPherson, 430 S.W.2d 312, 315 (Mo. Ct. App. 1968); *see also* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE — FEDERAL RULES OF CRIMINAL PROCEDURE § 557, at 315 (2d ed. 1982).
10. *See* Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), *cert. denied*, 377 U.S. 909 (1964); Town of Eliot v. Burton, 392 A.2d 56, 58 (Me. 1978).

ated with the finality of judgments.[11] This reluctance is reflected in the traditional standard used to review these new trial motions.[12] Under this standard, frequently referred to as the "*Berry*"[13] or "probability" test, the moving party must show that: (1) the evidence was in fact discovered after the trial; (2) its absence from the first trial was not owing to the defendant's lack of diligence; (3) it is so material that it would *probably* produce a different verdict if the new trial were granted; and (4) it is not merely "cumulative" or "impeaching."[14]

In certain cases, the evidence in question is not truly "newly discovered," but rather it has been discovered that the witness perjured himself at trial. In these instances, a majority of the federal circuits[15] and many state courts[16] reject the *Berry* test in favor of the more lenient test set forth in *Larrison v. United States*.[17] The *Larrison* test, also referred to as the "might" standard, permits a new trial when the court is "reasonably well satisfied" that: (1) the testimony given by a material witness is false; (2) the jury *might* have reached a different conclusion without it; and (3) the party seeking the new trial was either unable to meet the evidence because he was taken by surprise when the witness gave the false testimony, or he did not know of its falsity until after trial.[18] Proponents of this lower standard of materiality justify it by arguing that a conviction based on perjured testimony affronts judicial integrity.[19]

Recently, two federal courts of appeals rejected the *Larrison* stan-

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11. Gehner v. McPherson, 430 S.W.2d 312, 315 n.1 (Mo. Ct. App. 1968).
12. *See* 8A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 33.04[1] (2d ed. 1983); 4 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 599 (12th ed. 1976); *see generally* Annot., 59 A.L.R. FED. 657 (1982) (listing federal cases that apply the traditional *Berry* standard); Annot., 158 A.L.R. 1062 (1945 & Supp.) (listing state cases that apply the traditional *Berry* standard).
13. The traditional standard was first set forth in Berry v. Georgia, 10 Ga. 511, 526-27 (1851).
14. *Id.* at 527. In *Berry*, the court also required an affidavit from the witness, reflecting a concern for the creditability of the new evidence. *Id.*
15. *See, e.g.*, United States v. Gabriel, 597 F.2d 95, 98-100 (7th Cir.), *cert. denied*, 444 U.S. 858 (1979); United States v. Wallace, 528 F.2d 863, 866 (4th Cir. 1976); United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973); *see also* 3 C. WRIGHT, *supra* note 9, § 557.1, at 343-44 (indicating *Larrison* standard is majority rule in the circuits). For a listing of the federal courts that have applied the *Larrison* standard, see Annot., 59 A.L.R. FED. 657, 664-66 (1982). The Maryland practitioner may be interested to know that the United States Court of Appeals for the Fourth Circuit has adopted the *Larrison* standard. *See* United States v. Wallace, 528 F.2d 863, 866 (4th Cir. 1976).
16. *See, e.g.*, Conlow v. State, 441 A.2d 638, 640 (Del. 1982); State v. Naeole, 62 Hawaii 563, 617 P.2d 820, 824 (1980); State v. Caldwell, 322 N.W.2d 574, 585 (Minn. 1982).
17. 24 F.2d 82 (7th Cir. 1928).
18. *Id.* at 87-88.
19. Mesarosh v. United States, 352 U.S. 1, 14 (1956) ("waters of justice are polluted by the government's use of tainted testimony"); Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 124-25 (1956) (the "taint" of perjury can be removed only by a new trial); Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), *cert. denied*, 377 U.S. 909 (1964); 8A J. MOORE, *supra* note 12, ¶ 33.06[1].

dard in favor of the stricter *Berry* "probability" standard.[20] Primarily they criticize the *Larrison* "might" standard as being too speculative.[21] A literal application of the "might" standard, these courts contend, would require the granting of a new trial in every instance.[22] Moreover, finding no basis for distinguishing between perjured testimony and other types of newly discovered evidence, these jurisdictions prefer to apply the *Berry* "probability" test uniformly to all new trial motions involving newly discovered evidence.[23]

Maryland adopted a functional equivalent of the *Berry* test in *Jones v. State*.[24] Cases that have cited it, however, lack uniformity in their analyses and applications of the *Jones* court's holding and have employed a variety of standards for review.[25] Furthermore, the Maryland cases do not appear to distinguish between perjured testimony and other types of newly discovered evidence.[26] This uncertainty in the decisions of the state's intermediate appellate court is caused in part by the judiciary's strong policy of according great deference to trial courts' decisions on the

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20. United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). For a review of other cases criticizing or modifying the *Larrison* standard see Comment, *Ninth Circuit Adopts* Berry *Standard for New Trials Based Upon Perjured Testimony*, 11 GOLDEN GATE 171 (1981).
21. United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).
22. United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979) *cert. denied*, 445 U.S. 942 (1980); United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).
23. United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).
24. 16 Md. App. 472, 298 A.2d 483, *cert. denied*, 268 Md. 750 (1973). *Jones* states:

> There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Id. at 477, 298 A.2d at 486 (quoting Johnson v. United States, 32 F.2d 127, 130 (8th Cir. 1929)).

25. *Compare* Mack Trucks, Inc. v. Webber, 29 Md. App. 256, 277-78, 347 A.2d 865, 877 (1975) (evidence must be of such nature that, on retrial, the newly discovered evidence *would* produce a different result) *with* Harker v. State, 55 Md. App. 460, 475, 463 A.2d 288, 297 (1983) (discovery of evidence would be *likely* to result in an acquittal) *and* Andresen v. State, 24 Md. App. 128, 212, 331 A.2d 78, 127 (1974) (applying a test that merely excises the disputed testimony and then ascertains whether the remaining evidence is still sufficient to uphold the conviction) (citing 58 AM. JUR. 2D *New Trial* § 175 (1971)).
26. Stevenson v. State, No. 82-706, slip op. at 4 (Md. Ct. Spec. App. March 7, 1983) (per curiam) ("we do not agree with appellant that newly discovered evidence of perjury calls for a different standard of review than newly discovered evidence generally"), *aff'd*, 299 Md. 297, 473 A.2d 450 (1984).

motions.[27] Only the most compelling and extraordinary circumstances will warrant a reversal.[28] Accordingly, the focus thus far has been upon the exercise of discretion rather than upon the standard applied.

The rules of criminal procedure give a defendant the right to petition for a new trial when newly discovered evidence of perjury stems from a neutral source. When the perjury can be attributed to the prosecution, however, the defendant's due process right to a fair trial is implicated.[29] A new trial motion based on a due process infringement therefore involves two separate inquiries: (1) whether the prosecution is responsible for the perjured testimony; and (2) whether the perjured testimony is sufficiently material to warrant a new trial.

The United States Supreme Court set forth the tests for both of these queries in *United States v. Agurs*.[30] The first prong is satisfied if the prosecution "knew or should have known" that one of its witnesses was testifying falsely.[31] This fault-fixing standard appears to encompass instances of both prosecutorial misconduct and prosecutorial negligence.[32] Once the prosecution is deemed responsible for the perjury, the court must determine whether the perjured testimony is sufficiently material to warrant a new trial.[33] The *Agurs* Court stated that a new trial should be granted if there is "any reasonable likelihood that the perjured testimony could have affected the judgment of the jury."[34] This lower threshold of materiality reflects the Court's strong disapproval of state-sponsored

27. *See* I.O.A. Leasing Corp. v. Merle Thomas Corp., 260 Md. 243, 272 A.2d 1 (1971); Perlin Packing Co. v. Price, 247 Md. 475, 231 A.2d 702 (1967); Mack Trucks, Inc. v. Webber, 29 Md. App. 256, 347 A.2d 865 (1975).

28. A.S. Abell Co. v. Skeen, 265 Md. 53, 59, 288 A.2d 596, 599 (1972); Jones v. State, 16 Md. App. 472, 477, 298 A.2d 483, 486, *cert. denied*, 268 Md. 750 (1973).

29. 8A J. MOORE, *supra* note 12, ¶ 33.04; *see also* Mooney v. Holohan, 294 U.S. 103 (1935) (where the Supreme Court first established that the prosecution has a duty to disclose testimony known to be perjured). The Court broadened the *Mooney* principle in subsequent cases. *See* Brady v. Maryland, 373 U.S. 83 (1963) (when the nondisclosure of evidence is material to either guilt or sentencing, a new trial is warranted, regardless of the good or bad faith of the prosecution); Napue v. Illinois, 360 U.S. 264 (1959) (the false testimony need only relate to the credibility of a witness). The right to due process of law is preserved by the fifth (federal action) and fourteenth (state action) amendments to the Constitution. *See* U.S. CONST. amends. V & XIV, § 2. The Maryland Constitution also preserves the right to due process. *See* MD. DECL. OF RTS. art. 24.

30. 427 U.S. 97 (1976).

31. *Id.* at 103. The *Agurs* decision recited three types of situations involving nondisclosure of evidence that would violate due process. The other two situations involve pre-trial requests for disclosure of evidence. *Id.* at 104-07.

32. Earlier, the Supreme Court stated in Giglio v. United States, 405 U.S. 150 (1972), that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Id.* at 154.

33. Smith v. Phillips, 455 U.S. 209, 218-20 (1982).

34. *Agurs*, 427 U.S. at 103; *see also* Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)). At least one commentator has equated this test with the *Larrison* test. *See* 8A J. MOORE, *supra* note 12, ¶ 33.04[1], at 33-38.

perjury.[35]

In *Stevenson*, the Court of Appeals of Maryland relied on a plethora of persuasive authority to deduce that courts will not grant a motion for new trial unless the evidence is material to the outcome of the case.[36] Furthermore, the court reasoned that when the motion is based on newly discovered evidence, this materiality determination must be conducted prior to applying either the *Larrison* or *Berry* standards.[37] Applying this rule to the facts of the case, the court relied heavily upon the trial judge's ruling that the verdict "probably" would not be altered if a new trial were granted because the other evidence of guilt was so overwhelming.[38] The court held that, implicit in the trial judge's decision was a finding that the perjured testimony was immaterial to the outcome of the case.[39] As a result, the evidence could not satisfy the threshold materiality inquiry; thus, the court concluded, there was no need to adopt either the *Larrison* or the *Berry* standard.[40]

The *Stevenson* court further held that, because the evidence was not material to the outcome of the case, there had been no denial of due process and, therefore, no need for a new trial on that ground.[41] Relying on several Supreme Court and United States courts of appeals decisions, the court reasoned that the same initial materiality inquiry used to evaluate newly discovered evidence applied with equal force to due process violations.[42] The court reasoned "that the knowing and intentional use of false testimony by the prosecution is a violation of due process providing such testimony is material to the result of the case."[43] Finally, the court distinguished *Stevenson* on its facts from an Illinois case involving the same expert witness.[44] The perjury in the Illinois case had resulted in

35. These cases "involve a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104 (dictum); *see, e.g.*, Giglio v. United States, 405 U.S. 150, 153-54 (1972); Napue v. Illinois, 360 U.S. 264, 269-70 (1959); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

36. Stevenson v. State, 299 Md. 297, 301-04, 473 A.2d 450, 452-53 (1984).

37. *Id.* at 301-02, 473 A.2d at 452-53. On appeal, the defendant urged the court to adopt the "might" standard. *Id.* at 301, 473 A.2d at 452.

38. *Id.* at 301, 473 A.2d at 451-52. Adopting the "probability" standard, the trial judge relied upon Ginnelly v. Continental Paper Co., 57 N.J. Super. 480, 155 A.2d 154 (1959). *Stevenson*, 299 Md. at 301, 473 A.2d at 451-52.

39. *Stevenson*, 299 Md. at 301, 473 A.2d at 452.

40. *Id.* at 301-04, 473 A.2d at 452-53.

41. *Id.* at 304-08, 473 A.2d at 453-55. The defendant alleged a lack of diligence on the part of the prosecution in not checking the expert's credentials. Brief for Appellant Stevenson at 28-29, Stevenson v. State, 299 Md. 297, 473 A.2d 450 (1984). The state responded by arguing that it did not know of the perjury and that this lack of knowledge was not unreasonable. Moreover, even if there had been a due process violation, the state contended that the perjury did not relate to a material aspect of the trial. Brief for Appellee State at 14-17, Stevenson v. State, 299 Md. 297, 473 A.2d 450 (1984).

42. *Stevenson*, 299 Md. at 305, 473 A.2d at 453.

43. *Id.* at 305, 473 A.2d at 453-54.

44. *Id.* at 308, 473 A.2d at 455 (distinguishing People v. Cornille, 95 Ill. 2d 497, 448 N.E.2d 857 (1983)).

the grant of a new trial.[45]

The court of appeals's adoption of an initial materiality inquiry for new trial motions based upon newly discovered evidence reflects a misperception of the *Larrison* and *Berry* standards. Recognizing that materiality in this context is a matter of degree, these standards seek to balance the interests of preserving the finality of judgments and judicial economy,[46] with the injustice of convictions returned by juries that were denied the whole truth.[47] Because the decision to grant a new trial necessarily depends on the materiality of the perjury,[48] whether the evidence is material to the result is not, as the court states, the threshold question;[49] it is the principal consideration. The two tests, requiring the evidence to be such as would *probably* or *possibly* produce an acquittal, are simply means of testing materiality, and the application of either standard analytically assimilates the question of materiality.[50] Instructing trial judges to decide initially whether the newly discovered evidence is material to the result of the case makes any subsequent application of either standard redundant. In *Stevenson*, for example, the trial judge evaluated the likelihood of a different verdict if the jury had not heard the perjured testimony.[51] The trial judge effectively concluded that the *Berry* "probability" standard was not met, and therefore no new trial should be granted. This analysis conflicts directly with the court of appeals's holding that the possible effect on the jury's determination is a separate inquiry, warranted only after the evidence is found to be material to the outcome of the case.[52] Yet, materiality to the outcome of the case must be defined by the possible effect of the new evidence on the jury's determination. The unanswered question is: How can a trial judge determine materiality without at the same time examining the possible effect of the new evidence on the jury's determination?

The *Stevenson* decision contains no guidelines to aid either trial courts in making initial materiality determinations or appellate courts in reviewing lower court decisions. There is a good reason for according great deference to the trial judge; in most cases, he had the opportunity

45. The facts of People v. Cornille, 95 Ill. 2d 497, 448 N.E.2d 857 (1983) and *Stevenson* were nearly identical. In *Cornille*, false testimony given by the same expert prompted the Supreme Court of Illinois to find a due process violation and to reverse a conviction. The court held that "there is a reasonable likelihood that . . . [the] false testimony concerning his qualifications as an expert might have affected the jury's decision." *Cornille*, 95 Ill. 2d at 514, 448 N.E.2d at 866. The *Stevenson* court justified its decision by finding the amount of expert testimony to be more balanced as to the cause of the fire in *Cornille*. *Stevenson*, 299 Md. at 308, 473 A.2d at 455.

46. *See supra* notes 9-11 and accompanying text.

47. *See supra* note 19.

48. *See* 8A J. MOORE, *supra* note 12, ¶ 33.04[1]; 4 C. TORCIA *supra* note 12, § 599.

49. *Stevenson*, 299 Md. at 302, 473 A.2d at 452.

50. *See* 8A J. MOORE, *supra* note 12, ¶ 33.04[1], at 33-34.

51. *Stevenson*, 299 Md. at 301, 473 A.2d at 451.

52. *Id.* at 302, 473 A.2d at 453.

to hear all the evidence, including the perjured testimony. Thus, the trial judge is in the best position to evaluate the potential impact of the newly discovered evidence on the jury's verdict.[53] This is not to imply, however, that the trial judge's decision should not be reviewable on appeal. There still is a need for a standard to guide trial courts seeking to gauge how material perjured testimony must be to warrant a new trial. Such a standard would help ensure uniformity of decisions on these motions and an accurate, objective review at the appellate level. The Maryland judiciary has already shown a strong policy of deference to trial judges' rulings on new trial motions.[54] *Stevenson* can only serve to give the trial courts more discretionary power since Maryland's highest court neither offers nor requires a basis for a finding of immateriality.

In view of the need for guidance, the *Larrison* standard should be adopted in Maryland because instances of perjured testimony impugn the integrity of the criminal justice system.[55] Indeed, the Supreme Court has recognized that perjury poisons "the water in [the] reservoir, and the reservoir cannot be cleansed without first draining it of all impurity."[56] Moreover, an examination of jurisdictions applying the *Larrison* test disproves its critics' contention that it necessarily will always result in the granting of a new trial.[57] *Larrison*, therefore, is a justified modification of the stricter *Berry* standard for cases involving perjured testimony.

In analyzing the due process issue, the *Stevenson* court carried this undefined threshold materiality determination to its extreme. Implicit in its treatment of this issue is a failure to recognize the scope of prosecutorial misconduct as well as a failure to define the appropriate standard of materiality. Because the prosecution in *Stevenson* was unaware of the expert's false representations about his credentials,[58] the due process issue centered on prosecutorial negligence. Failing even to consider this issue, the court limits alleged due process violations to instances of knowing and intentional use of false testimony by the prosecution,[59] directly in conflict with the Supreme Court's articulation of a "should have known" standard.[60] Additionally, the court of appeals's reason for allowing the defendant to raise the due process issue for the first time on appeal is unclear; the court failed to inquire whether the prosecution was at fault because it "should have known" of the expert's perjury.

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53. *See generally* 8A J. MOORE, *supra* note 12, ¶ 33.03[4].
54. *See supra* notes 27-28 and accompanying text.
55. *See supra* note 19.
56. Mesarosh v. United States, 352 U.S. 1, 14 (1956) (the courts have a duty "to see that the waters of justice are not polluted").
57. *See, e.g., ex rel* Williams v. Walker, 535 F.2d 383 (7th Cir. 1976) (per curiam); United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); United States v. Bonilla, 503 F. Supp. 626 (D.P.R. 1980).
58. *Stevenson*, 299 Md. at 304-05, 473 A.2d at 453.
59. *Id.* at 305, 473 A.2d at 453-54.
60. *See supra* notes 31-36 and accompanying text.

Had this "should have known" inquiry been resolved against the state, the lower standard of materiality mandated by *United States v. Agurs*[61] should have been applied. It looks to whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury."[62] Rather than discussing the Supreme Court's test for materiality in cases where the state should have known of the perjury, the *Stevenson* court simply cited it as authority for the general proposition that perjured testimony must be material to the outcome of a case to warrant a new trial.[63] Once again, the trial judge's ruling was cited as support for a finding that the perjured testimony was immaterial to the result of the case.[64] Thus, the evidence received the same treatment under both claims. The United States Supreme Court, however, has cautioned that "[i]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice."[65] Furthermore, relying on the trial judge's ruling for a finding of immateriality in this context is inappropriate, because the trial judge never considered the due process issue.

Both holdings in *Stevenson*, therefore, are troublesome. First, the decision articulates a threshold materiality requirement that is already included in both the *Larrison* and *Berry* standards. This approach represents a misconception of the purpose of each of these options: to weigh varying degrees of materiality. Additionally, the court's new trial analysis is conspicuously lacking in guidance for the state's trial courts. The appellate courts will probably fill this void by deferring, in an increasing number of cases, to the trial court's exercise of discretion. As a result, there is an increased likelihood of a lack of uniformity among the trial courts' decisions on these motions. Second, the court's due process analysis is directly contradicted by Supreme Court authority. Not only did the court fail to consider instances involving prosecutorial negligence, but it also neglected to apply the materiality standard articulated by the very cases it cites in support of its proposition. Accordingly, it is not clear to what extent *Stevenson* will affect future decisions. The only certainty that arises from the case is that considerable confusion will exist until the court definitively resolves these issues.

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61. 427 U.S. 97 (1976).
62. *Id.* at 103. *See supra* notes 35-36 and accompanying text.
63. *Stevenson*, 299 Md. at 306-07, 473 A.2d at 454. Giglio v. United States, 405 U.S. 150 (1972) is cited for the standard. *Id. Agurs* is cited as an example of cases of other "factual contexts concerning due process." *Id.* at 307, 473 A.2d at 455.
64. *Id.* at 308, 473 A.2d at 455.
65. *Agurs*, 427 U.S. at 111.