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# Convictions Based on Lies: Defining Due Process Protection

Anne Bowen Poulin<sup>1</sup>

## Abstract

*The corrupting impact of false testimony on the justice system is profound and corrosive. The Supreme Court has long-since held that the due process clause protects against convictions based on testimony that the prosecutor knew or should have known was false.*

*Despite this precedent, courts have undermined that constitutional protection by imposing demanding requirements of prosecution knowledge, narrowing the definition of false testimony, and holding defendants to an inappropriate standard of materiality. As a result, the law does not provide adequate protection from conviction based on lies.*

*Courts must reinvigorate this area of the law. To provide appropriate protection, the requirements a defendant must meet to receive relief based on the use of false testimony must be clarified in the following ways. First, the prosecution should be deemed to have knowledge of the falsity not only if an individual prosecutor had actual knowledge, but also if the prosecution did not meet its duty to discover that the testimony was false or if the prosecution had knowledge of contrary information possessed by other government actors and therefore imputed to the prosecution. Second, the false testimony need not rise to the level of perjury. Third, the courts should apply the more lenient standard of materiality defined for false testimony cases by asking how the revelation that the witness had testified falsely would have influenced the jury in the initial trial rather than asking what would have occurred had the witness simply given truthful testimony.*

*In addition, the courts should revisit the law that applies when a defendant discovers that the prosecution unknowingly presented false testimony. If the falsity was material, the courts should conclude that the conviction violates due process despite the lack of prosecution*

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1. Professor of Law, Villanova University School of Law. I am indebted to Kristin Mancuso and Angela Hennesy for their excellent research assistance, to my colleague Professor Louis Sirico for his helpful comments, and to Villanova University School of Law for its generous support.

*knowledge. Even if the courts do not extend due process protection to the unknowing use of false testimony, they should grant the defendant a new trial more readily than with other types of newly discovered evidence. The corrupting impact of false testimony calls for at least this level of protection.*

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*It is the State that tries a man, and it is the State that must insure that the trial is fair.<sup>2</sup>*

Souter was convicted of murder in 1992, based on a death in 1979. The victim had spent the early part of the evening with Souter before being found lying dead on the highway. Souter's conviction was based on prosecution testimony about the bottle from which Souter had been drinking on the evening of the victim's death. Prosecution witnesses testified—falsely as it turned out—that the bottle had a sharp edge that

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2. Moore v. Illinois, 408 U.S. 786, 810 (1972) (Marshall, J., dissenting).

was capable of inflicting the fatal injury and that there was little blood at the scene, suggesting that the victim had been killed elsewhere and her body then moved onto the highway. The falsity of this testimony first came to light several years after Souter's conviction. The bottle's edge was dull and could not have caused the wound, and the back of the victim's clothing was soaked in blood. Even though the prosecution witnesses had given false testimony, the state courts rejected Souter's plea for a new trial.<sup>3</sup>

In 1994, Caramad Conley was convicted of a double-homicide on the testimony of an informant who testified that Conley had confessed to him. In his trial, a homicide investigator stood by while the informant falsely denied receiving benefits for his testimony against Conley. Conley served 18 years before a court concluded that his conviction was based on perjured testimony and ordered him released.<sup>4</sup>

## I. INTRODUCTION

The corrupting impact of false testimony on the justice system is profound and corrosive. The law abhors perjury.<sup>5</sup> In recent years, the justice system has seen the exonerations of defendants whose convictions resulted from trials that were held to be error-free and whose post-conviction challenges were rejected by the courts.<sup>6</sup> Some of these erroneous convictions rest on false testimony.<sup>7</sup>

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3. The hypothetical is based on *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005). The likely explanation for the victim's death was that she had been hit by a car. After losing in the Michigan courts, Souter petitioned in federal court. The Sixth Circuit held that his claim should not be barred for failure to comply with the statute of limitations, holding that Souter had made a sufficient showing of actual innocence to toll the statute.

4. Justin Berton, *Man Wrongfully Convicted of 2 Murders Freed*, SAN FRANCISCO CHRON., Jan. 13, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/01/12/BARQ1H868J.DTL#ixzz1AvoN8BPT>.

5. See 18 U.S.C. § 1621 (2006). See also *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (holding that failure to present false testimony cannot constitute prejudice to support an ineffective assistance claim); *Taylor v. Illinois*, 484 U.S. 400, 416 (1988) (holding that there is no constitutional right to present false testimony); *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) (commenting that perjury pollutes a trial). The expression of that abhorrence has changed over time. At one time, someone who had been convicted of perjury was incompetent to testify. See 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW, AND A DIGEST OF THE PENAL STATUTES 289 (5th ed. 1861). Now, that conviction may be used to impeach the witness, but will not bar the witness from testifying.

6. Since 1989, 273 inmates have been exonerated through the use of DNA testing. INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Sept. 10, 2010).

7. Daniel S. Medwed, *Up the River without a Procedure: Innocent Prisoners and Newly Discovered Evidence in State Courts*, 47 ARIZ. L. REV. 655, 657 (2005) (citing witness perjury among reasons for conviction of innocent defendants). See also

But what recourse is available to the criminal defendant who discovers that false testimony was used to obtain her conviction? The Supreme Court has long-since held that the due process clause protects against convictions based on testimony that the prosecutor knew or should have known was false.<sup>8</sup> Despite this precedent, the legal standards for reviewing convictions where the prosecution presented false testimony are not applied with clarity and consistency. Courts have narrowed that constitutional protection in three specific ways: imposing demanding requirements of prosecution knowledge; limiting what is regarded as false testimony; and holding defendants to an inappropriate standard of materiality. As a result, the law does not provide adequate protection from conviction based on lies.

Due process protection from the use of false testimony developed parallel to and in conjunction with the due process principles, flowing from *Brady v. Maryland*,<sup>9</sup> that require the prosecution to disclose exculpatory evidence to the defense. But protection from false testimony is more robust than protection from non-disclosure of exculpatory evidence. When false testimony is given at trial the truth finding process is fundamentally corrupted.<sup>10</sup> All the participants in the trial—the prosecutors, the law enforcement officers, and the witnesses—understand that false testimony is prohibited.<sup>11</sup> The presentation of false testimony violates that understanding. Proof that the prosecution

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Staughton Lynd, *Napue Nightmares: Perjured Testimony in Trials Following the 1993 Lucasville, Ohio, Prison Uprising*, 36 CAP. U.L. REV. 559, 567 (2008) (arguing that perjury is a widespread problem in criminal cases); Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 23-35 (2003) (describing prosecution use of false scientific evidence).

8. See *infra* Section II.

9. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of exculpatory evidence by the prosecution violates due process when the evidence “is material either to guilt or to punishment”).

10. See Note, *A Prosecutor’s Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 896 (1981) (remarking that “a jury that hears nothing is better informed than one that is actively misled”). See also *Jackson v. Brown*, 513 F.3d 1057, 1076 n.12 (9th Cir. 2008) (noting that “the prosecution’s knowing use of perjured testimony will be more likely to affect our confidence in the jury’s decision, and hence more likely to violate due process, than will a failure to disclose evidence favorable to the defendant”). The law has long inferred that a witness who will lie about one fact will lie about others. See *Mesarosh v. United States*, 352 U.S. 1, 13-14 (1956) (refusing to credit witness’ testimony in defendant’s trial because of witness’s false testimony in other settings). Additional concerns arise when the prosecutor knowingly countenances false testimony. The prosecutor’s willingness to do so signals her lack of concern with the fairness of the process and, further, suggests that she is compensating for a weak case and raises the additional concern that she may have allowed other falsities to go uncorrected or withheld other favorable evidence. See *infra* Section III.C.3.

11. See *United States v. Wong*, 431 U.S. 174, 180 (1977) (recognizing that perjury is never a protected option).

presented false testimony calls into question the value of all the testimony given by the lying witness. If known to members of the prosecution team, it casts doubt on the honesty of the entire case. False testimony cases thus always present a violation of a legal duty and the corruption of the trial process. As a result, they demand relief.

Due process protection reflects this demand. A defendant who demonstrates the improper use of false testimony is entitled to relief if there is any reasonable likelihood that the false testimony affected the outcome. In contrast, the standard in non-disclosure cases is higher: a defendant who establishes that the prosecution withheld favorable evidence must show a reasonable probability that the outcome would have been different had the evidence been disclosed.<sup>12</sup> Nevertheless, in some false testimony cases, defendants fail to seek or courts fail to apply the more protective standards, instead analyzing them as non-disclosure cases.<sup>13</sup> In others, courts construe that protection too narrowly or impose barriers that insulate convictions based on lies. As a result, those courts fail to deliver the promised due process protection, leaving defendants vulnerable to the use of false testimony.

This Article argues that courts should reinvigorate the due process protection to ensure that defendants like Souter and Conley, convicted on false testimony, receive prompt relief. Section II details relevant Supreme Court precedent, demonstrating the basis for strong protection

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12. See *United States v. Bagley*, 473 U.S. 667, 682 (stating the standard for materiality as a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”). See also WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 24.3, 1145-46 (5th ed. 2009) (noting that the Supreme Court continues to use the materiality standard articulated in *Bagley*, which was modeled after the definition of prejudice in claims of ineffective assistance of counsel). In cases of non-disclosure of exculpatory evidence, the court must determine how the defense could have used the exculpatory information and whether it would have changed the course of the trial, considering how it would have affected the defense investigation and strategy and whether it would have yielded admissible information.

13. See, e.g., *United States v. Risha*, 445 F.3d 298, 301 n.2 (3d Cir. 2006) (witness’s testimony that his contribution to the federal prosecution would have no impact on his pending state charges was inaccurate); *Ventura v. Attorney General*, 419 F.3d 1269, 1276 (11th Cir. 2005) (noting that state court did not treat false testimony claim as requiring a lower standard of materiality); *Monroe v. Angelone*, 323 F.3d 286, 314-15 (4th Cir. 2003) (addressing defendant’s claim as one of non-disclosure although it seems quite likely that testimony at trial was known by members of the government team to be false and the government made false argument in the case); *Perkins v. Russo*, 586 F.3d 115, 119 (1st Cir. 2009) (noting that state court did not differentiate between non-disclosure and false testimony claims). See also Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 *FORDHAM L. REV.* 1537, 1560-63 (2000) (suggesting that in recent years the Court has largely ignored the false testimony cases and has evaluated all claims as non-disclosure *Brady* violations).

against the use of false testimony. Section III explores the ways in which courts have enforced the three requirements for due process relief—prosecution knowledge; false testimony; and materiality. Section III also considers whether courts should enforce a requirement of defense due diligence in false testimony cases. Finally, Section IV advocates that the courts strengthen protection in cases where the government is not charged with knowledge that the testimony is false.

## II. THE SUPREME COURT PRECEDENT

The Supreme Court has long been committed to the principle that due process forbids the government from obtaining a conviction through the use of false testimony. Through a long line of cases, the Court has condemned the prosecution's use of false testimony.<sup>14</sup> The development of due process protection against the use of false testimony has been intertwined with protection against non-disclosure of exculpatory evidence. A brief review of the Court's decisions in the interrelated strains of due process protection is essential to understanding the issues facing the courts in false testimony cases.

Two cases form the foundation in the line of precedent relating to both false testimony and non-disclosure of exculpatory evidence. This line starts in 1935 with *Mooney v. Holohan*, a false testimony case.<sup>15</sup> In *Mooney*, the prisoner alleged that his conviction violated due process because the "prosecuting authorities" knowingly used perjured testimony, which was the sole basis for his conviction.<sup>16</sup> The Court condemned the state's corruption of the process without considering the precise requirements for such a due process claim.<sup>17</sup> The other

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14. See, e.g., *White v. Ragen*, 324 U.S. 760, 764 (1945) (acknowledging that obtaining conviction through knowing use of perjury violates due process); *New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 689 (1943) (same); *Hysler v. Florida*, 315 U.S. 411, 413 (1942) (prosecution's complicity in obtaining a conviction through the use of perjured testimony violates due process).

15. *Mooney v. Holohan*, 294 U.S. 103 (1935). See also Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 755 (1999) (tracing protection against use of perjured testimony to *Mooney*); Michael E. Rusin, Comment, *The Prosecutor's Duty of Disclosure: From Brady to Agurs and Beyond*, 69 J. CRIM. L. & CRIMINOLOGY 197, 201 (1978) (citing *Mooney* as originating duty).

16. *Mooney*, 294 U.S. at 110.

17. The Court explained:

[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

foundational case is a non-disclosure case: *Brady v. Maryland*.<sup>18</sup> In *Brady*, the Court granted the defendant a new capital sentencing hearing because the prosecution had not disclosed favorable evidence bearing on sentencing, thus establishing that proof of false testimony was not essential to a due process violation.<sup>19</sup> Even though *Brady* did not involve false testimony, the Court characterized its holding as an extension of *Mooney*.<sup>20</sup> The Court stressed that *Mooney* rested on the “avoidance of an unfair trial to the accused” and not on “punishment of society for misdeeds of a prosecutor.”<sup>21</sup>

Due process protection is triggered when the defendant establishes that the prosecution, acting with the requisite degree of knowledge, allowed materially false testimony to stand uncorrected. Three issues recur throughout the Court’s decisions and are critical to this aspect of due process protection. First, the Court has repeatedly addressed the level of governmental knowledge necessary for a due process claim. Second, the Court has clarified the falsity requirement. Third, the Court has had to define the level of harm that the defendant must establish to get relief, focusing on the requirement of “materiality.”

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*Mooney*, 294 U.S. at 112. The Court also rejected the argument that the actions of prosecutors did not fall within the fourteenth amendment. *Mooney*, 294 U.S. at 112-13.

18. *Brady v. Maryland*, 373 U.S. 83 (1963).

19. The Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. See Case Comment, *The Prosecutor’s Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L. J. 136, 136-45 (1964) (tracing development of prosecution duty and characterizing the rules as necessary to permit the defendant to receive a fair trial).

20. *Brady*, 373 U.S. at 86. Three years later, in 1967, the Court decided two cases, each of which appeared to entail intentional prosecutorial misconduct. In *Giles v. Maryland*, 386 U.S. 66 (1967), the Court granted relief because the prosecution deliberately suppressed evidence that would have impeached the testimony of the alleged rape victim. *Giles v. Maryland*, 386 U.S. 66, 72-73 (1967). A plurality of the Court concluded that the state authorities and witnesses may have “deliberately concealed” the information from the court. *Id.* at 75-76. See also *id.* at 99 (Fortas, J., concurring) (stating his belief “that deliberate concealment and nondisclosure by the State are not to be distinguished in principle from misrepresentation”).

In *Miller v. Pate*, 386 U.S. 1 (1967), the Court condemned the prosecutor’s knowing use of false evidence. The prosecutor had used a pair of “bloodstained” shorts as evidence, presenting expert testimony as to the blood type on the shorts, and stressing the evidentiary importance of the “bloodstained” shorts in argument to the jury. *Id.* at 4. Throughout, the prosecutor knew that the shorts were stained with paint, not blood. *Id.* at 6.

21. *Brady*, 373 U.S. at 87.



### A. *Defining the Knowledge Requirement*

While requiring some governmental knowledge, the Court has made it clear that the crux of the wrong is the unfairness of the proceeding, not the wrongdoing of the prosecutor.<sup>22</sup> Thus the Court has held that false testimony or non-disclosure of exculpatory evidence violated the defendant's due process rights even when the prosecutor did not have actual knowledge of the falsity or the exculpatory evidence. The Court's decisions guide the determination of how a defendant can satisfy the governmental knowledge requirement and establish a due process claim.

In the Court's early decisions, access to relief turned on whether the defendant could demonstrate that the prosecutor knowingly presented false testimony.<sup>23</sup> However, in *Mesarosh v. United States*,<sup>24</sup> the Court strongly condemned reliance on false testimony even though the prosecution had presented it unknowingly. In *Mesarosh*, the Solicitor General acknowledged that one of its key witnesses had given false testimony in other proceedings and, in an unusual request, asked that the case be remanded to the trial court. Instead, the Court granted the defendants a new trial based on the fact that the witness had been "totally discredited," concluding that the witness's false testimony in other

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22. The Court explained:

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile." . . .

*Id.* at 87-88.

23. See *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (granting relief to defendant who established that prosecution knowingly presented perjured testimony and suppressed favorable evidence); *Hysler v. Florida*, 315 U.S. 411, 419-20 (1942) (rejecting defendant's due process claim because he failed to substantiate his allegation that the authorities had procured the use of false testimony). In *Pyle*, the Court cited *Mooney* and held that a state prisoner would be entitled to habeas relief if "his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him." 317 U.S. at 215-16. See also *Price v. Johnston*, 334 U.S. 266, 287 (1948) (recognizing that petitioner's charge "that the prosecution brought undue pressure to bear on the Government's chief witness . . . to change his testimony and that this altered testimony was knowingly used to obtain petitioner's conviction" would support a habeas petition).

24. *Mesarosh v. United States*, 352 U.S. 1 (1956).

settings precluded the finding that he was truthful in the defendants' trial.<sup>25</sup> The Court held that "[t]he dignity of the United States Government will not permit the conviction of any person on tainted testimony."<sup>26</sup> Despite this strong statement, *Mesarosh* has had little impact.<sup>27</sup>

In contrast, *Giglio v. United States*,<sup>28</sup> is a key decision in defining protection from false testimony. In *Giglio*, the Court recognized that the government's failure to correct false testimony could violate due process even though no one acting for the government actually knew the testimony was false.<sup>29</sup> In *Giglio*, the defendant's accomplice testified against him at trial and on cross-examination denied having received any assurances from the government in exchange for his testimony. In fact, the accomplice had been promised that he would not be prosecuted. The prosecutor trying the case was unaware of the agreement and therefore did not correct the false testimony.<sup>30</sup> The Court nevertheless held that the failure to correct the false testimony violated the defendant's rights, strengthening due process protection with a clear rule expanding the ways in which the defendant could satisfy the knowledge requirement.<sup>31</sup>

The parallel development of the law governing non-disclosure claims also supports allowing a defendant to satisfy the knowledge requirement without establishing actual knowledge. Like the

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25. *Id.* at 13-14. The Court stressed its supervisory role, acknowledging a duty "to see that the waters of justice are not polluted." *Id.* at 14. The Court distinguished the situation from that in which a defendant files a motion for a new trial based on newly discovered evidence, because the government acknowledged their witness' perjury and asked the court to take action. *Id.* at 9-10.

26. *Id.* at 9. The same year, four justices dissented from the dismissal of a petition, arguing that the defendant was entitled to relief because the state "now knows that the testimony of the only witnesses against petitioner was false" and "[n]o competent evidence remains to support the conviction." See *Durley v. Mayo*, 351 U.S. 277, 290-91 (1956).

27. Later cases have declined to ascribe much precedential weight to *Mesarosh*, characterizing it as *sui generis*. See *United States v. Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975).

28. *Giglio v. United States*, 405 U.S. 150 (1972).

29. See generally Saltzburg, *supra* note 13, at 1560-63 (discussing *Giglio*). The Court noted in *Giglio* that prosecutors' offices could establish systems for sharing information to avoid a recurrence of the situation where the prosecutor did not correct the false testimony because he did not know of the agreement with the witness. *Giglio*, 405 U.S. at 154 (1972). However, in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), the Court rejected the argument that a prosecutor's office could be liable for the failure to institute such a system. *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 864-65 (2009).

30. 405 U.S. at 152. The prosecutor also argued in support of the witness' credibility that he had received no promises. *Id.* The witness was central to the prosecution's case, so the government's failure was clearly material. *Id.*

31. *Id.* at 154-55.

presentation of false testimony, non-disclosure can violate due process even though the prosecutor was unaware of exculpatory evidence.<sup>32</sup>

However, in *United States v. Agurs*,<sup>33</sup> the Court used language that has spawned some confusion. *Agurs* was a non-disclosure case, involving no allegation of false testimony, but the Court addressed the materiality requirement for both non-disclosure and false testimony cases.<sup>34</sup> In dictum, the Court inaccurately summarized the precedent governing false testimony, categorizing the *Mooney* line of cases as involving perjured testimony of which the prosecution “knew, or should have known” and compounded the confusion by referring to “the knowing use of perjured testimony.”<sup>35</sup> This characterization disregards *Giglio* and suggests that a defendant must demonstrate a high level of government knowledge.<sup>36</sup> This inaccurate dictum appears to have influenced future courts to construe due process protection narrowly.<sup>37</sup> Instead, the precedent should be read to reduce this barrier to relief.

### B. *Clarifying the Falsity Requirement*

The Court has also signaled that the falsity requirement is not as demanding as some lower court decisions suggest, recognizing that any false or misleading testimony may corrupt the truth-finding process and render the trial unfair.<sup>38</sup> The Court has made it clear that a defendant need not establish perjury to prevail in a false testimony case.<sup>39</sup> Moreover, even the use of testimony that is merely misleading may violate due process.

In *Alcorta v. Texas*,<sup>40</sup> the Court recognized that the prosecution’s failure to correct misleading testimony violated the defendant’s right to due process. The Court recognized that the prosecutor had knowingly fostered a false impression in his examination of a key prosecution

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32. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (granting defendant relief on the basis of non-disclosure even though the prosecutor did not have all the exculpatory information until after trial); *United States v. Bagley*, 473 U.S. 667, 671 n.4 (1985).

33. *United States v. Agurs*, 427 U.S. 97 (1976).

34. See *infra* section II.C (discussing materiality requirement).

35. *Agurs*, 427 U.S. at 103-04. See also Saltzburg, *supra* note 13, at 1566-68 (discussing and criticizing *Agurs*).

36. Saltzburg, *supra* note 13, at 1567-69.

37. *Id.* at 1570.

38. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 265 (1959) (granting relief based on the prosecution’s failure to correct false testimony, which was relevant only to impeach the witness’ credibility); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (granting relief based on the prosecution’s failure to correct misleading testimony, despite the fact that the testimony was not clearly false).

39. See *Alcorta*, 355 U.S. 28.

40. *Alcorta v. Texas*, 355 U.S. 28 (1957).

witness.<sup>41</sup> The Court granted relief because the witness conveyed a false impression, despite the fact that the testimony was not clearly false.<sup>42</sup> The misleading testimony strengthened the prosecution case, and more truthful testimony would have corroborated the defendant's claim of sudden passion and also impeached the witness's credibility.<sup>43</sup>

In *Napue v. Illinois*,<sup>44</sup> the Court also applied an inclusive definition of falsity. In *Napue*, the Court granted relief based on false testimony relevant only to impeach the witness.<sup>45</sup> Although the prosecutor trying the case had promised the accomplice he would seek to get his sentence reduced,<sup>46</sup> the accomplice falsely denied that he had received any promise, and the prosecutor did not correct the false testimony.<sup>47</sup> Even though the falsity testimony related only to the witness's credibility, the Court held that the defendant's right to due process was violated.<sup>48</sup>

However, in *Agurs*,<sup>49</sup> the Court used inaccurate language to describe the falsity requirement, appearing to endorse a narrow construction. When the Court summarized the precedent governing false testimony, it inaccurately described the *Mooney* line of cases as involving "perjured" rather than merely false or misleading testimony.<sup>50</sup> This limited

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41. *Id.* at 31.

42. The witness misrepresented his relationship with the defendant's wife as merely that of a friend, countering defendant's claim that he killed his wife in sudden passion when he found her kissing the witness. The witness later recanted and acknowledged that he had been conducting an affair with the wife. The prosecutor confirmed that when he was trying the case he knew of the witness's intimate relationship with the defendant's wife and instructed the witness not to disclose it unless asked directly. *Id.* at 30-31. See generally Saltzburg, *supra* note 13, at 1556-57 (discussing *Alcorta*); Rusin, *supra* note 15, at 204-05 (citing *Alcorta* as expanding on the holding in *Mooney*).

43. *Alcorta*, 355 U.S. at 31-32.

44. *Napue v. Illinois*, 360 U.S. 264 (1959). See Saltzburg, *supra* note 13, at 1558-59 (discussing *Napue*); Rusin, *supra* note 15, at 204-05 (citing *Napue* as the most expansive holding derived from *Mooney*).

45. *Napue*, 360 U.S. at 269-70.

46. The case arose from the testimony of the defendant's alleged accomplice, who had been sentenced to 199 years for the crime in which they both allegedly participated and who was now cooperating with the government.

47. *Napue*, 360 U.S. at 265.

48. The Court quoted the New York Court of Appeals:

It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. \* \* \* That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

*Id.* at 269-70 (quoting *People v. Savvides*, 1 N.Y.2d 554, 557 (1956)).

49. 427 U.S. 97 (1976).

50. *Id.* at 103-04 (stating that it "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the

characterization of the falsity requirement is not supported the cases preceding *Agurs*.<sup>51</sup> Although this aspect of the Court's opinion is dictum, it appears to have infected the development of the jurisprudence going forward, leading to a heightened requirement.<sup>52</sup> Instead, the decisions that preceded *Agurs* should govern.

### C. *Adapting the Materiality Requirement*

In both the false testimony and the non-disclosure cases, one critical question is the strength of the false testimony or the undisclosed exculpatory evidence. The Court has used "material" as a term of art to express the required showing of strength and has varied the definition of material depending on the nature of the defendant's claim.<sup>53</sup> In this regard, the Court has held that false testimony claims are subject to a lower materiality showing than non-disclosure claims.<sup>54</sup>

The Court introduced the term "materiality" into this line of cases in *Brady*, stating that suppression of exculpatory evidence by the prosecution "violates due process where the evidence is material either to guilt or to punishment."<sup>55</sup> In *Brady*, the Court did not appear to attach a special meaning to the term "material" as used in this context.<sup>56</sup> Only in later cases did materiality become a central focus in the jurisprudence of false testimony and non-disclosure.<sup>57</sup>

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judgment of the jury"). See also Saltzburg, *supra* note 13, at 1566-68 (discussing and criticizing *Agurs*).

51. Saltzburg, *supra* note 13, at 1567-69.

52. See, e.g., *United States v. Bagley*, 473 U.S. 667, 678 (1985) (echoing the inaccurate language of *Agurs* and referring to this line of cases as involving the "knowing use of perjured testimony"); Saltzburg, *supra* note 13, at 1570 *et seq.*

53. See *Bagley*, 473 U.S. 667.

54. See *id.*

55. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

56. The term is customarily used simply to express an aspect of the requirement that the evidence bear on the issues in the case. MCCORMICK, EVIDENCE § 185 (6th ed. 2006).

57. See *Strickler v. Greene*, 527 U.S. 263, 298 (1999) (Souter, J., concurring in part and dissenting in part) ("Brady itself did not explain what it meant by 'material' (perhaps assuming the term would be given its usual meaning in the law of evidence),") (citing Marshall, J., dissenting in *Bagley*, 473 U.S. 667, 703 n.5). Justice Marshall argued that "material" should be read merely to mean germane or relevant. 473 U.S. 703 n.5 (Marshall, J., dissenting). In decisions predating *Brady*, the Court had addressed the importance of the false testimony to the case, but had not attached the analysis to the "materiality" of the evidence. See, e.g., *Alcorta v. Texas*, 355 U.S. 28, 34 (1957) (describing the perjured testimony as "seriously prejudicial to petitioner," and noting that without the false testimony, he "might well" have been convicted of "murder without malice"). See also *Durley v. Mayo*, 351 U.S. 277, 290-301 (1956) (the dissenting justices emphasized that they viewed the conviction as a violation of due process because, without the false testimony, "no competent evidence remains to support the conviction").

As the Court refined its definition of materiality, it differentiated between false testimony and non-disclosure cases.<sup>58</sup> To support a non-disclosure claim, a defendant must establish a reasonable probability that the result would have been different had the exculpatory evidence been disclosed.<sup>59</sup> In contrast, a defendant who demonstrates that false testimony was improperly used at trial is required only to show a reasonable likelihood that the falsity had an impact on the outcome.<sup>60</sup> The Court further underscored this difference by equating the reasonable likelihood standard with the harmless error test.<sup>61</sup>

In *Agurs*, the Court advanced three reasons for applying a less demanding materiality standard in false testimony cases. The Court noted first that obtaining a conviction by the knowing use of perjury is fundamentally unfair. Second, the Court stated that false testimony cases involve prosecutorial misconduct, a proposition true of some but not all of the prior cases. Third, the Court asserted that “more importantly . . .

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58. See *Bagley*, 473 U.S. at 679-80; *Agurs*, 427 U.S. at 103-04. In *Agurs*, the Court discussed three situations that raise *Brady* issues: false testimony cases and two types of non-disclosure, defined by the specificity of the defense request for information and subject to different materiality standards. 427 U.S. at 106-07. See also Saltzburg, *supra* note 13, at 1566-68. In *Bagley*, the Court again addressed the different standards of materiality. Although the defendant complained that the prosecution had not disclosed the deal between two key witnesses and the law enforcement agency that conducted the investigation of the defendant, the defendant did not prove that the witnesses testified falsely at trial, and the case was analyzed as a non-disclosure. The Court discussed comprehensively the framework for analyzing non-disclosure and false testimony claims and again emphasized that the “reasonable likelihood” standard that applies in false testimony cases is more favorable to the defendant than the standard of materiality in non-disclosure cases, equating it to the harmless error standard. 473 U.S. at 679-80. See also Saltzburg, *supra* note 13, at 1570-73.

59. *Bagley*, 473 U.S. at 682 (1985). This requirement is identical to the prejudice requirement enforced in cases where the defendant establishes that counsel was incompetent. It represents a substantial barrier to relief. See *Moore v. Illinois*, 408 U.S. 786 (1972). The Court examined and rejected the defendant's non-disclosure claim because it concluded that the undisclosed exculpatory evidence of misidentification was not material. See Saltzburg, *supra* note 13, at 1562-63 (discussing *Moore*). Given what we now know about eyewitness identification, this case feels unsettling. See, e.g., Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 455-64 (discussing studies concluding that eyewitness error contributes to at least half of all wrongful felony convictions, and discussing common causes of such error).

60. *Bagley*, 473 U.S. at 679 n.9. The Court traced the rule to *Mooney, Napue*, and *Giglio*.

61. In *Bagley*, the Court explained:

Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.

*Id.* at 679-80.

they involve a corruption of the truth-finding process.”<sup>62</sup> For these reasons, the Court committed itself to applying the lower standard when the defendant shows improper use of false testimony.

Despite this favorable standard, defendants in three more recent cases failed to raise false testimony claims before the Supreme Court, despite strong indications that each case involved false testimony. Instead, each case came to the Court as a non-disclosure case. As a result, the decisions clarify the law concerning the obligation to disclose exculpatory evidence but do not directly consider the due process implications of false testimony. In two of the cases, *Kyles v. Whitley*<sup>63</sup> and *Banks v. Dretke*,<sup>64</sup> the defendant nevertheless won relief on the basis of non-disclosure, meeting the more demanding materiality standard.<sup>65</sup>

The other decision, *Strickler v. Greene*,<sup>66</sup> demonstrates the significance of the difference in the materiality standards. In *Strickler*, the evidence suggested that a key witness had testified falsely.<sup>67</sup> The police had interviewed the eyewitness to the victim’s abduction several

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62. *Agurs*, 427 U.S. at 103-04. The Court also stated that the standard “must reflect our overriding concern with the justice of the finding of guilt.”

63. *Kyles v. Whitley*, 514 U.S. 419 (1995). The same year, the Court denied certiorari over dissent and permitted the prisoner to be executed despite his claim that the State had conceded that the confession on which his sentence rested was false. The defendant did not allege that the prosecutors were aware of the falsity at his trial. *Jacobs v. Scott*, 513 U.S. 1067 (1995).

64. *Banks v. Dretke*, 540 U.S. 668, 695-97 (2004).

65. In *Kyles*, the defendant did not argue that the prosecution had allowed perjury to go uncorrected until after the development of the claim that the Supreme Court reviewed. 514 U.S. at 432 n.6. Although the issue was not ripe for review by the Court, *Kyles* raised a question of false testimony based on the post-conviction statement of one of the four identification witnesses who testified at trial. After the trial, the witness acknowledged that during the investigation she had told the police that she had not seen the perpetrator well enough to identify him. She explained that she identified *Kyles* at trial only after being pressured by members of the prosecution team and assured that all the other witnesses identified him.

In *Kyles*, the Court clarified four aspects of materiality: 1) the defendant does not have the burden to prove by a preponderance of the evidence that the suppressed evidence would have produced an acquittal; 2) the test is not sufficiency of the evidence; 3) once the court finds constitutional error (withholding of material information) there is no harmless error review; and 4) the evidence withheld must be considered cumulatively. 514 U.S. at 434-37.

In *Banks*, the government suppressed evidence that its key witness was a paid confidential informant and allowed the witness’s false testimony about the nature of his relationship with the police to stand uncorrected at trial. The defendant failed to raise the false testimony claim. 540 U.S. at 690 n.11. See also Brief for Petitioner, *Banks* (No. 02-8286), 2003 WL 22437577. Despite this failure, the defendant prevailed under the more demanding materiality test applied to the suppression of favorable evidence. *Banks*, 540 U.S. 668, 698-99.

66. *Strickler v. Greene*, 527 U.S. 263 (1999). See Saltzburg, *supra* note 13 (discussing *Strickler* at length).

67. *Strickler*, 527 U.S. at 273-74.

times, and her statements to the police would have contradicted her testimony at trial that she had an excellent, clear memory of the defendants as well as their victim and was struck by the events at the time she witnessed them.<sup>68</sup> Nevertheless, the defendant cast the case as a non-disclosure case rather than a false testimony case.<sup>69</sup> Holding the defendant to the higher standard of materiality, the Court rejected the defendant's due process claim. While the Court believed the suppressed information raised a reasonable possibility of a different result at verdict or sentence, the Court did not agree that it raised a reasonable probability.<sup>70</sup> Thus, in this instance, the defendant's failure to seek the more favorable standard by pursuing a false testimony claim rather than merely arguing on the basis of non-disclosure was fatal to the defendant's case.

Both courts and defendants should embrace the greater protection available in false testimony cases. The Court has consistently recognized the corrupting impact of false testimony, establishing protective rules. A defendant is entitled to relief if the prosecutor allowed to stand incorrect testimony that the prosecutor knew or should have known was false or misleading.<sup>71</sup> The testimony need not constitute perjury, and the prosecutor need not have had actual knowledge that the testimony was false or misleading.<sup>72</sup> The defendant need only show a reasonable likelihood that the false testimony had an impact on the outcome.<sup>73</sup> The Court has never abandoned or specifically narrowed its holdings in this line of cases.<sup>74</sup> Continued enforcement of this protection, based on the special concerns that arise in false testimony cases, is critical: the protection should not be either overlooked or diluted.

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68. The prosecutor's open file policy taken with the fact that the documents that impeached the witness were not provided to the prosecutor misled defense counsel.

69. See Brief for Petitioner, *Strickler* (No. 98-5864), 1998 WL 880835. See also Saltzburg, *supra* note 13, at 1545-50 (demonstrating the evidence established that witness had testified falsely and raising the question of why case was not evaluated as a false testimony case).

70. *Strickler*, 527 U.S. at 289-90. The Court stressed that the question was not whether the defendant would have received a different verdict, but whether the trial was fair. *Id.* at 291. Justice Souter, in an opinion joined by Justice Kennedy, argued that, although defendant had not met the burden for his conviction, he had met the burden as to his capital sentence. 527 U.S. at 297 (Souter, J., concurring in part and dissenting in part) ("I believe there is a reasonable probability . . . that disclosure . . . would have led the jury to recommend life, not death, and I respectfully dissent.").

71. See *supra* Section II.A (discussing the knowledge requirement).

72. See *supra* Section II.B (discussing the falsity requirement).

73. See *supra* Section II.C (discussing the reasonable likelihood standard).

74. See Saltzburg, *supra* note 13.



### III. ESTABLISHING A VIOLATION OF DUE PROCESS

To establish a due process violation based on false testimony, the defendant must clear the three hurdles discussed above. The defendant must show that false testimony was presented at trial, that the prosecution had the requisite culpability through actual, constructive, or imputed knowledge, and that the false testimony was significant enough to be deemed material. In addition, if the defendant knew or should have known the testimony was false, the defendant may need to persuade the court that the defendant did not fail to meet the defense obligation of due diligence.<sup>75</sup> Each of these hurdles is sometimes construed to become an insurmountable barrier to defense relief.

The courts should instead interpret each of these requirements in a manner that reflects the concerns underlying the Supreme Court's jurisprudence, reducing the barriers standing between the defendant and relief from a conviction based on false testimony. Subsection A argues that the knowledge requirement should be satisfied not only by proof of actual knowledge but also when the prosecutor would have discovered the falsity with the exercise of due diligence or when the knowledge of other government actors is imputed to the prosecutor. Subsection B argues that protection from false testimony is not limited to instances of perjury, but should apply equally to misleading, but not technically false testimony, and even to testimony that the witness believes is true, but is actually false. Subsection C contends that the courts sometimes impose too high a standard of materiality and discusses both the applicable standard and the way in which courts should evaluate whether a defendant has met that standard. Subsection D argues that courts should not enforce a requirement of defense due diligence in false testimony cases, recognizing that even if the defendant knows or could discover that the testimony is false, the defendant cannot defend against prosecution-endorsed falsity.

#### A. *The Knowledge Requirement*

A key question in determining the extent of due process protection is the requisite governmental knowledge the defense must establish to prove a violation based on false testimony. Prosecutors have a duty to pursue justice,<sup>76</sup> and courts often emphasize the prosecutor's obligation

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75. See *Shih Wei Su v. Filion*, 335 F.3d 119, 128 (2d Cir. 2003) (holding that the defense met their burden of due diligence for purposes of a false testimony claim).

76. See *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (citing cases); *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) (recognizing prosecutors' duty to see that justice is done); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314-15 (2001) (discussing basis for prosecutor's special duty).

to see that justice is done.<sup>77</sup> However, throughout the development of due process jurisprudence relating to non-disclosure of exculpatory evidence or false testimony, the Court has emphasized that the prosecution's good or bad faith is not the issue; the defendant need not show misconduct by an individual prosecutor.<sup>78</sup> The crux of the

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77. The most quoted statement of the prosecutor's special duty is found in *Berger v. United States*, 295 U.S. 78, 88 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*See also* *Drake v. Portuondo*, 553 F.3d 230, 240 (2d Cir. 2009) (stating that “a conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution . . . because, in order to reduce the danger of false convictions, we rely on the prosecutor not to be simply a party in litigation whose sole object is the conviction of the defendant before him,” and further stating that “[t]he prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost”); *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (en banc) (noting that “[t]he Supreme Court has long emphasized ‘the special role played by the American prosecutor in the search for truth in criminal trials’” (quoting *Strickler v. Green*, 527 U.S. 263, 281 (1999)) and that “a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment”); *see also* Ronald L. Carlson, *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?*, 1969 DUKE L.J. 1171, 1172 (1969) (noting emphasis on prosecutor's duty to do justice).

78. *See* *United States v. Agurs*, 427 U.S. 97, 110 (1976) (“[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor”); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (for *Brady* purposes it does not matter “whether the nondisclosure was a result of negligence or design”); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (noting that suppression of material exculpatory evidence violates due process “irrespective of the good faith or bad faith of the prosecution”); *Smith v. Sec’y of New Mexico Dept. of Corr.*, 50 F.3d 801, 823 (10th Cir. 1995) (emphasizing that *Brady* protection rests on fairness of trial, not wrongdoing of prosecutor). *See also* Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1405-06 (1987) (acknowledging the Court's assertion that the prosecutor's wrongdoing is not the issue but arguing that the Court has nevertheless varied test depending on degree of prosecutor's fault); Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 124-26 (1998) (explaining that prosecutorial misconduct is not generally treated as relevant to finding of trial error but arguing that the prosecutor's intent should always be relevant). *But see* *United States v. Dambly*, 134 F.3d 490, 493 (2d Cir. 1998) (characterizing false testimony cases as designed to discourage prosecutorial misconduct).

violation when false testimony stands uncorrected is not prosecutorial wrong-doing or negligence, but rather the corrupting effect on the trial.<sup>79</sup>

Nevertheless, the defendant is required to show at least some level of prosecution responsibility for the information.<sup>80</sup> When a prosecution witness testifies falsely at trial, the government knowledge may fall in one of four possible categories: 1) the prosecution knew the evidence was false and allowed it to stand; 2) the prosecutor did not know the testimony was false, but would have discovered the falsity had the prosecutor exercised due diligence; 3) the prosecutor did not know the testimony was false, but other government actors whose knowledge can be imputed to the prosecutor had information that demonstrated the falsity; and 4) no one on the prosecution team or whose knowledge can be imputed to that team knew or should have known the testimony was false. If the court treats the case as falling in this last category, the defendant must satisfy a more demanding standard to win relief.<sup>81</sup>

In some cases, the defendant can establish that the prosecutor handling the case actually knew the witness's testimony was false. More often, however, the prosecutor unwittingly presents false testimony.<sup>82</sup> Questions remain concerning how the defendant can fulfill her burden if she cannot establish actual knowledge.<sup>83</sup> While actual knowledge is sufficient, it is not necessary to establish a violation.<sup>84</sup> The defendant may succeed by arguing either that the prosecution had a duty to discover the falsity or that knowledge should be imputed or attributed to the prosecution. The most common phrasing of the prevailing test, drawn from Supreme Court precedents, uses duty language: the defendant must show that the prosecutor knew or should have known of the falsity.<sup>85</sup> In

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79. See Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1481-84 (2003) (discussing rationale for *Brady* obligation).

80. See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 140 (Carol Steiker ed., 2006) (stating that *Brady* "requires some prosecutorial misconduct").

81. See *infra* Section IV.

82. See Bibas et al., *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices*, 31 CARDOZO L. REV. 1961, 1984-85 (2010) (suggesting that prosecutions violations of discovery rules often result from negligence, inadvertence, tunnel-vision, and overwork as well as poor practices).

83. *Drake v. Portuondo*, 553 F.3d 230, 345 (2d Cir. 2009) (declining to clarify the knowledge requirement).

84. See *Mooney v. Trombley*, No. 05-CV-71329-DT, 2007 WL 2331881, at \*14 (E.D. Mich. 2007 Aug. 13, 2007) (stating that in order to obtain post-conviction relief, the defendant must allege that the prosecution knew or should have known about the perjured statement).

85. See *id.* at \*2, \*14 (rejecting post-conviction challenge based on claim of perjury because defendant did not allege that the prosecutor knew or should have known of the perjury), see also Reiss, *supra* note 78, at 1434 (discussing difficulty of proving

some cases, however, the Court mixes duty language and attribution language when discussing the knowledge requirement.<sup>86</sup> Likewise, others discussing due process violations do not always differentiate among the possible legal avenues for ascribing knowledge to the prosecution.<sup>87</sup> The way that the requirement is defined may be critical to the defendant's success. If the prosecution is able to defeat the defendant's argument that false testimony violated due process simply by insulating itself from knowledge of information pertinent to the case, the constitutional protection of the right to a fair trial is compromised.<sup>88</sup>

Subsection 1 addresses the challenges defendants face when attempting to establish actual knowledge. Subsections 2 and 3 discuss how the courts should construe the test to be applied when the defendant cannot establish actual knowledge on the part of a specific prosecutor. Subsection 2 addresses the "should have known" requirement, which allows the defendant to satisfy the knowledge requirement by demonstrating that the prosecution would have unearthed the falsity through the exercise of due diligence. Subsection 3 argues that courts should construe broadly the circumstances in which knowledge is imputed to the prosecution. Thus, in false testimony cases, the defendant may satisfy the knowledge requirement by three different avenues.

As the following discussion suggests, the non-disclosure cases provide some guidance on this issue. However, the non-disclosure cases describe a more limited prosecutorial obligation than is appropriate in false testimony cases. In defining the scope of the prosecution's disclosure obligation, the courts have been reluctant to create a broad

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prosecutorial intent). *But see* *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003) (stating that defendant must establish that prosecutor knew the testimony was false).

86. *Compare* *United States v. Agurs*, 427 U.S. 97, 103 (1976) (stating the requirement that the prosecutor "knew, or should have known"), *with* *Agurs*, 427 U.S. at 110 (addressing non-disclosure and stating that "[i]f evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it"). In *Giglio*, the Court stated both that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor" and that "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

87. *See, e.g.*, *Mastracchio v. Vose*, 274 F.3d 590, 600-01 (1st Cir. 2001) (using both imputation and duty language); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) (using both duty and attribution language in assessing alleged non-disclosure violation); Gershman, *Misuse of Scientific Evidence*, *supra* note 7, at 26 (using in a single paragraph the language of agency ("vicariously responsible"), duty ("constitutionally obligated under due process to ascertain"), and actual knowledge ("a prosecutor's claim of ignorance of the misconduct often is plainly incredible")).

88. *See* Barry Tarlow, Column, *RICO Report, Tape-Recorded Informer Conversations*, CHAMPION, June 24, 2000, at 55-58 (discussing risk to process when prosecution can avoid knowledge of information possessed by Bureau of Prisons).

constitutional right to discovery.<sup>89</sup> The prosecution's obligation to avoid false testimony should be broader than the obligation to locate and disclose exculpatory evidence. Whereas a non-disclosure violation may occur in the absence of affirmative action on the part of the prosecution team,<sup>90</sup> when the prosecution elects to call a witness, the courts should recognize a heightened obligation to assure the truthfulness of the witness's testimony.

### 1. Actual Knowledge

It is clear that the knowing use of perjured testimony violates the defendant's right to due process.<sup>91</sup> The prosecutor has both an ethical

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89. See *United States v. Bagley*, 473 U.S. 667, 675 (1985) (emphasizing that *Brady* obligation does not mandate open file policy and represents only limited departure from adversarial model). See also Villaverde, *supra* note 79, at 1486-87 (discussing limitations on *Brady* obligation necessary to preserve adversarial system); Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1674 n.6 (1996) (noting that *Brady* has not been read to impose such an obligation on the prosecution); Carlson, *supra* note 77, at 1403-04 (discussing Court's unwillingness to create right to discovery).

90. The prosecution may be unaware that exculpatory evidence exists or that it has value to the defense. Moreover, a prosecutor may withhold exculpatory evidence without clearly breaching any legal duty. The standard of materiality on which determination of whether the non-disclosure violated the defendant's rights is a post hoc determination, difficult to apply before the trial is completed. As a result, the test does not define a duty but instead defines the circumstances in which relief is required because the suppression of favorable evidence rendered the defendant's trial constitutionally deficient. See *Agurs*, 427 U.S. at 107-08 (acknowledging that the question of disclosure arises before and during trial as well as after trial, but that the standard of materiality, which requires a review of the evidence in the context of the entire trial, must logically apply at all times). A prosecutor turning to the *Brady* test for guidance before or during trial must predict what would happen at trial, asking whether the exculpatory information is so significant that its disclosure to the defense would have a probable effect on the outcome. See *Kyles v. Whitley*, 514 U.S. 419, 439 (1994) (discussing prosecutor's obligation). Thus the prosecutor, committed to the case and convinced of the defendant's guilt, may not see the exculpatory value of the information. See Paul Giannelli, *Brady and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593, 601-02 (2007) (discussing factors that weigh against prosecutor disclosing *Brady* material); Bibas, *supra* note 80, at 143 (noting that prosecutors have difficulty assessing what will be exculpatory).

The Court discussed this dynamic in *Kyles*, 514 U.S. at 437-40, remarking that the prosecutor necessarily must gauge when favorable evidence must be disclosed while also recognizing that the prosecutor may not actually be aware of all the favorable information. *Agurs* recognized that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete." 427 U.S. at 108. See also *Bagley*, 473 U.S. at 700-01 (Marshall, J., dissenting) (arguing that the Court's approach permits prosecutors to withhold exculpatory evidence without violating their constitutional obligation and citing examples).

91. See *Jenkins v. Artuz*, 294 F.3d 284, 293-94 (2d Cir. 2002) (finding violation due to knowing use of perjured testimony); *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). In *LaPage*, the court noted that prosecutors who know the witness has testified falsely may "interrupt their own questioning, and work out in a bench conference

duty<sup>92</sup> and a constitutional obligation to correct testimony that she knows to be false.<sup>93</sup> Despite these clear obligations, some prosecutors knowingly allow false testimony to stand uncorrected. This conduct amounts to deliberate deception and should be viewed as violating the defendant's right to due process.<sup>94</sup>

Proving that an individual prosecutor actually knew the testimony was false can be difficult.<sup>95</sup> The prosecutor who tries the case may not possess all the information bearing on the witness's truthfulness.<sup>96</sup> Moreover, prosecutors are not necessarily adept at assessing credibility and may not realize that a witness is providing false testimony.<sup>97</sup>

In some cases, the defendant has ready access to evidence that the prosecutor had actual knowledge. For example, the prosecutor may have heard the witness give contrary testimony under oath at an earlier proceeding.<sup>98</sup> In other cases, the prosecutor may have signed off on a plea agreement that the witness now denies under oath.<sup>99</sup> If the evidence

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with the judge and defense counsel how to inform the jury immediately that the testimony is false." *Id.* at 492. See also Gershman, *The Prosecutor's Duty to Truth*, *supra* note 76, 325-27 (2001) (discussing impropriety of prosecutor's subversion of truth).

92. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010) (establishing a duty of candor to the tribunal which includes the obligation to refrain from presenting false evidence); and 3.8(d) (providing that the prosecutor in a criminal trial shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . ."); see also Saltzburg, *supra* note 13, at 1577-78 (discussing ethical obligation not to present false testimony).

93. See *supra* Section II.A (discussing constitutional precedent).

94. See Henning, *supra* note 15, at 762 (arguing that "knowing use of perjured testimony reaches a particularly egregious level of prosecutorial misconduct and should therefore trigger an automatic reversal of a conviction upon a finding of actual prosecutorial knowledge").

95. Carlson, *supra* note 77, at 1173, 1185 (commenting that proof of prosecutorial wrongdoing may be hard to find).

96. See, e.g., *Giglio v. United States*, 405 U.S. 150 (1972) (finding due process violation because someone in prosecutor's office knew of false testimony, although the prosecutor trying the case did not have personal knowledge); *Moore v. Gibson*, 195 F.3d 1152, 1164 (10th Cir. 1999) (noting that information establishing falsity was in hands of law enforcement, but not known to prosecutor); *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999) (noting that government agencies working on case had information establishing falsity but prosecution did not).

97. See Giannelli, *supra* note 90, at 602-03 (discussing difficulty prosecutors experience in assessing truthfulness); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 931-40 (1999) (discussing difficulty of determining whether cooperating witnesses are truthful).

98. See, e.g., *United States v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000) (concluding that prosecutor knew testimony was false because it was inconsistent with witness's testimony under oath at earlier trial in which same prosecutor participated).

99. See, e.g., *Jackson v. Brown*, 513 F.3d 1057, 1072 (9th Cir. 2008) (finding violation where prosecutor questioning witness had made the relevant promise to the witness); *United States v. Mason*, 293 F.3d 826, 829-30 (5th Cir. 2002) (finding due process violation where prosecutor who had worked out plea agreement with witness

that establishes the falsity is in files that the prosecutor has reviewed, the prosecutor should be deemed to have actual knowledge even if the defendant cannot establish subjective awareness at the time of the false testimony.<sup>100</sup> Further, even if the defendant cannot demonstrate actual knowledge, the court should find knowledge if the defendant demonstrates that the prosecutor had enough information to raise a concern about the testimony but willfully blinded herself to the falsity.<sup>101</sup>

In some cases, however, the defendant cannot establish actual knowledge.<sup>102</sup> Despite clear Supreme Court holdings to the contrary, a number of courts have asserted that the defendant's due process rights are violated *only* if the prosecution knows of the falsity.<sup>103</sup> The courts

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allowed witness to testify falsely that no one had promised him anything in return for testifying).

100. In *United States v. Joseph*, 996 F.2d 36, 39-40 (3d Cir. 1993), the Third Circuit construed the knowledge requirement too narrowly. Considering whether the prosecutor knew or should have known of exculpatory evidence he had reviewed for a different case, the court concluded that the prosecutor had neither actual nor constructive knowledge of the favorable evidence.

101. See *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006) (stating that prosecution cannot avoid responsibility for false testimony by willfully avoiding knowledge of facts); *United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997) (noting the prosecution's willful ignorance in support of holding that defendant was entitled to relief). See also Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 555-56 (2007) [hereinafter Gershman, *Games Prosecutors Play*] (discussing prosecution willful blindness to exculpatory evidence); MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL §5.06 (LEXIS through 2011 legislation) (stating that “[n]o one can avoid responsibility for a crime by deliberately ignoring what is obvious” and defining willful blindness as “aware[ness] of a high probability” of the fact or circumstance, or “consciously and deliberately avoid[ing] learning” about it).

102. See, e.g., *Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002) (illustrating difficulty of establishing actual knowledge). See also Daniel E. Murray, *Convictions Obtained by Perjured Testimony: A Comparative View*, 27 OHIO ST. L.J. 102, 107 (1966) (discussing difficulty of establishing knowledge).

103. See, e.g., *Smith v. Sec’y, Dep’t of Corr.*, 572 F.3d 1327, 1334 (11th Cir. 2009) (quoting *Ford v. Hall*, 546 F.3d 1326, 1331-32 (11th Cir. 2008)) (stating that defendant must establish that “the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony . . .”); *Carter v. Mitchell*, 443 F.3d 517, 536 (6th Cir. 2006) (stating law as requiring proof that prosecutor deliberately allowed misleading testimony to stand uncorrected); *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002) (“[D]ue process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured”); *Knox v. Johnson*, 224 F.3d 470, 477 (5th Cir. 2000) (stating that due process test requires proof that the prosecutor knew the testimony was false); *King v. Trippett*, 192 F.3d 517, 523 (6th Cir. 1999) (violation lies in the knowing use of perjured testimony); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994) (asserting that violation is “axiomatic”); *United States v. Young*, 17 F.3d 1201 (9th Cir. 1994) (failing to evaluate false testimony under *Giglio* because prosecutor did not personally know testimony was false, but granting relief under more demanding materiality standard). See also *United States v. Noriega*, 117 F.3d 1206, 1220-21 (11th Cir. 1997) (holding that defendant had not shown due process violation because he had not adequately demonstrated government knowledge of facts contradicting claimed false

may have been led in this direction by the Court's statement of the law in *Agurs*, inaccurately characterizing prior precedent as holding "that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair" and is subject to a lower standard of materiality.<sup>104</sup>

In addition to the misdirection of *Agurs*, some courts are pulled in the direction of requiring actual knowledge by the belief that the due process violation involves wrongdoing.<sup>105</sup> If the court conceptualizes the violation as prosecutorial misconduct, the court is likely to require wrongful intent, based on actual knowledge of the falsity.<sup>106</sup> When courts demand such proof of knowledge, they may fail to provide a remedy to a defendant whose rights were violated at trial.<sup>107</sup> Instead, as the following two sections argue, courts should allow defendants to satisfy the knowledge requirement by showing either that the prosecution

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testimony and that although the government "treaded close to the line of willful blindness," the defendant had not established actual or constructive knowledge); *Abdus-Samad v. Bell*, 420 F.3d 614, 626 (6th Cir. 2005) (stating that prosecution must know of falsity); *Lynd*, *supra* note 7, at 564 (arguing that *Napue* requires defendant to show testimony was actually perjured); R. Michael Cassidy, "Soft Words of Hope:" Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. L. REV. 1129, 1163 (2004) (assuming that the Constitution is not violated if prosecutor does not correct testimony denying inducements to witness made by the police but not personally known to prosecutor). See also *In re Personal Restraint of Benn*, 952 P.2d 116, 151 (Wash. 1998) (discussing division of authority).

104. *Agurs*, 427 U.S. at 103-04. Elsewhere in the opinion, the Court stated that the violation consisted of using perjured testimony of which the prosecution "knew, or should have known," recognizing earlier holdings finding constitutional violations in the absence of actual knowledge. *Id.* at 103. See Saltzburg, *supra* note 13, at 1566-67 (arguing that the erroneous statement in *Agurs* redirected the development of the law).

105. See, e.g., *United States v. Dambly*, 134 F.3d 490, 493 (2d Cir. 1998) (suggesting that cases turn on prosecutorial misconduct and also stating that prosecution knowledge is required). See also *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (suggesting that judges may be disinclined to find prosecutors at fault).

106. *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010) (requiring knowledge to establish prosecutorial misconduct in eliciting or failing to correct false testimony); *Morales v. Woodford*, 388 F.3d 1159, 1179 (9th Cir. 2004) (footnote omitted) ("The due process requirement voids a conviction where the false evidence is 'known to be such by representatives of the State.' The essence of the due process violation is misconduct by the government, not merely perjury by a witness" (quoting *United States v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000))). See also *United States v. Wall*, 389 F.3d 457, 473 (5th Cir. 2004) (concluding that defendant did not have a constitutional claim in part because the trial court "exonerated the prosecution from any wrongdoing" in relation to the allegedly false testimony); *Noriega*, 117 F.3d at 1221 (stating that the defendant had failed to prove prosecutorial misconduct and must therefore satisfy the test for newly discovered evidence).

107. See *Schaff v. Snyder*, 190 F.3d 513, 530 (9th Cir. 1999) (stating that "[t]he clearly established Supreme Court precedent demands proof that the prosecution made knowing use of perjured testimony" and denying relief). See also *United States v. Seijo*, 514 F.2d 1357 (2d Cir. 1975) (applying higher standard of materiality where the government's negligence rather than overt misconduct, was responsible for the prosecutor's lack of knowledge that testimony was false).



had a duty to discover the falsity or that knowledge was imputed to the prosecution.

## 2. Duty to Discover

The Supreme Court's use of the words "knew or should have known" in describing the due process protection from the prosecution's use of false testimony suggests the prosecution's duty to discover favorable information.<sup>108</sup> As a result, courts should also ask whether the prosecution fulfilled the duty to investigate or discover the information that would have revealed the falsity.<sup>109</sup> In some instances where the prosecutor did not have actual or imputed knowledge of the falsity, the court will conclude that the prosecutor should have known the critical information and find a constitutional violation.<sup>110</sup>

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108. See, e.g., *Giglio v. United States*, 405 U.S. 150, 152 (1972); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that prosecutors have an express "duty to learn of any favorable evidence known to others acting on the government's behalf in the case").

109. See, e.g., *Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1117-18 (9th Cir. 2001) (noting that "prosecutor's duty to protect the criminal justice system" required further investigation of possible perjury by prosecution witness); *United States v. Stofsky*, 527 F.2d 237, 243-44 (2d Cir. 1975) (concluding government was not negligent in failing to discover information that would have revealed that key witness gave false testimony). *Brady* cases often focus on the prosecution's duty to discover favorable information. See *United States v. Bagley*, 473 U.S. 667 (1985) (considering *Brady* implications of information known to law enforcement agents but not to prosecutor); *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998) (discussing duty to search accessible files and stating that *Brady* violation will not be found if government diligently searched); *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (concluding that prosecution's failure to conduct search to verify witness's criminal record could support defendant's *Brady* claim.); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (concluding that prosecution could not avoid *Brady* obligation in deciding not to run record check on witness because prosecution has obligation to produce favorable evidence known or available to it); see also *Carlson*, *supra* note 77, at 1172; *Hochman*, *supra* note 89, at 1675 (characterizing *Brady* and its progeny as imposing on the prosecution an obligation to search for favorable evidence). See also *United States v. Tierney*, 947 F.2d 854, 860-61 (8th Cir. 1991) (stating that due process is violated if the government uses perjured testimony "knowingly, recklessly, or negligently"); *United States v. Stewart*, 323 F. Supp. 2d 606, 619 (S.D.N.Y. 2004) (having rejected attribution, court further considered and rejected argument that prosecution disregarded signals that should have prompted investigation and discovery of the facts that contradicted the false testimony).

110. See, e.g., *Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008) (concluding that prosecutor should have known testimony was false); *United States v. Bass*, 478 F.3d 948, 951 (8th Cir. 2007); *People v. Cornille*, 448 N.E.2d 857, 865 (Ill. 1983) (suggesting that prosecution cannot avoid responsibility by failing to inquire). See also *Kyles*, 514 U.S. at 437-38; *United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991) (holding that prosecutor has obligation to find favorable evidence that is readily available, which includes a duty to search accessible files). See generally *Villaverde*, *supra* note 79, at 1493-1512 (discussing approaches used by circuit courts in non-disclosure cases).

In *Giglio v. United States*,<sup>111</sup> the Court held that the government violated the defendant's right to due process by failing to correct false testimony even though the prosecutor trying the case was unaware that the testimony was false. In holding that the false testimony violated the defendant's right to due process, the Court used the language of duty and breach, as well as the language of attribution discussed below. The Court stated that the failure to correct the false testimony was the prosecutor's responsibility whether it was a result of "negligence or design."<sup>112</sup> This aspect of *Giglio* signals that a court should determine whether the prosecutor who allows false testimony to stand should have taken steps to learn the information that demonstrated the falsity of the testimony.

In challenges based on non-disclosure of favorable evidence, the Court has also recognized that the prosecution's obligation extends to exculpatory evidence in the hands of others.<sup>113</sup> In *Kyles v. Whitley*,<sup>114</sup> the Court stated that "the individual 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" and held that the failure to disclose evidence known only to police investigators violated the defendant's right to due process.<sup>115</sup> This duty should also extend to discovery of evidence that demonstrates the falsity of testimony at trial.

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111. 405 U.S. 150 (1972). See Villaverde, *supra* note 79, at 1489 (discussing *Giglio*).

112. *Giglio*, 405 U.S. at 155.

113. See, e.g., *Kyles*, 514 U.S. at 437 (finding *Brady* violation where prosecution did not disclose information in hands of police); *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (treating information in files of state agency as subject to *Brady* obligation). See also *Monroe v. Angelone*, 323 F.3d 286, 299 (4th Cir. 2003) (using duty language to describe prosecution's obligation under *Brady*); *Crivens v. Roth*, 172 F.3d 991, 997-98 (7th Cir. 1999) (concluding state was responsible for witness's convictions under an alias because the information was held by a state agency); *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (recognizing prosecution's "unique position to obtain information known to other agents of the government" and corresponding duty to learn of exculpatory evidence and holding that prosecution had duty to review witness's prison file to learn of exculpatory impeachment evidence); *United States v. Alvarez*, 86 F.3d 901, 904-05 (9th Cir. 1996) (discussing duty). See generally Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 *FORDHAM L. REV.* 1379, 1380-1384 (1999) (discussing *Brady* obligation); Hochman, *supra* note 89 (discussing prosecution's obligation to search for information); Stephen P. Jones, Note, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 *U. MEMPHIS L. REV.* 735, 756-61 (1995) (discussing whether information is deemed to be in the prosecutor's possession for purposes of *Brady* analysis). But see *United States v. Moore*, 25 F.3d 563, 569 (7th Cir. 1994) (stating that prosecutor does not have obligation to seek out favorable information not within his possession). One commentator has highlighted the fact that the Seventh Circuit developed a line of cases standing for this interpretation of *Brady* with no support. See Villaverde, *supra* note 79, at 1510-12.

114. 514 U.S. at 437 (1995).

115. See *id.* at 437-38. See also *Strickler v. Greene*, 527 U.S. 263 (1999) (relying on *Kyles* and applying *Brady* analysis to exculpatory evidence obtained by the detective and

The prosecutor's duty extends at least to the exercise of due diligence regarding information in the hands of the law enforcement officers working on the case. In *Jackson v. Brown*,<sup>116</sup> for example, the prosecutor failed to correct the witness's false denials that he had been promised favorable treatment. The prosecutor did not have actual knowledge of the promises made by the law enforcement officers.<sup>117</sup> Nevertheless, the court concluded that the prosecutor would have discovered the promises if he had fulfilled his duty to investigate.<sup>118</sup> As a result, the use of the false testimony violated the defendant's right to due process.<sup>119</sup>

Duty analysis will extend due process protection to cases in which the necessary knowledge would not be attributed to the prosecution. For example, in *United States v. Wallach*,<sup>120</sup> the Second Circuit granted relief based on the prosecutors' failure to investigate and discover that certain testimony was false. In *Wallach*, a prosecution witness testified falsely that he had stopped gambling at the government's request.<sup>121</sup> At trial, the defense produced evidence that the witness had in fact continued to gamble.<sup>122</sup> The prosecution disregarded the defense evidence. Although the prosecutors should have "been on notice" that the witness was committing perjury, they took no steps to investigate and did not correct the witness's false denials.<sup>123</sup> Further, the prosecution rehabilitated the witness on redirect examination by permitting him to explain away the defense evidence of his continued gambling.<sup>124</sup> The prosecutors had no actual knowledge of the falsity, and the knowledge of the lay witness would not be imputed to the prosecution. Nevertheless, the court

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not shared with the prosecutors); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) (referring to prosecutor's duty to find favorable evidence). See also Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331, 349-50 (1998) (discussing prosecution's duty to discover exculpatory evidence); Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, 22 PROSECUTOR 20, 27 (Mar. 2008) (citing *Kyles* for the proposition that the prosecutor is responsible for information in the hands of the police).

116. *Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008).

117. *Id.* at 1072.

118. *Id.* at 1074-75.

119. *Id.*

120. 935 F.2d 445, 456 (2d Cir. 1991).

121. *Id.* The witness was later convicted of perjury based on that false testimony.

122. *Wallach*, 935 F.2d at 457 (2d Cir. 1991).

123. *Id.* See also *Shih Wei Su v. Filion*, 335 F.3d 119 (2d Cir. 2003). In *Shih Wei Su*, the Second Circuit confronted a similar situation and turned to the concept of duty rather than attribution, stating that "before a prosecutor puts to the jury evidence that a witness has made no deal with the government, he or she has a fundamental obligation to determine whether that is so." 335 F.3d at 127. The court also referred to the prosecutor's "duty to avoid eliciting false testimony." *Id.*

124. *Wallach*, 935 F.2d at 457 (2d Cir. 1991).

concluded that the prosecution violated the defendant's right to due process by failing to fulfill the duty to discover and correct the false testimony.<sup>125</sup> In other cases, the duty to investigate may similarly be triggered by a defense motion or by other information that comes into the hands of the prosecution and make the prosecution responsible for knowledge that would not otherwise be imputed to it.<sup>126</sup>

Like knowingly using false testimony, negligently using false testimony suggests prosecutorial wrongdoing: the court determines that the particular prosecutor failed to fulfill her constitutional obligations to fairness by conducting the necessary inquiry.<sup>127</sup> Reliance on this standard may lead a court to deny a defendant relief out of reluctance to find prosecutorial fault or to impose what the court regards as an onerous burden on prosecutors.<sup>128</sup>

A duty approach should encourage the prosecution to exercise due diligence in its own pretrial investigation. For example, suppose the prosecution does not conduct a careful record check and erroneously informs the defense that a particular witness does not have a criminal record, believing it to be true. A court is unlikely to attribute the information contained in court records to the prosecution. However, if the court applies duty analysis, the court is likely to conclude that the prosecution was negligent and should have known of the record.<sup>129</sup>

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125. See also *Drake v. Portuondo*, 553 F.3d 230, 240 n.5 (2d Cir. 2009) (pointing out that in *Wallach*, the prosecutors may have been consciously avoiding the knowledge of falsity).

126. See also *United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (finding defense request for specific information triggered government duty to review local police department files).

127. See *United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991) (characterizing the prosecutor's failure to exercise due diligence to uncover witness's criminal conviction as "conduct unworthy of the United States Attorney's Office"). See also *Henning*, *supra* note 15, at 766 (arguing that reliance on negligence standard invites inquiry into prosecutorial motives). Cf. *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998) (concluding that defendant must establish something more than governmental mistake to prevail on *Brady* claim).

128. See, e.g., *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993) (rejecting defendant's claim in part because of unwillingness to "interpret *Brady* to require prosecutors to search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information", and noting that such a requirement would place an unreasonable burden on prosecutors). See also *United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (discussing reasonableness of burden to determine whether non-disclosure of evidence in police files and not discovered by prosecutor supported *Brady* claim); Carole Gordon Rapoport, *Dream Team or Evidentiary Nightmare? Defining When a Government Agency is Part of the Prosecution Team*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 81, 96-97 (2004) (citing burden imposed on prosecutors by broad definition of prosecution team).

129. See, e.g., *United States v. Duke*, 50 F.3d 571, 578 (8th Cir. 1995).

At least in theory, a duty approach should also encourage prosecutors' offices to create a better flow of information from law enforcement to the prosecution in order to satisfy that duty.<sup>130</sup> However, neither the states nor the federal government have put in place mechanisms encouraging law enforcement to gather, record, and transmit exculpatory evidence to the prosecution.<sup>131</sup> Thus, to establish robust protection from false testimony, the courts will often have to turn to the duty to discover or imputed knowledge to satisfy the knowledge requirement.

### 3. Imputed Knowledge

Instead of focusing solely on the prosecutor's subjective knowledge or duty to discover, courts should view the government's knowledge collectively and impute knowledge from other government actors to the prosecutor to fulfill the knowledge requirement.<sup>132</sup> If certain government actors possessed evidence establishing falsity, the court should treat the government team as having knowledge and need not determine who actually accessed or could have discovered the evidence.

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130. See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (expressing view that procedures could be implemented to ensure that information gets to prosecutors); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (suggesting that prosecution offices could establish procedures and regulations "to insure communication of all relevant information on each case to every lawyer who deals with it"); *United States v. Alvarez*, 86 F.3d 901, 904-05 (9th Cir. 1996) (exhorting prosecutors to personally review files rather than relying on law enforcement personnel). See also *Bibas et al.*, *supra* note 82, at 2023-25 (discussing interaction between prosecutor's offices and law enforcement); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 813-20 (2003) (highlighting need for improved team interaction between prosecution and law enforcement); Fisher, *supra* note 113, at 1382-84 (questioning ability of prosecutors to obtain information in police files).

131. See Gershman, *Games Prosecutors Play*, *supra* note 101, at 552-53 (discussing incentives for prosecutors not to search for exculpatory evidence); Fisher, *supra* note 113, at 1414-35 (discussing lack of and barriers to such mechanisms in United States and arguing that prosecutors do not have access to favorable evidence in police files and must rely on "persuasion and negotiation, rather than authority"). See also *id.* at 1435-38 (discussing police practices that keep exculpatory evidence away from prosecutors).

132. In *United States v. Osorio*, 929 F.2d 753 (1st Cir. 1991), the First Circuit recognized the parallel between the definition of prosecution knowledge under *Brady* and the imputation of knowledge within a corporation to establish corporate liability:

The criminal responsibility of a corporation can be founded on the collective knowledge of its individual employees and agents. There is no reason why similar principles of institutional responsibility should not be used to analyze the actions of individual government attorneys called upon to represent the government as an institution in matters of court-ordered disclosure obligations.

*Id.* at 761 (citation omitted).

The attribution approach has been used frequently when assessing *Brady* violations.<sup>133</sup> When assessing claims based on governmental failure to disclose exculpatory evidence, courts have not always required either that the prosecutor had subjective knowledge of the information or that the prosecutor should have discovered the information. Instead, courts have held that the defendant can show a due process violation by proving that other government actors knew of the exculpatory evidence.<sup>134</sup> In *Pennsylvania v. Ritchie*,<sup>135</sup> for example, the Court treated files in the state agency charged with child protection as if they were known to the prosecution, even though the contents of the files were

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133. See *Moore v. Gibson*, 195 F.3d 1152, 1164 (10th Cir. 1999) (noting that “[k]nowledge of police officers or investigators will be imputed to the prosecution”); *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999) (noting that when agency is sufficiently involved, agency knowledge will be imputed to prosecutor); *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) (noting in dictum that prosecutor is “presumed to have knowledge of all information” gathered in investigation); *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (holding that “[f]or *Brady* purposes, the FDA and the prosecutor were one” where the agency was responsible for administering the relevant statute and had consulted with the prosecutor on the criminal case); *United States v. Kaufmann*, 783 F.2d 708, 709 n.5 (7th Cir. 1986) (noting that other courts have attributed the knowledge of another public employee to the prosecution); *Wedra v. Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982) (stating that “knowledge of a police officer may be attributable to the prosecutor if the officer acted as an arm of the prosecution”); *Martinez v. Wainwright*, 621 F.2d 184, 187 n.4 (5th Cir. 1980) (using language of attribution in discussing *Brady* violation). See also Reiss, *supra* note 78, at 1410 n.214 (collecting cases discussing imputed knowledge); Carlson, *supra* note 77, at 1176-77 (arguing that all *Brady* violations be assessed under a concept of state action that includes “all law enforcement officers in the state” rather than looking for ways “to ‘charge’ the prosecutor with knowledge held by others”); Hochman, *supra* note 89 (discussing extent to which prosecutor will be charged with knowledge of favorable evidence).

134. See *Jackson v. Brown*, 513 F.3d 1057, 1074 (9th Cir. 2008):

The prosecutor is responsible for the nondisclosure of assurances made to his principal witnesses even if such promises by other government agents were unknown to the prosecutor. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure (citations omitted).

See also *United States v. Bagley*, 473 U.S. 667 (1985) (finding possible *Brady* violation based on information known to law enforcement officers but not to prosecutor); *United States v. Osorio*, 929 F.2d 753, 760-61 (1st Cir. 1991) (holding prosecutor responsible for information in the hands of other prosecutors in the same office or of the Federal Bureau of Investigation); *United States v. McCord*, 509 F.2d 334, 342 n.14 (D.C. Cir. 1974) (stating that “‘prosecution’ includes all agencies of the federal government involved in any way in the prosecution of criminal litigation”); *Manning v. State*, 884 So.2d 717, 723-24 (Miss. 2004) (granting defendant hearing on new trial motion where defendant produced evidence that law enforcement officers solicited perjury but offered no evidence that the prosecutor was aware that the testimony was false). See generally Villaverde, *supra* note 79, at 1489-90 (discussing attribution of knowledge to prosecutor).

135. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

privileged and had not been disclosed to the prosecutors or investigators in the case.<sup>136</sup>

Imputed knowledge should play at least as great a role in false testimony cases. When the prosecution calls a witness to testify, the government has a heightened obligation regarding information that demonstrates that the witness testified falsely. An argument can be made that courts should impute knowledge more broadly in the false testimony cases. When a witness testifies for the prosecution, the government concern with protecting against falsity is satisfied by knowledge of a far narrower range of information than in non-disclosure cases. The focus is only on information that counters witness's in-court testimony rather than on any information or evidence that might prove exculpatory.

The Supreme Court recognized that imputed knowledge could support a due process claim based on false testimony in *Giglio*.<sup>137</sup> Invoking agency theory, the Court held that the promise made by one prosecutor was attributed to the office as a whole.<sup>138</sup> This approach divorces the analysis of the false testimony from notions of prosecutorial wrongdoing or negligence. Instead of asking what the prosecutor knew or should have known, the court simply asks whether those close enough to the case that their knowledge is imputed to the prosecution had knowledge that contradicted the testimony. If a government actor possesses knowledge that would establish the falsity of a witness's testimony, imputing that knowledge to the prosecution entitles the defendant to have her claim evaluated under the lower materiality standard applied in false testimony cases. The courts should therefore address the question of imputed knowledge forthrightly and determine when the prosecutor is responsible for information known to others in government.<sup>139</sup>

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136. *Id.* at 57.

137. 405 U.S. 150, 152 (1972).

138. The Court explained, "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Id.* at 154 (citing RESTATEMENT (SECOND) OF AGENCY § 272, and American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d)).

139. *See, e.g.*, *Ex parte Castellano*, 863 S.W.2d 476, 480-81 (Tex. Crim. App. 1993) (recognizing that knowledge of law enforcement officers may be imputed to prosecution). *See also* *Sinha*, *supra* note 115, at 27 (citing *Giglio* for the proposition that "a prosecutor is responsible for disclosing to the defense not only evidence he knows about, but also information that is in the possession of other prosecutors in his office").

In *Giles v. Maryland*, 386 U.S. 66 (1967), Justice White, concurring, also treated the question as one of imputed knowledge, using the language of agency and attribution, not of duty:

There is another matter for the consideration of the Maryland court: the prosecuting attorney of Montgomery County was not charged with the knowledge of Prince George's County officers but he was charged with what

Despite this aspect of the reasoning in *Giglio*, some courts have taken restrictive positions on when the knowledge residing elsewhere in the government can be imputed to the prosecution and have declined to impute knowledge from one government actor to another.<sup>140</sup> The courts should give imputed knowledge a greater role in false testimony cases. In addition, the courts should establish criteria to guide decisions about when to impute knowledge.

The extent of imputation in false testimony cases should be both broader and narrower than that called for by rules of agency.<sup>141</sup> On one hand, the law enforcement agencies—state and federal—with whom the prosecution works are not generally agents of the prosecutor’s office. As a result, a strict rule of agency would circumscribe due process protection too narrowly, allowing law enforcement to defeat due process protection merely by withholding information from the prosecution. On the other hand, both the prosecutor’s office and the law enforcement and

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the police officers of Montgomery County knew. Was he also charged with the knowledge of other Montgomery County officials such as Lynn Adams, and, to the extent of their involvement with Montgomery County agencies, Dr. Connor and Dr. Doudoumopoulos?

*Id.* at 96. See also Carlson, *supra* note 77, at 1175.

140. See, e.g., *United States v. Hawkins*, 78 F.3d 348, 351 (8th Cir. 1996) (declining to impute knowledge from federal prosecutor in one state to federal prosecutor in a different state); *Pina v. Henderson*, 752 F.2d 47, 49-50 (2d Cir. 1985) (summarizing authority declining to impute knowledge from various federal agencies to prosecutor); *United States v. Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975) (declining to impute to prosecutors knowledge of contents of tax returns filed with IRS). In *Stofsky* the court also noted that the defendant could have found additional information with the exercise of due diligence. *Id.* at 245. See also *United States v. Steinberg*, 99 F.3d 1486, 1490-91 (9th Cir. 1996). In *Steinberg*, the agent working on the case knew that the law enforcement officer's testimony was false. *Id.* Nevertheless, the court declined to treat the case as a false testimony case, but gave the defendant relief on the basis of the *Brady* violation because the evidence withheld by the agents was material, characterizing the case as a “close one” under that standard of materiality. *Id.* Instead, the court should have imputed the agents’ knowledge to the prosecutor and assessed the case under the lower standard of materiality applied to false testimony cases.

141. Section 272 of the Second Restatement of Agency, cited in *Giglio*, provided:

In accordance with and subject to the rules stated in this Topic, the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.

RESTATEMENT (SECOND) OF AGENCY § 272 (1958). This provision was superseded by Section 5.04 of the Third Restatement of Agency, which provides:

For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent

(a) acts adversely to the principal as stated in § 5.04, or

(b) is subject to a duty to another not to disclose the fact to the principal.

RESTATEMENT (THIRD) OF AGENCY § 5.03 (2006).



other investigative agencies are agents of the same sovereign. A broad agency approach would lead to the position that all government knowledge is imputed to the prosecution. The resulting rule would be far broader than any recognized by the courts. It would extend to agencies with vastly disparate responsibilities and reach information not even available to prosecutors.<sup>142</sup>

Instead, courts should determine whether to impute knowledge from other government actors to the prosecution by looking at their connection to the investigation and prosecution.<sup>143</sup> The courts' construction of the government's discovery obligation under the Federal Rules of Criminal Procedure provides some guidance.<sup>144</sup> Under the rules, material may be regarded as falling within the prosecution's possession, custody or control, and therefore subject to discovery, even when the prosecutor does not actually possess the material. If an actor closely associated with the criminal case possesses material that would be discoverable if actually possessed by the prosecution, then the prosecution must disclose it.<sup>145</sup>

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142. See Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437 (2010) (discussing discovery challenges in terrorism cases); Richman, *supra* note 130, at 756-57 (describing federal agency structure and hierarchy); Fredman, *supra* note 115, at 336-38 (discussing some barriers between federal agencies). *But see* United States v. McVeigh, 954 F. Supp. 1441 (D. Colo. 1997) (stating broad view of prosecutors' obligations under *Brady* as agents of government). In *McVeigh*, the district court explained:

The lawyers appearing on behalf of the United States, speaking for the entire government, must inform themselves about everything that is known in all of the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial. That is their burden under *Brady*.

*McVeigh*, 954 F. Supp. at 1450.

143. See Rapoport, *supra* note 128 (discussing approaches).

144. See United States v. Hamilton, 107 F.3d 499, 509 n.5 (7th Cir. 1997) (noting that *Brady* imposes on a federal prosecutor an obligation to obtain favorable evidence from state entities if the prosecutor is aware of the information).

145. See United States v. Jordan, 316 F.3d 1215, 1249 (11th Cir. 2003) (recognizing that Federal Rule of Criminal Procedure 16 treats material in the hands of an investigative agency "closely connected to the prosecutor" as within the government's custody and control); United States v. Santiago, 46 F.3d 885, 893-94 (9th Cir. 1995) (holding that files held by the Bureau of Prisons were within prosecution possession and control given Bureau's role providing evidence for the prosecution); United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989) (declining either to limit obligation to material within the particular federal district or to extend the obligation to material in the possession of any federal agency, but holding that "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant"); United States v. Poulin, 592 F. Supp. 2d 137, 143 (D. Me. 2008) (concluding that recordings of phone calls in possession of county were within government's control where federal authorities "inherited" prosecution from the county sheriff, had free access to the recordings, and to large extent directed the state agency's own use of the recording system); United States v. Libby, 429

Within the law enforcement arm of a single jurisdiction, knowledge should be imputed to the prosecution broadly.<sup>146</sup> *Giglio* establishes that knowledge is imputed to the prosecutor from all members of the prosecutor's office.<sup>147</sup> In addition, knowledge should be imputed from the criminal investigative agencies that have contributed to the prosecution effort<sup>148</sup> as well as other government agencies that have assisted in the case.<sup>149</sup> The prosecution should be held responsible for

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F. Supp. 2d 1, 10-11 (D.D.C. 2006) (concluding that the Office of the Vice President and the Central Intelligence Agency were sufficiently aligned with the prosecution that material in their custody was within the prosecution's possession and control). *But see* *United States v. Gatto*, 763 F.2d 1040, 1047-48 (9th Cir. 1985) (holding that rule reaches only material within actual possession of federal government); *United States v. Diecidue*, 448 F. Supp. 1011 (M.D. Fla. 1978) (holding that knowledge of state officers was not imputable to federal authorities even though they participated in joint task force).

146. *See, e.g.*, *Smith v. Sec'y of New Mexico Dep't of Corr.*, 50 F.3d 801, 825 n.36 (10th Cir. 1995) (concluding that knowledge from two state agencies investigating defendant should be imputed to county prosecutor); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1985) (holding that *Brady* obligation extended to evidence in the hands of officers aligned with the prosecution team). *See also* Rapoport, *supra* note 128, at 98-99 (discussing threat to fairness if courts impute knowledge too narrowly).

147. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

148. *See* *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995) (noting that prosecution is deemed to have knowledge of information in files of agency working on the investigation); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (*per curiam*) (recognizing that *Brady* obligation applies to both investigative and prosecutorial members of prosecution team). This approach is consistent with decisions finding *Brady* violations where the exculpatory evidence was in the hands of a government agency, but not the prosecutor's office. *Id.* *See, e.g.*, *United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (recognizing that *Brady* obligation extends to members of prosecution team and declining to extend obligation to information in hands of other government actors); *United States v. Auten*, 632 F.2d 478, 480-81 (5th Cir. 1980) (rejecting government argument that it had not withheld criminal record of a government witness since it had not run a criminal record check); *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971) (stating that "[t]he duty of disclosure [imposed by the constitution and by Fed. R. Crim. P. 16] affects not only the prosecutor, but the Government as a whole, including its investigative agencies."). *See also* *Arnold v. McNeil*, 622 F. Supp. 2d 1294, 1321 (M.D. Fla. 2009), *aff'd sub nom. Arnold v. Sec'y, Dep't of Corr.*, 595 F.3d 1324, 1324 (11th Cir. 2010) (*per curiam*) (holding that corrupt officer's knowledge of his own wrongdoing was imputed to prosecutor, supporting defendant's claim that there was a *Brady* violation); *Criminal Discovery in Collaborative Cross-Agency Investigations: Does New Justice Department Guidance Create New Discovery Obligations?*, 5 BNA WHITE COLLAR CRIME REP. (BNA) NO. 193 (Mar. 12, 2010) (discussing connection to case that makes agency knowledge discoverable); Villaverde, *supra* note 79, at 1493-1502 (discussing prosecution team approach in *Brady* cases); Hochman, *supra* note 89, at 1681-83 (discussing "prosecution team" approach).

149. *See, e.g.*, *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) (stating that police officers who provided protection were part of state prosecution team); *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (holding that FDA and the prosecutor were one for *Brady* purposes where agency had worked closely with prosecutor on case); *Martinez v. Wainwright*, 621 F.2d 184, 186-88 (5th Cir. 1980) (finding *Brady* violation where prosecutor did not produce victim's rap sheet, which was in possession of medical

knowledge possessed by all members of the broadly defined prosecution team.<sup>150</sup> Even if the law enforcement officers are not under the authority of the prosecution, their knowledge should be imputed to the prosecution if they work closely with the prosecution on the case.<sup>151</sup> The government should not be permitted to avoid its obligation to correct false testimony by cabining critical information to keep it away from the prosecution.

Further, if a law enforcement officer testifies falsely then that officer's knowledge should be imputed to the prosecution even if the officer is from an agency that is not at the heart of the investigation.<sup>152</sup>

examiner's office). *But see* United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989) (per curiam) (stating that prosecution team is limited to prosecutor and those over whom prosecutor has authority).

150. The United States Department of Justice has addressed the question of who falls within the prosecution team. Concluding that prosecutors' obligation to search for exculpatory or impeaching evidence extends to material in the hands of members of the prosecution team, the guidance memo listed factors that help determine who is a member of the prosecution team:

- \* Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- \* Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- \* Whether the prosecutor knows of and has access to discoverable information held by the agency;
- \* Whether the prosecutor has obtained other information and/or evidence from the agency;
- \* The degree to which information gathered by the prosecutor has been shared with the agency;
- \* Whether a member of an agency has been made a Special Assistant United States Attorney;
- \* The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- \* The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

David W. Ogden, Memorandum from Deputy Attorney Gen. to Dep't Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html> [hereinafter Ogden Memo]. *See generally* David E. Roth et al., *Memo to Prosecutors: DOJ Focuses on Discovery Obligations*, 25-SUM CRIM. JUST. 4, 9-10 (2010) (discussing Ogden Memo and concept of prosecution team).

151. *See, e.g.*, United States v. Antone, 603 F.2d 566, 568-70 (5th Cir. 1979) (reasoning that knowledge of state investigators who cooperated in joint investigation should be imputed to federal prosecutors). *But see* United States v. Combs, 267 F.3d 1167, 1175-76 (10th Cir. 2001) (noting division of authority concerning whether information in files of other government agencies is subject to *Brady* and declining to decide whether government was responsible for information in Pretrial Services report related to witness); United States v. Sherlin, 67 F.3d 1208, 1218 (6th Cir. 1995) (holding failure to disclose presentence report of government did not violate *Brady*).

152. *See* United States v. Deutsch, 475 F.2d 55, 57-58 (5th Cir. 1973), *rev'd on other grounds*, United States v. Henry, 749 F.2d 203 (5th Cir. 1984) (holding prosecution

The prosecution's reliance on the testimony of any law enforcement employee should charge the prosecution with that witness' knowledge of falsity. Otherwise, a defendant may too easily fall victim to government-generated false testimony. For example, in *United States v. Williams*,<sup>153</sup> a government forensic expert testified falsely about his qualifications. The court evaluated the defendant's claim as establishing false testimony not known to the prosecution.<sup>154</sup> Instead, the court should have treated the defendant as having established knowing use of false testimony.<sup>155</sup> The prosecution should not be able to deny responsibility for the false testimony when a law enforcement witness embellishes his credentials or otherwise presents false information to the jury. The witness's integration into the investigation and trial should lead the courts to impute the witness's knowledge to the prosecution.

It is less clear whether information in the hands of government agents from the same jurisdiction but not related to the particular case should be imputed to the prosecution.<sup>156</sup> However, since the issue is not wrongdoing, but fairness, the courts should give robust protection,

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responsible under *Brady* for exculpatory evidence in Post Office employee's personnel file). The courts do not always impute such knowledge. See *United States v. Williams*, 233 F.3d 592, 593 (D.C. Cir. 2000) (treating false testimony by government forensic expert as unknowing use of false testimony). See also Hochman, *supra* note 89, at 1683-84 (discussing "readily available" approach under *Brady*). In *United States v. Massac*, 867 F.2d 174, 178-79 (3d Cir. 1989), the Third Circuit treated false testimony by an officer as a basis for a new trial motion based on newly discovered evidence of perjury and not as a basis for a constitutional violation.

153. *Williams*, 233 F.3d at 593. See also *United States v. Stewart*, 323 F. Supp. 2d 606, 616-18 (S.D.N.Y. 2004). In *Stewart*, the court declined to attribute to the prosecution the knowledge of a forensic expert from the Secret Service lab even though the expert had provided support to the prosecution as they prepared for trial. *Id.* at 618. The expert assisted in the end of the investigation by working with FBI agents to supervise the defense experts as they gathered ink samples, was designated as a witness for the prosecution, and helped the prosecutors anticipate the likely defense forensic testimony. *Id.* at 616. At trial, in addition to providing testimony, he was in court during the defense expert's testimony and suggested cross-examination questions to the prosecutor, who could not recall whether he used them. *Id.* at 616-17.

154. *Williams*, 233 F.3d at 593-94.

155. See *In re Investigation of West Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 505 (W. Va. 1993) (concluding that prosecution was responsible for false testimony of expert witness from State Police Crime Lab even though not aware of the falsity). But see *Stevenson v. State*, 473 A.2d 450, 450-52 (Md. 1984) (treating case as one of ordinary newly discovered evidence where defendant learned that state's forensic expert lied about credentials).

156. See, e.g., *United States v. Avellino*, 136 F.3d 249, 255-56 (2d Cir. 1998) (limiting extent of imputed knowledge under *Brady*); *United States v. Locascio*, 6 F.3d 924, 948-49 (2d Cir. 1993) (stating that knowledge of federal agents who did not work on the case in question would not be imputed to prosecution team). In *Avellino*, the Second Circuit expressed concern that extending imputation to agencies that were not involved in the prosecution would impose too great a burden on the prosecutor to unearth the information. *Avellino*, 136 F.3d at 255-56.

imputing knowledge possessed by any law enforcement agent in the same jurisdiction to the prosecution. For instance, in *United States v. Quinn*,<sup>157</sup> the defendant was prosecuted by federal authorities in New York for stock fraud. The Second Circuit held that he was not entitled to relief where the prosecutors in New York had allowed false testimony to stand uncorrected because they were unaware of a sealed indictment returned by a federal grand jury in Florida charging their key witness with stock fraud.<sup>158</sup> The court asserted—correctly—that to impute knowledge from anywhere in the federal government to the prosecution would be absurd. However, the court seemed to similarly reject as absurd the imputation of knowledge from one prosecutor to another within the Justice Department.<sup>159</sup> Instead, the court should have recognized that both United States Attorney's Offices were part of the same large office and should have imputed knowledge from one to the other. If the trial was unfair because the jury was not informed of the sealed indictment, the court should have ascribed to the Justice Department's responsibility for the critical piece of information and concluded that the defendant did not receive due process.

The result would not be imputation of knowledge throughout the federal government; imputation would still be circumscribed. For example, in *United States v. Pelullo*,<sup>160</sup> a non-disclosure case, the court stated as a general principle "that the prosecution is only obligated to disclose information known to others acting on the government's behalf in a particular case."<sup>161</sup> The court concluded that the Pension and Welfare Benefits Administration (PWBA), the civil arm of the United States Department of Labor, was not a member of the prosecution team, so there was no due process obligation to disclose favorable information in the hands of the PWBA, even though the criminal arm of the Department of Labor was working on the defendant's prosecution.<sup>162</sup> Similarly, information held by regulatory agencies not involved in the specific case should not be imputed to the prosecution.<sup>163</sup> In *Pina v.*

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157. *United States v. Quinn*, 445 F.2d 940 (2d Cir. 1971).

158. *Id.* at 943-944.

159. *Id.* at 944.

160. *United States v. Pelullo*, 399 F.3d 197 (3d Cir. 2005).

161. *Id.* at 218.

162. The court expressed concern about the practical challenge facing the prosecution given the defendant's multiple fraud schemes, spread both geographically and temporally. *Id.* at 210-11.

163. *See, e.g., United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (concluding in non-disclosure case that knowledge of exculpatory evidence held by Office of Thrift Supervision, Securities Exchange Commission, or Internal Revenue Service would not be imputed to prosecution where prosecutors did not have actual knowledge of the information and the regulatory agencies had not worked as part of prosecution team).

*Henderson*,<sup>164</sup> the Second Circuit reversed the district court holding that knowledge would be imputed from a parole officer to the prosecutor. The parole officer was neither a member of the prosecution team nor an employee of the government agencies involved in the prosecution, and, as the court noted, “did not work in conjunction with either the police or the prosecutor.”<sup>165</sup>

Knowledge in the hands of other sovereign jurisdictions, however, should not routinely be imputed to the prosecution. A prosecutor operating in one jurisdiction should be responsible for information in the hands of the law enforcement representatives from the other jurisdiction only if they are sufficiently involved in the investigation or prosecution.<sup>166</sup> In *United States v. Risha*,<sup>167</sup> the Third Circuit suggested three factors to consider when determining whether to impute knowledge from actors in one jurisdiction to a prosecutor in a different jurisdiction when evaluating a claim for non-disclosure of exculpatory evidence: (1) whether the party with knowledge of the information is acting on the government’s “behalf” or is under its “control”; (2) the extent to which state and federal governments are part of a “team,” are participating in a

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164. *Pina v. Henderson*, 752 F.2d 47 (2d Cir. 1985).

165. *Id.* at 49.

166. *See United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (imputing knowledge from state investigators to federal prosecutors with whom they had worked on case). *See also Moreno-Morales v. United States*, 334 F.3d 140, 146-47 (1st Cir. 2003) (holding that federal prosecutors were not required to turn over information in sealed minutes of Puerto Rican Senate); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) (stating that “[i]nformation possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case,” but refusing to charge federal prosecutors with knowledge of materials in the possession of a state police department); *United States v. Young*, 20 F.3d 758, 764-65 (7th Cir. 1994) (refusing to impute knowledge of witness’s criminal record to prosecution where prosecution had conducted diligent search and failed to find state conviction). *See also United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (holding that evidence in possession of county was not subject to disclosure under Rule 16); *United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997) (holding that records of guilt pleas entered in state court were not within federal prosecutors’ possession and control); *Thor v. United States*, 574 F.2d 215, 220-21 (5th Cir. 1978) (holding that material in possession of local police was not within prosecution’s possession and control for purposes of Rule 16). *See generally Richman*, *supra* note 130, at 768 (discussing increase in level of state-federal cooperation). *See also Ogden Memo*, *supra* note 150:

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor’s control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence.

*Id.*

167. *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006).

“joint investigation” or are sharing resources; and (3) whether the entity charged with constructive possession has “ready access” to the evidence.<sup>168</sup> A consideration of those factors will indicate whether the connection between the actors in the two different jurisdictions warrants imputation of knowledge.

In *United States v. Antone*,<sup>169</sup> for example, a prosecution witness in a federal trial testified falsely that he had hired his attorney with his own funds. In fact, the State of Florida had paid for his attorney. The payment had arisen from the work of a joint federal-state task force, but the federal authorities did not know of the arrangement.<sup>170</sup> Citing the cooperation of the state and federal actors in the joint investigation, the court concluded that knowledge of the agreement should be imputed to the federal prosecutor.<sup>171</sup>

The imputed knowledge approach offers some advantages. First, the court avoids the challenges of assessing subjective knowledge and of determining prosecution wrongdoing. The court merely makes an objective factual assessment of who had the information and their relationship to the investigation and prosecution. Further, this approach ensures that the government cannot disadvantage the defendant by compartmentalizing information or withholding information from the prosecutor, thereby allowing the prosecutor to present false testimony and deny knowledge of the contrary evidence.

Of course, the determination that the prosecution had knowledge of falsity based on rules imputing knowledge to the prosecution may overlap to a significant degree with the determination based on the prosecutor’s duty to discover information, discussed in the next section.<sup>172</sup> In some cases, however, the outcome will turn on whether the court relies on the prosecutor’s duty to discover or simply imputes

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168. *Id.* at 304. These factors closely parallel the factors suggested by the Ogden Memo to guide determination of who belongs to the prosecution team in a given case for purposes of defining the prosecution’s discovery obligations. *See* Ogden Memo, *supra* note 150.

169. *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979).

170. *Id.* at 568.

171. *Id.* at 569-70. In *Risha*, the court remanded for determination of whether knowledge of the witness’ arrangement with state authorities, which led to a favorable disposition of criminal charges against him in an unrelated state case, should be imputed to the federal prosecutors, imposing on them the obligation of disclosing the favorable evidence. *Risha*, 445 F.3d at 306.

172. *See, e.g.*, *Jackson v. Brown*, 513 F.3d 1057, 1073-75 (9th Cir. 2008). In *Jackson*, the Ninth Circuit concluded that the prosecutor would have known the testimony was false had the prosecutor fulfilled his duty to investigate, but also discussed the agency theory recognized in *Napue* and *Giglio* and concluded that the due process clause was violated because other members of the prosecution team were aware of the correct information, even though the prosecutor was not. *Id.* at 1072-75. The *Jackson* court did not differentiate between these two lines of reasoning. *Id.*

knowledge. For example, in *Arnold v. Secretary, Department of Corrections*,<sup>173</sup> the basis for the defendant's claim was the prosecution's failure to disclose the course of criminal conduct in which the lead investigator was engaged. The court acknowledged that the prosecutor would not have discovered the evidence through the exercise of due diligence because the detective was actively concealing his criminal acts.<sup>174</sup> Instead of relying on a failure to fulfill a duty to investigate, the court held that the detective's knowledge of his own criminality was imputed to the prosecutor.<sup>175</sup>

### B. Establishing Falsity

Courts also narrow protection from false testimony by defining the required falsity narrowly and by demanding a high level of proof from the defendant. The courts should recognize that a due process violation may occur even if the witness is not aware that the testimony is false or if the testimony is misleading but not technically false. Further, the courts should set the standard for proving falsity at an attainable level, recognizing the difficulty of gathering proof where the government has relied on false testimony and suppressed information essential to assessing the defendant's guilt.

#### 1. Defining Falsity

The concept of falsity in the false testimony cases should be construed broadly. The due process clause is not limited to protecting against the use of perjured testimony. Instead, the protection should encompass any inaccuracy that would tend to corrupt the truth-finding process and may include information elicited by the defense on cross-

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173. *Arnold v. McNeil*, 622 F. Supp. 2d 1294 (M.D. Fla. 2009), *aff'd sub nom. Arnold v. Sec'y, Dep't of Corr.*, 595 F.3d 1324, 1324 (11th Cir. 2010) (*per curiam*).

174. *Id.* at 1313-14. *See also Moore v. Gibson*, 195 F.3d 1152, 1164-65 (10th Cir. 1999) (addressing defendant's allegation that officers planted evidence and noting that knowledge would be imputed to prosecution; it seems unlikely that prosecutor would have discovered police misconduct); *Crivens v. Roth*, 172 F.3d 991, 996-98 (7th Cir. 1999) (concluding prosecution suppressed favorable information, without addressing how hard it would have been for prosecution to obtain the information, because the information was held by a state agency). *But see United States v. Hawkins*, 78 F.3d 348, 351 (8th Cir. 1996) (concluding that finding information possessed by federal prosecutor in a different state would have exceeded duty, but also declining to impute knowledge even though both prosecutors were agents of the federal government). In *Hawkins*, the court should have imputed the knowledge to the prosecutors in *Hawkins'* case regardless of whether due diligence would have led them to the information. *Id.*

175. *Arnold*, 622 F. Supp. 2d at 1315 (M.D. Fla. 2009) (citing *Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979)).



examination as well as by the prosecution on direct examination.<sup>176</sup> Due process should protect against all forms of misleading testimony that goes uncorrected by the prosecution.

Courts sometimes limit due process to protection from the knowing use of perjured testimony by the prosecution.<sup>177</sup> The courts have been led in this direction by the Court's inaccurate statement in dictum in *Agurs*, where the Court characterized the violation as the use of perjured testimony.<sup>178</sup> This characterization overstated the falsity requirement, failing to recognize that earlier decisions implementing this strain of due process protection were based on misleading testimony, not perjury.<sup>179</sup>

Led by this statement of the law, however, courts sometimes turn to perjury laws for the definition of falsity in this context.<sup>180</sup> The courts should not apply the strict standards that have been developed in the context of perjury prosecutions that require the defendant to prove perjury. The definition of perjury has been developed to determine when a witness should be criminally liable for testifying falsely under oath. The resulting perjury standard is too restrictive to adequately protect defendants against the corrupting impact of false testimony. The

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176. In *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir. 1997), the Fifth Circuit asserted that due process would not be violated by an uncorrected false statement elicited on cross-examination. This claim is clearly erroneous. A number of cases, including *Giglio*, focus due process analysis on false testimony on cross-examination. See, e.g., *Giglio v. United States*, 405 U.S. 150 (1972); *Carter v. Mitchell*, 443 F.3d 517, 535-36 (6th Cir. 2006); *Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995).

177. See, e.g., *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010) (saying that due process violation requires proof of perjury and citing perjury case); *United States v. Hoffecker*, 530 F.3d 137, 183 (3d Cir. 2008) (stating that defendant must establish perjury to demonstrate due process violation); *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998) (stating that testimony must be "actually perjured").

178. 427 U.S. 97, 103-04 (1976). See also *supra* Section II.B.

179. See *supra* Section II.B. See also Saltzburg, *supra* note 13, at 1566-72 (arguing that this statement in *Agurs* redirected the development of the law).

180. See, e.g., *McNair*, 605 F.3d at 1208 (saying that due process violation requires proof of perjury and citing perjury case); *Hoffecker*, 530 F.3d at 183 (stating that defendant must establish perjury to demonstrate due process violation); *Coe*, 161 F.3d at 343 (stating that testimony must be "actually perjured"); *Mastracchio v. Vose*, 274 F.3d 590, 603 n.5 (1st Cir. 2001) (citing cases involving prosecution for perjury for proposition that falsity requirement should be narrowly construed); *United States v. Edinborough*, 379 F. App'x 271 (3d Cir. 2010) (applying elements of perjury to false testimony claim); *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984) (rejecting claim because defendant had not alleged government subornation of perjury); *Alvarez v. United States*, 808 F. Supp. 1066, 1084-85 (S.D.N.Y. 1992) (concluding alleged falsity did not rise to the level of perjury and citing cases involving convictions for perjury and false statement); *Scott v. Foltz*, 612 F. Supp. 50, 53 (D.C. Mich. 1985) (reporting that state court had denied relief because the testimony was not "technically perjury"). See also *United States v. Tierney*, 947 F.2d 854, 860 (8th Cir. 1991) (asking whether testimony was perjured); Lynd, *supra* note 7, at 563 (arguing that *Napue* requires defendant to show testimony was actually perjured).

definition of perjury departs from the appropriate due process standard in two ways. First, perjury requires that the witness knows the testimony is false.<sup>181</sup> Second, testimony constitutes perjury only if it is demonstrably false and not if it merely misleads the jury.<sup>182</sup> Neither of these limitations should apply to false testimony cases.

First, the courts should recognize that the defendant's right to due process may be violated even if the witness is unaware of the falsity provided the prosecutor knows or should know the testimony is false.<sup>183</sup> The prosecution is not permitted to obtain a conviction by relying on a mistaken witness that misleads the jury. The fairness of the trial is equally compromised if the witness believes the testimony is accurate, but the prosecution knows or should know it was false. For example, in *Hayes v. Brown*, before trial the prosecution struck a deal with the witness' attorney. The prosecution agreed to dismiss pending felony charges after the witness testified, but asked the attorney not to tell the witness.<sup>184</sup> Having done so, the prosecution represented to the trial judge that there was no deal and elicited testimony from the witness at trial denying that there was a deal. The prosecution did not correct the resulting false testimony.<sup>185</sup> The Ninth Circuit concluded that the defendant was entitled to habeas relief.<sup>186</sup> The State argued unsuccessfully that the witness' ignorance precluded a finding that due

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181. See, e.g., 18 U.S.C. § 1621 (2006) (defining perjury as making a false statement that the witness does not believe to be true); 18 U.S.C. § 1623 (2006) (criminalizing the act of knowingly making a false statement); *United States v. Reveron Martinez*, 836 F.2d 684, 689 (1st Cir. 1988) (stating that to establish perjury government must prove statement was "knowingly" false, that defendant believed testimony was false). See also *Edinborough*, 379 F. App'x 271 (finding no perjury in absence of evidence that witness had willful intent to give false testimony); *Grant v. Ricks*, Nos. 00-CV-6861 JBW and 03-MISC-0066 JBW, 2003 WL 21847238, at \*5 (E.D.N.Y. July 29, 2003) (rejecting false testimony claim in part because witness could have believed truth of misleading testimony).

182. See *Bronston v. United States*, 409 U.S. 352, 360-62 (1973) (holding that witness does not commit perjury if the testimony is literally true, even if misleading); *United States v. Cook*, 489 F.2d 286 (9th Cir. 1973) (holding that perjury conviction cannot be based on statement that is misleading but literally true).

183. See *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988) (rejecting argument that prosecutor was not required to correct false testimony because he believed witness thought it was true); 5 WAYNE R. LAFAYETTE ET AL., CRIMINAL PROCEDURE 497 (1999) ("As lower courts have noted, it matters not whether the witness giving false testimony was mistaken or intentionally lying. If the prosecution knows that the witness's statement is untrue, it has a duty to correct it."); Saltzburg, *supra* note 13, at 1560 (noting that in *Napue* Supreme Court was not concerned with whether witness knew testimony was false).

184. *Hayes v. Brown*, 399 F.3d 972, 977 (9th Cir. 2005) (en banc) (noting that the prosecutor took these steps to enable the witness to deny the deal under oath without perjuring himself).

185. *Id.* at 980.

186. *Id.* at 988.

process was violated.<sup>187</sup> The court emphasized that the constitution protects against the use of testimony that the prosecutor knew or should have known was false, not merely perjured testimony.<sup>188</sup> The prosecution cannot use the witness as its unwitting tool that presents the false testimony convincingly because the prosecution keeps the witness in the dark.<sup>189</sup> Second, due process may be violated by testimony that misleads the jury while skirting actual falsity. Courts sometimes impose a high standard for falsity.<sup>190</sup> However, the Supreme Court recognized the corrupting impact of misleading testimony in *Alcorta* and granted relief because the prosecutor's questioning of a key witness created a

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187. *Id.* at 980-81.

188. *Id.* at 980.

189. *Id.* at 981; *People v. Potter*, 894 N.E.2d 490, 496-97 (Ill. App. Ct. 2008) (concluding that state allowed jury to be misled where witness testified there was no agreement but facts suggested prosecution manipulation since morning after she testified witness pleaded guilty and prosecution reduced charges and recommended probation based on her testimony in defendant's case); *People v. Nino*, 665 N.E.2d 847, 853-54 (1996) (concluding that prosecution purposely manipulated timing of witness's guilty plea to allow witness to appear in "misleading light"). *See also* *Phillips v. Woodford*, 267 F.3d 966, 984 (9th Cir. 2001) (discussing prosecutor's practice of "insulating" witnesses from information about promises of favorable treatment). *But see* *Willhoite v. Vasquez*, 921 F.2d 247, 250 (9th Cir. 1990) (concluding prosecution had no obligation to correct testimony that witness thought was true because witness did not know about deal); *Hayes*, 399 F.3d at 990 (9th Cir. 2005) (Tallman, J. dissenting) (concluding that false testimony was not material because the witness' credibility would have been unaffected by evidence of a deal as to which he was ignorant). In some cases, the prosecution can successfully avoid a false testimony claim by keeping the cooperating witness in the dark as to the likely ultimate sentence. *See, e.g.,* *Ferrell v. State*, 29 So. 3d 959, 977-78 (Fla. 2010) (finding no violation where witness testified and prosecutor argued that witness faced a ten-year sentence even though witness was ultimately sentenced to a mere one and a half years, but defendant could not establish agreement that contradicted testimony and argument).

190. *See, e.g.,* *Abdus-Samad v. Bell*, 420 F.3d 614, 626 (6th Cir. 2005) (citing *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000) (stating that testimony must be "indisputably false" rather than "merely misleading"); *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000) (rejecting defendant's argument that witness's testimony that there were no pending charges was false, concluding that witness understood question as referring to criminal charges and not to parole violation hearings); *United States v. Dickerson*, 248 F.3d 1036, 1042 n.4 (11th Cir. 2001):

It is not clear that Williams committed perjury, particularly with regard to pre-trial preparation. As noted by the district court judge, the defense counsel's question—"Did you meet with an agent or prosecutor to go over your proposed testimony?"—could be understood to ask whether the witness had been "coached." R12-134. Thus, Williams' negative response is arguably a denial of having been unduly influenced rather than, as Dickerson contends, an answer to the simple query whether he had met at all with any Government agent before the trial.

*See also* Cassidy, *supra* note 103, at 1163-64 (assuming that the Constitution is not violated if prosecutor presents misleading testimony concerning inducements to witness). Professor Cassidy goes on to argue that *Giglio* should be construed to extend to implied as well as express inducements. *Id.* at 1166-67.

false impression even though the witness' testimony was not actually false.<sup>191</sup> Following this precedent, the courts should recognize that lay jurors may be misled by testimony that is not actually false and are not likely to parse the testimony technically to discern the truth that lies behind misleading testimony.<sup>192</sup>

Whenever a witness's testimony actively misleads the jury, even if technically not false, the court should assess the claim as a possible false testimony claim.<sup>193</sup> For example, in *Manning v. State*,<sup>194</sup> the crime scene investigator testified that a footprint in blood found at the crime scene was not suitable for comparison to the defendant's shoe.<sup>195</sup> The investigator did not reveal that he had measured the print and discerned that the shoe was a much smaller size than the defendant's.<sup>196</sup> While not technically false, the witness's testimony generated the false impression that the evidence neither inculpated nor exculpated the defendant and should have been evaluated as a false testimony claim.<sup>197</sup> Similarly, if a witness testifies that she does not recall an event, such as a photo identification, the jury may be lead to believe the event never happened. If the prosecution knows the event took place, the prosecutor should have the obligation to correct the jury's misimpression.<sup>198</sup> Further, the prosecutor's questioning on cross-examination may violate the defendant's right to due process if the prosecutor manipulates the questioning to mislead the jury.<sup>199</sup>

Finally, courts sometimes apply additional inappropriate subject matter restrictions in false testimony cases. For example, in *United*

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191. 355 U.S. 28 (1957). In *Napue*, the Court cited *Alcorta* as standing for the proposition that the State violates due process if it allows false testimony to be uncorrected, reflecting the Court's view that prosecution use of misleading but technically true testimony may violate the defendant's due process rights. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). See generally *supra* Section II.B. See also *Davis v. Alaska*, 415 U.S. 308 (1974) (holding that limitation on cross-examination violated defendant's right to confrontation where it allowed prosecution witness to give misleading answers in response to counsel's questions probing bias).

192. See, e.g., *In re Jackson*, 835 P.2d 371, 381 (Cal. 1992) (rejecting argument that testimony was not technically false and recognizing that it could be misleading to a lay jury).

193. See generally Gershman, *Games Prosecutors Play*, *supra* note 101, at 538-42 (discussing prosecution efforts to mislead while avoiding technically false testimony).

194. *Manning v. State*, 884 So.2d 717 (Miss. 2004).

195. *Id.* at 725.

196. *Id.*

197. *Id.* at 724-25 (evaluating claim as one of non-disclosure rather than false testimony).

198. Cf. *McDonald v. State*, 553 P.2d 171, 177 (Okla. Crim. App. 1976) (holding that witness's testimony that he did not recall viewing photos was not technically false).

199. See, e.g., *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (finding violation where prosecutor used cross-examination to create a false impression and declined to call the witness who would have provided contrary information).

*States v. Meros*,<sup>200</sup> the Eleventh Circuit limited the protection to false testimony that hides the witness's bias against the defendant, and held that the protection did not extend to other types of false information relating to credibility.<sup>201</sup> The court in *Meros* concluded that the witness' self-serving claim that he had surrendered voluntarily was not the type of false statement that would support a due process claim.<sup>202</sup> To the contrary, there are no such limitations on the subject matter; the false testimony may relate to the substance of the criminal charges or to the witness's credibility. Any false or misleading statement regarding credibility may encourage the jury to overestimate the witness's credibility.<sup>203</sup> Such false testimony permits the prosecutor to strengthen the argument in support of the witness's credibility, actively misleading the jury and increasing the likelihood of conviction.<sup>204</sup> Conversely, if revealed to the jurors, the lie may destroy the witness's credibility altogether.<sup>205</sup>

Any false or misleading testimony should be sufficient to support a due process claim. If the subject matter renders the false testimony unimportant or tangential, the court may conclude it is not material,<sup>206</sup> but the court should not invoke a narrow definition of falsity to defeat the defendant's claim.

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200. *United States v. Meros*, 866 F.2d 1304, 1309-10 (11th Cir. 1989).

201. *Id.*

202. *Id.* at 1310.

203. *See, e.g., Ventura v. Attorney General*, 419 F.3d 1269, 1272-76 (11th Cir. 2005) (discussing *Giglio* claim based on witness' false denial that he had received benefit for his testimony); *People v. Olinger*, 680 N.E.2d 321, 329-31 (Ill. 1997). *See also Cassidy, supra* note 103 (discussing problems posed by inducements, one of which is risk of false testimony). The prosecution may avoid direct promises but nevertheless end up presenting intolerably false testimony. *See, e.g., Hayes v. Brown*, 399 F.3d 972, 977 (9th Cir. 2005) (finding due process violation although the witness was not aware of the deal received in exchange for testimony). *See also Cassidy, supra* note 103 (discussing use of implied promises to avoid either false testimony or useful impeachment material). Some courts imply agreements based on rewards that appear to flow from the witness' cooperation and testimony even in the absence of a proven agreement. *See id.* at 1160-62 (criticizing this approach).

204. *See, e.g., Douglas v. Workman*, 560 F.3d 1156, 1163 (10th Cir. 2009); *Shih Wei Su v. Filion*, 335 F.3d 119, 125 (2d Cir. 2003); *Jenkins v. Artuz*, 294 F.3d 284, 289 (2d Cir. 2002); *Phillips v. Woodford*, 267 F.3d 966, 983-84 (9th Cir. 2001); *Scott v. Foltz*, 612 F. Supp. 50, 52 (D.C. Mich. 1985) (reporting that prosecutor argued in rebuttal to defense closing that witness was to be believed because she had not made a bargain for her testimony); *see Cassidy, supra* note 103, at 1155-56 (summarizing law and discussing cases); *see generally id.* at 1140-41 (discussing accomplice's motives to fabricate).

205. *Alvarez v. United States*, 808 F. Supp. 1066, 1095 (S.D.N.Y. 1992) (discussing likely impact on credibility if jury learns witness lied under oath in prior trial).

206. *See infra* Section III.C.

## 2. Proving Falsity

Establishing that particular testimony was false is often challenging. The defendant may not be aware of possible falsity until long after the trial, when memories have faded and evidence has been lost.<sup>207</sup> The defendant must then muster sufficient evidence to convince the court that the trial testimony was false.<sup>208</sup>

In rare cases, irrefutable proof of falsity is readily available.<sup>209</sup> For example, if a witness denied having been convicted, later-discovered proof of a prior conviction establishes that the testimony was false.<sup>210</sup> Similarly, when the prosecution denies that a government witness received some benefit in exchange for cooperation and as a result allows the witness to testify falsely, the defendant may be able to obtain

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207. See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995) (defendant first learned of the exculpatory evidence during post-conviction review in the state); *Rosencrantz v. Lafler*, 568 F.3d 577, 585 n.5 (6th Cir. 2009) (noting witness's weak memory at time of hearing, ten years after trial); *Drake v. Portuondo*, 553 F.3d 230, 237-38 (2d Cir. 2009) ("*Drake II*") (defendant discovered the evidence that the expert had lied about his credentials through research he conducted while in prison, long after he had exhausted his direct appeals, and the state court did not allow him to develop a record to support his allegations that his conviction rested on perjured testimony); *Mitchell v. Gibson*, 262 F.3d 1036, 1064 (10th Cir. 2001) (describing information that first came to light at evidentiary hearing ten years after conviction).

208. See *Carlson*, *supra* note 77, at 1185. Professor Carlson identified three ways of establishing false testimony: "[W]here a key prosecution witness recants his trial testimony on the basis of honest mistake, where a vital witness for the state admits he perjured himself in the original trial, or where later evidence disproved trial testimony. . . ." *Id.*

209. See, e.g., *Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003) (concluding testimony at trial was false because it was contradicted by witness's allocution at sentencing); *United States v. Gallego*, 191 F.3d 156, 163 (2d Cir. 1999) (reporting that government sent defendant letter informing him that witness had perjured himself at trial); *United States v. Alzate*, 47 F.3d 1103, 1108 (11th Cir. 1995) (reporting that law enforcement officer revealed favorable information to the defense when prosecutor did not call him as witness); *United States v. Arnold*, 117 F.3d 1308, 1315-17 (11th Cir. 1997) (stating that the government had tape-recorded conversations with witnesses establishing falsity of trial testimony); *People v. Cornille*, 448 N.E.2d 857, 862 (Ill. 1983) (granting relief where witness was charged with perjury in defendant's trial and academic transcripts established that witness who testified as prosecution expert had lied about credentials). See also *Saltzburg*, *supra* note 13, at 1544-45 (discussing *Strickler* and noting that defense first learned of evidence demonstrating false testimony in discovery process in federal habeas case); *Carlson*, *supra* note 77, at 1185.

210. See, e.g., *Crivens v. Roth*, 172 F.3d 991, 997-98 (7th Cir. 1999) (convicting a witness under an alias); *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998) (stating the witness' full criminal record was not known to the prosecution or defense at trial because the convictions were under two different numbers).

unequivocal proof of the arrangement with the witness through a Freedom of Information Act request.<sup>211</sup>

More often, however, the necessary proof is elusive.<sup>212</sup> The prosecution is not always forthcoming, even when the defendant discovers some information after conviction that suggests the possibility of false testimony at trial.<sup>213</sup> In addition, the defendant's access to discovery during the post-conviction process is limited.<sup>214</sup>

The difficulty of accessing strong evidence of falsity can be fatal to the defendant's claim because courts often resist the argument that a witness testified falsely at trial. The mere fact that the witness has given inconsistent statements or can otherwise be impeached will not generally persuade the court that the witness's testimony was false.<sup>215</sup> Similarly,

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211. See, e.g., *United States v. Bagley*, 473 U.S. 667, 671 (1985) (reporting that defendant discovered proof of benefit when seeking to informant-witnesses through Freedom of Information Act request).

212. See *People v. Cornille*, 448 N.E.2d 857, 862 (Ill. 1983) (discussing challenges defendants faced when establishing that testimony at trial was false). *Parker v. Herbert*, No. 02-CV-0373, 2009 WL 2971575 (W.D.N.Y. May 28, 2009), illustrates how difficult it can be for the defense to gain access to information that challenges a prosecution witness. Shortly before trial, defense counsel acquired information that a key prosecution witness was under criminal investigation and was associated in crime with the victim of the homicide with which the defendant was charged. The trial court rejected counsel's requests for information without appearing to give them serious consideration. As a result, the witness was able to portray himself inaccurately as not being a drug dealer and having no motive to lie. The prosecution built on that false image in closing argument. About eight months after trial, the witness was indicted for a narcotics conspiracy that had included the homicide victim. At his sentencing, the prosecution moved for a 4-level downward departure due to his substantial assistance. Eighteen months later, the government asked to be relieved of its obligations under the plea agreement because of evidence implicating the witness in two homicides as well as evidence that he owed the victim of the original homicide \$25,000 at the time of his death, information that the government possessed and did not turn over during defendant's trial.

*Brady* and its progeny purport to define a duty of disclosure for the prosecutor, but do not do so effectively. The *Brady* test permits the prosecution to withhold favorable evidence without running a large risk of reversal because the defendant may never discover the undisclosed evidence. See *Giannelli*, *supra* note 90, at 603 (noting that suppression of *Brady* material is unlikely to be revealed); *Bibas*, *supra* note 80, at 142 (noting that defense lawyers often never learn of non-disclosed exculpatory evidence).

213. See *Banks v. Dretke*, 540 U.S. 668, 693 (2004) (reporting that even in post-conviction proceedings, state continued to deny falsely that witness had cooperated with police). *But see In re W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993) (ruling on prosecution petition to evaluate convictions in light of discovery that prosecution expert had testified falsely in a number of cases).

214. See *Strickler v. Greene*, 527 U.S. at 287 (discussing limitations on discovery during post-conviction review); *Monroe v. Angelone*, 323 F.3d 286, 294 (4th Cir. 2003) (noting that state court denied request for discovery to support claims on post-conviction review); *Moore v. Gibson*, 195 F.3d 1152, 1164-66 (10th Cir. 1999) (discussing standards for discovery and granting limited discovery hearing). See also *Medwed*, *supra* note 7, at 659 (noting difficulty of obtaining evidentiary hearing).

215. See, e.g., *United States v. McNair*, 605 F.3d 1152, 1208-09 (11th Cir. 2010); *United States v. Ogle*, 425 F.3d 471, 477 (7th Cir. 2005); *Coe v. Bell*, 161 F.3d 320, 343

courts often decline to accept a conflict between two witnesses as establishing falsity.<sup>216</sup> In addition, if a challenge to the falsity was raised at trial, even if not fully explored, the court may simply defer to the jury's assessment of credibility.<sup>217</sup>

The courts should entertain claims of false testimony more readily, scrutinizing the trial testimony when the defendant advances any contrary evidence. For example, in *Kutzner v. Johnson*,<sup>218</sup> an employee of a local company that sold wire testified at trial that the wire used in the homicide and found in the defendant's possession was not common in the geographic area.<sup>219</sup> In his post-conviction challenge, the defendant produced evidence demonstrating that the testimony was unfounded, including documentation from the manufacturer, establishing that the wire was commonly available in the area.<sup>220</sup> The court treated the new evidence as establishing a mere inconsistency between witnesses, and not as proof that the trial testimony was false.<sup>221</sup> The court should have accorded great weight to the evidence. The evidence clearly demonstrated that the witness was wrong and hence his testimony was false on this issue. The court should have concluded that the defendant had produced sufficient proof of falsity to satisfy that aspect of the due process claim.<sup>222</sup>

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(6th Cir. 1998) (stating that "mere inconsistencies" are not sufficient to establish a violation of due process); *Mooney v. Trombley*, No. 05-CV-71329-DT, 2007 WL 2331881, at \*1 (E.D. Mich. Aug. 13, 2007) (discovering defendant's evidence of falsity consisted only of testimony of a new witness who would testify that defendant's wife had made statements inconsistent with her testimony at trial that the defendant had assaulted her). See also *Rusin*, *supra* note 15, at 204-05. Courts similarly disregard evidence of failed memory. See, e.g., *Mills v. Scully*, 826 F.2d 1192, 1195-96 (2d Cir. 1987) (holding that testimony was not so false that it required correction where the witness's confusion resulted in some inaccuracies); *United States v. Milikowsky*, 896 F. Supp. 1285, 1297-98 (D. Conn. 1994) (concluding that witness's testimony, which was punctuated with claims of no memory, was not false testimony that required correction).

216. See, e.g., *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994) (rejecting defense argument based on disagreement between testimony of two prosecution witnesses); *Ferrell v. State*, 29 So. 3d 959, 979 (Fla. 2010) (rejecting argument based on contradiction between witnesses with no way of establishing which was truthful).

217. See *Rosencrantz v. Lafler*, 568 F.3d 577, 585-87 (6th Cir. 2009); *State v. Goodson*, 856 A.2d 1012, 1022-24 (Conn. App. 2004) (concluding that falsity was sufficiently explored at trial).

218. *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001).

219. *Id.*

220. *Id.*

221. *Id.*

222. The defendant would not have prevailed because the court concluded the challenged fact was not material and found no evidence that the government actors knew or should have known the evidence was false. *Id.*



Recantation of trial testimony presents a particularly difficult challenge for a defendant seeking due process relief.<sup>223</sup> Courts are reluctant to accept a witness's recantation as proof that the witness's trial testimony was false.<sup>224</sup> *Ortega v. Duncan*<sup>225</sup> provides insight into the assessment of recanted testimony and suggests an approach more favorable to the defendant. In *Ortega*, the witness had recanted in two other cases as well the defendant's, leading to dismissal of the charges in both the other cases.<sup>226</sup> The district court rejected the defendant's habeas petition on the ground that the witness was so unworthy of belief that his recantation was not credible.<sup>227</sup> The Second Circuit concluded that the trial court erred by focusing solely on whether the witness's recantation was credible.<sup>228</sup> Instead, the court should have used all the information available, including the recantation, to determine whether the witness's trial testimony was false.<sup>229</sup>

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223. See *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987) (stating that recantation will be viewed with great suspicion and gathering cases); Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75 (2008) (considering issues raised by recantation and courts' skepticism of recantation); Harris L. Beach, Jr., *Recanted Testimony: The Red-Headed Stepchild of Criminal Trial Practice*, S. C. LAWYER, at \*40 (May/June 1997) (discussing challenge for defense); Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based Upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1438-40 (1986) (discussing difficulty of establishing claim based on recantation).

224. See generally Armbrust, *supra* note 223, at 98-102.

225. *Ortega v. Duncan*, 333 F.3d 102 (2d Cir. 2003).

226. *Id.* at 104.

227. *Id.* at 107. The Second Circuit reported:

[T]he district court concluded that Garner had essentially no credibility, and was "a totally compliant witness, who can be led by a questioner virtually wherever the questioner wants him to go." Based on its observation of Garner's demeanor on the witness stand and on discrepancies amongst his several sworn recantations, the district court believed that Garner was "making it up as he goes along." The court thus found that Garner's recantation of the testimony he gave at Ortega's trial was unworthy of belief.

*Id.* The state court had declined to make a finding on the witness's credibility.

228. *Id.* at 107.

229. The court explained:

It is our view that a determination that Garner's recantation was not credible is insufficient to establish that Garner's trial testimony was not perjured. While a recantation must be "looked upon with the utmost suspicion," its lack of veracity cannot, in and of itself, establish whether testimony given at trial was in fact truthful. Rather, the court must weigh all the evidence of perjury before it, including but not limited to the recantation, before reaching this conclusion.

*Id.* (citation omitted).

In *State v. McCallum*, 561 N.W.2d 707 (Wis. 1997), the Supreme Court of Wisconsin also articulated an approach to evaluating recanted testimony that better protects the defendant. First, the court explained that the trial court should not resolve the case against the defendant merely because the recantation strikes the court as less credible than the trial testimony of the recanting witness:

An additional question concerns the standard that applies when a court must determine whether trial testimony was false. In some instances, courts set an inappropriately high standard. For example, in *Rosencrantz v. Lafler*,<sup>230</sup> the Sixth Circuit rejected the defendant's false testimony claim because the defendant had failed to show that the challenged testimony was "indisputably false."<sup>231</sup> The Illinois courts have required the defendant to produce clear and convincing evidence of falsity.<sup>232</sup> These standards set the bar too high. Instead, the courts should apply the standard sometimes used to govern motions for a new trial based on newly discovered evidence and ask whether the court is reasonably satisfied that the testimony was false.<sup>233</sup>

### C. *The Materiality Requirement*

The availability of relief for a defendant whose trial was infected by false testimony will depend on whether the defendant can meet the standard of materiality applied by the court. When the defendant establishes the prosecution's use of false testimony, the false testimony is material if there is any reasonable likelihood that it affected the outcome. This standard is less demanding than the standard of materiality applied

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A reasonable jury finding the recantation less credible than the original accusation could, nonetheless, have a reasonable doubt as to a defendant's guilt or innocence. It does not necessarily follow that a finding of "less credible" must lead to a conclusion of "no reasonable probability of a different outcome." Less credible is far from incredible. A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury. However, a finding that a recantation is less credible than the accusation does not necessarily mean that a reasonable jury could not have a reasonable doubt. Therefore, in sum, in determining whether there is a reasonable probability of a different outcome, the circuit court must determine whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt. If so, the circuit court must grant a new trial.

*Id.* at 711. In *McCallum*, the court also recognized that a conventional corroboration requirement poses a possibly insurmountable burden for defendant and therefore defined a more attainable standard of corroboration. The court held that defendant could satisfy the corroboration requirement by showing: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation. *Id.* at 711-12.

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

231. *Id.* at 584 and 587.

232. *People v. Cornille*, 448 N.E.2d 857, 862 (Ill. 1983).

233. *United States v. Lighty*, 616 F.3d 321, 374 (4th Cir. 2010) (stating that a new trial based on recantation should be granted only when "the court is reasonably satisfied that the testimony given by a material witness is false"); *United States v. Lanas*, 324 F.3d 894, 902-03 (7th Cir. 2003) (stating that to grant a new trial based on the discovery of false testimony, the court must be "reasonably satisfied" that the testimony was false).

in non-disclosure cases.<sup>234</sup> However, courts do not always give the defendant the benefit of this favorable standard. Recognizing the peculiar concerns raised by the use of false testimony at trial, the courts should apply the favorable materiality standard and should also assess materiality with care.

### 1. Defining Materiality

Standards of materiality and harm fall on a spectrum.<sup>235</sup> At the end most friendly to the defense is the harmless error test that requires the government to prove harmlessness beyond a reasonable doubt.<sup>236</sup> At the other end of the spectrum is the test commonly applied when the defendant moves for a new trial based on newly discovered evidence: the defendant must prove that the new evidence will probably produce a different result on retrial.<sup>237</sup> When the defendant establishes that the government withheld exculpatory evidence, the Court defines materiality as a reasonable probability that the result would have been different had the exculpatory evidence been disclosed and further defines a reasonable probability as one that undermines confidence in the outcome.<sup>238</sup>

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234. See *supra* Section II.C.

235. In *Strickler v. Greene*, Justice Souter discussed the various standards of materiality:

The circuitous path by which the Court came to adopt “reasonable probability” of a different result as the rule of *Brady* materiality suggests several things. First, while “reasonable possibility” or “reasonable likelihood,” the *Kotteakos* standard, and “reasonable probability” express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers’ reasoning, the differences among the standards are slight. Second, the gap between all three of those formulations and “more likely than not” is greater than any differences among them. Third, because of that larger gap, it is misleading in *Brady* cases to use the term “probability,” which is naturally read as the cognate of “probably” and thus confused with “more likely than not.” We would be better off speaking of a “significant possibility” of a different result to characterize the *Brady* materiality standard. Even then, given the soft edges of all these phrases, the touchstone of the enquiry must remain whether the evidentiary suppression “undermines our confidence” that the factfinder would have reached the same result.

527 U.S. 263, 300-01 (1999) (Souter, J., dissenting in part and concurring in part) (citations omitted). See also *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (recognizing difference between materiality standard in false testimony cases and that in undisclosed evidence cases); *United States v. Duke*, 50 F.3d 571, 577-78 (8th Cir. 1995) (discussing different standards).

236. *Chapman v. California*, 386 U.S. 18, 24 (1967).

237. *United States v. Agurs*, 427 U.S. 97, 111 (stating standard and collecting cases).

238. *United States v. Bagley*, 473 U.S. 667, 681-82 (1985). The Court adopted this definition of materiality from the definition of prejudice in cases where the defendant claims ineffective assistance of counsel and must establish incompetence plus prejudice. *Id.*

In false testimony cases, the standard of materiality that applies is less demanding, defined as any reasonable likelihood that the falsity had an effect on the outcome.<sup>239</sup> Further, the Court has stated that this standard dictates an inquiry equivalent to the harmless error inquiry.<sup>240</sup> The Court has also made it clear that the standard applied to an ordinary motion for a new trial based on newly discovered evidence, not based on a constitutional violation, is more demanding than any of the materiality standards that apply in non-disclosure or false testimony cases.<sup>241</sup>

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239. *United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997) (noting that issue probably did not affect outcome, but holding that defendant had satisfied the standard of materiality that applies in false testimony cases); *U.S. v. Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997) (“The standard of materiality is less stringent, however, when the prosecutor knowingly uses perjured testimony or fails to correct testimony he or she learns to be false.”); *Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995) (equating standard in false testimony cases to traditional harmless error test). In *Shih Wei Su v. Fillion*, 335 F.3d 119 (2d Cir. 2003), the Second Circuit commented on the standard that applies in false testimony cases:

Despite the fundamental nature of the injury to the justice system caused by the knowing use of perjured testimony by the state, the Supreme Court has not deemed such errors to be “structural” in the sense that they “affect [ ] the framework within which the trial proceeds.” Structural errors are those that “so fundamentally undermine the fairness or the validity of the trial that they require voiding [the] result [of the trial] regardless of identifiable prejudice.” Instead, even when a prosecutor elicits testimony he or she knows or should know to be false, or allows such testimony to go uncorrected, a showing of prejudice is required. But the Supreme Court has made clear that prejudice is readily shown in such cases, and the conviction must be set aside unless there is no “reasonable likelihood that the false testimony could have affected the judgment of the jury.”

*Id.* at 126-27 (citations omitted). *See also* *Hall v. State*, 650 P.2d 893, 899 (Okla. Crim. App. 1982) (finding reasonable likelihood that perjury presented by prosecution affected outcome).

240. *See Bagley*, 473 U.S. at 679-80. In *Bagley*, the Court addressed prior decisions and clarified the meaning of the materiality standard applied in cases of false testimony:

The Court noted the well-established rule that “a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.

*Id.* at 678-80 (citing *Agurs*, 427 U.S. at 193). *See also* *United States v. Duke*, 50 F.3d 571, 577 (8th Cir. 1995) (recognizing that standard is the same). The use of different language to express identical inquiry may be confusing. *See, e.g.*, In re Matter of Investigation of W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 505-06 (W. Va. 1993) (discussing standard that applies in false testimony cases and treating harmless error and reasonable likelihood inquiries as different).

241. In *Bagley*, the Court cited its discussion in *Agurs* and explained:

The Court rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal. The Court reasoned: “If the standard applied to the usual motion for a new trial

Nevertheless, despite the Supreme Court's clear holdings, other courts occasionally manifest confusion about the proper standard of materiality.<sup>242</sup> For example, in *United States v. Dickerson*,<sup>243</sup> the Eleventh Circuit equated the materiality requirement in false testimony cases to the higher standard applied to non-disclosure violations not involving falsity.<sup>244</sup> Applying that standard, the court concluded that the false testimony was not material, and the defendant was therefore not entitled to relief.<sup>245</sup> Application of the correct standard of materiality, placing the burden to show lack of effect on the government rather than imposing the burden of showing harm on the defendant, could have led to a different outcome. It is critical that the courts apply the reasonable likelihood standard and not a more demanding standard when the defendant demonstrates knowing use of false testimony.

## 2. Assessing Materiality

In some cases it is clear that the allegedly perjured information had no impact on the defendant's conviction or sentence.<sup>246</sup> In others, the

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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." The standard of materiality applicable in the absence of a specific Brady request is therefore stricter than the harmless-error standard but more lenient to the defense than the newly-discovered evidence standard.

473 U.S. at 680-81 (citations omitted).

242. See, e.g., *Morris v. Ylst*, 447 F.3d 735, 745-46 (9th Cir. 2006) (stating that materiality standard in false testimony cases is the same as in non-disclosure cases and concluding that defendant had not established that false testimony was material); *Ventura v. Attorney General*, 419 F.3d 1269, 1282 (11th Cir. 2005) (discussing state court's application of the wrong standard); *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986) (holding that trial court committed error when it required defendant to prove that correction of false testimony "probably would have resulted in acquittal"); *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009). In *Chabot*, the court held that the harmless error standard required the defendant to establish by a preponderance of the evidence that the falsity contributed to the conviction. Despite its confusion, the court granted the defendant relief. In other cases, however, the court's misunderstanding of the standard may lead to a negative outcome for the defendant. See, e.g., *Ex parte Fierro*, 934 S.W.2d 370 (Tex. Cr. App. 1996) (treating false testimony in hearing on motion to suppress like other false testimony but putting burden on defendant to show harm by a preponderance). *But see Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993) (applying correct standard of materiality and finding in favor of defendant).

243. *United States v. Dickerson*, 248 F.3d 1036 (11th Cir. 2001).

244. *Id.* at 1041-42 (stating that "[t]he materiality element is satisfied if the false testimony 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict'" (citing *Strickler v. Greene*, 527 U.S. 263, 290 (1999))).

245. *Id.* at 1042-43.

246. See, e.g., *Checks v. Gaetz*, 571 F.3d 680, 685-86 (7th Cir. 2009) (holding that allegedly false testimony that defendant no longer lived in the home where the murder

court's approach to materiality determines the outcome. There are two possible approaches: First, the court may assess the likely result had the defense been informed of the contradictory information and the witness testified truthfully, disclosing the facts favorable to the defendant or acknowledging impeaching information. Alternatively, the court may ask how the jury would have judged the case had the jurors learned that the witness had testified falsely under oath.<sup>247</sup> Only this second approach accounts for the gravity and corrupting effect of false testimony.

When the court merely asks what would have happened had the witness given truthful testimony, the court gives insufficient weight to the witness's willingness to testify falsely or the government's willingness to allow false testimony to stand uncorrected.<sup>248</sup> Instead, the court should focus on how a jury would respond upon learning that the witness had given false testimony under oath and the prosecution had failed to correct it. Thus, the court should assess the impact had the jury heard the witness' false testimony, learned it was false, and, further, learned about the government's awareness of the falsity.<sup>249</sup> The likely impact would be the destruction of the witness's overall credibility as well as the credibility of the prosecution itself, an impact beyond that of the truthful testimony alone.<sup>250</sup> Analyzing the impact of the false testimony in this way, a court is more likely to find materiality.<sup>251</sup>

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occurred had no influence on conviction of first degree murder and was harmless error as to the sentence because defendant's sentences were to be served concurrently).

247. A third approach would be to ask whether the evidence without the false testimony was sufficient to uphold the conviction. *See, e.g.*, In re Matter of Investigation of W. Va. State Police Crime Laboratory, Serology Div., 438 S.E.2d 501, 506 (W. Va. 1993) (directing lower courts to determine whether defendants in whose trials a state forensic expert had testified falsely would have been convicted in any event without the false testimony). The Court made it clear that this is not appropriate in *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995).

248. *See, e.g.*, *Cheeks*, 571 F.3d at 685-86 (discussing only what impact truthful testimony would have had on outcome and not considering impact on witness's credibility had jury learned she had lied under oath at trial). In some cases, the government concedes perjury, or even calls it to the defendant's attention. *See also* *United States v. Gallego*, 191 F.3d 156, 165 (2d Cir. 1999) (criticizing trial court for rejecting defendant's challenge to conviction in part by hypothesizing evidence that the prosecution could use on retrial to replace the perjured testimony).

249. *See, e.g.*, *Ortega v. Duncan*, 333 F.3d 102, 109 (2d Cir. 2003) (concluding that jury would have been unlikely to convict had it learned of the witness's perjury); *United States v. Mazzanti*, 925 F.2d 1026, 1030 n.6 (7th Cir. 1991) (recognizing that focus on how jury would have reacted had perjury been revealed at trial may be more favorable to defendant). *Cf.* *United States v. Bernal-Obeso*, 989 F.2d 331, 336 (9th Cir. 1993) (acknowledging likely impact on credibility if jury learns witness lied).

250. The Second Circuit took this approach in *United States v. Wallach*, 935 F.2d 445(2d Cir. 1991), explaining:

[The witness] was the centerpiece of the government's case. Had it been brought to the attention of the jury that [the witness] was lying after he had purportedly undergone a moral transformation and decided to change his ways,

A court that asks only what would have happened if contradictory evidence had been in the hands of the defense before the witness testified is less likely to conclude that the false testimony was material.<sup>252</sup> For example, in *Hollman v. Wilson*,<sup>253</sup> a prosecution witness denied having a criminal record, knowing that a clerical error had “seemingly purged a portion of his criminal past.”<sup>254</sup> Rather than ask how the jurors would have viewed his credibility had they learned that the witness had intentionally lied under oath, the court asked only what would have

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his entire testimony may have been rejected by the jury. It was one thing for the jury to learn that [the witness] had a history of improprieties; it would have been an entirely different matter for them to learn that after having taken an oath to speak the truth he made a conscious decision to lie.

*Id.* at 457. Further, in closing argument, the prosecutor emphasized the witness’ motive to be truthful. *Id.* at 459. See also *Jackson v. Brown*, 513 F.3d 1057, 1077 (9th Cir. 2008) (looking at total impact of falsity); *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975) (commenting that witness’s lie concerning lack of criminal record cast more doubt on testimony than proof of criminal record would have). In *Jackson*, the Ninth Circuit explained:

The State underestimates the impeachment value that the prosecutor’s correction of McFarland’s testimony could have served. Both the district court and the state court referee found that McFarland would likely have been thoroughly discredited. A jury could easily find that McFarland, facing an unknown sentence for a serious crime, would greatly appreciate the chance to serve out his sentence close to his family and hence would find significant value in the prosecutor’s promise. Moreover, although the witness had been cross-examined about his own attempts to benefit from his cooperation, evidence of an explicit promise of assistance by the trial prosecutor likely would have carried far greater weight than any speculative benefit McFarland might have thought he could achieve on his own. Moreover, that McFarland was willing to perjure himself in order to cover up prosecutor Marin’s promise would surely have called into question the truth of all of his testimony.

*Jackson*, 513 F.3d at 1076.

251. See, e.g., *Kyles*, 514 U.S. at 441-45 (discussing materiality assessment). See also *Rosencrantz v. Lafler*, 568 F.3d 577, 584 (6th Cir. 2009). In *Rosencrantz*, a witness testified falsely that she had not met with the prosecution before trial. The court properly rejected the prosecution argument that the false testimony was not material because the witness’s testimony was already riddled with inconsistencies. The court explained that “exposing Lasky as untruthful—thereby tipping the jury to another of Lasky’s inconsistencies and her willingness to lie under oath—would have affected the jury’s view of Lasky’s credibility.” *Id.* at 588. Indeed, had the jury learned of the meeting with the prosecution after hearing the witness’s false testimony, the jury might then have been concerned about the level of prosecution pressure applied to obtain the favorable trial testimony. The jury might also have viewed the prosecutor’s conduct as evidence that the prosecutor believed the case was weak.

252. See, e.g., *United States v. Williams*, 233 F.3d 592 (D.C. Cir. 2000). In *Williams*, a government forensic expert testified falsely about his qualifications, and the court asked whether the government would be able to obtain a conviction at a new trial, concluding that the government could rely on other witnesses to do so. *Id.* at 595. Instead, the court should have asked what would have happened had the perjury of the government witness been revealed in the initial trial, an evaluation that may have led to a different result.

253. *Hollman v. Wilson*, 158 F.3d 177, 182 (3d Cir. 1998).

254. *Id.* at 182.

happened had the defense known of the criminal history and used it to impeach the witness at trial.<sup>255</sup> The court speculated that the witness would not have lied had he known that the defense had that information.<sup>256</sup> The impact of proven perjury would be much greater than mere impeachment with a prior conviction.

Similarly, in *Guzman v. State*,<sup>257</sup> a restrictive assessment of materiality yielded the conclusion that the false testimony was not material. In *Guzman*, both the prosecution's key witness and the detective who paid her a \$500 reward for turning the defendant in testified falsely at trial that she had received no benefit for her cooperation.<sup>258</sup> The court concluded that the false testimony was not material because the witness had been impeached in other ways.<sup>259</sup> Had the court instead asked what would have happened had the jury learned that both the witness and the detective had committed perjury in the trial and that the prosecution had knowingly allowed the perjury to go uncorrected the court would more likely have granted the defendant relief.<sup>260</sup> The lower materiality standard reflects the concerns raised by the use of false testimony, and it should be applied in a manner that likewise reflects the corrupting power of such testimony.

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255. *Id.*

256. The court explained its assessment of materiality as follows:

Hollman contends that the harm created by the purported Brady violation was exacerbated because Dawkins escaped challenge for his perjury on the stand. It is true that Dawkins perjured himself by not revealing that he did have a criminal record but this does not give rise to separate rights under Brady. Further, we note that had all the parties had Dawkins's full criminal history, it is unlikely that he would have testified that he had no record. Rather, it appears that Dawkins was attempting to benefit from the clerical error which seemingly purged a portion of his criminal past.

*Id.* at 182.

257. *Guzman v. State*, 941 So.2d 1045, 1048-49 (Fla. 2006).

258. *Id.* at 1048.

259. The court concluded that the false testimony was harmless beyond a reasonable doubt. *Id.* at 1049.

260. *See id.* at 1056 (Anstead, J. dissenting). *See also* *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991). In *Lewis*, the rape victim testified in the defendant's trial that she had no doubt about identification of her two attackers. In the co-defendant's separate trial, she recanted and testified that she could not identify him. 946 F.2d at 1362. The Minnesota court denied the defendant's request for relief because it viewed the recantation as mere impeachment evidence that was insufficient to lead to a different outcome. The Eighth Circuit concluded that the impeachment value was strong and granted the defendant relief. The better analysis would have assessed the impact of telling the jury that the witness testified falsely under oath against the defendant. The impact on her credibility would exceed that of the mere impeachment value of the recantation.



### 3. Prosecution Culpability and Materiality

In assessing materiality, the court should consider the prosecution's level of culpability in the use of the false testimony. A finding of bad faith on the part of the prosecution should increase the likelihood of a finding of materiality. Similarly, if the prosecutor invoked the false testimony to persuade the jury to convict, it is more likely that the testimony is material.

The prosecutor's awareness of the falsity increases the likelihood that the falsity was material.<sup>261</sup> The Supreme Court recognized the significance of bad faith in *Arizona v Youngblood*.<sup>262</sup> Defining the standard to apply in cases where evidence has been lost or destroyed, the Court held that a requirement that the defendant show bad faith would single out the cases in which the evidence was more likely to have favored the defense.<sup>263</sup> In *Drake v. Portuondo*,<sup>264</sup> the Second Circuit applied similar reasoning to a false testimony case. The court commented on the prosecutor's conduct as evidence of materiality.<sup>265</sup>

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261. See *Talamante v. Romero*, 620 F.2d 784, 788 (10th Cir. 1980) (noting that prosecutor's bad faith may affect materiality determination when defendant raised non-disclosure claim); *United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978) ("[A] finding of intentional nondisclosure would carry with it a strong presumption that the prosecutor and members of his staff had perjured themselves."); *United States v. Esposito*, 523 F.2d 242, 248-49 (7th Cir. 1975) ("[A] court should be less inclined to hold unproduced evidence immaterial or to hold the non-production of admittedly material evidence harmless error if the prosecutor's failure to reveal the evidence was not in good faith."). See also *United States v. Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968) (recognizing that the prosecutor's awareness in non-disclosure cases makes a finding of materiality more likely, describing as the easy cases those in which the prosecutor deliberately suppresses favorable evidence, stating that the evidence in such cases is "almost by definition . . . highly material"); Gershman, *Mental Culpability and Prosecutorial Misconduct*, *supra* note 78, at 160 (suggesting that prosecutorial misconduct may evidence weakness in government's case); Reiss, *supra* note 78, at 1413 (noting role ascribed to prosecutor's culpability in assessing materiality).

262. *Arizona v. Youngblood*, 488 U.S. 51 (1988).

263. The Court explained:

[R]equiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

*Id.* at 58.

264. *Drake v. Portuondo*, 553 F.3d 230 (2d Cir. 2009).

265. The court explained:

The prosecutor virtually conceded the materiality of Walter's testimony in acknowledging that he called Walter to compensate for problems revealed with his theory of the case after it turned out that there was no evidence of semen in Smith's rectal cavity. Walter's testimony filled the gap in the prosecution's theory of intent with a sensationalistic and pseudo-scientific explanation of motive.

Correspondingly, the way in which the prosecutor uses the false testimony may also affect the assessment of materiality.<sup>266</sup> The prosecution gives the falsity a larger role if the prosecution not only presents false testimony but also invokes and emphasizes the false information in closing argument.<sup>267</sup> The prosecutor's reliance makes it more likely that the false testimony will have an impact on the outcome.<sup>268</sup> For example, false testimony that conceals inducements to a

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*Id.* at 245.

In an earlier decision in the same case, the Second Circuit commented:

Drake points to the prosecution's "covert and evasive" behavior as evidence of its knowing complicity in Walter's perjured testimony. The prosecutor evidently made no independent inquiry into Walter's background, and relied entirely on the recommendation of a dentist to vet the prosecution's chief witness on aberrant psychology. The prosecutor had been advised that a scheduling constraint would require that the trial conclude no later than a Tuesday certain; the prosecution nevertheless presented Walter's surprise testimony on the previous Friday, leaving no more than a weekend for the defense to investigate Walter's qualifications and the esoteric psychological condition about which he testified. Although defense counsel protested that over the weekend he could find no psychologist who had so much as heard of picquerism, the prosecution opposed a continuance. The prosecution concedes that Walter's highly prejudicial testimony was intended to bolster what it thought to be a significant weakness in its case on intent, the sole issue at trial.

*Drake v. Portuondo (Drake I)*, 321 F.3d 338, 346 (2d Cir. 2003).

266. In *Drake*, the court also noted that the prosecutor turned to the false testimony to fill a gap in the case against the defendant. *Drake*, 553 F.3d at 245.

267. See, e.g., *People v. Junior*, 811 N.E.2d 1267, 1272-73 (Ill. App. 2004) (noting that prosecutor used the witness's false denial of having received a benefit throughout the trial to strengthen the prosecution's case). The courts have also recognized that the prosecutor's false statements to the jury may violate due process. See also *United States v. Reyes*, 577 F.3d 1069, 1077-78 (9th Cir. 2009) (condemning prosecution's false statements in argument); Anne Bowen Poulín, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1463-65 (2001) (discussing due process violations based on false arguments by prosecutors). But see *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995) (per curiam), the Court stated that "[i]f the prosecution's initial denial that polygraph examinations of the two witnesses existed were an intentional misstatement, we would not hesitate to condemn that misrepresentation in the strongest terms," but went on to conclude that the evidence was not material. *Id.* at 5. It is not clear from the context of the case how the statement concerning the possible prosecution falsity fit into the analysis. The materiality discussion focused entirely on the fact that the polygraph evidence would not have played a role at trial. See Henning, *supra* note 15, at 764-65 (discussing *Wood* and concluding that the materiality of a false statement by a prosecutor would be evaluated under the "reasonable probability" test, and not treated as false testimony).

268. *Douglas v. Workman*, 560 F.3d 1156, 1163-64 (10th Cir. 2009) (noting prosecution's use of false testimony); *Jenkins v. Artuz*, 294 F.3d 284, 295 (2d Cir. 2002) (prosecutor's argument based on false testimony "sharpened the prejudice"); *United States v. Seijo*, 514 F.2d 1357, 132-63 (2d Cir. 1975) (noting that after witness falsely testified he had no criminal record, prosecution's closing argument emphasized the witness' lack of record); *Junior*, 811 N.E.2d at 1273 (finding that false testimony was material where prosecution used it throughout trial). In *Jenkins*, the Court also recognized "the heightened opportunity for prejudice where the prosecutor, by action or

witness may have a significant impact on the jury's assessment of the witness's credibility, and that will be enhanced if the prosecutor emphasizes the lack of inducements.<sup>269</sup> The courts should be alert for prosecution bad faith and prosecution reliance on false testimony as they assess materiality.

*D. Defense Awareness and the Obligation of Due Diligence*

Defense awareness of the falsity should not necessarily defeat a due process claim. If the defense was unable to air the issue for the jury despite awareness of the falsity, the defendant's right to due process has been violated.<sup>270</sup> Nevertheless, courts may be reluctant to find a due process violation if the defendant was aware of the falsity at trial.<sup>271</sup>

In considering the impact of defense awareness on due process analysis, courts should distinguish between non-disclosure and false testimony cases. Defense knowledge necessarily plays a larger role in false testimony cases than in failure to disclose cases.<sup>272</sup> A claim based on the prosecution's failure to disclose exculpatory evidence will be defeated by proof that the defense knew or should have known of the information. That awareness gives the defense the opportunity to

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inaction, is complicit in the untruthful testimony." *Jenkins*, 294 F.3d at 295; *see also Strickler v. Greene*, 527 U.S. 263, 295 (examining prosecution's reliance on the witness' account in closing and noting that the prosecutor did not argue her testimony at the capital sentencing hearing).

269. *See Cassidy*, *supra* note 103, at 1161-64 (discussing the significance of inducements to the assessment of credibility).

270. Of course, if the alleged falsity is fully revealed to the jury at trial, the defendant's rights have not been violated. *See, e.g., Tompkins v. Moore*, 193 F.3d 1327, 1340-42 (11th Cir. 1999) (recounting trial testimony that explored of unavailability of pre-death dental records from victim, demonstrating inaccuracy of expert's testimony that he had compared dental records to corpse); *United States v. Vaziri*, 164 F.3d 556, 562-64 (10th Cir. 1999) (concluding that alleged falsity was disclosed to the jury).

271. *See United States v. O'Keefe*, 128 F.3d 885, 894-95 (5th Cir. 1997) (commenting that courts are "reluctant" to find a due process violation of the defense has the information that establishes the falsity but elects not to use it).

272. *See United States v. Iverson*, 648 F.2d 737, 738 (D.C. Cir. 1981) (summarizing the law of defense knowledge of false testimony in failure to disclose cases). In *Iverson*, the court gave the following account of the role of defense knowledge of the falsity:

The early decisions dealing with the prosecutor's responsibility to disclose exculpatory information generally proceeded on the assumption that defense counsel had no knowledge of the critical information. Since then, the doctrine has been expanded to include situations in which the defense counsel, although possibly aware of the relevant information, was unable, as a practical matter, to use it to cast doubt upon contrary evidence proffered by the government or its witnesses. On the other hand, other recent decisions have indicated that no violation of due process results from prosecutorial nondisclosure if defense counsel both knows of the information and is able to make use of it but still chooses, for tactical reasons, not to do so.

*Id.*

develop the exculpatory information at trial, supporting the conclusion that the defense was therefore not harmed by the prosecution's non-disclosure.<sup>273</sup> In contrast, uncorrected false testimony may violate the defendant's constitutional rights even if the defense was aware that the testimony was false. The government has an obligation not to permit corruption of the process by presenting false testimony.<sup>274</sup> Mere awareness of the falsity will not necessarily equip the defense to protect against the corruption of the trial.<sup>275</sup> Despite awareness of the falsity, the defense may be frustrated in the effort to use the information and reveal

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273. See *Wilson v. Beard*, 589 F.3d 651, 663 (3d Cir. 2009) (acknowledging that *Brady* does not require the prosecution to disclose information that the defense knows, should know, or could discover with reasonable diligence but rejecting the state's argument that there was no *Brady* violation because defense could have discovered the witness's criminal record); *United States v. Pelullo*, 399 F.3d 197, 209 (3d Cir. 2005); *United States v. Vallejo*, 297 F.3d 1154, 1164 (11th Cir. 2002) (including among the requirements for a *Brady* violation that "the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence" and rejecting defendant's *Brady* claim because the defense could have obtained the questioned evidence through due diligence); *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000) ("there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source"); *United States v. Pandozzi*, 878 F.2d 1526, 1529-32 (1st Cir. 1989) (rejecting *Brady* claim based on information that defense could have discovered through due diligence); *United States v. McMahon*, 715 F.2d 498, 501-02 (11th Cir. 1983) (rejecting defendant's claim under *Brady* in part because the defense could have obtained the withheld documents by exercising reasonable diligence); *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (holding that evidence is not suppressed for *Brady* purposes if the defendant knew or should have known of "essential facts permitting him to take advantage of any exculpatory evidence"). The defense is not obligated to disregard prosecution representations that all favorable information has been provided. *But see Banks v. Dretke*, 540 U.S. 668, 695-97 (2004) (rejecting state's argument that defendant was on notice that favorable information existed despite reassurance from prosecution that all *Brady* material was disclosed). In *Banks*, the Court rejected as untenable a system in which the prosecution can mislead the defense, while placing on the defense the burden of discovering the suppressed evidence so long as the defense has any reason to suspect prosecutorial misconduct. *Id.* A due diligence requirement is also imposed on the defendant when the defendant seeks collateral review or moves for a new trial based on newly discovered evidence. See *United States v. Helmsley*, 985 F.2d 1202, 1206 (2d Cir. 1993).

274. See *Belmontes v. Woodford*, 350 F.3d 861, 881 (9th Cir. 2003) (rejecting argument that defense awareness defeated false testimony claim, recognizing independent duty of prosecution to "protect the system against false testimony") (citation omitted).

275. See *United States v. Mason*, 293 F.3d 826, 829-30 (5th Cir. 2002) (holding that defense access to plea agreement did not relieve prosecutor of obligation to correct witness's false testimony that he had received no promises in exchange for his testimony); *DeMarco v. United States*, 928 F.2d 1074 (11th Cir. 1991) (granting relief even though defense knew of deal with witness where witness denied deal and prosecution did not correct the false testimony). Indeed, if the defense challenges the testimony at trial and the prosecutor fails to take steps to verify its accuracy and thereby discover its falsity, the case should be treated as one in which the prosecutor should have known the testimony was false.

the falsity to the jury.<sup>276</sup> Similarly, even if the defendant highlights the falsity, the prosecution may undermine that effort by fostering the false impression through misleading questions or closing argument that exploits the falsity.<sup>277</sup> Doing so may violate due process despite defense knowledge of the falsity.

Of course, if the defense is aware of the falsity, the defense must exert appropriate efforts to demonstrate that the testimony is false.<sup>278</sup> But the defense obligation is limited by the realities of the case. The Second Circuit addressed this due diligence requirement in *Shih Wei Su v.*

276. See, e.g., *United States v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000) (discussing defendant's ineffectual effort to demonstrate that testimony was false). A similar result was reached on confrontation grounds in *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, the trial court acceded to the prosecution's request to bar cross-examination of a key witness concerning his juvenile offenses and adjudication. *Id.* at 310-11. As a result, the defense was precluded from demonstrating the witness's bias even though the defense possessed all the relevant information. *Id.* at 312-15. The Court noted that the witness fostered a false impression and held that the restriction on cross violated the defendant's right to confront the witness. *Id.* at 319-20.

277. See *Jenkins v. Artuz*, 294 F.3d 284, 294-95 (2d Cir. 2002) (detailing prosecutor's misleading questions and argument); *United States v. O'Keefe*, 128 F.3d 885, 894-95 (5th Cir. 1997); *DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) (noting that prosecution relied on the false testimony in closing argument); *United States v. Barham*, 595 F.2d 231, 241 (5th Cir. 1979) (testimony conveyed misleading impression concerning benefits witnesses had received for testifying); *Mills v. Scully*, 826 F.2d 1192, 1195 (2d Cir. 1987) ("Even where defense counsel is aware of the falsity, there may be a deprivation of due process if the prosecutor reinforces the deception by capitalizing on it in closing argument, or by posing misleading questions to the witnesses") (citation omitted). In *O'Keefe*, the court described the situations in which a due process violation could occur despite the defendant's possession of evidence demonstrating the falsity of the testimony:

[E]ven when the defense is aware of the falsity of the testimony, a deprivation of due process may result when the information has been provided to the defense but the government reinforces the falsehood by capitalizing on it in its closing argument, or the defense is unable to utilize the information, or when the government thereafter asks misleading questions.

*O'Keefe*, 128 F.3d at 894-95 (citations omitted).

278. See, e.g., *Robinson v. Arvonio*, 27 F.3d 877, 886 (3d Cir. 1994):

[W]hen it became clear that the prosecutor had not corrected the perjured testimony, the defense attorney could have alerted the judge and sought a remedy that would have eliminated any possibility of prejudice to his client, such as a stipulation or an instruction on the details of the agreement. Instead, the defense attorney sought to counter the misleading impression through cross-examination and closing argument. Although we agree with Robinson that his attorney did not waive the error by failing to call it to the attention of the court, an error which the defense attorney could have corrected at trial is not likely "to infect the integrity of the proceeding. . . ."

*Id.* at 886 (citation omitted).

See also *United States ex rel. Regina v. LaVallee*, 504 F.2d 580, 583 (2d Cir. 1974) (stating that where defense is aware that there may have been a promise but the witness denies it, the defense has an obligation to call available witnesses to prove the existence of the promise).

*Filion*,<sup>279</sup> holding that the ability of the defense to uncover the falsity did not defeat the defendant's claim. In *Shih Wei Su*, the prosecutor falsely represented there was no agreement with one of the prosecution's witnesses.<sup>280</sup> As a result, the defense elected not to cross-examine the witness about a possible plea agreement. The court held that the defense had satisfied its obligation of due diligence.<sup>281</sup> The court refused to require the defense to assume the prosecutor had lied, noting that it would have "involved enormous tactical danger."<sup>282</sup> The defense is not required to impugn the prosecutor's credibility in front of the jury.<sup>283</sup>

Similarly, in *United States v. Sanfilippo*,<sup>284</sup> the prosecution failed to correct the witness' false testimony denying aspects of his agreement with the government. The Fifth Circuit rejected the government's argument that the defendant should have taken additional steps to disclose the falsity.<sup>285</sup> Even though the defense was aware of the terms of the agreement and knew that the testimony was false, the prosecution had violated the defendant's right to due process.<sup>286</sup> The burden to correct false testimony from prosecution witnesses lies on the government, not on the defendant.

#### IV. CONVICTIONS BASED ON FALSE TESTIMONY WITHOUT GOVERNMENT CULPABILITY

Approaches are more varied and relief harder to obtain when a defendant demonstrates that false testimony was presented at trial but cannot establish prosecutorial culpability. Although one may argue that allowing a conviction to stand even though it rests on false testimony violates the constitution, most courts do not accept that argument. If the prosecutor acquires exculpatory evidence after conviction, *Brady* does

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279. *Shih Wei Su v. Filion*, 335 F.3d 119, 128 (2d Cir. 2003).

280. *Id.* at 123.

281. *Id.* at 128.

282. In *Shih Wei Su*, the court further explained:

It follows that when a prosecutor says that there was no deal and later elicits testimony from a witness denying the existence of a deal, it would be an unreasonable application of federal law, as determined by the Supreme Court, to fault the defendant for not proceeding in his cross-examination on the assumption that the prosecutor is a liar.

*Id.* at 128.

283. See also *Jenkins v. Artuz*, 294 F.3d 284, 287-89 (2d Cir. 2002) (concluding that defense had exercised adequate diligence where prosecutor artfully elicited misleading testimony); *United States v. Helmsley*, 985 F.2d 1202, 1208 (2d Cir. 1993).

284. *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977).

285. *Id.* at 178-79.

286. See also *DeMarco v. United States*, 928 F.2d 1074 (11th Cir. 1991) (reaching similar result on similar facts). In *Sanfilippo*, the prosecutor compounded the problem by invoking the false testimony when arguing to the jury that the witness was credible. 564 F.2d at 178.

not impose an obligation to disclose that information.<sup>287</sup> Correspondingly, prosecutors do not feel obliged to address the impact of perjury discovered after the fact.<sup>288</sup>

The Court has not established the approach to be taken when the post-conviction discovery reveals that the prosecution presented false testimony to the jury and the defendant cannot satisfy the knowledge requirement.<sup>289</sup> In false testimony cases, the courts' approach should not be as deferential as in other newly discovered evidence cases. The

287. In *District Attorney's Office for Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2320 (2009), the Court held that a convicted defendant does not have a due process right of access to evidence to test it for DNA. The Court explained:

A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."

*Id.* at 2320 (citation omitted).

In cases where the prosecution becomes aware of the perjury, the recent amendment to Rule 3.8 may come into play. Model Rules of Professional Conduct, Rule 3.8—Special Responsibilities of A Prosecutor, was amended in 2008 and now provides:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008).

These provisions have not yet been widely adopted. *See also* *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (discussing prosecutor's ethical obligation relating to later discovery of favorable evidence).

288. *See, e.g.,* *Commonwealth v. Spaulding*, 991 S.W.2d 651, 656 (Ky. 1999); *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938). In *Spaulding*, even after prosecuting its witness for committing perjury when he testified that the defendant had swung his knife at the victim the state opposed the defendant's request for relief. 991 S.W.2d at 656. In *Jones*, the defendant was facing execution and even though the State Attorney General believed that the defendant had been convicted on perjured testimony, no state or federal court up to the Sixth Circuit would grant relief. 97 F.2d at 335.

289. *See* *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006) (noting that the Court has not determined whether such presentation of false testimony violates due process and that there is a circuit split as to the standard to be applied); *see also* J. Gabriel Carpenter, Comment, *Determining Whether the Unintentional Use of Perjury by the Prosecution Warrants a New Trial in Evenstad v. Carlson: The Probability Test or the Possibility Test?*, 31 AM. J. TRIAL ADVOC. 389, 393 (2007).

presentation of false testimony necessarily corrupts the truth-finding process to some degree and undermines the claim that the trial was fair. As a result, the courts should strengthen protection from the unknowing use of false testimony in two ways. First, the courts should revisit the constitutional consequences of the unknowing use of false testimony, recognizing that its corrupting power may violate due process. Second, even if they do not view it as a constitutional violation, courts should apply a more lenient standard when a defendant moves for a new trial based on newly discovered evidence that establishes the use of false testimony at trial.

#### A. *Constitutional Violation?*

An argument can be made that the courts should extend due process protection to false testimony even when the prosecutor did not have the requisite knowledge at the time the witness testified.<sup>290</sup> The corrupting impact of the false testimony is just as great when it is unknown to the prosecutor.<sup>291</sup> If, as the Court has consistently stated, due process protects against unfairness in the proceeding, not merely against prosecutorial wrongdoing, prosecution knowledge should not be required to establish a due process violation.<sup>292</sup> Analysis should focus only on

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290. The Supreme Court has not addressed this question. See Evenstad, 470 F.3d at 783; see also Drake v. Portuondo (*Drake I*), 321 F.3d 338, 346 n.2 (2d Cir. 2003) (concluding that AEDPA did not permit granting of habeas relief in the absence of prosecutorial knowledge of perjury because that argument was not supported by clearly established Supreme Court precedent); Murray, *supra* note 102, at 107 (arguing that unknowing use of perjury to obtain conviction should be held to violate due process).

291. See Reiss, *supra* note 78, at 1410; Murray, *supra* note 102, at 107. As Professor Reiss pointed out in his comprehensive discussion of the role of prosecutorial intent in establishing constitutional violations: “The effect . . . of perjured testimony on the ‘truth seeking function of the trial process’ is the same whether or not the prosecutor knows of the perjury. The prosecutor’s knowledge does not change what the jury hears.” Reiss, *supra* note 78, at 1410. Professor Reiss also argues that “[t]he very idea of procedural safeguards is to erect mechanisms to ensure just adjudication against improper state maneuvers, whatever the motivation behind them.” *Id.* at 1436.

292. Reiss, *supra* note 78, at 1407-08 (pointing out the illogic of varying materiality standard depending on prosecutor’s mental state). Professor Reiss explained:

It is clear, then, that under the *Agurs-Bagley* scheme a prosecutor’s mental state is not, as the Court has insisted, wholly irrelevant to determining when the nondisclosure of evidence favorable to the defense amounts to constitutional error. Were the constitutional concern truly limited to ‘the misconduct’s effect on the trial,’ then the same standard of materiality would be applicable to all nondisclosures. If some types of prosecutorial suppression are more likely than others to affect a trial, then such nondisclosures are more apt to meet the requisite standard of materiality and will more frequently result in a constitutional violation. There is no need to evaluate their effect under a different standard of materiality.

*Id.* at 1407-08 (footnote omitted).



whether the false testimony rendered the trial and resulting conviction unfair.<sup>293</sup>

This argument has not gained traction. Most courts decline to hold that the use of false testimony violates the defendant's right to due process in the absence of government knowledge.<sup>294</sup> Some have argued that a knowledge requirement is essential to differentiate false testimony cases from other newly discovered evidence cases.<sup>295</sup> For example, in

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The distinctions the Court has drawn in the *Brady* area reflect differences in the prosecutor's culpability with respect to different types of suppression.

293. See *Jones v. Kentucky*, 97 F.2d 335, 338 (6th Cir. 1938) (granting relief where the Commonwealth conceded perjury but was taking no steps to set aside conviction and stating that the defendant "is not to be sacrificed upon the altar of a formal legalism too literally applied. . ."); *Bibas*, *supra* note 80, at 151-54 (arguing that relief in *Brady* cases should not turn on wrongfulness of prosecutor's behavior); *Carlson*, *supra* note 77, at 1183-87 (suggesting that defendants should be able to overturn convictions based on false testimony regardless of governmental knowledge and discussing cases).

294. See, e.g., *Jacobs v. Singletary*, 952 F.2d 1282, 1287 n.3 (11th Cir. 1992) (rejecting defendant's request for due process based relief due to false testimony where defendant had not shown that prosecution knew or should have known the testimony was false); *United States v. Tierney*, 947 F.2d 854, 860-61 (8th Cir. 1991) (stating that a lower standard applies only if the government is at least negligent); *Shore v. Warden*, 942 F.2d 1117, 1122 (7th Cir. 1991); *Sanders v. Sullivan*, 863 F.2d 218, 222-24 (2d Cir. 1988) (noting that proof of false testimony does not normally establish a due process violation and summarizing authority).

295. See, e.g., *Henning*, *supra* note 15, at 757-59. Professor Henning addressed the question of prosecutorial knowledge as an element of a false testimony claim:

Due process must entail something greater than the standard for a new trial, *i.e.*, more than just the existence of perjured testimony. Reliance on the prosecutor's *knowledge* of the perjury provides the additional element that raises questions regarding the fundamental fairness of the proceeding beyond just the probative value of the newly discovered evidence.

*Id.* at 759 (emphasis added).

Some courts refuse to extend constitutional protection to these cases because they conclude that there is no state action when the false testimony is entered without government culpability. See, e.g., *Burks v. Egeler*, 512 F.2d 221, 224-25 (6th Cir. 1975); see also *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) (discussing authority); *Murray*, *supra* note 102, at 103 (discussing prosecution knowledge as necessary for state action). The better view is that prosecution culpability is not necessary for state action. In *Cuyler v. Sullivan*, for example, the Court rejected the state's argument that a conflict of interest on the part of privately retained counsel did not entail state action and therefore could not violate the defendant's constitutional rights. *Cuyler v. Sullivan*, 446 U.S. at 343-45. The Court held that the criminal trial itself satisfied the state action requirement. *Id.* at 343-45. In *Sanders*, the Second Circuit considered and rejected the argument that a conviction based on false testimony without government knowledge did not violate the constitution. *Sanders*, 863 F.2d at 224. The court recognized that the refusal to intervene to cure a conviction based on false testimony was sufficient state action to represent a violation of the right to due process. *Id.* at 224. See also *Kentucky v. Spaulding*, 991 S.W.2d 651, 656-57 (Ky. 1999) (holding that the use of perjured testimony against the defendant involved state action and could constitute a due process violation even if the prosecution neither knew nor should have known the testimony was false). But see *Schaff v. Snyder*, 190 F.3d 513, 530 (9th Cir. 1999) (declining to adopt the court's position in *Sanders*).

*Agurs*, the Court explained that a different standard is required because otherwise “there would be no special significance to the prosecutor’s obligation to serve the cause of justice.”<sup>296</sup> This reasoning is convoluted: the issue is not the prosecution’s failure to adhere to a high standard, but the fairness of the process to the defendant.

The better view is expressed in decisions recognizing the unknowing use of false testimony as the basis for constitutionally mandated relief.<sup>297</sup> The government should not be permitted to allow a conviction based on false testimony to stand. In *Sanders v. Sullivan*, a key witness recanted after he met defendant in prison and in his recantation placed blame for the homicide on someone who was now deceased. The Second Circuit asserted that “[i]t is simply intolerable . . . that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies.”<sup>298</sup> The court concluded that, if the trial court found the recantation credible, due process called for relief.<sup>299</sup>

Courts recognizing that unknowing use of false testimony represents a constitutional violation impose a higher burden on the

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296. *United States v. Agurs*, 427 U.S. 97, 111(1976).

297. *See* *Hall v. Director of Corrections*, 343 F.3d 976, 981-84 (9th Cir. 2003). In *Hall*, the defendant was convicted of first-degree murder based in part on notes produced by a jailhouse informant in exchange for a deal. *Id.* at 978. After conviction the informant testified that he had falsified the evidence. *Id.* at 980. Although the courts were skeptical of the informant’s testimony, it was corroborated by expert handwriting analysis. *Id.* at 982. The Ninth Circuit concluded that the letters were false. Even though the prosecution had not known of the falsity at trial, the court granted the defendant’s petition for habeas corpus, concluding that the falsity was material and that due process did not permit the prosecution to allow the conviction to stand given its post-conviction knowledge that the evidence was fabricated. *Id.* at 981-85; *see also* *Ex parte Carmona*, 185 S.W.3d 492 (Tex. Crim. App. 2006) (holding that revocation of probation based on perjured testimony apparently not known to the prosecution violated due process); *Murray*, *supra* note 102, at 107 (arguing that unknowing use of perjury to obtain conviction should be held to violate due process). *Cf.* *Durley v. Mayo*, 351 U.S. 277, 290-91 (1956) (Douglas, J. dissenting) (arguing that governmental knowledge was not essential to due process claim, because post-conviction investigation had revealed that the testimony of the only witnesses against petitioner was false and that the conviction was therefore not supported by any competent evidence); *Hysler v. Florida*, 315 U.S. 411, 423-24 (1942) (Black, J. dissenting) (questioning the limitation of due process protection to cases in which prosecution knew of falsity at trial).

298. *Sanders*, 863 F.2d at 224.

299. *Id.* at 222-24 (“[I]t is indeed another matter when a credible recantation of the testimony in question would most likely change the outcome of the trial and a state leaves the conviction in place.”). In *Sanders*, the court recognized that the weight of authority was against the defendant. *Id.* at 222 (summarizing authority). The vitality of *Sanders* as a protection against erroneous state conviction is not clear under the AEDPA. *See* *Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003) (applying *Sanders* to state conviction under AEDPA); *Smith v. Herbert*, 275 F. Supp. 2d 361, 368 (E.D.N.Y. 2003) (concluding that *Sanders* cannot be applied to a petition under the AEDPA).

defendant than the burden in cases of knowing use of false testimony.<sup>300</sup> In *Sanders*, the Second Circuit held that in cases involving false testimony not known to the prosecution, the defendant was entitled to a new trial only if the new evidence would probably result in a more favorable outcome for the defendant. The court emphasized that only extraordinary instances would violate due process, those in which the court possesses a “firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.”<sup>301</sup> Adopting this approach would appropriately protect against convictions based on lies.

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300. See, e.g., *Spaulding*, 991 S.W.2d at 656-57. In *Spaulding*, the court explained the burden on the defendant seeking to establish such a violation: not only does the defendant have to prove that specific testimony was perjured but the defendant must show “both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief.” *Id.* at 657. But see *Ex parte Chabot*, 300 S.W. 3d 768, 771 (Tex. Crim. App. 2009) (concluding that the same standard should apply to unknowing use of perjured testimony as to knowing use).

301. *Sanders*, 863 F.2d at 226; see also *United States v. Wallach*, 935 F.2d 445, 456-57 (2d Cir. 1991) (applying the *Sanders* standard of review). In *Wallach*, the court explained: “Where the government was unaware of a witness’s perjury, however, a new trial is warranted only if the testimony was material and ‘the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.’” *Wallach*, 935 F.2d at 456 (citations omitted). See also *Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003) (holding that due process is violated by the presentation of false testimony by a government witness without the prosecution’s knowledge only when “the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted” (citations omitted)); *United States v. Gallego*, 191 F.3d 156, 163 (2d Cir. 1999) (stating that the standard for a new trial based on false testimony in the absence of culpability required the defendants to establish “that they likely would have been acquitted in the absence of the perjured testimony or had that perjury been exposed at trial”).

In some cases, the defendant may be able to establish that defense counsel’s failure to uncover the falsity constitutes ineffective assistance of counsel, entitling defendant to relief on that ground. For example, in *Thomas v. Kuhlman*, falsity pervaded a trial without the prosecutor’s knowledge but would have been discovered had counsel performed adequately. *Thomas v. Kuhlman*, 255 F. Supp. 2d 99 (E.D.N.Y. 2003). In *Thomas*, the defendant was convicted of murdering his ex-girlfriend. A central piece of the prosecution’s case was the testimony of a witness testifying in exchange for a reduction in charges that allowed her to avoid a possible 25-year sentence. *Id.* at 102. Her testimony placed the defendant on the fire escape outside the victim’s apartment at about the time of the homicide. Unfortunately, it was physically impossible for the witness to have seen that fire escape from her vantage point. *Id.* at 104. Although the witness’ testimony was false, neither the prosecutor nor defense counsel had visited the scene, so at trial neither recognized the falsity. *Id.* at 112. Although the court recognized that the prosecutor possibly should have known the testimony was false, it concluded that relief should not be granted on that basis. *Id.* at 113. Of course, to obtain relief on this ground the defendant cannot merely establish a reasonable likelihood that the false testimony affected the verdict but must meet the higher standard, showing that counsel’s failure to discover the falsity was incompetent and that there is a reasonable probability that counsel’s deficiency had an effect on the verdict. See *Strickland v. Washington*, 466 U.S. 668 (1984) (defining requirements for relief based on incompetence of counsel).

*B. Non-Constitutional New Trial Standard*

The defendant's recourse, lacking the constitutional argument, is to move for a new trial based on newly discovered evidence.<sup>302</sup> That avenue presents specific impediments.<sup>303</sup> First, the defendant has a limited time in which to file the motion. Second, the rule specifically precludes the new trial if the defense could have discovered the evidence through the exercise of due diligence.<sup>304</sup> Finally, the rule demands that the defendant meet a higher standard than the materiality standard in false testimony cases. One question raised by a new trial motion based on evidence of false testimony is whether the standard should be easier to satisfy when the new evidence reveals false testimony or perjury in the original trial.<sup>305</sup>

Even if the unknowing use of false testimony does not violate due process, the courts should draw a distinction between cases where a defendant proves that a witness testified falsely at trial and other newly discovered evidence cases.<sup>306</sup> A central challenge is achieving the appropriate balance between administrative interests such as the finality of convictions and the defendant's interest in a fair proceeding.<sup>307</sup> The courts should more readily grant the defendant a new trial when newly discovered evidence demonstrates that trial testimony was false. Proof of false testimony establishes that the trial process was corrupted to some degree.<sup>308</sup> In contrast, a case where the newly discovered evidence does not uncover false testimony may not entail a corruption of the trial process; the newly discovered evidence may call the accuracy of the conviction into question but does not necessarily signal unfairness of the process itself.

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302. See, e.g., FED. R. CRIM. P. 33. Rule 33(a) provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment." *Id.*

303. See generally Medwed, *supra* note 7, at 658-59 (discussing procedural barriers to new trial); Henning, *supra* note 15, at 759.

304. *United States v. Ogle*, 425 F.3d 471, 476 (7th Cir. 2005) (discussing assessment of new trial motion under the rule).

305. See Daniel Wolf, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925, 1945-47 (1985) (arguing that standard should be more protective).

306. See generally *id.* at 1945-47 (suggesting four reasons for treating false testimony cases differently: threat to the defendant's right to a fair trial, threat to the process, government responsibility, and ability to gauge accurately the impact of the false testimony on the trial).

307. *Id.* at 1947 (commenting that approaches to new trial requests based on false testimony do not strike the proper balance).

308. *Id.* at 1946 (suggesting that "[w]hen false testimony is introduced, it is likely that something suspicious (and unfair) is going on at trial").

The concern with corruption of the process represented by false testimony at the initial trial has led some courts to adopt a protective test. The test most favorable to the defendant was established in *Larrison v. United States* and adopted by a number of other courts.<sup>309</sup> Under the *Larrison* test, the court must assess the possibility that the false testimony affected the outcome but the defendant needs only to demonstrate that the jury *might* have reached a more favorable verdict in the absence of the falsity.<sup>310</sup> Concerns with the finality of convictions and the seemingly low hurdle defined by *Larrison* have persuaded many courts to reject the test out of the fear that it would lead too often to reversal.<sup>311</sup> The prevailing test instead treats post-conviction proof of

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309. *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir.1928); *see also* *United States v. Wilson*, 624 F.3d 640, 663-64 (4th Cir. 2010) (stating that the “might” test applies in cases of recantation); *United States v. Lofton*, 233 F.3d 313, 318 (4th Cir. 2000) (stating that “might” test applies to new trial requests based on the discovery that a prosecution witness testified falsely at trial); *United States v. Willis*, 257 F.3d 636, 643 (6th Cir. 2001) (holding that standard in recantation cases is whether jury might have reached a different result without the false testimony); *United States v. Massac*, 867 F.2d 174, 178-79 (3d Cir. 1989) (applying the *Larrison* test without expressly adopting it). *See generally* Medwed, *supra* note 7, at 668-69 (discussing the test).

310. Under *Larrison*, the defendant is entitled to a new trial if:

- (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
- (b) That without [the testimony,] the jury might have reached a different conclusion.
- (c) That the party seeking the new trial was taken by surprise when the false testimony was given, and was unable to meet it or did not know of its falsity until after the trial.

*Larrison*, 24 F.2d at 87-88.

*See* *United States v. Mazzanti*, 925 F.2d 1026, 1029-30 (7th Cir. 1991) (addressing variations in test and comparing test with other approaches); Carpenter, *supra* note 289, at 391-92 (discussing the test).

It is worth noting that in *Larrison*, the Seventh Circuit was not persuaded that the recantation on which the defendants relied was credible, and therefore denied the request for a new trial. *Larrison*, 24 F.2d at 89. The Seventh Circuit overruled *Larrison* in *United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004). *See also* *United States v. Huddleston*, 194 F.3d 214, 219 (1st Cir. 1999) (discussing and criticizing *Larrison*).

311. *See, e.g.*, *United States v. Williams*, 233 F.3d 592, 595 (D.C. Cir. 2000) (stating that standard is the same in all newly discovered evidence cases and asking whether defendant would probably be acquitted at new trial); *United States v. Stofsky*, 527 F.2d 237, 245-46 (2d Cir. 1975). In *Stofsky*, the Second Circuit declined to adopt the *Larrison* test and instead adopted the “time-honored probability standard.” *Stofsky*, 527 F.2d at 246. The court explained its reluctance to apply the more lenient standard:

[T]he test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, ‘might’ have acquitted.

*Id.* at 46.

perjured testimony like other newly discovered evidence and requires the defendant to satisfy a probability standard, a higher hurdle than *Larrison's* "might" test.<sup>312</sup> This approach gives too little weight to the distinct threat posed by false testimony.<sup>313</sup>

In *United States v. Williams*,<sup>314</sup> for example, the D.C. Circuit addressed and rejected the argument that newly discovered evidence of falsity should be assessed differently from other newly discovered evidence, characterizing the difference as "illusory."<sup>315</sup> The court explained:

Newly discovered evidence may often tend to prove that the evidence before the jury was not "true." A third party may confess to the crime; it may turn out that the main government witness has a string

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*See also* Medwed, *supra* note 7, at 664-65 (discussing emphasis on finality); Wolf, *supra* note 305, at 1930-33 (criticizing standard established in *Larrison*).

312. *See Mitrione*, 357 F.3d at 718 (gathering decisions from the federal circuits). The probability test is sometimes referred to as the *Berry* test, acknowledging its origin in *Berry v. State*, 10 Ga. 511 (Ga. 1851). In *Berry*, considering whether the defendant was entitled to a new trial based on newly discovered evidence, the court asked whether the new evidence "would probably produce a different result" and also asked whether the new evidence would be "likely to change the verdict which has been rendered." *Id.* at 513, 528. *See generally* Medwed, *supra* note 7, at 667-68 (discussing the *Berry* test).

313. There are also divergent approaches to the focus of the inquiry. *See* *United States v. Williams*, 233 F.3d 592, 595 (D.C. Cir. 2000) (recognizing difference in approaches); *Carpenter*, *supra* note 289, at 405-06 (discussing approaches). Some courts look forward, asking whether the new evidence would probably result in a more favorable verdict if the defendant won a new trial. *See, e.g., United States v. Williams*, 233 F.3d 592, 594-95 (D.C. Cir. 2000) (defining test and concluding that in a new trial, prosecution could avoid calling witness who committed perjury and obtain conviction using other witnesses); *United States v. Huddleston*, 194 F.3d 214, 217-21 (1st Cir. 1999) (discussing and adopting forward-looking standard and concluding the new trial would result in conviction); *United States v. Provost*, 969 F.2d 617, 622 (8th Cir.1992) (applying forward-looking standard); *United States v. Sinclair*, 109 F.3d 1527, 1532 (10th Cir.1997) (stating forward-looking test). In *Williams*, the court recognized the difference between the two approaches to the inquiry. *Williams*, 233 F.3d at 595. *But see* *United States v. Krasny*, 607 F.2d 840, 844-46 (9th Cir. 1979) (stating the rule both as forward-looking and as backward-looking). Others apply a backward-looking test and require the defendant to show that the jury would probably have reached a different verdict in the absence of the perjury. *See, e.g., Mitrione*, 357 F.3d at 718 (holding that defendant must show that jury would probably have acquitted had it not heard the perjured testimony, but concluding that the defendant did not); *United States v. Petrillo*, 237 F.3d 119, 123-24 (2nd Cir. 2000) (applying a backward-looking test and concluding "new evidence was unlikely to have altered the jury's verdict. . ."). A variation on the backward-looking test is to ask whether the jury would have convicted had the witness' testimony been exposed as perjury. *See, e.g., Ortega v. Duncan*, 333 F.3d 102, 109 (2d Cir. 2003) (concluding that had the jury known of the witness' perjury, it would have been unlikely to convict); *see also* Wolf, *supra* note 305, at 1932-33.

314. *Williams*, 233 F.3d at 595.

315. *Id.* at 595. The court cited the discussion in Daniel Wolf, *I Cannot Tell A Lie: The Standard for New Trial in False Testimony Cases*, *supra* note 305, at 1945, and found it unpersuasive.

of felony convictions; proof positive of the defendant's alibi might surface. Any one of these items of newly discovered evidence, in various degrees, throws doubt on the accuracy of the trial evidence pointing to the defendant's guilt.<sup>316</sup>

The *Williams* court failed to acknowledge that false testimony cases necessarily entail an affirmative effort to mislead the jury and that few pieces of evidence will have as great an impact on a jury as learning that a witness has knowingly lied. The impact of previously undisclosed favorable evidence will depend on how the facts were presented at trial and will not necessarily undermine the credibility of any particular witness.

Consider for example the post-trial discovery that, unknown to the prosecution team, a prosecution witness was engaged in criminal activity at the time of trial. If neither the defense nor the prosecution asked questions that elicited false answers, the later-discovered evidence merely offers an additional basis for impeaching the witness.<sup>317</sup> However, if the witness was asked related questions at trial and gave a false denial, the newly discovered evidence has greater significance. The witness actively corrupted the truth-finding process, misleading the jury. The witness' credibility is vulnerable to the most pointed attack—proof that the witness testified falsely under oath to this fact finder.

In cases of false testimony, the courts' approach to new trial motions should emphasize the fairness of the process over interests in finality.<sup>318</sup> It is more destructive of the justice process to have false testimony presented to the fact finder at trial than simply to have missed some evidence.<sup>319</sup> The test should fall closer to the protective end of the spectrum: the courts should grant the defendant a new trial if it is reasonably likely that the false testimony had an impact on the outcome.<sup>320</sup>

## V. CONCLUSION

Courts must reinvigorate the law to deliver on the promise that the due process clause protects against convictions based on false testimony. Despite clear precedent, courts do not enforce this aspect of due process

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316. *Williams*, 233 F.3d at 595.

317. There would be no *Brady* violation because the prosecution neither knew nor should have known of the information.

318. See Wolf, *supra* note 305, at 1934 (criticizing the probability test of giving insufficient weight to considerations of fairness).

319. *But see* Carpenter, *supra* note 289, at 399-400 (pointing out that courts generally apply the same test regardless of whether the newly discovered evidence reveals perjury).

320. See Wolf, *supra* note 305, at 1947-49 (advocating for "significant chance" test); see also Carpenter, *supra* note 289, at 404-06 (discussing differences among tests).

protection with clarity and consistency. The protection has been diminished by decisions that interpose barriers that defendants cannot surmount. To provide appropriate protection, the requirements a defendant must meet to receive relief based on the use of false testimony must be clarified in the following ways. First, the prosecution should be deemed to have knowledge of the falsity not only if an individual prosecutor had actual knowledge but also if the prosecution did not meet its duty to discover that the testimony was false or if knowledge of the contrary information is possessed by other government actors and therefore imputed to the prosecution. Second, to support a due process claim based on false testimony, the falsity need not meet the definition of perjury; the testimony may be merely misleading. Third, the courts should apply the more lenient standard of materiality defined for false testimony cases and should ask how the revelation that the witness had testified falsely would have influenced the jury in the initial trial. Finally, the courts should recognize that a defendant may advance a valid false testimony claim even if the defense knew or should have known that the testimony was false, unless the falsity was fully aired at the trial.

In addition, the courts should revisit the law that applies when a defendant discovers that the prosecution unknowingly presented false testimony. If the falsity was material, the courts should conclude that the conviction violates due process despite the lack of prosecution knowledge. Even if the courts do not extend due process protection to the unknowing use of false testimony, they should grant the defendant a new trial more readily than with other types of newly discovered evidence. The corrupting impact of false testimony calls for at least this level of protection.



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