

Summer 1996

## Kyles v. Whitley: Death or Declaration

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### Recommended Citation

Ty Howton, Kyles v. Whitley: Death or Declaration, 86 J. Crim. L. & Criminology 1461 (1995-1996)

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## KYLES V. WHITLEY: DEATH OR DECLARATION?

Kyles v. Whitley, 115 S. Ct. 1555 (1995)

### I. INTRODUCTION

In *Kyles v. Whitley*,<sup>1</sup> the Supreme Court granted certiorari to determine whether police misconduct resulted in an innocent man's conviction and death sentence. Kyles claimed that, contrary to the findings of lower courts, the prosecution withheld evidence "material" to his defense in contradiction to *United States v. Brady*<sup>2</sup> and *United States v. Bagley*.<sup>3</sup> The Supreme Court found that the Fifth Circuit mistakenly applied the *Brady* "materiality" standard and that there was a "reasonable probability" that the evidence withheld from Kyles would have undermined the jury's verdict.<sup>4</sup> Thus, the Court granted a new trial to reconsider the defendant's conviction and death sentence.<sup>5</sup>

This Note argues that the Supreme Court did not grant certiorari to review the Fifth Circuit's application of the "materiality" standard as it claimed, but to consider whether the lower court had sentenced an innocent man to death. By using an illusory "legal error" to justify certiorari rather than the Court's true concerns over imposition of the death penalty, the Court has confused the "materiality" standard for future courts.

This Note further argues that Justice Scalia and the dissent incorrectly asserted that the Court was barred from granting certiorari by the "two court rule" and 28 U.S.C. § 2254. Moreover, by arguing the "two court rule" and 28 U.S.C. § 2254 apply to "materiality" determinations, the dissent exacerbated a circuit court split over the proper standard of review.

### II. BACKGROUND

#### A. THE COURT'S INSTITUTIONAL ROLE IN GRANTING CERTIORARI

The Supreme Court obtains its power to decide cases from Article

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<sup>1</sup> 115 S. Ct. 1555 (1995).

<sup>2</sup> 373 U.S. 83 (1963).

<sup>3</sup> 473 U.S. 667 (1985).

<sup>4</sup> *Kyles*, 115 S. Ct. at 1569.

<sup>5</sup> *Id.* at 1560.

III of the United States Constitution.<sup>6</sup> Article III of the Constitution grants the Court authority to decide all cases or controversies within its jurisdiction.<sup>7</sup> However, the Court's most important role in the American judiciary is to consider cases whose resolution can be expected to provide useful guidance to lower courts confronted with similar legal issues.<sup>8</sup> Under this institutional role, the Court generally does not grant certiorari to review a case if it would have no legal significance apart from the settlement of the case or controversy.<sup>9</sup> Furthermore, the Court must, to stay within this institutional role, grant certiorari to decide only one or two narrow issues presented by the parties in dispute.<sup>10</sup>

A departure from this institutional role is normally considered inappropriate for the Supreme Court because it requires the Court to function as a court of errors and appeals.<sup>11</sup> A court of errors and appeals searches the record of every case that comes before it for legal or factual errors.<sup>12</sup> Its primary goal in searching each case for errors is to do justice in that particular case.<sup>13</sup> Generally, the errors and appeals model is thought to be inappropriate for the Supreme Court because it runs counter to traditional conceptions of the Supreme Court's role, it is a practical impossibility, and it does not efficiently or effectively prevent unjust executions.<sup>14</sup>

Statutes and case law ensure that the Supreme Court comports with its customary institutional role. Two examples of such law are 28 U.S.C. § 2254(d) and the "two court rule."<sup>15</sup> Section 2254(d) requires

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<sup>6</sup> Article III, Sec. 2 cl. 1 of the United States Constitution states that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

<sup>7</sup> *Id.*

<sup>8</sup> Derick P. Beralge, Note, *Pleas of the Condemned: Should Certiorari Petitions from Death Row Receive Enhanced Access to the Supreme Court?*, 59 N.Y.U. L. REV. 1120 (1984) [hereinafter *Condemned*]. Cf. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 715 (1984).

<sup>9</sup> *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

<sup>10</sup> SUP. CT. R. § 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.").

<sup>11</sup> *Condemned*, *supra* note 8, at 1120.

<sup>12</sup> *Id.* at 1134.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1135.

<sup>15</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1577 (1995) (Scalia, J., dissenting).

reviewing courts to defer to lower court findings of fact in habeas corpus<sup>16</sup> proceedings.<sup>17</sup> Under the statute, reviewing courts can only grant certiorari if one of eight statutory exceptions is established by the courts<sup>18</sup> or if the review is not of a finding of fact, but a mixed issue of law and fact or an issue simply of law.<sup>19</sup> Similarly, the "two court rule" prevents the court from reviewing factual findings by lower courts<sup>20</sup> when two lower courts come to the same conclusion upon

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<sup>16</sup> For a general discussion of habeas corpus, see Amos E. Hartston & Jay Gonzalez, *Habeas Relief for State Prisoners*, 83 GEO. L.J. 1392 (1995).

Habeas corpus is the exclusive federal remedy available to a state prisoner who challenges the fact or duration of her confinement and seeks as relief her speedier or immediate release. The Supreme Court has characterized the writ as a "remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Id.* (citation omitted)

<sup>17</sup> 28 U.S.C. § 2254(d) (1994). Specifically, 28 U.S.C. § 2254(d) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . .

<sup>18</sup> *Id.*; *Burden v. Zant*, 498 U.S. 433, 437 (1991) ("A habeas court may not disregard [the § 2254] presumption [of correctness] unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of that conclusion."). The eight exceptions are: (1) the merits of the factual dispute were not resolved by state hearing; (2) the state court's fact finding procedure was not adequate to provide a full and fair hearing; (3) the material facts were not adequately developed at the state hearing; (4) the state court lacked jurisdiction over either the subject matter or the petitioner; (5) counsel was not appointed for an indigent petitioner; (6) the petitioner did not receive a full and fair hearing; (7) the petitioner was otherwise denied due process of law; or (8) the petitioner produced the state record and the federal court concludes that the evidence is insufficient to fairly support the state court's determination. 28 U.S.C. § 2254(d).

<sup>19</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980); *See also Miller v. Fenton*, 474 U.S. 104, 110-16 (1985) (holding voluntariness of confession is a question of law subject to independent federal habeas review); *Ouimette v. Moran*, 942 F.2d 1, 4-5 (1st Cir. 1991) (holding materiality of facts withheld by prosecution during state trial is mixed question of law and fact subject to independent federal habeas review).

<sup>20</sup> *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271 (1949), contains a classic statement of the two-court rule. The Court affirmed a district court ruling, affirmed by the court of appeals, that various patent claims were valid. Justice Jackson began by quoting Civil Rule 52, and finding that its clearly erroneous test was applicable in cases turning on expert testimony. *Id.* at 274. He then justified a particularly narrow scope of review by the Supreme Court in terms of the Court's own institutional role: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in absence of a very obvious and exceptional showing of error." *Id.* at 275. *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("[B]oth courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task."); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984) ("In accord with our usual practice, we must now accord great

making a finding of fact.<sup>21</sup> However, the purpose is again the same—to keep the Supreme Court involved in resolving confusing legal issues rather than individual claims of injustice.<sup>22</sup>

#### B. THE *BRADY* RULE

In the United States, the Constitution ensures a criminal defendant's right to a fair trial.<sup>23</sup> The Due Process Clauses of the Fifth and Fourteenth Amendments "require . . . that [government] action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"<sup>24</sup> A prosecutor can violate the Due Process Clause by suppressing exculpatory or impeaching evidence that is material to his guilt or punishment.<sup>25</sup> When a prosecutor fails to disclose evidence, the United States Supreme Court relies on *Brady v. Mary-*

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weight to a finding of fact which has been made by a district court approved by a court of appeals.")

<sup>21</sup> *Graver Tank*, 336 U.S. at 275.

<sup>22</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1577 (1995) (Scalia, J., dissenting).

<sup>23</sup> The criminal defendant's right to a fair trial is mandated by the Due Process Clause of the Fifth Amendment to the United States Constitution. U.S. CONST. amend. V. "[C]onstruction of [the Due Process] Clause will apply equally to the comparable clause in the Fourteenth Amendment applicable to trials in state courts." *United States v. Agurs*, 427 U.S. 97, 107 (1976).

<sup>24</sup> Nicholas A. Lambros, Note, *Conviction and Imprisonment Despite Nondisclosure of Evidence Favorable to the Accused By the Prosecution: Standard of Materiality Reconsidered*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 103 (1993) [hereinafter *Conviction and Imprisonment*] (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926)). See also *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819) in which the Supreme Court stated:

By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under protection of the general rules which govern society.

*Id.* The Fifth Amendment to the United States Constitution states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The Fourteenth Amendment to the United States Constitution states that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>25</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963).

land<sup>26</sup> and its progeny to determine whether a defendant's due process rights are compromised.

### 1. *Historical Predecessors to the Brady Rule*

As the Court noted in *Kyles v. Whitley*, "[t]he prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation . . . ."<sup>27</sup> In 1935, the Supreme Court began addressing misconduct in cases where prosecutors knowingly used perjured testimony to convict criminal defendants.<sup>28</sup> In *Mooney v. Holohan*,<sup>29</sup> a labor leader was convicted of first degree murder and sentenced to life imprisonment.<sup>30</sup> The defendant applied for a writ of habeas corpus, claiming that the prosecutor obtained the conviction by using false testimony.<sup>31</sup> After being denied a writ of habeas corpus by the District Court of California and the Ninth Circuit, the defendant appealed to the Supreme Court.<sup>32</sup> The defendant's request was denied because he had not exhausted his remedies in state court;<sup>33</sup> however, in dicta the Court found the knowing use of false testimony by the prosecutor amounted to a violation of due process.<sup>34</sup>

In 1942, the Supreme Court, in *Pyle v. Kansas*,<sup>35</sup> reaffirmed the principle set forth in *Mooney*. In *Pyle*, the defendant was convicted of murder and robbery.<sup>36</sup> Subsequently, he was sentenced to a life term for the murder and ten to twenty years for the robbery conviction.<sup>37</sup> After his application for a writ of habeas corpus was denied by the Supreme Court of Kansas, Pyle sought review by the United States

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<sup>26</sup> *Id.*

<sup>27</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1565 (1995).

<sup>28</sup> *Conviction and Imprisonment*, *supra* note 24, at 106. See also *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam).

<sup>29</sup> *Mooney*, 294 U.S. at 103.

<sup>30</sup> *Id.* at 109.

<sup>31</sup> *Id.* at 110.

<sup>32</sup> *Id.* at 109.

<sup>33</sup> *Id.* at 115.

<sup>34</sup> *Id.* at 112. The Court stated:

[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 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.

*Id.*

<sup>35</sup> 317 U.S. 213 (1942).

<sup>36</sup> *Id.* at 213-14.

<sup>37</sup> *Id.* at 214.

Supreme Court.<sup>38</sup> The defendant alleged that he was convicted because the prosecution knowingly used perjured testimony and deliberately did not disclose favorable evidence.<sup>39</sup> The defendant argued that the nondisclosure of evidence violated his constitutional right to a fair trial.<sup>40</sup> The Supreme Court found that "[t]hese allegations [of using false testimony and suppressing favorable evidence] sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to be released from his present custody."<sup>41</sup> As a result, the United States Supreme Court reversed the state court's denial of the writ of habeas corpus and affirmed *Mooney's* prohibition against a prosecutor's knowing use of false testimony and suppression of evidence favorable to the accused.<sup>42</sup>

Thus, *Mooney* and *Pyle* established a constitutional rule barring the prosecution from using perjured testimony. More importantly, *Mooney* and *Pyle* laid the foundation that would eventually become the principle espoused in *Brady v. Maryland*: a prosecutor's suppression of favorable evidence violates due process where the evidence is material to guilt or innocence.<sup>43</sup>

## 2. *The Creation of the Brady Rule*

The United States Supreme Court decided *Brady v. Maryland* in 1963.<sup>44</sup> Brady was convicted of first degree murder and sentenced to death.<sup>45</sup> Although Brady admitted at trial to having a role in the crime, he claimed that a companion committed the actual murder.<sup>46</sup> Upon a request to examine the extrajudicial statements of Brady's companion, the prosecution released several of the companion's statements.<sup>47</sup> However, the prosecution withheld the companion's statement in which he admitted that he had killed the murder victim.<sup>48</sup> This admission was disclosed only after Brady had been tried, convicted, and sentenced.<sup>49</sup> Brady's request for post-conviction relief was denied by the trial court; however, the Maryland Court of Appeals remanded the case for retrial on the issue of punishment, but not

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<sup>38</sup> *Id.* at 215.

<sup>39</sup> *Id.* at 214.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 215-16 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)).

<sup>42</sup> *Id.* at 216.

<sup>43</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 84.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 85.

guilt.<sup>50</sup> The United States Supreme Court affirmed the lower court's holding that the newly discovered evidence was only "material" to punishment and that retrial on this issue alone did not violate the accused's right to due process.<sup>51</sup>

*Brady v. Maryland* was a landmark decision because, for the first time, the United States Supreme Court announced that a prosecutor had an affirmative constitutional duty to disclose exculpatory evidence upon request of the defense.<sup>52</sup> The *Brady* rule dictates "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 punishment, irrespective of the good faith or bad faith of the prosecution."<sup>53</sup>

While *Brady* demanded prosecutors to disclose evidence when "material," the Court never defined "materiality."<sup>54</sup> The subsequent *Brady* cases heard by the Supreme Court developed a definition of materiality "by which a prosecutor could gauge his disclosure responsibilities."<sup>55</sup>

### 3. *Brady Today—The Development of Materiality*

#### a. *United States v. Agurs*

In *United States v. Agurs*,<sup>56</sup> the issue before the Supreme Court was whether the *Brady* rule should be expanded to include cases in which the defense did not make a specific request for evidence and to cases in which the prosecution did not use perjured evidence.<sup>57</sup> In *Agurs*, the defendant was convicted of second degree murder.<sup>58</sup> After trial the defendant claimed that the prosecutor did not disclose information regarding the victim's background that would have bolstered the defendant's self-defense argument.<sup>59</sup> According to the defendant, the prosecution's suppression of the evidence resulted in an unfair trial.<sup>60</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 88-91. See also *United States v. Agurs*, 427 U.S. 97, 106 (1976) for a discussion of the *Brady* decision.

<sup>52</sup> *Brady*, 373 U.S. at 87.

<sup>53</sup> *Id.*

<sup>54</sup> Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure*, 59 IOWA L. REV. 433, 436-37 (1973).

<sup>55</sup> *Id.* at 438; See also *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

<sup>56</sup> 427 U.S. 97 (1976).

<sup>57</sup> *Agurs*, 427 U.S. at 107. The Court had to decide whether a prosecutor was constitutionally obligated to disclose exculpatory evidence when there was only a general request or no request at all. *Id.*

<sup>58</sup> *Id.* at 98.

<sup>59</sup> *Id.* at 100.

<sup>60</sup> *Id.*



The Supreme Court rejected the defendant's claims.<sup>61</sup>

In rejecting the defendant's claims, the Court identified three situations in which a *Brady* claim might arise.<sup>62</sup> First, the Court identified situations where previously undisclosed evidence revealed that the prosecution introduced trial testimony it knew or should have known was perjured.<sup>63</sup> In this situation, the Court held that perjured testimony is "material" and a conviction must be vitiated if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."<sup>64</sup>

Second, the Court addressed the situation where the government failed to accede to a defense request for disclosure of specific exculpatory evidence.<sup>65</sup> While the Court did not define a particular standard of materiality for these situations, it indicated that the standard might be pro-defense subject to harmless-error review.<sup>66</sup>

Third, the Court highlighted the situation where the government failed to volunteer exculpatory evidence never requested, or requested only in a general way.<sup>67</sup> In this situation, the Court held that reversal was only warranted where the undisclosed evidence would create a reasonable doubt that did not otherwise exist.<sup>68</sup>

In sum, the Court found a duty on the part of the government to disclose evidence even when the defendant does not request evidence that may be favorable to him.<sup>69</sup> However, the Government need only disclose the information when it would be "of sufficient significance to result in the denial of the defendant's right to a fair trial."<sup>70</sup>

b. *United States v. Bagley*—Today's Standard for Materiality

The standards of materiality prescribed for the three situations enunciated in *Agurs* were modified significantly in *United States v. Bagley*.<sup>71</sup> In *Bagley*, the defendant was convicted of violating a federal narcotics statute.<sup>72</sup> The Supreme Court granted certiorari to determine

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<sup>61</sup> *Id.* at 114.

<sup>62</sup> *Id.* at 103.

<sup>63</sup> *Id.* at 103-04.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 104.

<sup>66</sup> *United States v. Bagley*, 473 U.S. 667, 681 (1984); *Agurs*, 427 U.S. at 104.

<sup>67</sup> *Agurs*, 427 U.S. at 106.

<sup>68</sup> *Id.* at 112.

<sup>69</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1565 (1995).

<sup>70</sup> *Id.* "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose." *Agurs*, 427 U.S. at 108.

<sup>71</sup> *United States v. Bagley*, 473 U.S. 667 (1985).

<sup>72</sup> *Id.* at 671.

the proper standard of materiality to be applied in a reviewing court's analysis of whether a conviction should be overturned due to the prosecutor's failure to disclose impeachment evidence upon request.<sup>73</sup> The Supreme Court, in its holding, disavowed any difference between exculpatory and impeaching evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances—the “specific or general request” and the “no request” situations.<sup>74</sup>

Furthermore, the Court set forth the definition of materiality used today. The new standard of materiality was a result of the application formulated in *Strickland v. Washington*<sup>75</sup> to resolve ineffectiveness of counsel claims.<sup>76</sup> The new rule stated that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>77</sup> A “‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”<sup>78</sup> Thus, the Court created a new rule for materiality that applied to all instances of nondisclosure while maintaining the lowest standard of materiality for the knowing use of perjured testimony.<sup>79</sup>

#### C. THE STANDARD OF REVIEW FOR *BRADY* “MATERIALITY” DETERMINATIONS

Normally, the review of lower court decisions is conducted under one of two standards. First, if the lower court decision is a finding of fact, the reviewing court evaluates the decision under a “clearly erroneous” standard of review.<sup>80</sup> Under a “clearly erroneous” standard of review, the reviewing court cannot reverse a finding of fact simply because the court is convinced that it would have decided the case differently.<sup>81</sup> Rather, when the lower court decision is a finding of fact, the reviewing court must defer to the lower court decision unless it is “clearly erroneous.”<sup>82</sup>

Second, when there is a question of law or a mixed question of

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<sup>73</sup> *Id.* at 669.

<sup>74</sup> *Id.* at 676, 682; *See also* *Kyles v. Whitley*, 115 S. Ct. at 1565.

<sup>75</sup> 466 U.S. 668 (1984).

<sup>76</sup> *Conviction and Imprisonment*, *supra* note 24, at 124.

<sup>77</sup> *Bagley*, 473 U.S. at 682; *See also* *Strickland*, 466 U.S. at 695 (1984).

<sup>78</sup> *Id.*

<sup>79</sup> *Bagley*, 473 U.S. at 678.

<sup>80</sup> FED. R. CIV. P. 52(a) (1995) (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . .”).

<sup>81</sup> *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985).

<sup>82</sup> *Id.* *See also* *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

law and fact, the reviewing court normally considers the case *de novo*. Under *de novo* review, the Court does not have to defer to the lower court opinion because, theoretically, it has granted certiorari to clarify the use of a particular legal standard rather than to reevaluate the facts of a case.<sup>83</sup>

Currently, the circuit courts are split over the proper standard of review to apply in "materiality" determinations under *Bagley*. While a minority of the courts defer to lower court opinions as if the determination is a finding of fact,<sup>84</sup> the majority of courts perceive the "materiality" determination as a mixed question of law and fact that requires *de novo* review.<sup>85</sup> Supreme Court precedent supports a *de novo* review of "materiality" when a habeas petition alleges a violation of the *Brady* doctrine. In *Strickland v. Washington*, the Court created the "reasonable probability" standard, later used to define materiality, and determined the standard was a mixed question of law and fact.<sup>86</sup> Because *Bagley* borrowed the standard from *Strickland* to define "materiality," most circuit courts have found that application of the materiality standard should also be a mixed question of law and fact requiring *de novo* review.<sup>87</sup>

More generally, the Court has, in evaluating petitions for habeas corpus relief, refused to equate findings of fact with mixed questions of law and fact when applying standards of review.<sup>88</sup> While pure findings of fact in habeas petitions are normally accorded a "clearly erroneous" standard of review, mixed questions of fact and law have traditionally been adjudicated under a *de novo* standard.<sup>89</sup>

### III. FACTS AND PROCEDURAL HISTORY

#### A. THE CRIME

At approximately 2:20 p.m. on September 20, 1984, Mrs. Dolores Dye, a sixty year old woman, was murdered in the parking lot at the

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<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995); *United States v. Price*, 13 F.3d 711, 722 (3d Cir. 1994).

<sup>85</sup> See, e.g., *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995); *Banks v. Reynolds*, 54 F.3d 1508, 1516 (10th Cir. 1995); *Wilson v. Whitley*, 28 F.3d 433, 437-38 (5th Cir. 1994); *Cornell v. Nix*, 976 F.2d 376, 382 (8th Cir. 1992).

<sup>86</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (citing *Strickland*, 466 U.S. at 694).

<sup>87</sup> *Wilson*, 28 F.3d at 437 n.6.

<sup>88</sup> *Sumner v. Mata*, 455 U.S. 591, 597 (1982).

<sup>89</sup> *Brecht v. Abrahamson*, 507 U.S. 619, 642 (1993) (Stevens, J., concurring); *Wright v. West*, 505 U.S. 277, 296-304 (1992) (O'Connor, J., concurring).

Schwegmann Brother's grocery store in New Orleans.<sup>90</sup> As Dye was putting her grocery bags into the trunk of her red Ford LTD, a man accosted her.<sup>91</sup> After a short struggle, the man drew a revolver, fired into Dye's left temple, and killed her.<sup>92</sup> The gunman took Dye's keys and drove away in the LTD.<sup>93</sup>

#### B. THE INVESTIGATION

On the day of the murder, New Orleans police took statements from several eyewitnesses, who offered descriptions of the gunman.<sup>94</sup> Police spoke to Isaac Smallwood, Henry Williams, and three other witnesses at the scene.<sup>95</sup> Isaac Smallwood was working at a street corner by the Schwegmann Brother's parking lot.<sup>96</sup> The gunman drove past Smallwood in the LTD, allowing Smallwood to see the gunman's face.<sup>97</sup> Williams was also working nearby the parking lot.<sup>98</sup> Williams witnessed the struggle and murder and saw the gunman's face as the gunman slowly passed within twelve feet of him.<sup>99</sup>

Later that day the police discovered two additional eyewitnesses, Robert Territo and Darlene Cahill, who had left the crime scene, but called the station to report the murder.<sup>100</sup> Territo witnessed the shooting and saw the gunman's face at close range when the murderer stopped for a traffic light next to the truck Territo was driving.<sup>101</sup> Cahill witnessed the murder from approximately 100 feet away while riding in a vehicle on an adjacent highway.<sup>102</sup>

All of the witnesses agreed that the gunman was a black man, who wore a dark colored shirt, blue-jeans, and his hair in "plaits."<sup>103</sup> However, the witnesses differed in their descriptions of height, age, weight, build and hair length.<sup>104</sup> Two witnesses reported seeing a man of seventeen or eighteen, while another described the gunman as approximately twenty-eight years old.<sup>105</sup> One witness described the gunman's

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<sup>90</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1560 (1995).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Kyles v. Whitley*, 5 F.3d 806, 808 (5th Cir. 1993).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Brief for Respondent at 3, *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (No. 93-7927).

<sup>103</sup> *Kyles*, 5 F.3d at 808.

<sup>104</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1560 (1995).

<sup>105</sup> *Id.*

5'4" or 5'5", medium build, 140-150 pounds; another witness described him as thin and close to six feet.<sup>106</sup> One witness said he had a mustache; none of the others mentioned any facial hair.<sup>107</sup> Finally, one witness said the murderer had shoulder length hair; another witness said the murderer had short hair.<sup>108</sup>

Based on the eyewitness testimony, the police believed the killer might have driven his own car to Schwegmann's and left it there when he drove off in Dye's LTD.<sup>109</sup> As a result, the police recorded the license numbers of the cars remaining in the parking lot near the store on the evening of the murder.<sup>110</sup> The police did not take down the license numbers of every car in the parking lot.<sup>111</sup>

Despite the eyewitness accounts and the recorded license numbers, the police were without leads until Saturday evening, September 22, 1984, when a man identifying himself as James "Beanie" Joseph<sup>112</sup> called police to report that a man named "Curtis"<sup>113</sup> had sold him a red Ford LTD on Thursday, September 20, 1984.<sup>114</sup> During the phone call, Beanie told the police that he had read about Dye's murder in the newspaper and feared that the LTD he purchased was the victim's.<sup>115</sup>

A police detective subsequently met with Beanie at 10:00 p.m. that Saturday evening.<sup>116</sup> During this meeting Beanie told the police that he bought the car on Friday, September 21, 1984, rather than Thursday as he had suggested earlier on the phone.<sup>117</sup> Beanie led the police to the LTD he bought from Kyles, later identified as Dye's.<sup>118</sup> After showing the police the location of the car, Beanie told them he had changed the plates on the car, and that he was worried about being charged for the murder on the basis of his possession of the LTD.<sup>119</sup> The police assured him not to worry.<sup>120</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1560-61.

<sup>108</sup> *Id.* at 1561.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Kyles v. Whitley*, 5 F.3d 806, 816 (5th Cir. 1993).

<sup>112</sup> The informant used several aliases throughout his cooperation with the police including Joseph Wallace (his actual name), Joseph Banks, and James Joseph. *Kyles*, 115 S. Ct. at 1561. Both the Fifth Circuit and the Supreme Court referred to Wallace as "Beanie," so that is the name that is used in the Note.

<sup>113</sup> *Id.* at 1561. "Curtis" was later identified as Curtis Kyles, the petitioner. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Brief for Respondent at 3, *Kyles* (No. 93-7927). See also *Kyles*, 115 S. Ct. at 1561. The detective wore a microphone for his own protection. *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

During the conversation, Beanie explained that he lived with Kyles' brother-in-law, Johnny Burns.<sup>121</sup> Beanie described Kyles as a slim, six foot tall, twenty-four or twenty-five year old with a "bush hair-style."<sup>122</sup> When questioned whether Kyles ever wore his hair in "plaits," Beanie responded yes, but that he "had a bush" when Beanie bought the car.<sup>123</sup> Beanie also instructed the police that Kyles regularly carried two pistols, a .38 caliber and a .32 caliber.<sup>124</sup> Beanie told police that if the police could "set him up good," he would get them the gun used to kill Dye.<sup>125</sup>

Beanie then showed the detectives the location of Kyles' apartment and told them what happened after he bought the car from Kyles.<sup>126</sup> After buying the car from Kyles, Beanie and Johnny Burns drove Kyles to Schwegmann's at about 9 p.m. on Friday evening to pick up Kyles' car, an orange four-door Ford.<sup>127</sup> Beanie instructed the police that Kyles' car was located on the same side of the parking lot as the murder scene.<sup>128</sup> Beanie later showed them the exact spot.<sup>129</sup> Beanie also told the police that Kyles removed the grocery sacks from the LTD and put Dye's stolen purse in the garbage outside his apartment on the following day.<sup>130</sup>

After the visit to Schwegmann's, the detective took Beanie to the police station where the detectives conducted an extensive interview with Beanie on the record which was later transcribed and signed by Beanie.<sup>131</sup> During the interview, Beanie repeated substantially what he had earlier reported to the detectives.<sup>132</sup> However, some portions of Beanie's statements contradicted his earlier story.<sup>133</sup>

Based on the information provided by Beanie, the police retrieved garbage from the front of Kyles' residence.<sup>134</sup> Inside one of the garbage bags, the police found Dye's purse, identification and other personal belongings wrapped in a Schwegmann's grocery

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* According to testimony and photographs introduced at trial, Kyles' car was really a two-door Mercury. *Id.*

<sup>128</sup> *Id.* at 1562.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* For example, Beanie indicated that he had learned of the robbery from his brother-in-law, not from his own reading of the newspaper as he earlier alleged. *Id.*

<sup>134</sup> *Id.*

sack.<sup>135</sup>

On Monday, September 24, 1984, the police arrested Kyles and searched his apartment under warrant.<sup>136</sup> The police seized eight Schwegmann's grocery bags, a .32 caliber revolver with one spent round from behind Kyles' stove,<sup>137</sup> a homemade holster, a box of .32 caliber ammunition, and a Schwegmann's bag filled with a large amount of dog and cat food similar to that purchased by the victim.<sup>138</sup> No identifiable fingerprints could be obtained from the evidence seized at Kyles' apartment; however, Kyles' fingerprints were on a Schwegmann's receipt found in the LTD.<sup>139</sup> The receipt's contents were illegible due to the chemicals applied by police to identify fingerprints.<sup>140</sup>

After Kyles was arrested, a detective prepared a photo lineup for five eyewitnesses.<sup>141</sup> Three of the witnesses picked Kyles immediately, another picked him tentatively.<sup>142</sup>

#### C. THE TRIALS

Kyles was subsequently indicted for first degree murder.<sup>143</sup> Before Kyles' trial the defense filed a motion for disclosure by the State of any exculpatory evidence.<sup>144</sup> The prosecution responded that there was "no exculpatory evidence of any nature,"<sup>145</sup> despite the prosecutor's knowledge of Beanie's statements, contemporaneous eyewitness statements, and the computer print-out of license plate numbers recorded after the murder.<sup>146</sup>

At Kyles' first trial, in November, 1984, the State relied on the testimony of four eyewitnesses that were at the crime scene.<sup>147</sup> The defense argued that Kyles had been set up by Beanie, who had planted evidence in Kyles' apartment and garbage in order to shift suspicion away from himself, remove an impediment to his romance with Pinky Burns,<sup>148</sup> and to collect reward money.<sup>149</sup> Beanie, how-

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<sup>135</sup> *Id.* at 1563.

<sup>136</sup> *Id.* at 1562.

<sup>137</sup> The .32 caliber gun was later identified as the murder weapon. *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1563.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* Pinky Burns was Kyles' common law wife. *Id.* at 1562 n.4

<sup>149</sup> *Id.* at 1563. Beanie was awarded \$1,600.00 as a reward. *Id.* at 1564.

ever, did not testify.<sup>150</sup> The jury was deadlocked, and the court declared a mistrial.<sup>151</sup>

After the mistrial, the chief trial prosecutor, Cliff Strider, interviewed Beanie.<sup>152</sup> Beanie again changed important parts of his story; "notwithstanding the many inconsistencies among Beanie's statements, neither Strider's notes nor any other notes or transcripts were given to the defense."<sup>153</sup>

In December, 1984, Kyles was tried a second time.<sup>154</sup> The State, again, relied primarily on the testimony of the four eyewitnesses to establish Kyles as the gunman.<sup>155</sup> In addition, the State offered a blown-up photograph of what was alleged to be Kyles' car parked in the Schwegmann's lot at the time of the murder.<sup>156</sup> The defense, again, argued that the perpetrator was Beanie, not Kyles.<sup>157</sup> In support of this assertion, defense witnesses, who were friends and relatives of Kyles, testified that Beanie was seen driving Dye's LTD on Thursday, September 20; that Beanie changed the license plates on the car, and offered to sell the car on Friday, September 21 for \$300.00; and that Beanie was seen looking behind Kyles' kitchen stove, where the gun was later found, on Sunday, September 23.<sup>158</sup> Kyles took the stand and explained that the receipt with his fingerprints on it had fallen out of a bag during a ride in the LTD when he removed cigarettes he had purchased from the bag.<sup>159</sup> In rebuttal, the prosecution brought in Beanie to stand next to Kyles so that each witness could identify the murderer.<sup>160</sup> Each witness identified Kyles as the killer.<sup>161</sup> Beanie again did not testify.<sup>162</sup> The jury returned a verdict of guilty of first degree murder and a sentence of death.<sup>163</sup> The conviction and sentence were affirmed on direct appeal.<sup>164</sup>

On collateral review, it was revealed that the State had failed to

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1563.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1563-64. Strider's notes indicated that Beanie went with Kyles to retrieve Kyles' car from the Schwegmann's lot on Thursday, not Friday as he had earlier claimed. *Id.* at 1563. Also, Beanie told Strider that when he picked up the car he was not only accompanied by Burns, but also Kevin Black. *Id.*

<sup>154</sup> *Id.* at 1564.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Kyles*, 5 F.3d at 809-10.

<sup>159</sup> *Kyles*, 115 S. Ct. at 1564.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *State v. Kyles*, 513 So. 2d 265 (La. 1987), *cert. denied*, 486 U.S. 1027 (1988).



disclose evidence favorable to the defense.<sup>165</sup> Documents withheld from the defense included contemporaneous statements that Williams and Smallwood gave to police right after the murder; a tape recording of the conversation between Beanie and police detectives that occurred on Saturday, September 22, 1984; Beanie's typed and signed statement; Cliff Strider's handwritten notes from his interview with Beanie after the first trial; and a computer print-out of license plate numbers recorded in the parking lot after the murders.<sup>166</sup> Despite the discovery of the new evidence, the State trial court denied relief, and the State Supreme Court denied Kyles' application for discretionary review.<sup>167</sup>

Kyles, having exhausted his state remedies, filed a habeas corpus petition in the United States District Court for the Eastern District of Louisiana.<sup>168</sup> He raised twenty potential violations of his rights.<sup>169</sup> Most relevant among these was the question of whether the evidence withheld from him by the police was material and whether his conviction was obtained in violation of his due process rights under *Brady v. Maryland*.<sup>170</sup>

Citing *Brady*, the District Court held that even if the police had disclosed the evidence, there was not a "reasonable probability" that the result of the trial would have been different.<sup>171</sup> Therefore, the court found the evidence immaterial and no due process violation.<sup>172</sup> After addressing the other alleged violations, the court denied Kyles' petition.<sup>173</sup>

Subsequently, Kyles appealed to the Court of Appeals for the Fifth Circuit.<sup>174</sup> In a divided vote, the Fifth Circuit affirmed the District Court's decision.<sup>175</sup> Kyles again argued, among other things, that the State's failure to disclose information was a *Brady* violation.<sup>176</sup> Like the District Court, the Court of Appeals held that the evidence

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<sup>165</sup> *Kyles*, 115 S. Ct. at 1564.

<sup>166</sup> *Id.* at 1563.

<sup>167</sup> *State ex rel. Kyles v. Butler*, 566 So. 2d 386 (La. 1990).

<sup>168</sup> *Kyles v. Whitley*, 5 F.3d 806, 844 (1993).

<sup>169</sup> *Kyles*, 5 F.3d at 847 (1993).

<sup>170</sup> *Id.* *Brady v. Maryland*, 373 U.S. 83 (1963). A *Brady* violation occurs when the prosecution withholds evidence that is material and favorable to the defendant. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See id.* at 682. A reasonable probability is shown when the nondisclosure of evidence "undermines the confidence in the outcome of the trial." *Id.*

<sup>171</sup> *Kyles v. Whitley*, 5 F.3d 806, 848 (1993).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 861.

<sup>174</sup> *Id.* at 862.

<sup>175</sup> *Id.* at 806.

<sup>176</sup> *Id.* at 810.

was immaterial because there was not a "reasonable probability" that the evidence would have undermined the outcome of the trial.<sup>177</sup> The court concluded that regardless of the undisclosed evidence, Kyles faced "overwhelming evidence of guilt."<sup>178</sup> Therefore, the court found that neither a *Brady* nor a due process violation occurred.<sup>179</sup>

Kyles' arguments did find favor, however, in Judge King's dissent.<sup>180</sup> Judge King stated that "[f]or the first time in my fourteen years on this court . . . during which I have participated in the decisions of literally dozens of capital habeas cases . . . I have serious reservations about whether the State sentenced to death the wrong man."<sup>181</sup> Unlike the majority, Judge King believed the undisclosed police evidence would have undermined the jury verdict.<sup>182</sup> He based this decision on several factors. First, Judge King did not believe the evidence against Kyles was as strong as the majority suggested because Kyles' original jury, hearing evidence essentially identical to that offered in the second trial, was deadlocked on the question of guilt.<sup>183</sup> Second, Judge King thought that the undisclosed conversations with Beanie revealed various inconsistencies that would strengthen Kyles' defense that Beanie framed him.<sup>184</sup> Third, Judge King purported that the undisclosed contemporaneous witness statements undermined witness testimony at the trial.<sup>185</sup> Finally, Judge King asserted that the undisclosed print-out of license numbers, which did not include Kyles' car, would have undercut the picture prosecutors used to prove Kyles was in the parking lot at the time of the murder.<sup>186</sup>

The Supreme Court granted certiorari to determine whether Kyles' due process rights were violated by the prosecution's failure to disclose evidence.<sup>187</sup>

#### IV. SUMMARY OF OPINIONS

##### A. MAJORITY OPINION

In an opinion written by Justice Souter,<sup>188</sup> the Supreme Court reversed the Fifth Circuit's decision and granted a new trial for Curtis

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<sup>177</sup> *Id.* at 817.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 820 (King, J., dissenting).

<sup>181</sup> *Id.* (King, J., dissenting).

<sup>182</sup> *Id.* (King, J., dissenting).

<sup>183</sup> *Id.* at 832 (King, J., dissenting).

<sup>184</sup> *Id.* (King, J., dissenting).

<sup>185</sup> *Id.* (King, J., dissenting).

<sup>186</sup> *Id.* at 840 (King, J., dissenting).

<sup>187</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1556 (1995).

<sup>188</sup> Justices O'Connor, Stevens, Ginsburg and Breyer joined Justice Souter's opinion.

Kyles.<sup>189</sup> Relying on *Brady v. Maryland*<sup>190</sup> and *United States v. Bagley*,<sup>191</sup> Justice Souter found there was a "reasonable probability" that the evidence withheld by the prosecution would have caused the jury to reach a different decision.<sup>192</sup> Therefore, Justice Souter found the evidence material and a new trial necessary.<sup>193</sup>

As a threshold matter, Justice Souter addressed why the Court of Appeals' decision was subject to review.<sup>194</sup> Relying on *Burger v. Kemp*,<sup>195</sup> Justice Souter stated that the Court's duty to search for constitutional error with painstaking care is never more exacting than in a capital case.<sup>196</sup> Therefore, the Court concluded, there was reason to question whether the Court of Appeals evaluated the significance of the undisclosed evidence under the correct standard.<sup>197</sup>

Justice Souter then identified the correct standard for cases in which the prosecution failed to disclose exculpatory evidence. Relying on *United States v. Bagley*,<sup>198</sup> the Court declared that evidence favorable to the defendant is material, and constitutional error results from its suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>199</sup>

According to Justice Souter, four aspects of materiality require emphasis under *Bagley*.<sup>200</sup> First, Justice Souter explained that a showing of materiality does not require demonstration by a preponderance that disclosure of suppressed evidence would have resulted in the defendant's acquittal.<sup>201</sup> Rather, Justice Souter stressed, the touchstone of materiality is a "reasonable probability" of a trial in which the verdict is undermined.<sup>202</sup>

Second, Justice Souter argued that a determination of materiality is not a sufficiency of evidence test.<sup>203</sup> One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence

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<sup>189</sup> *Id.*

<sup>190</sup> 373 U.S. 83 (1963).

<sup>191</sup> 473 U.S. 667 (1985).

<sup>192</sup> *Kyles*, 115 S. Ct. at 1569.

<sup>193</sup> *Id.* at 1575.

<sup>194</sup> *Id.* at 1560.

<sup>195</sup> 483 U.S. 776 (1987) (holding petitioner's ineffective assistance of counsel claim invalid).

<sup>196</sup> *Kyles*, 115 S. Ct. at 1560 (1995) (quoting *Burger*, 483 U.S. at 785).

<sup>197</sup> *Id.*

<sup>198</sup> 473 U.S. 667 (1985).

<sup>199</sup> *Kyles*, 115 S. Ct. at 1565 (1995) (quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.), 685 (opinion of White, J., concurring in part and concurring in judgment)).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1565-66.

<sup>202</sup> *Id.* at 1566.

<sup>203</sup> *Id.*

would have been excluded, but by showing that the favorable evidence could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."<sup>204</sup>

Third, Justice Souter stated that, contrary to the Court of Appeals' assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless error review because the constitutional standard for materiality under *Bagley* imposes a higher burden than the harmless error standard of *Brecht v. Abrahamson*.<sup>205</sup>

Fourth, Justice Souter stressed that the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item-by-item.<sup>206</sup> The Court explained that it is the prosecutor's duty to evaluate the evidence in sum and determine whether a "reasonable probability" has been generated.<sup>207</sup> Justice Souter concluded his *Bagley* discussion by declaring that the Court of Appeals had wrongly evaluated the evidence as a series of individual materiality evaluations, rather than the cumulative evaluation *Bagley* requires.<sup>208</sup>

In the next section of the opinion, Justice Souter explained how disclosure of the withheld evidence would have made a different result in Kyles' trial reasonably probable.<sup>209</sup> First, Justice Souter compared two accounts offered by eyewitnesses at trial with the undisclosed contemporaneous statements they gave to police right after the crime occurred.<sup>210</sup> Henry Williams' contemporaneous statement described Kyles as more than five inches shorter than his actual height and much thinner than his actual build.<sup>211</sup> Isaac Smallwood said in his statement that he did not see the murder or the assailant outside the vehicle, yet Justice Souter pointed out that at trial Smallwood testified he saw the .32 caliber weapon when Kyles struggled with Dye outside the car and that he saw the actual shooting.<sup>212</sup>

Second, Souter addressed the undisclosed conversations and statements regarding Beanie.<sup>213</sup> Justice Souter alleged Beanie's state-

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* The Court explained that a *Bagley* error could not be treated as harmless because the "reasonable probability" standard put forth in *Bagley* necessarily entails the conclusion that the suppression must have had "substantial injurious effect or influence in determining a jury's verdict." *Id.* (quoting *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1712 (1993)).

<sup>206</sup> *Id.* at 1567.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1569.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1569-71.

<sup>211</sup> *Id.* at 1569.

<sup>212</sup> *Id.* at 1570.

<sup>213</sup> *Id.* at 1571-73. Examples of the inconsistencies included the varying days Beanie told

ments were fraught with inconsistencies which the defense could have used to challenge the thoroughness of the police investigation.<sup>214</sup>

Third, the opinion discussed the undisclosed list of license plates police recorded after the murder.<sup>215</sup> The release of this information, claimed Justice Souter, would have undermined the prosecutions' use of a photograph to establish that Kyles' car was at the scene of the murder when it was committed.<sup>216</sup> Finally, Justice Souter concluded that the newly discovered evidence made the prosecution's case much weaker while drastically increasing the persuasiveness of defense arguments.<sup>217</sup> As a result, he held there was a "reasonable probability" that the earlier jury decision had been undermined and that a new trial should be granted.<sup>218</sup>

#### B. JUSTICE STEVENS' CONCURRENCE

In his concurrence, Justice Stevens<sup>219</sup> offered three reasons why the case was given "favored treatment" over other death penalty cases in determining a grant of certiorari.<sup>220</sup> First, Justice Stevens claimed that a hung jury in the first trial provided strong reason to believe the significant errors that occurred at the second trial were prejudicial.<sup>221</sup> Second, cases in which the record reveals so many instances in which the state failed to disclose exculpatory evidence are extremely rare.<sup>222</sup> Third, Justice Stevens' independent review of the case left him with serious doubts as to the defendant's guilt.<sup>223</sup> As a result of these three factors, Justice Stevens stated that "[the Court's] duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though [the Court's] labors may not provide posterity with a newly minted rule of law."<sup>224</sup>

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the police he bought the car and Kevin Black's involvement in retrieving the car and transferring the groceries. *Id.* at 1571. Justice Souter believed that these inconsistencies, when added to Beanie's suggestion to look in Kyles' garbage for the handbag and his knowledge of where Kyles' car was parked during the murder, amounted to a powerful defense. *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1573-74.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1574-75.

<sup>218</sup> *Id.* at 1575-76.

<sup>219</sup> Justice Ginsberg and Justice Breyer joined Justice Stevens' opinion.

<sup>220</sup> *Id.* at 1576 (Stevens, J., concurring) (quoting *Id.* at 1577 (Scalia, J., dissenting)).

<sup>221</sup> *Id.* (Stevens, J., concurring).

<sup>222</sup> *Id.* (Stevens, J., concurring).

<sup>223</sup> *Id.* (Stevens, J., concurring).

<sup>224</sup> *Id.* (Stevens, J., concurring).

## C. JUSTICE SCALIA'S DISSENT

Justice Scalia,<sup>225</sup> writing in dissent, concluded that the Court should not have granted certiorari to the petitioner, nor should the Court have reversed the decisions of the lower courts.<sup>226</sup> Justice Scalia admonished the Court for granting certiorari, reasoning that it was wholly unprecedented to consider a fact-bound claim of error rejected by every state and federal court that had previously heard it.<sup>227</sup> Relying on *United States v. Johnson*,<sup>228</sup> Justice Scalia argued that it was the Court's policy to deny a claim by a petitioner that a correct view of the law was incorrectly applied to the facts.<sup>229</sup> Furthermore, Justice Scalia argued that the Court has, in the past, applied the "two court" rule with particular vigor and deferred to lower courts when both the district and circuit courts agreed on what factual conclusion the record required, as in this case.<sup>230</sup> Finally, Justice Scalia pointed out that under 28 U.S.C. § 2254(d), the Court was required to defer to lower court findings of fact when reviewing habeas corpus petitions.<sup>231</sup> Thus, Justice Scalia argued certiorari should not have been granted in the *Kyles* case.

Justice Scalia also questioned the majority's assertion that review was warranted by a legal error made by the Court of Appeals.<sup>232</sup> Justice Scalia argued that the Court of Appeals applied the same materiality standard the majority used in its opinion.<sup>233</sup> Moreover, Justice Scalia asserted that the Court of Appeals applied the *Brady* standard correctly because it evaluated the evidence's impact as a whole, unlike the majority, which he argued made several individual findings of materiality.<sup>234</sup>

Next, Justice Scalia proclaimed that the Court "having improvidently decided to review the facts of the case, went on to get the facts wrong."<sup>235</sup> In particular, Justice Scalia argued that the potential effect of the *Brady* material on the eyewitness testimony was immaterial.<sup>236</sup> Justice Scalia reasoned that even with the introduction of the *Brady*

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<sup>225</sup> Chief Justice Rehnquist, Justice Thomas, and Justice Kennedy joined Justice Scalia's opinion.

<sup>226</sup> *Id.* at 1576 (Scalia, J., dissenting).

<sup>227</sup> *Id.* (Scalia, J., dissenting).

<sup>228</sup> 268 U.S. 220, 227 (1925).

<sup>229</sup> *Kyles*, 115 S. Ct. at 1577 (Scalia, J., dissenting).

<sup>230</sup> *Id.* (Scalia, J., dissenting).

<sup>231</sup> *Id.* (Scalia, J., dissenting).

<sup>232</sup> *Id.* (Scalia, J., dissenting).

<sup>233</sup> *Id.* (Scalia, J., dissenting).

<sup>234</sup> *Id.* at 1578 (Scalia, J., dissenting).

<sup>235</sup> *Id.* (Scalia, J., dissenting).

<sup>236</sup> *Id.* at 1579 (Scalia, J., dissenting).

evidence, the testimony of two witnesses remained unaffected.<sup>237</sup> Contemporaneous statements did not compromise the testimony of Robert Territo, who witnessed Kyles commit the murder and saw Kyles at close range, or Darlene Cahill, who saw Kyles commit the murder from 100 feet away.<sup>238</sup> As for Isaac Smallwood, Justice Scalia argued that his testimony was "barely affected" by the introduction of the contemporaneous police statements.<sup>239</sup> Justice Scalia noted that although Smallwood may not have seen the defendant outside of the LTD, he did see Kyles' face at close range, thereby making him an effective witness.<sup>240</sup> Justice Scalia did admit that Henry Williams' testimony was somewhat impaired because his description of the gunman in the undisclosed contemporaneous statement did not match Kyles.<sup>241</sup>

However, Justice Scalia went on to say that he was concerned with the majority's proposition that the effective impeachment of one witness can call for a new trial even though the attack did not extend directly to others.<sup>242</sup> Justice Scalia argued that the majority's position assumed an irrational jury and was incompatible with the whole idea of a materiality standard, which presumes incriminating evidence that would have been impeached by proper disclosure can be logically separated from incriminating evidence that remains unaffected.<sup>243</sup>

Finally, Justice Scalia addressed the strength of the physical evidence against Kyles.<sup>244</sup> Specifically, the dissent stressed the importance of the cat food found in Kyles' home.<sup>245</sup> Prior to her murder, Dye had been doing her weekly grocery shopping which included buying pet food for her two cats and her dog.<sup>246</sup> Thus, Justice Scalia alleged, finding fifteen cans of pet food similar to the type normally purchased by Dye was strong proof that Kyles committed the murder.<sup>247</sup> Justice Scalia went on to point out that when the defendant was questioned at trial about the cat food, he testified that he bought a great deal of it because it was on sale.<sup>248</sup> However, the prosecution presented witnesses from the store that testified the pet food was not on sale as Kyles claimed.<sup>249</sup> Justice Scalia concluded that the State

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<sup>237</sup> *Id.* at 1582 (Scalia, J., dissenting).

<sup>238</sup> *Id.* at 1580, 1582 (Scalia, J., dissenting).

<sup>239</sup> *Id.* (Scalia, J., dissenting).

<sup>240</sup> *Id.* at 1581 (Scalia, J., dissenting).

<sup>241</sup> *Id.* at 1581 n.3 (Scalia, J., dissenting).

<sup>242</sup> *Id.* at 1582-83 (Scalia, J., dissenting).

<sup>243</sup> *Id.* at 1583 (Scalia, J., dissenting).

<sup>244</sup> *Id.* at 1583-85 (Scalia, J., dissenting).

<sup>245</sup> *Id.* at 1584 (Scalia, J., dissenting).

<sup>246</sup> *Id.* (Scalia, J., dissenting).

<sup>247</sup> *Id.* (Scalia, J., dissenting).

<sup>248</sup> *Id.* at 1585 (Scalia, J., dissenting).

<sup>249</sup> *Id.* (Scalia, J., dissenting).

presented a "massive core" of evidence showing the petitioner was guilty of murder, and that he lied about his guilt.<sup>250</sup> Justice Scalia concluded that the *Brady* evidence only immaterially affected the "core" of evidence, and therefore did not warrant a new trial for the petitioner or a lesser sentence.<sup>251</sup>

## V. ANALYSIS

This Note addresses the Supreme Court's grant of certiorari in *Kyles v. Whitley*. This Note argues that the Supreme Court granted certiorari in *Kyles v. Whitley* to review whether an innocent man was sentenced to death, but "strained" to find a legal error in order to justify certiorari. Unfortunately, the Supreme Court's use of an illusory legal error created confusion over the proper application of the "materiality" standard. To have avoided potential confusion, the Court should have justified certiorari consistent with its true concerns over the killing of a potentially innocent man.

This Note also addresses the dissent's use of the "two court rule" and 28 U.S.C. § 2254(d) to argue that certiorari should have been denied. The dissent misapplied the "two court rule" and § 2254 in its argument that the Supreme Court should not have granted certiorari in *Kyles v. Whitley*. Moreover, the dissent's use of the "two court rule" and § 2254 will further confuse an already present circuit court split over the proper standard of review in *Brady* cases.

### A. THE COURT'S GRANT OF CERTIORARI

#### 1. *The Supreme Court Granted Certiorari to Review Whether an Innocent Man Had Been Sentenced to Death*

The Supreme Court's true concern in granting certiorari was that the lower courts had sentenced the wrong man to death, not that they had used the wrong legal standard of "materiality." This is best evidenced by the Court's own statements. Justice Souter first implied that the severity of the death penalty was the reason the Court granted certiorari when he stated that the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."<sup>252</sup> Moreover, the majority went on to emphasize in its description of the case history that Justice King, in his circuit court dissent, stated "for the first time in my fourteen years on this court . . . I have serious reservations about whether the State has sentenced to

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<sup>250</sup> *Id.* (Scalia, J., dissenting).

<sup>251</sup> *Id.* (Scalia, J., dissenting).

<sup>252</sup> 115 S. Ct. at 1560 (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)).



death the right man."<sup>253</sup>

The most telling evidence of the Court's sentiments is Justice Stevens' short concurrence. In an attempt to justify certiorari beyond the "strained" legal error found by the Court, Justice Stevens reiterated Justice King's sentiments in his concurring opinion. "Despite my high regard for the diligence and craftsmanship of the author of the majority opinion in the Court of Appeals, my independent review of the case left me with the same degree of doubt about petitioner's guilt expressed by the dissenting judge in that court."<sup>254</sup> As a result of such doubt, Justice Stevens concluded it was the Court's duty to consider a case like *Kyles*.<sup>255</sup>

The Court's real desire to consider whether an innocent man was wrongly sentenced to death is also evidenced by its "strained"<sup>256</sup> attempt to find legal error. First, after claiming the Fifth Circuit used the wrong "materiality" standard, the Court went on to use the same "materiality" standard as the Fifth Circuit and to mimic the circuit court's application of the standard. The Supreme Court, in *United States v. Bagley*, reformulated the "materiality" standard originally used in *United States v. Agurs*.<sup>257</sup> Under *Bagley* the standard for determining the "materiality" of undisclosed evidence was no longer whether the "evidence would create a reasonable doubt in the mind of the trial judge," but whether there was a reasonable probability the jury's decision would be undermined by the new evidence.<sup>258</sup>

While the majority did emphasize four aspects of materiality under *Bagley*,<sup>259</sup> it mimicked the court of appeals' ultimate reliance on

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<sup>253</sup> *Id.* at 1564 (quoting *Kyles v. Whitley*, 5 F.3d 806, 820 (1993) (King, J., dissenting)).

<sup>254</sup> *Id.* at 1576. While Justice Stevens acknowledged a legal issue in this case, he went on to justify certiorari on three grounds. One of the grounds was his concern that the death penalty had been given to an innocent man. He also justified certiorari by pointing to the hung jury in *Kyles*' first trial and by the number of instances the prosecution did not disclose evidence. *Id.*

<sup>255</sup> *Id.* "Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of the case, even though our labors may not provide posterity with a newly minted rule of law." *Id.*

<sup>256</sup> The dissent argued that "[s]training to suggest a legal error in the decision below that might warrant review, the Court asserts that '[t]here is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence.'" *Id.* at 1577 (Scalia, J., dissenting) (quoting *id.* at 1561).

<sup>257</sup> See *supra* notes 71-79 and accompanying text.

<sup>258</sup> Compare *United States v. Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.") with *United States v. Agurs*, 427 U.S. 97, 112 (1976) (constitutional error exists when "the omitted evidence creates a reasonable doubt that did not otherwise exist").

<sup>259</sup> The four aspects of materiality emphasized by the court were that: (1) a showing of materiality does not require demonstration by a preponderance that disclosure of the sup-

the *Bagley* touchstone of materiality—"a reasonable probability" of a different result.<sup>260</sup> Moreover, the *Kyles* decision did nothing to quell the general complaints regarding the *Bagley* standard of "materiality" or to remedy its shortcomings.<sup>261</sup> Thus, while *Kyles* could be said to reaffirm the *Bagley* standard of "materiality" it certainly could not be said to change the standard in any way that justified certiorari.

Second, in reviewing the court of appeals' opinion, the Court incorrectly concluded that, "[t]here is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence."<sup>262</sup> To the contrary, the circuit court majority applied the "materiality" standard exactly as it was set forth by the Supreme Court in *Bagley*.

Under the *Bagley* materiality standard, courts must evaluate suppressed evidence collectively, not item by item, when determining its effect on a jury verdict.<sup>263</sup> However, only after the court has evaluated the "tendency and force"<sup>264</sup> of the evidence item by item can the collective effect of the evidence then be separately evaluated for the pur-

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pressed evidence would have resulted ultimately in the defendant's acquittal; (2) the *Bagley* standard of materiality is not a sufficiency of evidence test; (3) once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review; and (4) the *Bagley* standard of materiality requires the impact of suppressed evidence on the jury's verdict to be evaluated collectively, not item-by-item. *Kyles*, 115 S. Ct. at 1566-67. Some may argue that the Court's attempt to itemize the application of the *Bagley* rule is a step towards using bright line rules instead of speculation over the impact suppressed evidence will have on jury verdicts. However, the Court's emphasis on the four aspects of materiality were not new to the *Kyles* case. Rather, the aspects espoused by the Court were already in jurisprudence as indicated by their cites to previous cases emphasizing the aspect.

<sup>260</sup> Compare *Kyles v. Whitley*, 5 F.3d 806, 811 (1993) ("We apply the *Bagley* standard here by examining whether it is reasonably probable that, had the undisclosed information been available to *Kyles*, the result would have been different.") with *Kyles v. Whitley*, 115 S. Ct. 1555, 1569 (1995) ("In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.").

<sup>261</sup> Terrence J. Galligan, Comment, *The Prosecutor's Duty to Disclose Exculpatory Evidence After United States v. Bagley*, 1 GEO. J. LEGAL ETHICS 213, 225-31 (1987). The *Bagley* standard has been criticized on both theoretical and practical grounds. The standard is attacked as theoretically flawed because instead of using a fairness inquiry, as *Brady* originally intended, the Court in *Bagley* moved to a result-oriented approach. *Id.* at 225. Critics assert that this potentially countenances what would otherwise be gross constitutional error, if the reviewing court feels that the error did not affect the outcome of the trial. *Id.* Critics also contend that the standard does not give practical guidance to prosecutors, who must speculate *ex ante* about the effect a piece of evidence will have on a jury. *Id.* at 227. Moreover, critics argue that the standard is impractical for judges to apply, because a judge must speculate on the impact of evidence from a cold record. *Id.*

<sup>262</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1569 (1995).

<sup>263</sup> *Id.* at 1567.

<sup>264</sup> *Id.* at 1567 n.10. "Tendency and force" are terms coined by the majority in their opinion.

pose of determining materiality.<sup>265</sup> Although the circuit court spent considerable time determining the "tendency and force" of each piece of evidence, it declared several times that for the purposes of determining materiality the pieces of evidence were not evaluated independently, as the Supreme Court suggested, but collectively, as *Bagley* requires.<sup>266</sup>

The Supreme Court performed the same application of the *Bagley* standard when it evaluated the undisclosed evidence.<sup>267</sup> First, it evaluated the evidence item by item.<sup>268</sup> Only after the individual evaluation of each piece of evidence did the Supreme Court then decide the collective effect of the evidence.<sup>269</sup> Thus, because the Supreme Court employed the same standard and the same approach as the court of appeals, it is unlikely that the Supreme Court truly found error in the Fifth Circuit's application of *Bagley*.

## 2. *The Court Created Legal Error to Justify Certiorari*

The Court's primary role in the American judicial system is to hear cases whose resolution can be expected to provide useful guidance to lower courts confronted with similar issues.<sup>270</sup> As a result, any obligation to do justice in an individual case is secondary to the Court's role as expositor of constitutional and federal law.<sup>271</sup> Thus, certiorari is generally justified when it is granted to clarify law confused by lower courts, but not when it is granted to hear individual claims of injustice.<sup>272</sup>

Undoubtedly, the majority recognized that granting certiorari to review the guilt or innocence of Kyles would have fallen outside this

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<sup>265</sup> *Id.*

<sup>266</sup> See *Kyles v. Whitley*, 5 F.3d 806, 807 (1993) (basing its rejection of petitioner's claim on "a complete reading of the record"); *id.* at 811 ("Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit."); *id.* at 817 ("We are not persuaded that it is reasonably probable that the jury would have found in Kyles' favor if exposed to any or all of the undisclosed materials.").

<sup>267</sup> The Supreme Court admitted so much in footnote 10: "We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Kyles*, 115 U.S. at 1567 n.10.

<sup>268</sup> *Id.* at 1569-75.

<sup>269</sup> *Id.* at 1575 ("Confidence that [jury verdict would have been the same] cannot survive a recap of the suppressed evidence and its significance for the prosecution.").

<sup>270</sup> *Condemned*, *supra* note 8, at 1135.

<sup>271</sup> *Id.*

<sup>272</sup> The dissent argues that the Court has generally adhered to the policy that when a petitioner claims that a concededly correct view of the law was incorrectly applied to the facts, certiorari is normally denied. *Kyles*, 115 S. Ct. at 1576 (Scalia, J., dissenting) (citing *United States v. Johnston*, 268 U.S. 220, 227 (1925)).

normal judicial function.<sup>273</sup> The Court, therefore, found that the court of appeals made a legal mistake that needed clarification.<sup>274</sup> This allowed the Court to justify certiorari under its normal institutional role.<sup>275</sup> Thus, by finding legal error the Court attempted to avoid any implication that it was reviewing all death penalty cases for legal and factual errors, a role it was not designed to perform.<sup>276</sup> At the same time, the Court was able to address its true concern over Kyles' actual guilt.

### 3. *The Court's Use of an Illusory Legal Error Will Confuse Lower Courts in the Future*

As a result of using lower court error as justification for certiorari rather than its true concern over Kyles' guilt, the Court has confused the application of the *Bagley* materiality standard for future courts. When using the *Bagley* standard, virtually all circuit courts evaluate the "force" of evidence individually before making a collective determination of whether the evidence is material.<sup>277</sup> By criticizing this approach yet employing the approach itself, the Supreme Court has left the circuit courts with no direction on how to correctly apply the standard. Rather, the circuit courts can only continue to apply the standard as they have without the reassurance that the application will be upheld on appeal.

Unfortunately, the Supreme Court's attempt to find legal error in the lower court could create even more drastic results. Circuit courts, now under the understanding that individual analysis is wrong, may abandon the important job of evaluating the individual evidence's "force" altogether.<sup>278</sup> Instead of reviewing the individual impact of the

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<sup>273</sup> By granting certiorari simply to review *Kyles* because it was a death penalty case the Court would have given the impression that they were functioning as a court of errors and appeals searching the record in every death penalty case for potential injustice. See *id.* at 1577 (Scalia, J., dissenting).

<sup>274</sup> *Kyles*, 115 S. Ct. at 1569.

<sup>275</sup> Certiorari was justified under the Court's institutional role because it appeared that the Supreme Court was going to give lower courts guidance on how to use the *Bagley* "materiality" standard.

<sup>276</sup> While the Court attempted to avoid questions about its grant for certiorari, it is obvious from the dissent's scathing opinion that certiorari was at the least questionable and more likely not justified at all.

<sup>277</sup> See, e.g., *United States v. Hanna*, 55 F.3d 1456, 1459-61 (9th Cir. 1995).

<sup>278</sup> Determining the "tendency and force" of the evidence individually is important because it makes the court think about whether the evidence will actually have any impact. For example, in *Kyles* the withheld material included the contemporaneous statements of the eyewitnesses and Beanie's statements to police. Individual evaluation, before the collective evaluation, required the court to identify and explain how the contemporaneous statements affected the testimony in court and how Beanie's contradictory statements could have affected the plausibility of the defendant's defense. Only after thinking

evidence, which offers justification for a court's ultimate finding of the evidence's collective impact, a court can now simply make unsupported, conclusory decisions about the evidence's collective impact.<sup>279</sup> This conclusory approach would hardly insure an intelligent decision of whether evidence withheld by the prosecution would undermine the jury's verdict, yet it could be upheld under the Supreme Court's confusing decision in *Kyles v. Whitley*.

4. *The Court Should Have Justified Certiorari in a Way That Was Consistent With its True Concerns Over the Death Penalty*

To avoid the confusion created by an illusory legal error, the Court should have justified certiorari consistent with its true concern over the death penalty. Although the Supreme Court's grant of certiorari to review *Kyles*' possible innocence would have exceeded the bounds of its traditional institutional role,<sup>280</sup> it would have been appropriate<sup>281</sup> because: (1) it would have been within the Court's constitutional power; (2) it would have been consistent with the Court's increased scrutiny in death penalty cases; and (3) it would have had limited implications for the Court's disposition towards future death penalty cases.

First, the Supreme Court's constitutional authority justified hearing *Kyles*' case. Article III of the Constitution grants the Supreme Court the authority to decide all cases or controversies within its jurisdiction.<sup>282</sup> It is within the Court's jurisdiction to hear any case involving a constitutional issue.<sup>283</sup> The prosecution's suppression of evidence in this case was a violation of the defendant's due process

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through the smaller pieces of evidence item by item and evaluating their effect, can courts decide whether the combined impact of all of the withheld evidence undermines a jury's verdict.

<sup>279</sup> By citing the boilerplate language in *Kyles* that the only necessary determination is the collective impact of the evidence, courts now have the ability to conclude that evidence taken collectively has an impact without having to justify their determinations by showing how the evidence specifically affects previous trial testimony, arguments, etc. The danger of allowing courts to make conclusory decisions without justification is that the courts may more easily exercise their biases when making their decisions.

<sup>280</sup> It would have exceeded the bounds of its normal institutional role because the Court would not have purported to create any new "generalizable" principle of law.

<sup>281</sup> This position is consistent with Justice Stevens' concurrence. In concurrence Justice Stevens states, "I wish such review [of guilt or innocence] were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate." *Kyles v. Whitley*, 115 S. Ct. 1555, 1576 (1995) (Stevens, J., concurring). While this Note argues that certiorari to review *Kyles*' guilt was appropriate in this case, some authors have promoted models that would give all death penalty cases special attention in the selection process. See, e.g., *Condemned*, *supra* note 8, at 1142-48.

<sup>282</sup> See *supra* notes 6-7 and accompanying text.

<sup>283</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803).

right to a fair trial.<sup>284</sup> Thus, because the issue in the *Kyles* case was constitutional in nature, it would have been within the Supreme Court's power to grant certiorari.<sup>285</sup>

Second, the grant of certiorari would have been appropriate because the Supreme Court accords a higher degree of scrutiny to the review of death penalty cases.<sup>286</sup> The Court has long held that "[t]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny" in death penalty cases.<sup>287</sup> As a result, the Court has required that cases like *Kyles* "be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact-finding."<sup>288</sup>

In light of *Kyles*' ambiguous facts, it would have been consistent with the Supreme Court's use of heightened scrutiny in death penalty cases to grant certiorari. As Justice Stevens correctly argues, "[o]ur duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law."<sup>289</sup>

Finally, the grant of certiorari would not have greatly affected the Court's policy for granting certiorari in future death penalty cases. While granting certiorari to review guilt may have given the impression that the Court was willing to search for legal and factual errors in every death penalty case, the Court in reality could never serve such a function.<sup>290</sup>

In his dissenting opinion, Justice Scalia himself makes it abundantly clear that "[s]ince the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case

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<sup>284</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1575 (1995).

<sup>285</sup> Because it is the Court's historical role to protect individual liberties it might even be said that the Court not only had the constitutional power to review *Kyles v. Whitley* to make sure *Kyles* received a fair trial, but that it was also the Court's duty. See, e.g., Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, reprinted in 57 F.R.D. 573, 578 (1972) (essential functions of the Court include definition and vindication of rights guaranteed by Constitution, assuring uniformity of federal law, and maintaining constitutional distribution of powers in a federal union); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 60-128 (1980) (Court's essential role is protection of individual liberties).

<sup>286</sup> See generally *Murray v. Giarratano*, 492 U.S. 1, 21-23 (1989) (Stevens, J., dissenting).

<sup>287</sup> *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

<sup>288</sup> *Satterwhite v. Texas*, 486 U.S. 249, 263 (1988) (Marshall, J., concurring in part and concurring in the judgment) (quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part)). Justice Scalia's argument that the Supreme Court should defer to lower court decisions ignores this proposition. If the Supreme Court deferred to lower courts, meaningful appeal would never take place in death penalty cases as it should.

<sup>289</sup> *Kyles v. Whitley*, 115 S. Ct. 1555, 1576 (1995) (Stevens, J., concurring).

<sup>290</sup> *Condemned*, *supra* note 8, at 1135.

of this sort will often be repeated—which is to say little fear that today's grant has any generalizable principle behind it.”<sup>291</sup> Simply put, searching every record in death penalty cases for legal and factual errors, like the Court did in *Kyles*, would put catastrophic demands on the Court's workload that could not be met.<sup>292</sup> Thus, it is unlikely the Court's grant of certiorari to review the death of a potentially innocent man would have changed its institutional role.

B. THE DISSENT'S USE OF THE “TWO COURT RULE” AND § 2254

1. *The Dissent Improperly Used the “Two Court Rule” and 28 U.S.C. § 2254(d) to Argue Certiorari Should Have Been Denied*

In dissent, Justice Scalia argued that the “two court rule” and 28 U.S.C. § 2254(d) precluded the Supreme Court from hearing *Kyles v. Whitley*.<sup>293</sup> The “two court rule” requires that a reviewing court defer to lower court findings of fact when two consecutive courts find the same way.<sup>294</sup> Similarly, § 2254(d) requires that a reviewing court defer to lower court findings of fact in habeas corpus petitions.<sup>295</sup> The dissent reasoned that the “materiality” determination was fact-based and, thus, under the “two court rule” and § 2254(d) the Supreme Court was required to defer to lower court decisions.<sup>296</sup> Because all of the lower courts found that a *Brady* violation had not occurred, the dissent argued that the Supreme Court was barred from granting certiorari to review their decisions.<sup>297</sup>

However, the dissent's suggestion that “materiality” determinations are an exercise in fact-finding ignores Supreme Court precedent. *Bagley's* formulation of the materiality standard was derived from *Strickland v. Washington*.<sup>298</sup> In *Strickland*, the Court held that the same inquiry in the context of an ineffective assistance of counsel claim presented a mixed question of law and fact.<sup>299</sup> Because *Bagley* borrowed the “reasonable probability” standard from *Strickland*, the review of whether evidence is “material” should not require deference to lower courts under the “two court rule” or § 2254(d) because it is not a finding of fact, but a mixed issue of fact and law.<sup>300</sup>

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<sup>291</sup> *Kyles*, 115 S. Ct. at 1578.

<sup>292</sup> *Condemned*, *supra* note 8, at 1135.

<sup>293</sup> *Kyles*, 115 S. Ct. at 1577.

<sup>294</sup> See *supra* note 20 and accompanying text.

<sup>295</sup> See *supra* note 17 and accompanying text.

<sup>296</sup> *Kyles*, 115 S. Ct. at 1577.

<sup>297</sup> *Id.*

<sup>298</sup> *United States v. Bagley*, 473 U.S. 667, 682-83 (1985) (opinion of Blackmun, J.) (adopting the *Strickland* definition of materiality).

<sup>299</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

<sup>300</sup> See *Wilson v. Whitley*, 28 F.3d at 438 n.6. In *Sumner v. Mata*, 455 U.S. 591, 597

## 2. *The Dissent Exacerbated a Circuit Court Split Over the Proper Standard of Review for Brady/Bagley Violations*

By suggesting "materiality" determinations are an exercise in fact-finding, the dissent further confused the proper standard of review for *Bagley* violations. Currently, the courts of appeals are split over the proper standard of review for "materiality" determinations. While a few of the circuit courts have found "materiality" determinations to be an exercise in fact-finding that require deference to lower courts under a "clearly erroneous" standard,<sup>301</sup> the majority of circuit courts consider "materiality" determinations a mixed issue of law and fact that require *de novo* review.<sup>302</sup>

The dissent's suggestion that materiality determinations are a finding of fact adds confusion to the circuit court split because it directly contradicts Supreme Court precedent that suggests materiality determinations are a mixed question of fact and law.<sup>303</sup> This ambiguity over the correct standard of review is only compounded by the majority's decision not to address this issue. Rather, the majority's finding that a legal error occurred, automatically required *de novo* review without the need for explaining what the appropriate standard should be when there is no legal error, but a mixed question of law and fact. Thus, in the absence of a definitive Supreme Court standard of review for *Brady* violations, it is likely the circuit courts will remain split over the subject.

## VI. CONCLUSION

The Supreme Court did in *Kyles v. Whitley* what the lower courts hearing the case should have done long before—remanded the case to a jury for a determination of whether Kyles actually committed the murder. Only a jury's evaluation of the new evidence and the demeanor of the witnesses could ensure an accurate conclusion in the *Kyles* case. Unfortunately, to reach the correct result, the Court had to create an illusory legal error out of whole cloth. By doing so, the Court not only confused lower court application of the "materiality" standard, but, more importantly, missed a golden opportunity to express to the general public that it is concerned about the wrongful imposition of the death penalty.

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(1982), the Court explicitly refused to give deference to lower court findings under § 2254(d) when the issue was a mixed question of law and fact rather than a pure finding of fact. As a mixed question of law and fact, the standard of review traditionally has been *de novo*. *Brecht v. Abrahamson*, 507 U.S. 619, 642 (Stevens, J., concurring).

<sup>301</sup> See *supra* note 82 and accompanying text.

<sup>302</sup> See *supra* note 83 and accompanying text.

<sup>303</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984).



