

NOTE

TAKING A CLOSER LOOK AT
PROSECUTORIAL MISCONDUCT:

THE NINTH CIRCUIT'S
MATERIALITY ANALYSIS IN
HAYES V. BROWN AND ITS
IMPLICATIONS FOR WRONGFUL
CONVICTIONS

Nowhere in the Constitution or in the Declaration of Independence, nor for that matter in the Federalist or in any other writing of the Founding Fathers, can one find a single utterance that could justify the decision by any oath-bound servant of the law to look the other way when confronted by the real possibility of being complicit in the wrongful use of false evidence to secure a conviction in court.¹

INTRODUCTION

Over the last two decades, an alarming number of wrongful convictions have been overturned, primarily as a result of successful exonerations by the Innocence Project.² In a survey

¹ *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005) (quoting *N. Marianna Islands v. Bowie*, 236 F. 3d 1083, 1096 (9th Cir. 2001)).

² See The Innocence Project, <http://innocenceproject.org> (last visited Aug. 10, 2006). The Innocence Project was founded by Barry Scheck and Peter Neufeld at the

of the causes of wrongful convictions, prosecutorial misconduct was listed as a cause in nearly half of the cases.³ In twenty-five percent of those cases, the type of misconduct was the knowing use of false testimony.⁴ Perjured testimony in general, particularly by cooperating witnesses, has been another major cause of these terrible injustices.⁵

The prosecutor's actions in *Hayes v. Brown*⁶ illustrate how this type of prosecutorial misconduct can lead to wrongful convictions. By presenting false evidence and misleading the judge, jury, and opposing counsel, the prosecution enhanced the credibility of its key witness.⁷ By providing inducements to this accomplice witness, the prosecutor gave him a significant incentive to lie—an incentive about which the jury was not fully informed.⁸ Blufford Hayes was convicted and sentenced to death as a result.⁹ Although this case may not be one of factual innocence, *Hayes* illustrates how a prosecutor's unethical conduct resulted in a tainted and unjust trial.

This note argues that the Ninth Circuit's meaningful factual analysis in applying the materiality standard led to its reversal of Mr. Hayes's conviction. The Court's willingness to look beyond the Government's assertions and to take into account every way in which the prosecutor's duplicitous conduct might have affected the jury's verdict allowed it to reach a different decision than prior reviewing courts. Moreover, the Court did so while adhering to established Supreme Court precedent and remaining within the confines of modern federal habeas review.¹⁰ The Ninth Circuit's analysis under this standard can help prevent wrongful convictions by deterring prose-

Benjamin N. Cardozo School of Law in 1992. It has since expanded into the national Innocence Network and has exonerated over 160 people.

³ See The Innocence Project, <http://innocenceproject.org/causes/> (last visited Aug. 10, 2006) (finding thirty-three of the seventy-four DNA exonerations surveyed were caused by prosecutorial misconduct).

⁴ See *id.*

⁵ See *id.* (finding fourteen of the seventy-four DNA exonerations were caused by the perjury of accomplices and snitches); see also Steven Clark, *Procedural Reforms in Capital Cases Applied to Perjury*, 34 J. MARSHALL L. REV. 453, 453 (2001) (finding the most common cause of capital wrongful convictions in Illinois is perjury).

⁶ See generally *Hayes v. Brown*, 399 F.3d 972.

⁷ *Id.* at 985-86.

⁸ See *id.* at 979.

⁹ *Id.* at 977.

¹⁰ See *Napue v. Illinois*, 360 U.S. 264, 270 (1959); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

torial misconduct and encouraging prosecutors to take care in using the bargained-for testimony of accomplice witnesses. Further, the Court's holding can lead to reversals of wrongful convictions by instructing other courts to engage in meaningful reviews of such claims.

Part I of this note provides the background on the evolution of the materiality standard and its application in modern federal habeas review.¹¹ Part II fully describes the facts, procedural history, and holdings in the *Hayes* case.¹² Part III analyzes how the Ninth Circuit reached its conclusion to reverse Mr. Hayes's conviction through its application of the materiality standard.¹³ Further, this Part outlines how this depth of analysis can help reverse and prevent wrongful convictions caused by prosecutorial misconduct and false testimony.¹⁴ Part IV concludes that to preserve the integrity of the criminal justice system, state misconduct must not go unchecked, as it has been shown to lead to the convictions of innocent persons.¹⁵

I. BACKGROUND

The Supreme Court has long disapproved of prosecutors employing deceptive means to obtain convictions.¹⁶ By 1935, the Court had recognized that a State's use of false evidence offended the due process clauses of the Fifth and Fourteenth Amendments.¹⁷ Subsequently, the Court established that a prosecutor's failure to correct false testimony was unconstitutional.¹⁸ The landmark cases of *Napue v. Illinois* and *Brady v. Maryland* held that reversal was required for non-disclosure of evidence or for the use of false testimony only if it affected the outcome of the trial.¹⁹ This principle would become known as the "materiality" standard, a second inquiry after establishing a violation of a defendant's due process rights.²⁰ Other Su-

¹¹ See *infra* notes 16-70 and accompanying text.

¹² See *infra* notes 71-149 and accompanying text.

¹³ See *infra* notes 150-185 and accompanying text.

¹⁴ See *infra* notes 186-206 and accompanying text.

¹⁵ See *infra* notes 207-209 and accompanying text.

¹⁶ See *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935).

¹⁷ See *id.*; U.S. CONST. amend. V, XIV.

¹⁸ See *Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

¹⁹ See *Napue v. Illinois*, 360 U.S. 264, 270 (1959); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²⁰ See, e.g., *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v.*

preme Court and Ninth Circuit decisions provide guidance on what factors determine whether false evidence is “material” and what circumstances warrant reversal.²¹

A. EARLY SUPREME COURT CASES ADDRESSING
PROSECUTORIAL MISCONDUCT AND THE USE OF FALSE
EVIDENCE

The Supreme Court first granted relief for the use of false testimony by a prosecutor in *Mooney v. Holohan*.²² There, the defendant alleged that the prosecution had used false testimony to obtain his conviction and death sentence.²³ Further, he contended that the prosecutor withheld evidence that would have exposed the perjury.²⁴ In rejecting the Government’s narrow view of due process requirements, the Court held the State’s knowing use of false testimony was “inconsistent with the rudimentary demands of justice,” and hence, unconstitutional.²⁵

Seven years later, in *Pyle v. Kansas*, the Court held that suppression of evidence favorable to the accused was sufficient to create constitutional error.²⁶ There, a prosecutor coerced a witness to testify falsely.²⁷ After being convicted, the defendant obtained written statements from both the witness and the prosecutor admitting to the perjury and stating that the trial had been unfair.²⁸ The Court reversed, holding that these allegations indicated that defendant’s constitutional rights had been violated.²⁹

Further, in *Alcorta v. Texas*, the Supreme Court announced that prosecutors have an independent duty to correct information they know to be false.³⁰ There, the defendant had

Agurs, 427 U.S. 97, 103 (1976); Hayes v. Brown, 399 F.3d 972, 979 (9th Cir. 2005).

²¹ See *Giglio*, 405 U.S. at 154; *Agurs*, 427 U.S. at 103; *United States v. Bagley*, 473 U.S. 667, 684 (1985).

²² *Mooney v. Holohan*, 294 U.S. 103, 115 (1935).

²³ *Id.* at 110.

²⁴ *Id.*

²⁵ *Id.* at 112.

²⁶ *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942).

²⁷ *Id.* at 214.

²⁸ *Id.* at 215.

²⁹ *Id.* at 216.

³⁰ *Alcorta v. Texas*, 355 U.S. 28, 32 (1957). See also *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (recognizing rule); Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005)

argued he killed his wife in the heat of passion when he saw her kissing another man.³¹ Prior to calling the man the prosecutor instructed him not to testify that he had had intercourse with defendant's wife unless he was asked explicitly.³² The witness then testified that he had not had relations with defendant's wife.³³ The Court found that the prosecutor's failure to correct the false testimony violated due process.³⁴ In reversing the defendant's conviction and death sentence, the Court reasoned that had the jury heard about the affair, it might have accepted defendant's heat of passion defense.³⁵ Therefore, although the Court had yet to coin the term "materiality," it had begun to consider the impact of the constitutional violation on the outcome of the defendant's trial in reaching its decision.

B. THE MODERN CASES GOVERNING REVERSAL FOR PROSECUTORIAL MISCONDUCT AND THE EMERGENCE OF THE MATERIALITY STANDARD: *NAPUE* AND *BRADY*

In the seminal case regarding a prosecutor's use of false testimony, *Napue v. Illinois*, the Court announced the circumstances and standards that warranted reversal.³⁶ *Napue* involved false testimony that went to the credibility of a key prosecution witness.³⁷ The witness testified that he had not received a sentence reduction for his testimony and the prosecutor failed to correct his statement.³⁸ In reversing, the Court reasoned that credibility evidence pertaining to a key witness was sufficient to warrant reversal under those circumstances.³⁹ In addition, it held that although the jury had heard other evidence about the witness' credibility, the outcome still might have been different had the jury known about the sentence reduction.⁴⁰ This case established the test for materiality that the Ninth Circuit applied in *Hayes*: a new trial is required "if

(same).

³¹ *Alcorta*, 355 U.S. at 28-29.

³² *Id.* at 31.

³³ *Id.* at 29.

³⁴ *Id.*

³⁵ *Id.* at 32.

³⁶ *See Napue v. Illinois*, 360 U.S. 264, 264 (1959).

³⁷ *Id.* at 267.

³⁸ *Id.*

³⁹ *Id.* at 269.

⁴⁰ *Id.* at 270.

the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.”⁴¹ Moreover, the *Napue* Court identified three important factors in applying this standard: (1) the nature of the false evidence, (2) the importance of the witness to the prosecution’s case, and (3) whether the evidence was cumulative.⁴²

In *Brady v. Maryland*, the Supreme Court recognized another form of prosecutorial misconduct as unconstitutional: the failure to disclose evidence favorable to the defense.⁴³ The Court held that reversal for nondisclosure of evidence was warranted regardless of whether the prosecutor had intentionally withheld the evidence.⁴⁴ However, the Court also held that defendant’s due process rights are violated only “where the evidence is material either to guilt or to punishment.”⁴⁵ Subsequent cases would clarify that what constituted “material” evidence depended on whether or not the prosecutor’s misconduct was intentional.⁴⁶

C. POST *NAPUE*/*BRADY* APPLICATION OF THE MATERIALITY STANDARD UNDER MODERN FEDERAL HABEAS REVIEW

1. *Supreme Court and Ninth Circuit Cases*

Recent cases have interpreted the materiality standards set forth in *Napue* and *Brady*. For instance, *Giglio v. United States* reaffirmed *Napue*, holding that the use of false testimony relating to credibility was sufficient to warrant a reversal.⁴⁷ There, defendant alleged both the prosecution’s nondisclosure of immunity given to a key witness and the use of false testimony.⁴⁸ The Court emphasized that materiality often turned on the importance of the witness’ credibility to which the suppressed evidence relates: “[w]hen the ‘reliability of a

⁴¹ *Id.* at 271-72; *Hayes v. Brown*, 399 F.3d 972, 989 (9th Cir. 2005) (Tallman, J., dissenting).

⁴² See *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959).

⁴³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (citing *Pyle v. Kansas*, 317 U.S. 213, 213 (1942)).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Agurs*, 427 U.S. 97, 103-04 (1976).

⁴⁷ *Giglio*, 405 U.S. at 154.

⁴⁸ *Id.* at 150-51.

given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of materiality]."⁴⁹ The Court further noted in *United States v. Bagley* that it has consistently refused to distinguish between exculpatory and impeachment evidence in determining materiality.⁵⁰

In *United States v. Agurs*, the Supreme Court held that different standards of materiality applied depending on whether or not the prosecutor knowingly used the false evidence.⁵¹ It reasoned that *Napue's* "any reasonable likelihood" standard is a lower standard of materiality that should apply only when a state knowingly presents false evidence to the jury.⁵² The *Agurs* Court explained that this standard was appropriate in such cases "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking process."⁵³ Therefore, courts are more likely to find a violation material when false evidence is used intentionally rather than inadvertently.⁵⁴ Finally, the *Agurs* Court also implied that this standard was implicated when a prosecutor knew or *should have known* that the testimony was false.⁵⁵ However, the circuits are split on this proposition.⁵⁶

Among the cases in which the Ninth Circuit has applied *Napue's* standard,⁵⁷ *Benn v. Lambert* discussed the issue of cumulative impeachment in determining materiality.⁵⁸ There, the Court found *Brady* error for the prosecutor's knowing failure to disclose damaging evidence relating to the credibility of

⁴⁹ *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

⁵⁰ *United States v. Bagley*, 473 U.S. 667, 675-76 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

⁵¹ *United States v. Agurs*, 427 U.S. 97, 103-04 (1976).

⁵² *Id.* at 103.

⁵³ *Id.* at 104.

⁵⁴ *Id.*

⁵⁵ *Id.* at 103.

⁵⁶ See Aron E. Goldschneider, *Edict v. Dicta: Rolling Back Rights in the Second Circuit under the Clearly Established Clause of the AEDPA Amended Habeas Statute*, 26 N. ILL. U. L. REV. 1, 49 (2005) [hereinafter Goldschneider] (finding that the First, Second, Third, Fourth, Eighth, and Ninth Circuits have recognized the "should have known" standard, while the Fifth, Sixth, Seventh, Eleventh Circuits require actual knowledge).

⁵⁷ See, e.g., *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003), vacated, 125 S. Ct. 1697 (2005); *N. Mariana Islands v. Bowie*, 236 F.3d 1083 (9th Cir. 2001).

⁵⁸ *Benn v. Lambert*, 283 F.3d 1040, 1054-1059 (9th Cir. 2002).

a key prosecution witness.⁵⁹ The Court rejected the argument that the suppressed evidence was cumulative because the prosecution had disclosed some impeachment evidence pertaining to the witness.⁶⁰ It reasoned that while some impeachment evidence was disclosed, this did not render all undisclosed evidence cumulative.⁶¹

2. *The Materiality Standard in Other Circuits*

The application of the materiality standard varies among the circuits. While some have applied the standard set forth in *Napue* and *Giglio* in the broad manner advocated by the Ninth Circuit in *Hayes*, other circuits have been more reluctant. For example, the Second Circuit has been less receptive to habeas claims under *Napue*. In a case dealing with whether shooting murders were intentional or accidental, the prosecutor's knowing use of an "expert" whose qualifications and diagnosis of the defendant were completely fictitious was found immaterial.⁶² Because the diagnosis pertained to the probability that the defendant had shot the victims intentionally, there was arguably some likelihood that the decision would have affected the jury's verdict.⁶³

In contrast, the Eleventh Circuit Court of Appeals reversed the denial of a petition for habeas corpus based on a prosecutor's failure to correct false testimony regarding a witness's immunity.⁶⁴ However, although the case is similar to *Hayes* in that the false testimony pertained to impeachment of an accomplice witness, the Court's decision is more straightforward due to the clear falsity of the testimony and the lower court's application of the wrong standard.⁶⁵ Nevertheless, the Court's reversal of a capital conviction based on the false accomplice testimony pertaining to credibility was in the spirit of the *Hayes* decision.

⁵⁹ *Id.* at 1054.

⁶⁰ *Id.* at 1054-55.

⁶¹ *Id.*

⁶² *Drake v. Portuondo*, 321 F.3d 338, 342 (2d Cir. 2003).

⁶³ *See Goldschneider*, *supra* note 56, at 55-56 (arguing that the court's interpretation of review under the AEDPA led to a finding that the violation was immaterial even though reversal was warranted).

⁶⁴ *Brown v. Wainwright*, 785 F.2d 1457, 1458 (11th Cir. 1986).

⁶⁵ *Id.* at 1464.

Although these cases had different outcomes, both illustrate the narrower view of the materiality standard taken in other circuits. If the courts had applied the reasoning from *Hayes*, both would have resulted in clear reversals.

3. *Modern Habeas Corpus Review Under the AEDPA*

No discussion of the application of a Supreme Court standard on federal habeas review can be complete without noting the significant impact of the 1996 Antiterrorism and Effective Death Penalty Act (“AEDPA”).⁶⁶ Under subsection 2254(d)(1) of the AEDPA, federal courts may only reverse a conviction if the state appellate court’s decision is “contrary to, or involved an unreasonable application of, clearly established Federal law.”⁶⁷ The Supreme Court later held that the “clearly established” language referred only to “holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.”⁶⁸ The AEDPA has limited the ability of federal courts to review independently habeas claims, and has been criticized for doing so at the same time that wrongful convictions continued to be discovered.⁶⁹ With the chilling effect of the AEDPA as a backdrop, the Ninth Circuit’s analysis in *Hayes* becomes even more significant.

The Ninth Circuit followed the standard and reasoning set forth in the Supreme Court cases in reaching its decision in *Hayes* as permitted under the AEDPA.⁷⁰ Nevertheless, the *Hayes* Court reached a different result than prior reviewing courts. The consistently strong disapproval of state misconduct in earlier cases indicates that the *Hayes* Court’s conclusion was appropriate.

II. THE *HAYES V. BROWN* DECISION

In *Hayes*, the Ninth Circuit revisited the materiality stan-

⁶⁶ Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 (1996).

⁶⁷ 28 U.S.C.A. § 2254(d) (West 2006).

⁶⁸ *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

⁶⁹ See Goldschneider, *supra* note 56, at 8; see also Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 539 (1999) (arguing that AEDPA’s highly deferential standard has “handcuffed” habeas review in federal courts).

⁷⁰ *Hayes v. Brown*, 399 F.3d 972, 987-88 (9th Cir. 2005).

dard in analyzing the state's use of false evidence. Its careful scrutiny of the facts, coupled with its thorough consideration of the materiality of the false testimony, led to the reversal of Mr. Hayes's conviction.

A. FACTS AND PROCEDURAL BACKGROUND

Vinod "Pete" Patel was murdered at a motel in Stockton, California on New Year's Day in 1980.⁷¹ Mr. Patel was the motel's manager, and Blufford Hayes was staying in a room with his sister.⁷² Mr. Hayes's sister later testified that at the time, the sink in her room had been leaking and that she had asked Mr. Patel to fix it.⁷³ When she returned from work that day, she found Mr. Patel's body in her room.⁷⁴ Mr. Patel had died as a result of multiple stab wounds.⁷⁵

1. *The Events of January 1, 1980 According to Blufford Hayes*

Mr. Hayes testified that he went to the motel office to complain to Mr. Patel about the leaky sink, returned to his room and went to sleep.⁷⁶ He testified that he awoke to someone slapping him and realized it was Mr. Patel.⁷⁷ Allegedly, Mr. Patel had a knife and during the struggle, Mr. Hayes stabbed him in the arm and chest.⁷⁸ Mr. Hayes then bound Mr. Patel's hands and feet with wire hangers, supposedly to put an end to the fight.⁷⁹

Shortly thereafter, Mr. Hayes went to the motel room of Andrew James, a longtime acquaintance.⁸⁰ Mr. James shared the room with his girlfriend, Michelle Gebert.⁸¹ Mr. Hayes stated that he needed a ride because he had "downed" someone.⁸² Mr. James said he did not believe it and would go see for

⁷¹ *Id.* at 974.

⁷² *Id.*

⁷³ *Id.* at 975.

⁷⁴ *Id.* at 976.

⁷⁵ *Id.*

⁷⁶ *Hayes v. Brown*, 399 F.3d 972, 975 (9th Cir. 2005).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Hayes v. Brown*, 399 F.3d 972, 975 (9th Cir. 2005).

himself.⁸³ However, when Mr. Hayes looked out, Mr. James had not gone to the room, but instead was in the motel office.⁸⁴ Mr. Hayes went to the office and found Mr. James taking boxes of cigarettes out of the office.⁸⁵ They loaded them into Mr. James's car and left.⁸⁶

2. *The Events of January 1, 1980 According to Andrew James*

Mr. James's testimony differed from that of Mr. Hayes. He testified that he left his room with Mr. Hayes.⁸⁷ When he arrived at his car, there were already two boxes of cigarettes inside.⁸⁸ Mr. James testified that it was not until they were in the car that Mr. Hayes told him that he had "offed" Mr. Patel.⁸⁹ Mr. Hayes stated that Mr. Patel had swung at him and that Mr. Hayes had "[done] the do with him."⁹⁰ After he returned to the motel, Mr. James discussed what to do with Ms. Gebert.⁹¹ He testified that he had been afraid to go to the police because he "had cases at the time," but Ms. Gebert eventually called the police.⁹²

Mr. Hayes was arrested and tried before a jury in San Joaquin County.⁹³ By this time, Mr. James had moved to Florida.⁹⁴ The prosecution flew him back to California to testify, promising that he would be permitted to return afterward.⁹⁵ At the time of his testimony, Mr. James had four felony charges pending in California: three counts of felony theft with a prior conviction and a charge of being under the influence of heroin.⁹⁶ He also had a history of convictions for theft crimes.⁹⁷

Prior to trial, prosecutor Terrence Van Oss and Mr.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 975-76.

⁸⁷ *Id.* at 976.

⁸⁸ *Hayes v. Brown*, 399 F.3d 972, 976 (9th Cir. 2005).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Hayes v. Brown*, 399 F.3d 972, 976 (9th Cir. 2005).

⁹⁵ *Id.* at 976-77.

⁹⁶ *Id.* at 977.

⁹⁷ *Id.*

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James's attorney agreed to give Mr. James transactional immunity for the murder *and* to dismiss his other pending felonies.⁹⁸ However, Mr. Van Oss insisted that Mr. James not be informed about the dismissal of the charges so that he could testify that they were still pending.⁹⁹ Several notes in Mr. James's attorney's file established that such a deal was in place, that Mr. James need not attend arraignments on the charges, and that the charges were to be dismissed at the conclusion of Mr. Hayes's trial.¹⁰⁰ In addition, the notes revealed Mr. Van Oss's desire to keep the deal secret.¹⁰¹

After he secured the deal, Mr. Van Oss misled both the judge and Mr. Hayes's counsel in pretrial hearings by denying any such negotiations had occurred.¹⁰² At trial, Mr. Van Oss deliberately elicited false testimony from Mr. James that he had received no such deal.¹⁰³ Defense counsel impeached Mr. James with his prior convictions, drug use, and transactional immunity.¹⁰⁴ In closing arguments, the prosecution emphasized Mr. James's credibility.¹⁰⁵

A jury convicted Mr. Hayes of first-degree murder, burglary, and robbery.¹⁰⁶ In addition, the jury found two special circumstances, burglary-murder and robbery-murder, to be true.¹⁰⁷ The Court followed the jury's recommendation and sentenced Mr. Hayes to death.¹⁰⁸ On appeal, the California Supreme Court reversed the robbery conviction and the robbery-murder special circumstance.¹⁰⁹ However, it affirmed Mr. Hayes's other convictions and the death sentence.¹¹⁰

In 1995, Mr. Hayes filed his first amended petition for a writ of habeas corpus in federal court.¹¹¹ The court held evidentiary hearings both on penalty phase issues and on an inef-

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Hayes v. Brown, 399 F.3d 972, 979 (9th Cir. 2005).

¹⁰¹ *Id.*

¹⁰² *Id.* at 979-980.

¹⁰³ *Id.* at 980.

¹⁰⁴ *Id.* at 987.

¹⁰⁵ *Id.* at 980.

¹⁰⁶ Hayes v. Brown, 399 F.3d 972, 977 (9th Cir. 2005).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

factive assistance of counsel claim.¹¹² Both parties moved for summary judgment and the magistrate judge recommended granting the State's motion.¹¹³ A district court judge reviewed and denied Mr. Hayes's petition.¹¹⁴ After a divided panel affirmed the judgment, the Ninth Circuit voted to rehear the decision en banc.¹¹⁵

B. EN BANC NINTH CIRCUIT DECISION

Judge Thomas, writing for the majority, began by emphasizing the Court's disapproval of prosecutorial misconduct.¹¹⁶ He then closely reexamined the facts of the case and conducted a thorough analysis of the materiality standard.¹¹⁷ Judge Tallman, who wrote a partial dissent joined by three other judges, agreed that Mr. Van Oss's conduct had violated Mr. Hayes's constitutional rights.¹¹⁸ However, Tallman refused to accept that the false testimony in this case affected the jury's verdict, thus finding it immaterial.¹¹⁹

1. *The Majority*

The *Hayes* majority first rejected the Government's contention that there was no violation of due process because Mr. James did not commit perjury.¹²⁰ The Court held that *Napue* error occurred whenever false evidence was knowingly used, regardless of whether the witness committed perjury, noting, "[t]his saves [the witness] from perjury, but it does not make his testimony truthful."¹²¹ In addition, the Court reasoned that the affirmative duty set forth in *Alcorta* and *Pyle* required prosecutors to correct testimony known to be false.¹²² Therefore, the State's misconduct had resulted in a violation of Mr.

¹¹² *Hayes v. Brown*, 399 F.3d 972, 977 (9th Cir. 2005).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 974.

¹¹⁷ *Hayes v. Brown*, 399 F.3d 972, 987-89 (9th Cir. 2005).

¹¹⁸ *Id.* at 989 (Tallman, J., concurring).

¹¹⁹ *Id.* at 989 (Tallman, J., dissenting).

¹²⁰ *Id.* at 980-81 (majority opinion).

¹²¹ *Id.* at 981 (quoting *Willhoite v. Vasquez*, 921 F.2d 247, 251 (9th Cir. 1990) (Trott, J. concurring)).

¹²² *Id.* at 981.

Hayes's due process rights under both standards.

The majority also considered the standard of review that should apply in the case.¹²³ It noted that even when courts find constitutional error, there is no *per se* rule of reversal.¹²⁴ The Court applied the rule from *Napue* that if there is any reasonable likelihood that the false evidence affected the jury's verdict, then the conviction cannot stand.¹²⁵ It reasoned that the *Brecht* harmless error analysis that generally applied to habeas review was unnecessary because a finding of materiality was necessarily also a finding that the error was not harmless.¹²⁶

Applying the materiality standard, the Court reached the crucial factual conclusion that Mr. James had some knowledge that "something was afoot" regarding the "secret" deal.¹²⁷ This finding was in direct opposition to the Government's factual assertions.¹²⁸ The majority reasoned that Mr. James would not have risked returning to California without the deal, as he had been hesitant to go to the police in the first place because of his outstanding charges.¹²⁹

The Court proceeded to consider the likelihood that Mr. James's false testimony affected the jury's verdict.¹³⁰ First, Mr. James's testimony was important to the prosecution's case because nearly all of the other evidence linking Mr. Hayes to Mr. Patel's murder was circumstantial.¹³¹ Additionally, Mr. James provided the only evidence that supported the prosecution's burglary-murder theory of the case, which was necessary for the special circumstances to be found true, and for the death sentence to be imposed.¹³² Finally, Mr. James alone testified that Mr. Hayes had actually confessed to killing Mr. Patel.¹³³ Hence, Mr. James was a key prosecution witness and, accordingly, his credibility was a crucial factor for the jury to con-

¹²³ Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 984-85.

¹²⁷ *Id.* at 987.

¹²⁸ *Id.* at 980.

¹²⁹ Hayes v. Brown, 399 F.3d 972, 987 (9th Cir. 2005).

¹³⁰ *Id.* at 985-86.

¹³¹ *Id.*

¹³² *Id.* at 986.

¹³³ *Id.* at 985.

sider.¹³⁴

Another significant factor in the Court's decision was its finding that the false evidence was non-cumulative. It reasoned that the impeachment evidence regarding Mr. James that the jury did hear was not as important as what they did not hear.¹³⁵ Since both Mr. Hayes and Mr. James were drug users with criminal histories, these facts would not have been important to the jury's determination of whom to believe.¹³⁶ Further, the Court reasoned that the transactional immunity Mr. James received was also insubstantial because Mr. James probably would not have faced charges arising from this case anyway.¹³⁷ Consequently, the Court reasoned that Mr. James's false testimony regarding the "secret" deal was non-cumulative.¹³⁸

In addition, the majority noted that the constitutional violation under the prosecutor's duty to correct false evidence was also material.¹³⁹ It reasoned that had Mr. Van Oss corrected Mr. James's false testimony, he would have been forced to reveal the details of the "secret" deal, which would likely have caused the jury to lose all confidence in the reliability of the prosecution.¹⁴⁰ Accordingly, the Court found the prosecutor's failure to perform his duty material.

Finally, the Court noted that this case was not an anomaly: numerous cases involving the knowing use of false evidence had recently come before the Court.¹⁴¹ In denouncing such conduct, Judge Thomas opined, "[w]hen even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened."¹⁴²

2. *The Dissent*

Judge Tallman, writing for the four dissenters, concurred that the use of false evidence violated Mr. Hayes's due process

¹³⁴ *Id.*, at 987.

¹³⁵ Hayes v. Brown, 399 F.3d 972, 987 (9th Cir. 2005).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 988.

¹⁴⁰ Hayes v. Brown, 399 F.3d 972, 988 (9th Cir. 2005).

¹⁴¹ *Id.*

¹⁴² *Id.*

rights, yet he strongly criticized the majority's holding on the issue of materiality, arguing that the majority had misapplied the standard.¹⁴³ However, the dissent's disagreement with the majority actually resulted primarily from its acceptance of the Government's contention that Mr. James had no knowledge of the deal, stating that, "[t]o label the testimony of James 'false' is a misnomer on these facts."¹⁴⁴ In accepting this version of the facts, the dissent reasoned that Mr. James had no further incentive to testify, that his credibility remained unchanged, and that his testimony regarding the deal was thus immaterial.¹⁴⁵

The dissent further argued that the evidence of the "secret" deal was cumulative because Mr. James's credibility was sufficiently tested by other evidence.¹⁴⁶ It noted that the jury heard of Mr. James's transactional immunity and other favors from the State, including money and airline tickets.¹⁴⁷ The dissent contended that since these factors could have affected Mr. James's credibility, the dismissal of the other felonies only amounted to cumulative impeachment evidence and was immaterial.¹⁴⁸ Therefore, based on its assumption that Mr. James knew nothing about the "secret" deal when he testified and that the deal would have amounted to cumulative impeachment, the dissent found the majority's conclusions on the materiality issue improper.¹⁴⁹

III. THE COURT'S MATERIALITY ANALYSIS IN *HAYES* AND ITS IMPLICATIONS FOR WRONGFUL CONVICTIONS

The Ninth Circuit reached its conclusion in *Hayes* by carefully reexamining the facts in deciding whether the false testimony pertaining to Mr. James's credibility was reasonably likely to have affected the jury's verdict.¹⁵⁰ By engaging in this meaningful review of Mr. Hayes's case, the Court granted relief while adhering to the materiality standard set forth in *Napue*

¹⁴³ *Id.* at 989 (Tallman, J., dissenting).

¹⁴⁴ *Id.* at 990.

¹⁴⁵ *Id.* (Tallman, J., dissenting).

¹⁴⁶ *Hayes v. Brown*, 399 F.3d 972, 990 (9th Cir. 2005) (Tallman, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 991 (Tallman, J., dissenting).

¹⁵⁰ *Id.* at 985-88.

and its progeny.¹⁵¹ Accordingly, other courts should follow the *Hayes* majority's materiality analysis to ensure the reversal of wrongful convictions caused by prosecutorial misconduct.

A. THE MAJORITY'S FINDING THAT MR. JAMES HAD SOME KNOWLEDGE OF THE "SECRET" DEAL

The majority's determination that Mr. James must have known that "something was afoot" regarding his pending felonies, and its finding that the "secret" deal was in all likelihood not secret, were crucial to its holding on materiality.¹⁵² Despite both the Government's and the dissent's insistence that Mr. James was unaware of the deal, the majority reexamined the facts and reached a different and more logical conclusion that ultimately led to reversal.

1. *Mr. James's Return from California*

In the intervening period between the murder of Pete Patel and the prosecution of Mr. Hayes, Mr. James had moved from California to Florida.¹⁵³ In spite of his pending felonies in California, Mr. James agreed to reenter the jurisdiction to testify in Mr. Hayes's murder trial.¹⁵⁴ Not only was it likely that Mr. James relocated to Florida because he was a "wanted man" in California, but it was highly improbable that he decided to return without any promise that he would not be arrested. Mr. Van Oss's promise that Mr. James could return to Florida after testifying would have indicated to Mr. James that he need not worry about being prosecuted for his pending felonies. Further, Mr. James's testimony in the *Hayes* trial revealed his concerns about his pending charges.¹⁵⁵ He stated that when he discussed what to do about the murder with Ms. Gebert, he expressed his fear of calling the police due to his pending felonies.¹⁵⁶ Hence, Mr. James' testimony indicated that from the outset he was concerned with being involved in the case due to

¹⁵¹ *Id.*; *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Agurs*, 427 U.S. 97, 103-04 (1976); *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959).

¹⁵² *Hayes v. Brown*, 399 F.3d 972, 987 (9th Cir. 2005).

¹⁵³ *Id.* at 979.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 976.

¹⁵⁶ *Id.*

his own problems with the law. The majority recognized that the only logical explanation for Mr. James's cooperation was his expectation that he would face neither immediate incarceration upon his return,¹⁵⁷ nor years in prison after being convicted of the pending charges.¹⁵⁸ Thus, the Court concluded that Mr. James had at least some knowledge of the deal.

2. *The Indicia of Special Treatment*

The Court's reasoning that Mr. James could not have overlooked the special treatment he received as soon as he became involved in the *Hayes* case was a logical conclusion drawn from the facts. First, Mr. James was not arrested, incarcerated or even arraigned on his pending felonies throughout his twenty-two-month-long involvement in the case.¹⁵⁹ In addition, he did not attend a single court appearance for those charges and suffered no repercussions as a result.¹⁶⁰ Mr. James had been involved in the criminal justice system on numerous prior occasions and would have known that it was unusual not to be required to appear at court proceedings.¹⁶¹ Surely his attorney provided him with an explanation of why he need not attend any of these proceedings. Hence, the Court properly concluded that either by his attorney's words or conduct, Mr. James had knowledge of the deal.

The majority determined that Mr. James's knowledge that he would not be prosecuted for his pending felonies was the logical conclusion based on the facts of this case. Since the knowledge that he would not face jail time was likely the decisive factor in Mr. James's decision to come to California and testify against Mr. Hayes, it was a fact the jury should have

¹⁵⁷ See First Amended Petition for a Writ of Habeas Corpus, *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (on file with author) [hereinafter *Hayes Habeas*], at 56; see also *Hayes v. Woodford*, 301 F.3d 1054 (9th Cir. 2002). At the time, Mr. James was on probation. Therefore, by reentering California, he could have been incarcerated immediately for violating probation, and would have remained so pending the outcome of his current felony charges.

¹⁵⁸ *Hayes v. Brown*, 399 F.3d 972, 987 (9th Cir. 2005).

¹⁵⁹ See *Hayes Habeas*, *supra* note 157, at 58-60. Mr. James's arraignment was continued on twelve separate occasions during proceedings against Mr. Hayes, from February 1980 to December 1981. Neither Mr. James nor his attorney appeared at any of these proceedings.

¹⁶⁰ See *id.*

¹⁶¹ See *Hayes*, 399 F.3d at 977.

heard in determining his credibility. The Court's close factual analysis led it to reject unconvincing assertions that Mr. James was kept in the dark. In this way, the majority was able to avoid the troubling implications of the Government's materiality argument, which essentially asserted that precisely because they had kept the truth from the Court and the witness, the Government should be found not to have influenced the outcome.

B. THE MATERIALITY OF THE FALSE TESTIMONY AND THE PROSECUTOR'S FAILURE TO CORRECT IT

The Ninth Circuit's close analysis of Mr. Van Oss's misconduct under the "any reasonable likelihood" standard set forth in *Napue* and its progeny led to the Court's reversal when previous reviewing courts had affirmed. Under the assumption that Mr. James must have had some awareness of the "secret" deal, the Court examined both the importance of his false testimony to the prosecution's theory of the case, and whether or not impeaching Mr. James with this deal would have been cumulative.¹⁶² Finally, the Court considered the likely outcome of the case had the prosecutor performed his duty of correcting the false testimony.¹⁶³ By carefully considering whether these factors would have affected the jury's verdict, the Court applied the materiality standard in the manner contemplated by the Supreme Court when prosecutors engage in intentional misconduct.¹⁶⁴

1. *The Importance of Mr. James's Testimony to the Prosecution's Theory of the Case*

A key factor the *Hayes* Court considered in applying the materiality standard was the importance of Mr. James's testimony to the prosecution. It concluded that whether or not the jury took Mr. James's word over that of Mr. Hayes was determinative of the outcome of the trial.¹⁶⁵ Accordingly, the false testimony that bolstered Mr. James's credibility was material.

¹⁶² *Id.* at 986.

¹⁶³ *Id.* at 988.

¹⁶⁴ See *Napue v. Illinois*, 360 U.S. 264, 270 (1959), and *Giglio v. United States*, 405 U.S. 150, 154 (1972).

¹⁶⁵ *Hayes v. Brown*, 399 F.3d 972, 986 (9th Cir. 2005).

Mr. James testified to several facts that were critical to the prosecution's case. First, he was the only person who testified that Mr. Hayes confessed to the murder.¹⁶⁶ In addition, his testimony supported the prosecution's theory of burglary and murder that led to Mr. Hayes's conviction and death sentence.¹⁶⁷ Specifically, the State had to prove Mr. Hayes's intent to commit burglary.¹⁶⁸ Because there was conflicting testimony regarding who burglarized the office, the State's case depended on the jury accepting Mr. James's version of events.¹⁶⁹ The jury had to believe that Mr. Hayes committed the burglary in order to find the special circumstance true and to impose a death sentence.¹⁷⁰ By identifying the necessity of Mr. James's testimony to the prosecution's case, the Court concluded that it was material.

On the other hand, the prosecutor's withholding of a deal with a less important witness may not have had a material effect on the verdict because the jury could have reached its decision without finding the witness credible. However, the *Hayes* case turned on whether Mr. James was more credible than Mr. Hayes. Both defense counsel and prosecutor Van Oss emphasized this fact in closing arguments: the former stating, "[i]n this case, you can only conclude that [Mr. Hayes] committed a robbery or a burglary if you believe Andrew James beyond a reasonable doubt . . ."¹⁷¹ and the latter arguing, "Andrew James may be a very bad man, he may have a bad past, he is not a murderer as the defendant is in this case."¹⁷² The Court's consideration of the importance of Mr. James's testimony to the prosecution's case supported its finding that the false evidence was material.

2. *The Court's Finding That the "Secret" Deal Was Not Cumulative*

Another key factor in the majority's finding of materiality was its conclusion that Mr. James's false testimony was non-

¹⁶⁶ *Id.* at 985.

¹⁶⁷ *Id.* at 985-86.

¹⁶⁸ *Id.* at 985.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 986.

¹⁷¹ *Hayes v. Brown*, 399 F.3d 972, 986 (9th Cir. 2005).

¹⁷² *Id.* at 980.

cumulative. The dissenters in *Hayes* argued that withholding the “secret” deal from the jury was immaterial because Mr. James had already been impeached with his transactional immunity, criminal history, and other favors provided by the State.¹⁷³ However, by distinguishing the “secret” deal from the other impeachment evidence, the majority reached a different and sounder conclusion.

a. The (In)significance of Mr. James’s Transactional Immunity

The Court reasoned that a charge against Mr. James in the Patel murder was unlikely, thus making his transactional immunity an unpersuasive factor in deciding his credibility. It reasoned that no theory of the case, including the one set forth by Mr. Hayes himself, implicated Mr. James in the murder of Mr. Patel.¹⁷⁴ According to Mr. Hayes, he had stabbed Mr. Patel in self-defense.¹⁷⁵ According to the prosecution, Mr. Hayes killed Mr. Patel as part of a plan to commit burglary.¹⁷⁶ In either scenario, Mr. James was not involved in Mr. Patel’s death, and therefore did not risk being charged with his murder.

Although testimony at the *Hayes* trial did implicate Mr. James in the burglary, a burglary charge would have been tenuous at best. Mr. Hayes testified that Mr. James had gone down to the motel office on his own and had taken the cigarettes, and another witness testified that she had seen Mr. James carrying boxes to his car.¹⁷⁷ According to his own testimony, Mr. James may have been an accessory to the burglary by giving Mr. Hayes a ride with the stolen goods.¹⁷⁸ However, a charge of burglary based on these facts would not only have been difficult to prove, but would have contradicted the State’s theory in the *Hayes* case. Since the prosecution contended that Mr. Hayes murdered Mr. Patel in order to commit burglary, charging Mr. James conflicted with the prosecution’s interest in seeking the death penalty. The majority recognized that the prosecution’s theory of felony-murder precluded its charging

¹⁷³ *Id.* at 990 (Tallman, J., dissenting).

¹⁷⁴ *Id.* at 972.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 985-86.

¹⁷⁷ *Hayes v. Brown*, 399 F.3d 972, 975-76 (9th Cir. 2005).

¹⁷⁸ *Id.* at 976.

Mr. James with burglary.¹⁷⁹ By distinguishing between the likely effect on the jury of Mr. James's transactional immunity from that of the "secret" deal, the Court found the latter non-cumulative, and thus material.¹⁸⁰

b. The Court's Conclusion That Mr. James' Impeachment with His Prior Convictions Was Non-Cumulative

The Court noted that because both Mr. James and Mr. Hayes had similar pasts, their impeachments at trial with their prior drug use and criminal histories were unlikely to significantly affect the jury's reasoning.¹⁸¹ In essence, the unsavory pasts of Mr. Hayes and Mr. James served to equalize them in the jury's eyes in terms of their moral characters. Therefore, the knowledge that Mr. James had an added incentive to lie in this case might have changed the jury's impression of his credibility. The Court's comparison of the characters of both Mr. James and Mr. Hayes allowed it to conclude that the impeachment for prior convictions and drug use did not render the "secret" deal cumulative.

3. *The Materiality of Mr. Van Oss's Failure to Correct False Testimony*

By considering the outcome of the trial had Mr. Van Oss performed his duty to correct Mr. James's false testimony, the Court recognized another theory for a finding of materiality.¹⁸² The *Hayes* majority first considered the materiality of Mr. Van Oss's failure to correct Mr. James's false testimony regarding his pending felonies.¹⁸³ More significantly, it also considered the impact on the jury if Van Oss had corrected Mr. James's testimony, which would have required revealing the "secret" deal to the jury.¹⁸⁴ In recognizing the devastating impact this would have had on the State's case, the Court found that this

¹⁷⁹ *Id.* at 985.

¹⁸⁰ *See supra* notes 57-61 and accompanying text. Although *Lambert* involved a *Brady* violation and was not cited in *Hayes*, it engaged in a similar analysis in finding undisclosed evidence non-cumulative.

¹⁸¹ *Hayes v. Brown*, 399 F.3d 972, 987 (9th Cir. 2005).

¹⁸² *Id.* at 988.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

constitutional error was also material.¹⁸⁵ Although the Court did not ultimately rely on this reasoning to reach its conclusion to grant relief, the discussion indicated the Court's approval for considering this issue. Because the prosecution has a duty to correct false evidence, it follows that a court should consider the impact on the jury of fulfilling that duty, as the Court did in *Hayes*. Thus, this reasoning may be useful in finding materiality for the knowing presentation of false evidence in future cases.

The depth of the Ninth Circuit majority's analysis allowed the Court to reach its decision to grant Mr. Hayes a new trial. Moreover, its application of facts and law in *Hayes* demonstrated a commitment to taking allegations of prosecutorial misconduct seriously. Other courts should adhere to the Court's reasoning to address the problem of wrongful convictions.

C. THE *HAYES* DECISION'S POSITIVE IMPLICATIONS FOR PREVENTING AND REVERSING WRONGFUL CONVICTIONS

Prosecutorial misconduct has emerged as a troubling and significant cause of wrongful convictions.¹⁸⁶ In addition, perjured testimony of prosecution witnesses—particularly accomplices—is also to blame in many of these cases.¹⁸⁷ However, an examination of the *Hayes* Court's materiality analysis reveals several positive implications for addressing these issues. First, in light of the limitations on habeas review, the lack of prosecution discipline, and the absence of other remedies for wrongful convictions, courts must engage in a meaningful application of the materiality standard when there are allegations of prosecutorial misconduct and the use of false evidence.¹⁸⁸ Second, courts must focus, as did the Ninth Circuit, on the prosecutor's duty to correct testimony regarding a deal with a witness, whether express or implied, to prevent wrongful convictions by encouraging prosecutors to make sure the testimony of accomplice witnesses is truthful and correcting it when it is not.¹⁸⁹ Finally, courts should follow the Ninth Circuit's materiality

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* notes 2-4 and accompanying text.

¹⁸⁷ See *supra* note 5 and accompanying text.

¹⁸⁸ See *infra* notes 191-202 and accompanying text.

¹⁸⁹ See *infra* notes 203-206 and accompanying text.

analysis and its reluctance to accept the Government's assertions to reverse wrongful convictions resulting from state misconduct.¹⁹⁰

1. *The Need for Meaningful Review of Cases Alleging Prosecutorial Misconduct and the Use of False Testimony to Address Wrongful Convictions*

In their book, *Actual Innocence*, the founders of the Innocence Project begin the chapter on prosecutorial misconduct by emphasizing courts' resistance to reversal: "[f]or an innocent person, the two most dangerous words in the language of the law are 'harmless error.'"¹⁹¹ They explain that appellate courts use these "magic words" to "absolve . . . prosecutors of misconduct."¹⁹² The authors go on to describe numerous cases in which prosecutors engaged in misconduct that was found harmless by the courts, yet the defendants were later exonerated based on DNA evidence.¹⁹³ In the context of a prosecutor's knowing use of false evidence, a court finding a violation immaterial is analogous to it finding the error harmless.¹⁹⁴

This reluctance by reviewing courts to meaningfully examine cases of misconduct,¹⁹⁵ coupled with the chilling effect that the AEDPA has had on federal habeas review,¹⁹⁶ has created a harsh climate in which the wrongfully convicted must plead their cases. Thus, carefully applying the established Supreme Court standards that are available on habeas review has become even more important. The reversal in the *Hayes* case illustrates the difference that courts can make when such a close analysis is applied. For example, the Ninth Circuit's careful consideration of each piece of impeachment evidence led to its conclusion that the "secret" deal was non-cumulative and thus material.¹⁹⁷

In addition, as reversals continue to occur based on DNA

¹⁹⁰ See *supra* notes 152-161 and accompanying text.

¹⁹¹ BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 172 (New American Library 2001).

¹⁹² *Id.*

¹⁹³ *Id.* at 172-74.

¹⁹⁴ See *supra* notes 30 and 125-126 and accompanying text.

¹⁹⁵ See *supra* notes 62-65 and accompanying text.

¹⁹⁶ See *supra* notes 66-70 and accompanying text.

¹⁹⁷ *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005).

evidence, it becomes apparent that far more innocent persons are incarcerated whose alleged crime did not create this type of evidence. Although numerous proposals have been made for remedying wrongful convictions,¹⁹⁸ few thus far have been implemented. Hence, granting reversal on habeas review based on due process violations continues to be a vital remedy in overturning wrongful convictions in spite of the breakthroughs in scientific evidence.

Another important reason for a close analysis of cases implicating the materiality standard is the lack of prosecutorial discipline for misconduct.¹⁹⁹ With rare exception, no prosecutors have been disciplined for their roles in wrongful convictions, even in those cases in which the misconduct was deemed grossly negligent or intentional.²⁰⁰ In fact, in almost all cases in which prosecutorial misconduct was found, no discipline was imposed.²⁰¹ Consequently, little deterrence exists in terms of damage to prosecutors' careers or reputations. To illustrate, prosecutor Van Oss is now Superior Court Judge Van Oss in the same county where he lied to the judge and jury during the proceedings against Mr. Hayes decades earlier.²⁰² In light of these circumstances, adjudication of habeas claims based on allegations of misconduct is one of the only avenues through which courts review a prosecutor's actions. Accordingly, courts have a duty to do so meaningfully.

2. *Use of the Ninth Circuit's Materiality Standard to Prevent and Reverse Wrongful Convictions Based on False Testimony*

In *Hayes*, the Court considered not only the materiality of

¹⁹⁸ See Ellen Yaroshefsy, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275, 278 (2004) (proposing the creation of innocence commissions); see also Sam Roberts, Note, *Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 262 (2005) (proposing recording all pretrial meetings between police, prosecutors and cooperating accomplices and snitches).

¹⁹⁹ See Yaroshefsy, *supra* note 198, at 278-79.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 277. (finding that prosecutors are rarely disciplined even for misconduct that is considered "highly reprehensible," such as suppressing facts and secreting evidence).

²⁰² *Hayes v. Brown*, 399 F.3d 972, 976 (9th Cir. 2005); San Joaquin County Superior Court, Judicial Officers of the Superior Court, at <http://www.stocktoncourt.org/courts/people1.htm> (last visited Aug. 10, 2006).

the false testimony regarding the “secret” deal, but also the impact the prosecutor’s correction would have had on the verdict.²⁰³ This new factor in considering the prosecutor’s duty to correct gives “teeth” to this standard by taking into account how such a correction would affect the credibility of the prosecution in the eyes of the jury. Although commentators already view this duty to correct as discouraging prosecutors from using false testimony, this added factor could further deter prosecutors from using testimony that is likely perjured.²⁰⁴ Furthermore, the duty to correct can also help address the general problem of perjured testimony as prosecutors may take more seriously the possibility that witnesses are not being completely truthful about the incentives they have received for their testimony.²⁰⁵ Therefore, the Court’s reinforcement of the duty to correct and its focus on the consequences of not fulfilling that duty may help address the problem of wrongful convictions caused by perjury and prosecutorial misconduct.

The *Hayes* Court’s unwillingness to accept the Government’s assertions regarding the “secret” deal may further deter prosecutors from concealing incentives or allowing potentially false testimony to go uncorrected.²⁰⁶ This suspicion is logical: when a court reaches the question of materiality, it has already established that the prosecution has engaged in misconduct of constitutional magnitude. Therefore, to rely on the State or the Government’s version of the facts is to accept the view of persons who have already demonstrated that they are capable of deceit. If other courts review such claims similar to the review by the Ninth Circuit, the prosecutor’s word may be insufficient if a court’s factual analysis leads it to conclude otherwise. Therefore, the Ninth’s Circuit’s decision in *Hayes* may further

²⁰³ See *supra* notes 182-185 and accompanying text.

²⁰⁴ See R. Michael Cassidy, “Soft Words of Hope:” *Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1163-64 (2004) (arguing that although greater restrictions should be implemented to prevent a prosecutor’s complicity in perjury, *Napue*’s duty to correct false testimony can help reveal inducements prosecutors give to cooperating witnesses in exchange for their testimony); see also Roberts, *supra* note 198, at 267 (noting that although prosecutors are not required to record interviews with cooperating and accomplice witnesses, their affirmative duty to correct false testimony is one due process protection for defendants).

²⁰⁵ See Cassidy, *supra* note 204 and accompanying text; see also Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 324, 337-38 (asserting that in addition to the prosecutor’s duty not subvert the truth, prosecutors have a duty to prejudge whether witness testimony is truthful).

²⁰⁶ See *supra* notes 156-162 and accompanying text.

instruct prosecutors to take greater care in both giving inducements to witnesses and correcting their testimony at trial.

IV. CONCLUSION

Rarely is a defendant fortunate enough to obtain signed statements from a prosecutor and a perjurious witness attesting to the unfairness of the trial, as was the case in *Pyle v. Kansas*.²⁰⁷ In most cases, the parties dispute the facts surrounding the misconduct and courts must make determinations based on those facts that are available. However, courts should examine every fact at their disposal and thoroughly consider materiality without a bias towards the Government if they are serious about addressing the problem of wrongful convictions. The profoundly worrisome statistics linking prosecutorial misconduct and false testimony to wrongful convictions indicate that subsequent courts should follow the majority's analysis in *Hayes*.²⁰⁸

Although the Supreme Court requires that the materiality standard be met in order for a defendant to be granted relief in cases involving a prosecutor's knowing use of false evidence,²⁰⁹ the *Hayes* case illustrates that a court's willingness to meaningfully apply this standard can make the difference between affirmance and reversal. Only Mr. James and Mr. Hayes know precisely what happened on January 1, 1980, but the Ninth Circuit properly found that regardless, the prosecutor's actions caused Mr. Hayes to be sentenced to death without a fair trial. Accordingly, courts must carefully consider cases involving such allegations to ensure that this standard does not become a barrier to justice that allows wrongful convictions to stand and emboldens prosecutors to obtain convictions at any cost. Hence, courts must follow the Ninth Circuit's lead to confront the issues of prosecutorial misconduct and wrongful convictions and to maintain the integrity of the criminal justice system.

²⁰⁷ *Pyle v. Kansas*, 317 U.S. 213, 215 (1942).

²⁰⁸ See *supra* notes 2-4 and accompanying text.

²⁰⁹ *Giglio v. United States*, 405 U.S. 150, 154 (1972).

LYNN DAMIANO*

* J.D. Candidate, Golden Gate University School of Law, San Francisco, CA, December 2006; B.A. Geography, University of California, Berkeley, CA. I would first like to thank my faculty mentor Professor Robert Calhoun, Jr. for his advice and insights. I would also like to thank Professor Susan Rutberg for her valuable feedback, support, and encouragement during my time at the Innocence Project and while writing this note. Finally, my parents were also very supportive during this long and challenging process.