PROPERLY PARTITIONING PREJUDICE: ANALYZING MIXED *BRADY* AND *NAPUE* CLAIMS

*Patrick Scariano**

Due process affords criminal defendants the right to receive evidence possessed by the government that would aid in their defense. This right was codified in Brady v. Maryland. Brady*'s lesser-known ancestor is* Napue v. Illinois*, which gave defendants the right to a new trial if the government knowingly offered perjured testimony in their original trial. The U.S. Supreme Court has held that these rights are critical to support verdicts worthy of confidence necessary to ensure due process.*

Unfortunately, defendants victimized by misconduct are often affected by multiple violations of their rights. Courts have developed ways to examine the prejudicial effect of multiple Brady *claims in a single case, but introducing* Napue *claims with* Brady *presents an analytical challenge because of the differing standards needed for a new trial under each type of claim. This Note examines how federal circuits have analyzed mixed-claim cases, where a defendant alleges both* Brady *and* Napue *claims. The U.S. Court of Appeals for the Ninth Circuit has analyzed all* Napue *claims together with* Brady *claims, the U.S. Court of Appeals for the Second Circuit has analyzed some* Brady *claims together with* Napue *claims, and the U.S. Court of Appeals for the Fourth Circuit has analyzed using a combination of the other two tests. This Note argues that the Ninth Circuit framework is the best of the three at accurately apportioning claims when analyzing mixed-claim cases, but that courts should adopt a modified methodology to more accurately account for the serious harm perjured testimony inflicts on a trial.*

* J.D. Candidate, 2026, Fordham University School of Law; B.S., 2023, Villanova University. I would like to thank my Note advisor, Professor Ian Weinstein, and my primary editor, Sarya Baladi, for their invaluable guidance, feedback, and encouragement throughout writing process, with special thanks to Professor Sepehr Shahshahani for his mathematical assistance. I would also like to thank the board and members of the *Fordham Law Review* for their support and editing assistance.

INTRODUCTION

"A lie is a lie."[1] After his first trial ended in a deadlocked jury, La Carla Martez Dow was convicted for the robbery of a convenience store in California, based on an identification by the store's cashier.[2] At the police lineup, Dow's attorney expressed concern that Dow was the only member of the lineup with any facial scar, and that the witness may falsely identify Dow using only the fact that a scar existed.[3] Dow's counsel asked the district attorney to have each individual in the lineup wear a bandage to cover the area under the right eye, the area where Dow had a small scar.[4] The first trial ended in a mistrial, and during the second trial the detective conducting the lineup testified that Dow, and not his attorney, had requested the bandages used to cover the scars.[5] The prosecutor knew this was false but did not

1. Napue v. Illinois, 360 U.S. 264, 269 (1959) (quoting People v. Savvides, 136 N.E.2d 853, 854 (1956)).
2. Dow v. Virga, 729 F.3d 1041, 1044 (9th Cir. 2013).
3. *Id.* When describing the perpetrator after the robbery, Sablad said the perpetrator had a "scar somewhere on his face." *Id.*
4. *Id.* at 1043.
5. *Id.* at 1045.

correct the witness.[6] Then, in rebuttal closing arguments,[7] the same prosecutor "exploited her knowing presentation of false evidence" by arguing that Dow requesting the bandages to cover his scar was evidence of consciousness of guilt.[8] The judge allowed this argument over the objections of defense counsel, and Dow was ultimately convicted.[9] This was the only significant difference between the two trials; it turned a close case into a conviction.[10]

It is intolerable for a prosecutor to elicit testimony that misleads a jury about an important fact.[11] The goal of a "criminal prosecution is not that it shall win a case, but that justice shall be done."[12] The duty of a prosecutor is not to convince the jury that an indictment should return a conviction.[13] A prosecutor's duty is to accurately present the evidence and explain why the jury should render a guilty verdict.[14] It is for a jury to ultimately decide guilt or innocence[15] and it must do so based on the high standard of beyond a reasonable doubt.[16] The U.S. Supreme Court has avoided more precisely defining this standard, noting "[a]lthough this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication."[17] But the Court has approved some language defining reasonable doubt to be used in jury instructions: "'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon."[18]

In *Brady v. Maryland*[19] in 1963, the Supreme Court wrote, "[t]he United States wins its point whenever justice is done its citizens in the courts."[20] Unfortunately, not all prosecutors live up to the calling of Justice George Sutherland in *Berger v. United States*[21] to do justice above winning cases.

---

6. *Id.*

7. Because the prosecutor made her improper argument during rebuttal, the defense had no meaningful opportunity to respond beyond objecting. *Id.* at 1050.

8. Defense counsel seems to have missed this testimony during examinations, because defense counsel objected to its use during closing on lack of evidence grounds. *Id.*

9. *Id.* at 1044, 1046.

10. *Id.* at 1050. Dow was initially sentenced to fifteen years in prison, before having his conviction overturned by the U.S. Court of Appeals for the Ninth Circuit. *Id.* at 1044, 1052.

11. *See* Stephan A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1560, 1574 (2000).

12. Berger v. United States, 295 U.S. 78, 88 (1935).

13. *Cf.* Pierre v. Louisiana, 306 U.S. 354, 356 (1939) (explaining an indictment is not evidence of guilt).

14. *Cf.* Haskell v. Superintendent Greene SCI, 866 F.3d 139, 151 (3d Cir. 2017) (holding a prosecutor's presentation of false evidence entitled the defendant to a new trial).

15. U.S. CONST. amend. VI.

16. *See* Leland v. Oregon, 343 U.S. 790, 802–03 (1952) ("It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'").

17. Victor v. Nebraska, 511 U.S. 1, 5 (1994).

18. *Id.*

19. 373 U.S. 83 (1963).

20. *Id.* at 87.

21. 295 U.S. 78, 88 (1935).

Prosecutors are often evaluated primarily on their conviction rate.[22] This system is in direct conflict with the purpose of the criminal justice system, as it incentivizes prosecutors to focus on their "personal tallies" rather than obtaining convictions fairly and justly.[23] This disconnect can lead to prosecutors engaging in misconduct that ranges from mildly to extraordinarily concerning in order to get convictions.[24]

Such misconduct was recently brought into the public eye when the high profile criminal trial of actor Alec Baldwin—who shot and killed Halyna Hutchins in an on-set accident—came to a screeching halt.[25] Baldwin's attorneys accused the prosecutors of not turning over ammunition that could have been linked to the case.[26] The judge agreed, dismissing the case with prejudice.[27] One of the special prosecutors resigned following the dismissal, the fourth resignation of a prosecutor working on the case.[28]

Baldwin is fortunate that his fame and privilege brought his case to light,[29] but he is far from being the only victim of prosecutorial misconduct.[30] A 2020 analysis of 2,400 known exonerations between 1989 and 2019 showed that 720 exonerations (30 percent) were at least partially the result of prosecutorial misconduct.[31] Worryingly, the proportion of exonerations of defendants convicted of murder is even higher at 44 percent, roughly 400 between 1989 and 2019.[32] Black exonerees were more likely to be victims of misconduct than White exonerees (57 percent to 52 percent).[33] The racial divide is even starker for murder exonerations, with 78 percent of Black murder exonerees being victims of misconduct compared to 64 percent of White murder exonerees.[34] Perhaps the most concerning of all, 87 percent

22. *See* Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2123 (2010).

23. *See id.* at 2127.

24. *See* Jeffrey L. Kirchmeier, Stephen R. Greenwald, Harold Reynolds & Jonathan Sussman, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1331 (2009).

25. Andrew Hay, *Alec Baldwin "Rust" Shooting Case Dismissed Over Withheld Evidence*, REUTERS (July 13, 2024, 4:37 AM), https://www.reuters.com/legal/government/alec-baldwin-trial-suspense-judge-mulls-motion-dismiss-charge-2024-07-12/ [https://perma.cc/4HCN-MECZ].

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* Alex Marshall & Julia Jacobs, *Alec Baldwin's "Rust," Marked by Tragedy, Holds Premiere in Poland*, N.Y. TIMES (Nov. 20, 2024), https://www.nytimes.com/2024/11/20/movies/rust-premiere-alec-baldwin.html [https://perma.cc/4878-T5EG].

30. *See generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016).

31. SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT 12 tbl.3 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/N78A-SSF8].

32. *Id.*

33. *Id.* at 28 tbl.6.

34. *Id.*

of Black death penalty exonerees were victims of misconduct, compared to 68 percent of White death penalty exonerees.[35]

The pervasiveness of this misconduct is frightening, and it is for legislatures and courts to remedy. What happened in Baldwin's case is more commonly known as a *Brady* violation, from *Brady v. Maryland*, where the government withholds evidence helpful to the defense from discovery.[36] Concealing evidence was the most common type of misconduct found during the 2020 study, occurring in 1,064 of the 2,400 exonerations (44 percent).[37] Victims of *Brady* violations are only entitled to a new trial "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[38]

A less common, yet no less insidious, type of prosecutorial misconduct is the presentation of false testimony.[39] The Supreme Court held in *Napue v. Illinois*[40] that the knowing use of false testimony that contributed either directly or indirectly to a guilty verdict is a due process violation.[41] The Court also held that prosecutors have a duty to correct false testimony if they only learn of its falsity after its presentation.[42] Victims of *Napue* violations are entitled to a new trial unless the failure to correct it was harmless beyond a reasonable doubt.[43]

In almost all cases of false testimony (*Napue*), exculpatory evidence (*Brady*) is also withheld.[44] One of the most common overlapping cases is where a witness lies about receiving a cooperation deal with prosecutors, and the prosecutor fails to disclose the deal.[45] This can present a problem for courts deciding whether to grant a defendant a new trial, because the standard for a material violation under *Napue* is substantially lower than for *Brady*.[46] When a defendant claims both types of violations, the outcome of the appeal may turn on how much evidence a court places under the lower standard of *Napue* and how much *Napue* evidence may roll over into a *Brady* analysis. The U.S. Courts of Appeals for the Ninth and Second Circuits have disagreed

35. *Id.*
36. 373 U.S. 83, 87 (1963).
37. GROSS ET AL., *supra* note 31, at 75.
38. *See* Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)); *id.* at 685 (White, J., concurring in part and concurring in judgment).
39. GROSS ET AL., *supra* note 31, at 99.
40. 360 U.S. 264 (1959).
41. *Id.* at 269.
42. *Id.* at 269–70.
43. *See Bagley*, 473 U.S. at 680 (plurality opinion).
44. This is the case almost by definition because the withheld truth would have benefitted the defense, except in the unlikely event, the false testimony benefitted the defense. GROSS ET AL., *supra* note 31, at 99.
45. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154 (1972); Gomez v. Comm'r of Corr., 336 Conn. 168, 191 (2020).
46. *See infra* Parts I.A.3, I.B.3; *see also* 1 DONALD F. SAMUEL, ELEVENTH CIRCUIT CRIMINAL HANDBOOK § 206, LexisNexis (database updated June 2024) ("The materiality threshold for a *Napue* claim is more defense-friendly [than *Brady*].").

on how much evidence should be considered under each standard, with U.S. Courts of Appeals for the Fourth Circuit recently adding a third variation.[47]

This Note seeks to elucidate the reason why the courts have diverged and to recommend a test that best reflects the principles of due process underpinning each rule. Part I provides the historical development of due process rules that grew from both *Napue* and *Brady* and introduces how courts analyze collective claims. Part II explains the diverging answers federal circuit courts have given when asked to mix types of claims and determine whether there is enough evidence for a material violation. Part III argues that allowing *Napue* claims to be aggregated with *Brady* claims under the *Brady* standard in mixed-claim cases best captures the due process principles underpinning both rules and best serves victims of misconduct. Part III also outlines a new framework for courts to apply such a method.

I. EVIDENTIARY PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct frequently involves denying defendants information critical to their defense.[48] Therefore, this Note begins by explaining due process and how courts have protected defendants' rights to evidence to aid in their defense. Part I.A starts by discussing the fundamental due process principles that bore *Napue* and how *Napue* is used. Part I.B details the *Brady* rule as it grew out of *Napue*. Finally, Part I.C describes the "collective" analysis courts use when a case has multiple alleged *Brady* or *Napue* violations.

It is important to distinguish "material[ity]" as a standard from "*Brady*/*Napue* material." "*Brady*/*Napue* material" is a term of art that describes either withheld favorable evidence, in the case of *Brady*, or the knowing use of false testimony, in the case of *Napue*.[49] "Material" is the standard by which courts determine whether or not *Brady* or *Napue* "material" creates enough prejudice to constitute an actionable violation.[50] For clarity, this Note refers to "*Brady*/*Napue* material," as "*Brady*/*Napue* evidence," but where courts have used the term "material," the term will remain unchanged.

A. Napue *Violations: No Truth at All*

Napue gave shape to theoretical ideas of due process set out in the Constitution and outlined by the Supreme Court by providing a concrete basis for the overturning of a conviction obtained through misconduct.[51] Part

47. Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008); United States v. Vozzella, 124 F.3d 389, 392 (2d Cir. 1997); Juniper v. Davis, 74 F.4th 196, 211 (4th Cir. 2023).

48. *See* GROSS ET AL., *supra* note 31, at 75.

49. *See, e.g.*, Reis-Campos v. Biter, 832 F.3d 968, 975, 976 (9th Cir. 2016); *see also Brady Material*, BLACK'S LAW DICTIONARY (12th ed. 2024).

50. *See* Lisa Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1214 (2000).

51. *See* Kara MacKillop & Neil Vidmar, *Decision-Making in the Dark: How Pre-trial Errors Change the Narrative in Criminal Jury Trials*, 90 CHI.-KENT L. REV. 957, 966 (2015).

I.A.1 describes the due process principles underlying the *Napue* rule. Part I.A.2 delineates the boundaries of *Napue* evidence. Finally, Part I.A.3 illustrates materiality under the *Napue* standard.

1. Constitutional Basis for *Napue*

Napue is based in due process rights and served as the origin of *Brady*.[52] The Constitution guarantees defendants the right to due process.[53] "The cornerstone of due process is the prevention of abusive governmental power."[54] To prove a due process claim, the parties must show that the government deprived them of a protected interest without due process of law.[55] Many protected interests are found in the first eight amendments to the Constitution.[56] The Due Process Clauses of the Fifth and Fourteenth Amendments not only protect enumerated rights,[57] but also require that state action be "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[58]

Napue is derived from another landmark Supreme Court case, *Mooney v. Holohan*.[59] In *Mooney*, an incarcerated person serving a commuted life sentence[60] petitioned for relief because his conviction resulted from perjured testimony and without the benefit of evidence the prosecutor suppressed.[61] *Mooney* sets out the broad principle that backs defendants' rights to an open and honest trial: "[Due process] is a requirement that cannot . . . be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial . . . through a deliberate deception . . . by the presentation of testimony known to be perjured."[62]

The *Mooney* rule was given shape in *Pyle v. Kansas*[63]: "that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him . . . sufficiently charge a deprivation of rights."[64] These cases set the outline for both *Brady* and *Napue*: they state the basics of (1) *Napue*—false (perjured) testimony

52. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

53. The Fourteenth Amendment applies due process to state cases whereas the Fifth Amendment applies it to federal cases. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

54. *See* Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989).

55. *See* 16B AM. JUR. 2D *Constitutional Law* § 933, Westlaw (database updated Jan. 2025).

56. *Id.*

57. *Id.*

58. *Id.*

59. 294 U.S. 103 (1935).

60. Originally a death sentence. *Id.* at 109.

61. *Id.* The Court did not reach the substantive question because of a procedural deficiency. *Id.* at 115.

62. *Id.* at 112.

63. 317 U.S. 213 (1942).

64. *Id.* at 216.

knowingly used—and (2) *Brady*—suppression of evidence favorable to the defendant.[65]

2. What Is *Napue* Evidence

In *Napue*, decided four years prior to *Brady*, Henry Napue was tried for the killing of a police officer during the course of a robbery gone wrong.[66] The principal witness for the prosecution was one of Napue's accomplices, George Hamer.[67] The jury returned a guilty verdict largely based on Hamer's testimony.[68] Following the verdict, the prosecutor filed a petition to reduce Hamer's sentence, alleging he had promised to do so in exchange for his testimony against Napue.[69] Napue filed a post-conviction petition alleging that Hamer had falsely testified that he had been promised nothing for his testimony, and that the prosecutor handling the case had known this to be false.[70]

The Supreme Court condemned the conviction, as upheld by the Supreme Court of Illinois, holding the knowing use of false testimony to obtain a "tainted conviction" has no place in "any concept of ordered liberty."[71] The justices also had no sympathy for a claim of good faith: "That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same."[72] The Court found that other admitted impeachment evidence did not cure this deficiency.[73]

Later courts have expanded on the offense false testimony presents to the sanctity of courts. In *United States v. Agurs*,[74] the Court found that the introduction of false testimony is "a corruption of the truth-seeking function of the trial process."[75] In *Wood v. Bartholomew*,[76] the Court did not find that withheld polygraph results were material, but noted, "[i]f the prosecution's initial denial that . . . [the evidence] existed were an intentional misstatement, we would not hesitate to condemn that misrepresentation in the strongest terms."[77]

---

65. *Id.*
66. Napue v. Illinois, 360 U.S. 264, 265 (1959).
67. *Id.* Hamer's testimony was "extremely important" because of the time since the killing, the dim light in the cocktail lounge made eyewitness identification very difficult and uncertain, and other witnesses had left the state. *Id.* at 265–66.
68. *Id.* at 266.
69. *Id.* at 267. The attorney asked that the court effect "consummation of the compact entered into between the duly authorized representatives of the State of Illinois and George Hamer." *Id.* (quoting petition for writ of error coram nobis).
70. *Id.*
71. *Id.* at 269.
72. *Id.* at 270.
73. *Id.*
74. 427 U.S. 97 (1976).
75. *Id.* at 104.
76. 516 U.S. 1 (1995).
77. *See id.* at 5.

Napue evidence is not limited to substantive facts and is commonly invoked when the false evidence is related to witness credibility.[78] The Supreme Court has found perjured testimony material under *Napue* when it bore on the credibility of a witness upon whom "the Government's case depended almost entirely."[79]

3. How *Napue* Works on Appeal

Under *Napue*, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."[80] *Napue* itself did not articulate a standard of materiality required for reversal, though it did use the future words describing the standard in the opinion.[81] Consistent with the harsh treatment of perjured testimony demonstrated above, the Court focused on the gravity of the error on its face.[82] In *Giglio v. United States*,[83] the Court made the standard of materiality clear: any reasonable likelihood that the evidence could have affected the judgment of the jury requires reversal.[84] In contrast to *Brady*, *Napue*'s standard mainly remained unchanged since the landmark case itself.[85]

In summary, here is where *Napue* violations stand today: (1) the testimony (or evidence) must be actually false, (2) the prosecution must have known or should have known that the testimony was actually false, and (3) the false testimony must have been material.[86] Knowing prosecutorial use of false testimony under *Napue* is material unless failure to disclose it would be harmless beyond a reasonable doubt.[87] The Supreme Court has made *Napue*'s materiality standard considerably less demanding than the standard for *Brady* claims[88] because of the insidiousness of *Napue* violations' inhibition of truth seeking, beyond just prosecutorial misconduct.[89]

---

78. As was the case in *Napue v. Illinois*. 360 U.S. at 269; *see also* Giglio v. United States, 405 U.S. 150, 151 (1972).

79. *See Giglio*, 405 U.S. at 154.

80. *Napue*, 360 U.S. at 269.

81. *Id.* at 271 ("[T]he State argues that we are . . . bound by [the lower court's] determination that the false testimony could not in any reasonable likelihood have affected the judgment of the jury.").

82. *Id.* at 270 ("[I]f it is in any way relevant to the case, the district attorney has the responsibility and duty to correct.").

83. 405 U.S. 150 (1972).

84. *Id.* at 154.

85. *See* Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 382 (2011) (explaining that although lower courts have applied the standard differently, the Supreme Court has been clear about the overall standard).

86. *See* United States v. Renzi, 769 F.3d 731, 751 (9th Cir. 2014); Basden v. Lee, 290 F.3d 602, 614 (4th Cir. 2002).

87. *See* United States v. Bagley, 473 U.S. 667, 680 (1985) (plurality opinion) (restating the established principle that "any reasonable likelihood that the false testimony could have affected the judgment of the jury").

88. *See* Dickey v. Davis, 69 F.4th 624, 637 (9th Cir. 2023).

89. *See* United States v. Agurs, 427 U.S. 97, 104 (1976); *see also* Mooney v. Holohan, 294 U.S. 103, 113 (1935) ("[A] deliberate deception of court and jury by the presentation of

B. Brady *Violations: Avoiding the Truth*

Brady claims grew out of *Napue* jurisprudence and became distinct as courts identified a difference in the type of conduct *Brady* regulates. Part I.B.1 outlines the due process principles underlying the *Brady* rule. Part I.B.2 describes the development of the *Brady* rule's contours of what can be *Brady* evidence. Lastly, Part I.B.3 explains how the standard for materiality of a *Brady* violation has developed in use by appellate courts.

1. Constitutional Basis for *Brady*

In *Brady*, John Brady was tried for a murder committed during the perpetration of a robbery.[90] There was no question as to Brady's commission of the robbery, as Brady admitted in his own defense at trial.[91] However, Brady testified that his accomplice, Boblit, had committed the murder.[92] Prior to the trial, Brady had asked the prosecutor to disclose any statements by Boblit, which was partially acceded to, with the notable exception of Boblit's confession to the murder.[93] Brady was convicted, sentenced to death, and had his conviction affirmed before he was notified of Boblit's confession.[94]

Consistent with *Mooney*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process"[95] because it is not for the prosecutor to gatekeep evidence from a trial.[96] Judges gatekeep evidence to ensure it is relevant,[97] and juries assign weight to that evidence.[98] The Court's framing in *Brady* emphasizes the fault of the prosecutor in failing to comply with a due process obligation specifically requested by the defendant.[99] However, the Court also held that the rule is irrespective of the intent of the prosecutor.[100] This "no-faith" requirement underlies *Brady*'s development as a rule of process rather than directly remedying misconduct.[101]

---

testimony known to be perjured . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.").

90. Brady v. Maryland, 373 U.S. 83, 85 (1963).

91. *Id.* at 84.

92. *Id.* Brady's counsel conceded guilt as to the murder during summation, only asking for a verdict "without capital punishment." *Id.*

93. *Id.* at 85. Boblit was tried after Brady. *Id.* at 84.

94. *Id.*

95. *Id.* at 87.

96. *Id.* at 88 ("That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.").

97. *See* FED. R. EVID. 402; *see also* United States v. Dingwall, 6 F.4th 744, 760 (7th Cir. 2021).

98. *See* Jackson v. Denno, 378 U.S. 368, 386 n.13 (1964).

99. *See Brady*, 373 U.S. at 87 (holding that "the suppression by the prosecution of evidence favorable to an accused *upon request*" violates due process (emphasis added)).

100. *Id.*

101. *See* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 392 (1984).

The Court continued painting the basis for the *Brady* rule in *Agurs*, clarifying that *Brady* violations were not predicated on the moral culpability of the prosecutor's actions.[102] The test instead is one of reasonableness; the Court held the prosecutor should be presumed to have constructive knowledge of significant evidence under state control, even if the prosecutor does not have actual knowledge.[103] *Agurs* also began to soften the request requirement, waiving it where there would be "sufficient significance to result in the denial of the defendant's right to a fair trial."[104] This reinforced the *Brady* rule as one designed to safeguard a fair trial under due process, not one concerned with punishing misconduct.[105]

This adaptation became even more pronounced in *United States v. Bagley*,[106] where the Supreme Court completely eliminated the "request" requirement from *Brady*.[107] This fully shifted the pretrial burden to disclose to prosecutors.[108] It also shifted the posttrial analysis of facts almost entirely onto the materiality of the disclosure.[109]

2. What is *Brady* Evidence

A wide variety of evidence can be considered material, based on the facts of a trial.[110] The easiest case of *Brady* evidence is *Brady* itself: evidence of a fact that directly tends to support the defendant's innocence may fall under *Brady*.[111] Originally, the Supreme Court would evaluate whether *Brady* evidence was requested during pretrial proceedings and the degree of specificity in the request to determine whether relevant evidence fell under *Brady*,[112] but now courts look only to the favorability and weight of the evidence.[113]

The first wrinkle took shape in *Giglio* when the Court considered whether indirect evidence of innocence, most commonly in the form of evidence tending to impeach a witness testifying at trial, may be lawfully withheld.[114] In *Giglio*, the only witness linking the defendant to a forgery conspiracy was the co-conspirator.[115] The prosecution failed to disclose an alleged promise

102. *See* United States v. Agurs, 427 U.S. 97, 110 (1976).
103. *Id.*
104. *Id.* at 108.
105. *See id.*
106. 473 U.S. 667 (1985) (plurality opinion).
107. *See id.* at 682.
108. *See id.* at 700.
109. *See id.* at 678–84.
110. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154 (1972) (holding failure to disclose promise of leniency to key witness is material); Banks v. Dretke, 540 U.S. 668, 701 (2004) (holding failure to disclose a witness was a paid informant is material); Youngblood v. West Virginia, 547 U.S. 867, 868 (2006) (holding failure to disclose a document supporting a defendant's case theory is material).
111. *See* Brady v. Maryland, 373 U.S. 83, 85 (1963).
112. *See* United States v. Agurs, 427 U.S. 97, 104 (1976).
113. *See Bagley*, 473 U.S. at 682.
114. *Giglio*, 405 U.S. at 154.
115. *Id.* at 150.

not to prosecute the co-conspirator in exchange for his testimony.[116] The Court held that because evidence of the promise bore materially on the witness's credibility, it was favorable to the defense under *Brady*.[117]

Evidence may also fall under *Brady* even if it is not under the direct control of the prosecutor.[118] The prosecutor has an obligation under *Brady* to investigate whether the police have evidence favorable to the defendant.[119] The Court imposed this duty because prosecutors are in the best position to "gauge the likely net effect" of undisclosed evidence.[120] The duty to disclose under *Brady* also provides incentive to err on the side of disclosure, even if evidence is not facially material.[121]

Courts are split as to whether evidence inadmissible at trial may be considered under *Brady*.[122] Some courts merely consider admissibility a factor in their materiality analysis.[123] Some require inadmissible evidence to lead to admissible evidence.[124] And some still do not consider whether evidence is admissible at all.[125]

3. How *Brady* Works on Appeal

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."[126] Much of *Brady* jurisprudence has developed around what constitutes a "material" nondisclosure.[127]

Agurs was the first case to give real shape to materiality under *Brady*.[128] There, the Court described three differing standards of materiality for three different levels of request by the defendant.[129] First, knowing use of uncorrected false testimony would be held to the standard of "any reasonable

116. *See id.*

117. *Id.* at 154–55 (also relying on *Napue*).

118. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).

119. *See id.* at 438 ("[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."); *Giglio*, 405 U.S. at 154 ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").

120. *See Kyles*, 514 U.S. at 437.

121. *See* Kurcias, *supra* note 50, at 1205.

122. *See* Blaise Niosi, Note, *Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence Is Material Under the* Brady *Rule*, 83 FORDHAM L. REV. 1499, 1502 (2014); United States v. Rosario-Diaz, 202 F.3d 54, 66 (1st Cir. 2000); Madsen v. Dormire, 137 F.3d 602, 604 (8th Cir. 1998).

123. *See* Johnson v. Folino, 705 F.3d 117, 130 (3d Cir. 2013); *Madsen*, 137 F.3d at 604.

124. *See* Coleman v. Calderon, 150 F.3d 1105, 1117–18 (9th Cir.), *rev'd in part*, 525 U.S. 141 (1998); *see also* Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999).

125. *See* Felder v. Johnson, 180 F.3d 206, 212 (5th Cir. 1999); United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995).

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

127. *See generally* Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1783–88 (2007) (discussing *Brady*'s materiality standard).

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

129. *Id.* at 103.

likelihood that the false testimony could have affected the judgment of the jury."[130] Second, evidence specifically requested but undisclosed did not receive a clear standard.[131] And finally, no request (or an overly broad request) would require finding that "the omitted evidence creates a reasonable doubt that did not otherwise exist."[132]

Shortly after *Agurs*, the Court decided two parallel issues of due process: first, when the Government may deport witnesses preventing their availability to the defense,[133] and second, when ineffective assistance of counsel requires a new trial in *Strickland v. Washington*.[134] In each of those cases, the Court, relying on *Agurs*, imposed a "reasonable probability . . . sufficient to undermine confidence in the outcome [of the trial]" test.[135]

One year later, the Court applied the standard of materiality in *Strickland* to the *Brady* claims in *Bagley*, simplifying the *Agurs* standards.[136] The Court wanted to preserve *Agurs*'s rejection of a harmless error rule for *Brady* violations[137] in order to ensure there was no duty to disclose the prosecutor's entire file, as part of limiting the scope of the rule.[138] The Court also disclaimed a rule of "automatic reversal," and emphasized that nondisclosures must be analyzed for their effect given the facts at trial.[139]

A common method of *Brady* analysis when the withheld evidence is impeachment material is to discount the affected witness's testimony and to evaluate whether the jury would have reasoned differently—in other words, whether there is a reasonable probability the result would have been different.[140] However, the Supreme Court has disclaimed this approach as a risk of missing the correct inquiry, which is whether the inclusion of the evidence undermines confidence in the verdict.[141]

In summary, to demonstrate a *Brady* violation today, a petitioner must show that the undisclosed evidence was (1) favorable to them because it is either exculpatory or impeaching, (2) that the prosecution had the evidence

130. *Id.*

131. *Id.* at 104; *see also* United States v. Bagley, 473 U.S. 667, 681 (1985) (plurality opinion) (explaining that there was no standard reached in *Agurs*).

132. *Agurs*, 427 U.S. at 112.

133. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982).

134. 466 U.S. 668 (1984).

135. *Id.* at 694; *Valenzuela-Bernal*, 458 U.S. at 874 ("[R]easonable likelihood that the testimony could have affected the judgment of the trier of fact.").

136. *See Bagley*, 473 U.S. at 682.

137. *See id.* at 680.

138. *See id.*; *accord* LAURAL HOOPER, DAVID RAUMA, MARIE LEARY & SHELIA THORPE, FED. JUD. CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 38–45 (2011), https://www.uscourts.gov/sites/default/files/rule16rep_2.pdf [https://perma.cc/N599-VT7Q] (discussing reasons for only allowing narrow discovery for criminal defendants).

139. *Bagley*, 473 U.S. at 677.

140. *See, e.g.*, Phillips v. Fisher, No. 1:19-cv-01589, 2023 U.S. Dist. LEXIS 18024, at *65 (E.D. Cal. Feb. 2, 2023); Higgins v. Galaza, No. CV 05-7599, 2011 U.S. Dist. LEXIS 85814, at *58 (C.D. Cal. Apr. 27, 2011).

141. *See* Strickler v. Greene, 527 U.S. 263, 290 (1999).

and failed to disclose it, and (3) that it was material to the defense (i.e., prejudice must have ensued).[142] Evidence is now material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[143] A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence; rather, reasonable probability means only that the likelihood of a different result is great enough to "undermine confidence in the outcome of the trial."[144]

C. Analyzing Collective Prejudice

The two standards seem simple, but they can quickly become muddled when applied to real cases. Oftentimes, appeals will allege multiple violations of *Brady* or *Napue*.[145] In *Kyles v. Whitley*,[146] the Court adopted a "collective" or "cumulative"[147] analysis to resolve cases with multiple *Brady* claims.[148] Essentially, courts must consider the total material effect of all of the *Brady* claims on the outcome of the trial.[149] *Kyles* held the following combination of withheld evidence was enough to have a cumulative material effect: (1) the lead testifying detective was "less than candid," (2) one eyewitness was not consistent in describing the killer and another was coached, and (3) an informant's behavior gave rise to suspicion that he had planted evidence.[150] The Court opined that individual pieces of evidence or even combinations may not have been enough to require a new trial, but that the totality of the violations did meet the materiality standard.[151] The Supreme Court has never directly extended cumulative analysis to *Napue* claims, but lower courts have analyzed multiple *Napue* claims collectively in the same manner as *Brady*.[152]

The Supreme Court recently heard arguments in *Glossip v. Oklahoma*,[153] where a question on cumulative *Napue* and *Brady* claims was granted certiorari.[154] However, the facts and briefing of the case are unusual. The

142. *See id.* at 281; *see also* United States v. Wilson, 624 F.3d 640, 661 (4th Cir. 2010); United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999).
143. *See* Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (quoting *Bagley*, 473 U.S. at 682).
144. *See* Smith v. Cain, 565 U.S. 73, 75 (2012) (citation omitted).
145. John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1154 (2005).
146. 514 U.S. 419 (1995).
147. Not to be confused with cumulative evidence that needlessly restates facts already in evidence. FED. R. EVID. 403.
148. *Kyles*, 514 U.S. at 436.
149. *See id.*
150. *See id.* at 453–54.
151. *Id.* at 454.
152. *See, e.g.*, United States v. Robinson, 68 F.4th 1340, 1351 (D.C. Cir. 2023); Phillips v. Ornoski, 673 F.3d 1168, 1190 (9th Cir. 2012).
153. No. 22-7466 (U.S. argued Oct. 9, 2024).
154. *See* Petition for Writ of Certiorari, *Glossip*, No. 22-7466 (U.S. May 4, 2023).

respondent filed a brief in support of the petitioner,[155] and neither the petitioner's nor the respondent's brief cite to any of the circuit opinions on mixed-claim cases.[156] Without Supreme Court guidance, circuits will need to continue to refine tests on their own.

II. WHERE TO PUT PREJUDICE

The current collective analysis works with multiple of one type of claim but opened the door to collective analyses of mixed claims in the same case. This is especially difficult due to the common overlap between the two types of claims,[157] so much so that *Napue* claims are sometimes analyzed as a subset of *Brady* claims.[158] Such a split in analysis has occurred and has recently deepened to a three-way circuit split.

Part II.A will describe the Ninth Circuit's test for evaluating combined *Napue* and *Brady* evidence, which rolls over *Napue* evidence into *Brady* analysis. Part II.B will describe the Second Circuit's test, which pulls some *Brady* evidence into *Napue* analysis. Lastly, Part II.C will describe the Fourth Circuit's test, which combines the Ninth and Second Circuit approaches.

A. Jackson *in the Ninth Circuit: Rolling Over* Napue *Evidence into* Brady

The problem of mixed claims first arose in the Ninth Circuit in *United States v. Zuno-Arce*.[159] In *Zuno-Arce*, Reuben Zuno-Arce was convicted in a second trial for the murder of a Drug Enforcement Administration agent.[160] Five years after the verdict, a witness who testified only at the first trial signed a declaration stating that he had perjured himself at the prosecution's urging, which contradicted other witnesses' testimony at the second trial.[161] Zuno-Arce alleged this meant the second trial was evidence that the government knew the witnesses in the second trial were also committing perjury, an alleged *Napue* violation.[162] Zuno-Arce also alleged six separate *Brady* violations, generally for witness bias and failure to disclose the alleged perjury inducement.[163]

The district court saw the issue separating mixed cases into the *Napue* and *Brady* standards of materiality.[164] The court noted that the then recent *Kyles* decision, requiring courts to consider the collective nature of *Brady*

155. Brief for Respondent in Support of Petitioner at 1–3, *Glossip*, No. 22-7466 (U.S. Apr. 23, 2024).
156. *See id.*; Brief for Petitioner, *Glossip*, No. 22-7466 (U.S. Apr. 2024).
157. *See supra* note 44 and accompanying text.
158. *See* Juniper v. Davis, 74 F.4th 196, 211 (4th Cir. 2023).
159. 25 F. Supp. 2d 1087 (C.D. Cal. 1998), *aff'd*, 339 F.3d 886 (9th Cir. 2003).
160. *Id.* at 1092.
161. *Id.* at 1092, 1117.
162. *Id.* at 1117.
163. *Id.* at 1119–23.
164. *Id.* at 1117.

claims,[165] made mixed cases "awkward because the measure of materiality depends on the nature of the transgression; some fall under the *Napue* definition of materiality while others under the *Bagley* [*Brady*] definition."[166] The court, in short order, set out a test for mixed cases: if the defendant fails to succeed on the *Napue* claims, the court should consider the false testimony in conjunction with the *Brady* claims.[167] The district court dismissed and denied Zuno-Arce's claims on the merits.[168]

The Ninth Circuit never reached the issue on appeal in *Zuno-Acre*, but did in *Jackson v. Brown*.[169] The defendant, Earl Jackson, alleged that the prosecution made promises to jailhouse informants that were not disclosed to the defense and that the informants denied the existence of the promises at trial.[170] In *Jackson*, the Ninth Circuit also recognized the issue presented in *Zuno-Arce*, and articulated the reason why the differing standards matter:

> The *Napue* and *Brady* errors cannot all be collectively analyzed under *Napue*'s "reasonable likelihood" standard, as that would overweight the *Brady* violations. On the other hand, they cannot be considered in two separate groups, as that would fail to capture their combined effect on our confidence in the jury's decision.[171]

However, the Ninth Circuit also noted the tests' similarities: "At both stages, we must ask whether the defendant 'received . . . a trial resulting in a verdict worthy of confidence.'"[172] The Ninth Circuit directly relied on *Zuno-Acre* and held that courts should consider the *Napue* violations "collectively" under the *Napue* standard, and if they are not material standing alone, then "consider all of the *Napue* and *Brady* violations collectively" under the *Brady* standard.[173]

In *Jackson*, the test for mixed cases was not necessary to the outcome.[174] Jackson only argued that the false and suppressed evidence was material to the special circumstances finding—intent to cause death—that made him eligible for the death penalty.[175] The jailhouse informants were the two key witnesses for the finding of intent to cause death.[176] The court resolved the issue on *Napue* alone, holding that the correction of the witnesses' denials of the promises inducing them to testify created a "reasonable likelihood that the false testimony *could* have affected the judgment of the jury."[177]

---

165. *See* Kyles v. Whitley, 514 U.S. 419, 436 (1995).
166. *Id.*
167. *Id.*
168. *Id.* at 1124.
169. 513 F.3d 1057 (9th Cir. 2008).
170. *Id.* at 1070.
171. *Id.* at 1076.
172. *Id.* (quoting *Kyles*, 514 U.S. at 434) (omission in original).
173. *Id.*
174. *Id.* at 1077 ("[W]e need not separately address the materiality of the *Brady* violations.").
175. *See id.* at 1076–77.
176. *Id.* at 1078.
177. *Id.* (finding that the willingness to perjure themselves to cover the promise was material in addition to the promise itself).

Even after *Jackson*, the overwhelming majority of mixed cases in the Ninth Circuit do not rely on *Jackson*'s holding to change the outcome.[178] In *Dickey v. Davis*,[179] the Ninth Circuit reversed a death sentence on the basis of *Napue* and *Brady* evidence.[180] The witness lied on direct examination about speaking to and receiving gifts from the prosecutor.[181] The prosecutor used the witness's testimony extensively during closing arguments.[182] After the motion for a new trial, the prosecutor disclosed lies about a consequential matter that the witness had told him in the past.[183] The Ninth Circuit reversed[184] on *Napue* alone, reasoning that the prosecutor knew the witness had lied before, the witness lied at trial, the lies were egregious, and the witness was central to the special-circumstances finding (so discrediting him may have changed the outcome).[185]

B. Vozzella *in the Second Circuit: Pulling Some* Brady *Evidence into* Napue

In *United States v. Vozzella*,[186] Charles Urrego was indicted for, among other counts, conspiring to collect extortionate loans.[187] Because there was no indictment for the underlying act, the prosecutors had to prove that Urrego had at least one co-conspirator.[188] Prosecutors staked their case on records from an alleged co-conspirator, containing lists of names, loans, and interest rates, and matching records found in Urrego's apartment.[189] The co-conspirator did not testify and Urrego was unable to determine the veracity of the records.[190]

However, after trial, in the Presentence Investigation Report, the prosecutors disclosed a proffer session with the critical co-conspirator that occurred one year before trial.[191] In this session, the alleged co-conspirator told prosecutors that he never made any loans to third parties, the records seized from him were entirely fictitious, and the money he borrowed was strictly for his personal use as a gambler.[192] The prosecutors had also

178. Meaning the result would be the same even without the *Jackson* test. *See, e.g.*, Clements v. Madden, 112 F.4th 792, 807 (9th Cir. 2024) (reversed on *Napue* alone); Browning v. Baker, 875 F.3d 444, 476 (9th Cir. 2017) (reversed on *Brady* alone); Reis-Campos v. Biter, 832 F.3d 968, 978 (9th Cir. 2016) (affirmed considering both *Napue* and *Brady* evidence).
179. 69 F.4th 624 (9th Cir. 2023).
180. *See id.* at 648.
181. *See id.* at 643.
182. *See id.* at 629.
183. *See id.* at 634.
184. Reversed only as to penalty because the witness was only central to intent to kill, not guilt. *Id.* at 648.
185. *Id.* at 640.
186. 124 F.3d 389 (2d Cir. 1997).
187. *Id.* at 390.
188. *Id.* at 391.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

checked two entries on the list and found that both entries were false.[193] Most of the phone numbers on the records were for a phone in the co-conspirator's bar.[194] The prosecutors made no further inquiry into the records' veracity.[195] Urrego appealed his conviction based on the failure to disclose exculpatory evidence and the reliance on the records the prosecutors determined to be false.[196]

Though *Vozzella* came before *Jackson*, the Ninth Circuit did not cite to *Vozzella* in their *Jackson* opinion.[197] Curiously, in *Vozzella*, the Second Circuit also did not rely on *Bagley* in its analysis of the *Brady* claims, instead using the three categories of evidence as set out in *Agurs*.[198] In doing so, the court held the use of the false records fell into the first category of *Agurs*,[199] what would have simply been *Napue* if the court used the then recent *Bagley* decision,[200] and the undisclosed statements fell into the third category, what merged into simple *Brady* in *Bagley*.[201] Then, in dicta,[202] the court noted that "where undisclosed *Brady* material undermines the credibility of specific evidence that the government otherwise knew or should have known to be false, the standard of materiality applicable to . . . [*Napue*] applies."[203] The Second Circuit justified its reasoning by relying on the principle from *Mooney*: "In such circumstances, the failure to disclose is part and parcel of the presentation of false evidence to the jury and therefore 'corrupt[s] . . . the truth-seeking function of the trial process,' and is a far more serious act than a failure to disclose generally exculpatory material."[204]

The court reversed Urrego's conviction for conspiracy because the combined violations met the standard of materiality for false evidence.[205] Relying on the combined prejudicial effect of the false loan records and nondisclosure of the alleged co-conspirator's exculpatory testimony,[206] the court held that these facts "easily" met the standard.[207]

193. *See id.*
194. *Id.*
195. *See id.*
196. *Id.*
197. Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008).
198. *Vozzella*, 124 F.3d at 392. This may be because *Bagley* was a plurality opinion, however, the Second Circuit later acknowledged and used *Bagley*. United States v. Coppa (*In re* United States), 267 F.3d 132, 142 (2d Cir. 2001).
199. *Vozzella*, 124 F.3d at 391–92.
200. This is the category for knowing use of false evidence. *Id.* at 392.
201. This is the category for unrequested, undisclosed exculpatory evidence. *Id.*
202. *Id.* ("Although the issue probably does not affect the outcome.").
203. *Id.* In other words, the question is whether the *Brady* evidence may cast light on the falsity of the *Napue* evidence.
204. *Id.* (alteration in original) (citation omitted) (quoting United States v. Agurs, 427 U.S. 97, 104 (1976)).
205. *Id.* at 393.
206. *Id.*
207. *Id.*

As noted by the petitioners in the Fourth Circuit, *Vozzella* was never subsequently cited for cumulative analysis in the Second Circuit.[208] In 2003, in *Shih Wei Su v. Filion*,[209] the Second Circuit reversed a denial of a writ of habeas corpus on the basis of a common mixed-claim fact: a key witness's lie about receiving a plea deal.[210] The court reversed using only *Napue* because it found that the jury may have discounted the witness's testimony, which was critical to determining guilt, if the falsity had been corrected.[211] In a recent Second Circuit decision, *Marquez v. Barrone*,[212] the court was presented with the same type of case, but with a less central witness.[213] In reviewing the case, the Second Circuit assumed the witness had a leniency agreement that was not disclosed.[214] The Second Circuit did not invoke *Vozzella*, or any other mixed-claim test, and resolved the case by holding only individually that the prejudice was not material under either test.[215]

C. Juniper *in the Fourth Circuit: Combining the Tests*

In *Juniper v. Davis*,[216] the Fourth Circuit was the first circuit court to recognize that a split existed.[217] The decision came in 2023, twenty-seven years after *Vozzella* and fifteen years after *Jackson*.[218] However, the Fourth Circuit noted that it had avoided the question in a previous, unpublished decision, because the result would have been the same under either standard.[219] The Fourth Circuit took up the question of mixed claim cases in *Juniper* because "the question is squarely presented by this case, and because the parties extensively briefed it below."[220] However, the court found that *Juniper* was no different than their previous unpublished case and ruled that the petitioner's claim failed under either test.[221]

The defendant, Anthony Juniper, was tried and convicted for four concurrent murders in an apartment.[222] At trial, the prosecution presented "a

208. Petitioner's Brief Regarding Appropriate Cumulative Materiality Standard at 6, Juniper v. Davis, No. 11-CV-746, 2021 WL 3722335 (E.D. Va. Aug. 23, 2021), *aff'd*, 74 F.4th 196 (4th Cir. 2023).
209. 335 F.3d 119 (2d Cir. 2003).
210. *Id.* at 127.
211. *Id.* at 129.
212. No. 22-2855, 2024 U.S. App. LEXIS 13410 (2d Cir. June 4, 2024), *aff'g sub nom.* Marquez v. Dougherty, No. 19-CV-00962, 2022 U.S. Dist. LEXIS 173407 (D. Conn. Sept. 26, 2022).
213. *Dougherty*, 2022 U.S. Dist. LEXIS 173407, at *44.
214. *Barrone*, 2024 U.S. App. LEXIS 13410, at *6.
215. *Id.* at *5, *8.
216. 74 F.4th 196 (4th Cir. 2023).
217. *Id.* at 212 (discussing the circuit split); Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008) (not discussing *Vozzella*).
218. *Juniper*, 74 F.4th at 196.
219. *Id.* at 212; United States v. Arias, 217 F.3d 841 (4th Cir. 2000).
220. *Juniper*, 74 F.4th at 212.
221. *Id.* at 252.
222. *Id.* at 204.

mountain of testimonial and forensic evidence of [Juniper]'s guilt."[223] While preparing a habeas corpus petition,[224] Juniper discovered statements by neighbors of the victim that, if accepted, would have pointed to an alternative suspect and altered the prosecution's timeline.[225] After a lengthy fight to even get the neighbors' statements, dismissal of some claims, and remand,[226] Juniper discovered additional *Brady* evidence and some *Napue* evidence and amended his petition.[227] After prehearing summary judgment, Juniper was left with nine *Brady* claims and two *Napue* claims (both assumed to be knowingly false)[228]: (1) a jailhouse informant (ironically) lied about not having a motive to lie, and (2) the responding officer denied knowledge of the apartment where the crime was committed after initially going to the wrong apartment.[229] The district court rejected all claims without mixing.[230]

On appeal, the Fourth Circuit held that courts should "apply the *Napue* standard to a cumulative analysis of the *Napue* claims, plus any *Brady* claims that showed the falsity of the testimony," and then "apply the *Brady* standard to a cumulative analysis of all the *Brady* and *Napue* claims."[231] The Fourth Circuit took its standard as a combination of the Second and Ninth Circuit standards.[232] In deciding on this approach, the Fourth Circuit only justified its decision by writing: "In briefing below, the parties converged on an analysis combining the Second and Ninth Circuits' approaches . . . . We find this approach . . . to make good sense, and we adopt it."[233]

On briefing in the district court, Juniper primarily advocated for a broad reading of *Vozzella* and asked that the court apply the *Napue* standard to all the claims.[234] Juniper relied on aggravating factors in the *Brady* violations to justify fully extending the standard, namely that the "prosecution misinterpreted or resisted its *Brady* obligations in the face of court opinions and throughout years of litigation" and that prosecutors "suppressed 'a mountain of evidence.'"[235] Juniper argued that this constituted "bad faith or, at a minimum, that the prosecution was cavalier to the point of recklessness," thus justifying a reduced standard.[236]

223. *Id.*
224. *Habeas Corpus*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see* 28 U.S.C. § 2254 (outlining federal requirements for a habeas corpus petition).
225. *Juniper*, 74 F.4th at 205.
226. The Commonwealth of Virginia opposed this discovery for three years before a district judge ordered its production in 2013. *Id.*
227. *Id.* at 207.
228. *Id.* at 208.
229. *Id.* at 244.
230. *Id.* at 208.
231. *Id.* at 213.
232. *Id.*
233. *Id.*
234. Petitioner's Brief Regarding Appropriate Cumulative Materiality Standard, *supra* note 208, at 2.
235. *Id.* at 3.
236. *Id.* at 4.

Juniper argued for a hybrid test similar to the one adopted by the Fourth Circuit in the alternative.[237] Juniper reasoned that *Vozzella* "does not [properly] account for the continuing depletion of confidence in the verdict as additional alleged constitutional violations pile up," whereas *Jackson* "does not compensate for the particular harm caused when the prosecution suppresses the evidence that prevents the defendant from bringing false evidence and testimony to light."[238] Juniper argued that *Vozzella* held that *Brady* evidence "closely-linked" to *Napue* evidence should be additionally considered under the *Napue* standard.[239]

The warden,[240] in his response brief, argued against a broad reading of *Vozzella* that would apply the *Napue* standard to all mixed claims.[241] His reasoning rested on *Jackson*'s refusal to extend the *Napue* standard: overweighting of the *Brady* violations.[242] The warden similarly batted away Juniper's aggravating factor claim, arguing that the remedy for multiple *Brady* claims is collective analysis[243] and that the Supreme Court has specifically removed good or bad faith from the *Brady* analysis.[244] The warden endorsed use of a hybrid test of both *Jackson* and *Vozzella* but took issue with Juniper's interpretation of *Vozzella* as moving *Brady* evidence "closely-linked" with *Napue* evidence under the *Napue* standard.[245] The warden insisted that *Vozzella* held more narrowly that only *Brady* evidence that "actually demonstrates the falsity of the testimony given at trial in violation of *Napue*" should be considered with *Napue* violations,[246] in contrast to Juniper's broader "closely-linked" standard.[247] The warden's test was adopted by the Fourth Circuit.[248]

Using this test, the court found that the mixed claims were not material and affirmed Juniper's conviction. In their decision, the court noted, "[however] we will not condone [the] suppression of exculpatory and impeaching evidence by [the] prosecution."[249] No court in the Fourth Circuit has cited *Juniper* since for its holding on mixed-claims cases.[250] The U.S. Court of

237. *Id.*
238. *Id.* at 7.
239. *Id.* at 8.
240. The warden is the defendant because the party having custody over the petitioner is the defendant in a habeas corpus case. *See* Rumsfeld v. Padilla, 542 U.S. 426, 434 (2004).
241. Warden's Response to Juniper's Brief Regarding the Cumulative Materiality Standard at 2, 5, Juniper v. Davis, No. 11-CV-746, 2021 WL 3722335 (E.D. Va. Aug. 23, 2021), *aff'd*, 74 F.4th 196 (4th Cir. 2023).
242. *Id.*
243. *Id.* at 3 (citing Kyles v. Whitley, 514 U.S. 419, 436 (1995)).
244. *Id.* (citing Strickler v. Greene, 527 U.S. 263, 280 (1999)).
245. *Id.* at 6.
246. *Id.*
247. Petitioner's Brief Regarding Appropriate Cumulative Materiality Standard, *supra* note 208, at 8.
248. *Juniper*, 74 F.4th at 214.
249. *Id.* at 254 (internal quotations omitted) (quoting Muhammad v. Kelly, 575 F.3d 359, 370 (4th Cir. 2009)).
250. *See, e.g.*, United States v. Smith, No. 23-4085, 2024 U.S. App. LEXIS 10061 (4th Cir. Apr. 25, 2024); Farris v. United States, No. 22-cv-00557, 2023 U.S. Dist. LEXIS 138179 (W.D.N.C. Aug. 8, 2023).

Appeals for the Third Circuit cited to it in a case presenting mixed claims, but declined to decide the issue because it would not change the outcome.[251]

III. PUTTING PREJUDICE WHERE IT BELONGS

Having laid out the circuit split at issue, this Note now turns to an analysis of the different approaches. Failure to provide any vehicle to cumulatively analyze mixed-claim cases may leave defendants with two sets of claims, each at the cusp of warranting a new trial, but not quite meeting the standard.[252] However, this Note argues that reframing the mixed-claim collective analysis around a central standard will make it easier for courts to apply and give defendants the full benefit of remedy.

Part III.A explains the framework used to analyze mixed-claim cases. Part III.B then contends that the basic framework from the Ninth Circuit's *Jackson* decision most accurately captures the due process principles from the circuit split. Part III.C ends by arguing that courts should adopt a modified *Jackson* test that more properly accounts for the weight of *Napue* violations.

A. Reframing the Circuit Tests to Compare Their Components

Each of the three tests from the circuit split divides *Brady* and *Napue* evidence into different buckets and applies each of the standards to a varying amount of the evidence.[253] To show how the shifting of evidence changes the weight of the result, this part visualizes the tests into mathematical formulas. The options available for evidentiary buckets are as follows: *Brady* violations (B_V), *Napue* violations (N_V), and *Brady* violations "cast[ing] light on the falsity of *Napue* material"[254] (B_{VCL}). Courts have articulated two different standards of materiality: *Brady* (B_S) and *Napue* (N_S). Courts consider the *Brady* standard higher than the *Napue* standard on a direct scale, so $B_S > N_S$ for all three circuit tests.

For example, the status quo with no special test for mixed claim analysis would look like the following: if $(N_V \geq N_S \; or \; B_V \geq B_S)$ then there is a material violation. In words, if either a collective analysis of all the *Napue* evidence in a trial meets or exceeds the *Napue* standard for materiality, or a collective analysis of all the *Brady* violations in a trial meets or exceeds the *Brady* standard for materiality, then there is a material violation and a new trial is warranted.[255]

---

251. Rega v. Sec'y, Pa. Dep't of Corr., 115 F.4th 235, 244 n.7 (3d Cir. 2024).

252. *See supra* Part II.

253. Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008); United States v. Vozzella, 124 F.3d 389, 392 (2d Cir. 1997); *Juniper*, 74 F.4th at 211.

254. *See Juniper*, 74 F.4th at 213.

255. *See* Kyles v. Whitley, 514 U.S. 419, 433–34 (1995); United States v. Bagley, 473 U.S. 667, 680 (1985) (plurality opinion).

Visualizing the circuit tests using these variables makes comparing them simpler. In the Ninth Circuit, *Jackson* held that courts should first consider *Napue* violations alone under the *Napue* standard, and if *Napue* alone is not sufficient, consider both *Napue* and *Brady* violations under the *Brady* standard or—if $(N_V \geq N_S \; or \; (B_V + N_V) \geq B_S)$ then there is a material violation.[256] In the Second Circuit, based on *Vozzella*, *Napue* violations are considered with *Brady* violations "casting light" on the falsity of the *Napue* violations under *Napue*, then *Brady* violations are considered alone under the *Brady* standard or—if $\left((N_V + B_{VCL}) \geq N_S \; or \; B_v \geq B_S\right)$ then there is a material violation.[257] Comparing those formulas to the Fourth Circuit test in *Juniper*, it is easy to see how the Fourth Circuit allows either the *Jackson* or *Vozzella* tests to be satisfied: if $\left((N_V + B_{VCL}) \geq N_S \; or \; (B_V + N_V) \geq B_S\right)$ then there is a material violation.[258] These inequalities provide options for partition. The question for courts is how to shift the variables around in the formula.

B. Accurately Partitioning Violations with the Ninth Circuit Jackson *Framework*

The Ninth Circuit *Jackson* test places the variables correctly because it recognizes that *Brady* evidence demands heightened materiality, but also that prejudice does not happen in a vacuum. Both *Brady* and *Napue* are rooted in the right to a fair trial,[259] but Supreme Court precedent clarifies that *Brady* evidence must be subject to a no-faith standard and heightened materiality.[260] *Brady* started with a complex scheme revolving around what specificity of evidence was requested by a defendant and whether prosecutors complied with those requests.[261] The petitioner in *Juniper v. Davis* argued that the "mountain of suppressed" evidence gave rise to a sufficient inference of malicious intent that the standard should be lowered as a punitive measure.[262] However, the Supreme Court chipped away any remnant of scienter in *Brady* with *Bagley*[263] and has disclaimed any consideration of prosecutors' intent.[264] Instead, the Court presumes knowledge from possession, imposing an affirmative duty of prosecutors to be thorough in maintaining their files.[265] The Court went so far from requiring any scienter that even possession by police is enough to satisfy *Brady*.[266] It would clearly change longstanding precedent to create a new category of *Brady* evidence with a scienter requirement.

256. *Supra* Part II.A.
257. *Supra* Part II.B.
258. *Supra* Part II.C.
259. *See supra* Part I.A.1.
260. *See supra* note 101 and accompanying text.
261. *See* cases cited *supra* notes 129–32 and accompanying text.
262. *See supra* notes 235–36.
263. *See supra* text accompanying notes 107–09.
264. *See supra* note 102; United States v. Agurs, 427 U.S. 97, 110 (1976).
265. *See supra* notes 118–21 and accompanying text.
266. *See* cases cited *supra* note 119.

This contrasts with *Napue*, which has a lower standard of materiality and explicitly requires the prosecution's actual knowledge of the perjury as an essential element of a violation.[267] This is due to various reasons. First, *Napue*, unlike *Brady*, maintains an element of punishment, as courts are more offended by the permittance of perjury than nondisclosure.[268] Second, *Napue* imposes a much lighter duty on prosecutors, only to correct perjured testimony if it arises.[269] The evidence shows the common cases for reversal are not where a witness accidentally perjures themselves and the prosecutor carelessly misses it, but where a prosecutor actually relies on that perjury, usually during closing.[270] Third, *Napue* misconduct has a corrupting effect on the judiciary,[271] as it happens in the courtroom in front of the judge and jury.[272] Lying in court is particularly insidious and not only discredits the witness, but the prosecution as a whole. The same cannot be said for *Brady* evidence, which is almost always violated pretrial and often by negligence or when there is a belief that disclosure was not required.[273] Prosecutors are rarely punished for such misconduct,[274] so the remedy should focus on correcting the prejudice suffered by criminal defendants.

The Second and Fourth Circuits get this dynamic wrong. Beyond not conforming with *Brady* precedent, the Second Circuit *Vozzella* test—the only method to consider *Brady* evidence under *Napue*—is not functionally helpful for defendants as a practical matter. The "casting light" category of *Brady* evidence[275] does not add to a collective analysis, because prejudice is baked into the corollary *Napue* violation that the *Brady* evidence "casts light on." The clear example of this is when prosecutors fail to disclose a plea deal made with a key witness, and the witness testifies to not having a plea deal at trial (the *Napue* evidence is the perjury about not having a plea deal, and the *Brady* evidence is the plea deal itself).[276] *Vozzella* would allow the plea deal itself to be considered with the perjury under the *Napue* standard. It would be marginally more impeaching, if at all, for the jury to know the details of the plea deal with prosecutors when they already know the witness lied about having one in the first place.[277] The Fourth Circuit *Juniper* test should not be used for the same reason, because it only differs from the Ninth Circuit *Jackson* test by additionally tacking on a *Vozzella* "casting the light" category.[278]

---

267. *See supra* note 41 and accompanying text.
268. *See supra* text accompanying notes 72, 74.
269. *See supra* text accompanying note 42.
270. *See supra* notes 7–8, 182 and accompanying text.
271. *See supra* text accompanying note 75.
272. *See supra* text accompanying note 75.
273. *See supra* notes 108, 119 and accompanying text.
274. *See* Burke, *supra* note 22, at 2130.
275. *See supra* note 203.
276. *See supra* note 214.
277. *Cf.* Marquez v. Barrone, No. 22-2855, 2024 U.S. App. LEXIS 13410, at *6–8 (2d Cir. June 4, 2024) (finding disclosure of a cooperation agreement would be cumulative when a witness admits to wanting to testify for leniency).
278. *See supra* notes 231–32 and accompanying text.

The Ninth Circuit and *Jackson* get it right by keeping it simple. *Brady* evidence cannot be moved under the *Napue* standard, but to satisfy due process, *Napue* evidence must be considered in a collective analysis, so it should roll over into *Brady*. Prosecutors should not be free of a *Napue* violation just because alone it was harmless. *Napue* evidence still contributes to prejudice against the defendant, so it should be able to push the subsequent *Brady* analysis toward the threshold of materiality.[279] The Ninth Circuit accomplished this without offending precedent by simply allowing *Napue* evidence to survive into the *Brady* analysis.[280] There is no harm to the government in considering *Napue* evidence under a higher standard than previously, and there is no indication in case law that *Napue* evidence should be sequestered if it fails materiality alone.

Facilitating the partition of claims also allows courts to be consistent in invoking their own mixed-claim tests. When a mixed-claim case can be reversed on either *Napue* or *Brady*, there is no cause for concern because the prosecution knows that the result would be no different under a mixed test. However, when a conviction is affirmed in a mixed-claim case where the court does not invoke their mixed-claim test, the question is raised: why? In *Marquez*, the Second Circuit did just that, deciding that *Brady* and *Napue* claims were not material without discussion of *Vozzella*.[281] The court found that there was overwhelming alternative evidence showing the defendant's guilt to satisfy both tests,[282] but this should not be enough to ignore *Vozzella*. The most likely explanation is that the Second Circuit has not really thought about *Vozzella* since writing it, and it would be difficult to implement in practice. Courts should have a test that can be raised every time an appellant properly pleads *Brady* and *Napue* claims and does not receive a reversal on one type of claim.

C. More Easily Analyzing the Partition with a Modified Jackson *Standard*

Courts need a simple standard because the current approach leaves courts inconsistently applying standards to simplify their judgments. The Ninth Circuit, by far the most prolific circuit in mixed-claim analysis, seldom has a case where claim mixing was outcome determinative.[283] This is at least partially because courts consider *Brady* and *Napue* materiality standards completely separate analyses, even if they have some overlap. This is evidenced by the descriptions of each test as a set of steps, starting over from no prejudice when considering a new set of evidence.[284] Recentering the

279. *See supra* text accompanying note 171.
280. *See supra* note 173 and accompanying text.
281. *See supra* note 215 and accompanying text.
282. *Marquez*, 2024 U.S. App. LEXIS 13410, at *8–9.
283. *See supra* note 178 and accompanying text.
284. *See supra* notes 173, 231.

analysis on the right to a fair trial[285] will accurately consider prejudice to defendants and allow courts to faithfully simplify their judgment.

As such, this Note proposes reframing conviction reversal decisions on a single question: whether the defendant "received . . . a trial resulting in a verdict worthy of confidence,"[286] represented in this Note's analysis as V_{WC} or 100 percent of a material violation. The Ninth Circuit in *Jackson* stated that this was the fundamental question for both *Napue* and *Brady* analyses,[287] and it allows courts to ask the collective question of whether all misconduct undermined confidence in the verdict. And in fact, the Ninth Circuit considered *Napue* and *Brady* two ways of performing the same test before it decided *Jackson*.[288]

This is no clearer a standard than before, so filling in the details with *Jackson*'s framework will allow courts to apply the test consistently. First, courts would need to define what circumstance constitutes lack of confidence in the verdict. They already have: *Napue* evidence[289] that is not harmless beyond a reasonable doubt[290] or *Brady* evidence[291] that has a reasonable probability that, had the evidence been presented, the result of the proceeding would have been different,[292] therefore now $B_S = N_S = V_{WC}$. Because the *Napue* standard requires less evidence to meet than the *Brady* standard,[293] that fails to recognize how the standards are both the minimum required materiality for a reversal.[294] The difference from *Jackson* then comes after courts determine that the claims in an appeal do not meet *Napue*.

Instead of resetting and rolling evidence into *Brady*, courts should consider how close the *Napue* violations came to the *Napue* standard. How far the prejudice caused by the *Napue* violations was from the *Napue* standard should be the additional prejudice necessary under the subsequent *Brady* analysis to justify reversal. This mimics the rollover of *Napue* violations into *Brady*, as in *Jackson*, but does not actually require courts to engage in an analysis of different violations at the same time. In mathematical terms the overall test should be: if $\left(\frac{N_V}{N_S} + \frac{B_V}{B_S} \geq V_{WC}\right)$ then a conviction must be vacated. However, this does not solve the problem of difficulty in application, so breaking the test out into steps is prudent. Analytically, it is not necessary to consider *Napue* or *Brady* separately, since any set of violations that would meet an individual standard would meet the mixed

285. *See supra* note 53 and accompanying text.
286. *See supra* note 172.
287. *See supra* note 172.
288. Morris v. Ylst, 447 F.3d 735, 745 (9th Cir. 2006) ("The test for prejudice for a *Mooney-Napue* claim is the same as that for materiality in a *Brady* claim. That is, we must decide whether, despite the use of perjured testimony, Petitioner received a 'trial resulting in a verdict worthy of confidence.'" (citations omitted)).
289. Or *Brady* evidence considered under *Napue*. *See supra* Parts II.B–C.
290. *See supra* note 43.
291. Or *Napue* evidence considered under *Brady*. *See supra* Parts II.A, II.C.
292. *See supra* note 38 and accompanying text.
293. *See supra* note 46.
294. *See supra* Parts I.A.III, I.B.III.

standard, but courts tend to want to decide cases on simpler grounds first in a multistep process.[295]

So, in practice, courts would perform a three-part test. The first two steps are simply to perform a standard cumulative single-type violation analysis as set out in *Kyles*.[296] First, courts would analyze the *Napue* violations under the *Napue* standard. Second, if the *Napue* violations were not material standing alone, the court would analyze the *Brady* violations separately under the *Brady* standard. Third, if neither type of violation were material standing alone, the court would turn back to each analysis and determine how close they came to materiality under their respective standards. Ideally, this would come in the form of a percentage of materiality in each test: for instance, a *Brady* violation going substantially to the credibility of a witness that only corroborated a secondary fact would only have a low effect of materiality, such as 20 percent.[297] The court would then add together the independent cumulative material effect and if it meets or exceeds 100 percent, the cumulative effect of both types of violations is material and the court should reverse.

Using *Brady* as evidence to tip a close *Napue* claim over the edge is consistent with the Supreme Court's view of collective claims. In *Agurs*, the Court wrote, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."[298]

This reframing keeps the focus on the prejudice caused by the collective violations by removing the need to parse carefully which evidence may fall under a difference standard than typically. This test is also consistent with the Supreme Court's disclaimer of a common method of *Brady* analysis: discounting inculpatory testimony belied by withheld impeachment material.[299] In disclaiming, the Supreme Court expressed a preference for the focus to be on a verdict worthy of confidence, not sufficiency of evidence supporting the conviction when ignoring the tainted evidence.[300]

This will also help prevent courts from shying away from using a mixed-claim test at all, as potentially seen in the Second Circuit with *Marquez*.[301] Although *Marquez* represents the possible extreme of no use of a mixed-claim test at all, the Ninth Circuit's case history presents a subtler alternative: courts are unwilling to find the ground that necessarily exists in a mixed-claim case, where it is only by combining the prejudice from both *Brady* and *Napue* violations that a defendant gets a reversal. This is certainly

295. *See* cases cited *supra* note 178.
296. *See supra* Part I.C.
297. It would be disingenuous to suggest precise percentages could be accurately assigned, so it would be prudent to restrict the possibilities to multiples of 10 percent.
298. United States v. Agurs, 427 U.S. 97, 113 (1976).
299. *See supra* notes 140–41 and accompanying text.
300. *See supra* note 141 and accompanying text.
301. *See supra* note 281 and accompanying text.

a rare case, but it remains to be seen what set of facts will compel a court to reverse a case on mixed-claim grounds.

This Note proposes an elementary set of facts that would constitute such a case, though the likelihood of their concurrent occurrence is indeterminable. The facts are as follows: two witnesses testify to identifying the defendant as the perpetrator of a crime, where either witness's testimony alone would survive a motion for acquittal.[302] But one witness has an undisclosed cooperation agreement, and the other perjured themselves about their whereabouts during the crime and the prosecutor knew but failed to correct it. If a court were to look at the violations independently using "overwhelming evidence"[303] reasoning, they may not rise to the level of material because of the other's corroboration, but the court should still reverse because the errors together discredit all evidence of identity. Now one simply need imagine instead of direct evidence, there was only circumstantial evidence of guilt, discredited by both *Brady* and *Napue* violations. Circumstantial evidence is by its nature difficult to weigh, but just as with direct evidence, there exists some combination of evidence that reasonably could change the verdict. Forcing courts to weigh each category of violations individually ensures none get improperly weighed during an overall analysis.

There remains a possibility that assigning weights to the *Napue* and *Brady* violations separately will reveal a simpler truth that moots the problem. The Ninth Circuit, the only circuit with substantial mixed-claim precedent, rarely, if ever, decides cases on the narrow grounds *Jackson* created for mixed analysis.[304] This raises a question about how courts really view the differing standards of materiality. One is hard-pressed to find the "close" *Napue* case—a case where the court nearly came to a reversal, but the evidence did not quite meet the mark.[305] This may make sense; *Napue* is sometimes described as a rule of "virtual automatic reversal."[306] So if courts are forced to give partial weight to *Napue* evidence, they may decide that, in general, *Napue* evidence is either sufficient to warrant reversal alone, or it has negligible weight. This outcome would be a success for the modified *Jackson* test, because it would compel courts to be specific about how they are weighing evidence in mixed-claim cases to give defendants more certainty when preparing their appeals.

CONCLUSION

Breaking down mixed-claim cases into their components via a modified *Jackson* test is the best resolution to the circuit split over mixed-claim cases.

---

302. FED. R. CRIM. P. 29(a).
303. *See supra* text accompanying note 282.
304. *See* cases cited *supra* note 178.
305. *See* cases cited *supra* note 178.
306. United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975). This is in stark contrast to *Brady*, for which the Supreme Court has disclaimed "automatic reversal." *See supra* note 139 and accompanying text.

The Second Circuit's "casting light" category of *Brady* claims, also used by the Fourth Circuit, does not significantly alter outcomes, is inconsistent with *Brady*'s history of ignoring prosecutorial intent, and adds an unnecessary complex step to an already abstract analysis. Allowing *Napue* claims to roll over into the facially higher *Brady* standard, as the Ninth Circuit does, is entirely consistent with precedent and presents a minimum increase in complexity for appellate courts. However, when the analysis remains framed under *Brady*'s higher materiality standard, the gravity of *Napue* violations may be lost. So, courts should account for *Napue* violations' contribution toward a verdict unworthy of confidence separately from *Brady* claims before combining the prejudice to preserve *Napue* violations' effect on defendants' rights to a fair trial. This would ensure that criminal defendants receive the full possible remedy for misconduct suffered and unjust verdicts unworthy of confidence are not allowed to stand.