Strickler v. Greene: Preventing Injustice by Preserving the Coherent "Reasonable Probability" Standard to Resolve Issues of Prejudice in Brady Violation Cases

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STRICKLER v. GREENE: PREVENTING INJUSTICE BY PRESERVING THE COHERENT “REASONABLE PROBABILITY” STANDARD TO RESOLVE ISSUES OF PREJUDICE IN BRADY VIOLATION CASES

In Strickler v. Greene, the United States Supreme Court considered whether the Commonwealth of Virginia violated Brady v. Maryland and its progeny when the prosecution maintained an open file policy but failed to disclose exculpatory documents to the defendant’s counsel. The Court held that although the undisclosed documents containing impeaching eyewitness testimony were favorable to the defendant for the purposes of a Brady analysis, the defendant failed to establish the prejudice necessary to meet the materiality requirement. The majority justified this decision by identifying the three fundamental components of a true Brady violation and by determining that the third component—that the defendant can satisfy the materiality inquiry—was not established because the defendant did not convince the Court that there was a reasonable probability that the result of the trial would have been different had the suppressed documents been disclosed to the defense. In using the “reasonable probability” standard to determine whether a verdict is worthy of confidence, the

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2. 373 U.S. 83 (1963); see also infra note 47 and accompanying text (stating the facts and holding of the Brady decision).
3. Strickler, 527 U.S. at 265-66 (identifying the issue before the Court); id. at 273-75 (describing the documents that provided the basis for the defendant's Brady claim).
4. Id. at 296.
5. Id. at 281-82 (“There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”). The Court determined that the first two components were “unquestionably established by the record.” Id. at 282. As for the first component, the State’s key witness, Anne Stoltzfus, changed her testimony at trial from what she had initially related to the police—that the incident was merely a “trivial episode of college kids carrying on.” Id. The contrast between her testimony and the documents containing her initial statements to the police “sufficiently established” the impeaching character of the documents. Id. The second component was also established because there was no dispute that the Commonwealth knew that the documents existed but did not disclose them to defendant’s counsel. Id.
6. Id. at 296.
7. See Kyles v. Whitley, 514 U.S. 419, 435 (1995) (noting that “[o]ne does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been
Court prudently chose not to adopt the capricious "significant possibility" standard and preserved a comprehensible evaluative form embedded in case history. The reasonable probability standard provides a clear and consistent measure by which judges can accurately gauge the effect of *Brady* violations. Furthermore, by virtue of its reliability and endurance, the standard safeguards procedural due process rights afforded to every individual under the Fourteenth Amendment and prevents occurrences of injustice by providing certainty to judges, lawyers, and defendants alike.

I. THE CASE

On January 5, 1990, Thomas David Strickler and Ronald Henderson abducted, robbed, and violently murdered Leanne Whitlock, a James Madison University student. Strickler was convicted of capital murder and sentenced to death for all three offenses in the Circuit Court of Augusta County. In a separate trial, Henderson was convicted of first-degree murder, a noncapital offense. At Strickler's trial, Anne Stoltzfus, the prosecution's key witness, provided vivid testimony concerning Whitlock's abduction. Before and during the

excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict); see also infra notes 78-84 and accompanying text (discussing what Strickler needed to show in order to undermine confidence in the jury's verdict).

8. In his partial dissent, Justice Souter argued that the standard for measuring prejudice in *Brady* violation cases should be phrased as "significant possibility" instead of "reasonable probability," the phrasing the Court has repeatedly embraced. *Id.* at 298-301 (Souter, J., concurring in part and dissenting in part). The two standards will be discussed at great length throughout this Note.


10. *Strickler*, 527 U.S. at 266. Whitlock died as a result of multiple blunt force injuries to the head inflicted by a sixty-nine-pound rock. *Id.* at 269.


13. *Id.* At trial, Stoltzfus stated that she was at a local shopping mall on the day that Whitlock was abducted. *Id.* at 270. Stoltzfus testified that she had witnessed Strickler, whom she described as "Mountain Man," and Henderson, whom she called "Shy Guy," walking around at the mall. *Id.* at 270-71 (quoting App. 36-37). She further testified that Strickler was "revved up" and that she followed them because she was concerned about Strickler's behavior. *Id.* at 271 (quoting App. 36-37). Stoltzfus testified that after leaving the mall she had witnessed "Mountain Man" approach Whitlock's car, pound on the door, force himself into the vehicle, and motion for Henderson and an unidentified woman to also get into the car. *Id.* Stoltzfus then pulled her car parallel to Whitlock's car and saw Strickler hit Whitlock. *Id.* at 271-72. Stoltzfus stated that after she had driven away she realized that Whitlock had mouthed the word "Help." *Id.* (quoting App. 47). When asked
trial, the prosecutor maintained an open file policy, which theoretically gave Strickler’s counsel access to all of the evidence in the Augusta County prosecutor’s files, including notes from police interviews with Stoltzfus.14 Because of this open file policy, Strickler’s counsel did not file a pre-trial motion for discovery of possible exculpatory evidence.15 In closing argument, he conceded that the evidence at trial was sufficient to support the robbery and abduction charges as well as the first-degree murder charge, but argued that the evidence was insufficient to prove that the defendant was guilty of capital murder.16 The judge instructed the jury that Strickler could be found guilty of the capital offense if the evidence established, beyond a reasonable doubt, that Strickler had “jointly participated in the fatal beating”17 and had been “an active and immediate participant in the act or acts that caused the victim’s death.”18 The jury found Strickler guilty of abduction, robbery, and capital murder.19

Strickler filed a federal habeas corpus petition, alleging that his trial counsel had rendered ineffective assistance due, in part, to his failure to file a motion under Brady v. Maryland.20 The circuit court dismissed his petition, and the Supreme Court of Virginia affirmed.21 Strickler then filed a federal habeas corpus petition in the United States District Court for the Eastern District of Virginia.22 The district court entered a sealed ex parte order granting Strickler’s counsel the right to examine and copy all of the police and prosecutorial files in the case.23 That order led to Strickler’s counsel’s first examination of the Stoltzfus documents, which included materials prepared by Stoltz-
fus and notes taken by a police detective who had interviewed Stoltz-
        fus.24 These documents impeached significant portions of her trial 
        testimony.25 Based on the discovery of these documents, Strickler 
        raised a direct claim that his conviction was invalid because the prose-
        cution had failed to comply with the Brady rule and, therefore, that 
        Strickler had been denied due process of law under the Fourteenth 
        Amendment.26 
        The district court granted Strickler’s application for a writ of 
        habeas corpus and vacated his capital murder conviction and death 
        sentence because the Commonwealth had failed to disclose exculpa-
        tory evidence that was “sufficiently prejudicial to undermine confi-
        dence in the jury’s verdict.”27 The United States Court of Appeals for 
        the Fourth Circuit vacated in part the district court’s decision and 
        remanded the case with instructions to dismiss the petition because 
        Strickler had not raised his constitutional claim at his trial or in the 
        state collateral proceeding; thus the court could not address the Brady 
        claim unless Strickler could demonstrate cause and actual prejudice.28 
        The Fourth Circuit also concluded that even if Strickler’s claim could 
        overcome the procedural default, the Brady claim would fail on the 
        merits because the “‘Stoltzfus materials would have provided little or 
        no help . . . in either the guilt or sentencing phase of the trial,’”29 and 
        thus Strickler could not establish prejudice.30 
        The Supreme Court granted certiorari to consider whether the 
        Commonwealth had violated the Brady rule, whether the procedural 
        default was excused by an adequate showing of cause, and, if so,
whether Strickler had established the prejudice necessary to under-
mine confidence in the jury's verdict.\textsuperscript{31}

\section*{II. Legal Background}

The term "Brady violation" generally refers to any breach of the prosecution's broad obligation to disclose exculpatory evidence.\textsuperscript{32} In determining how to articulate the Brady standard, the Court has rec-ognized that the rule must be consistent with case law and must safe-guard the accused's due process rights in order to prevent occurrences of injustice.\textsuperscript{33} Even before the Brady concept's actual in-
ception in 1963, the Court had already noted that the State must pro-
vide a corrective judicial process when a defendant has been denied the due process of law.\textsuperscript{34} These judgments prior to Brady laid the ini-
tial groundwork for later decisions that would produce a standard to measure prejudice to the accused while protecting his or her due pro-
cess rights. From 1935, when the Supreme Court decided Mooney v.
Holohan,\textsuperscript{35} to its monumental Brady decision in 1963, to its 1995 deci-
sion in Kyles v. Whitley,\textsuperscript{36} the Court has crafted a standard, consistent with case law and constitutional safeguards, to determine prejudice in Brady violations.

\subsection*{A. Before Brady}

In Mooney v. Holohan, the Supreme Court held that a conviction obtained through the use of evidence that the State knows to be false violates the Fourteenth Amendment.\textsuperscript{37} The Court rejected the Attorney General's argument that the acts or omissions of the prosecution cannot, in and by themselves, amount to a denial of due process of law.\textsuperscript{38} The Court also rejected the argument that due process is de-

\textsuperscript{31} Id. at 266. The Supreme Court held: (1) that undisclosed documents impeaching eyewitness testimony as to circumstances of abduction were favorable to the defendant for the purposes of Brady, id. at 289; and (2) that the defendant reasonably relied on the prosecution's open file policy and established cause for procedural default in raising the Brady claim, id. at 285, 289; but (3) that defendant could not show materiality under Brady or prejudice that would excuse defendant's procedural default, id. at 296. The first two determinations by the Court are not particularly relevant for the purposes of this Note and will not be discussed further to any great extent.

\textsuperscript{32} See id. at 281.

\textsuperscript{33} See id. at 280-82 (tracing the evolution of Brady and noting the "special role played by the American prosecutor" to ensure that "justice will be done").

\textsuperscript{34} Mooney v. Holohan, 294 U.S. 103, 109 (1935) (per curiam).

\textsuperscript{35} 294 U.S. 103 (1935).

\textsuperscript{36} 514 U.S. 419 (1995).

\textsuperscript{37} Mooney, 294 U.S. at 112-13.

\textsuperscript{38} Id. at 111-12.
nied only when an act or omission deprives a defendant of notice or deprives him of the opportunity to present his own evidence. Instead, the Court determined that a violation of due process occurs, regardless of notice, if the State knowingly presents perjured testimony to a court.

Twenty years later in *Napue v. Illinois*, the Court extended *Mooney* by holding that a defendant’s due process rights are violated when the State, although not soliciting false evidence, allows such evidence to go uncorrected when it appears. The Court emphasized that a prosecuting attorney has the duty to correct what he knows to be false because the impact of such false evidence can lead to an unfair trial. Furthermore, the Court found that “a State may not knowingly use false evidence, including false testimony . . . [even if] the false testimony goes only to the credibility of the witness.” The Court also loosely determined a standard by which to measure the materiality of the prejudice created. This standard required that a new trial be given if there was a reasonable likelihood that the false testimony affected the judgment of the jury.

The *Mooney* and *Napue* decisions laid the essential groundwork for the Court to actualize an intelligible rule by which exculpatory evidence could be defined and measured with certainty to determine whether prejudice exists and due process has been violated. This rule emerged in *Brady v. Maryland*.

39. *Id.* at 112.
40. *Id.* The Court explained:

[Due Process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

*Id.*

42. *Id.* at 269.
43. *Id.* at 269-70. The Court explained:

"[T]he district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

*Id.* at 270 (quoting New York v. Savvides, 136 N.E.2d 853, 854-55 (N.Y. 1956)).
44. *Id.* at 269.
45. *Id.* at 271-72. The Court determined that it was not bound by the lower court's conclusion that "the false testimony could not in any reasonable likelihood have affected the judgment of the jury." *Id.* In fact, the Court concluded that it is the duty of the Court to require a new trial when "federal constitutional deprivations" exist. *Id.*
46. *Id.*
B. Brady and Beyond

In 1963, the Court in Brady v. Maryland extended its holdings in Mooney and Napue by determining that the prosecution violates the due process rights of a defendant when it withholds any exculpatory evidence. More specifically, the Court ruled that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Thus, the Court noted that a finding of materiality was required, but failed to attach a name to that standard; indeed, it would take the Court another twenty years to articulate an appropriate name for the standard.

In Giglio v. United States, the Court expanded the definition of exculpatory materials by including impeaching evidence in this category. The Court explained that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility" will be considered exculpatory. The

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47. 373 U.S. 83 (1963). In Brady v. Maryland, John L. Brady and his companion were convicted of first-degree murder and sentenced to death. Id. at 84. At his trial, Brady admitted to participating in the crime, but claimed that his companion had carried out the actual killing. Id. Prior to the trial, Brady's counsel requested that the prosecution allow him to examine the companion's extrajudicial statements. Id. Several of these statements were shown to Brady's counsel. Id. The prosecution, however, withheld the companion's statement in which he had admitted to the actual killing. Id. This statement did not come to Brady's attention until after he was tried, convicted, and sentenced, and until after the Court of Appeals of Maryland affirmed his conviction. Id.

In a post-conviction proceeding, the Court of Appeals of Maryland held that the suppression of the evidence by the prosecutor denied Brady due process of law. Brady v. State, 226 Md. 422, 427, 174 A.2d 167, 169 (1961). The court remanded the case regarding the question of punishment, but not the question of guilt, because the court found that "nothing in [the suppressed confession] could have reduced . . . Brady's offense below murder in the first degree." Id. at 430, 174 A.2d at 171.

The Supreme Court granted certiorari to determine whether Brady was denied a constitutional right when the Court of Appeals of Maryland restricted the new trial to the question of punishment. Brady, 373 U.S. at 85. The Court answered in the negative. Id. at 90-91. The Court also held that suppression of exculpatory evidence upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87.

48. Brady, 373 U.S. at 87. Exculpatory evidence is any evidence favorable to the accused. Id.

49. Id. (emphasis added). The words "upon request" were removed from this rule in the Court's decision in United States v. Agurs, 427 U.S. 97, 107 (1972).

50. See Brady, 373 U.S. at 87.

51. See infra notes 59-73 and accompanying text (discussing United States v. Bagley, 473 U.S. 667 (1985), the first case to expressly use "reasonable probability" as the standard by which to resolve issues of prejudice in Brady violations).

52. 405 U.S. 150 (1972).

53. Id. at 154 (internal quotation marks omitted).
Giglio Court then noted that the prosecution will be held responsible for both the negligent and intentional nondisclosure of such evidence. Furthermore, the Court explained that a prosecutor is a federal or a state actor, and thus, a statement made by a prosecutor is to be attributed to the government.

After the Giglio decision, the Court continued to define the responsibilities of a prosecutor who possesses exculpatory materials. In United States v. Agurs, the Court explained that "if evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it." The Agurs Court also noted that the duty to disclose such evidence is applicable even though there has been no request by the accused. The Agurs Court further identified a rule that is implicit in the proper materiality standard—"if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."

A decade later, in United States v. Bagley, Justice Blackmun addressed the issue of materiality and the standard to be applied in determining whether a conviction should be reversed because of a failure to disclose impeaching or exculpatory evidence. The Court

54. Id.
55. Id.
57. Id. at 110. But cf. Giglio, 405 U.S. at 154 (stating that not all possibly favorable evidence undisclosed by the prosecutor will be judged as prejudicial to the extent that a new trial is required).
58. Agurs, 427 U.S. at 107. In Brady, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process." Brady v. Maryland, 373 U.S. 83, 87 (1963) (emphasis added).
59. Agurs, 427 U.S. at 112. In Agurs, the Court found that a less demanding standard was appropriate when the prosecution fails to turn over materials in the absence of a specific request. Id. at 111-12. The Court refrained from attaching a label to that standard, but indicated that the standard was somewhat less strict than the harmless-error standard, which requires the reviewing judge to set aside a verdict unless his "conviction is sure that the error did not influence the jury, or had but very slight effect." Id. at 112 (quoting Kotteakos v. United States, 328 U.S. 750, 764 (1946)).
61. Id. at 678-84 (opinion of Blackmun, J.). Justice Blackmun wrote the opinion of the Court and Part III, which was not the opinion of the Court. Bagley, 473 U.S. at 669. Justice Blackmun explained in Part III, in which Justice O'Connor joined, that reasonable probability is the proper materiality standard in Brady violation cases. Id. at 682 (opinion of Blackmun, J.). The Court then reversed the judgment of the Court of Appeals and remanded the case to consider "whether there [was] a reasonable probability that, [had certain evidence] been disclosed to the defense, the result of the trial would have been different." Id. at 684.

Justice White wrote a concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, agreeing with Justice Blackmun's assertion that reasonable probability is the
determined that "reasonable probability" of a different result was the appropriate standard to identify prejudice of undisclosed exculpatory information.\textsuperscript{62}

\textit{Bagley} took the term "reasonable probability" from \textit{Strickland v. Washington}.\textsuperscript{63} In \textit{Strickland}, the defendant, who had been convicted of several violent crimes,\textsuperscript{64} claimed that his counsel's assistance had been so ineffective that it required the reversal of his conviction or his death sentence.\textsuperscript{65} The Court determined that the proper standard for establishing prejudice requires that a "defendant show that there is a reasonableness probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."\textsuperscript{66} The Court in \textit{Strickland} also stated that "a reasonable probability is probability sufficient to undermine confidence in the outcome."\textsuperscript{67}

After examining the various components of the reasonable probability standard that the Court had used in \textit{Strickland}, Justice Blackmun applied the standard to the issue of materiality in \textit{Bagley}.\textsuperscript{68} In \textit{Bagley}, the Court outlined aspects of materiality, the examination of which can aid in the determination of a \textit{Brady} violation.\textsuperscript{69} First, due process requires that the Government disclose "evidence that is both favorable to the accused and material either to guilt or to punishment."\textsuperscript{70} Second, Justice Blackmun stated that constitutional error results when the Government suppresses this evidence "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different."\textsuperscript{71} Justice Blackmun explained that it must be reasonably probable that

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appropriate materiality standard. \textit{Id.} at 668-69, 687 (White, J., concurring in part and concurring in the judgment).

For purposes of this Note, Justice Blackmun's opinion in Part III will be simply referred to as the opinion of the \textit{Bagley} Court because of the number of Justices that agreed with Blackmun's adoption of the term "reasonable probability."

\textsuperscript{62} See \textit{supra} note 61.

\textsuperscript{63} 466 U.S. 668 (1984); see \textit{Bagley}, 473 U.S. at 682 (opinion of Blackmun, J.) (quoting \textit{Strickland}, 466 U.S. at 694).

\textsuperscript{64} \textit{Strickland}, 466 U.S. at 671-72.

\textsuperscript{65} See \textit{id.} at 684. The \textit{Strickland} Court explained that to set aside a death sentence or reverse a conviction, a defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. \textit{Id.} at 687.

\textsuperscript{66} \textit{Id.} at 694 (emphasis added).

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Bagley}, 473 U.S. at 682 (opinion of Blackmun, J.).

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Bagley}, 473 U.S. at 674 (internal quotation marks omitted) (quoting \textit{Brady v. Maryland}, 473 U.S. 83, 87 (1963)).

\textsuperscript{71} \textit{Id.} at 682 (opinion of Blackmun, J.).
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the evidence would have placed the case in such a different light so as to "undermine confidence in the outcome." Third, Justice Blackmun found the reasonable probability standard "sufficiently flexible" to pertain to instances when there has been no request for disclosure, a "general request" for disclosure, and a "special request" by the defense to disclose evidence, thus eliminating the possibility of several possible standards to measure prejudice in Brady violation cases. Finally, Justice Blackmun noted that the reviewing court must consider the Brady violation "in light of the totality of circumstances."

The Court implemented the Bagley materiality components in Kyles v. Whitley. Justice Souter wrote for the majority and employed "reasonable probability" as the standard to measure materiality in Brady violations. Justice Souter noted in his opinion that "Bagley's touchstone of materiality is a 'reasonable probability' . . . and the adjective is important." Thus, the Court's use of the reasonable probability standard to measure the effect of Brady violations is the result of the Court's careful examination of the history and constitutional implications of Brady and its progeny.

III. THE COURT'S REASONING

In Strickler v. Greene, the Supreme Court held that Strickler could not show materiality under Brady because he could not illustrate that there was a reasonable probability that his conviction or sentence would have been different had the exculpatory material been disclosed. Writing for the majority, Justice Stevens initially noted that "the differing judgments of the District Court and the Court of Appeals attest to the difficulty of resolving the issues of prejudice." Unlike the Fourth Circuit, the Court believed that the Stoltzfus testimony was prejudicial in the sense that it made Strickler's conviction more likely than had she not testified, and that discrediting Stoltzfus's testi-

72. Id.
73. Id.
74. Id.
76. Id. at 434.
77. Id.
78. Strickler, 527 U.S. at 296.
79. Justice Stevens was joined in full by Chief Justice Rehnquist and Justices O'Connor, Scalia, Ginsburg, and Breyer. Id. at 265. Justice Thomas joined as to Parts I and IV, agreeing with the Court's decision to use the reasonable probability standard to determine materiality under Brady. Id. Justices Kennedy and Souter joined in the majority opinion as to Part III. Id. at 265.
80. Id. at 289.
mony might have changed the outcome of the trial. The Court, however, was quick to note that this standard of prejudice was not the one that Strickler needed to satisfy. Rather, Strickler needed “to convince [the Court] that ‘there [was] a reasonable probability’ that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.” The Court further stressed that the materiality inquiry was a matter of determining whether the evidence favorable to the defense “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”

After extensively reviewing the record, the majority concluded that even if Stoltzfus and her testimony had been entirely discredited, the jury might still have concluded that Strickler was the ringleader, but that proof that he was the dominant criminal participant was not necessary to convict him of capital murder. The majority concluded by explaining that Stoltzfus’s testimony, which had described Strickler as having demonstrated aggressive behavior, was not as damaging as the evidence that he had spent the evening of the murder dancing and drinking at a bar for about five hours, or that he had killed Whitlock with a sixty-nine-pound rock. Therefore, the majority was not convinced that there was a reasonable probability that the jury would

81. Id.
82. Id.
83. Id. at 289 (emphasis added). The Court further explained: “The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Id. at 289-90 (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).
84. Id. at 290 (quoting Kyles, 514 U.S. at 435).
85. Id. at 292. The Court justified this statement by noting the trial court’s instructions to the jury which stated that

- to convict petitioner of capital murder, it must find beyond a reasonable doubt that (1) “the defendant killed Leanne Whitlock;” (2) “the killing was willful, deliberate and premeditated;” and (3) “the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape.”

Id. at 294 n.44 (quoting Strickler v. Murray, 452 S.E.2d 648, 650 (Va. 1995)).
86. Id. at 295-96. Professor Scott Sundby found that “jurors frequently cited a defendant’s lack of remorse as a significant factor in precipitating their decision to impose the death penalty.” Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 CORNELL L. REV. 1557, 1558 (1998). Furthermore, “jurors generally based their conclusion that a defendant lacked remorse on factors other than the defendant’s words at trial. In some cases, the jurors based their perceptions on the nature of the defendant’s actions at the time of the crime.” Id. at 1561.
have returned a different verdict had Stoltzfus's testimony been severely impeached or entirely excluded.  

Writing separately, Justice Souter took issue with the question of prejudice and materiality and the standard by which it is measured. Justice Souter found that the phrasing of the standard was deceptive, and he indicated that the continued use of the term "probability" caused an unjustifiable risk of misleading courts into treating it as the more demanding standard of "more likely than not." Justice Souter asserted that the standard of "significant possibility" would be a better term to capture the degree to which the undisclosed evidence would place the actual result in question. Justice Souter justified the use of the significant possibility standard by tracing the evolution of Brady and examining different measures of materiality. Furthermore, he determined that the Court had followed a "circuitous path" in adopting the reasonable probability standard. Keeping in mind his own caveat concerning the appropriate level of materiality, Justice Souter parted with the majority in their determination that the exculpatory material was inadequate to undermine confidence in the jury's sentencing recommendation.

IV. Analysis

In Strickler, the Supreme Court, in examining the evolution of Brady, maintained reasonable probability as the standard by which to measure materiality for Brady violations. Reasonable probability was first introduced in Bagley as the appropriate standard to resolve issues of prejudice in matters where the prosecution has failed to disclose exculpatory documents to the defense. The Bagley Court's conclusion that reasonable probability was the appropriate standard is con-

87. See Strickler, 527 U.S. at 296.
88. Id. at 296-97 (Souter, J., concurring in part and dissenting in part).
89. Id. at 297.
90. Id. at 300. Justice Souter determined that the term "probability" is misleading in Brady cases because it is "naturally read as a cognate of 'probably,' and thus confused with 'more likely than not'" [standard].
91. Id. at 297.
92. Id. at 298-300.
93. Id. at 300.
94. Id. at 301-02. Justice Souter's assessment of materiality turned on two points. First, he believed that the jurors would have given weight to the degree of leadership exercised by the defendant. Id. Second, he believed that "no other testimony [came] close to the prominence and force of Stoltzfus's account in showing Strickler as the unquestionably dominant member of the trio." Id.
95. Strickler, 527 U.S. at 296.
sistent with the Court's earlier characterization of the previously unnamed standard. By preserving this standard in *Strickler*, the Court provides a clear guideline by which judges can accurately gauge whether the prosecution's withholding of exculpatory materials caused prejudice that deprived the accused of the right to a fair trial.

A. Reasonable Probability: A Standard That Fits

In reviewing *Brady* and its progeny, it is clear that the Court was correct in its affirmation that reasonable probability is the proper standard by which to resolve issues of prejudice when an accused asserts a *Brady* violation. The original configuration of the rule stated that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."\(^97\) However, *Brady* never set forth a standard by which to define materiality. The Court began its articulation of an appropriate standard in *Agurs*,\(^98\) where it stated that if there was any reasonable likelihood that perjured testimony had affected the verdict, then the resulting conviction must be set aside.\(^99\) In the perjured testimony cases where the prosecution knew that the evidence was false, the Court applied a less demanding materiality standard, not just because these cases involved "prosecutorial misconduct," but because they involved "a corruption of the truth-seeking function of the trial process."\(^100\) This "likelihood" standard was more a punishment for the prosecution's error than a reliable measure of materiality for *Brady* violations where the wrongdoing by the prosecution was less severe.\(^101\)

In *Agurs*, the Court also expressly rejected any possibility or likelihood standard to measure materiality for a *Brady* violation.\(^102\) The *Agurs* Court noted that the prosecutor does not have a constitutional obligation to disclose all information that might affect the jury's ver-

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98. *Strickler*, 527 U.S. at 298 (Souter, J., concurring in part and dissenting in part). The Court began to articulate a standard by discussing the measure of materiality in instances when the prosecution knowingly used perjured testimony. *Id.* at 298-99.
100. *Agurs*, 427 U.S. at 104.
101. *Id.* at 103-04.
102. *Id.* at 108-10.
The Court justified this by stating that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Thus, the Agurs Court recognized that any kind of possibility standard would be constitutionally inadequate to measure the effect of prejudice in Brady violations.

At the same time, the Court rejected a standard that would require the defendant to demonstrate that the evidence, if disclosed, "probably would have resulted in acquittal." The Agurs Court finally decided upon a middle-of-the-road standard to identify prejudice in Brady violations. The Court, however, attached no specific label to this standard. The Court in Bagley looked at Agurs to define this standard as falling somewhere between the "probability standard," which is explained above, and a "harmless-error" standard, under which all nondisclosures are considered to be constitutional errors requiring a new trial unless the reviewing judge is convinced that the nondisclosure did not influence the jury or had only a very slight effect. The Court then correctly established reasonable probability as the standard by which to measure prejudice for Brady violations because it is the most appropriate articulation of a middle-of-the-road standard that falls between the two standards discussed in Agurs.

In his separate opinion in Strickler, Justice Souter claimed that the Court took a "circuitous path" in adopting the reasonable probability standard. It indeed did not. In actualizing reasonable probability, the Court examined Brady and its progeny and took into account the severity of prosecutorial misconduct to determine the degree of mate-

103. See id. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."); see also supra notes 69-74 and accompanying text (noting Bagley's four aspects of materiality that assist in determining whether a Brady violation has occurred).
104. Agurs, 427 U.S. at 109-10 (emphasis added).
105. Id. at 111.
106. Id. at 111-13; see also supra note 59 and accompanying text (describing the Agurs standard).
107. Agurs, 427 U.S. at 111-13. In Agurs, the Court did not articulate a materiality standard. However, the Court did discuss where this standard should fall in order to accurately "reflect [the Court's] overriding concern with the justice of the finding of guilt." Id. at 112.
Over the years, the Court has formulated a coherent standard that falls in between the perjured testimony punishment standard and any "sporting theory of justice" standard. Reasonable probability is a logical formulation of a standard that is not as demanding as the more-likely-than-not standard—an essentially punitive standard—and more demanding than a mere possibility standard. In *Kyles*, the Court determined that the reasonable probability standard is the appropriate standard to accurately gauge whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict and the *Strickler* Court prudently adhered to this determination.

**B. Rejecting Significant Possibility: A Capricious Standard**

In embracing reasonable probability as the standard by which to measure materiality in a *Brady* violation, the Court wisely disregarded the sliding-scale standard of significant possibility. In his separate opinion, Justice Souter asserted that the Court should have characterized the *Brady* standard as requiring a significant possibility that the undisclosed materials would have led the jury to a different decision. He first noted that reasonable possibility or reasonable likelihood—the standard not adopted by the *Agurs* court—and...
reasonable probability do indeed express distinct levels of confidence concerning the effects of prejudice.\textsuperscript{117} However, Justice Souter asserted that the distinction among the standards is slight.\textsuperscript{118} He further stated that "the gap between all three of those formulations and 'more-likely-than-not' is greater than any differences among them."\textsuperscript{119} Noting the larger gap between more-likely-than-not and the other three standards, Justice Souter erroneously argued that it would be misleading for courts to use the term "probability" because it is so closely related to the word "probably."\textsuperscript{120} Thus, Justice Souter determined that the reasonable probability standard would be mistaken for the more-likely-than-not standard.\textsuperscript{121} It was through this imprecise reasoning that he arrived at the conclusion that "significant possibility" is the "proper" way to phrase the \textit{Brady} materiality standard.\textsuperscript{122}

In fact, the "significant possibility" standard could be equally as deceptive, for this phrase is naturally read as simply "possibility." Thus, it is likely to be equated with reasonable possibility, the less demanding standard. Furthermore, the Court in \textit{Bagley} chose not to adopt this less demanding standard when it articulated a standard for identifying prejudice in \textit{Brady} violations.\textsuperscript{123}

The \textit{Bagley} decision was not the first to dismiss a possibility standard when resolving issues of prejudice in \textit{Brady} violations.\textsuperscript{124} In \textit{Agurs}, the Court stated that materiality is not satisfied by "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial."\textsuperscript{125} In \textit{Agurs}, the Court did not accept Justice Marshall's characterization of the \textit{Brady} standard—that "[i]f there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside."\textsuperscript{126}

\begin{itemize}
\item \textit{Strickland v. Strickler}, 527 U.S. at 300 (Souter, J., concurring in part and dissenting in part).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.) (determining that "reasonable probability" is "sufficiently flexible to cover specific, general, or no request nondisclosures); \textit{see also id.} at 713-14 (Stevens, J., dissenting) (asserting that the standard for materiality should be "reasonable likelihood").
\item \textit{See United States v. Agurs, 427 U.S. 97, 109-10 (1976).}
\item \textit{Id.}
\item \textit{Agurs}, 427 U.S. at 119 (Marshall, J., dissenting) (emphasis added).
\end{itemize}
Washington, the Court once again struck down the significant chance standard in favor of the reasonable probability standard. The Court has repeatedly recognized that any chance standard is akin to a possibility standard, and neither establish materiality in the constitutional sense. Thus, the Court has determined that these types of standards are not reliable enough to resolve issues of prejudice in Brady violations when an accused’s constitutional rights are at issue.

In sum, “significant chance” and Justice Souter’s “significant possibility” both can be read and understood as simply “possibility.” Thus, these standards easily could be equated with the less demanding standard of reasonable possibility. The Agurs Court emphasized that a “mere possibility . . . does not establish ‘materiality’ in the constitutional sense.” In fact, the Court has long maintained that the “law rarely offers judgments on proof of mere possibilities.”

It was Justice Souter himself who stated that the adjective in a standard is important. The adjective that should receive careful attention in a standard that decides an accused’s individual rights is the adjective that is the most identifiable and cognizable. This adjective would then be the second word in the Brady phraseology—the word that allows the standard to be read as either possibility or probability. It is for this reason that the Court cannot employ any standard which

127. 466 U.S. 668, 694 (1984). In his Strickland dissent, Justice Marshall again advocated a significant chance standard, asserting that a person on death row . . . should not be compelled to demonstrate a “reasonable probability” that he would have been given a life sentence if his lawyer had been competent; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate.

Id. at 716-17 (Marshall, J., dissenting) (citation omitted).

128. See Brady v. Maryland, 373 U.S. 83, 90-91 (1963) (“[W]e cannot . . . say that the deprival of the defendant of [a] sporting chance through the use of a bifurcated trial denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.” (citation omitted)); supra notes 122-126 (discussing the rejection of a chance or possibility standard in Bagley, Agurs, and Strickland).


130. FTC v. Morton Salt Co., 334 U.S. 37, 56 (1948) (Jackson, J., dissenting in part). In his partial dissent, Justice Jackson noted three decisions in which the Court has refused to offer a judgment using a possibility standard. These decisions were Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922) (“[The Court] do[es not think that the purpose in using the word ‘may’ was to prohibit the mere possibility of the consequences described.”); International Shoe Co. v. FTC, 280 U.S. 291, 298 (1930) (noting that the Clayton Act “deals only with such acquisitions as probably will result in lessening competition to a substantial degree”); and Corn Products Co. v. FTC, 324 U.S. 726, 738 (1945) (discussing the provisions of the Clayton Act and stating that “the use of the word ‘may’ was not to prohibit discriminations having ‘the mere possibility’ of those consequences, but to reach those which would probably have the defined effect on competition”).

incorporates the term possibility, including Justice Souter’s significant possibility standard, for it naturally could be read as reasonable possibility, the less demanding standard, which the Court has never adopted in *Brady* violation cases.¹³²

The Court’s repeated failure to adopt these possibility or chance standards demonstrates that the Court is not willing to employ a standard that so closely resembles a mere “possibility” for cases of this constitutional magnitude, for mere possibilities do not have the capacity to safeguard an individual’s due process rights. Thus, the Court prudently preserved the reasonable probability standard to determine the level of materiality in *Brady* violations. This standard is reliable, and it will prevent inconsistencies in the law and will avoid occurrences of injustice.

C. Protecting Due Process, Preventing Injustice

The Court has correctly decided that reasonable probability is the most appropriate and reliable standard to gauge issues that concern fundamental constitutional protections. In his separate opinion in *Strickler*, Justice Souter stated that “significant possibility” is a better way to phrase the materiality standard that gauges whether an accused received a fair trial.¹³³ He implies that significant possibility and reasonable probability are the same standard, and that the former is simply a clearer expression of the rule.¹³⁴ Therefore, it seems that Justice Souter believes that the significant possibility standard is a standard that is able to gauge issues that concern constitutional rights.

However, the two standards are not the same; in fact, they are quite different and have been employed by the Court to measure dissimilar issues in the law.¹³⁵ The difference in the two standards becomes evident when Justice Souter notes in which contexts the various phrases have been used.¹³⁶ The two standards can be contrasted by

¹³². See *supra* notes 124-128 and accompanying text (discussing the Court’s rejection of possibility standards to measure prejudice in *Brady* violations).

¹³³. See *Strickler*, 527 U.S. at 297 (Souter, J., concurring in part and dissenting in part) (stating that when the Court describes the standard as reasonable probability, he “[takes it] to mean . . . significant possibility”).

¹³⁴. *Id.*

¹³⁵. See *Times-Picayune Publ’g Corp. v. Schulinghamp*, 419 U.S. 1301, 1305 (1974) (“[T]he general standards governing the grant of a stay application [are]: there must be a reasonable probability that four members of the Court would consider the underlying issue meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court’s decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.”).

¹³⁶. See *Strickler*, 527 U.S. at 300 n.3 (Souter, J., concurring in part and dissenting in part).
considering the three-part test to grant a stay pending certiorari.\textsuperscript{137} The significant possibility standard is employed when the Court examines whether the Court will reverse the lower court’s decision.\textsuperscript{138} The Court also uses the reasonable probability standard in this three-part test.\textsuperscript{139} To justify a grant of application to stay, there must be a reasonable probability that four members of the Court will consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction.\textsuperscript{140} The Supreme Court’s use of the two standards to measure two requirements of different weight in the judicial process implies that there is a significant difference between the two standards. It can be inferred from this distinction that the Court recognizes significant possibility as a less demanding standard because it simply is used to determine whether the decision might be overturned. This requirement does not carry as much importance as the Court’s jurisdiction, which is a constitutional necessity. Because the latter is measured by reasonable probability, it is evident that this is the standard that the Court considers to be more reliable to resolve questions of constitutionality.

Because the Court in Strickler must employ a standard that will preserve a defendant’s constitutional right to a fair trial, it logically follows that the Court would use the reasonable probability standard as opposed to the significant possibility standard, which the Court has never adopted to determine issues of constitutionality. Certainly, when the situation warrants the Court’s involvement, implementing the reasonable probability standard is the most effective way to achieve a legally accurate conclusion without diluting a defendant’s constitutional right to a fair trial.

Thus, the significant possibility standard is not simply a better rephrasing of the reasonable probability standard, as Justice Souter stated in his partial dissent.\textsuperscript{141} In fact, it is a less demanding materiality standard than reasonable probability, and it is not used by the Court to determine fundamental constitutional protection issues. Indeed, the Strickler Court was prudent in preserving the reasonable probability standard, for it is the standard that the Court has repeat-

\textsuperscript{137} See Times-Picayune, 419 U.S. at 1305; see also supra note 136 (discussing how the two standards are implemented in a stay pending certiorari); see also Strickler, 527 U.S. at 300 n.3 (Souter, J., concurring in part and dissenting in part).

\textsuperscript{138} See Times-Picayune, 419 U.S. at 1305; see also Strickler, 527 U.S. at 300 n.3 (Souter, J. concurring in part and dissenting in part).

\textsuperscript{139} See Times-Picayune, 419 U.S. at 1305; see also Strickler, 527 U.S. at 300 n.3 (Souter, J. concurring in part and dissenting in part).

\textsuperscript{140} See Times-Picayune, 419 U.S. at 1305.

\textsuperscript{141} Strickler, 527 U.S. at 297 (Souter, J., concurring in part and dissenting in part).
edly employed to safeguard the procedural due process rights of criminal defendants while ensuring that unjust decisions have not been reached.

V. Conclusion

In *Strickler*, the Supreme Court prudently preserved reasonable probability as the standard by which to measure whether the defendant received a fair trial in the absence of certain exculpatory material undisclosed to the defense.\(^{142}\) By preserving the reasonable probability standard to resolve issues of prejudice in *Brady* violations, the majority correctly rejected the sliding-scale significant possibility standard. The Court recognized that the significant possibility standard can not establish materiality in the constitutional sense and that reasonable probability is the more appropriate standard by which to ensure that an accused's procedural due process rights are protected. Thus, the Court in *Strickler* has provided a reliable and coherent standard for judges to gauge whether the trial was one worthy of confidence. The Court's continuing application of the reasonable probability standard not only allows judges to accurately measure the effect of *Brady* violations, but because of its certainty, the standard also provides for the protection of an accused's constitutional rights, thereby preventing occurrences of injustice.

CORINNE M. NASTRO

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