

# THE PROBLEM WITH *JOHNSON* AND *LEMOND*: IRRECONCILABLE SCIENCE AND THE *BRADY-NAPUE* NO-MAN'S LAND

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## INTRODUCTION

On July 16, 2009, Wendell Patrick Lemond sat in an Orange County, California, courtroom.<sup>1</sup> He was on trial for the 1985 murder of Catherine Tameny, a former coworker.<sup>2</sup> Lemond had been arrested more than twenty years after the murder when a cold case detective finally matched saliva found on Tameny's body to a sample of Lemond's DNA.<sup>3</sup> Now, Lemond watched as Mary Hong—a forensic expert with the Orange County Crime Lab and president of the California Association of Criminalists<sup>4</sup>—took the stand. She would testify about a test the Crime Lab had run back in 1985 on another DNA sample collected from Tameny's body—a sample that matched not to Lemond, but to a man named Larry Herrera.<sup>5</sup> Her testimony about those test results, the prosecution explained, created a specific timeline, and that timeline meant Lemond, not Herrera, must have committed the murder.<sup>6</sup> Lemond would later be convicted and sentenced to twenty-five years to life.<sup>7</sup>

Lemond did not know that fifteen months earlier, Mary Hong sat on the same witness stand, in front of the same judge, testifying in the murder trial of Lynn Dean Johnson.<sup>8</sup> In that trial, she testified about the same test, also

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1. Reply and Supplemental Brief in Support of Motion to Dismiss the Death Penalty; Motion for New Penalty Phase Trial at 59, *People v. Wozniak* (Cal. Super. Ct. Sept. 23, 2016) (No. 12ZF0137) 2011 WL 1554108 [hereinafter *Wozniak* Supplemental and Reply Brief].

2. *People v. Lemond*, No. G043449, 2011 WL 1554108, at \*1 (Cal. Ct. App. Apr. 26, 2011).

3. *Id.* at \*2.

4. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 20.

5. Transcript of Record at 257-58, *People v. Lemond* (Cal. Super. Ct. Jul. 14, 2009) (No. 07NF2652) 2011 WL 1554108 [hereinafter *Lemond* Transcript].

6. *See id.* at 250-52; *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 64.

7. *Lemond*, 2011 WL 1554108, at \*1.

8. Transcript of Record at 2033, *People v. Johnson* (Cal. Super. Ct. June 11, 2008) (No. 04ZF0071) 2010 WL 5383909 [hereinafter *Johnson* Transcript].

conducted in 1985.<sup>9</sup> Once again, her testimony created a timeline—one that proved damning for Johnson.<sup>10</sup>

What Lemond would have had little chance of knowing—because the prosecutor (a member of the same unit that tried Johnson’s case) never disclosed the information to the defense—was that Hong’s statements in the two trials were irreconcilable.

This Note tells the story of a startling use of forensic expert testimony that would appear to violate due process under the umbrella of United States Supreme Court cases concerning prosecutorial misconduct, *Brady v. Maryland*<sup>11</sup> and *Napue v. Illinois*.<sup>12</sup> Part II traces how these lines of cases have evolved with crippling limitations that may place irreconcilable expert testimony beyond the reach of their protections. Part III illuminates the problem presented by Lemond’s case in more detail and explores how an earlier California Supreme Court ruling may enable the kind of prosecutorial tactics employed in *Lemond*. Part IV suggests a recalibration of the materiality standard to shrink the gap in the due process jurisprudence. Finally, Part V reconnects this proposed standard to the rationale behind the due process safeguards of *Napue* and *Brady*.

## II. THE WEAKNESS OF *BRADY V. MARYLAND* AND THE DANGERS OF FACTUALLY INCONSISTENT FORENSIC TESTIMONY

For a criminal defendant burned by prosecutorial misconduct, the term “*Brady* violation” might evoke a promise of inevitable justice. *Brady*’s core principle—if a prosecutor withholds evidence that would help a defendant, the trial is fundamentally unfair (and therefore violates that defendant’s constitutional right to due process)<sup>13</sup>—seems to celebrate the ideal that the prosecution’s interest is “not that it shall win a case, but that justice shall be done.”<sup>14</sup>

In the half-century since *Brady* was decided, criminal courts have seen a dramatic increase in the use of forensic science—often as the prosecution’s

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9. *Id.* at 2098.

10. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 53. Scott Sanders, Johnson’s trial counsel, revealed the connection between Johnson’s and Lemond’s cases in a brief in *People v. Wozniak* to help illustrate an alleged pattern of misconduct by the Orange County District Attorney’s Office. *See id.* at 6.

11. 373 U.S. 83 (1963).

12. 360 U.S. 264 (1959).

13. *See Brady*, 373 U.S. at 87.

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

primary tool for connecting the defendant to the crime.<sup>15</sup> Scientific evidence carries its own promise of objective justice: that a test result tells the truth, regardless of what either side may want or believe.<sup>16</sup> But with state-employed forensic experts often testifying for the prosecution in hundreds of trials over the course of their careers, there is a danger that they may see themselves as agents of the prosecution, and so tailor their findings or their testimony to fit the prosecution's theory of a crime.<sup>17</sup>

If a prosecutor's office allows one expert to testify in a trial about a scientific procedure, standard, or result—then give contradictory testimony in a second trial, when the prosecutor's narrative requires it—*Brady* would seem to demand disclosure of that contradiction to the second defendant. However, the gradual narrowing of *Brady*'s scope has left it ill-equipped to deter this situation or to provide a remedy, should it result in a conviction.

#### A. *The Brady and Napue Materiality Mess*

When the Supreme Court decided *Brady v. Maryland* in 1963, it established what would become a line of cases addressing the effect of a prosecutor's failure to disclose evidence favorable to the defense. The *Brady* Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>18</sup> The Court was not concerned with punishing prosecutors for the failed disclosure, but with ensuring defendants have all available information for a trial that “comport[s] with standards of justice.”<sup>19</sup>

A “*Brady* violation” has three components: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.<sup>20</sup>

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15. See *United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (order denying petition for rehearing en banc) (Kozinski, C.J., dissenting, joined by Pregerson, J., Reinhardt, J., Thomas, J., & Watford, J.) (“[M]odern criminal trials frequently turn on forensic reports.”).

16. See Janet Hoeffel, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465, 466 (1990).

17. Annie Dookhan, a Massachusetts crime-lab technician, spent several years filing positive results for over 40,000 drug samples she had not properly tested, and the FBI even initiated an investigation of its own crime lab concerning over 10,000 cases, “due to numerous problems with forensic analysis” and potential lab misconduct. *Olsen*, 737 F.3d at 632 (Kozinski, C.J., dissenting, joined by Pregerson, J., Reinhardt, J., Thomas, J., & Watford, J.).

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

19. *Id.* at 87-88.

20. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

This third component, prejudice, is usually referred to in the *Brady* context as “materiality.”<sup>21</sup> While *Brady* itself never singled out materiality as the fulcrum on which this kind of due process violation should tilt,<sup>22</sup> succeeding Supreme Court decisions have focused on materiality as the key point in finding or denying a *Brady* violation<sup>23</sup>—and in doing so, have narrowed (and complicated) its definition.<sup>24</sup> In 2013, the Ninth Circuit described *Brady* materiality as it stands now:

The Supreme Court and courts of appeals have found evidence to be “material” when “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” “A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial.” “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.” Reversal of a conviction or sentence is required only upon a “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.” This necessarily is a retrospective test, evaluating the strength of the evidence after trial has concluded.<sup>25</sup>

If it seems difficult to pin down exactly what this standard requires, that obscurity has not been lost on its audience, either. A collection of dissents,<sup>26</sup> prosecutors’ guides,<sup>27</sup> and fancifully-titled law review articles<sup>28</sup> have emerged, alluding to (if not openly decrying) its convoluted nature and apparent unattainability.<sup>29</sup> This frustrates defendants and emboldens some

21. *Benn v. Lambert*, 283 F.3d 1040, 1053 n.9 (9th Cir. 2002).

22. See Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1142 (2005).

23. See *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999).

24. Scott Sundby notes that “this gradual contraction of *Brady*’s reach was often partially masked because it took place in cases where the Court was at the same time extending *Brady*’s applicability to new fact situations.” Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 647 (2002) [hereinafter Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*].

25. *United States v. Olsen*, 704 F.3d 1172, 1183 (9th Cir. 2013) (citations omitted).

26. See, e.g., *Bagley*, 473 U.S. at 685 (Marshall, J., dissenting); *Olsen*, 737 F.3d at 625 (Kozinski, C.J., dissenting, joined by Pregerson, J., Reinhardt, J., Thomas, J., & Watford, J.).

27. See Prosecuting Attorneys Coordinating Council, *Brady and Giglio: A Prosecutor’s Guide to Producing Evidence* (Nov. 2015), [https://www.michiganprosecutor.org/files/PAAM/Internal/Brady&Giglio\\_%20Manual.pdf](https://www.michiganprosecutor.org/files/PAAM/Internal/Brady&Giglio_%20Manual.pdf).

28. See, e.g., Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L. J. 211 (2005); Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, *supra* note 24.

29. Eugene Cerruti describes it as a “doctrinal abyss.” Cerruti, *supra* note 28, at 214.

prosecutors to follow their worst instincts. Not only is the materiality standard inherently retrospective,<sup>30</sup> but its threshold question of whether all undisclosed evidence collectively “undermine[s] confidence in the verdict” shifts the burden of proving there *was* a prejudicial error to the defense—and in doing so, makes it that much more tempting for a prosecutor to withhold evidence during the trial stage.<sup>31</sup>

Worst of all, the “reasonable probability of a different verdict” requirement implies that, for there to be a violation, the suppressed evidence must be *so* harmful to the prosecutor’s case that he never should have prosecuted it in the first place.<sup>32</sup> As a result, appellate courts are not usually willing to find the *Brady* evidence would have affected the outcome of the trial.<sup>33</sup> “By raising the materiality bar impossibly high,” says the dissent from the denial of rehearing en banc in *United States v. Olsen*, the court allows prosecutors to remain secure in the belief that, if there is a claim of nondisclosure, “judges will dismiss the *Brady* violation as immaterial.”<sup>34</sup>

*Napue v. Illinois*, decided four years before *Brady*, found a due process violation when a prosecutor presents witness testimony he knows or should know to be false.<sup>35</sup> In *Napue* cases, the due process violation lies in the presentation of evidence, rather than the suppression of it.<sup>36</sup> The rationale for this violation lies in the notion that a prosecutor’s “depriving a defendant of liberty through a deliberate deception of court and jury” is “as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.”<sup>37</sup>

*Napue* cases have their own standard of materiality, more straightforward and favorable to the defense than *Brady*’s: a new trial is required if the false testimony could in any reasonable likelihood have

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30. As Cernuti points out, this standard travels beyond simple “harmless error” and into the realm of “harmless conviction”; a prosecutor’s failure to disclose becomes error not at the trial stage, but “only when a reviewing court concludes that the nondisclosure of its own accord has produced a wrongful conviction at trial.” *Id.* at 213-14.

31. See Hoeffel, *supra* note 22, at 1144.

32. See Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland* *supra* note 24, at 651.

33. See Hoeffel, *supra* note 22, at 1151.

34. 737 F.3d 625, 633 (9th Cir. 2013) (Kozinski, C.J., dissenting, joined by Pregerson, J., Reinhardt, J., Thomas, J., & Watford, J.).

35. 360 U.S. 264, 269 (1959). When the state suppresses this evidence, *Brady* is implicated as well; the information that the testimony is false is valuable for impeachment, and so satisfies *Brady*’s first prong. See *Giglio v. United States*, 405 U.S. 150, 153 (1972).

36. 360 U.S. at 269.

37. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); see also Seth Apfel, *Prosecutorial Misconduct: Comparing American and Foreign Approaches to a Pervasive Problem and Devising Possible Solutions*, 31 ARIZ. J. INT’L & COMPAR. L. 835 (2014).

affected the judgment of the jury.<sup>38</sup> The testimony might *not* have affected the jury's judgment, but is still material under *Napue* if it *could* have affected the verdict—a standard that is “quite easily satisfied.”<sup>39</sup> The Supreme Court has maintained this more defendant-friendly standard for *Napue* cases “not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.”<sup>40</sup> But what happens when one trial's truth-seeking process conflicts with another?

*B. Erroneous Forensic Expert Witness Testimony Poses Particular Challenges for Brady and Napue.*

Guilt in criminal trials frequently turns on forensic expert testimony.<sup>41</sup> But recently, the general integrity of forensic practice has taken a hit: in 2009, The National Academy of Sciences released a landmark report detailing numerous problems in the field of criminal forensic science.<sup>42</sup> The report found that, amongst other issues, “imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence,” leading to wrongful convictions.<sup>43</sup>

Even more troubling is when an expert testifies erroneously not because of a lack of scientific understanding, but because she wants to tailor her findings to fit the prosecution's case. Forensic experts who work for the state can “feel a responsibility to provide a desirable outcome and often see themselves on the same side as the prosecutors and police.”<sup>44</sup> This can cause significant damage, thanks to what Ohio Innocence Project director Mark Godsey has labeled the “Reverse CSI-Effect.” As he explains,

The “Reverse CSI Effect,” as I call it, can be stated as follows: while jurors may have come to expect, as a result of CSI-type shows, high-tech forensic testimony in criminal cases, and may inappropriately acquit when such evidence is lacking, these same jurors, as a result of these same CSI-type

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38. *Giglio*, 405 U.S. at 154 (citing *Napue*, 360 U.S. at 271).

39. *United States v. Ausby*, 916 F.3d 1089, 1093 (D.C. Cir. 2019).

40. *United States v. Agurs*, 427 U.S. 97, 104 (1976).

41. *United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (order denying petition for rehearing en banc) (Kozinski, C.J., dissenting, joined by Pregerson, J., Reinhardt, J., Thomas, J., & Watford, J.).

42. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NRC REPORT], <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

43. *Id.* at 4.

44. Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always a “Harmless Error”*: *DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 433-34 (2011).

shows, often place too much weight on forensic evidence in cases where forensic evidence IS in fact produced by the prosecution, resulting in convictions in cases where the defendant probably should have been acquitted.<sup>45</sup>

It would seem that, when a prosecutor presents testimony an expert has altered to fit the prosecution's case, it would be a straightforward task for an appellate court to find a *Napue* violation: the government has presented testimony it knows or should know is false, and the weight forensic testimony often carries (due to the "Reverse CSI Effect")<sup>46</sup> makes it likely to be material under *Napue*'s strict standard. But when it comes to forensic science, the concept of "false," as required by *Napue*, is not so easy to pin down. The Supreme Court has observed that "[s]cientific conclusions are subject to perpetual revision,"<sup>47</sup> and the National Academy of Sciences found that the adversarial nature of litigation—and lawyers' and judges' lack of scientific understanding—leaves the trial process unsuitable for "the task of finding 'scientific truth.'"<sup>48</sup> Therefore, however questionable the testimony might appear, demonstrating it to be "false" in a courtroom might remain an elusive task.

Even if problematic scientific testimony struggles to reach the level of falsity required by *Napue*, its exaggerated or misleading nature—valuable for impeachment purposes, if employed with the intention to mislead—might be enough for a *Brady* claim. But then the labyrinthine *Brady* materiality standard gets in the way; and so, even with little other evidence to prove an element of the crime beyond that testimony itself, a court might be reluctant to reverse.<sup>49</sup>

### C. Inconsistency Enters the Fray

If the shifting sands of scientific thought make it difficult for a court to determine the truth of a witness's statement, inconsistency might help flag problematic testimony. This idea—that if a witness makes two irreconcilable, contradictory statements, one of them must be a lie—is not novel: one of the two federal perjury statutes allows a jury to convict when it

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45. Mark A. Godsey & Marie Alao, *She Blinded Me With Science: Wrongful Convictions and the "Reverse CSI-Effect"*, 17 TEX. WESLEYAN L. REV. 481, 483 (2011).

46. According to Godsey, "I have seen undue reliance on state forensic testimony in perhaps hundreds of cases since starting the Ohio Innocence Project." *Id.* at 498.

47. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

48. NRC REPORT, *supra* note 42, at 12.

49. See *United States v. Olsen*, 704 F.3d 1172, 1184-85 (9th Cir. 2013); *United States v. Olsen*, 737 F.3d 625, 632-33 (9th Cir. 2013) (order denying petition for rehearing en banc) (Kozinski, C.J., dissenting, joined by Pregerson, J., Reinhardt, J., Thomas, J., & Watford, J.).

finds that the defendant has made two inconsistent statements, without having to determine *which* of the two statements is false.<sup>50</sup>

Furthermore, inconsistency of this sort (without a finding of which statement is false) can be the basis for a *Napue* violation. *Smith v. Goose* featured a witness who testified in the separate trials of two co-defendants—and told irreconcilable stories about how each man was individually responsible for the same murder.<sup>51</sup> The same prosecutor tried both cases and endorsed both stories, even objecting in the second case when the defense tried to offer the very theory that had convicted the defendant in the first trial.<sup>52</sup> Citing both *Bagley* (a *Brady* descendent) and *Napue* in its decision,<sup>53</sup> the Eighth Circuit granted a writ of habeas corpus vacating Smith's murder conviction, declaring that “[w]e do not hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather, we hold only that the use of inherently factually contradictory theories violates the principles of due process.”<sup>54</sup>

The Ninth Circuit similarly decided *Thompson v. Calderon*, a case where a prosecutor objected to defense witnesses who planned to present evidence of a third-party suspect in a murder trial.<sup>55</sup> After the trial, the prosecutor proceeded to try that third-party suspect for the same crime and subpoenaed those same witnesses to appear for the prosecution<sup>56</sup>—thereby discrediting the very evidence he had offered in the first trial.<sup>57</sup> Citing *Napue* again, the court found a due process violation and noted that “it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime.”<sup>58</sup>

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50. 18 U.S.C. § 1623(c). Furthermore, unlike the other perjury statute (18 U.S.C. § 1621), which does not allow for irreconcilable statements and requires independent corroboration of the falsity (known as the “two witness rule”), § 1623(c) requires only that the government prove the statements are “irreconcilably contradictory.” Andrew Riggs Dunlap & David M. Herzog, *Perjury*, 38 Am. Crim. L. Rev. 1121, 1142 (2001).

51. 205 F.3d 1045, 1047-48 (8th Cir. 2000). The witness, Lytle, testified in Smith's trial that he discovered Smith and Cunningham in a room together with the victim immediately after the murder was committed; then, after Smith was convicted, Lytle testified in Cunningham's trial that Cunningham had committed the murder alone before Lytle and Smith arrived at the house together. *Id.*

52. *Id.* at 1050.

53. *Id.* at 1049.

54. *Id.* at 1052.

55. 120 F.3d 1045, 1056 (9th Cir. 1997) (en banc), *rev'd on other grounds*, 523 U.S. 538 (1998).

56. *Id.*

57. *Id.* at 1059.

58. *Id.* at 1058.

Inconsistent, irreconcilable forensic assessments over multiple trials concerning one crime—without independent confirmation of which assessment is faulty—may therefore be enough to raise a *Napue* claim, if a court were to follow *Smith*'s and *Thompson*'s lead. After all, the prosecutor would have presented testimony he knew to be false, in *one* of the trials, and the irreconcilability would remove a need to determine which trial contained the false assessment.

But what about different crimes? Of course, most witnesses would have no reason to testify in multiple trials concerning unrelated crimes, but forensic experts may testify in hundreds of trials.<sup>59</sup> Therefore, a forensic expert could provide contradictory testimony in trials that have nothing to do with each other—for example, if the validity of the same method or practice should be at issue in multiple cases. And whether the trials concern one crime or separate crimes, a prosecution witness's testifying inconsistently should corrupt the trial's truth-seeking process just the same. But as the courts have yet to extend this doctrine beyond trials stemming from a single act, if an inconsistency should assert itself in two trials for unrelated crimes, neither defendant may have a path to challenge the conviction for a violation of his right to due process.

### III. MARY HONG, JAMES RIBE, AND THE SPECTRE OF MATERIALITY RUN AMOK

#### A. *Two Murders, Two Reports, One Conclusion*: People v. Lynn Dean Johnson

Brigett Lamon and Catherine Tameny were murdered in 1985 in Anaheim, California, less than three months apart from each other.<sup>60</sup> Lamon's body was found in a dumpster at the end of May; she had been beaten and sexually assaulted.<sup>61</sup> Police at the crime scene took vaginal and anal swabs.<sup>62</sup> Tameny's parents found her in her apartment in August.<sup>63</sup> She had an electrical cord around her neck, and the bedroom showed signs of a

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59. *Johnson* Transcript, *supra* note 8, at 2041.

60. See *People v. Lemond*, No. G043449, 2011 WL 1554108, at \*1 (Cal. Ct. App. Apr. 26, 2011); *People v. Johnson*, No. G041009, 2010 WL 5383909, at \*1 (Cal. Ct. App. Dec. 29, 2010).

61. *Johnson*, 2010 WL 5383909, at \*1.

62. *Id.*

63. *Lemond*, 2011 WL 1554108, at \*1.

struggle.<sup>64</sup> The police took vaginal swabs,<sup>65</sup> as well as swabs of saliva from Tameny's breast.<sup>66</sup>

The path to Mary Hong's irreconcilable testimony begins with a technician at the Orange County Crime Lab named Daniel Gammie.<sup>67</sup> In 1985, Gammie analyzed the swabs taken from both Lamon and Tameny.<sup>68</sup> Gammie found semen on both swabs from Lamon,<sup>69</sup> and on the vaginal swab from Tameny.<sup>70</sup>

Gammie ran a number of tests on the swabs; one of those tests analyzed the samples for the presence of a protein found in bodily fluids called P30.<sup>71</sup> Gammie had been conducting P30 testing on samples for about six to eight months before he conducted his analysis in these two murder cases.<sup>72</sup> Gammie would use the quantity of P30 to estimate the concentration of semen in a sample,<sup>73</sup> and from that he would draw conclusions about how much time had passed since the semen had been deposited.

On September 26, 1985, Gammie filed a report of his analysis of Tameny's swabs, which read: "Spermatozoa were found in a vaginal swab from TAMENY; however, the semen concentration and sperm density were very low and therefore indicated that the semen was not deposited at or near the time of death."<sup>74</sup> On September 27—the very next day—Gammie filed his report on Lamon: "Spermatozoa were detected in the vaginal, anal, and thigh swabs; however, the semen concentrations and sperm densities were low and therefore indicated that the semen was not deposited at or near the time of death."<sup>75</sup> Aside from one "very," Gammie's findings and conclusions about the P30 tests in the Lamon and Tameny reports were identical.<sup>76</sup>

Since DNA typing was not yet in use, no arrests were made in either case for nearly twenty years; however, testing conducted on the Lamon samples in 2004 provided a match for Lynn Dean Johnson.<sup>77</sup> Even beyond the DNA

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64. *Id.*

65. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 60.

66. *Lemond*, 2011 WL 1554108, at \*2.

67. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 17.

68. *Id.* at 22.

69. *People v. Johnson*, No. G041009, 2010 WL 5383909, at \*1 (Cal. Ct. App. Dec. 29, 2010).

70. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 23.

71. *Johnson* Transcript, *supra* note 8, at 1930.

72. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 33.

73. *Johnson* Transcript, *supra* note 8, at 1937.

74. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 23.

75. *Id.*

76. *See id.* at 22.

77. *People v. Johnson*, No. G041009, 2010 WL 5383909, at \*1-2 (Cal. Ct. App. Dec. 29, 2010). The DNA testing itself that identified Johnson as the donor happened to be conducted by Mary Hong herself. She testified that the probability of error was greater than one in one trillion,

match, Johnson was a logical suspect. As Johnson's public defender Scott Sanders wrote:

Johnson was serving a prison sentence in an unrelated sex crime when the DNA testing was conducted, and in a subsequent police interview, denied having any contact with the victim. Johnson also had access to tools that could have been used in the killing. The prosecution's case would seemingly have been perfect, but for Gammie's report.<sup>78</sup>

Gammie's report posed a significant problem: Lamon had left work at 9:30 p.m. on May 25 and went to her parents' house; later, Lamon's mother drove her home and was the last person to see her alive.<sup>79</sup> Lamon's body was found the next morning.<sup>80</sup> This meant that there was a short window—well under twelve hours—in which Lamon must have been killed. If Gammie's report were accurate, and the sperm sample (the only thing connecting Johnson to Lamon) was “not deposited at or near the time of death,”<sup>81</sup> then Johnson did not have sex with Lamon during that window of time, but at some earlier time in the days prior to her death. This would not comport with the theory the prosecution intended to present at trial: that Johnson had raped and murdered Lamon that night.

But there was a solution: rather than endorse his original report, Gammie would testify at trial that his 1985 conclusion was founded on now-outdated and unreliable science.<sup>82</sup> Gammie appeared as a witness, and he did discredit his own report.<sup>83</sup> He said that while there was a “thinking back then” in 1985 that “a high P30 level” would “indicate a more recent deposition,”<sup>84</sup> his opinion eventually changed.<sup>85</sup> Gammie had come to understand by the time he testified that “it is just unreliable to try to make that correlation” between the concentration of semen from the P30 tests and the time the semen was deposited.<sup>86</sup> With regard to the conclusion of his 1985 report, Gammie said that he “could not support that now.”<sup>87</sup>

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*id.* at \*2—the same odds she would later give for error in matching the saliva sample found on Tamenny to Wendell Lemond. *Lemond* Transcript, *supra* note 5, at 244.

78. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 17.

79. *Johnson*, 2010 WL 5383909, at \*2.

80. *Id.* at \*1.

81. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 17.

82. *Johnson* Transcript, *supra* note 8, at 1979.

83. *Johnson*, 2010 WL 5383909, at \*1.

84. *Johnson* Transcript, *supra* note 8, at 1970.

85. *Id.* at 1969.

86. *Id.* at 1943.

87. *Id.* at 1942.

But even though Gammie had written the report himself, the testimony of a single ex-employee<sup>88</sup> might not have been enough to convince the jurors,<sup>89</sup> and so the prosecution brought in another expert to take its case across the finish line.

When Orange County Crime Lab forensic scientist Mary Hong took the stand in Johnson's trial, she stated that she had testified "well over 100 times" in both Orange County and Los Angeles County.<sup>90</sup> She unequivocally supported Gammie's discrediting of his own 1985 report: when asked if she agreed with the report's conclusion, she said, "I don't agree with it because there are many variations in the amount of semen that might be deposited and in the way it might be deposited that might affect our findings from a vaginal swab that's collected from an individual."<sup>91</sup> With regard to P30, Hong had the following exchange with the prosecutor:

Q: Now, the value that's assigned to it, can that be used to kind of tell us, well, this P30 was deposited at or near the time of intercourse, but a different value would mean [sic] it was deposited later, for example?

A: No.

Q: All right. With regard to P30, does it work the opposite way? Do you look at a vaginal or anal swab and say, "Well, there is no P30 found in this particular sample; so, therefore, it must necessarily have been deposited more than 16 hours prior to being collected?"

A: No.

Q: Why can't you say that?

A: Because it depends on how much was deposited in the—originally, how much was deposited. So there may be an individual with a lower P30 concentration, plus the semen concentration may be lower. Or, you know, all of the semen that was deposited may not have been collected. It may have been deposited in some other area that wasn't collected.<sup>92</sup>

When confronted with a journal article that said P30 levels *did* change with time, and became undetectable within forty-eight hours of intercourse, she explained that that study used a "more sensitive method, and it is not in common use in forensic science."<sup>93</sup> Finally, Hong made clear her conclusion

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88. Gammie left the crime lab in 1995. *Wozniak Supplemental and Reply Brief*, *supra* note 1, at 31.

89. *See id.* at 20.

90. *Johnson* Transcript, *supra* note 8, at 2041.

91. *Id.* at 2098.

92. *Id.* at 2105-06.

93. *Id.* at 2200.

that the P30 levels might indicate the sperm was deposited a *maximum* of twenty-four hours from collection, but could not indicate any *minimum* amount of time before it was collected; it could have been deposited anytime within that window, including right before the murder itself.<sup>94</sup>

Johnson's defense had been that he had consensual sex with Lamon at some point before the night she died, and Gammie's original report would have backed up that story by concluding that Johnson's sperm was *not* deposited "at or near the time of death."<sup>95</sup> But Gammie and Hong discredited that conclusion by testifying that P30 could never reliably indicate a minimum time before collection.<sup>96</sup> Therefore, the prosecution was free to argue that the semen matched to Johnson was deposited right before Lamon was killed, proving that Johnson raped and murdered her.

### *B. Two Trials, Two Stories About One Conclusion: People v. Wendell Patrick Lemond*

A year later, Wendell Patrick Lemond was tried for the murder of Catherine Tameny.<sup>97</sup> In this case, Gammie's original P30 report posed no problem at all for the prosecution.<sup>98</sup> There were both sperm and saliva swabs taken from Tameny's body; while the saliva matched Lemond, the sperm sample matched a man named Larry Herrera,<sup>99</sup> who had dated Tameny.<sup>100</sup>

Tameny's body was found at 10:15 on a Monday morning;<sup>101</sup> questioned one day later, Herrera told a detective that he had last been with Tameny on Saturday morning, having slept over at her apartment on Friday night.<sup>102</sup> Herrera's story changed at Lemond's trial; Herrera then said he had unprotected sex with Tameny on Saturday evening and left her apartment on Sunday at noon.<sup>103</sup> The sperm swab was taken after Tameny's body was discovered at 10:15 a.m. on Monday, and so by either of his accounts, Herrera had sex with Tameny well over twenty-four hours before the time of collection.<sup>104</sup>

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94. *See id.* at 2102-03.

95. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 27, 32.

96. *Johnson* Transcript, *supra* note 8, at 1943, 2105.

97. *Wozniak* Supplemental and Reply Brief, *supra* note 1, at 22.

98. *Id.* at 24 ("Gammie's finding that the sperm was not deposited at or near the time of death was not exculpatory for defendant Lemond; in fact, it was quite helpful for prosecution.").

99. *Lemond* Transcript, *supra* note 5, at 257.

100. *Id.* at 166.

101. *People v. Lemond*, No. G043449, 2011 WL 1554108, at \*1 (Cal. Ct. App. Apr. 26, 2011).

102. *Lemond* Transcript, *supra* note 5, at 167.

103. *See id.* at 158-59.

104. *See id.* at 158.

That fit perfectly with Gammie's original conclusion that the sperm was not deposited near the time of death. Now, the problem was his and Hong's testimony in *Johnson*: after they actively discredited the nearly identical report in that case, the P30 analysis here could no longer eliminate Herrera as a suspect.<sup>105</sup> In fact, with the revised "zero to twenty-four hour window" that Hong suggested in Johnson's trial, the P30 analysis now *implicated* Herrera: Tameny was with her parents on Sunday morning and had spoken to her mother at 9:00 p.m. on Sunday night,<sup>106</sup> so she must have been murdered within thirteen hours of her body's discovery. If Gammie's and Hong's *Johnson* testimony was to be believed, the sperm was deposited the night of the murder—when Herrera denied being with Tameny—and that would make Herrera, not Lemond, the most viable suspect.

But the District Attorney's office was prosecuting Lemond, not Herrera. So when Hong took the stand in Lemond's trial, she never mentioned Gammie's report, even though its conclusion supported the prosecution's case.<sup>107</sup> Instead, she simply repeated that conclusion and vouched for its accuracy. Hong said that P30 "was not detected" in the sperm sample<sup>108</sup> and unequivocally stated how important that was in fixing a timeline:

Q. All right. So the lack of P30 would indicate that the sex occurred 12 to 24 hours—further than 12 to 24 hours than [sic] collection; is that correct?

A. Yes.<sup>109</sup>

"Yes." In other words, the P30 test she had disavowed in Johnson's trial as bad science was now valid again, and it *did* indicate a minimum amount of time between collection and deposit. That minimum time happened to support Herrera's stories about when he last had sex with Tameny—leaving Lemond as the only viable suspect.

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105. An Application for the Appointment of Counsel to File a Petition for a Writ of Habeas Corpus if Meritorious Grounds for Habeas Corpus Are Found to Exist Based on Newly Discovered Evidence and/or Ineffective Assistance of Trial Counsel at 5-6, *Lemond v. Davis*, No. 8:17CV01657 (C.D. Cal. Apr. 5, 2017).

106. *Lemond*, 2011 WL 1554108, at \*1.

107. Hong never even mentioned Gammie's name. When the original analysis of the sperm sample is discussed, no name is associated with it; rather, both Gundy, the prosecutor, and Hong refer to it in the passive voice, saying the analysis "was done," and that P30 "was not detected." *Lemond* Transcript, *supra* note 5, at 249. That Hong would echo the conclusions of the report in her testimony, without ever discussing the report, suggests the prosecutor knew that Hong had discredited an identical report a year earlier in *Johnson*—and so did not want her to explicitly endorse Gammie's report in this trial. *See id.*

108. *Id.*

109. *Id.* at 250-51.

And so, both Johnson and Lemond were convicted: Johnson, with Mary Hong insisting that a lack of P30 allowed *no* conclusion of when a sperm sample “must necessarily have been deposited,” then Lemond, with Hong assuring the jury that lack of P30 meant that the sex occurred “further than 12 to 24 hours than collection.”

Instinctively, it would seem that there is a *Napue* and/or *Brady* violation here somewhere—there are two statements that cannot both be true, and there was a failure to disclose the first statement to the second defendant. But potential problems abound. If the defense argues a *Napue* violation in either case, the California Attorney General’s office may claim that there is enough debate in the scientific community regarding P30 analysis to prevent a court from fairly ruling that either statement in particular is false. Hong’s testimony in *Johnson* might well be enough for a *Brady* claim in *Lemond*: whether or not it was false, it does not take much imagination to see the immense value it might have had for impeaching Hong’s later claims. But in that event, the Attorney General’s office could very well argue Lemond hasn’t met the materiality requirement. And the story of how California courts have handled something known as the “Ribe Box” shows just how successful that argument might be, no matter how important the testimony was to the prosecution’s case.

C. “*What’s in the Box?*”<sup>110</sup>

Dr. James Ribe was a Los Angeles deputy coroner who, in at least six cases in the 1990s, changed his testimony regarding the nature, time, or cause of injuries suffered by the victim—including estimated time between infliction of injuries and death.<sup>111</sup> One of those cases, *People v. Wingfield*, found Eve Wingfield accused of the beating death of her boyfriend David Helm’s two year-old son, Lance.<sup>112</sup> After supervising Lance’s autopsy, Ribe testified at Wingfield’s preliminary hearing that the time between infliction of injuries and death was from “a matter of minutes to a very few hours.”<sup>113</sup> He also said Lance might “have remained alert enough to ask for water and to attempt to drink it even after being injured.”<sup>114</sup> These estimates put Wingfield in control of Lance during the bulk of the time Lance could have been injured; they led Wingfield’s attorney to advise her that the prosecution

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110. SEVEN (New Line Cinema 1995).

111. See *People v. Salazar*, 3 Cal. Rptr. 3d 262, 267-68 (Ct. App. 2003), *rev’d*, 112 P.3d 14 (Cal. 2005).

112. *People v. Salazar*, 112 P.3d 14, 20-21 (Cal. 2005).

113. *Id.* at 22.

114. *Id.*

“had a strong case against her” and so “she would be better off taking a deal.”<sup>115</sup> She listened to him, pleaded no contest to manslaughter, and was sentenced to ten years.<sup>116</sup>

But a year later, Eve Wingfield sought to withdraw her plea.<sup>117</sup> This led to a follow-up investigation in which two detectives concluded, after consulting with an experienced child-abuse pathologist, that Lance’s death must have happened much more rapidly than Ribe had estimated.<sup>118</sup> The detectives interviewed Ribe, and while he stood by the short end of his estimated timeframe, he conceded the long end “was highly unlikely,” and he “admitted that he gave the ‘wrong’ answer when he said that Lance could have remained alert ‘almost up to the very end.’”<sup>119</sup> As a result of Ribe’s new position (supported by Ribe’s superior), Wingfield was allowed to withdraw her plea; her boyfriend, David Helms—who was alone with Lance just before his death—was eventually convicted of Lance’s murder.<sup>120</sup>

Concern within the Los Angeles District Attorney’s Office about Ribe’s regular reversals led staff to compile some transcripts of Ribe’s problematic testimony into a collection known in the office as the “Ribe box.”<sup>121</sup> The office concluded that “*Brady* and its progeny required the production of these records” to defense counsel in cases where Ribe testified.<sup>122</sup> Ribe’s name was also added to a “*Brady* database” that the District Attorney’s Office maintained.<sup>123</sup> The Ribe box included information about *Wingfield*.<sup>124</sup>

It was a very honorable plan. But the problem with the disclosure-ready Ribe box was that prosecutors were not very good about disclosing it. When Jose Salazar was tried for the murder of an infant whom his mother was babysitting, Dr. Ribe testified—once again creating a timeline that placed Salazar in control of the victim at the time the injuries would have (according to Ribe) been inflicted.<sup>125</sup> Almost three months before trial, Salazar’s counsel requested discovery from the prosecutor concerning Ribe’s

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 23.

119. *Id.*

120. *Id.* at 21, 23.

121. *Brown v. Cal. Dep’t of Corr. & Rehab.*, No. CV 12-9126 DMG (MRW), 2018 WL 4896665, at \*5 (C.D. Cal. Mar. 29, 2018), *report and recommendation adopted*, No. CV 12-9126 DMG (MRW), 2018 WL 4870848 (C.D. Cal. Oct. 3, 2018), *aff’d*, 802 F. App’x 253 (9th Cir. 2020).

122. *Id.*

123. *Id.*

124. *Id.* at \*6.

125. *Salazar*, 112 P.3d at 23.

testimony in prior “shaken baby” cases,<sup>126</sup> but no information was ever provided.<sup>127</sup> After Salazar was convicted, his appellate counsel sent a detailed request to the District Attorney’s Office, requesting five specific categories of Ribe-related information.<sup>128</sup> She received over 1,500 pages of documents—but not the information she requested.<sup>129</sup> When she sent a letter about this omission, she received no response.<sup>130</sup> When she went in person to a District Attorney’s branch office and asked to see the Ribe box, she was told she could not make copies of any of the (still incomplete and unindexed) material, and when she wrote to the original trial prosecutor requesting information for the habeas petition she was preparing, the prosecutor did not respond to that letter either.<sup>131</sup>

The California Court of Appeal found this sufficient for a *Brady* violation and granted the habeas petition,<sup>132</sup> but the California Supreme Court reversed.<sup>133</sup> The problem? Materiality. The Ribe box information was favorable to the defense for impeachment purposes, and the California Supreme Court applied the standard that “impeachment evidence has been found to be material where the witness at issue ‘supplied the only evidence linking the defendant(s) to the crime.’”<sup>134</sup> That a witness must provide the *only evidence* of guilt in order for impeachment to be material would seem to imply that, if the prosecution presents more than one witness, impeachment evidence can never be material—a standard that would doom many criminal defendants’ *Brady* claims to failure (including Wendell Lemond’s), regardless of how egregious the suppression might be.

But the California Supreme Court went one step further: upon examining all the other cases in the Ribe box for their potential for impeachment in *Salazar*, it declared that in “none of the other cases,” including *Wingfield*, did Ribe’s testimony “present an issue of materiality.”<sup>135</sup> From this proclamation, the Los Angeles County District Attorney’s Office drew a very

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126. Forensic science in “shaken baby syndrome” cases has been a particularly fraught arena, with rapidly-shifting standards and a history of wrongful convictions. See Godsey & Alao, *supra* note 45, at 487-89.

127. *People v. Salazar*, 3 Cal. Rptr. 3d 262, 270 (Ct. App. 2003), *rev’d*, 112 P.3d 14 (Cal. 2005).

128. *Id.* at 271.

129. *Id.* at 271-72.

130. *Id.* at 271.

131. *Id.* at 272.

132. *Id.* at 278-79.

133. *People v. Salazar*, 112 P.3d 14, 16 (Cal. 2005).

134. *Id.* at 25-26 (citing *United States v. Petrillo*, 821 F.2d 85, 90 (2d Cir. 1987)). There were certainly reasons to view Ribe’s testimony as immaterial in Salazar’s conviction: other forensic experts testified to the timeline, and Salazar admitted to actions that could feasibly have caused the injuries the victim suffered. *Id.* at 16-17.

135. *Id.* at 27 n.7.

bizarre conclusion: that, because the Ribe evidence was not material in *Salazar*, it could never be material in any future case.<sup>136</sup> As a result, the Office ceased production of the Ribe boxes and removed Ribe's name from the *Brady* database.<sup>137</sup>

So when defendant Sharrieff Brown was facing testimony from Ribe in yet another “shaken baby syndrome” case, and his attorney asked for a file district attorney's offices “keep on Dr. Ribe,” the prosecutor was perfectly comfortable telling both defense counsel and the judge that “counsel is mistaken, there are no files that the People keep on Dr. Ribe.”<sup>138</sup> Furthermore, by the time defense counsel cross-examined Ribe at trial, the judge had read the *Salazar* decision, with its lengthy discussion of the Ribe box—and knew full-well that the prosecutor's earlier statement that there were “no files” on Ribe was a lie.<sup>139</sup> But rather than impose any consequences on the prosecution for its blatant attempt to suppress evidence, the judge took a cue and barred the defense from mentioning any of Ribe's previous cases because “I don't think that's relevant.”<sup>140</sup>

The Ninth Circuit has said, with regard to *Brady*, that “a trial prosecutor's speculative prediction about the likely materiality of favorable evidence, however, should not limit the disclosure of such evidence, because it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be ‘material’ after trial.”<sup>141</sup> But not only did the trial judge in *Brown* allow the prosecutor to determine the materiality of the Ribe box in advance, he also endorsed an approach of determining the materiality of evidence in trials that do not yet exist.<sup>142</sup> It is difficult to conceive of this development as anything but prosecutors' abuse of a materiality standard run amok—perfectly poised to enable the brazen use of Mary Hong's testimony in *Lemond* without any disclosure of her testimony in *Johnson*.

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136. As the prosecutor told the trial judge in *Brown*, there was “an appellate case [*Salazar*] which basically rules that that material is not relevant in any other proceedings.” *Brown v. Cal. Dep't of Corr. & Rehab.*, No. CV 12-9126 DMG (MRW), 2018 WL 4896665, at \*3 (C.D. Cal. Mar. 29, 2018), *report and recommendation adopted*, No. CV 12-9126 DMG (MRW), 2018 WL 4870848 (C.D. Cal. Oct. 3, 2018), *aff'd*, 802 F. App'x 253 (9th Cir. 2020). This view—that Ribe's previous testimony can never be *Brady* evidence because it can never be relevant to impeaching him—seems to deviate from what the California Supreme Court was suggesting in *Salazar*: that none of the Ribe box cases were successfully argued as material to Ribe's credibility in that case.

137. *Id.* at \*11.

138. *Id.* at \*2

139. *Id.*

140. *Id.* at \*3.

141. *United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013).

142. *Brown*, 2018 WL 4896665, at \*3.

## IV. WHERE DO WE GO FROM HERE?

“There is an epidemic of *Brady* violations abroad in the land,” wrote Judge Kozinski in his dissent from the denial of rehearing en banc in *United States v. Olsen*.<sup>143</sup> “Only judges can put a stop to it.”<sup>144</sup> While this Note mainly serves to highlight the problem at hand, *Brady* and *Napue* are the product of judicial action, and (as Sharrieff Brown’s trial shows us), judicial engagement is necessary if anything is going to change.

One solution would be to extend *Smith*’s and *Thompson*’s *Napue*-based rule—that “a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime”<sup>145</sup>—to trials for *separate* crimes. *In re Sakarias* has already imported that rule to California state law.<sup>146</sup> After all, if testimony creates a fundamental unfairness in the second of two trials concerning one particular act—as Hong’s testimony would have in Lemond’s trial, if Johnson and Lemond were being tried for the same murder—then one could argue that same testimony creates the same unfairness when the defendants are tried in unrelated cases.

Another solution would be for the court to extend *Napue*’s more defendant-friendly standard of materiality to a *Brady* analysis when the *Lemond* situation should arise. Adjusting *Brady*’s standard in this way has been proposed for cases that claim both *Brady* and *Napue* violations.<sup>147</sup> The Ninth Circuit flirted with this approach in *Jackson v. Brown*, only to shy away at the last minute:

Although we must analyze *Brady* and *Napue* violations “collectively,” the difference in the materiality standards poses an analytical challenge. 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. To resolve this conflict, we first consider the *Napue* violations collectively and ask whether there is “any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.” If so, habeas relief must be granted. However, if the *Napue* errors

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143. 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, C.J., dissenting, joined by Pregerson, J., Reinhardt, J., Thomas, J., & Watford, J.).

144. *Id.*

145. *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), *rev’d on other grounds*, 523 U.S. 538 (1998).

146. 106 P.3d 931, 947 (Cal. 2008). Incidentally, the “inconsistent theories and facts” in this case arose in part from testimony given by Dr. James Ribe.

147. See Apfel, *supra* note 37, at 865 (suggesting a consideration of all relevant evidence under *Napue*’s standard when there are separate violations of *Napue* and *Brady*).

are not material standing alone, we consider all of the *Napue* and *Brady* violations collectively and ask whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding *would* have been different.”<sup>148</sup>

The *Johnson* and *Lemond* cases, however, present a more nuanced situation than a case that just alleges both *Napue* and *Brady* violations. *Lemond*—or a similarly situated “second trial” defendant—might very well have a *Brady* claim if the prosecution suppressed the fact that the expert gave irreconcilable testimony in a previous trial (*Johnson*, of course, would not; there was nothing yet to disclose at the time of his trial). That information would be valuable to impeach the witness’s credibility. But with a materiality burden so cumbersome as was imposed by the California Supreme Court in *Salazar* (that, in order for impeachment evidence to be material, the impeached witness must present the only evidence connecting the defendant to the crime), the “second trial” defendant would stand little chance. While *Lemond*’s DNA, as processed by Hong, does happen to be the only evidence connecting him to the crime, another California defendant in *Lemond*’s shoes might be so unfortunate as to have a whole second witness testify against him, leaving his *Brady* claim all but doomed.

When a witness testifies in two trials as Hong did, there *is* conduct worthy of a *Napue* violation—somewhere. If the two instances of the witness’s testimony are irreconcilable, and no new information has come to light between the two trials, then the government presented false evidence against a criminal defendant in *one of the trials*. It may be easy to determine which case has the erroneous testimony—one instance may demonstrate a clear violation of generally accepted scientific standards, while the other comports with them—and so it would be easy to determine where the *Napue* violation lies. If it were in the second trial, that defendant could make a *Napue* claim, and avail himself of that friendlier standard, without having to worry about *Brady* at all.

But if courts are in fact unsuitable for “the task of finding scientific truth,”<sup>149</sup> then a court may struggle to determine which trial contains the false evidence. Reasonable experts may disagree about which prosecutor presented false testimony, but there is still an inherent falsity when *one* expert claims to believe two contradictory conclusions at the same time. When those two cases have been prosecuted by the same attorney, or the same office,<sup>150</sup> and the prosecutor is aware of the contradiction, then he not only

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148. 513 F.3d 1057, 1076 (9th Cir. 2008).

149. NRC REPORT, *supra* note 42, at 12.

150. *Giglio* extends the obligation to disclose to prosecutors from the same office, since the office operates as an “entity.” *Giglio v. United States*, 405 U.S. 150, 154 (1972).

endorses that falsity but employs it to deprive “a defendant of liberty through a deliberate deception of court and jury”<sup>151</sup> (the very rationale for a *Napue* violation). In *Johnson* and *Lemond*, it played a part in sending at least one of two criminal defendants to prison for life. And yet, without the ability to say for certain which trial contains the false testimony, neither defendant can claim a due process violation under *Napue* as it stands now.

Therefore, since false testimony exists somewhere, but it may not be clear which defendant has the *Napue* claim, the “second trial” defendant should have his *Brady* claim considered material under the *Napue* standard, rather than the *Brady* standard. This would give the defendant a fighting chance at reversal: for example, false testimony by an expert witness has been found material under *Napue* when it provided the primary evidence contradicting the defendant’s argument,<sup>152</sup> even though there was still “substantial evidence” connecting the defendant to the crime.<sup>153</sup> Mary Hong provided the primary evidence that contradicted both Johnson’s and Lemond’s theories of the crimes for which they were tried. Under *Napue*, one of them might stand a real chance of reversal.

In light of the “Ribe box” cases, it is difficult to imagine Lemond’s *Brady* argument offering the same opportunity for success. But a defendant should not pay the price for (nor should the government reap the benefit of) the prosecution’s failure to disclose a contradiction that could sway the judgment of a jury, just because the court cannot pin down exactly where the real false statement lives.

## V. CONCLUSION

Mary Hong’s testimony shows us just why the Gordian Knott that *Brady* has become must be sliced in half. The prosecutor’s use of her testimony in Lemond’s trial—and his failure to disclose to Lemond Hong’s *Johnson* testimony—appears to offend the principles of *Berger*, appears to violate *Napue*, and *Brady*, and *Giglio*—and yet, there is a very real danger that the California Supreme Court will decide (as it did in *Salazar*) that it does not matter now, because, unless all the stars align, it *would not* have mattered *then*. If a prosecutor can engage in conduct this ethically suspect, only to stumble blindly through cracks in one due process violation after another like Mr. Magoo, the time has come for a recalibration of the standard. Hong’s testimony in Johnson’s and Lemond’s trials cannot coexist in the same universe; the fact that the defendants were tried for separate crimes, instead

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151. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

152. *United States v. Ausby*, 916 F.3d 1089, 1094-95 (D.C. Cir. 2019).

153. *Id.* at 1091.

of the same crime, should not make that inconsistency any less significant, or any less a violation of the defendant's right to a fair trial. Hiding Mary Hong's contradictory *Johnson* testimony from Lemond is a clear "corruption of the truth-seeking process," the very conduct that lies behind *Napue*'s more defendant-friendly materiality standard. So, if the unique nature of scientific opinion makes *Napue* unavailable, its standard should judiciously apply to a *Brady* analysis instead. Otherwise, another fundamental inconsistency—between the prosecutor's reliance on an expert's credibility at trial, and minimization of that credibility's importance as "immaterial" when it is challenged later on—will persist, unchecked and uncorrected.