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Criminal Law - The Mirage of Brady in Wyoming: How Will the Wyoming Supreme Court Allow a Prosecutor to Go - Beintema v. State

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CRIMINAL LAW—The Mirage of *Brady* in Wyoming: How Far Will the Wyoming Supreme Court Allow a Prosecutor to Go? *Beintema v. State*, 969 P.2d 1124 (Wyo. 1998).

INTRODUCTION

A Gillette police officer discovered approximately fifty grams of marijuana in the possession of a juvenile during an investigation into a report of a runaway.[1] The marijuana had been obtained from Darrel Huskinson, and the police subsequently obtained a search warrant for the Huskinson residence.[2] The police discovered approximately two ounces of marijuana in the bedroom of Brent and Tammy Huskinson, Darrel's parents.[3]

During the search of his home, Brent Huskinson directed police to his supplier, whom he described as "Paul B." from Colorado.[4] Along with this description, Huskinson also provided a phone number to contact his supplier.[5] During December of 1994, Paul Beintema was arrested and charged with delivery of marijuana.[6] A jury subsequently convicted Beintema of this charge on December 14, 1995.[7]

As a result of his cooperation, Huskinson was promised "that his family would not be prosecuted, and he would receive a probation recommendation in exchange for his testimony against Beintema."[8] In addition to this plea agreement, Detective Rozier of the Gillette Police Department exerted additional pressure on Huskinson to testify. This pressure was in the form of threats which, as Huskinson testified at the hearing for Beintema's Motion for New Trial, were made the day of Huskinson's arrest and the day of Beintema's trial.[9] According to Huskinson, Detective Rozier's threats focused on the effect Huskinson's lack of cooperation would have on the welfare of his family.[10] Detective Rozier indicated to Huskinson that if he cooperated by testifying, then his wife and son would not be arrested and prosecuted, and nothing would happen to his children.[11]

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1. Beintema v. State, 969 P.2d 1124, 1125 (Wyo. 1998).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* Although Beintema was charged under the 1996 Wyoming statute, § 35-7-1031(a)(iii) (Michie Supp. 1996), it should be noted that the statute has remained unchanged in the current 1999 version, § 35-7-1031(a)(iii) (LEXIS 1999).
7. *Id.* at 1125.
8. *Id.* at 1130 (Golden, J. dissenting).
9. Brief of Appellant at 2-3, Beintema v. State, 969 P.2d 1124 (Wyo. 1998) [hereinafter Brief of Appellant].
10. *Id.*
11. *Id.*

Beintema's trial counsel filed a formal request for exculpatory material on August 21, 1995.[12] Despite this request, the prosecution did not disclose the plea agreement.[13] In fact, the prosecutor specifically stated in a face-to-face conversation with defense counsel that there was no plea agreement with Huskinson.[14] Additionally, Detective Rozier's threats to Huskinson were not disclosed to the defense, but were later revealed at the hearing on Beintema's Motion for a New Trial on September 11, 1997.[15]

Following his conviction, Beintema filed an unsuccessful appeal based on ineffective assistance of counsel and references to prior bad acts by the prosecution during trial.[16] On August 23, 1997, the Wyoming Supreme Court affirmed the conviction.[17] Prior to the court's decision, Beintema filed a third motion for new trial the appeal was based on the Newly Discovered Evidence doctrine and violations of *Brady v. Maryland*.[18] This motion was denied in a decision letter by the trial judge.[19]

Beintema argued, among other things, that the prosecution suppressed material impeachment evidence against Huskinson and Detective Rozier, and thereby violated his Due Process rights by not disclosing the evidence in accordance with *Brady*.[20] Beintema argued that as a result of this non-disclosure a new trial should be granted.[21] However, the Wyoming Supreme Court disagreed with Beintema and affirmed his conviction.[22]

This case note will explain how the trial of Paul Beintema was arguably unfair. This unfairness resulted from the apparent violation of basic Due Process rights which led to an abridgment of the constitutionally mandated disclosure of evidence required by *Brady v. Maryland*. The note will initially address possible Due Process violations that resulted from the actions of the prosecution at the trial. The note will then analyze the components of a *Brady* challenge, and describe how the Wyoming Supreme Court applied the *Brady* doctrine. Specifically, this note will address the Due Process requirements of the prosecution in a criminal trial, the court's *Brady* test in its discussion of the suppressed evidence, and the application of its *Brady* test to the evidence.

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12. Brief of Appellant, *supra* note 9, at 3.
13. *Id.* at 3-4.
14. *Id.*
15. Appellant's Memorandum in Support of Petition for Writ of Habeas Corpus, Beintema v. Everett (No. 99-CV-035-J) (citing Transcript of hearing on Motion for New Trial pp. 4-6, 8-10).
16. *Beintema*, 969 P.2d at 1125. The Wyoming Supreme Court denied Beintema's first appeal and affirmed his conviction. It is Beintema's appeal from the decision letter denying the motion for a new trial based on Newly Discovered Evidence and *Brady* violations that is the subject of this note.
17. *Id.* at 1125-26.
18. *Id.*
19. *Id.* at 1126.
20. Brief of Appellant, *supra* note 9, at 33.
21. *Id.*
22. *Beintema*, 969 P.2d at 1130.

BACKGROUND

Commentators and courts have extensively discussed a prosecutor's constitutional duty to correct false testimony and to disclose exculpatory evidence to the defense.[23] Based on concepts of Due Process found in the Fifth and Fourteenth amendments to the United States Constitution, these rules, known together as the *Brady* rule, require the reversal of a defendant's conviction if the falsified or suppressed evidence is found to be material.[24]

Constitutional Due Process

Due Process concerns arising out of prosecutorial misconduct have been the focus of case law since the 1935 United States Supreme Court decision of *Mooney v. Holohan*.[25] In *Mooney* the Court addressed the problem of deliberate deception of a court and jury by the known false representation of evidence by the prosecution.[26] The United States Supreme Court held that such activity on the part of the prosecutor was deemed incompatible with the "rudimentary demands of justice."[27] The Court again addressed this problem, this time in *Napue v. Illinois*.[28] That decision focused more on allowing known false testimony to go uncorrected by the prosecution, but reached the same result: a violation of Due Process.[29] Following the decision in *Brady*, the Supreme Court again addressed the problem of prosecutorial misconduct in *Giglio v. United States*.[30] *Giglio,* containing facts very similar to *Beintema*, focused on the reliability of witness testimony and its effect on the jury.[31] The Court stated that "'when the reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of disclosure]."[32] As a result, the United States Supreme Court determined that a new trial is required if "the false testimony could . . in any reasonable likelihood have affected the judgment of the jury."[33] Therefore, the rule from *Giglio* is that when there is evidence relevant to the credibility of a witness, a jury is entitled to know about it.[34]

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23. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C.L. REV. 693, 696 (1987).
24. *Id.*
25. 294 U.S. 103 (1935).
26. *Id.*
27. *Id.* at 112.
28. 360 U.S. 264 (1959).
29. *Id.*
30. 405 U.S. 150 (1972).
31. *Id.*
32. *Id.* at 154 (quoting *Napue*, 360 U.S. at 269).
33. *Id.* (quoting *Napue*, 360 U.S. at 271).
34. *Id.* at 155.

Ethical Obligations

The obligations of the prosecutor do not end with United States Supreme Court case law however. The prosecutor who fails to disclose exculpatory evidence, fails to correct perjured testimony, or makes misrepresentations to the court may also violate numerous ethical rules.[35] The "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action" is established in the Disciplinary Rules of the Model Code of Professional Responsibility.[36] Similarly, the Model Rules of Professional Conduct describe violations of conduct which can result in various forms of disciplinary action.[37]

The Model Code of Professional Responsibility Disciplinary Rule 7-102(A)(4) states that a lawyer shall not "knowingly use perjured testimony or false evidence."[38] Likewise, under Model Rule 3.3(a)(4), a lawyer cannot "offer evidence that the lawyer knows to be false."[39] The state of Wyoming has adopted the exact language concerning this issue in its own Rule 3.3(a)(4).[40] An additional burden is placed on the prosecutor by the Canons of Professional Ethics. Canon 29 states that "counsel upon the trial of a cause in which perjury has been committed owe it to the profession and the public to bring the matter to the knowledge of the prosecuting authorities."[41] A prosecutor will also violate Disciplinary Rule 7-102(A)(5) and Model Rule 3.3(a)(1) if he argues false evidence to a judge or jury.[42] Wyoming Rule 3.3(a)(1) likewise adopts this language regarding arguing false evidence to a court when it states a lawyer may not knowingly "make a false statement of material fact or law to a tribunal."[43]

The ethical obligations of the prosecutor regarding the suppression or nondisclosure of evidence are also addressed by the various rules of conduct. Model Rule 3.8, as well as Wyoming Rule 3.8, requires the prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense."[44] The Model Code mandates similar requirements of

35. Rosen, *supra* note 23, at 712.
36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1983).
37. MODEL RULES OF PROFESSIONAL CONDUCT, Scope, cmt. 5 (1983) (amended 1998).
38. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1983).
39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983) (amended 1998).
40. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (LEXIS 1999).
41. CANONS OF PROFESSIONAL ETHICS Canon 29 (1965); *see also* STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 3-5.6(a) (1986) (amended 1992) (relating to the prosecutor's obligation regarding the presentation of false testimony and the suppression of other evidence).
42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1983). MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1983) (amended 1998).
43. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (LEXIS 1999).
44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1983) (amended 1998). WYOMING RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (LEXIS 1999).

the prosecutor. Disciplinary Rule 7-102(A)(3) requires that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."[45] Similarly, Disciplinary Rule 7-109(A) requires that a "lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."[46] These ethical obligations imposed by the modern ethical codes are somewhat different from the Due Process requirements.[47] The difference concerns the standard of materiality. That standard is most notably advanced by the United States Supreme Court in *Brady v. Maryland*[48] and its progeny.

Brady v. Maryland

In 1963, the Supreme Court of the United States handed down *Brady v. Maryland*, which became a "landmark decision" regarding disclosure of exculpatory evidence by the prosecution.[49] This case was the result of the conviction of John Brady and his accomplice, Boblit, for murder.[50] The issue was the suppression of an admission by Boblit to the police that he had committed the crime, despite defense requests for such information.[51] Although Brady admitted participating in the crime, he insisted that Boblit had committed the actual murder.[52] Because of the suppression of the evidence, Brady was unable to challenge the prosecution's claim that he in fact committed the crime.[53] The Supreme Court held that the prosecution in a criminal case has a Due Process obligation under the Federal Constitution to disclose evidence which is material to a defendant's guilt or punishment, irrespective of the good faith or bad faith or the prosecution.[54]

In *United States v. Bagley*, decided in 1985, the Supreme Court expanded the scope of *Brady* in two ways.[55] First, the Court defined "material" to mean evidence that has the effect of a reasonable probability of a different verdict, which is one sufficient to "undermine the confidence in the outcome of the trial."[56] This standard was a departure from the Supreme

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1983).
46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(A) (1983).
47. Rosen, *supra* note 23, at 714.
48. Brady v. Maryland, 373 U.S. 83 (1963).
49. Robert L. Widener, Note, *The Prosecutorial Duty to Disclose Exculpatory Information*, 34 S.C.L. REV. 67 (1982).
50. *Brady*, 373 U.S. at 84.
51. *Id.*
52. *Id.*
53. *Id.* The evidence that was suppressed in *Brady* was a statement made by Boblit in which he admitted to the killing. Despite requests by the defense attorney, the prosecution did not disclose this specific document. However, the Court determined that the evidence did not relate to the guilt of the Brady, but did relate to his punishment. Consequently, the rule advanced by the Court includes the phrase "evidence is material whether to guilt *or to punishment*." Brady v. Maryland, 373 U.S. 83, 87 (1963) (emphasis added).
54. Widener, *supra* note 49, at 84.
55. 473 U.S. 667 (1985).
56. *Id.* at 678.

Court's decision in *United States v. Agurs*.[57] The Court eliminated the sliding scale of materiality found in *Agurs* that was dependent upon the nature of the request by the defense.[58] Second, the *Bagley* Court disavowed any difference between exculpatory and impeachment evidence.[59] As a result, the prosecution is now required to disclose material impeachment evidence as well as material exculpatory evidence.[60]

The current state of the *Brady* disclosure doctrine is stated in the 1995 United States Supreme Court decision of *Kyles v. Whitley*.[61] This decision concisely states the doctrine as one that creates an affirmative duty on the part of the prosecution to disclose material exculpatory and impeachment evidence.[62] It additionally states the manner in which a reviewing court should address a *Brady* challenge. The initial test is whether in the absence of the evidence, the defendant has received a fair trial.[63] A fair trial is understood to be a trial resulting in a verdict worthy of confidence.[64] Additionally, a trial court is to review undisclosed evidence collectively, not item-by-item, to determine the materiality of the evidence in relation to the trial.[65]

The Wyoming Supreme Court has been confronted with numerous *Brady* claims.[66] The court first acknowledged the *Brady* doctrine in the

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57. 427 U.S. 97 (1976).

58. *Bagley*, 473 U.S at 682. In *Agurs*, the Supreme Court determined that the level of materiality depended on the circumstances of the suppression. If the conviction was obtained through the use of perjured testimony, then a reversal was in order if there was a reasonable likelihood that the false testimony could have affected the jury. If the conviction was obtained through the suppression of exculpatory evidence in the face of a specific request, then materiality would be measured by whether the suppressed evidence could have affected the outcome of the jury. If however only a general request for "Brady evidence" was made, or if no request at all was made, then the standard to be applied was whether the suppressed evidence created a reasonable doubt where one did not otherwise exist. *Agurs*, 427 U.S. at 103-07.

59. *Bagley*, 473 U.S. at 676. For clarification purposes, exculpatory evidence is that which can clear or tend to clear a defendant of guilt or fault. On the other hand, impeachment evidence does not address the defendant's guilt directly, but rather is an attempt to discredit a witness by calling into question the believability of the witness.

60. *Bagley*, 473 U.S. at 676.

61. 514 U.S. 419 (1995).

62. *Id.* at 434.

63. *Id.*

64. *Id.*

65. *Id.* at 437.

66. Since the adoption of the *Brady* doctrine in 1977, there have been thirty-one references to *Brady* by the Wyoming Supreme Court as of the decision in *Beintema*. It is worth noting that in twenty-one years since the adoption of *Brady*, the Wyoming Supreme Court had never reversed a conviction based on a *Brady* claim. Rodriguez v. State, 962 P.2d 141 (Wyo. 1998); Spencer v. State, 925 P.2d 994 (Wyo. 1996); Kerns v. State, 920 P.2d 632 (Wyo. 1996); Relish v. State, 860 P.2d 455 (Wyo. 1993); Roderick v. State, 858 P.2d 538 (Wyo. 1993); Young v. State, 849 P.2d 754 (Wyo. 1993); Haworth v. State, 840 P.2d 912 (Wyo. 1992); Haworth v. State, 1992 Wyo. Lexis 151; Keene v. State, 835 P.2d 341 (Wyo. 1992); Phillips v. State, 835 P.2d 1062 (Wyo. 1992); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); Jones v. State, 813 P.2d 629 (Wyo. 1991); Lacey v. State, 803 P.2d 1364 (Wyo. 1990); Hopkinson v. State, 798 P.2d 1186 (Wyo. 1990); Gale v. State, 792 P.2d 570 (Wyo. 1990); Story v. State, 788 P.2d 617 (Wyo. 1990); Stephens v. State, 774 P.2d 60 (Wyo. 1989); Pote v. State, 733 P.2d 1018 (Wyo. 1987); Haselhuhn v. State, 727 P.2d 280 (Wyo. 1986); Pellatz v. State, 711 P.2d 1138 (Wyo. 1986); Wilde v.

1977 decision of *Dodge v. State*.[67] Although *Brady* has officially been a part of Wyoming jurisprudence for twenty-two years, the Wyoming Supreme Court has never reversed a conviction based on a claim of *Brady* violations.[68]

PRINCIPAL CASE

The essence of *Beintema* is nondisclosure of evidence due to prosecutorial misconduct. The Wyoming Supreme Court dismissed both of Beintema's claims requesting a new trial. The court determined that the evidence in question did not amount to newly discovered evidence under *Barnes v. State* [69] and *Opie v. State*.[70] The Wyoming Supreme Court then reasoned that the suppressed evidence of both the plea agreement between the prosecution and Huskinson, as well as the threats made by Detective Rozier, were not material to either Beintema's guilt or punishment.[71] The court's explanation simply stated "[w]e do not need to determine whether the prosecution improperly suppressed the evidence in this case because Beintema has not shown that the evidence in question was material to his guilt or punishment."[72] The court gave no additional support for this conclusion. The Wyoming Supreme Court upheld Beintema's conviction in a three to two decision.[73]

The Wyoming Supreme Court indicated that it had decided the case on its particular facts.[74] In doing so, it acknowledged the very heart of the issue of the case when it stated "[w]e do not mean to suggest that we, in any way, condone prosecutors suppressing evidence. The practicing bar may rest

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State, 706 P.2d 251 (Wyo. 1985); State ex rel. Hopkinson v. District Court, 696 P.2d 54 (Wyo. 1985); Pote v. State, 695 P.2d 617 (Wyo. 1985); Wheeler v. State, 691 P.2d 599 (Wyo. 1984); Hopkinson v. State, 679 P.2d 1008 (Wyo. 1984); In re GP, 679 P.2d 976 (Wyo. 1984); Gee v. State, 662 P.2d 103 (Wyo. 1983); Fitzgerald v. State, 601 P.2d 1015 (Wyo. 1979); Johnson v. State, 592 P.2d 285 (Wyo. 1979); Jones v. State, 568 P.2d 837 (Wyo. 1977); Dodge v. State, 562 P.2d 303 (Wyo. 1977).

67. 562 P.2d 303 (Wyo. 1977).

68. See *supra* note 66.

69. 858 P.2d 522 (Wyo. 1993). The Wyoming Supreme Court determined that Beintema's requested evidence did not qualify under the Newly Discovered Evidence rule as set out in *Barnes*. The factors to be used in a claim of Newly Discovered Evidence are (1) the defendant did not become aware of the new evidence until after trial; (2) it was not because of a lack of due diligence that the new evidence did not come to light sooner; (3) the evidence is so material that it would probably produce a different verdict; and (4) the evidence in not cumulative. *Barnes*, 858 P.2d at 536. It is important to note that although not the focus of this note, the Newly Discovered Evidence doctrine *did* play an part in the court's decision. In its conclusion that there was no Brady violation, the court applied a factor of the Newly Discovered Evidence doctrine. The court concluded that the evidence of Detective Rozier's threats was *cumulative* to evidence already in existence. Beintema v. State, 969 P.2d 1124, 1129 (1998).

70. 422 P.2d 84 (Wyo. 1967).

71. *Beintema*, 969 P.2d at 1130.

72. *Id.* at 1129.

73. *Id.* at 1130.

74. *Id.*

assured that the Brady rule is alive and well in Wyoming and that this Court will enforce it in a *proper* case."[75]

The dissent, authored by Justice Golden and joined by Chief Justice Lehman, acknowledged misconduct on the part of the prosecution in the case and stated its consequences. "[It] produced the desired result of a conviction in a weak case for charges based solely upon the testimony of a witness who the jury did not know had a possible interest in testifying falsely against Beintema in order to protect his family and his liberty."[76] Justice Golden also took issue with the conduct of the prosecution in the case. His dissent notes that a fundamental question of the case should have been "whether the prosecutor's conduct in making a false statement to the jury and in allowing his primary witness to make a false statement to the jury requires a new trial."[77]

ANALYSIS

In *Beintema* the Wyoming Supreme Court missed an opportunity to properly apply the well-founded *Brady* rule. In its decision, the Wyoming Supreme Court held that misrepresentation by the prosecutor regarding an existing plea agreement, as well as allowing the primary witness to allegedly commit perjury, was not necessarily misconduct resulting in a violation of Due Process. As a result, the court held that, under the facts of *Beintema*, the evidence of the plea agreement between the State and its primary testifying witness, as well as threats made to that witness by police were not material impeachment evidence required to be disclosed under *Brady*.[78]

There are essentially three points to the *Beintema* decision. The first point deals with the Due Process and ethical questions raised by the prosecution's conduct at the trial. The second is the Wyoming Supreme Court's *Brady* test in its discussion of the suppressed evidence, and the third point is the court's application of its *Brady* test to the evidence.

Prosecutorial Misconduct and Due Process Violations in Beintema

The place to begin the analysis of *Beintema* is the apparent misconduct by the prosecutor in the trial. It appears that the prosecution was allowed to engage in misconduct in the form of making false statements to the jury and in allowing a witness to testify falsely without bringing the perjury to the attention of the court. In its decision, the Wyoming Supreme Court ostensibly sanctioned this conduct.

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75. *Id.* (emphasis added).
76. *Beintema*, 969 P.2d at 1130 (Golden, J. dissenting) (emphasis added).
77. *Id.*
78. *Id.* at 1130.

> It is well established constitutional law that when a prosecutor makes false statements or knowingly allows a witness to make false statements, a due process violation has occurred, a fair trial has been denied if the jury's judgment was affected, and the defendant is entitled to a new trial.[79]

This brief statement by Justice Golden in his dissent is an excellent description of prosecutorial misconduct and its Due Process consequences.

The current state of law concerning prosecutorial misconduct is found in *Giglio*, which involved a plea agreement with the government's key witness.[80] The defendant was convicted based almost entirely on the testimony of this one witness. In fact, Chief Justice Burger stated as much in his opinion:

> [T]he Government's case depended almost entirely on Taliento's [the primary testifying witness] testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it.[81]

The rule that emerged from *Giglio* is a result of over sixty years of case law and is a cornerstone of Due Process protection.[82] Where the prosecution has either deliberately deceived the court through the presentation of known false evidence, or has allowed false testimony to go uncorrected, a new trial is required.[83] The prosecution manifestly violated both aspects of this standard in *Beintema*.

Initially, the prosecution violated this standard when it falsely told the jury that there was no plea agreement when in fact there was. Specifically, the prosecutor told the jury in his opening statement that Huskinson would testify "having not entered into any sort of agreement."[84] The prosecution deliberately deceived the court and the jury with this statement. In addition to this statement to the jury, the prosecution also elicited false and misleading testimony from Huskinson.[85] Huskinson testified that no plea agreement

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79. *Beintema*, 969 P.2d at 1130 (Golden, J. dissenting). *See also*, Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964) (hereinafter *Prosecutor's Constitutional Duty*). *See generally*, Victor Bass, Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972).

80. 405 U.S. 150 (1972).

81. *Id.* at 154-55.

82. *Id.* at 153-154.

83. *Id. See also*, *Prosecutor's Constitutional Duty*, *supra* note 79, at 137.

84. Brief of Appellant, *supra* note 9, at 4.

85. *Id.* at 11.

existed.[86] This elicitation violated the other aspect of *Giglio*, allowing false testimony to go uncorrected.

The standard for granting a new trial because of false testimony is enunciated in *Napue v. United States* and restated in *Giglio*. That standard requires a new trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."[87]

Applying this standard to the facts in *Beintema*, a new trial probably should have been granted as it was in *Giglio*. As stated earlier, the cases of *Giglio* and *Beintema* are remarkably similar in their facts. However, their results are diametrically opposed to one another. It would be very difficult to argue that the false testimony of Huskinson and the prosecution as to the existence of a plea agreement would not have reasonably "affected the judgment of the jury."[88] Had the prosecutor not knowingly elicited false testimony and allowed it to go uncorrected nor have knowingly made false statements to the jury, the jury could have seen Huskinson's real interest in the case. Arguably, Huskinson was not a disinterested citizen, but a man willing to do whatever it took to protect not only his liberty, but the liberty of his wife and son as well.

Ethical Considerations

Perhaps the strongest argument that can be raised regarding the conduct of the prosecution in this case is the one that was left virtually untouched by the Wyoming Supreme Court. Although clearly not an issue of law raised by Beintema on appeal, it would be hard to fault the court for publicly admonishing the prosecution for the apparent unethical behavior it exhibited at the trial. However, the Wyoming Supreme Court failed to do so.

The two most pertinent ethical rules for this situation in Wyoming would be Wyoming Rules of Professional Conduct 3.3 and 3.8. As alluded to earlier, these sections mirror the Model Rules of Professional Conduct regarding the issues of making false statements to the court and failing to disclose evidence.

It is hard to deny that the prosecution in this case violated these ethical canons during the course of the Beintema trial. It appears quite clearly that the prosecution failed to properly disclose the impeachment evidence of Huskinson's plea agreement as ethically required under Rule 3.8(d).[89]

86. *Id.*
87. Giglio v. U.S., 405 U.S. 150 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)).
88. *Id.*
89. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (LEXIS 1999).

Likewise, the prosecution violated Rule 3.3(a)[90] and Rule 3.3(d)[91] by first falsely telling the jury that no plea agreement existed between Huskinson and the State when in fact one did. Secondly, the prosecution violated 3.3(d) by offering evidence that the prosecutor knew to be false by allowing Huskinson to falsely testify to the non-existence of the plea agreement.

There is very little insight into this matter in Wyoming jurisprudence. It could be that the very reason there is no direction regarding this issue lies in the *Beintema* decision itself. Because the Wyoming Supreme Court has failed to address the issue of unethical prosecutorial conduct, the perception that the court will condone such conduct has apparently grown. Until the Wyoming Supreme Court makes an affirmative stand against this type of conduct, the problem will likely persist.

Brady Violations: The Standard for Materiality

The standard for disclosure of evidence under *Brady* would appear to be well settled and clear.[92] The prosecution in a criminal case has an affirmative duty to disclose all material exculpatory and impeachment evidence to the defense.[93] This requirement of disclosure is not a rule of discovery, however; rather it stems from constitutional Due Process.[94] Additionally, the prosecution is considered not merely a party to a suit, but the representative of a sovereign.[95] The prosecutor is to be the advocate of the State, but that advocacy is to be "tempered by an obligation of fairness."[96] As such, the prosecutor is responsible for the conduct of everyone involved in the case on the government's behalf.[97] Therefore, the prosecution is responsible for the conduct of other prosecutors, criminal psychologists, and even the police.

The touchstone of the *Brady* doctrine is materiality.[98] This is because the prosecution has only a duty to disclose exculpatory and impeachment evidence that is *material* to either the guilt or punishment of the defendant.[99] There are two components to consider when referring to *Brady*

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90. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (LEXIS 1999).
91. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (LEXIS 1999).
92. Nicholas A. Lambros, Note, *Conviction and Imprisonment Despite Nondisclosure of Evidence Favorable to the Accused by the Prosecution: Standard of Materiality Reconsidered,* 19 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 103, 104 (1993).
93. Kyles v. Whitley, 514 U.S. 419, 434, 437 (1995).
94. United States v. Bagley, 473 U.S. 667, 675 (1985). *See also, Prosecutor's Constitutional Duty, supra* note 79 (indicating that the nondisclosure of exculpatory evidence to the defense by the prosecutor is as constitutionally significant as the use of perjured testimony by the prosecutor).
95. *Bagley*, 473 U.S. at 675 n. 6 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
96. Rosen, *supra* note 23, at 695.
97. *Kyles*, 514 U.S. at 437.
98. *Bagley*, 473 U.S. at 674.
99. *Kyles*, 514 U.S. at 434.

materiality.[100] The first is the test for materiality.[101] The second is the standard by which the test for materiality is applied to the evidence in question.[102] The burden is on the defendant to show that the evidence suppressed by the prosecution is material by satisfying both components for a successful *Brady* challenge.[103]

Initially, the defendant must satisfy the test for materiality. To satisfy this component, the defendant must show that there is a "reasonable probability" of a different result.[104] He need not demonstrate by a preponderance of the evidence that the disclosure of the suppressed evidence would have resulted in his acquittal, but simply that a reasonable probability of a different verdict exists.[105] As the United States Supreme Court stated in *Kyles*, "[t]he question [of materiality] 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."[106] This is not determined by a sufficiency of the evidence test.[107] The correct test is an "Exclusion of the Evidence Test," which would focus on the effect the absent evidence would have had on the trial, not whether there was enough evidence present to convict.[108] The heart of the test is, as the Supreme Court stated in *Kyles*, whether a fair trial was afforded the defendant in the absence of the evidence.[109]

The second component of *Brady* materiality is the standard by which the test is applied to the evidence.[110] That standard can easily be considered a "Collective Evidence Standard."[111] Essentially this standard requires the test of materiality to be applied to all of the suppressed evidence collectively, not item-by-item.[112] The reviewing court is to consider all of the evidence together, not piece by piece, to determine its impact on the case.[113] Therefore, the defendant must be able to show that taking all of the evi-

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100. Brady v. Maryland, 373 U.S. 83, 87 (1963).
101. *Kyles*, 514 U.S. at 434-35.
102. *Id.*
103. *Id.* at 434.
104. *Id.*
105. *Id.*
106. *Id.* (emphasis added).
107. *Id.*
108. It should be noted that the name of this test has been developed by the author of this note and is merely used for convenience. The title of this test as used by the author has not been adopted by any court, treatise, or text.
109. *Kyles*, 514 U.S. at 434.
110. *Id.* at 436.
111. As with the "Exclusion of the Evidence Test," the name for the "Collective Evidence Standard" was also developed by the author, and is merely used for convenience. The title of this test has not been adopted by any court, treatise, or text.
112. *Kyles*, 514 U.S. at 435.
113. *Id.*

dence as a whole, the nondisclosure of the evidence is such as to put the case in a different light and thus question the credibility of the verdict.[114]

In *Beintema*, the Wyoming Supreme Court appears to have misapplied both aspects of *Brady*. The court initially applied a different test of materiality. The Wyoming Supreme Court apparently applied a "Sufficiency of the Evidence Test." However, as the United States Supreme Court stated in *Kyles*, this evidentiary test is improper.[115] The proper test would have been the Exclusion of the Evidence Test so as to determine whether Beintema received a fair trial in the absence of the evidence. However, the Wyoming Supreme Court concluded, "taking all the evidence presented at Beintema's trial into consideration, we conclude that, even if the evidence of Detective Rozier's threats were presented to the jury, *it probably would not produce a different verdict*."[116] This comment makes it appear that the Wyoming Supreme Court correctly reviewed all of the evidence in question collectively, however, this is in fact not the case. The context of this comment by the court was made solely in its discussion of the threats made by Detective Rozier, and was apparently *not* made in the context of the evidence collectively. This test is ostensibly contrary to the analysis required under *Kyles*. In fact, the United States Supreme Court specifically stated in *Kyles* that "it is not a sufficiency of the evidence test."[117] The "Exclusion of the Evidence Test" would appear to be the correct test to have been applied because the Supreme Court in *Kyles* stated that a reviewing court is to determine whether *in the absence of the evidence* a fair trial resulted.[118] As a result, it clearly appears the Wyoming Supreme Court applied the incorrect test to determine if the suppressed evidence was material to the *Beintema* decision.

Following the discussion of the plea agreement, the court next addressed the threats by Detective Rozier. Because the prosecution is responsible for the actions of everyone involved in a case on the government's behalf, it is responsible for knowing about and disclosing the evidence of the threats made by Detective Rozier. However, the facts of the case appear to indicate that the threats were never disclosed until done so by Huskinson himself at the Hearing for a New Trial on September 11, 1997, almost three years after the threats first began.[119] Just as with the analysis of the plea agreement, the Wyoming Supreme Court appears to have misapplied its *Brady* analysis with respect to the threats made by Detective Rozier.

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114. *Id.* at 437.
115. *Id.* at 434.
116. Beintema v. State, 969 P.2d 1124, 1129 (Wyo. 1998) (emphasis added).
117. *Kyles*, 514 U.S. at 434.
118. *Id.* at 436.
119. Appellant's Memorandum in Support of Petition for Writ of Habeas Corpus at 8, Beintema v. Everett (No. 99-CV-035-J) (citing Motion for a New Trial, Exhibit 7, pp. 15-16, 19).

Here, the Wyoming Supreme Court apparently misapplied the standard of materiality under *Brady*. The United States Supreme Court in *Kyles* clearly states that material evidence should be defined collectively, not item-by-item.[120] The correct standard is the "Collective Evidence Standard" to analyze the effect all of the suppressed evidence had on the trial. Therefore, the court should have reviewed the plea agreement and the threats *collectively*, not item-by-item to determine their impact on the verdict as required of a reviewing court under *Kyles* and *Brady*.[121]

Had the evidence been so reviewed, the case could likely have been put into such a different light as to question the credibility of the verdict. The prosecution's case was based almost entirely on Huskinson's testimony because it appears there simply was no other evidence against Beintema.[122] Had the evidence been reviewed collectively to determine its impact on the verdict, the evidence of the undisclosed plea agreement and threats could likely have been sufficient to question the credibility of the witness and hence the verdict.

Brady, Giglio and Beintema: A Comparison

The Wyoming Supreme Court's decision in *Beintema* appears to depart from well established federal case law on the duty of the prosecution to disclose favorable material evidence to the defense. The rule for such disclosure is well established.[123] However, the court appears to have side-stepped the rule, and instead affirmed Beintema's conviction of a drug charge based solely on the word of a witness whom the jury did not know had a substantial interest in the outcome of the case. It is clear the Wyoming Supreme Court did not simply ignore the existence of the *Brady* doctrine entirely. Justice Macy's opinion contains an ample description of the rule and how the rule should be applied.[124] However, one conclusion that can be drawn by the Wyoming Supreme Court's decision is that the court simply *did not follow the rule* in this case, leaving many questions as to its proper application for Wyoming prosecutors and defense attorneys alike.

The conviction is primarily based on the testimony of one witness. That witness has been promised a plea agreement that will allow him to escape prosecution for his own participation in the criminal scheme. The prosecution has willfully withheld the existence of the agreement from the defense. The prosecution has affirmatively stated that no plea agreement exists. Therefore, the defense does not have the information available to impeach the credibility of the witness at trial. Consequently, the defendant

120. *Kyles*, 514 U.S. at 436.
121. *Id.*
122. Beintema v. State, 969 P.2d 1124, 1130 (Wyo. 1998) (Golden, J. dissenting).
123. Lambros, *supra* note 92 at 104.
124. *Beintema*, 969 P.2d at 1129.

is convicted. After the conviction, it becomes known that the witness was not testifying merely as a concerned citizen. He was testifying to preserve his plea agreement, and therefore maintain his liberty. Had the *Brady* rule been adhered to, the court would have followed the "Collective Evidence Standard" and the "Exclusion of the Evidence Test" and reviewed the evidence collectively to determine the impact of its absence on the verdict and whether a fair trial was granted. As Justice Souter stated in *Kyles*, "the question is not whether the state would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same."[125] If after the review, the court felt that the excluded evidence would have had an impact on the jury, then a new trial should have been granted.[126] In fact, this is exactly what the United States Supreme Court did in the case of *Giglio v. United States*.[127]

In that case, the United States Supreme Court found that nondisclosure of this vital impeachment evidence was sufficient to undermine the confidence in the verdict. The facts of *Giglio* and the facts of *Beintema* are amazingly similar. What is just as amazing is that the Wyoming Supreme Court decided *Beintema* in complete contradiction to the Supreme Court's decision that Giglio was wrongfully convicted.[128]

CONCLUSION

The Wyoming Supreme Court's decision in *Beintema v. State* could represent a shift in the way federal law regarding disclosure of evidence is adhered to in Wyoming. It could be argued that the court refuses to apply this well-established doctrine of law in favor of a more streamlined approach to conducting trials. Perhaps most concerning about this case is the fact that the court failed to hold the prosecution accountable for its apparent misconduct which arguably violated a cornerstone of American criminal justice. The Wyoming Supreme Court's holding creates the possibility that even in the most obvious case, a new trial will neither be needed nor allowed. In the end, the decision in *Beintema* simply makes it not only more difficult for a defendant in Wyoming to obtain an acquittal, but for that defendant merely to receive a fair trial.

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125. *Kyles*, 514 U.S. at 453.
126. *Id. See also*, Cynthia L. Corcoran, Note, *Due Process—Prosecutors Must Disclose Exculpatory Information When the Net Effect of the Suppressed Evidence Makes It Reasonably Probable the Disclosure Would Have Produced a Different Result*—Kyles v. Whitley, *115 S. Ct. 1555 (1995)*, 26 SETON HALL L. REV. 832 (1996).
127. 405 U.S. 150 (1972).
128. *Id.*