TESTS FOR HARM IN CRIMINAL CASES: A FIX FOR BLURRED LINES

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INTRODUCTION

In 2011, Alexander Vasquez was convicted of participating in a drug conspiracy and was sentenced to serve twenty years in prison.[1] Error infected his trial: the trial court improperly allowed the jury to use against Vasquez recorded conversations between Vasquez's codefendant, Joel Perez, and Perez's wife, Marina. The jury heard Marina tell her husband that Vasquez's attorney had suggested that Perez could enter a plea and receive a better sentence but should do so

1 United States v. Vasquez, 635 F.3d 889 (7th Cir. 2011).

without implicating Vasquez.[2] Despite this error, Vasquez did not receive a new trial. Dividing 2-1, a panel of the Seventh Circuit applied the harmless error doctrine and allowed the conviction to stand. The division demonstrates that the court's approach as it applies the doctrine will determine the outcome. The majority focused only on the evidence that supported the conviction and concluded that the prosecution evidence was strong enough that the error was harmless.[3] The dissent instead focused on the role of the erroneously admitted evidence as well as weaknesses in the government's case.[4] The dissenting judge pointed out that the erroneously admitted evidence was highly prejudicial (playing a dramatic role in the end of the trial and undermining the credibility of Vasquez's attorney who then had to argue to the jury on his behalf) and that the government emphasized this evidence.[5] The dissent also noted that the jury acquitted Vasquez of one of two charges, reading this as a sign of the weakness of the case.[6]

Existing Supreme Court precedent does not clearly endorse one approach over the other, and the *Vasquez* case offered the Court the opportunity to provide guidance. Unfortunately, the Court bypassed that opportunity. Having issued a writ of certiorari, the Court dismissed the writ as improvidently granted after hearing argument in the case.[7]

The Court's dismissal of the writ in *Vasquez* has broad implications. Harm assessment tests are central to criminal procedure. A number of tests that determine whether a criminal defendant is entitled to relief require courts to assess the harm caused by a particular error or shortcoming.[8] If the court does not find the requisite degree of harm, the court will deny the defendant relief even though trial er-

2 *Id.* at 897.

3 *Id.* at 898.

4 *Id.* at 902–04.

5 *Id.* at 903.

6 *Id.*

7 Vasquez v. United States, 132 S. Ct. 1532, 1532 (2012).

8 The harmless error doctrine is first among the harm assessment tests, frequently invoked by courts to uphold convictions despite clearly established error. United States v. Pallais, 921 F.2d 684, 692 (7th Cir. 1990) (commenting that "[t]he expansive code of constitutional criminal procedure that the Supreme Court has created in the name of the Constitution is like the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defendant from obtaining any benefit from the code"); Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1055 (2005) (noting that the "significance of the doctrine has grown"); *see also* Lee E. Teitelbaum, et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147 (1983) (discussing some tests that require assessment of harm).

ror, attorney incompetence, or the suppression of favorable evidence may have tainted the process that led to the defendant's conviction.

The way in which these tests are defined and applied is critical to ensure that a criminal accused receives a fair trial and to enforce the rights guaranteed by the Constitution. Unfortunately, the tests are not well differentiated and are often applied in a manner that does not adequately protect the defendant's interest in a fair trial. Each of these rules is too often viewed in isolation or in relation to only one or two other standards on the spectrum of harm assessment. They are all defined in similar terms, and all should be considered in relation to each other. This Article argues that the courts should define the harm assessment tests with greater clarity and should ensure that they are implemented in a manner that more effectively protects defendants' right to a fair trial.

This Article focuses on six harm assessment tests that determine whether a defendant will receive relief for an identified flaw in the criminal process. The tests fall into three categories. First, three of the tests apply when the defendant establishes a specific error at trial: the plain error test, the harmless error test in instances of nonconstitutional error (*Kotteakos* test), and the harmless error test in instances of constitutional error (*Chapman* test).[9] Second, two of the tests are included in the definition of defendants' constitutional rights and apply when the defendant identifies a failing on the part of the prosecution or defense counsel: if the prosecution fails to disclose exculpatory evidence or to correct false testimony, the defendant must show materiality (a harm test) in order to establish a due process violation.[10] If the defendant alleges a violation of the right to counsel through incompetent representation, the defendant must show that the incompetence resulted in prejudice to the defendant (a harm test).[11] Finally, this Article considers motions for a new trial based on newly discovered evidence.[12] While these motions do not

9 *See infra* Part I.B, D.

10 *See infra* Part I.C.

11 Throughout the Article, I sometimes refer generically to "error." I recognize that a constitutional violation through nondisclosure of exculpatory evidence, false testimony, or incompetence of counsel is not shown unless the defendant satisfies the materiality or prejudice requirement by demonstrating harm. When discussing those constitutional claims, I use "error" as shorthand to refer to the government action (nondisclosure or allowing false testimony to stand uncorrected) or attorney incompetence.

12 For ease of terminology, this category will be referred to as motions for new trial under Rule 33. I recognize that motions for a new trial based on constitutional claims are often made under Rule 33. *See* United States v. Maldonado-Rivera, 489 F.3d 60, 66 (1st Cir. 2007) (discussing difference in standard). However, for the purposes of this Article, they will be referred to as different categories.

arise from an error in the first trial, they reflect the defendant's claim that the first trial was flawed because it was conducted in the absence of significant favorable evidence. These motions require the court to assess the significance of the newly discovered evidence to the trial and mirror the harm assessment tests.

Each of these harm assessment tests operates after the prosecution has won a conviction. The tests are crafted to assure the court that the conviction resulted from a fair (or fair enough) trial. Each standard reflects the courts' efforts to balance the interest in the finality of convictions against the defendant's interest in the enforcement of specific recognized rights and in receiving a fair trial. The administration of the harm assessment tests determines the value of the rules that protect criminal defendants and, further, whether the government or the defendant will bear the risk of the problem that occurred at trial.[13] If the courts adopt a more prosecution-friendly

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In addition, some courts have applied a more defense-friendly standard when the new trial motion rests on the discovery that false testimony was presented at trial even though the defendant cannot establish a constitutional violation. The circuits that apply a different test demand only that the defendant show that "without the false testimony, the jury might have reached a different conclusion." I have discussed this issue elsewhere and will not focus on it in this Article. *See generally* Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331 (2011).

13 Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 994 (1973). If the defendant cannot obtain a remedy because the court finds a lack of harm, the right that was violated does not protect the defendant.

Moreover, each of these inquiries opens an avenue for the appellate court to uphold a conviction without necessarily addressing the propriety of the underlying conduct, reducing guidance to other courts and to prosecutors as to what constitutes an error and what does not. *See, e.g.*, United States v. Hasting, 461 U.S. 499, 505 (1983) (holding that the Court of Appeals should not have exercised its supervisory authority to address improper prosecutorial comment on the defendants' silence because it was harmless); *see also* Strickland v. Washington, 466 U.S. 668, 697 (1984) (explaining that a court evaluating a claim of ineffective assistance need not analyze both the incompetence prong and the prejudice prong, but may resolve the case based on whichever of the two prongs is easier; specifically emphasizing that resolving the case based on lack of prejudice would relieve the court of having to "grade" counsel's performance); United States v. Manon, 608 F.3d 126, 131, 138 (1st Cir. 2010) (noting that courts need not determine whether attorney was incompetent because no prejudice flowed from the specified action); United States v. Ortiz, 474 F.3d 976, 981–82 (7th Cir. 2007) (noting that the court need not resolve the question of error because the alleged error was harmless); United States v. Resendiz-Patino, 420 F.3d 1177, 1181 (10th Cir. 2005) (avoiding question of whether evidence was hearsay by concluding admission of challenged evidence was harmless). *See generally* Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call to Presume Prejudice From Representational Absence*, 76 TEMP. L. REV. 827, 839 (2003) (discussing invitation to resolve cases based on lack of prejudice); Richard Klein, *The Constitutionalization of* In*effective Assistance of Counsel*, 58 MD. L. REV. 1433, 1466–67 (1999) (discussing reliance on prejudice analysis to reject defendants' claims without addressing competence of representation); Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1182–83 (1995) (re-

test, they increase the likelihood that a conviction infected by error will stand.[14] If the test is more defense-friendly, a conviction may be set aside even though it was not influenced by the trial problem, giving the defendant a windfall.

It is important to bear in mind that courts can make mistakes as they apply these tests. Because the prosecution has already won a conviction in these cases, the defendant faces the challenge of instilling doubt in the minds of the appellate judges, acting against the psychological forces that weigh on the side of affirming the conviction and overcoming a record that favors the government. The cases in which convicted defendants have been exonerated bear witness to some of these mistakes. In 133 of the first 200 cases in which defendants were exonerated by DNA evidence, a court had affirmed the conviction with a written explanation.[15] Moreover, in almost a third of those cases, the court applied the harmless error test and resolved it against the defendant, sometimes describing the evidence as "overwhelming" against the defendant who was later shown to be innocent.[16] In addition, both *Brady* violations and incompetence of counsel have been shown to contribute to the conviction of innocent defendants, and yet to get relief a defendant must satisfy a demanding harm assessment test.[17]

The courts should redefine the harm assessment tests to achieve greater protection of the defendant's rights, recognizing that some of the distinctions employed in discussing harm assessment are too fine to be meaningful. The courts should also provide better guidance regarding how to apply the tests. This Article prescribes an approach to achieve these goals. The Article recommends that courts reduce the number of tests, clarify the burden of proof, and recognize that the apparent strength of the government's case should not overcome a claim of harm. Further, the courts should adopt a uniform approach to applying the tests: the courts should view the evidence in

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marking on the inclination of courts to invoke harmless error to avoid addressing claims of error).

14 *See generally* Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459, 465 (2009) (lamenting the move away from federal appellate review designed to "correct[] the errors of lower courts and certify[] the quality of justice provided").

15 *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 95 (2008).

16 *See id.* at 107–08; *see also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 304 (2006) (citing a case in which the Wisconsin Court of Appeals stated that the case was not close, even though defendant had a strong alibi, and held that DNA evidence failing to link the defendant to the crime was insufficient to warrant a new trial; the defendant was ultimately exonerated).

17 *See* Garrett, *supra* note 15, at 96.

the light most favorable to the defendant, look closely at the role of the error and its impact on lay jurors, and limit the degree of deference to the trial court.

In Part I, I set out the basic definition of each of the tests. As stated, the tests require courts to draw fine distinctions concerning the impact of an identified harm on a defendant's case. In Part II, I attempt to place the tests on a spectrum based on the courts' definitions of the tests and also consider the reasons why one test should be more demanding than another. In Part III, I examine the lack of differentiation among the tests. The tests require courts to make apparently impossible distinctions. The lack of differentiation is compounded by the fact that courts vary the language of the tests, blurring the distinctions among them. As a result, tests that are ostensibly different often run together. In Part IV, I review the way in which courts apply the tests, considering the language and reasoning they employ as they apply the various tests and the lack of differentiation among the tests.[18] In Part V, I suggest methods to clarify the definition and application of these tests to provide stronger protection of the defendant's right to a fair trial.

I. THE LANGUAGE OF THE TESTS

As courts have developed harm assessment tests, they have grasped for language that will differentiate among the tests and provide meaningful guidance to future courts. This quest has not been entirely successful. Before examining that confusion, however, it is critical to try to capture the prevailing definitions. In this Part, I examine the basic definition of each test, and in Part II, I show the relationship among the tests.

A. New Trial Based on Newly Discovered Evidence (Rule 33)

The most difficult harm assessment test for the defendant to satisfy is the standard under Rule 33 of the Federal Rules of Criminal Procedure to win a new trial based on newly discovered evidence in

18 The discussion in this Article does not claim to touch on every decision that applies one of the tests covered; there are too many decisions defining and applying these tests. In order to limit the volume of decisions, the Article does not consider sentencing cases or cases in which the conviction rests on a guilty plea. Further, the Article does not delve into the voluminous state decisions but is limited in scope to federal cases. Finally, the Article does not examine the special questions of harm assessment that arise in habeas corpus cases.

the absence of a constitutional violation.[19] To win a new trial, the defendant must convince the court that the newly discovered evidence would probably produce an acquittal[20] as well as satisfy the other

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19 FED. R. CRIM. P. 33(a) provides:

> Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

For ease of terminology, this category will be referred to as motions for new trial under Rule 33. I recognize that motions for a new trial based on constitutional claims are often made under Rule 33. *See* United States v. Maldonado-Rivera, 489 F.3d 60, 66 (1st Cir. 2007) (discussing difference in standards, noting that a defendant moving for a new trial based on a *Brady* violation need only satisfy the reasonable probability test rather than showing that the evidence would probably result in acquittal). However, for the purposes of this Article, they will be referred to as different categories. *See also* LAFAVE ET AL., CRIMINAL PROCEDURE, § 24.11(c) at 1198–1200 (5th ed. 2009) (discussing the "exacting standards" that apply to a motion for new trial based on newly discovered evidence).

20 *See* United States v. Mitrione, 357 F.3d 712, 718 (7th Cir. 2004), *vacated*, Mitrione v. United States, 543 U.S. 1097 (2005) (gathering decisions from the federal circuits). *See generally* 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, §§ 582–84 (4th ed. 2011) (discussing the requirements for receiving a new trial). This probability test is sometimes referred to as the *Berry* test, acknowledging its origin in *Berry v. State*, 10 Ga. 511 (Ga. 1851). In *Berry*, considering whether the defendant was entitled to a new trial based on newly discovered evidence, the court asked whether the new evidence "would probably produce a different verdict" and also asked whether the new evidence would be "likely to change the verdict which has been rendered." *See id.* at 527–28; WRIGHT ET AL., *supra*, § 584; Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 667–68 (2005) (discussing the *Berry* test).

Some courts apply a slightly less demanding test if the new evidence reveals perjury in the prosecution case, even though there is no constitutional violation, because the prosecutors had no reason to know that the testimony at the first trial was false. Because this represents a minority position, it will not be the focus of the discussion below. *See* Poulin, *Convictions Based on Lies*, *supra* note 12, at 397–99 (discussing standard); WRIGHT ET AL., *supra*, § 585. Under the test established in *Larrison v. United States*, the defendant needs to demonstrate only that the jury might have reached a more favorable verdict in the absence of the falsity. 24 F.2d 82, 87–88 (7th Cir. 1928), *overruled by* United States v. Mitrione, 357 F.3d 712 (7th Cir. 2004); *see also* United States v. Wilson, 624 F.3d 640, 663–64 (4th Cir. 2010) (stating that the "might" test applies in cases of recantation); United States v. Willis, 257 F.3d 636, 643 (6th Cir. 2001) (holding that the standard in recantation cases is whether the jury might have reached a different result without the false testimony); United States v. Lofton, 233 F.3d 313, 318 (4th Cir. 2000) (stating that the "might" test applies to new trial requests based on the discovery that a prosecution witness testified falsely at trial); United States v. Sanchez, 969 F.2d 1409, 1413–14 (2d Cir. 1992) (holding that motions for new trial should be granted "only with great caution" after the identification of perjured testimony); United States v. Massac, 867 F.2d 174, 178–79 (3d Cir. 1989) (applying the *Larrison* test without expressly adopting it). *See generally* Medwed, *supra*, at 668–69 (discussing the test).

Concerns with the finality of convictions and the seemingly low hurdle defined by *Larrison* have persuaded many courts to reject the test out of the fear that it would lead too often to reversal. As a result, false testimony cases are usually governed by the prevailing test, requiring the defendant to establish that she would probably be acquitted in a new trial. *See, e.g.*, United States v. Gonzalez-Gonzalez, 258 F.3d 16, 20–21 (1st Cir. 2001)

three requirements of the Rule: the evidence must be newly discovered; the failure to discover the evidence at the first trial must not be due to a lack of diligence; and ordinarily the evidence must not be merely impeaching or cumulative.[21] Even if the defendant satisfies these requirements, the court has discretion to deny the motion if the court is not convinced that the interest of justice requires a new trial.[22]

B. Plain Error

Under Rule 52(b) of the Federal Rules of Criminal Procedure, a defendant who fails to preserve a claim of error at trial may nevertheless obtain relief based on plain error. The Rule provides that "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[23] The Court has construed the Rule as having several requirements[24] and places the burden on the defendant to establish those requirements.[25]

(holding that the same standard applies to claims based on unwitting government use of false testimony); United States v. Williams, 233 F.3d 592, 595 (D.C. Cir. 2000) (stating that the standard is the same in all newly discovered evidence cases and asking whether the defendant would probably be acquitted at new trial); United States v. Huddleston, 194 F.3d 214, 217 (1st Cir. 1999) (requiring the defendant to establish that she would probably be acquitted in a new trial); United States v. Stofsky, 527 F.2d 237, 245–46 (2d Cir. 1975) (rejecting more lenient standard because it would require reversal based on perjury even on minor matters); *see also* Medwed, *supra*, at 664–65, (discussing emphasis on finality); Daniel Wolf, Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925, 1930–33 (1985) (criticizing standard established in *Larrison*).

21 *See* WRIGHT ET AL., *supra* note 20, at §§ 583–84.

22 *See, e.g.*, United States v. Montilla-Rivera, 171 F.3d 37, 40 (1st Cir. 1999) (stating that ruling under Rule 33 will be reviewed for abuse of discretion); United States v. Spencer, 4 F.3d 115, 118–19 (2d Cir. 1993) (emphasizing that the trial court "must exercise 'great caution' in determining whether to grant a retrial on the ground of newly discovered evidence, and may grant the motion only 'in the most extraordinary circumstances'" and that the trial court's ruling would be reviewed only for abuse of discretion). The *Spencer* court also noted that the district court's findings of fact would stand unless they were clearly erroneous. *Spencer*, 4 F.3d at 119; *see also* WRIGHT ET AL., *supra* note 20, § 856 (stating that decisions will be reviewed for abuse of discretion).

23 FED. R. CRIM. P. 52(b). Both Rule 52(b), stating the plain error rule, and Rule 52(a), stating the harmless error requirement for non-constitutional error, use the same "substantial rights" language. *See also* FED. R. CRIM. P. 52(a).

24 *See* United States v. Olano, 507 U.S. 725, 734, 736 (1993) (opining that there must be an "error"; it must be "plain" (clear or obvious under current law); it must affect substantial rights; and it must so seriously affect the fairness, integrity, or public reputation of judicial proceedings that the court should exercise discretion to correct the error). *See generally* Edwards, *supra* note 13, at 1183–85 (discussing development of plain error test).

25 Jones v. United States, 527 U.S. 373, 394–95 (1999) ("Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually af-

A central requirement is that the defendant must establish harm. The defendant must show that the error was "prejudicial: [i]t must have affected the outcome of the district court proceedings."[26] To determine prejudice in this context, the Court invokes the reasonable probability harm assessment test that defines prejudice in claims of ineffective assistance of counsel and materiality in *Brady* cases.[27]

Under the plain error rule, however, the court is not required to grant relief even if the defendant establishes harm, but has discretion to do so.[28] The court should grant relief only if the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," and relief is necessary to avoid a miscarriage of justice.[29]

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fected his substantial rights."); *Olano*, 507 U.S. at 734 (holding that defendant has the burden of persuasion on the question of prejudice under plain error, whereas the government would have the burden to establish harmless error had the defendant objected); United States v. Monroe, 353 F.3d 1346, 1352 (11th Cir. 2003) (recognizing that defendant bears the burden to establish prejudice in plain error review). *See also* United States v. Foree, 43 F.3d 1572, 1579 (11th Cir. 1995) (applying plain error analysis to a claim of constitutional error and noting that the *Chapman* test was modified and the burden of persuasion placed on the defendant when the defendant did not object properly at trial).

26 *Olano*, 507 U.S. at 734–36; *see also* United States v. Robinson, 627 F.3d 941, 955 (4th Cir. 2010) (stating requirement); United States v. Dukagjini, 326 F.3d 45, 61 (2d Cir. 2002) (stating standard). In *Olano*, the Court declined to decide whether the phrase "'affecting substantial rights' is always synonymous with 'prejudicial,'" recognizing that some categories of error may be structural and require reversal without a showing of prejudice. *Olano*, 507 U.S. at 735. *See also* WRIGHT ET AL., *supra* note 20, § 856 ("In most claims of plain error, the outcome turns on whether or not prejudice can be demonstrated.").

27 *See* United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004) (stating test). *See also* United States v. Ebron, 683 F.3d 105, 142 (5th Cir. 2012) (stating that test is reasonable probability); Close v. United States, 679 F.3d 714, 720 (8th Cir. 2012) (pointing out that the showing required in plain error analysis to establish that an error affects the defendant's substantial rights is "virtually identical" to the showing of prejudice required to establish a constitutional violation as a result of incompetence of counsel); United States v. Gonzalez-Rodriguez, 621 F.3d 354, 363 (5th Cir. 2010) (stating that test is reasonable probability enough to undermine confidence in the outcome).

28 The plain error rule is to be employed sparingly, providing relief only "in those circumstances in which a miscarriage of justice would otherwise result." *Olano*, 507 U.S. at 736 (internal citations omitted); *see also* United States v. Young, 470 U.S. 1, 16 (1985). *See generally* WRIGHT ET AL., *supra* note 20, § 856 (explaining the plain error rule).

29 *See* United States v. Cotton, 535 U.S. 625, 631–33 (2002) (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)) (noting that the error must affect substantial rights and must also seriously affect the fairness, integrity, or public reputation of judicial proceedings and holding that error failed to meet that standard); United States v. Harris, 471 F.3d 507, 512 (3d Cir. 2006) (citing *Olano*, 507 U.S. at 734) (concluding that the alleged error would not have "affected the outcome"); United States v. Monroe, 353 F.3d 1346, 1352 (11th Cir. 2003) (emphasizing the role of discretion in plain error review). *See also* Edwards, *supra* note 13, at 1190 (noting that courts have construed this requirement as requiring reversal only when the error may have resulted in the conviction of an innocent defendant); United States v. Gandia-Maysonet, 227 F.3d 1, 5 (1st Cir. 2000) (explaining that "[t]he main practical difference between [harmless error and plain error] is that plain error requires not only an error affecting substantial rights but also a find-

By allowing a court to correct only particularly egregious errors, the plain error rule gives the court the power to avoid an unjust result without undermining the requirement that a party enter a timely objection to preserve error.[30]

C. *Incompetence of Counsel, Nondisclosure of Exculpatory Evidence, and False Testimony*

In defining violations of the Sixth Amendment through incompetence of counsel and violations of the Due Process Clause through nondisclosure of exculpatory evidence (*Brady* claims)[31] or permitting false testimony to stand, the Court has imposed a burden on the defendant to show harm. To obtain relief on grounds of counsel's incompetence, the defendant must show prejudice.[32] To establish a due process violation, the defendant must show materiality of the undisclosed evidence or false testimony.[33] If the defendant does not meet that burden, there is no constitutional error.[34] In most cases, the test for prejudice is the same as that for materiality. The standard of materiality is less demanding if the case involves false testimony.[35]

1. *Prejudice Resulting from Incompetent Counsel and Materiality of Exculpatory Evidence*

The Court has defined these constitutional violations as requiring the defendant to show harm as an element of the constitutional violation. The tests are identical, and courts sometimes use the terms in-

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ing . . . that the error has 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings'") (citation omitted) (emphasis omitted). *See generally* WRIGHT ET AL., *supra* note 20, § 856 (discussing the plain error rule).

30 *See, e.g.*, United States v. Frost, 684 F.3d 963, 972 (10th Cir. 2012); United States v. Poitra, 648 F.3d 884, 892 (8th Cir. 2011); United States v. Turner, 474 F.3d 1265, 1275–76 (11th Cir. 2007); United States v. Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005). If defense counsel's failure to raise the error at trial was due to incompetence, then the defendant may be able to obtain relief by demonstrating that the incompetence resulted in prejudice. The availability of this avenue alleviates the impact of the stringent plain error test.

31 The Court first held that nondisclosure of exculpatory evidence by the prosecution was a due process violation in *Brady v. Maryland*, 373 U.S. 83, 86 (1963). As a result, claims based on nondisclosure are frequently referred to as *Brady* claims.

32 Strickland v. Washington, 466 U.S. 668, 694 (1984) (stating standard).

33 United States v. Bagley, 473 U.S. 667, 678 (1985) (stating standard).

34 Strickler v. Greene, 527 U.S. 263, 289–90 (1999) (making it clear that the burden of establishing materiality falls on the defendant).

35 *See, e.g.*, Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008) (recognizing difference between materiality standard in false testimony cases and that in undisclosed evidence cases); United States v. Duke, 50 F.3d 571, 577–78 (8th Cir. 1995) (discussing different standards).

terchangeably.[36] The defendant must show a reasonable probability that, but for the identified problem, the outcome would have been more favorable. The Court defines a reasonable probability as one sufficient to undermine confidence in the outcome.[37]

In *Strickland v. Washington*, the Supreme Court defined the two elements necessary to establish ineffective assistance of counsel in violation of the Sixth Amendment based on the incompetence of counsel.[38] The mere failure of counsel to represent the defendant competently does not violate the defendant's rights. Instead, the defendant must also show prejudice flowing from counsel's failings. To establish prejudice, the defendant must show a reasonable probability that, but for the attorney's failings, the outcome would have been more favorable, where a reasonable probability is one sufficient to undermine confidence in the outcome.[39] In *Strickler v. Greene*, the Court explained that the reasonable probability standard was not satisfied even though the defendant had shown that the non-disclosed impeachment evidence "might have changed the outcome of the trial;" the reasonable probability test demanded a stronger showing of harm.[40]

Similarly, the prosecution may violate the defendant's right to due process if it fails to disclose exculpatory evidence.[41] To obtain relief

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36 *See, e.g.*, United States v. Higgs, 663 F.3d 726, 735 (4th Cir. 2011); Bucci v. United States, 662 F.3d 18, 38 n.20 (1st Cir. 2011).

37 *See Bagley*, 473 U.S. at 678 (defining test for materiality of non-disclosed exculpatory evidence); *Strickland*, 466 U.S. at 694 (defining test for prejudice flowing from counsel's incompetence). *See generally* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1156–68 (2005) (discussing development of prejudice and materiality tests).

38 466 U.S. at 694. The Court's standards for determining when attorney incompetence violates the Sixth Amendment have been criticized as creating such a high barrier to relief that they fail to protect criminal defendants from the failings of their lawyers. *See* Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 516–17 (2009) (criticizing the early application of *Strickland*). Moreover, the test is structured and applied in a manner that provides limited guidance as to what constitutes attorney incompetence. *Id.* at 520.

39 *Strickland*, 466 U.S. at 694; *see also* Kimmelman v. Morrison, 477 U.S. 365, 389 (1986) (discussing the *Strickland* standard); United States v. Manon, 608 F.3d 126, 131 (1st Cir. 2010) (applying the *Strickland* standard); WRIGHT ET AL., *supra* note 20, § 627 (noting that *Strickland* defined the burden of proof for a defendant alleging errors by defense counsel); Klein, *supra* note 13, at 1445–46 (discussing standard established in *Strickland*); Kelly Green, Note, *"There's Less in This Than Meets the Eye": Why* Wiggins *Doesn't Fix* Strickland *and What the Court Should Do Instead*, 29 VT. L. REV. 647, 659–68 (2005) (discussing development of the prejudice requirement).

40 *Strickler*, 527 U.S. at 289–90; *see* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 716–18 (2006) (discussing *Strickler*).

41 *See generally* WRIGHT ET AL., *supra* note 20, at § 256.

on this basis, the defendant must demonstrate not only that the government possessed and failed to turn over evidence that tended to exculpate the defendant, but also that the evidence was "material."[42] The Court adopted the *Strickland* test to define materiality: the undisclosed evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed, and a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."[43]

This test reflects the judgment that certain government interests outweigh concerns with fairness to the defendant. In nondisclosure cases, the Court applies a government-friendly harm assessment test for fear that a rule more favorable to the defendant would effectively impose a broad duty of disclosure on the government, an obligation that the Court views as too great a burden on the criminal process.[44] The Court has imposed the same requirement for a defendant seeking relief based on the incompetence of defense counsel out of concern that heightened Sixth Amendment protection would lead to interference in the relationship between the defendant and defense counsel and would render final judgments unstable.[45]

In both categories of cases, the requirement that the defendant raise a concern that is "enough to undermine confidence in the outcome" requires the defendant to raise some level of doubt regarding the defendant's guilt.[46] The First Circuit has noted that the defendant may win reversal even if there is "less than an even chance that the evidence would produce an acquittal."[47] Nevertheless, given the strong pressures on the court to uphold the conviction, this require-

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42 *Bagley*, 473 U.S. at 678 (stating requirement).

43 *See id.* at 678–82 (citation omitted) (defining standard of materiality by adopting *Strickland* test of prejudice); *see also Strickler*, 527 U.S. at 281–82 (discussing the *Brady* materiality standard); United States v. Agurs, 427 U.S. 97, 112–13 (1976) (seeking a unified standard to replace the diverse standards applied by lower courts, which included standards ranging from evidence that was merely helpful to the defense, to evidence which raised a reasonable doubt as to defendant's guilt); WRIGHT ET AL., *supra* note 20, § 586.

44 *Agurs*, 427 U.S. at 112. In *Agurs*, the Court stated:

> On the other hand, since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were error. . . . Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

Id. at 111–12.

45 *Strickland*, 466 U.S. at 690.

46 *Id.* at 694.

47 *See* Conley v. United States, 415 F.3d 183, 188 (1st Cir. 2005) (quoting United States v. Sepulveda, 15 F.3d 1216, 1220 (1st Cir. 1993)).

ment establishes a daunting barrier to a defendant seeking relief, posing an insurmountable burden in many cases.[48]

2. Materiality in False Testimony Cases

The government's failure to correct false testimony can also violate the defendant's right to due process.[49] The Court applies a more defense-friendly harm assessment test for cases in which the government permits false testimony to stand uncorrected, reflecting the concern that false testimony corrupts the truth finding process of the trial.[50] False testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[51]

D. Harmless Error

Even if the defendant can establish that error infected her trial, the conviction will be affirmed if the court concludes that the error was harmless. Federal law mandates harmless error review as a precondition for granting relief to the defendant for non-constitutional error.[52] In addition, aside from a small number of structural constitutional errors that result in automatic reversal, constitutional errors

48 *See* Gershman, *supra* note 40, at 712–15 (discussing the implementation of the materiality standard); Klein, *supra* note 13, at 1468 (arguing that the standard requires the defendant to prove innocence in order to get relief based on counsel's incompetence).

49 *See generally* WRIGHT ET AL., *supra* note 20, § 256.

50 *See* United States v. Arnold, 117 F.3d 1308, 1315 (11th Cir. 1997) (stating "[t]he standard of materiality is less stringent, however, when the prosecutor knowingly uses perjured testimony or fails to correct testimony he or she learns to be false"). *See generally* Poulin, *supra* note 12.

51 *Bagley*, 473 U.S. at 678; *Agurs*, 427 U.S. at 103–04 (citing Napue v. Illinois, 360 U.S. 264 (1959) and Giglio v. United States, 405 U.S. 150 (1972); *see also Bagley*, 473 U.S. at 681–82; United States v. Sanchez, 969 F.2d 1409, 1413–14 (2d Cir. 1992) (stating that a new trial would not be granted if "the jury probably would have acquitted in the absence of false testimony"); Poulin, *supra* note 12 (criticizing the statement of the basic rule).

52 Under FED. R. CRIM. P. 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." In the U.S. Code, harmless error is explained: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. *See generally* Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 TEX. WESLEYAN L. REV. 391, 393–96 (2011) (discussing history of harmless error rule); Edwards, *supra* note 13, at 1173–74 (discussing evolution and application of harmless error rule); Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 433–34 (2009) (discussing genesis of harmless error rule).

are also subject to harmless error review.[53] The harmless error doctrine permits courts to conserve resources and avoid pointless retrials and, in some cases, permits the court to avoid addressing the merits of the defendant's error argument altogether.[54] The applicable harm assessment test to determine harmless error depends on whether the error was constitutional or non-constitutional.[55]

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53 *See* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988) (criticizing the Court for failing to articulate a coherent rationale for determining which constitutional errors are subject to harmless error review and which are not). *See generally* WRIGHT ET AL., *supra* note 20, § 855 (discussing which errors are subject to harmless error analysis); Fairfax, *supra* note 52, at 443–44 (discussing origin of the test and Court's limitation on errors not subject to harmless error review); William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 172 (2001) (recognizing that courts limit errors that are reversible per se); Saltzburg, *supra* note 13, at 1000 (discussing genesis of harmless error tests).

In some cases, the question of whether there was a constitutional violation is not clearly distinguished from the assessment of harmless error. *See, e.g.*, United States v. Pirovolos, 844 F.2d 415, 421 (7th Cir. 1988). In *Pirovolo*s, the court considered and rejected the allegation that the prosecution's rebuttal argument violated due process but noted that it collapsed the error and the harmlessness inquiries into the single question of whether the defendant received a fair trial. *Id.* at 427 n.10. In rejecting the defendant's claim, the court noted that the evidence of guilt was overwhelming. *Id.* at 421; *see also* David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 GA. ST. U. L. REV. 417, 432–35 (2009). Professor Rossman points out that in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Court held that the defendant's absence from a view held during his trial did not violate his due process rights because the defendant had not shown "a reasonable probability that injustice had been done." Rossman, *supra*, at 433. In *Rushen v. Spain*, 464 U.S. 114 (1983) the Court cited *Snyder* as a harmless error holding, although, as Professor Rossman points out, the case did not turn on harmless error. Instead, the proof of harm was necessary to establish the error. Professor Rossman also points to the discussion in *Kentucky v. Stincer*, 482 U.S. 730 (1987). In *Stincer*, the majority held that the defendant had not shown that his exclusion from his competency hearing violated due process because he had "failed to establish that his presence at the competency hearing would have contributed to the fairness of the proceeding." *Id.* at 747 n.21. Justice Marshall complained about the resulting blurred line between whether there was a violation and whether it was harmless. *Id.* at 754.

54 *See* Neder v. United States, 527 U.S. 1, 8 (1999) (emphasizing limitations on errors not subject to harmless error analysis); Brecht v. Abrahamson, 507 U.S. 619, 636–38 (1993) (discussing role of harmless error analysis); United States v. Hasting, 461 U.S. 499, 509 (1983) (recognizing that harmless error doctrine permits courts to conserve resources); *see also* Edwards, *supra* note 13, at 1191 (discussing role of doctrine in conserving judicial resources); Fairfax, *supra* note 52, at 447 (stating that harmless error rule was prompted primarily by concerns of efficiency and finality).

55 *See generally* Edwards, *supra* note 13, at 1170–79 (discussing the development of the tests and stating that "it is hard to discern any material differences in the two standards"); Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335 (1994) (discussing the Court's various statements of harmless error rules). In some cases, the parties fail to address the type of error involved. *See, e.g.*, United States v. Jefferson, 925 F.2d 1242, 1255 n.15 (10th Cir. 1991) (noting that the parties had not addressed the issue of which standard applied). In some instances, it may not be clear which test applies. United States v. Evans, 352 F.3d 65, 69 (2d Cir. 2003)

1. Non-Constitutional Error: the Kotteakos *Test*

The test for harmlessness of non-constitutional error in federal cases, grounded in federal legislation, was established in *Kotteakos v. United States.*[56] *Kotteakos* defined the harm assessment test that is now codified in Rule 52(a) of the Federal Rules of Criminal Procedure.[57] Applying this test, the court asks whether the error had a "substantial and injurious effect or influence in determining the jury's verdict."[58] In addition, although it is sometimes said that both harmless error tests place the burden of establishing harmlessness on the government,[59] the *Kotteakos* test is sometimes applied with an unclear allocation of the burden or with the burden falling on the defendant.

2. Constitutional Error: The Chapman *Test*

The test for harmless error in cases of constitutional error is more protective of the defendant and more exacting of the government.

(noting that it is unresolved which test applies to a judge's ex parte communication with the jury); *see also* Landes & Posner, *supra* note 54, at 172 (criticizing application of the more demanding test for constitutional error); Saltzburg, *supra* note 13, at 1030 (arguing that the test should be the same for all criminal cases, regardless of the type of error).

56 328 U.S. 750 (1946); *see also* Brecht v. Abrahamson, 507 U.S. 619, 629–31 (1993) (discussing origins of test); Solomon, *supra* note 8 (discussing origins of test); WRIGHT ET AL., *supra* note 20, § 852 (discussing background of rule).

57 Rule 52(a) provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." FED. R. CRIM. P. 52(a).

58 *See, e.g.*, United States v. Lane, 474 U.S. 438, 449 (1986) (stating that "an error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict'" (citation omitted)); *see also* Fry v. Pliler, 551 U.S. 112, 122 (2007) (holding that "[s]ince the Ninth Circuit correctly applied the *Brecht* standard rather than the *Chapman* standard, we affirm the judgment below."); United States v. Powell, 334 F.3d 42, 45 (D.C. Cir. 2003) (stating the two tests); O'Neal v. McAninch, 513 U.S. 432, 436 (1995) (holding that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win"); *Brecht*, 507 U.S. at 623 ("[T]he standard for determining whether habeas relief must be granted is whether the *Doyle* error 'had substantial and injurious effect or influence in determining the jury's verdict.'" (citation omitted)); United States v. Jefferson, 925 F.2d 1242, 1253–55 (10th Cir. 1991) (discussing the two tests); United States v. Pirovolos, 844 F.2d 415, 425 (7th Cir. 1988) (setting out the two tests).

59 *See* United States v. Whitmore, 359 F.3d 609, 622 (D.C. Cir. 2004) (putting the burden on the government under both standards); United States v. Seschillie, 310 F.3d 1208, 1215 (9th Cir. 2002) (stating that the burden is on the government to establish harmlessness of non-constitutional error).

The government must convince the court beyond a reasonable doubt that the error did not contribute to the verdict.[60]

The harmless error test to be applied in instances of constitutional error is derived from *Chapman v. California*.[61] In determining the controlling test, the Court recognized and dismissed the California "overwhelming evidence" approach.[62] In *Chapman*, the Court recognized that the defendant, complaining of the error, does not shoulder the burden of showing it was harmless.[63] Instead, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[64] Because of the Court's clarity, the *Chapman* test is rarely expressed using different terminology.[65] Dilution of the protection flows from the manner in which it has been applied.[66]

II. PLACING THE TESTS ON A SPECTRUM

As noted at the outset, each of these definitions seems more straightforward than it proves to be in application. To determine the

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60 Chapman v. California, 386 U.S. 18, 24 (1967). *See generally* Saltzburg, *supra* note 13, at 1013–14 (discussing *Chapman*).

61 386 U.S. 18 (1967). *See* Mitchell, *supra* note 55, at 1341–43 (discussing test); Solomon, *supra* note 8, at 1059–60 (discussing test). Prior to *Chapman*, in *Fahy v. Connecticut*, 375 U.S. 85 (1963), the Court applied a harmless error test to the unconstitutional admission of illegally seized evidence, asking "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy*, 375 U.S. at 86–87.

62 *Chapman*, 386 U.S. at 23 (specifically rejecting the reasoning of the California court that affirmed the conviction of Chapman's codefendant). In *People v. Teale*, 404 P.2d 209, 220 (Cal. 1965), the court explained its holding:

> It clearly appears that the error . . . could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when considered with the other substantial evidence, the proof of his guilt must be deemed overwhelming.

63 *Chapman*, 386 U.S. at 24.

64 *Id.*; United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004); *see* Saltzburg, *supra* note 13, at 1012–13 (discussing test).

65 *But see* Schneble v. Florida, 405 U.S. 427, 432 (1972) (expressing the test as requiring the Court to "determine on the basis of 'our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average jury,'" and stating further that "unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required" (citations omitted)); United States v. McGee, 408 F.3d 966, 975–77 (7th Cir. 2005) (concluding that possible violation of right to confrontation was harmless because "the not-fully-impeached evidence had little or no effect on the reliability of the factfinding process at trial"); Kordenbrock v. Scroggy, 919 F.2d 1091, 1111 (6th Cir. 1990) (Kennedy, J., dissenting) (stating that "[p]roperly framed, the question is whether the outcome of the trial or conduct of the defense would have been different" in the absence of the error).

66 *See infra,* Part V. *See generally* Saltzburg, *supra* note 13, at 1015–18 (criticizing the Supreme Court's application of standard).

effect of the various harm assessment tests, we must consider how they relate to each other, locating them on a spectrum.[67] Courts that have addressed the relationships among some of these tests have not generally looked at the full spectrum of harm assessment tests. Doing so reveals the lack of differentiation among these ostensibly different tests.

The hierarchy of harm assessing tests is as follows:

- ☐ Rule 33 and plain error demand more of the defendant than all other tests
- ☐ The reasonable probability test for materiality and prejudice demands more from the defendant than false testimony materiality
- ☐ The reasonable likelihood test of materiality in false testimony cases is the same or more demanding than *Kotteakos* harmless error
- ☐ A *Kotteakos* harmless error argument is harder for the defendant to overcome than a *Chapman* harmless error argument

The harm assessment tests range from more government-friendly to more defendant-friendly. One key variable is the allocation of the burden of proof.[68] At the government-friendly end of the spectrum are the tests that impose the burden on the defendant (Rule 33 new trial motions, plain error, materiality, and prejudice). At the defendant-friendly end of the spectrum are the harmless error tests, which place the burden on the government to show lack of harm. The oth-

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67 *See* Hagos v. People, 288 P.3d 116, 120–22 (Colo. 2012) (en banc) (comparing various tests).

68 In *O'Neal v. McAninch*, the Court attempted to move away from burden of persuasion language. The Court explained:

> [W]e deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of "burden of proof." The case before us does not involve a judge who shifts a "burden" to help control the presentation of evidence at a trial, but rather involves a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, "Do I, the judge, think that the error substantially influenced the jury's decision?" than for the judge to try to put the same question in terms of proof burdens (*e.g.*, "Do I believe the party has borne its burden of showing . . . ?").

513 U.S. 432, 436–37 (1995). The Court held that in a habeas case, error is not harmless if the judge is in "grave doubt about the likely effect of an error on the jury's verdict." *Id.* at 435. The Court went on: "By 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* Even while declaring that allocation of the burden is not useful to the inquiry and suggesting that the judge should simply ask "[d]o I . . . think the error substantially influences the jury's decision?," the Court recognized that in rare cases the "record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness." *Id.* at 436–37. This language describes a failure of proof, precisely the circumstance in which the burden of persuasion most clearly comes into play: that the state has failed to meet its burden, resulting in a determination favorable to the defendant. *See* Edwards, *supra* note 13, at 1201–02 (discussing *O'Neal*).

er principal variable is the statement of the level of certainly required, whether of harm or lack of harm.

It may also be helpful to distinguish the harm assessment tests from two more government-friendly approaches.[69] First, none of the tests on which this Article focuses allow the government to show lack of harm merely by demonstrating that the conviction is supported by sufficient evidence—the baseline requirement for a constitutionally valid conviction.[70] In applying the harm assessment tests, a court cannot simply ask whether the prosecution introduced enough evidence to uphold the conviction but must assess with particularity the role the identified error played in the overall trial.[71] Second, none of these tests place on the defendant the burden of showing harm by a preponderance of the evidence; the burden is less than the preponderance standard.[72] Thus, each of these harm-assessing tests is more defendant-friendly than either the sufficiency of the evidence test or a requirement that the defendant show harm by a preponderance of the evidence.

The following discussion places the various harm assessment tests in relation to each other. First, it explains hierarchy of the tests in which the defendant bears the burden is as follows.

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69 These tests are also distinct from the most defendant-friendly approach, which requires reversal without consideration of harm for errors that are structural or create a presumption of prejudice. *See* Neder v. United States, 527 U.S. 1, 8 (1999) (discussing structural errors not subject to harmless error review); LAFAVE, ET AL, *supra* note 19, §27.6(d). These errors are not the focus of this Article.

70 To determine whether the evidence is sufficient to support a conviction, a court merely asks whether, viewing the evidence in a light favorable to the government, a reasonable jury could have found all the elements of the offense were established beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (setting baseline for constitutionally mandated sufficiency of the evidence). This test thus sets a low bar and also gives the government the benefit of all the inferences.

71 *See* Strickler v. Greene, 527 U.S. 263, 290 (1999) (holding that a materiality inquiry in case where defendant claims *Brady* violation does not turn on assessment of sufficiency of the evidence); Satterwhite v. Texas, 486 U.S. 249, 258–59 (1988) (stating the harmless error question is "not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was"); United States v. Lane, 474 U.S. 438, 449 (1986) (harmless error inquiry does not focus on sufficiency of the evidence); Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963) (noting that the harmless error inquiry is not concerned with whether sufficient evidence supports the conviction); Kotteakos v. United States, 328 U.S. 750, 765 (1946) (holding that the "[harmless error] inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error."). In oral argument in *Vasquez*, some of the Justices viewed the government's rational jury argument as tantamount to asking for a directed verdict for the government, an unsustainable position. Transcript of Oral Argument at 37-38, Vasquez v. United States, 132 S. Ct. 1532 (2012) (No. 11-199).

72 *See* United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004); Kyles v. Whitley, 514 U.S. 419, 434 (1995).

A. Rule 33 Is More Government-Friendly Than All the Other Tests.

The harm assessment test for a Rule 33 motion for a new trial based on newly discovered evidence is the most demanding of the standards, placing the burden on the defendant to show actual probability of acquittal on retrial as distinct from mere reasonable probability.[73] In *Agurs*, the Court explicitly stated that the materiality showing in nondisclosure cases was *less* demanding than the showing required by Rule 33 for a new trial based on newly discovered evidence in the absence of government culpability.[74] In addition, of course, Rule 33 imposes additional requirements on the defendant.

B. Plain Error Is More Government-Friendly Than All the Harm Assessment Tests Other Than Rule 33 Motions.

In *United States v. Dominguez Benitez*, the Court explained the difference between the plain error and harmless error standards: each requires a determination that the error had an effect on substantial rights but the plain error test places the burden on the defendant to show harm whereas the harmless error test places the burden on the government.[75] In addition, like Rule 33, the plain error test requires the defendant to satisfy additional requirements.[76]

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73 *See* United States v. Gonzalez-Gonzalez, 258 F.3d 16, 20–22 (1st Cir. 2001) (differentiating between the "actual probability" new trial standard and "reasonable probability" test that applies to *Brady* claims); United States v. Hall, 434 F. Supp. 2d 19, 21 (D. Me. 2006) ("The nature of the fourth element (commonly called the 'prejudice' requirement) depends on the reason for the newly discovered evidence."); *see also* United States v. Maldonado-Rivera, 489 F.3d 60, 66 (1st Cir. 2007) (discussing the standard that applies to new trial motion based on *Brady* violation).

74 The *Agurs* Court stated:

> On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.

United States v. Agurs, 427 U.S. 97, 111 (1976) (citations omitted); *see also* United States v. Bagley, 473 U.S. 667, 680 (1985) (summarizing the *Agurs* Court holding, which rejected the harmless error rule).

75 542 U.S. at 81–82 (explaining that the burden is on the government in harmless error inquiries and on the defendant when the issue is plain error); *see also* United States v. Minore, 292 F.3d 1109, 1118 (9th Cir. 2002) (recognizing that standards are the same but the burden of persuasion shifts). The Court also addressed the harmless error test that applies to collateral review, a topic beyond the scope of this Article. The Court explained that, on collateral review, the government can meet "the more lenient *Kotteakos* standard." *Dominguez Benitez*, 542 U.S. at 81 n.7; *see* Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (stating that the "application of the *Kotteakos* standard on collateral review" will not confuse matters for habeas courts).

76 *See supra* Part II.A.

C. *Reasonable Probability Is More Government-Friendly Than Harmless Error.*

Because the defendant bears the burden to satisfy the reasonable probability test to establish prejudice or materiality, it clearly demands more than the harmless error tests. Nevertheless, in *United States v. Dominguez Benitez*, the Court stated that the *Kotteakos* harmless error test is similar to the reasonable probability test employed to determine materiality or prejudice.[77] Thus, in nondisclosure cases and incompetent counsel cases, the standard of materiality or prejudice falls somewhere between the Rule 33 test and the test for materiality in the false testimony cases, and it is clearly more demanding than the test for non-constitutional harmless error.[78]

D. *Nondisclosure Materiality (Reasonable Probability) Is More Government-Friendly Than False Testimony Materiality.*

Locating the two materiality standards on the spectrum, the Court has made it clear that the reasonable probability materiality showing required when the defendant claims that the government committed a *Brady* violation by failing to disclose exculpatory evidence demands a higher showing from the defendant than the reasonable likelihood

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77 In *Dominguez Benitez*, the Court stated:

> In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have invoked a standard with similarities to the *Kotteakos* formulation in requiring the showing of "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different."

542 U.S. at 81–82 (citing *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.) (adopting the prejudice standard applied in cases of incompetent counsel for claims based on the government's failure to disclose exculpatory evidence).

The *Agurs* Court also emphasized that the materiality standard in a nondisclosure case is not satisfied whenever the government cannot show lack of harm under the *Kotteakos* test. Emphasizing the materiality standard, the Court explained:

> It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his "conviction is sure that the error did not influence the jury, or had but very slight effect."

427 U.S. at 111–12 (citing Kotteakos v. United States, 328 U.S. 750, 764 (1946)).

78 The *Agurs* Court also drew a distinction based on whether the defendant had specifically requested the undisclosed exculpatory evidence, but the Court abandoned that distinction in *Bagley*, 473 U.S. at 678. *See also* Hagos v. People, 288 P.3d 116, 119–20 (Colo. 2012) (explaining that the "reasonable probability" test is more difficult to satisfy than the harmless error test for non-constitutional error).

standard that applies when the defendant establishes a false testimony claim.[79]

E. False Testimony Materiality Is More Government-Friendly Than the Kotteakos *Harmless Error Test.*

The Court has stated that the harm assessment standard in false testimony cases is close, and possibly identical, to the harmless error test.[80] The difference lies in the burden of proof. The defendant clearly has the burden to establish the materiality of false testimony because materiality is a necessary element of the constitutional violation. Under *Kotteakos*, either the government has the burden to show lack of harm or neither party has the burden.[81] Either way, the harm assessment test in cases of uncorrected false testimony is close to the harmless error test but more government-friendly because the burden falls on the defendant.

F. The Kotteakos *Harmless Error Test Is More Government-Friendly Than the* Chapman *Harmless Error Test.*

The Court has firmly fixed the relationship between the two harmless error standards. The *Chapman* test for constitutional error is more defendant-friendly than the *Kotteakos* test. The *Chapman* harmless error test is the only harm assessment test that places a substantial burden (beyond a reasonable doubt) on the government.[82]

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79 *Agurs*, 427 U.S. at 112–13; *see also* Strickler v. Greene, 527 U.S. 263, 290–91 (1999) (stating that the prosecutor's closing argument supported the District Court's conclusion that "admittedly undisclosed documents were sufficiently important to establish a violation of the *Brady* rule").

80 *See Bagley*, 473 U.S. at 679–80 ("[I]t may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt."); *see also Strickler*, 527 U.S. at 298–301 (Souter, J., concurring in part and dissenting in part) (reasoning that "'reasonable likelihood' [is] synonymous with 'reasonable possibility' and thus [ought to] have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt" (citation omitted)).

81 *See* United States v. Whitmore, 359 F.3d 609, 622 (D.C. Cir. 2004) (putting burden on the government); United States v. Seschillie, 310 F.3d 1208, 1215 (9th Cir. 2002) (placingburden on the government to establish harmlessness of non-constitutional error). *See also* O'Neal v. McAninch, 513 U.S.432, 436– 42 (1995) (discussing allocation of burden). *But see* United States v. Hardy, 643 F.3d 143, 153 (6th Cir. 2011) (suggesting that burden lies on defendant); United States v. Noel, 581 F.3d 490, 503 (7th Cir. 2009) (placing burden on defendant).

82 *See supra* note 81 and accompanying text.

III. BLURRED LINES

The courts' efforts to differentiate among these tests is not entirely successful. Although it is clear that some harm assessing tests are intended to convey a more exacting standard than others, the courts do not effectively and consistently articulate or implement those differences. Two problems emerge when one examines these harm assessing tests as requiring a range of harm determinations that fall along a spectrum. First, as discussed in Section A below, the tests ask courts to draw impossibly fine distinctions. Second, as discussed in Section B, courts do not employ the terminology consistently, failing to adhere to consistent definitions of the tests.

A. Meaningless Distinctions

The lack of differentiation among the tests generates confusion and may lead courts to equate tests that are intended to be distinct. The refined terminology that the Court has developed causes the tests to run together. The Court expects its language to accomplish an impossible mission of meaningfully defining differentiated points on the spectrum even while recognizing that it does not do so effectively.[83]

Writing before the development of the prejudice and materiality tests, and discussing only the definition of harmless error, Chief Justice Roger Traynor of the California Supreme Court identified the problem of articulating a standard that was clear and struck the proper balance.[84] He identified the following as the only possible standards: more probable than not, reasonably probable, highly probable, and almost certain.[85] He rejected a test defined in terms of reasonable probability out of hand, based in part of the vagueness it

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83 *See, e.g.*, Harrington v. Richter, 131 S. Ct. 770, 792 (2011) (noting that the "difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight"); *see also* United States v. Peck, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, C.J., concurring) (noting the uncertainty present in "most cases" of "whether the reviewing court is to consider the effect of the error on the jury or predict what verdict would have been rendered in the absence of the error").

84 ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 34–35 (1970) (discussing appropriate definition of harmless error).

85 Chief Justice Traynor of the California Supreme Court reached the conclusion that harmless error should be assessed by asking whether it is highly probable that the error did not have any effect and reversing if that question could not be answered in the affirmative. *Id.* at 35–36; *see also* Gov' of Virgin Islands v. Toto, 529 F.2d 278, 284 (3rd Cir. 1976) (discussing Chief Justice Traynor's analysis).

would inject.[86] Of course, reasonable probability is precisely the harm assessing test used to resolve questions of materiality and prejudice.

Even members of the Supreme Court have noted that the tests are too numerous and the distinctions among them impossibly fine. Justice Antonin Scalia, concurring in *Dominguez Benitez*, pointed out that the Court had adopted at least four different standards—the *Chapman* "harmless beyond a reasonable doubt" standard in cases of constitutional error; the *Kotteakos* "substantial and injurious effect or influence" standard; the "even less defendant-friendly" reasonable probability standard defined in *Strickland*; and the "still yet less defendant-friendly 'more likely than not'" standard applied to new trial requests based on newly discovered evidence.[87] Arguing for a simpler scheme, Justice Scalia complained:

> Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking. That is especially so when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not factfinding, but closer to divination.[88]

He argued that "[f]or purposes of estimating what *would* have happened . . . the only serviceable standards are the traditional 'beyond a reasonable doubt' and 'more likely than not.'"[89] The adoption of a harm assessment scheme based on these familiar burdens is unlikely. Only the *Chapman* test is currently defined in these terms, placing on the government the burden of showing constitutional error was harmless beyond a reasonable doubt. The substitution of either of these standards for the language used in the other harm assessing tests would substantially increase the burden on the party allocated that burden, generally the defendant. Nevertheless, the courts should consider Justice Scalia's principal point: there are too many difficult to grasp distinctions.

Justice David Souter also commented on the problem of defining appropriate harm assessment tests. In *Strickler v. Greene*, he commented on the lack of clarity in the definition of materiality. He

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86 Chief Justice Traynor commented that "[t]he nebulous test of reasonableness is unlikely to foster uniformity either in the application of standards, should there be any, or in the pragmatic exercise of discretion." TRAYNOR, *supra* note 84, at 34–35.

87 *See* United States v. Dominguez Benitez, 542 U.S. 74, 86–87 (2004) (Scalia, J., concurring) (emphasis omitted). Justice Scalia did not recognize the separate and more defendant-friendly standard that applies to false testimony cases.

88 *Id.*; *see also* Brecht v. Abrahamson, 507 U.S. 619, 656 (1993) (O'Connor, J., dissenting) (discussing the two standards of harmless error and stating "each requires an exercise of judicial judgment that cannot be captured by the naked words of verbal formulae").

89 *Dominguez Benitez*, 542 U.S. at 87 (Scalia, J., concurring).

complained of "the unfortunate phrasing of the shorthand version [of the standard of materiality] in which the standard is customarily couched . . . [in particular] the familiar, and perhaps familiarly deceptive formulation: whether there is a 'reasonable probability' of a different outcome if the evidence withheld had been disclosed."[90] He noted the tension between this statement of the standard and the fact that the defendant does not need "to show that a different outcome would have been more likely than not with the suppressed evidence."[91] Justice Souter cautioned that "[d]espite our repeated explanation of the shorthand formulation in these words, the continued use of the term 'probability' raises an unjustifiable risk of mismisleading courts into treating it as akin to the more demanding standard, 'more likely than not.'"[92]

Justice Souter expressed his view on the source of the confusion:

> The circuitous path by which the Court came to adopt "reasonable probability" of a different result as the rule of *Brady* materiality suggests several things. First, while "reasonable possibility" or "reasonable likelihood," the *Kotteakos* standard, and "reasonable probability" express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers' reasoning, the differences among the standards are slight. Second, the gap between all three of those formulations and "more likely than not" is greater than any differences among them. Third, because of that larger gap, it is misleading in *Brady* cases to use the term "probability," which is naturally read as the cognate of "probably" and thus confused with "more likely than not."[93]

Justice Souter further suggested that "significant possibility" would better express the standard that the defendant must satisfy in nondisclosure cases.[94]

B. Non-Standard Use of Terms

Substantial confusion also pervades these tests because of the way in which courts discuss and apply them. Cases purporting to apply the same test sometimes articulate the test differently.[95] Even small

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90 Strickler v. Greene, 527 U.S. 263, 297 (1999) (Souter, J., concurring in part and dissenting in part).

91 *Id.*

92 *Id.* at 297–98.

93 *Id.* at 300 (citations omitted).

94 *Id.* at 298.

95 *See* Mitchell, *supra* note 55, at 1351–52 (discussing different definitions of and approaches to the harmless error test in instances of constitutional error and describing harmless error doctrine as being "in a state of confusion"); *see also* United States v. Hall, 434 F.3d 42 (1st Cir. 2006). In *Hall*, the court failed to distinguish among the standards. The court merely stated that it was "persuaded the disputed information, if known to [the defend-

shifts in language may ultimately impact the application of harm assessing tests, and they certainly blur the lines between the tests. When courts are confused, the defendant may be deprived of protection.

Even the Supreme Court sometimes blurs the distinctions between tests by equating tests that are actually different. In *Dominguez Benitez*, the Court equated the "reasonable likelihood" test to the "reasonable probability" test.[96] The Court also implied that the standard for materiality in false testimony cases is the same as the standard in nondisclosure cases and that it is identical to the *Kotteakos* harmless error test.[97] In addition, the Court acknowledged the confusion of the lower courts: "This [reasonable probability] standard is similar to one already applied by some Courts of Appeals, though those courts have not drawn a direct connection to *Strickland* and *Bagley*, and in some cases understood themselves to be reviewing for harmless, rather than plain, error."[98] This lack of clarity undermines the protection provided by these different sets of rules.

In some cases, courts simply get the applicable test wrong, rephrasing or misstating it. Sometimes, the court frames a test more favorable to the defendant.[99] In *United States v. Williams*, for example,

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ant], would not have affected the trial's outcome." *Id.* at 56. This conclusion is broad enough to encompass all three prejudice tests that apply to new trial motions (the reasonable likelihood test that applies to false testimony cases, the reasonable probability test that governs in nondisclosure cases, and the Rule 33 standard).

96 *Dominguez Benitez*, 542 U.S. at 81–82. The case focused on the defendant's challenge to his conviction on the grounds that the trial court had failed to comply with Rule 11 when taking the defendant's guilty plea. The Court applied plain error analysis. *See also* Harrington v. Richter, 131 S. Ct. 770, 792 (2011) (stating the *Strickland* standard of prejudice as "reasonably likely").

97 *Dominguez Benitez*, 542 U.S. at 81–82.

98 *Id.* at 82 n.8. The Court cited two decisions from the Courts of Appeals: in United States v. Martinez, 289 F.3d 1023, 1029 (7th Cir. 2002), the court applied the plain-error standard, asking "whether any Rule 11 violations would have likely affected [the defendant's] willingness to plead guilty"; in United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993) (en banc), on harmless-error review, the court asked "whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty."

99 *See, e.g.*, United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (reversing because the Second Circuit had held that the defendant was entitled to relief under the plain error test if there was "any possibility, *no matter how unlikely* that the jury could have convicted [the defendant] based exclusively on pre-enacted conduct," rather than requiring the defendant to satisfy the more demanding test); *see also* Stephenson v. Wilson, 629 F.3d 732, 737–38 (7th Cir. 2011) (dissenting from the denial of hearing en banc, three judges stated that the defendant must demonstrate "a reasonable probability that, but for his [attorney's] deficient performance," the outcome of the trial might have been different (rather than "would" have been different) and that the defendant "need only show that the likelihood of a different outcome was better than negligible"); United States v. Caracappa,

the Seventh Circuit stated that the defendant need only establish a "reasonable possibility" that the result would have been different but for his attorney's failings.[100] In *United States v. Gonzalez-Gonzalez*, the First Circuit equated the *Brady* "reasonable probability" test with the "any reasonable likelihood" test of materiality in cases of knowing use of false testimony.[101] That assertion of equivalence, which either makes the test in nondisclosure cases less demanding or the test in false testimony cases more demanding, has been echoed in later First Circuit cases citing *Gonzalez-Gonzalez*.[102]

Conversely, in other cases the court's error cuts against the defendant.[103] For example, in *United States v. Dickerson*, the Eleventh Circuit equated the materiality requirement in false testimony cases to the higher standard applied to nondisclosure violations that did not involve falsity, requiring the defendant to show the likelihood of

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614 F.3d 30, 49 (2d Cir. 2010) (stating that the defendant "did not establish that the outcome of the trial could have been different" but going on to state a reasonable probability standard); Bailey v. Rae, 339 F.3d 1107, 1118 (9th Cir. 2003) (noting that state courts had applied the wrong standard to determine materiality); Caban v. United States, 281 F.3d 778, 786 (8th Cir. 2002) (stating that "remote likelihood" does not satisfy *Strickland* test). This blurring of the distinctions and confusing use of language is also evident in state court decisions. *See, e.g.*, Hagos v. People, 288 P.3d 116, 119 (Colo. 2012) (discussing confusion and noting that the term "reasonable possibility" was picked up from a decision of the Supreme Court). Examination of state court decisions is beyond the scope of this Article.

100 616 F.3d 685, 690 (7th Cir. 2010) (holding that the defendant had not satisfied even this favorable version of the test).

101 258 F.3d 16, 21–22 (1st Cir. 2001) ("Although the Supreme Court has not described whether there is a difference between the 'reasonable likelihood' and 'reasonable probability' standards, we believe they are equivalent.") (citing Strickler v. Greene, 527 U.S. 263, 298 (1999) and WEBSTER'S THIRD NEW INTER'L DICTIONARY 1310 (1993)).

102 *See* United States v. Maldonado-Rivera, 489 F.3d 60, 68 n.4 (1st Cir. 2007) (recognizing the *Gonzalez-Gonzalez* holding that standards are identical); United States v. Casas, 425 F.3d 23, 53 (1st Cir. 2005) (treating standards as interchangeable, and citing *Gonzalez-Gonzalez*); United States v. Ramos-Gonzalez, 747 F. Supp. 2d 280, 290–91 (D.P.R. 2010) (citing *Gonzalez-Gonzalez* and equating reasonable likelihood and reasonable probability standards in false testimony claim); *see also* Shih Wei Su v. Filion, 335 F.3d 119 (2d Cir. 2003). In *Shih Wei Su*, the Second Circuit commented on the standard that applies in false testimony cases, stating it as equivalent to the harmless error test:

> [T]he Supreme Court has made clear that prejudice is readily shown in such cases, and the conviction must be set aside unless there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury."

Id. at 126–27 (citations omitted).

103 *See, e.g.*, United States v. Ford, 550 F.3d 975, 981 (10th Cir. 2008) (stating that a defendant must establish materiality by a preponderance of the evidence); United States v. Aviles-Colon, 536 F.3d 1, 19–20 (1st Cir. 2008) (noting that the trial court had applied a materiality test that imposed too great a burden on the defendant); United States v. McCoy, 410 F.3d 124, 131–32 (3d Cir. 2005) (noting that the trial court applied too demanding a standard of prejudice).

harm sufficient to undermine confidence in the verdict.[104] In *United States v. McNair*, the Eleventh Circuit again confused the requirements, stating:

> "When a government lawyer elicits false testimony that goes to a witness's credibility, we will consider it sufficiently material to warrant a new trial only when the estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." In other words, "[t]he materiality element is satisfied if the false testimony could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." The false testimony is deemed material if there is a reasonable likelihood the false testimony could have affected the judgment of the jury.[105]

Acting on its understanding of the standard in each of these cases, the Eleventh Circuit concluded that the false testimony was not material, and the defendant was therefore not entitled to relief.[106]

Courts have also varied in their statement of the test for a new trial under Rule 33. Some have framed the test as requiring that the defendant "demonstrate that the new evidence is 'likely to result in an acquittal upon retrial;'"[107] others have asked whether the new evidence "will probably result in an acquittal."[108] It has also been stated

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104 248 F.3d 1036, 1041–42 (11th Cir. 2001) ("The materiality element is satisfied if the false testimony 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'") (quoting Strickler v. Greene, 527 U.S. 263, 290 (1999)); *see also* Morris v. Ylst, 447 F.3d 735, 745–46 (9th Cir. 2006) (stating that materiality standard in false testimony cases is the same as in nondisclosure cases and concluding that defendant had not established that false testimony was material); Ventura v. Attorney Gen. of Fla., 419 F.3d 1269, 1282 (11th Cir. 2005) (discussing the Florida Supreme Court's application of the wrong standard); Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986) (holding that the trial court committed error when it required defendant to prove that correction of false testimony "probably would have resulted in acquittal"); *Ramos-Gonzalez*, 747 F. Supp. 2d at 296 (rejecting defendant's false testimony claim and failing to differentiate between the materiality standard governing false testimony claims and that governing ordinary *Brady* cases). In *Ex parte Chabot*, the court held that the harmless error standard required the defendant to establish by a preponderance of the evidence that the falsity contributed to the conviction; despite its confusion, the court granted the defendant relief. 300 S.W.3d 768, 771 (Tex. Crim. App. 2009). In other cases, however, the court's misunderstanding of the standard may lead to a negative outcome for the defendant. *See, e.g.*, *Ex parte* Fierro, 934 S.W.2d 370, 376–77 (Tex. Crim. App. 1996) (en banc) (treating false testimony in hearing on motion to suppress like other false testimony but putting burden on defendant to show harm by a preponderance).

105 605 F.3d 1152, 1208 (11th Cir. 2010) (citations omitted).

106 *Id.* at 1211.

107 United States v. Hernandez-Rodriguez, 443 F.3d 138, 146 (1st Cir. 2006).

108 United States v. Gonzalez-Gonzalez, 258 F.3d 16, 20 (1st Cir. 2001); *see also* United States v. Carmichael, 269 F. Supp. 2d 588, 598–600 (D.N.J. 2003) (stating that the new evidence need only raise a reasonable doubt and granting new trial because "there is a strong possibility that in light of this evidence at a new trial . . . the jury would acquit the defend-

that the court should not grant a new trial unless there is "a real concern that an innocent person may have been convicted,"[109] or the defendant raises a reasonable doubt as to her guilt.[110]

The harmless error test applied to non-constitutional errors also suffers from variable language. In *United States v. Colombo*, the Second Circuit not only quoted *Kotteakos*, stating that an error may be considered harmless if "our 'conviction is sure that the error did not influence the jury,'" but also quoted Chief Justice Traynor of the California Supreme Court, asking whether "it is 'highly probable' that the error did not contribute to the verdict."[111] In *United States v. Boros*, the Seventh Circuit asked "whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded," but then went on to state that the court reverses "only if [the] exclusion [of the improperly admitted evidence] would have made the jury more likely to acquit the defendant."[112] Departing from the statement of the test in *Kotteakos*, these statements appear to shift the test in favor of the prosecution.

Courts also sometimes shift the meaning of the test by interchanging words. For example, applying the harmless error test in *United States v. King*, the Seventh Circuit first quoted its earlier decision in *Pirovolos* and its use of the term "substantial":

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ant"). Wright and Welling also state that a defendant will receive a new trial if she satisfies the other criteria and "the court thinks there is a reasonable probability of an acquittal." WRIGHT ET AL., *supra* note 21, § 584.

109 United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992); *see also* United States v. Alvarez, 808 F. Supp. 1066, 1096 (S.D.N.Y. 1992) ("There must be a real concern that an innocent person may have been convicted. It is only when it appears that an injustice has been done that there is a need for a new trial in the interest of justice." (internal quotations omitted)).

110 *Carmichael*, 269 F. Supp. 2d at 598–99 (noting that evidence must raise a reasonable doubt, but need not establish innocence).

111 United States v. Colombo, 909 F.2d 711, 713 (2d Cir. 1990) (quoting United States v. Ruffin, 575 F.2d 346, 359 (2d Cir. 1978); United States v. Corey, 566 F.2d 429, 432 (2d Cir. 1977)); *see also* United States v. Mitchell, 365 F.3d 215, 252–53 (3d Cir. 2004) (quoting earlier decisions stating test as whether it is "highly probable that the error did not contribute to the judgment").

112 668 F.3d 901, 910–11 (7th Cir. 2012) (citations omitted); *see also* United States v. Pirovolos, 844 F.2d 415, 421 (7th Cir. 1988):

> In a federal criminal trial, an error in admitting evidence will be held harmless "[o]nly if 'we are convinced that 'the error did not influence the jury, or had but very slight effect,' and can say 'with fair assurance, after stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" Or, more simply, we will reverse a conviction only if the error may have had a "substantial influence" on the outcome of the case. Based on the record before us, we are confident that admission of evidence of Pirovolos's prior convictions had no substantial influence on the jury's verdict.

> [T]he next question is whether we can say "with fair assurance, after stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." As we said in *Pirovolos*, we will reverse a conviction only if the error may have had a "substantial influence" on the verdict.[113]

The court then employed the term "substantial" differently, stating that the error was harmless, as in *Pirovolos*, because the evidence of guilt was "*substantial* and largely uncontroverted, so that the jury's guilty verdict would likely have been the same even without the prejudicial information."[114] The court thus picked up the term "substantial," which was used in *Pirovolos* to define the level of influence that would make the error harmful, and instead used it to describe the amount of evidence that would render an error harmless.

The allocation of the burden of showing harm or harmlessness when applying the test in instances of non-constitutional error is also a source of confusion.[115] In *Kotteakos,* the Court acknowledged that the statute placed the burden to establish harm on the party seeking the new trial.[116] But the Court declined to fix the burden and stated that it would depend on the nature of the error.[117] Nevertheless, the

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113 897 F.2d 911, 914 (7th Cir. 1990) (citations omitted).

114 *Id.* (emphasis added).

115 *See* LAFAVE, ET AL, *supra* note 19, § 27.6(b), at 1322 ("Many state courts have adopted the *Kotteakos* standard for reviewing violations of state statutes and rules. A few courts have favored still another standard . . . ."); *see, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 647 (1993) (White, J., dissenting) (expressing view that *Kotteakos* test for harmless error places the burden on the defendant to establish prejudice); *Boros*, 668 F.3d at 911 (placing burden on the defendant, and stating that the defendant "has not established that the government's case would have been significantly less persuasive to the jury" had the evidence been excluded); United States v. Whitmore, 359 F.3d 609, 622 (D.C. Cir. 2004) (placing burden of showing harmless error on the government); United States v. Tome, 61 F.3d 1446, 1455 (10th Cir. 1995) (acknowledging that the burden of proof is on the government under *Kotteakos*); *Pirovolos*, 844 F.2d at 427 (placing burden of showing harm on the defendant). In *Boros*, the court applied a government-friendly version of the *Kotteakos* test. *Boros*, 668 F.3d at 910–11. The court stated that it would reverse "only if [the] exclusion [of the improperly admitted evidence] would have made the jury more likely to acquit." *Id.*

116 *See* Saltzburg, *supra* note14, at 1007 n.60 (suggesting that *Kotteakos* settled the question, placing the burden on the government).

117 The Court explained:

> It is also important to note that the purpose of the bill in its final form was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded." But that this burden does not extend to all errors appears from the statement that immediately follows. "The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it."

Court's framing of the test suggests that close cases must be resolved in favor of the defendant, implying that the burden is on the government: if the court entertains grave doubt about the impact, it cannot deem the error harmless.[118] Some courts explicitly place the burden on the government.[119] For example, the Seventh Circuit has explained that "[e]rrors do not merit reversal when the government proves that they are harmless" and further clarified its view of the burden of proof by stating that the "basic idea" is that "we must be convinced that the jury would have convicted even absent the error."[120] Other courts, however, place the burden on the defendant. For example, the Sixth Circuit has held that "[a]n error is harmless unless one can say, with fair assurance that the error materially affected the defendant's substantial rights—that the judgment was 'substantially swayed' by the error."[121]

Not surprisingly, trial courts also demonstrate confusion about the standards.[122] In *González-Soberal v. United States,* for example, the First Circuit noted that the trial court had applied the wrong standard to determine prejudice in an ineffective assistance of counsel case.[123] The trial court had stated that the defendant had to "demonstrate that but for the unprofessional error, he would not have been found

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Kotteakos v. United States, 328 U.S 750, 760 (1964) (citations omitted). The Court further set out the congressional intent on the burden: "[W]hether the burden of establishing that the error affected substantial rights or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is 'technical' or is such that 'its natural effect is to prejudice a litigant's substantial rights.'" *Id.* at 765.

118 *See id.* at 764–65 (noting that the court cannot hold error harmless if the error had a substantial influence or if the court "is left in grave doubt"); *see also* United States v. Evans, 352 F.3d 65, 69 (2d Cir. 2003) (stating proper standard as "a fair assurance that the verdict was not affected"); United States v. Jefferson, 925 F.2d 1242, 1255 (10th Cir. 1991) (stating standard).

119 *See* United States v. Connelly, 142 F. App'x 951, 953 (8th Cir. 2005) (determining that the burden is on the government to establish no "grave doubt" as to whether error substantially influenced outcome); *see also* WRIGHT ET AL., *supra* note 20, § 854 (stating that the burden is clearly on the prosecution).

120 United States v. Ortiz, 474 F.3d 976, 982 (7th Cir. 2007) (considering the harm caused by improperly admitting other crime evidence).

121 United States v. Hardy, 643 F.3d 143, 153 (6th Cir. 2011) (citing other Sixth Circuit decisions using the same language); *see also* United States v. Noel, 581 F.3d 490, 503 (7th Cir. 2009) (stating that, ordinarily, the burden is on the defendant to show that "an error affected his substantial rights" by demonstrating prejudice).

122 *See, e.g.*, White v. Roper, 416 F.3d 728 (8th Cir. 2005). In *White*, the trial court generated some confusion by appearing to apply a "reasonable possibility" test rather than the "reasonable probability" test in an ineffective assistance of counsel case. The Eighth Circuit concluded that the trial court had not repudiated the standard and had correctly focused on whether it lacked confidence in the verdict. *White*, 416 F.3d at 733.

123 244 F.3d 273, 277 (1st Cir. 2001).

guilty."[124] The First Circuit recognized that the trial court had imposed a higher standard than the *Strickland* reasonable probability test.[125] In *United States v. Brodie*, the D.C. Circuit noted that the trial court denied the defendant's motion for a new trial based on a *Brady* violation because "there is no evidence that 'a new trial could *probably* produce an acquittal.'"[126]

United States v. King, a trial court decision from the Eastern District of Virginia, illustrates the blurred lines.[127] In *King*, the defendant moved for a new trial after a prosecution witness recanted.[128] The District Court recognized the usual framing of the Rule 33 test (that the new evidence would probably produce an acquittal in a new trial). However, the court then restated the requirement, stating that the defendant must "show that the probability of a different result is sufficiently strong to undermine confidence in the outcome of the trial in which the conviction was obtained."[129] This language equated the harm requirement to the materiality test in nondisclosure cases, and the court supported its statement by citing a decision in which the new trial motion was based on a *Brady* violation. The court also stated that "the newly discovered evidence must be such that, on a new trial, there is a significant likelihood that the jury's verdict would be not guilty."[130] Ultimately, the District Court turned to the *Larrison* test, requiring only that "the jury might have reached a different conclusion without the false evidence," because the case involved false testimony by a government witness.[131]

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124 *Id.* (quoting United States v. González-Soberal, Civ. No. 98-1292(JAF), at 4 (D.P.R. Feb. 8, 1999)).

125 The First Circuit pointed out: "This higher standard was considered, and explicitly rejected, by the Court in *Strickland*: 'The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" *Id.* (quoting Strickland v. Washington, 466 U.S. 688, 694 (1984)); *see also* United States v. Petrillo, 821 F.2d 85, 90 (2d Cir. 1987) (reporting that the trial court blurred the distinction among the materiality tests, applying a "reasonable possibility" test in a case where the defendant alleged false testimony); United States v. Ramos-Gonzalez, 747 F. Supp. 2d 280, 290 (D.P.R. 2010) (holding that "slightly different standards apply to these two claims, but both require the defendant to show some degree of prejudice" (citation omitted)).

126 524 F.3d 259, 266 (D.C. Cir. 2008) (emphasis in original) (citation omitted).

127 232 F. Supp. 2d 636, 644–46 (E.D. Va. 2002) (discussing different tests).

128 *Id.* at 643.

129 *Id.* at 645.

130 *Id.*

131 *Id.* at 648–49.

IV. APPLYING THE TESTS

Each of these tests requires the court—generally an appellate court—to assess the presence of harm in the defendant's trial and to evaluate whether the alleged errors contributed to the conviction. If the court identifies a sufficient risk that the error harmed the defendant, the court will reverse.[132] Each application of a harm assessment test is specific to the facts of the case, so other decisions provide limited guidance.[133] Nevertheless, if the distinctions among the tests have meaning, those distinctions should be reflected in the application of the tests. They are not.

Instead, application of the harm assessment tests reveals several troubling patterns. First, courts do not appear to have consistent approaches to the tests, and, even applying identical tests, different judges adopt approaches that lead to different results.[134] Second, rather than differentiating among the application of different tests, courts adopt the same analysis regardless of the test they are applying.[135] Third, courts adopt approaches to applying all these tests that undermine protection of the defendants' rights and the fairness of the criminal process.[136]

A sampling of cases applying the different harm assessment tests reveals common themes in their analyses. Courts focus on the strength of the government's case. They summarily dismiss the impact of impeaching or cumulative information. They draw pro-government inferences and also reject or disregard defense theories that might sway a jury. Finally, they defer too readily to the trial court's assessment of harm. These approaches, which blur the lines between the tests, are found in decisions applying each of the tests

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132 Generally, the court's only option is to reverse. *See* Landes & Posner, *supra* note 53, at 164 (concluding that if the appellate court "decides not to affirm the conviction, the only remedy available to it is to reverse the trial court and remand the case for retrial").

133 *See* WRIGHT ET AL., *supra* note 20, § 854 (noting that "decisions in other cases are of only limited value").

134 *See, e.g.*, United States v. Vasquez, 635 F.3d 889, 897–900 (7th Cir. 2011) (demonstrating that the majority and the dissent, applying the same test, reached different results); *see also* Strickler v. Greene, 527 U.S. 263, 302 (1999) (Souter, J., concurring in part and dissenting in part) (pointing out that even though he applied "the same standard to the same record," he reached a different conclusion); Mitchell, *supra* note 55, at 1335–37, 1351 (discussing different definitions of and approaches to the harmless error test in instances of constitutional error and describing harmless error doctrine as being "in a state of confusion").

135 *See* discussion *infra* pp. 1024–28.

136 *See* discussion *infra* Section IV.

and threaten the protection of the defendant's rights. Each is discussed below.

A. Focusing on the Strength of the Government's Case

In applying each of these tests, courts routinely find against defendants because they conclude that the strength of the government's case overcomes any argument that the defendant was harmed. This analytical approach will often be the easiest path for the court because review is based on a record that led to the defendant's conviction. The record therefore presents the government's best evidence and arguments.

The Supreme Court has sent mixed messages on whether this focus is appropriate. On the one hand, the Court has cautioned against focusing too heavily on the defendant's guilt.[137] That view is consistent with the recognition that questions of credibility and the weight of evidence are difficult to gauge from a cold record and also recognizes the defendant's right to trial by jury and the crucial role of the jury.[138] On the other hand, several of the standards are crafted to produce reversal only if the court doubts the accuracy of the conviction, directing the court to grant relief only if the error complained of "undermines confidence in the outcome."[139] This encourages the reviewing court to focus its assessment on the question of actual guilt and, consequently, the strength of the government's case.

Regardless of the reason, courts regularly dismiss defendants' claims under each of these tests by stating that the evidence against the defendant is "overwhelming" or "compelling."[140] Applying the

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137 *See, e.g.*, Weiler v. United States, 323 U.S. 606, 611 (1945) (applying the harmless error test, the Court stated that it was "not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty"); *see also* United States v. Lane, 474 U.S. 438, 465 (1986) (Brennan, J., concurring in part and dissenting in part) (criticizing the majority's reliance on the conclusion that there was overwhelming evidence to find harmless error).

138 *See* Stacy & Dayton, *supra* note 54, at 82 (arguing "many courts have assumed virtually unreviewable discretion to evaluate the weight and credibility of the evidence" as opposed to submitting it to the jury).

139 *See supra* Section I.C.

140 *See, e.g.*, *Lane*, 474 U.S. at 450 (stating that misjoinder was harmless in light of overwhelming evidence of guilt); United States v. Valerio, 676 F.3d 237, 247 (1st Cir. 2012) (rejecting ineffective assistance of counsel claim because evidence was overwhelming); United States v. Williams, 616 F.3d 685, 690 (7th Cir. 2010) (concluding that even if the defendant succeeded in showing that his attorney's performance was deficient, his ineffective assistance claim would still fail due to overwhelming evidence of guilt); Thomas v. United States, 305 F. App'x. 587, 589 (11th Cir. 2008) (rejecting ineffective assistance claim and implying the evidence of guilt was overwhelming); United States v. Paulino, 445 F.3d 211,

Rule 33 new trial standard, courts have rejected defendants' motions because of the strength of the government's case by referring to it as strong, overwhelming, or consisting of substantial evidence.[141] Courts assessing plain error also emphasize the strength of the government's case and deny relief on the ground that the evidence against the defendant is overwhelming.[142]

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219 (2d Cir. 2006) (holding error harmless because evidence "overwhelmingly established" guilt and also referring to evidence as compelling); United States v. Boyd, 435 F.3d 316, 318 (D.C. Cir. 2006) (holding error harmless because evidence was overwhelming); United States v. Jones, 389 F.3d 753, 758 (7th Cir. 2004) (holding error harmless because evidence was overwhelming); Kiley v. United States, 260 F. Supp. 2d 248, 270 (D. Mass. 2003) (stating that the defendant could not prevail in his *Brady* claims because the evidence against him was overwhelming); *see also* Brecht v. Abrahamson, 507 U.S. 619, 639 (1993) (concluding error was harmless and noting that the evidence of guilt "was, if not overwhelming, certainly weighty"). One commentator has argued that the courts apply overwhelming evidence assessment in a number of different ways. *See* Mitchell, *supra* note 55, at 1359. Mitchell criticizes the reliance on overwhelming evidence to establish lack of harm and argues that courts apply this approach in at least five different ways:

> "Overwhelming evidence" is a vague standard that has been interpreted by courts and commentators in a variety of ways, including: (a) so much untainted evidence "that the jury would *necessarily* find the defendant guilty" on that evidence alone; (b) so much untainted evidence that "it is clear beyond a reasonable doubt that if the jury had never [been exposed to the error] its verdict would have been the same;" (c) so much untainted evidence that the average jury "would not have found the State's case significantly less persuasive" absent the error; (d) so much untainted evidence that the court "can say, with fair assurance . . . the judgment was not substantially swayed by the error;" and (e) so much untainted evidence that "there is no substantial possibility that the result would have been any different."

Id. (footnotes omitted).

141 *See, e.g.*, United States v. Robinson, 627 F.3d 941, 951 (4th Cir. 2010) (referring to the evidence on some of the counts as "overwhelming"); United States v. Casas, 425 F.3d 23, 54 (1st Cir. 2005) (holding that the defendant was not entitled to a new trial because there was "strong evidence" of the defendant's criminal involvement); United States v. Spencer, 4 F.3d 115, 119 (2d Cir. 1993) (noting that "[p]ersuasive independent evidence . . . supported the defendant's conviction" and also commenting that there was "overwhelming testimony" from a number of witnesses); *see also* United States v. Ramos-Gonzalez, 747 F. Supp. 2d 280, 290 (D.P.R. 2010) (stating that prejudice prong is difficult to satisfy "where there is a substantial amount of other evidence supporting" the defendant's conviction). In some instances, courts assert that mere sufficiency of the evidence is enough to defeat the defendant's motion for a new trial. *See, e.g.*, United States v. Saada, 212 F.3d 210, 217 (3d Cir. 2000).

142 *See, e.g.*, United States v. Cotton, 535 U.S. 625, 633 (2002) (upholding conviction because even if error affected substantial rights, the evidence was uncontroverted and overwhelming); United States v. Carrasco, 540 F.3d 43, 53 (1st Cir. 2008) (holding admission of certain confessions after previously ruling them inadmissible was not harmless error); United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (holding that any possible violation of defendant's Fifth Amendment right against self-incrimination did not constitute plain error); *see also* United States v. Littrell, 439 F.3d 875, 883 (8th Cir. 2006) (quoting an Eighth Circuit opinion stating that an "improper argument is less likely to have affected the verdict . . . when the evidence is overwhelming than in a case where the evidence is weak" but also stating that "ample evidence" supported the challenged find-

Courts rejecting ineffective assistance, nondisclosure, and false testimony claims also rely on the strength of the government's case, characterizing the evidence against the defendant as overwhelming or compelling.[143] Some courts apply even a lower standard, rejecting claims on the basis that there were "ample grounds on which the jury could have convicted [the defendant]"[144] or that there was "substantial evidence."[145] In *Gonzalez-Gonzalez*, where the defendant sought relief because the government had not corrected false testimony, the First Circuit held that the testimony was not material, pointing to "the sheer volume of evidence" of the defendant's guilt, asserting, "[t]his was not a close case," and noting that "ample evidence supports the jury's verdict."[146]

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ing (citation omitted)); United States v. Choy, 309 F.3d 602, 607 (9th Cir. 2002) (reversing for plain error where evidence was "not overwhelming"); United States v. Tellier, 83 F.3d 578, 581 (2d Cir. 1996) (reversing for plain error where there was not legally sufficient evidence against the defendant in absence of the erroneously admitted evidence); WRIGHT ET AL., *supra* note 21, § 856 ("Clearly one purpose of the plain error rule is to protect the defendant. If a serious injustice was done it should be remedied. For this purpose courts have consistently recognized that the strength or weakness of the evidence is relevant.")

143 In *Strickland v. Washington*, 466 U.S. 668, 696 (1984), the Court noted that a "weakly supported" verdict was more likely to be affected by counsel's incompetence "than one with overwhelming record support." The courts implementing these rules often rely on the strength of the government case. *See, e.g.,* United States v. Orr, 636 F.3d 944, 951 (8th Cir. 2011) (concluding incompetence was not prejudicial because evidence on the issue affected was "substantial"); United States v. Manon, 608 F.3d 126, 138 (1st Cir. 2010) (concluding that arguably erroneous admission of evidence which counsel did not prevent did not prejudice the defendant because, even without that evidence, there was "substantial evidence" of guilt); United States v. Hasan, 586 F.3d 161, 170 (2d Cir. 2009) (asserting that defendant could not establish prejudice because the case against him was overwhelming); United States v. Jackson, 345 F.3d 59, 74 (2d Cir. 2003) (noting that verdict was supported by "compelling evidence"); United States v. Gonzalez-Gonzalez, 258 F.3d 16 (1st Cir. 2001) (summarizing and commenting on the amount of evidence against the defendant); United States v. Frederick, 775 F. Supp. 2d 1146, 1160 (D.S.D. 2011) (stating evidence was substantial); *see also* United States v. Garner, 507 F.3d 399, 409 (6th Cir. 2007) (dissenting judge viewed evidence as overwhelming, while the two-judge majority rejected that characterization).

144 United States v. Del-Valle, 566 F.3d 31, 41 (1st Cir. 2009); *see also* United States v. Ramos-Gonzalez, 747 F. Supp. 2d 280, 291 (D.P.R. 2010) (citing *Del-Valle* and holding that motion for a new trial based on *Brady* should be denied if there were "ample grounds on which the jury could have convicted" the defendant).

145 United States v. Miller, 520 F.3d 504, 515 (5th Cir. 2008) (noting that "there was a substantial body of evidence" establishing guilt); United States v. Madori, 419 F.3d 159, 169 (2d Cir. 2005) (holding that *Brady* requirements had not been violated because evidence was not "material"); *see also* United States v. Brunshtein, 344 F.3d 91, 101 (2d Cir. 2003) (stating there was "abundant evidence" on the relevant issue).

146 *Gonzalez-Gonzalez*, 258 F.3d at 22–24; *see also* United States v. Spinelli, 551 F.3d 159, 166 (2d Cir. 2008) (noting that "ample other evidence supported the conviction").

Even when the courts apply more defendant-friendly harm assessment tests, they are apt to cite the strength of the government's case as a reason to conclude there was no harm. Indeed, courts also appear most comfortable resolving the harmless error question on the strength of the government's case.[147] Of course, if the government's case is weak, the error is likely to be harmful.[148] More often, however, the court concludes that the strength of the government's case mandates a finding of harmlessness.[149] Applying harmless error tests, courts use the same language as when applying other tests, often referring to the evidence as "overwhelming" or "compelling" but in some cases stating only that the evidence was "ample." Even when applying the purportedly protective *Chapman* test, courts look to the

147 *See, e.g.*, United States v. Lane, 474 U.S. 438, 450 (1986) (stating the overwhelming evidence rendered misjoinder harmless); United States v. Hardy, 643 F.3d 143, 153 (6th Cir. 2011) (addressing improperly admitted other act evidence and stating that the error is harmless "if the other record evidence of guilt is overwhelming, eliminating any fair assurance that the conviction is substantially swayed by the error"); United States v. Brown, 921 F.2d 1304, 1308 (D.C. Cir. 1991) (holding the trial court's error was harmless because of the "very substantial evidence indicating [defendant's] guilt"); United States v. Colombo, 909 F.2d 711, 714 (2d Cir. 1990) (emphasizing strength of government's case as a key factor in assessing harmlessness); *see also* United States v. Kaplan, 490 F.3d 110, 123 (2d Cir. 2007) (listing the strength of the government's case as one of four considerations in determining harmless error); WRIGHT ET AL., *supra* note 21, § 854 (stating that the strength of government case is single most important factor); Edwards, *supra* note 13, at 1170 (noting tendency of judges to invoke harmless error doctrine to affirm where proof of defendant's guilt is strong); Teitelbaum, et al, *supra* note 8, at 1187–89 (discussing the role of the strength of the government's case in harmless error analysis). *But see Miller*, 673 F.3d at 701 (stating strength of government's case is not the "sole relevant factor").

148 *See, e.g.*, *Miller*, 673 F.3d at 701 (rejecting the government's argument that the evidence was overwhelming and finding harm); *Colombo*, 909 F.2d at 714 (reaching the conclusion that the error was not harmless, the court stressed that the evidence against the defendant "passed the sufficiency-of-the evidence test by a 'hair's breadth'").

149 *See, e.g.*, United States v. Stubblefield, 643 F.3d 291, 297 (D.C. Cir. 2011) (concluding that admission of other act evidence was harmless and summarizing government's evidence); United States v. Boros, 668 F.3d 901, 912 (7th Cir. 2012) (characterizing government evidence as "compelling"); United States v. Kaplan, 490 F.3d 110, 128 (2d Cir. 2007) (concluding error was harmless because "there was overwhelming evidence"); United States v. Mitchell, 31 F.3d 628, 632 (8th Cir. 1994) (affirming because there was "ample competent evidence" supporting conviction); United States v. King, 897 F.2d 911, 915 (7th Cir. 1990) (stating that the evidence of guilt was "more than overwhelming"); United States v. Pirovolos, 844 F.2d 415, 421 (7th Cir. 1988) (concluding that error was harmless because "the evidence against [the defendant]'s self-defense argument was more than overwhelming"); *see also* United States v. Hardy, 643 F.3d 143, 153 (6th Cir. 2011) (noting that the question of harmlessness generally turns on whether the other evidence of guilt was overwhelming); United States v. Powell, 334 F.3d 42, 45–46 (D.C. Cir. 2003) (noting that the evidence against the defendant "was strong, although not overwhelming" but concluding error was harmless); WRIGHT ET AL., *supra* note 21, § 854 (stating that "error may be more freely disregarded if the evidence of defendant's guilt was overwhelming").

strength of the government's case and assert overwhelming evidence of guilt as a basis for concluding a constitutional error was harmless.[150]

B. Dismissing Claims as Based on Impeaching or Cumulative Evidence

Under each of the harm assessment tests, courts also reject defendants' claims on the ground that the evidence involved was merely impeaching or cumulative. Courts often state that, if new evidence is merely impeaching or cumulative, it will not be sufficient to win a new trial.[151] When considering newly discovered impeachment evi-

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150 *See, e.g.*, United States v. McGee, 408 F.3d 966, 975–77 (7th Cir. 2005) (concluding that the strength of government's case rendered error harmless); *see also* Kordenbrock v. Scroggy, 919 F.2d 1091, 1112 (6th Cir. 1990) (en banc) (Kennedy, J., dissenting) (describing the evidence as overwhelming and viewing evidentiary value of the improperly admitted evidence as equivocal).

In *Chapman*, the Court specifically rejected the overwhelming evidence approach, but in later cases, the Court framed the test less favorably and invited reliance on the strength of the government's case. In *Harrington v. California*, 395 U.S. 250, 254 (1969), the majority invoked overwhelming evidence reasoning and found the error to be harmless. The dissenting Justices in *Harrington* argued that, by relying on the strength of the government's case, the decision effectively overruled *Chapman*. *Id.* at 255–56. The Court's acceptance of government arguments based on overwhelming evidence of guilt has made the *Chapman* test more government-friendly in its application than its statement of strong protection would suggest. *See, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (emphasizing the strength of the government's case); United States v. Hasting, 461 U.S. 499, 511–12 (1983) (pointing to "overwhelming evidence" and holding error harmless); Brown v. United States, 411 U.S. 223, 231 (1973) (pointing to properly admitted "overwhelming and largely uncontroverted evidence" to support conclusion error was harmless); Schneble v. Florida, 405 U.S. 427, 430–31 (1972) (holding *Bruton* violation was harmless); *see also* Brent M. Craig, "*What Were They Thinking?*"*—A Proposed Approach to Harmless Error Analysis*, 8 FLA. COASTAL L. REV. 1, 2–12 (2006) (discussing decisions); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 21–39 (1976) (concluding that "the cases support the propriety of an overwhelming evidence test" but criticizing said test).

151 *See* United States v. Mensah, 434 F. App'x. 123, 127 (3d Cir. 2011) (rejecting motion based on evidence that was cumulative and impeaching); United States v. Saada, 212 F.3d 210, 216 (3d Cir. 2000) (rejecting motion for new trial because evidence was merely impeaching or cumulative); United States v. Spencer, 4 F.3d 115, 119 (2d Cir. 1993) (denying motion for new trial and noting "'[t]he discovery of new evidence which merely discredits a government witness and does not directly contradict the government's case ordinarily does not justify the grant of a new trial'" (citation omitted)); United States v. Custis, 988 F.2d 1355, 1359 (4th Cir. 1993) (stating rule); United States v. Provost, 921 F.2d 163, 164 (8th Cir. 1990) (stating rule); *see also* United States v. Valerio, 676 F.3d 237, 240 (1st Cir. 2012) (concluding defendant was not entitled to new trial because there was "sufficient evidence" to sustain defendant's conviction); United States v. Quiles, 618 F.3d 383, 390–96 (3d Cir. 2010) (concluding that defendants were not entitled to new trial where the new evidence only impeached the witness and did not strongly exculpate the defendants). *See generally* WRIGHT ET AL., *supra* note 21, § 854. Only in rare cases will a court consider impeachment evidence sufficient to warrant a new trial. *See, e.g.*, United

dence, some courts simply reason that there is sufficient evidence of guilt without the testimony of the witness who would be impeached by the new evidence.[152] Courts also cite the cumulative nature of the evidence in harmless error analysis.[153]

Courts considering claims of nondisclosure and ineffective assistance also emphasize the fact that evidence was or would have been only cumulative or impeaching, therefore concluding that the flaw did not generate harm.[154] In nondisclosure cases, the Court has held

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States v. Jones, 84 F. Supp. 2d 124 (D.C. Cir. 1999) (granting new trial based on information that prosecution expert had falsified credentials); United States v. King, 232 F. Supp. 2d 636, 651 (E.D. Va. 2002) (concluding that even if evidence was viewed as merely impeaching, it warranted a new trial); United States v. Kladouris, 739 F. Supp. 1221 (N.D. Ill. 1990) (granting new trial based on evidence that impeached key witness).

152 *See, e.g.*, United States v. Mensah, 434 F. App'x. 123, 127 (3d Cir. 2011) (stating that new trial motion may be denied if there is "sufficient independent evidence to sustain a finding of guilt"); United States v. Robinson, 627 F.3d 941, 950 (4th Cir. 2010) (emphasizing "the impressive amount of evidence" against the defendant from sources other than the impeached witnesses); *Saada*, 212 F.3d at 217 (noting that evidence was sufficient even without the testimony of the witness whose credibility was challenged by the new evidence); United States v. Adams, 759 F.2d 1099, 1108 (3d Cir. 1985) (noting that, even if impeached witness's testimony was disregarded, there was "more than sufficient" evidence to sustain conviction); United States v. Leary, 378 F. Supp. 2d 482, 494 (D. Del. 2005) (concluding that the defendant could not meet that Rule 33 standard because even without the testimony of the witness in question there was sufficient evidence to support the conviction).

153 *See, e.g.*, United States v. Kaplan, 490 F.3d 110, 123 (2d Cir. 2007) (listing whether the evidence was cumulative as one of four considerations in determining harmless error); United States v. Kenyon, 481 F.3d 1054, 1063 (8th Cir. 2005) (examining record and holding that improper admission of prior statements was harmless, noting that the statements provided only cumulative evidence and did little to support the witness's credibility); United States v. Newton, 369 F.3d 659, 680 (2d Cir. 2004) (holding admission of statement taken in violation of *Miranda* to be harmless in part because the statement duplicated an admissible statement by the defendant); United States v. Dukagjini, 326 F.3d 45, 62 (2d Cir. 2002) (concluding that "[t]he inadmissible aspects of [the witness's] testimony, viewed in relation to the prosecution's formidable array of admissible evidence, was merely corroborative and cumulative"); United States v. Young, 248 F.3d 260, 269 (4th Cir. 2001) (concluding that any error in excluding certain evidence was rendered harmless because the witness was impeached through other testimony); United States v. Mitchell, 31 F.3d 628, 632 (8th Cir. 1994) (concluding that the excluded evidence was harmless error because no substantial rights of the defendant were affected); *see also* Field, *supra* note 150, at 41–43 (discussing "cumulative evidence test").

154 *See, e.g.*, United States v. Brown, 650 F.3d 581, 592 (5th Cir. 2011) (stating that impeachment evidence is not material if the witness's testimony is "strongly corroborated"); United States v. Walker, 657 F.3d 160, 186 (3d Cir. 2011) (impeachment evidence not material because it was cumulative); United States v. Orr, 636 F.3d 944, 953 (8th Cir. 2011) (rejecting claim based on failure to impeach in part because the witness's testimony was "merely cumulative"); United States v. Warshak, 631 F.3d 266, 300 (6th Cir. 2010) (stating that undisclosed witness testimony was not material for *Brady* purposes because it was cumulative of arguments presented at trial); United States v. Emor, 573 F.3d 778, 782 (D.C. Cir. 2009) (rejecting *Brady* claim where the undisclosed interview of the witness would have been used only to impeach with prior inconsistent statements, an avenue already

that the failure to disclose impeachment evidence may violate due process.[155] As a result, courts cannot summarily dismiss a claim based on the fact that the information is mere impeachment. Nevertheless, they often conclude that the suppressed impeachment evidence is not material if the witness was impeached with other evidence at trial or if the witness's testimony was corroborated.[156] In *Tankleff v. Senkowski*, for example, the defendant sought relief based on newly disclosed impeachment evidence.[157] The evidence would have undermined the credibility of both the witness who the defendant argued had actually committed the double murder with which the defendant was charged and the detective who had not vigorously pursued that witness as a suspect.[158] The Second Circuit rejected the claim, concluding that the newly revealed evidence was merely cumulative impeachment evidence and that both witnesses had been adequately impeached; as a result the additional information would not

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pursued at trial); United States v. Miller, 520 F.3d 504, 514 (5th Cir. 2008) (holding that there was not a reasonable probability the outcome would have been different had evidence been disclosed because it was merely cumulative); United States v. Turner, 501 F.3d 59, 73 (1st Cir. 2007) (rejecting *Brady* claim where undisclosed evidence was merely cumulative of "stronger evidence presented at trial"); United States v. Hall, 434 F.3d 42, 55 (1st Cir. 2006) (rejecting defendant's *Brady* claim because, among other reasons, the evidence was cumulative); United States v. Gonzalez-Gonzalez, 258 F.3d 16, 24 (1st Cir. 2001) (stating that evidence was cumulative); *see also* Conley v. United States, 415 F.3d 183, 196 (1st Cir. 2005); Bailey v. Rae, 339 F.3d 1107, 1116 (9th Cir. 2003) (noting that state court that erroneously rejected *Brady* claim had concluded the exculpatory evidence was not material by characterizing it as cumulative). *See generally* Gershman, *supra* note 40, at 718–19 (discussing application of "cumulative evidence" reasoning). In *Conley*, although the defendant won reversal due to the government's suppression of impeachment evidence, the panel was divided, with one judge dissenting on the grounds that the impeachment evidence was cumulative and the witness's testimony was corroborated. 415 F.3d at 196.

155 *See* United States v. Bagley, 473 U.S. 667, 676 (1985).

156 *See, e.g.*, United States v. Cooper, 654 F.3d 1104, 1119 (10th Cir. 2011) (finding suppressed impeachment evidence immaterial); United States v. Spinelli, 551 F.3d 159, 165–66 (2d Cir. 2008) (discussing and rejecting *Brady* claim based on nondisclosure of impeachment evidence); United States v. Miller, 520 F.3d 504, 515 (5th Cir. 2008) (rejecting *Brady* claim even though the non-disclosed evidence would have impeached a key government witness); United States v. Oruche, 484 F.3d 590, 599–600 (D.C. Cir. 2007) (concluding that impeachment information was not material because the witness was "thoroughly impeached at trial" and her testimony was corroborated); United States v. Jackson, 345 F.3d 59, 74 (2d Cir. 2003) (rejecting *Brady* claim because there was no reasonable probability that the outcome would have been different if the undisclosed evidence was disclosed at trial); Moreno-Morales v. United States, 334 F.3d 140, 147–48 (1st Cir. 2003) (rejecting *Brady* claim where evidence was impeaching and witness had already been impeached).

157 135 F.3d 235 (2d. 1998).

158 *Id.* at 251.

have added enough to be material.[159] Ultimately, the defendant was exonerated and released after serving seventeen years in prison.[160] Had the courts been more receptive to the defendant's argument, his innocence might have been disclosed far sooner.[161]

C. Drawing Pro-Government Inferences

Courts also tend to view the evidence in a light favorable to the government. As a result, they deny relief even though, had the initial trial been free of error, the jury might not have drawn the inferences essential to conviction in the government's favor, and, if the case were retried, the new jury might not draw those inferences in the government's favor. This tendency is evident in all the harm assessment tests.

When evaluating a Rule 33 motion, the trial court can weigh the evidence and consider its own opinion of witness credibility.[162] Although the court need not view the evidence in a light favorable to the government, courts do so by deferring to pro-government determinations made by the jury at trial or simply drawing all inferences in favor of the government.[163]

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159 *Id.* at 250–51.

160 *See Charges Dropped Against New York Man*, THE INNOCENCE PROJECT, (June 30, 2008), http://www.innocenceproject.org/news-events-exonerations/charges-dropped-against-new-york-man?searchterm=tankleff.

161 *See also Spinelli*, 551 F.3d at 166 (rejecting claim in part because "the evidence of perjury would have been cumulative"); United States v. Ramos-Gonzalez, 747 F. Supp. 2d 280, 296–97 (D.P.R. 2010) (rejected defendant's false testimony claim because the evidence the defendant brought forward in support of his claim was "cumulative").

162 *See* United States v. Lighty, 616 F.3d 321, 373–75 (4th Cir. 2010) (discussing trial court's consideration of credibility in denying motion for new trial); United States v. Brennan, 326 F.3d 176, 186 (3d Cir. 2003) (considering whether the trial court appropriately allowed a prosecutor to argue for a witness's credibility); United States v. Freeman, 77 F.3d 812, 816 (5th Cir. 1996) (noting that trial court appropriately took into account witness's credibility in ruling on new trial motion); United States v. Spencer, 4 F.3d 115, 119 (2d Cir. 1993) (affirming the denial of the new trial motion in part because the district court found there was no indication that the trial testimony of the witness impugned by the newly discovered evidence was untrue); United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992) (stating that a trial court has broad discretion to evaluate a witness's credibility); United States v. Carmichael, 269 F. Supp. 2d 588, 600 (D.N.J. 2003) (ruling in defendant's favor in part because the court credited a witness who came forward to exculpate the defendant); *see also* United States v. Hernandez-Rodriguez, 443 F.3d 138, 148 (1st Cir. 2006) (recognizing assessment of credibility as appropriate, but stating that the court could not reject magistrate's assessment that testimony was credible without independently hearing the witness).

163 *See Brennan*, 326 F.3d at 189 (discussing facts at trial in a light favorable to the prosecution); United States v. Saada, 212 F.3d 210, 216–18 (3d Cir. 2000) (noting that the jury had heard similar evidence and arguments at trial and had not credited them); United States v. Yu, 902 F. Supp. 464, 468–69 (S.D.N.Y. 1995) (concluding that it was "not clear"

Similarly, courts applying the plain error test also often view the evidence in a light favorable to the government. In *Gonzalez-Rodriguez*, for example, the Fifth Circuit rejected the defendant's claim that the erroneous admission of evidence was plain error because there was enough circumstantial evidence from which the jury *could* find guilt.[164]

Assessing prejudice caused by incompetent representation or materiality of nondisclosure, courts are also apt to view the case favorably to the government. In *Strickler v. Greene*, for example, the Court outlined the various theories that would have *allowed* the jury to convict the defendant without the discredited testimony, reviewing the jury instructions and the evidence in detail.[165] It appears that the Court gave the government the benefit of the doubt, looking for ways to justify the verdict.[166] Indeed, when courts dismiss the potential impact of impeachment evidence it is often because they draw inferences favorable to the government, concluding that the jury would

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that new evidence would probably lead to acquittal, the court noted that there was enough evidence to allow the jury to reach its verdict and stated that "[w]hile the connection may be tangential and based on inference, the jury found it sufficient"); *Hernandez-Rodriguez*, 443 F.3d at 149 (Howard, J., dissenting) (taking the position that defendant's new evidence should be treated with skepticism and pointing to reasons for rejecting the credibility of the witness, defendant's codefendant who had been convicted after denying his involvement and post-conviction came forward to exculpate the defendant); United States v. Robinson, 627 F.3d 941, 951 (4th Cir. 2010) (stating "[w]e know that the jury credited much of [the evidence against the defendant]").

164 United States v. Gonzalez-Rodriguez, 621 F.3d 354, 366–67 (5th Cir. 2010).

165 *Strickler*, 527 U.S. at 292–96.

166 *See id.*; *see also* Close v. United States, 679 F.3d 714 (8th Cir. 2012) (concluding that response had counsel objected would have had no effect); United States v. Warshak, 631 F.3d 266, 300 (6th Cir. 2010) (viewing the evidence in a light favorable to the government and holding that the exculpatory evidence was not material, in part, because the witness "had plenty of incentive to stretch the truth in [the defendant]'s favor"); United States v. Wilson, 605 F.3d 985, 1007 (D.C. Cir. 2010) (noting that impeachment of an officer by showing she was under investigation might have been ineffective because the jury "could easily have concluded" that she would not aggravate her problems by committing perjury); United States v. Ford, 550 F.3d 975, 983–84 (10th Cir. 2008) (dividing on question of materiality, with majority drawing inferences in favor of the prosecution and the dissenting judge positing the way in which the evidence would have supported the defendant's claim of entrapment); United States v. Hughes, 230 F.3d 815, 820–21 (5th Cir. 2000) (explaining away exculpatory evidence); Ashley Flynn, Case Note, Strickler v. Greene, *119 S. Ct. 1936 (1999)*, 12 CAP. DEF. J. 165, 173 (1999) (stating that "the materiality determination at the appellate level is rarely favorable to defendant"); Russel D. Francisco, Comment, Strickler v. Greene: *A Deadly Exercise in Legal Semantics and Judicial Speculation*, 74 ST. JOHN'S L. REV. 509, 511–12 (2000) (stating that the Court engaged in legal semantics to justify the verdict and sentence recommendation).

have still believed the prosecution witness and that other impeachment sufficiently attacked the witness's credibility.[167]

Applying the *Kotteakos* harmless error test, courts also draw pro-government inferences, often appearing to operate under the influence of hindsight bias, looking for reasons to uphold the conviction. They find error harmless where the jury *could* convict if it drew the necessary inferences in favor of the prosecution.[168] In some cases, the court expresses this as an opinion that the government presented a strong circumstantial case; that opinion rests on the assumption that any fact finder would draw inferences favorable to the prosecution from the circumstantial evidence.[169] Even under the defendant-friendly *Chapman* test, courts often draw all inferences in favor of the government.[170]

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167 *See, e.g.*, United States v. Garcia-Torres, 341 F.3d 61, 71 (1st Cir. 2003) (concluding impeachment value would have been "minimal" and noting that defense had "exploited other opportunities" to impeach the witness); Moreno-Morales v. United States, 334 F.3d 140, 147–48 (1st Cir. 2003) (concluding that defendant had "ample evidence of witness's story changing" in rejecting materiality of evidence withheld); United States v. Hughes, 230 F.3d 815, 820–21 (5th Cir. 2000) (dismissing impeaching statement as "ambiguous" and concluding witness's testimony was sufficiently tested).

168 *See, e.g.*, United States v. Roach, 582 F.3d 1192, 1208 (10th Cir. 2009) ("Because the jury could have drawn the inference that [the defendant] was a gang member without [the improperly admitted "expert"] testimony, the possibility that the jury would use that inference to support a guilty verdict existed even without [the improper] testimony."); United States v. Dukagjini, 326 F.3d 45, 62 (2d Cir. 2002) (concluding error was harmless, noting that the jury "could have" interpreted the evidence favorably to the government even without the improperly admitted evidence because other witnesses had provided some of the same information); United States v. Rea, 958 F.2d 1206, 1221 (2d Cir. 1992) (concluding improperly admitted evidence was harmless in part because "the jury could easily infer" the same facts from other properly admitted evidence); *see also* United States v. Kaplan, 490 F.3d 110, 123 (2d Cir. 2007) (stating "we are not required to conclude that it could not have had any effect whatever; the error is harmless if we can conclude that that testimony was unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record" (quoting *Rea*, 958 F.2d at 1220)); Edwards, *supra* note 13, at 1187–88 (quoting Justice Traynor and noting that courts often assume the jury drew all inferences in favor of the prosecution).

169 *See, e.g.*, United States v. Wesley, 422 F.3d 509, 515 (7th Cir. 2005) (finding error harmless in light of government's "strong circumstantial evidence"); United States v. Jefferson, 925 F.2d 1242, 1255 (10th Cir. 1991) (holding error harmless because "there was an abundance of evidence, other than [the improperly admitted evidence], from which the jury could have" resolved the case against the defendant without considering the possibility that the jury would not view the circumstantial evidence favorably to the government).

170 *See* Schneble v. Florida, 405 U.S. 427, 430–31 (1972) (assuming truth of government's evidence); United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (pointing to inferences that supported conviction); *see also* Stacy & Dayton, *supra* 54, at 128 nn.194–95 (citing examples of decisions holding error harmless because, drawing all inferences in the government's favor, the jury could have found the defendant guilty).

D. Rejecting the Defense Theory of the Case

Just as they often view the evidence in a light favorable to the government, courts also tend to dismiss out of hand the defense theory advanced to support the argument that the defendant suffered harm. For example, considering a motion for a new trial in *United States v. Garland*, the trial court disregarded the fact that the new evidence specifically supported the defendant's claim that he was not guilty of fraud because he himself had been defrauded.[171] In *United States v. Montilla-Rivera*, the court rejected the defendant's plain error argument, noting that the trial court properly rejected the testimony proffered by the defendant's two codefendants, who had already been convicted and sentenced.[172] The court stated it was appropriate to reject their testimony because it was "inherently suspect."[173]

Likewise, in assessing prejudice and materiality, courts frequently reject the defendant's theory.[174] In *United States v. Walker*, for example, the court rejected the defendant's argument that the prosecution violated *Brady* by failing to disclose that their witness had been found in possession of trace amounts of cocaine.[175] The court rejected each of the three ways in which the defense argued the evidence was material, showing itself unreceptive to the defense theories.[176] In *United States v. Dumas*, the trial court justified its conclusion that evidence was not material by anticipating how the government would have responded had the defendant possessed the non-disclosed evidence.[177] The trial court also rejected the argument that additional non-disclosed evidence warranted relief because it would have supported the entrapment defense, dismissing the defense as constructed on "a thin reed."[178]

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171 The Sixth Circuit vacated and remanded this decision. United States v. Garland, 991 F.2d 328, 336 (6th Cir. 1993).

172 171 F.3d 37, 41 (1st Cir. 1999).

173 Id. at 42.

174 *See, e.g.*, United States v. Caracappa, 614 F.3d 30, 48–49 (2d Cir. 2010) (stating that the defendant's testimony at the hearing on the ineffective assistance claim "made it clear that he was not a credible witness" and "made it overwhelmingly clear that his testimony at the trial would have proven a disaster" (emphasis removed)); United States v. Severns, 559 F.3d 274, 279–80 (5th Cir. 2009) (crediting prosecution arson expert and stating that the defendant had not provided "a coherent explanation").

175 657 F.3d 160, 185–88 (3d Cir. 2011).

176 *Id.*; *see also* United States v. Gonzalez-Gonzalez, 258 F.3d 16, 23 (1st Cir. 2001) (ruling that trial court was not even required to hold hearing to determine merits of the defendant's claim because defendant's claim was "conclusively refuted"); Conley v. United States, 332 F. Supp. 2d 302, 315–18 (D. Mass. 2004) (rejecting argument that evidence was material).

177 207 F.3d 11, 16 (1st Cir. 2000).

178 *Id.* at 16–17.

Courts assessing harmless error are also apt to dismiss the defense theory.[179] In *United States v. King*, for example, the Seventh Circuit stated that the evidence that the defendant owned the firearm in question was uncontroverted.[180] The court disregarded a witness's testimony that he heard the defendant tell police the gun was not his.[181] Had the jury credited that testimony, it would have acquitted.[182]

In *United States v. Hasting*, the defendants claimed mistaken identity at trial.[183] The Court dismissed the defense evidence as "scanty" and discounted the claim of mistaken identity because the defendants "tendered no evidence placing any of them at other places at the relevant times."[184] The Court thus conflated a mistaken identity de-

179 *See, e.g.*, United States v. Boros, 668 F.3d 901, 911 (7th Cir. 2012) (characterizing the defense evidence as "scant" and discounting impact of error because the defendant had not expressed surprise or concern nor disclaimed involvement in the correspondence with his coconspirators that the government introduced at trial); United States v. Wilson, 605 F.3d 985, 1007 (D.C. Cir. 2010) (dismissing the defense theory of credibility as "implausible"); United States v. Miller, 520 F.3d 504, 515 (5th Cir. 2008) (concluding that *Brady* material would not have provided sufficient support for defense); United States v. Jernigan, 492 F.3d 1050, 1065 (9th Cir. 2007) (en banc) (Bea, J., dissenting) (noting that the judges favoring affirmance rejected the posited use of the favorable evidence to support the defense of mistaken identity, adhering to the view that the issue of identity had been explored and the defendant had lost); United States v. Powell, 334 F.3d 42, 46 (D.C. Cir. 2003) (stating that the defendant's theory of defense was "implausible"); United States v. Hernandez, 948 F.2d 316, 325 (7th Cir. 1991) (noting weaknesses in the defense as support for conclusion that error was harmless); United States v. Pirovolos, 844 F.2d 415, 421–22, 427 (7th Cir. 1988) (characterizing the defense as "preposterous" and stating further,"we see little chance that a rational jury would have believed [the defendant]'s story, even if the trial were stripped of all error"); *see also* United States v. McGee, 408 F.3d 966, 982–83 (7th Cir. 2005) (characterizing the defendant's claim that he was coerced into selling drugs as "deficient as a matter of law").

180 897 F.2d 911, 914 (7th Cir. 1990).

181 *Id.*

182 *See also* United States v. Resendiz-Patino, 420 F.3d 1177, 1181–82 (10th Cir. 2005) (looking at the range of possible inferences the jury could have drawn in the absence of the arguably improper prosecution evidence and concluding that none would have strongly supported the defendant's defense); United States v. Pinillos-Prieto, 419 F.3d 61, 73 (1st Cir. 2005) (concluding that it was harmless, if error at all, not to give the defendant's proposed jury instruction because the factual version of events that supported defendant's argument was "an unlikely scenario, to put it mildly" and "the evidence for the government's version of events was so much stronger than the evidence for the version of events under which an error could have affected the verdict"). In *Resendiz-Patino*, the court dismissed the possible argument the defendant could have made had the evidence shown someone else's fingerprints were on the battery sheath. 420 F.3d at 1181–82. Although the evidence would not have conclusively established that the defendant was not aware that the cocaine was in the battery, the jury might have been more inclined to that view had the only fingerprints belonged to someone other than the defendant. The court should have recognized that possibility.

183 461 U.S. 499, 511 (1983).

184 *Id.* at 511–12.

fense with an alibi defense, dismissed the indications of possible mistaken identity, and held the error harmless.[185]

E. Giving Too Much Deference to the Trial Court

Appellate courts often defer to the trial court on harm-related questions. Some appellate judges accord too much deference to the trial court.[186] In *United States v. Jernigan*, for example, even though the non-disclosed evidence supported the defendant's claim of mistaken identity, the trial court rejected the *Brady* claim, and a panel of the Ninth Circuit deferred to that determination.[187] A majority of the court sitting en banc reversed, but even then the dissenting judges complained that the majority failed to accord sufficient deference to the trial court's assessment that the evidence would not have swayed the jury.[188]

In *González-Soberal v. United States*, the First Circuit remanded the case, emphasizing that the trial court was better positioned to assess the credibility of the government's witnesses.[189] Instead, the court should have recognized the importance of giving the defendant the opportunity to have a jury determine the key issue of credibility rather than permitting the trial judge to make the final assessment.[190]

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185 In *United States v. Hasting*, the majority summarized the defense evidence as follows:

> The evidence presented by them was testimony showing (a) that some of respondents' hair styles immediately before and after the incident differed from the victims' descriptions of their assailants' appearances, (b) that two of the victims had been unable to pick one of the respondents, Anderson, out of a lineup, (c) that it was so dark at the time of the attacks and during the car trips, that Newcomb did not have an unobstructed view of the rape he described, and (d) that Stewart's mother testified that the girls she saw with her son did not look "scared."

Id. at 511 (emphasis removed). This is precisely the kind of evidence that may signal an inaccurate identification. *See also* United States v. Agurs, 427 U.S. 97, 113–14 (1976) (deferring to trial court's assessment of harm flowing from the failure to disclose exculpatory evidence). *See generally* Gary L. Wells, *What do we Know About Eyewitness Identification?*, 48 AM. PSYCHOLOGIST 553 (1993) (discussing factors that contribute to false identifications).

186 *See, e.g.*, United States v. Dumas, 207 F.3d 11, 14 (1st Cir. 2000) (stating that trial court's determination of materiality in *Brady* claim is accorded deference).

187 United States v. Jernigan, 451 F.3d 1027, 1033 (9th Cir. 2006), *rev'd and remanded*, 492 F.3d 1050 (9th Cir. 2007) (en banc). The en banc court was divided.

188 *Jernigan*, 492 F.3d at 1062–63 (Bea, J., dissenting).

189 244 F.3d 273, 279 (1st Cir. 2001).

190 *See also* United States v. Dumas, 207 F.3d 11, 14–17 (1st Cir. 2000) (deferring to the trial court's rejection of *Brady* claim based on its prediction of government's response had the defendant possessed the evidence and conclusion that entrapment defense was constructed on "a thin reed").

V. PROPOSED GUIDELINES FOR ASSESSING HARM

Better clarification of the definition and guidance as to the application of these harm-assessing tests can alleviate the problem of blurred lines. Currently, courts do not effectively differentiate among these harm-assessing tests, and there is little guidance as to how the tests should be applied. Nevertheless, the courts maintain the illusion that the harm assessment tests, applied in cases implicating weighty defense interests or posing the likelihood of greater harm to the defendant, demand less of defendants. But if the tests are effectively the same in application, then the courts are not giving defendants more access to relief for some alleged violations than for others. Moreover, as both the definition of the tests and their application blur, making each test the same as the others, the burden on the defendant to show harm increases as courts employ the same verdict-justifying avenues of reasoning to find lack of harm, regardless of the nature of the error, creating barriers to enforcement of protected rights.[191]

The hazards are compounded by strong systemic forces that weigh against granting relief. These forces make any lack of clarity work to the detriment of defendants. All the harm assessment tests derive from the proposition that not every procedural shortcoming warrants a new trial. The Constitution is concerned with "accurate and reliable results" in criminal cases but does not guarantee a process that is entirely error-free.[192] The interests in the finality of verdicts and in conserving resources encourage a government-friendly approach to harm assessment.[193]

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191 All tests that require the court to assess the harm of an alleged error stunt the development of the law. As the Court suggested in *Strickland v. Washington*, 466 U.S. 668, 695–96 (1984), judges can bypass the determination of whether there was error, incompetence, or improper withholding of exculpatory evidence, and resolve the case by concluding that, regardless of whether there was error, it was harmless, there was no prejudice, or the evidence was not material. The tendency to reject defense challenges on this basis is only amplified if the harm assessment standards are ill defined.

192 *See* Smith, *supra* note 38, at 519 (discussing the purpose espoused by the Court in the crafting test); *see also* Cunningham-Parmeter, *supra* note 13, at 839 (same).

193 *See, e.g.*, United States v. Hasting, 461 U.S. 499, 507 (1983); United States v. Gandia-Maysonet, 227 F.3d 1, 5 (1st Cir. 2000) (stating that the plain error rule "serves obvious interests of fairness and judicial economy"). *See generally* WRIGHT ET AL., *supra* note 20, § 853 (discussing reasons for harmless error doctrine). In *Hasting*, the Court quoted California Supreme Court Chief Justice Traynor that the goal of the harmless error doctrine is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error." 461 U.S. at 509 (citations omitted).

In addition, reviewing a case to determine the harm of a particular error is necessarily challenging.[194] With limited insight into what the jury actually considered and found persuasive, the court must determine how the jury did or would react to particular evidence or arguments.[195] The task may entail a daunting amount of work.[196] It takes less time and effort to affirm than to reverse.[197] The temptation is to view the record favorably to the verdict winner (the government) and give short shrift to the defendant's theories. Judges who are not directed to adopt a more protective approach may be inclined simply to assure themselves of the defendant's guilt and the likelihood of conviction in an error-free trial.[198] A judge who believes that the defendant will be convicted again on retrial has little incentive to reverse.[199]

Furthermore, judges are not always well positioned to make a judgment about harm. Commentators have identified a number of reasons why judicial assessments of harm may be flawed.[200] Several

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194 *See* TRAYNOR, *supra* note 84, at 36 (describing the difficulty of the task faced by appellate judges when reviewing for harmless error).

195 Teitelbaum, et al, *supra* note 84, at 1152 (discussing the difficult task of determining what information would have been relied on by a particular jury).

196 In *Hasting*, 461 U.S. at 516–17, Justice John Paul Stevens described the practical challenge for an appellate court called on to review for harmless error. He explained that the transcript of the trial was 1,013 pages and acknowledged that he had "read only a few of the 450 pages of the transcript of the suppression hearing." *Id.* at 517. He explained: "The task of organizing and digesting the testimony is a formidable one." *Id.* He lamented that:

> As a practical matter, it is impossible for any Member of this Court to make the kind of conscientious and detailed examination of the record that should precede a determination that there can be no reasonable doubt that the jury's deliberations as to each defendant were not affected by the alleged error.

Id.

197 *See* Conley v. United States, 415 F.3d 183, 193–94 (1st Cir. 2005) (noting the burden imposed on the system by ordering a new trial). *See generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 36 (2013).

198 *See* Stacy & Dayton, *supra* note 53, at 127 (arguing that "prevailing conceptions of outcome-oriented standards violate the sixth amendment right to a jury trial by inviting judges to make probabilistic judgments of a defendant's guilt based on their own views of the weight and credibility of evidence"); *see also* WRIGHT ET AL., *supra* note 20, at § 853 (pointing out tension between these two inquiries); Mitchell, *supra* note 55, at 1357 (arguing that appellate review focused on whether an error contributed to the verdict is less fact-intensive than an inquiry into whether there was overwhelming evidence and is therefore more deferential and more appropriate).

199 *See* Landes & Posner, *supra* note 53, at 175 (noting that the standard approach to assessment of harmful error "makes it more likely that the appellate court will fail to detect a harmful error").

200 *See* Findley & Scott, *supra* note 16, at 309 (describing confirmation bias); Solomon, *supra* note 8, at 1086–87 (describing hindsight bias and the attribution error); *see also* WRIGHT

psychological effects may also play a role: hindsight bias, outcome bias, confirmation bias, and belief persistence. Given that appellate judges consider almost exclusively the criminal cases of convicted defendants, they are likely to be predisposed to view defendants as guilty and to have confidence in guilty verdicts.[201] Hindsight bias encourages judges to regard the defendant's conviction as a foregone conclusion and, therefore, see any error as harmless.[202] Outcome bias—the tendency to view a result as the correct result—also encourages judges to uphold convictions as uninfluenced by error.[203] Confirmation bias—the tendency to view evidence as supporting existing beliefs—may also play a role in judicial review.[204] Belief persistence

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ET AL., *supra* note 20, § 853 (suggesting that the judge's attitude will impact application of harmless error analysis).

201 *See* EPSTEIN ET AL., *supra* note 197, at 11 (noting that appeals by criminal defendants are subsidized—suggesting that frivolous appeals are therefore more likely—and "are so lacking in merit that even liberal court of appeals judges usually vote to affirm").

202 Hindsight bias is the tendency to see outcomes (in these cases, the convictions) as inevitable. *See* Stephanos Bibas, *The Psychology of Hindsight Bias and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1-5 (2004) (discussing hindsight bias as an impediment to protection from ineffective assistance of counsel); Findley & Scott, *supra* note 16, at 317–22 (discussing the impact of hindsight and outcome bias on harm assessment); Solomon, *supra* note 8, at 1086. Findley and Scott point out the hazard that "[u]nder [the harmless error] doctrine, cognitive biases can contribute in powerful ways to a conclusion that the defendant was indeed guilty, and that the error was therefore harmless." Findley & Scott, *supra* note 16, at 350. The authors further state that "doctrines that expressly shift the burden to prove that an alleged error might have affected the outcome of the case to the defendant are even more likely to reinforce cognitive- and role-based tunnel vision." *Id.*; *see also* Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 OR. L. REV. 69, 92 (2011). The author explains:

> Hindsight bias is the tendency of people to overestimate the predictability of past events. In other words, it makes the past seem more predictable than it actually was. Hindsight bias occurs because learning an outcome causes people to update their beliefs about the world. People then rely on these new beliefs to generate retroactive estimates of what was predictable. In doing so, they ignore the fact that the outcome itself inspired the change in their beliefs. Consequently, they conclude that the actual outcome was more predictable or foreseeable than it actually was.

Id. (footnotes omitted).

203 *See* Findley & Scott, *supra* note 16, at 319–20 (discussing outcome bias); *see also* Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 571 (1988) (stating that outcomes may focus a judge's attention on evidence that supports that decision); Terence R. Mitchell & Laura S. Kalb, *Effects of Outcome Knowledge and Outcome Valence on Supervisors' Evaluations*, 66 J. APPLIED PSYCHOL. 604, 605 (1981) (reporting that outcome knowledge may influence a judge's evaluation of a decision).

204 *See* Findley & Scott, *supra* note 16, at 309 ("Confirmation bias, as the term is used in psychological literature, typically connotes the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses."); *see also* EPSTEIN ET AL., *supra* note 197, at 45 (discussing confirmation bias); John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 27–29 (1983) (reporting that expectancies lead to confirmation bias in the selective recall of ev-

likewise weighs on the side of affirming convictions, leading judges faced with new evidence to commit to their original belief, sometimes either by simply ignoring the evidence or by actively scrutinizing the new evidence to undermine its effect.[205] It is difficult for courts to resist these pressures to dismiss identified errors as harmless.[206] Indeed, the number of cases in which the court characterizes the prosecution evidence as overwhelming without careful scrutiny suggests biased review.[207]

An important question underlying this discussion is how the tests *should* relate to one another and how they should operate. Both the definition of each test and its application control the defendant's ac-

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idence); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 193–94 (1998) (discussing confirmation bias in judicial proceedings).

205 *See* Findley & Scott, *supra* note 16, at 313–14 (defining belief persistence as the "natural tendencies [that] make people resistant to change even in the face of new evidence that wholly undermines their initial hypotheses"); *see also* Craig A. Anderson, et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1037–38, 1041–43 (1980) (observing the belief perseverance effect even when the original belief was based on minimal and logically inadequate evidence and the person has no strong emotional or behavioral commitment to the prior evidence); Jerold L. Downey & Larry Christensen, *Belief Persistence in Impression Formation*, 8 N. AM. J. PSYCHOL. 479, 480, 484 (2006) (finding that the belief perseverance effect occurs even when discredited information is replaced with correct information); Lee Ross, et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 888 (1975) (demonstrating that a person's beliefs persevere even after the basis for those beliefs have been discredited).

206 *See* Findley & Scott, *supra* note 16, at 321; Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 632 (1986) (reporting that an analysis of 4,000 reported appellate decisions between 1970 and 1983 involving an ineffective assistance claim showed that only 3.9% resulted in a finding of reversible error). Findley and Scott suggest:

> With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings. To some extent, placing the burden of proving the harmless nature of an error on the beneficiary of the error—in criminal cases, requiring the government to prove harmless error beyond a reasonable doubt—might be intended to mitigate the effects of hindsight and outcome biases. Nonetheless, courts routinely find significant errors harmless, and that is partly because hindsight bias and outcome bias work in tandem with other values, such as a desire to respect finality and avoid wasteful retrials of obviously guilty defendants.

Findley & Scott, *supra* note 16, at 321 (footnotes omitted).

207 *See* Stacy & Dayton, *supra* note 53, at 130–31 (noting that courts deem error harmless if the evidence of guilt is "overwhelming" even without assuring themselves that the evidence "would compel a rational jury resolving all reasonable evidentiary conflicts in the defendant's favor to convict as a matter of law"). The authors further argue that overwhelming evidence analysis is applied with no "objective indicia" and less restrictively than asking if rational jury would be compelled not to convict. *Id.*

cess to relief when there was a flaw in the process. The more government-friendly the harm assessment test, the more likely the court will conclude that the defendant suffered no harm when the defendant actually suffered harm but is simply unable to satisfy the applicable test. Thus, a more significant right should call for a less demanding harm assessment test. Conversely, when the claim is less deserving or the countervailing interests stronger, the harm assessment test can fairly demand more from the defendant. The proposals set out below are intended to achieve an appropriate balance between protecting defendants' rights and preserving government interests.

In the sections that follow, I advocate for changes to clarify the tests and guide their application. First, I argue that the courts should reduce the number of tests and the reliance on small differences in language, clearly allocate and define the burden of proof, and discourage courts from rejecting claims of harm based merely on the sufficiency of the evidence or the apparent strength of the government's case. I then prescribe an approach to applying the tests that will lead to more careful consideration of the defense's claims of harm.

A. Reduce the Number of Tests

Courts do not distinguish effectively among the current array of harm assessment tests. Instead of expecting fine differences in the language that defines the tests to play out in differences in protection, the courts should reduce the number of tests to a manageable number of meaningfully defined tests. In all cases in which the defendant bears the burden of establishing harm, the courts should apply the same test. When the issue is harmless error, the burden falls on the government, and the test should be more demanding.

The differentiation between the two harmless error tests is well established by existing law. The line between the *Kotteakos* and *Chapman* harmless error tests reflects the recognition that constitutional rights command more protection than non-constitutional rules. The more-demanding *Chapman* test assures that courts will less readily dismiss a violation of the defendant's constitutional rights as harmless. When applying the harmless error tests, where the government bears the burden, courts should require the government to establish the harmlessness of non-constitutional error by a preponderance and the harmlessness of constitutional error beyond a reasonable doubt.

The adoption of a uniform test in all other harm assessment tests, however, may be controversial. But a uniform harm standard, ap-

plied appropriately, will still provide appropriate differentiation based on the countervailing concerns underlying the current tests. The two tests that are currently the least defendant-friendly are those governing Rule 33 new trial motions and the plain error test. The strict requirements for a new trial motion under Rule 33 reflect the strong interest in allowing a verdict untainted by error to stand. The defendant who received an error-free trial resulting in conviction should not easily win a "do over." The courts do not want to reward a defendant for deferring aspects of the defense investigation until after conviction. Only a strong showing that the omission of the now discovered evidence harmed the defendant should justify a new trial. Similarly, the heightened showing required under the plain error rule reflects the court's desire to encourage the defense to be attentive and raise errors in the trial, rather than holding back and expecting—even hoping—to be able to attack an unfavorable verdict.[208]

Adoption of a uniform harm test may appear to inappropriately reduce the barriers to relief in instances of new trial motions and plain error review. It does not. Both Rule 33 motions and plain error review do not turn solely on the standard of harm. Both tests require the defendant to clear substantial additional hurdles and, further, give the court discretion to deny relief even if the defendant meets those requirements.

On the other hand, the adoption of a uniform test may appear not to provide sufficient protection when the identified flaws seriously threaten the fairness of the process.[209] However, the current tests

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208 In *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004), the Court recognized that plain error review calls for a demanding test "to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *See also* Johnson v. United States, 520 U.S. 461, 465–66 (1997) (emphasizing the obligation of the parties at trial to take appropriate steps to assure the fairness and accuracy of the trial and allow errors to be corrected promptly); United States v. Noel, 581 F.3d 490, 505 (7th Cir. 2009) (Easterbrook, J., concurring) ("It is supposed to be harder to show plain error (when the defendant forfeited the issue by failing to raise it in the district court) than to show harmless error (when the defendant did raise the issue, and the judge wrongly rejected the argument)."); United States v. Lafayette, 983 F.2d 1102, 1106–07 (D.C. Cir. 1993) (refusing, on appeal, to allow the defense to bring in dubious new evidence that could have been discovered and used at an earlier stage).

209 Before the Court held that materiality in nondisclosure cases are governed by the reasonable probability test, the Courts of Appeals had applied less government-friendly tests. In *United States v. Agurs*, 427 U.S. 97, 108 (1976), for example, the D.C. Court of Appeals had "assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict." The Court condemned that approach as setting the bar too low, stating that the approach was too close to the "sporting theory of justice" expressly rejected in *Brady*. *Id.* The Court explained that "a jury's appraisal of a case 'might' be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt." *Id.* at 108–09. As a result, the Court con-

are not particularly defense-friendly. Even when the defendant demonstrates nondisclosure of exculpatory evidence or incompetence of counsel, either of which creates a risk of unfairness and possibly skews the record created at trial, the test places a burden on the defendant that necessarily results in some convictions being affirmed even though the nondisclosure actually harmed the defendant. The protection must lie in the application of the test, and not its definition.

Yet another concern of adopting a uniform test is the apparent diminution of protection in false testimony cases if the courts no longer apply the "reasonable likelihood" test in false testimony cases rather than the harm assessment test applied in nondisclosure cases. There are two responses to that concern. First, the protection is illusory even under the current "reasonable likelihood" standard of materiality. That test does not reliably translate into a more protective assessment.[210] Second, protection can be implemented through careful application of the test. The corrupting effect of false testimony explains the current more defendant-friendly materiality test in false testimony cases.[211] That corrupting effect should become a factor in the court's assessment of materiality. For example, if courts view the evidence in a light favorable to the defendant and apply both backward-looking and forward-looking analyses, as described below, they are likely to conclude that false testimony is material unless the witness was entirely peripheral to the case.

The language used to define the uniform harm assessment test to be applied when the defendant bears the burden of showing harm should avoid the problems of the current tests, which rely too heavily

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cluded: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109–10.

210 *See generally* Poulin, *supra* note 12 (discussing ways in which courts have diluted protection in false testimony cases).

211 United States v. Bagley, 473 U.S. 667, 679–80 (1985); *see* Poulin, *supra* note 12; *see also* United States v. Willis, 257 F.3d 636, 644 (6th Cir. 2001) (discussing reasons for applying a less demanding test when a new trial motion is based on demonstration that testimony at the first trial was false). In *Willis*, the court explained that typically, in new evidence situations, the court is concerned that "defendants might sandbag the prosecution, waiting to see if they are convicted before bringing forth new evidence in an attempt to get a second chance at acquittal." *Id.* In contrast, if the defendant relies on a claim of false testimony, sandbagging is not an issue; instead, the concern is that pressure may have been applied to persuade the witness to recant. But the court saw sufficient protection against this risk in two checks: first, the court must be "reasonably well satisfied that the original testimony given by the now-recanting government witness was false" and, second, the prosecution can bring perjury charges against the recanting witness. *Id.* at 645 (citations omitted).

on small differences in language. The courts should recognize that there is no meaningful distinction among the current "reasonable probability," "reasonable likelihood," and "actual probability" tests. In framing the test going forward, courts should avoid the use of the word "probability," which encourages courts to require persuasion at the preponderance level. Instead, the test should be framed as requiring the defendant to show a reasonable likelihood or significant possibility. The particular choice of language is not critical.

B. Clearly Allocate and Define the Burden of Proof

The allocation and definition of the burden of proof may be outcome-determinative.[212] In evenly balanced cases, or cases where necessary information is unavailable to either party, the party with the burden will lose.[213] The courts should be clear concerning which party bears the burden and what standard should be applied.

It is important that the court applying each test be clear as to which party bears the risk of uncertainty. In most of these tests, the allocation is clear: the burden lies with the defendant to establish harm in all but the harmless error tests.[214] However, the Court has

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212 *See, e.g.*, United States v. Gonzalez-Rodriguez, 621 F.3d 354, 367 (5th Cir. 2010). The court held against the defendant under a plain error standard, explaining that the burden of proof determined the outcome:

> We recognize that Agent Crawford's testimony appears to have played an important role in this case: without Agent Crawford's testimony, the first jury failed to return a unanimous verdict; with Agent Crawford's testimony, a second jury unanimously convicted Gonzalez-Rodriguez. Were it the Government's burden to establish harmless error beyond a reasonable doubt, our conclusion today might be different.

Id. (citations omitted); *see also* Edwards, *supra* note 13, at 1201–03 (discussing importance of allocation of the burden).

213 For example, in *United States v. Olano*, 507 U.S. 725, 727 (1993), the defendant appealed based on the claim that alternate jurors were allowed to sit in on the deliberations. There was no way to assess the impact of this error on the case, so the defendant could not establish plain error. *Id.* at 737–41.

214 Unfortunately, placing the burden of proof on the defendant results in affirming more convictions than would be the case if the burden of proof was on the prosecution. Rossman, *supra* note 53, at 527. Rossman cites Justice Scalia, concurring in *Freeman v. Pitts*, 503 U.S. 467, 503 (1992), a school desegregation case, in which the Court states that the allocation of the burden of proof "foreordains the results." *Id.* at 527 n.453. As Justice Sandra O'Connor pointed out, dissenting in *Brecht v. Abrahamson*, the standard of harmless error applied determines the level of confidence that the verdict is reliable despite the problem that occurred at trial. 507 U.S. 619, 653 (1993) (O'Connor, J., dissenting). In her view, the *Kotteakos* standard did not "offer[] an adequate assurance of reliability" when a trial error might have affected the accuracy of the outcome. *Id.* Justice O'Connor explained: "By tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a

generated some uncertainty about the placement of the burden in instances of non-constitutional error, when the *Kotteakos* test applies. In these instances, the Court should place the burden of establishing harmless error unequivocally on the government.

The courts should also define the burden clearly. Placing the burden of establishing harm on the defendant necessarily means that, in some cases, the problem of which the defendant complains actually harmed the defendant, but the defendant will not be able to carry the burden of demonstrating harm. The result may be an uncorrected threat to the defendant's rights and the fairness of the process.[215] One partial antidote to this hazard is a clearly defined burden. Although the Court has stated that the harm assessment tests do not require the defendant to show harm by a preponderance of the evidence, there is a risk that the courts applying the test will impose this higher burden. Continuing to frame the tests in terms of probability and likelihood increases that risk.[216] The Court should continue to stress the limited nature of the defendant's burden in these cases.

C. Emphasize That the Apparent Strength of the Government Case Should Not Be Sufficient to Overcome a Claim of Harm

Each of these harm assessment tests emphasizes factual support for the conviction rather than the importance of procedural regularity of the proceeding. As a result, the tests necessarily permit convictions to stand despite procedural shortcomings. But the courts

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conviction will be preserved despite an error that actually affected the reliability of the trial." *Id.*

215 United States v. Hasting, 461 U.S. 499, 511–12 (1983). Justice William Brennan, writing separately, noted:

> The case is made even stronger if we consider, as the discussion in text does not, the interests of criminal defendants in having their constitutional rights protected. Whether or not an error ultimately is determined to be harmless, a defendant's rights still have been violated. Criminal defendants have an even stronger interest in being protected from intentional violations of their constitutional rights, especially in view of the difficulties surrounding harmless error inquiries.

Id.. at 527 n.6 (Brennan, J., concurring). As the Seventh Circuit noted in *United States v. Rodriguez*, "[a] defendant's liberty should not so often depend upon our struggle with the particular circumstances of a case to determine from a cold record whether or not the prosecutor's remarks were harmless." 627 F.2d 110, 113 (7th Cir. 1980).

216 One can reason that "[r]equiring a quantum of proof beyond equipoise is the preponderance of the evidence standard" and the reasonable probability test requires less than the preponderance standard, so equipoise must be sufficient to establish reasonable probability. *Rodriguez*, 406 F.3d at 1299 (Barkett, J., dissenting from denial of rehearing en banc) (emphasis removed); *see also* United States v. Dominguez Benitez, 542 U.S. 74, 86–87 (2004) (Scalia, J., concurring) (applying plain error test and concluding that prejudice must be established by a preponderance of the evidence, and not merely "reasonable probability," arguing that less demanding standard was not "serviceable").

should not amplify this emphasis by affirming simply because the government seems to have a strong case. The Court has stated that the determination should not turn on the reviewing court's assessment of the defendant's guilt[217] and that the harm assessment tests require more than mere sufficient evidence. Nevertheless, courts continue to emphasize the adequacy of the government's case in discussing harm.[218] Some courts assert that overwhelming evidence supports the conviction without carefully considering the possibility of harm.[219] Equally troubling, some courts accept less than overwhelming evidence as adequate to support a finding of no harm.[220] The courts should demand more searching assessment of harm. While addressing the strength of the evidence against the defendant, the reviewing court should adopt the approach described below.

D. Prescribe an Approach to Applying the Tests

The way in which courts apply the tests will either enhance the protection of the defendant or increase the likelihood that an error that actually harmed the defendant will not be redressed. Yet, different judges take markedly different approaches to harm assessment. That variation was apparent in the division of the Court of Appeals in *Vasquez*: the majority viewed the evidence in a light favorable to the government and the dissenting judge looked at the dynamics of the trial and jury deliberation, recognized that the jury might draw inferences favorable to the defendant, and placed the error in the context of the defense presented.[221] Only by expressly adopting a specific and

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217 *See* Kotteakos v. United States, 328 U.S. 750, 763–64 (1946) (explaining that the role of the appellate court is not to determine the defendant's guilt or innocence and not "to speculate upon probable reconviction," but to take the trial outcome into account and assess the effect of the error).

218 For example, applying the harmless error test, judges sometimes inquire only whether "independent evidence of guilt taken alone could support the conviction," an assessment that closely resembles the test for sufficiency of the evidence. Findley, *supra* note 16, at 350 (noting that some courts "broadly search the record by asking whether independent evidence of guilt taken alone could support the conviction" (emphasis removed)); *see* Edwards, *supra* note 13, at 1187 (noting that many courts hold error harmless if the evidence of guilt is sufficient).

219 *See* Anderson, *supra* note 53, at 395 (suggesting that harmless error analysis is often "cursory, with little explanation" (footnotes omitted)).

220 *See* Edwards, *supra* note 13, at 1204–06 (discussing the hazard of focusing on the admissible evidence of guilt); Field, *supra* note 150, at 21–36 (arguing against the overwhelming evidence approach to harmless error analysis); Stacy & Dayton, *supra* note 53, at 128–30 (arguing that some courts treat the test as a sufficiency of the evidence inquiry).

221 United States v. Vasquez, 560 F.3d 461 (6th Cir. 2009). Applying the harmless error test, judges sometimes inquire whether the actual jury was likely influenced by the error, sometimes focus on whether the jury would have convicted absent the error, and some-

uniform approach to harm assessment will the courts protect the defendant's rights.

United States v. Jernigan, a nondisclosure case, also illustrates the importance of the approach taken to assess harm.[222] In *Jernigan*, the defendant claimed mistaken identity, but her description—a short, Hispanic or Asian woman, with a poor complexion—matched the description of the bank robber, and eyewitnesses identified her as the robber; she was convicted at trial.[223] Before trial, while the defendant was in custody, two additional bank robberies were committed in the same area by a woman fitting the same description.[224] The prosecution did not share any of this information with the defense.[225] The other robber was eventually identified and arrested through a tracking device in money taken in yet another robbery, committed after defendant's trial.[226] The defendant learned of these events from fellow prison inmates.[227] She then sought a new trial.[228] She argued that the evidence specifically supported her defense of mistaken identification and that disclosure would have influenced her trial strategy.[229] The panel of the Ninth Circuit rejected the defendant's arguments, deferring to the trial court and assessing the eyewitness identification testimony in a light favorable to the government.[230] A majority of the court sitting en banc demonstrated a better understanding of the vagaries of eyewitness identification, viewed the evidence in a light favorable to the defense, identified weaknesses in the government's case, and reversed the conviction.[231].

The courts should implement an approach to applying the harm assessing tests that will better guide the application of the various tests

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times ask what a reasonable jury would do absent the error. *See* Field, *supra* note 150 (discussing approaches to harmless error analysis); Solomon, *supra* note 8, at 1062 (discussing approaches to harmless error); Stacy & Dayton, *supra* note 53, at 126–30 (discussing variations in application of harmless error test).

222 492 F.3d 1050 (9th Cir. 2007) (en banc).

223 *Id.* at 1051–52.

224 *Id.*

225 *Id.*

226 *Id.* at 1052–53.

227 *Id.*

228 *Id.* at 1053. Because some of the information had been known to the government before her trial and some had not, she raised both a *Brady* claim and a Rule 33 new trial motion. *Id.*

229 United States v. Jernigan, 451 F.3d 1027 (9th Cir. 2006), *reversed and remanded*, 492 F.3d 1050 (9th Cir. 2007) (en banc).

230 *Jernigan*, 451 F.3d at 1033. The dissent from the en banc decision criticized the majority for its lack of deference to the trial court and for giving too little weight to the prosecution evidence. *Id.* at 1062-65.

231 *Jernigan*, 492 F.3d at 1054–57.

and also provide greater protection. The courts should adopt the following rules for assessing harm. They should view the evidence in the light most favorable to the defendant, examine the role of the error in the trial, giving weight to the defense theory of the case, and apply both backward-looking and forward-looking analyses. In addition, the courts should accord more weight to signals sent by the jury and also recognize that jurors may react more strongly than judges to certain evidence. Finally, the courts should limit the degree of deference to the trial court. These steps are discussed below.

1. View the evidence in a light favorable to the defendant

Appellate courts are accustomed to applying tests that view the evidence in a light favorable to the verdict winner. These harm assessment tests operate only after conviction, so courts will be drawn to an approach that favors the government.[232] Moreover, by placing the burden on the defendant, the harm assessment tests create additional bias in favor of affirming the conviction, which also increases the likelihood that the court will view the record in a light favorable to the government. Instead, when assessing harm, the court should recognize that a different fact finder could draw the inferences in favor of the defendant and should therefore draw all inferences in favor of the defendant, giving weight to arguments that reframe the evidence in light of the identified error.[233] Adopting this defense-friendly per-

232 *See* Satterwhite v. Texas, 486 U.S. 249, 258–59 (1988) (rejecting state court's application of *Chapman* as too favorable to the government and too close to measuring only the sufficiency of the evidence where the state court reasoned that "the properly admitted evidence was such that the minds of an average jury would have found the State's case . . . sufficient . . . even [without the erroneously admitted evidence]"); *see also* Neder v. United States, 527 U.S. 1 (1999). In *Neder*, the Court stated that the *Chapman* test requires a court to ask whether a jury could reasonably find in favor of the defendant, thus recognizing that the court must view the evidence in a light favorable to the defendant. *Neder*, 527 U.S. at 19. The court nevertheless concluded that the failure to instruct the jury on an element of the offense constituted harmless error in that case. *Id.* at 19–20. *See also id.* at 32–34 (Scalia, J., dissenting) (criticizing application of test as tantamount to directing a verdict for the prosecution). In *Vasquez*, the government rejected the suggestion that inferences should be drawn in favor of the defendant, even though the burden of showing harmlessness was on the government. Transcript of Oral Argument at 53–55, Vasquez v. United States, 132 S. Ct. 1532 (2012) (No. 11-199).

233 *See* United States v. Hernandez-Rodriguez, 443 F.3d 138, 140 (1st Cir. 2006) (reversing trial denial of a Rule 33 motion, which was based on the view that the circumstantial evidence against the defendant was insurmountable, and concluding that the trial court failed to recognize the full potential force the new evidence would have if accepted by the jury); *see also* United States v. Kenyon, 397 F.3d 1071, 1082 (8th Cir. 2005) (stating that *Kotteakos* test requires the court to give the benefit of the doubt to the defendant); United States v. Whitmore, 359 F.3d 609, 623 (D.C. Cir. 2004) (explaining that the government

spective should lead the court to recognize that the jury might have developed a reasonable doubt or credited different evidence if the case were tried without the flaw.[234] Taking this approach, courts should not dismiss claims of harm simply because the government's case is strong, the evidence in question is merely cumulative or impeaching, or the defense is unpersuasive to the court.[235]

The determination of which inferences to draw is especially critical when the case against the defendant is circumstantial.[236] In such

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had not established lack of harm, because "the government has not shown that a reasonable jury would have put aside relevant, impeaching evidence about the government's key witness and reached a similar verdict had it heard the excluded cross-examination"). The question can also be framed as asking whether any reasonable jury could have found the defendant not guilty. *See* Stacy & Dayton, *supra* note 53, at 133–34 (arguing that the court should resolve case on grounds that evidence against defendant is overwhelming only if it resolved all inferences in the defendant's favor); Teitelbaum, *supra* note 8, at 1189–90 (discussing this "directed verdict" approach).

When the court does not give the government the benefit of the inferences, the defendant is more likely to prevail, but reversal will not be automatic. *See, e.g.*, United States v. White, 341 F.3d 673 (8th Cir. 2003) (ultimately concluding that the defendant did not suffer prejudice); United States v. Nickerson, 556 F.3d 1014, 1020 (9th Cir. 2009) (examining how trial would have proceeded had counsel performed competently but concluding that defendant was not prejudiced).

234 *See, e.g.*, United States v. Fulcher, 250 F.3d 244, 255 (4th Cir. 2001) (holding that new evidence, if believed, was more favorable to the defendants and that, even though it was by no means clear that the defendants would be able to persuade the jury to draw the inferences in their favor, they should have the opportunity to do so).

235 When courts reject claims of harm because evidence is merely cumulative or impeaching, they rely on their own assessment of the witness's credibility, rather than giving the defendant the opportunity to have a jury assess the witness's credibility in light of the additional impeachment information. *See, e.g.*, United States v. Orr, 636 F.3d 944, 953 (8th Cir. 2011); Bucci v. United States, 662 F.3d 18, 38–39 (1st Cir. 2011) (rejecting *Brady* claimed based on impeachment evidence); United States v. Emor, 573 F.3d 778, 782 (D.C. Cir. 2009) (rejecting *Brady* claim on ground evidence would have offered only cumulative impeachment of a type already used at trial); *see also* Field, *supra* note 150 (criticizing the overwhelming evidence approach and also suggesting that the cumulative evidence test should be narrowed to provide appropriate protection for the defendant); Stacy & Dayton, *supra* note 53, at 134 (suggesting that court employ cumulative evidence analysis only if the "evidence is cumulative as a matter of law").

236 *See* Chapman v. California, 386 U.S. 18, 25–26 (1967) (pointing to the circumstantial nature of the case and concluding that "honest, fair-minded jurors might very well have brought in not guilty verdicts"); *see also* Harrington v. California, 395 U.S. 250, 254 (1969). In *Harrington*, the majority affirmed, relying on the strength of the government case and noting that the case before it "was not woven from circumstantial evidence;" however, the dissenting Justices pointed out weaknesses in the government's case that might have led to acquittal had the inadmissible evidence not been admitted. *Id.*; *see also* United States v. Brodwin, 292 F. Supp. 2d 484, 497–98 (S.D.N.Y. 2003) (acknowledging that "some presentation of the circumstantial evidence, under a different theory of prosecution" could result in a conviction of the defendants, but concluding that "the circumstantial evidence would probably not have been sufficient, and thus the new evidence would probably result in an acquittal").

cases, harm assessment necessarily requires the court to determine which inferences the jury could or would have drawn in the absence of the error. Analysis that draws inferences in favor of the government will generally yield a finding of no harm, whereas assessment that recognizes the jury's province to draw pro-defense inferences is more likely to find harm.

Similarly, this approach is also likely to result in a finding of harm if the case turns on credibility. In *United States v. Carmichael*, for example, the trial court granted a new trial when a witness, who had lied to the grand jury and was not called at trial, came forward to confess that the gun was his after the defendant was convicted of being a felon in possession of a firearm.[237] The court emphasized the importance of giving the defendant the chance to have the jury evaluate the evidence[238] and concluded that the defendant was entitled to have the jury assess the credibility of this exculpatory testimony, despite the fact that it contained some inconsistencies and contradicted the defendant's account to some degree.[239]

This approach is crucial in cases where the defendant shows that counsel was incompetent, the government failed to correct false testimony, or the government withheld exculpatory evidence. In cases that turn on the assessment of prejudice or materiality, the underlying problem may skew the record against the defendant.[240] Only a review that takes the evidence in a light favorable to the defendant and entertains the possibility that the jury may have weighed the case differently protects the defendant against these violations.[241]

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237 United States v. Carmichael, 269 F. Supp. 2d 588, 593, 600 (D.N.J. 2003).

238 *Id.* at 599.

239 *Id.* at 599–600. The court did not see the inconsistencies as critical and, further, based on the circumstances of the witness's confession and the existence of corroboration for some of the witness's account, concluded that the witness was credible.

240 *See* Klein, *supra* note 13, at 1467 (noting that record may be skewed by counsel's incompetence); *see also* Stacy & Dayton, *supra* note 53, at 131 (criticizing materiality and prejudice tests because "there are no objective factors upon which courts can rely in determining the probability of various reasonable resolutions of evidentiary conflicts and, hence, of various reasonable outcomes"). The authors also note:

> Few courts have construed [the reasonable probability] standard to mean that a defendant need only demonstrate that a jury could reasonably acquit based in part on the evidence in question, or that counsel's unprofessional errors could reasonably have influenced a jury. Rather, courts have considered only whether there is a substantial probability that a jury would acquit based on the evidence sought or an improved performance by counsel. . . . [Courts] must depend only on their own perceptions of the strength and credibility of the evidence.

Id.

241 *See* Bailey v. Rae, 339 F.3d 1107, 1119 (9th Cir. 2003) (recognizing risk of improper review and stating that the assessment requires "a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evi-

In *Smith v. Cain*, for example, the majority of the Court took this approach and held that the State had violated *Brady*.[242] Chief Justice John Roberts, writing for the majority, pointed out that both the State and the dissent based their assessment of materiality on pro-prosecution inferences the jury *could* draw to convict the defendant despite the new evidence, but that the Court could not be confident that the jury *would* have favored the government in that way.[243] If the court does not review the evidence in the light favorable to the defendant, it threatens the role of the jury.[244]

2. *Examine the Role of the Error in the Trial, Giving Weight to the Defense Theory of the Case*

To assess harm, the court should analyze in detail the relationship between all the errors of which the defendant complains and the dynamic of the trial.[245] The court should consider the theory of the defense, the timing of the error in the course of the trial, the parties' opening and closing arguments, prosecution conduct in relation to the error, and the jury instructions presented at trial to determine whether any of these aspects of the trial heightens the significance of the flaw.[246] Viewing the record in a light favorable to the defendant

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dence each side presented at trial") (quoting Boss v. Pierce, 263 F.3d 734, 745 (7th Cir. 2001)).

242 132 S. Ct. 627, 631 (2012).

243 *Id.* at 630. *See also* González-Soberal v. United States, 244 F.3d 273, 279 (1st Cir. 2001) (considering defendant's ineffective assistance claim and acknowledging that, while there was significant evidence of guilt, it had "little basis for estimating how the jury would have perceived" the new evidence).

244 If the court determines guilt and therefore finds no harm, the jury is deprived of the opportunity to perform its function of assessing the evidence and determining guilt or innocence. *See* Edwards, *supra* note 13, at 1192 (arguing that reliance on appellate assessment of harm to affirm convictions threatens to usurp role of jury); Field, *supra* note 150, at 33 and 52–53 (arguing that the "overwhelming evidence" test for harmless error usurps the role of the jury); Stacy & Dayton, *supra* note 53, at 127 (suggesting a harmless error approach drawn from civil procedure that examines the impact of the error on a reasonable jury and draws all inferences in the defendant's favor and arguing that such a test is necessary to protect the role of the jury); Teitelbaum, et al, *supra* note 8, at 1180 (arguing that if appellate court focuses on factual guilt, it supplants jury).

245 *See* Kyles v. Whitley, 514 U.S. 419, 421–22 (1995) (holding that materiality should be judged by the cumulative effect of the non-disclosed evidence); *see also* Blume & Seeds, *supra* note 37, at 1154 (arguing that all sources of potential harm in a case should be cumulated in determining whether the defendant is entitled to relief).

246 *See, e.g.*, United States v. Miller, 673 F.3d 688, 701 (7th Cir. 2012) (analyzing the likely reaction of the jurors to the improperly admitted evidence, mentioning the "vigorous defense" and the government use of improper evidence); United States v. Bentley, 489 F.3d 360, 366 (D.C. Cir. 2007) (considering impact of allowing the jury to see cash that had not actually been admitted as evidence and concluding that the cash added little to the

should also prompt courts to consider the defense theory more seriously, recognizing that jurors could accept the posited defense. In addition, the court should ask if the flaw affected the defense strategy in the case.[247]

A number of decisions model this type of analysis.[248] In *González-Soberal v. United States*, for example, the First Circuit remanded the

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prosecution case and did not undermine the defense); United States v. Kaplan, 490 F.3d 110, 123 (2d Cir. 2007) (listing "the prosecutor's conduct with respect to improperly admitted evidence" as one of four considerations in determining harmless error); United States v. Powell, 334 F.3d 42, 46–48 (D.C. Cir. 2003) (discussing in detail how the inadmissible evidence fit into the case and concluding that the defendant "did not suffer perceptible prejudice"); United States v. Tome, 61 F.3d 1446, 1455 (10th Cir. 1995) (explaining that the "*Kotteakos* standard requires a reviewing court to examine the entire record, focusing particularly on the erroneously admitted [evidence]" to "discern whether the [wrongfully admitted evidence], in light of the whole record, 'substantially influenced' the outcome of the trial" or left the court in "grave doubt" as to its effect); United States v. Brown, 921 F.2d 1304, 1308 (D.C. Cir. 1990) (finding error harmless, noting that prosecutors "did not exploit" the erroneously admitted evidence); United States v. Colombo, 909 F.2d 711, 715 (2d Cir. 1990) (concluding that the introduction of inadmissible prejudicial information was not harmless because defendant's credibility was crucial to his defense and because the prosecution's focus on the improperly admitted evidence counteracted the effect of the trial court's limiting instruction); United States v. King, 232 F. Supp. 2d 636, 645 (E.D. Va. 2002) (considering prosecution's reliance on false testimony in argument to the jury); *see also* Field, *supra* note 150, at 42–44 (suggesting that different items of evidence may have very different impacts on the jury); Solomon, *supra* note 8, at 1095–97 (providing recommendations to judges as they conduct harmless-error analyses to "match the normative ideal of accurate determinations of factual causation").

The court should also consider weaknesses in the government's case. *See, e.g.*, United States v. Hernandez-Rodriguez, 443 F.3d 138, 147 (1st Cir. 2006) (granting motion for new trial where evidence presented against the defendant in the first trial was sufficient to support his conviction but not so strong that it would "overwhelm" the new evidence and preclude a likelihood of acquittal); United States v. Arroyo, 301 F. Supp. 2d 217, 226 (D. Conn. 2004) (granting motion for a new trial, noting that the evidence of the defendant's guilt was "hardly overwhelming" and that a new trial should be granted only in "most extraordinary circumstances"); *King*, 232 F. Supp. at 651 (highlighting weakness of government case and granting new trial); *see also* United States v. Spencer, 4 F.3d 115, 119 (2d Cir. 1993) (noting that the trial court found "[p]ersuasive independent evidence" of defendant's guilt and affirming the denial of the new trial motion).

247 *See* Blume & Seeds, *supra* note 37, at 1168–74 (discussing the *Strickland* prejudice and *Bagley* materiality tests); Saltzburg, *supra* note 13, at 990 (discussing relationship between error and trial strategy, suggesting that as a result of error "[a] meritorious line of defense may be dropped, an important witness held back, or entire strategies abandoned even though they should prevail").

248 *See, e.g.*, United States v. Vasquez, 635 F.3d 889, 898 (7th Cir. 2011) (affirming the lower court's decision and concluding that the district judge's erroneous admission of evidence was ultimately harmless); United States v. Triumph Capital Grp., Inc., 544 F.3d 149, 162–63 (2d Cir. 2008) (looking closely at relationship between undisclosed evidence and defense and reversing district court finding that evidence did not support defendant's position); United States v. Aviles-Colon, 536 F.3d 1, 20–21 (1st Cir. 2008) (concluding nondisclosed impeachment evidence was material by examining how it supported the defense and undermined the prosecution narrative); United States v. Garner, 507 F.3d 399, 405–

case because "[t]he district court did not point to the possible limited value of the impeachment testimony, to the effectiveness of the cross-examination of the two government witnesses otherwise, to the strength of the available evidence against the defendant, or to any other factor or factors that may have been observed and noted by the district court."[249] In finding harm, the court reviewed the evidence carefully, focusing on the lack of corroboration of the government's evidence and the vulnerable credibility of the two key prosecution witnesses.[250] Similarly, in *United States v. Price*, the Ninth Circuit granted relief even though the undisclosed information was merely impeachment evidence. The court looked closely at the importance of the witness to the verdict, the vulnerability of the government's case, and the way in which the defendant could have used the new evidence.[251]

It is particularly critical for the reviewing court to consider the defense theory of the case, not only looking at the theory advanced at the first trial, but also considering how the defense might approach a retrial. In *United States v. Jernigan*,[252] the judges who ultimately overturned the conviction recognized that the *Brady* material spoke di-

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07 (6th Cir. 2007) (holding, over dissent, that non-disclosed evidence was material, in part because it supported the theory of the defense and ultimately concluding that the defendant did not receive a fair trial); United States v. Garland, 991 F.2d 328, 336 (6th Cir. 1993) (reversing trial court's denial of the defendant's motion for a new trial based on newly discovered evidence because the trial court had not recognized that the new evidence specifically supported the defendant's theory of the case); United States v. Rea, 958 F.2d 1206, 1221 (2d Cir. 1992) (finding error harmless in part because prosecution did not mention the improper opinion in argument and in part due to signals sent by jury); *see also* United States v. Ford, 550 F.3d 975, 993–95 (10th Cir. 2008) (Gorsuch, J., dissenting) (disagreeing with conclusion that evidence was not material and pointing out that the prosecution was able to foster a false and favorable impression in the presentation of its case and in argument and attack the defendant's credibility due to the absence of the undisclosed evidence).

249 244 F.3d 273, 277 (1st Cir. 2001).

250 *Id.* at 278–79.

251 *See* 566 F.3d 900, 913–14 (9th Cir. 2009) (noting that "impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case" (citation omitted)); *see also* United States v. Cuffie, 80 F.3d 514, 517–18 (D.C. Cir. 1996). In *Cuffie*, the D.C. Circuit found undisclosed impeachment evidence to be material despite the availability of other avenues of impeachment at trial. The court noted that the undisclosed evidence demonstrated that the witness had committed perjury and could therefore have "a significant impact on the fairness of the trial." *Id.* at 518.

252 492 F.3d 1050, 1057 (9th Cir. 2007) (en banc) (reversing the district court decision and holding that the government's suppression of material evidence deprived the defendant of a fair trial); *see also* United States v. Whitmore, 359 F.3d 609, 623 (D.C. Cir. 2004) (rejecting government effort to persuade court that the defendant's theory was not credible and emphasizing that "competing theories about the case are matters for a jury's consideration").

rectly to the defense of mistaken identity. Similarly, in *United States v. Gil*, the Second Circuit found a *Brady* violation because the undisclosed memo specifically corroborated the defense and the government had argued that the defense was unsupported by any documentation; as a result, the court concluded that the memo was material.[253] The court's rejection of the defense theory supplants the role of the jurors to assess credibility and weight of the evidence.

Taking this approach should also provide robust protection in false testimony cases. When *Bagley* was remanded, the Ninth Circuit recognized that the witnesses had testified falsely, contradicting the now-disclosed evidence that they had received benefits for their testimony.[254] The court stated "[i]t is inconceivable that evidence of perjury would not, as an objective matter, affect a factfinder's assessment of a witness' credibility."[255] The court also recognized that, had the prosecution given the information to the defense at trial, the defendant's trial strategy might have been different and "might have resulted in [the defendant's] acquittal."[256] This tack should make reversal more likely in false testimony cases.[257]

3. Apply Both Backward Looking and Forward Looking Analysis

The reviewing court should also assess the impact of the error from two vantage points. The court should not only attempt to determine the impact of the error at the time of the initial trial (this jury, this trial), but should also consider the likely outcome of an error-free trial (a future reasonable jury, error-free trial).[258] In addition,

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253 297 F.3d 93, 103–04 (2d Cir. 2002). In *Gil*, the trial court had stated "assuming the very best scenario for the defense, [the memo] would [not] have made a whit's bit of difference to the jury in their review of the evidence," but the Second Circuit, looking more closely at the relationship between the exculpatory evidence and the defense in the case as well as the prosecution's argument, concluded the evidence was material. *Id.* *See also* Bailey v. Rae, 339 F.3d 1107, 1116 (9th Cir. 2003). In *Bailey*, the state courts concluded that the evidence was cumulative and would not have altered the outcome. Examining the role the evidence could have played more closely, the Ninth Circuit that the undisclosed evidence was material because it would have "changed the dynamic" of the trial. *Id.*

254 Bagley v. Lumpkin, 798 F.2d 1297, 1299 (9th Cir. 1986).

255 *Id.* at 1301.

256 *Id.*

257 *See* United States v. Williams, 233 F.3d 592, 594 (D.C. Cir. 2000) (stating that the standard created a rule of "virtual automatic reversal").

258 *See* United States v. Lighty, 616 F.3d 321, 374–75 (4th Cir. 2010) (stating that, when a motion is based on recantation, the trial court must determine, in part, whether the jury might have reached a different conclusion in the absence of the now-recanted testimony and then ask whether the new testimony "would probably produce an acquittal"); United States v. Del-Valle, 566 F.3d 31, 39–41 (1st Cir. 2009) (looking backward and conducting

the court should ask what would have happened at the first trial had the error been exposed to the jury before they retired to deliberate. The court should then give the defendant the benefit of the most favorable of these assessments.

When the defendant complains of an error such as counsel's incompetence, nondisclosure of exculpatory evidence, or false testimony, the court should recognize that the error may have skewed the defense strategy in the initial trial.[259] If the defense plausibly argues that the error affected the strategy at the trial that led to the conviction, the court should not just assess the actual impact on the jury but should further consider the likelihood of a more favorable outcome on retrial or how the first trial might have progressed had the strategy not been skewed.[260]

The false testimony cases provide a useful illustration. Courts often adopt a backward-looking analysis to assess the impact of perjury and require the defendant to show that the jury would probably have reached a different verdict in the absence of the perjury.[261] A varia-

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detailed review of the evidence against the defendant); United States v. Spencer, 4 F.3d 115, 119 (2d Cir. 1993) (first stating the probable-acquittal standard but then restating the test in backward-looking language); Alvarez v. United States, 808 F. Supp. 1066, 1094 (S.D.N.Y. 1992) (quoting 3 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 557 (2d ed. 1982)).; *see also* United States v. Leary, 378 F. Supp. 2d 482, 493–94 (D. Del. 2005) (considering the likely impact of newly discovered impeachment evidence, the court pointed out that the witness in question had been impeached with other evidence at trial, leading the court to conclude that the evidence was cumulative and that it was not likely that the jury would have reached a different verdict had the evidence been used at trial, and also addressing the question of whether the new evidence would probably produce an acquittal); United States v. Arroyo, 301 F. Supp. 2d 217, 228–29 (D. Conn. 2004) (looking backward, stating that "[b]ut for" the misleading evidence, "the government probably would have been unable to meet its burden to prove guilt beyond a reasonable doubt," and that "[h]ad the jury known the truth . . . it would have had 'a tremendous impact on the jury's credibility assessment of the witness[es]'" and the jury would probably have acquitted). In the oral argument in *Vasquez*, the government argued that the Court should assess only the impact of the error on a reasonable or rational jury, whereas the defense argued that the Court should assess the impact of the error on the actual jury. Transcript of Oral Argument at 27–29, Vasquez v. United States, 132 S. Ct. 1532 (2012) (No. 11-199).

259 *See* United States v. Velarde, 485 F.3d 553, 561 (10th Cir. 2007) ("[T]he issue cannot be what the defense has already proved, but what the defense might reasonably be able to prove . . . ."); *see also* Field, *supra* note 150, at 47–54 (discussing ways in which error may have changed trial dynamic); Saltzburg, *supra* note 13, at 990.

260 Saltzburg, *supra* note 13, at 990; *see* United States v. Miller, 673 F.3d 688, 701 (7th Cir. 2012) (mentioning the possible effect of the error on the defense strategy in deciding that the error was not harmless).

261 *See, e.g.*, United States v. Mitrione, 357 F.3d 712, 718 (7th Cir. 2004) (holding that defendant must show that jury would probably have acquitted had it not heard the perjured testimony, but concluding that the defendant did not), *vacated*, Mitrione v. United States, 543 U.S. 1097 (2005); United States v. Petrillo, 237 F.3d 119, 123–24 (2d Cir. 2000) (ap-

tion on the backward-looking test is to ask whether the jury would have convicted had the witness's testimony been exposed as perjury.[262] Using this approach, the court would ask whether the jury would have viewed the case differently had they learned that a witness had lied to them under oath and that the government had knowingly allowed the false testimony to stand. It seems likely that this disclosure would discredit the entire case against the defendant.

Other courts look forward, asking whether the new evidence would probably result in a more favorable verdict if the defendant won a new trial.[263] Applying a forward-looking analysis, the court may focus on the way in which the defendant could use the new information but, equally, may hypothesize the way in which the government could successfully respond to the problem raised by the defendant.[264] For example, in *United States v. Williams*, the court concluded that in a new trial, the prosecution could avoid calling witnesses who committed perjury and obtain a conviction using other witnesses.[265] This tack should be taken very cautiously, given the challenge of determining how the jury would react to evidence that was never offered at the first trial.[266]

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plying a backward-looking test and concluding "new evidence was unlikely to have altered the jury's verdict"), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

262 *See, e.g.*, Ortega v. Duncan, 333 F.3d 102, 109 (2d Cir. 2003) (concluding that had the jury known of the witness's perjury, it would have been unlikely to convict).

263 *See, e.g.*, United States v. Huddleston, 194 F.3d 214, 217–21 (1st Cir. 1999) (discussing and adopting forward-looking standard, and concluding the new trial would result in conviction); United States v. Sinclair, 109 F.3d 1527, 1532 (10th Cir. 1997) (stating forward-looking test); United States v. Provost, 969 F.2d 617, 622 (8th Cir. 1992) (applying forward-looking standard). Rule 33 mandates a forward-looking inquiry.

264 *See, e.g.*, United States v. Davis, 15 F.3d 526, 532 (6th Cir. 1994) (affirming denial of new trial in part because prosecution would not have to call a witness targeted by newly discovered impeachment evidence at the retrial).

265 233 F.3d 592, 595 (D.C. Cir. 2000).

266 *See* United States v. King, 232 F. Supp. 2d 636, 652 (E.D. Va. 2002). The government sought to persuade the court to consider evidence that it had not used at the first trial but argued it could use on retrial of the case. Rejecting this argument, the court described the challenge that approach would pose:

> It is difficult enough to assess the probability of acquittal when the witnesses have testified under the rules of evidence, when they have faced cross-examination, when the Court has the benefit of the jury's verdict, and when the Court has heard the evidence and the witnesses, both at trial and in support of the motion. Where the prosecution asks the Court to consider the effect of evidence that would have been offered, evidence that has not been tested by cross-examination or circumscribed by the rules of evidence, the exercise becomes one of sheer speculation. The Court declines to speculate on the basis of hearsay, double hearsay, and a modicum of uncross-examined firsthand knowledge and, thereupon, to surmise how a case of that configuration would come out without the testimony of [the discredited witnesses] or with that testimony but also with the testimony of [witnesses who would testify to the plan to present false testimony] and the recantation of [one of the key witnesses].

United States v. King, a trial court decision addressing the defendant's motion for a new trial after a prosecution witness recanted, illustrates the different paths of analysis that can be used.[267] Taking a backward-looking approach, the District Court concluded that without the false testimony, "the jury might well have reached a different conclusion . . . ."[268] Weighing a different claim, the court applied forward-looking analysis and concluded that the new evidence would probably preclude the government from presenting several witnesses central to the case and that a new trial would not likely produce a conviction.[269] The court also noted that even if the now-discredited witnesses testified at a new trial, the defense would be able to use the evidence now available to impeach them, again making conviction unlikely.[270]

4. Accord More Weight to Signals Sent By the Jury

Courts should scrutinize the jury's actual conduct in the case for indications of harm. They should consider factors such as the length of deliberations, any jury requests or questions, and whether the verdict included a partial acquittal or the inability to reach a verdict on some charges.[271] Such factors may not always be present but, when they are, they provide unusual insight into the harmfulness of a specific error.[272]

Id.

267 *Id.* at 645; *see also* United States v. Jones, 84 F. Supp. 2d 124, 126–27 (D.C. Cir. 1999) (granting new trial based on assessment of what would have happened had information that prosecution expert lied about his credentials been discovered before defendant's trial and predicting what would happen in new trial); United States v. Brodwin, 292 F. Supp. 2d 484, 495 (S.D.N.Y. 2003) (examining how the new evidence fit the prosecution's theory of the case and interacted with the evidence presented at the initial trial and holding that defendant was entitled to a new trial because the new evidence "would very likely require the exclusion of important evidence admitted at trial and because it would require the Government to change the theory of prosecution it presented to the jury"); United States v. Alvarez, 808 F. Supp. 1066, 1095–96 (S.D.N.Y. 1992) (scrutinizing the evidence admitted against the defendant at the first trial, but also surmising that "[a]t a second trial skilled counsel could use the new evidence to dramatic effect," and describing how the evidence could play in a new trial).

268 *King*, 232 F. Supp. 2d at 649.

269 *Id.* at 650.

270 *Id.* at 651.

271 *See* Solomon, *supra* note 8, at 1095–97. In the oral argument of *Vasquez*, the government argued that the Court should not consider indications that the jury struggled with the case. Transcript of Oral Argument at 34–37, Vasquez v. United States, 132 S. Ct. 1532 (2012) (No. 11-199).

272 *But see* Stacy & Dayton, *supra* note 53, at 128 (arguing that courts do not have good information concerning what influenced jury).

In some cases, courts have viewed jury behavior as signaling harm.[273] For example, if the jury failed to reach a verdict on some counts, requested further instruction, or requested re-reading of any evidence, the appellate court may be able to draw a fair inference as to what the jury regarded as important in the case.[274]

However, even when the jury sends clear signals, courts do not always consider those signals in their assessment of harm.[275] For example, in *Gonzalez-Rodriguez*, the court concluded that the defendant had not shown that the plain error affected his substantial rights, even though the first jury failed to return a unanimous verdict, and the jury in the second trial, in which the government relied on improperly admitted evidence, convicted.[276] The sequence signaled both that the case was close and that the erroneously admitted evidence played a key role. Whenever the jury returns a split verdict, the courts should read it as a sign that the jury would have responded positively to a stronger showing by the defense, not that the jurors carefully parsed the testimony.

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273 *See, e.g.*, United States v. Wisecarver, 598 F.3d 982, 990 (8th Cir. 2010) (applying reasonable probability test and concluding that the erroneous supplemental jury instruction was plain error because the case was close, the instruction was supplemental, and the jury's split verdict was consistent with application of the erroneous instruction); United States v. Garner, 507 F.3d 399, 407–08 (6th Cir. 2007) (noting that jury question signaled importance of non-disclosed evidence); United States v. Russell, 221 F.3d 615, 623 (4th Cir. 2000) (relying in part on jury questions in concluding, over dissent, that defendant was prejudiced); United States v. Alvarez, 808 F. Supp. 1066, 1079 (S.D.N.Y. 1992) (remarking that the jury deliberated ten hours, asked to have all the testimony related to the defendant read back to them, and obtained a number of additional instructions from the court); *King*, 232 F. Supp. 2d at 648 (considering fact that jury acquitted the defendant on some charges). *But see* United States v. Rea, 958 F.2d 1206, 1221 (2d Cir. 1992) (noting that the jury asked to have some testimony re-read but did not focus on the objectionable evidence and that the jury reached a verdict of guilty on all counts in less than a day; therefore finding the error harmless).

274 *See, e.g.*, United States v. Colombo, 909 F.2d 711, 712, 715 (2d Cir. 1990) (reaching conclusion that error was harmful and noting that first trial had ended in a hung jury).

275 *See e.g.*, United States v. Ford, 550 F.3d 975, 980, 987 (10th Cir. 2008); United States v. Hinton, 423 F.3d 355, 362–63 (3d Cir. 2005) (citing the jury's acquittal of the defendant on two counts as factor supporting conclusion that error was harmless); United States v. Newton, 369 F.3d 659, 680 (2d Cir. 2004) (discounting the fact that the jury hung in the first trial as an indication that the evidence against the defendant was weak); United States v. Buchanan, 891 F.2d 1436, 1437–38 (10th Cir. 1989) (rejecting *Brady* claim even though first trial ended in hung jury). In *Ford*, the panel of judges divided over whether the withheld evidence was material, and only the dissenting judge attributed significance to the fact that the jury acquitted the defendant of two charges. 550 F.3d at 994.

276 United States v. Gonzalez-Rodriguez, 621 F.3d 354, 367 (5th Cir. 2010) (noting that the change in outcome could have been due to the admissible portions of the agent's testimony as well as the difference in the jurors).

5. Recognize that Jurors May React More Strongly than Judges to Certain Evidence

Judges may ascribe different weight than lay jurors to the same evidence.[277] Jurors relate to each side of the case as a narrative story rather than an assembly of items of evidence, which affects the way error impacts their understanding of the case.[278] Stories carry strong inferential power such that only a small number of facts are needed for jurors to develop a story around the evidence.[279] Moreover, jurors assess the strength of the stories told at trial by determining if the stories match their particular understandings of society.[280]

Judges, on the other hand, rely on their own perspective and experience to determine the strength of the case against the defendant.[281] Because of their experience and training, judges may dismiss evidence as cumulative, concluding it had or would have had limited impact, whereas jurors actually attach significant weight to redundant evidence.[282] Judges naturally base their assessment of harm on their reaction to the error, and may therefore inaccurately assess the impact of error on the jury.[283] Instead of assuming that their assessment of the evidence represents the jury's view, judges should recognize that evidence may affect jurors in a way that it does not affect the court.[284]

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277 *See* Teitelbaum, et al., *supra* note 8, at 1184–85 (noting differences between law-trained and lay assessments of harm).

278 *See* Solomon, *supra* note 8, at 1089–90; *see also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE ix (1981) (discussing the importance of storytelling in the courtroom); W. Lance Bennett, *Storytelling in Criminal Trials: A Model of Social Judgment*, 64 Q. J. OF SPEECH 1, 1–3 (1978) (discussing how stories help jurors organize evidence); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 REV. L. & WOMEN'S STUDIES 387, 434–37 (1996) (discussing importance of narrative).

279 *See* BENNETT & FELDMAN, *supra* note 278, at 4.

280 *See Id.*, at 68 (noting that jurors are not completely objective in their credibility assessments because jurors may be influenced by well-constructed stories that lack strong evidentiary support).

281 *See* Stacy & Dayton, *supra* note 53, at 131.

282 Solomon, *supra* note 8, at 1091–92; see REID HASTIE, ET AL., INSIDE THE JURY 163–64 (1983) (observing two models of evidence assessment). The authors observed an "evidence-driven" style of jury deliberation, marked by jurors reviewing the evidence in an attempt to "agree upon the most credible story." The authors also observed a "verdict-driven" style of deliberation, marked by jurors choosing a single verdict and citing all the evidence in support of that verdict. *Id.*

283 *See* Teitelbaum, et al., *supra* note 8, at 1154 (reporting results of comparison of law-trained and lay assessments of harm).

284 *See* Anderson, *supra* note 52, at 401 (noting that judges dismiss as harmless error the presentation of evidence that may strongly affect the jurors). Judges should also recognize the tendency to understate the prejudicial impact of evidence on the defendant. *See*

For example, evidence that a court views as "merely cumulative or impeaching" may round out the defendant's case and persuade the jurors.[285] Either the omission or the inclusion of information will impact the coherence and persuasiveness of the narrative.[286]

United States v. Russell illustrates the different approaches to interpreting jury conduct taken by different judges.[287] In *Russell*, the defendant, a prisoner, claimed prejudice based on the erroneous admission of two prior convictions, in addition to the conviction for which he was incarcerated. The majority concluded that the defendant had suffered prejudice, based in part upon the questions from the jury.[288] However, the third member of the panel disagreed, concluding that the improperly admitted convictions did not have the required negative impact and positing a different explanation for the questions.[289] The majority approach, more receptive to the possibility that jurors would be prejudiced by the improper evidence, provides more appropriate protection to the defendant.[290]

6. Limit the degree of deference to the trial court

Both new trial motions and plain error determinations are discretionary and are therefore reviewed only for abuse of discretion. The standard of review for the other claims should be made clear,[291] and

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Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 385–90 (2006) (reporting prejudicial impact of joinder of charges permitted by courts and suggesting that courts may underestimate prejudicial effect of joinder or overestimate effectiveness of limiting instructions).

285 In *Moreno-Morales v. United States*, 334 F.3d 140, 148 (1st Cir. 2003), the court recognized "the impeaching power of a witness's evolving story" but nevertheless rejected the defendant's claim. *See also* United States v. Griffin, 324 F.3d 330, 350–351 (5th Cir. 2003) (holding that agent's improper overview evidence, presented before the evidence in the case, was harmless because it was supported by other evidence); HASTIE, ET AL., *supra* note 282, at 163–64 (observing that "verdict-driven juries" choose a single verdict and list all the evidence that supports that verdict); Field, *supra* note 149, at 37 (criticizing cumulative evidence approach to harmless error analysis); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189–91 (1992) (noting that jurors will more readily accept the story that has the greatest coverage, coherence, and uniqueness).

286 *See* BENNETT & FELDMAN, *supra* note 278, 88–90 (finding that jurors view more ambiguous stories as less plausible and noting that only a small number of facts are needed for jurors to draw inferences and construct stories); Pennington & Hastie, *supra* note 285, at 189–91 (explaining that stories' coverage, coherence, and uniqueness affect jurors' decisions).

287 221 F.3d 615, 617 (4th Cir. 2000).

288 Id. at 623.

289 Id. at 625 (Williams, J., concurring in part and dissenting in part).

290 *Russell*, 221 F.3d at 617.

291 For example, not all courts agree on the standard of review for questions of materiality. *Compare* United States v. Pettiford, 627 F.3d 1223, 1227 (D.C. Cir. 2010) (stating that re-

more claims should be reviewed de novo,[292] rather than for abuse of discretion.[293] The protections at stake are so important that the claims warrant a second close look.

One customary reason for deference, advanced in some of the harm assessment cases, is that the trial court is better positioned to assess the actual impact of the proceedings on the jury and the credibility of the witnesses.[294] Thus, if the issue turns on the credibility of witnesses or specific trial dynamics, the appellate court will generally defer to the trial court. However, once the defendant has been convicted, the presiding judge is likely to suffer from the types of bias discussed above, which will predispose the judge to believe the prosecution witnesses were accurate and largely truthful and to approach defense claims with skepticism. Unlike a typical question of fact re-

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view of materiality is de novo*), with* United States v. Warshak, 631 F.3d 266, 300 (6th Cir. 2010) (denial of motion for new trial based on violation of *Brady* reviewed for abuse of discretion) (quoting United States v. Graham, 484 F.3d 413, 416 (6th Cir. 2007)).

292 *See Pettiford*, 627 F.3d at 1227 (stating that review of materiality is de novo); United States v. Miller, 520 F.3d 504, 514 (5th Cir. 2008) (noting that *Brady* claims are de novo but that "due deference" must be accorded to the trial court); United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) (stating that review of *Brady* and *Giglio* claims is de novo); United States v. Sipe, 388 F.3d 471, 478–79 (5th Cir. 2004) (noting disagreement about standard of review that applies to *Brady* questions); United States v. Buchanan, 891 F.2d 1436, 1440 (10th Cir. 1989) (stating that review is de novo); *see also* United States v. Brown, 650 F.3d 581, 589 (5th Cir. 2011) (stating that review of *Brady* claim is de novo, but fact findings are accorded deference and determination of materiality made after in camera review is reviewed only of clear error).

293 *See* United States v. Tate, 633 F.3d 624, 629 (8th Cir. 2011) (noting that the stating for review is for abuse of discretion); United States v. Rubashkin, 655 F.3d 849, 857 (8th Cir. 2011) (standard of review of ruling denying Rule 33 motion for new trial is abuse of discretion); *Warshak*, 631 F.3d at 300 (stating that the denial of motion for new trial based on violation of *Brady* is reviewed for abuse of discretion) (quoting *Graham*, 484 F.3d at 416); United States v. Baker, 453 F.3d 419, 421 (7th Cir. 2006) (stating standard as abuse of discretion); *see also* United States v. Holder, 657 F.3d 322, 328 (6th Cir. 2011) (stating that review of decision concerning whether there was a *Brady* violation is de novo, but review of denial of new trial on that ground is for abuse of discretion).

294 *See* United States v. Lighty, 616 F.3d 321, 375 (4th Cir. 2010) (discussing trial court's opportunity to assess the role of the evidence and deferring to trial court); *Miller*, 520 F.3d at 514 (stating that the appellate court has "an inherent disadvantage" because it reviews a cold record and that "due deference" must therefore be accorded to the trial court); *Sipe*, 388 F.3d at 479 (discussing trial court's advantage); United States v. Mitchell, 365 F.3d 215, 257 (3d Cir. 2004) (stating that "the District Court had the best vantage point"); *Dumas*, 207 F.3d at 16 (noting "the district court's superior position from which to assess the new evidence"); Edwards, *supra* note 13, at 1193. In *United States v. Gambino*, the Second Circuit stated:

> The trial court has "broad discretion" to decide Rule 33 motions based upon its evaluation of the proof produced, and its ruling is deferred to on appeal because, having presided over the trial, it is in a better position to decide what effect the newly discovered materials might have had on the jury.

59 F.3d 353, 364 (2d Cir. 1995) (citations omitted).

solved on the evidence where the judge does not have a stake in the result, harm assessments require the judge to gauge the impact of an error she herself permitted and to possibly undertake a retrial of the case.[295] For that reason, the customary deference should not be accorded a self-serving determination of lack of harm.

Recognizing the pressures on the trial court to justify the outcome of the trial and find no harm, appellate courts should defer only if the trial court ruling is counter to those pressures. If the trial court's ruling favors the defendant, it may be accorded deference.[296] A pro-defendant finding signals that the trial court did not succumb to the pressures to allow the verdict to stand; there is less reason to fear that factors such as hindsight bias have influenced the trial court. Otherwise, deference should be limited; the reviewing court should examine carefully the trial court's determination that the defendant was not harmed.

CONCLUSION

Better guidance in defining and applying the harm-assessing tests is critical to assuring that an accused defendant receives a fair trial and to enforcing the rights guaranteed by the Constitution. Currently, the tests ask courts to draw impossibly fine distinctions, and courts fail to adhere to consistent definitions of the tests. The resulting lack of clarity, in addition to the pressure to affirm convictions and the psychological forces that weigh on the side of affirming convictions, poses the danger that errors that contributed to convictions will go uncorrected. Moreover, because of the blending in application of the harm assessing tests, courts fail to provide greater protection when the defendant shows a violation that is said to warrant more protection, and the burden on the defendant to prove harm may tend to increase.

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295 *See* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1331–33 (2004) (arguing for more robust appellate review).

296 *See, e.g.*, White v. Roper, 416 F.3d 728, 732 (8th Cir. 2005) (deferring to trial court's finding of prejudice and not independently reviewing the evidence); *Sipe*, 388 F.3d at 478–79 (deferring to the trial court's assessment that the evidence withheld was material). *But see* Conley v. United States, 415 F.3d 183, 194 (1st Cir. 2005) (Torruella, J., dissenting) (arguing that the trial court's conclusions, which resulted in a finding of materiality, were not entitled to deference); United States v. Hughes, 230 F.3d 815, 817 (5th Cir. 2000) (reversing grant of new proceeding even though both the Magistrate Judge and the District Court Judge had held evidentiary hearing and concluded that non-disclosed evidence was material); Mitchell, *supra* note 55, 1353–57 (arguing that appellate courts should defer to trial courts on questions of harmless error).

Thus, the courts must provide better guidance in the definition and application of these harm-assessing tests. First, courts should reduce the number of tests and the reliance on small distinctions in language. The differentiations on which courts have relied involve distinctions too fine to be meaningful. Second, courts should clearly allocate and define the burden of proof. Third, courts should emphasize that the mere sufficiency of the evidence should not lead a court to reject a claim of harm. Finally, courts should prescribe an approach to applying the tests. Such an approach should accord more weight to signals sent by the jury and look more closely at the role of the error in the trial. Moreover, the evidence should be viewed in the light most favorable to the defendant. Courts should also attempt to consider the likely outcome of an error-free trial in addition to determining the impact of the error at the time of the initial trial. Finally, the prescribed approach should recognize that jurors and judges may react differently to certain evidence. By better defining and applying these harm assessing tests, the courts will achieve both clarity and functionality that will better enforce protected rights across the board.