

**CONSIDERING *NAPUE* AND THE DEFENSE’S ROLE IN CORRECTING
FALSE TESTIMONY AT TRIAL**

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Introduction

Henry Napue was [convicted](#) of murder and sentenced to 199 years imprisonment. His conviction was heavily influenced by the testimony of his former accomplice—and the prosecution’s key witness—George Hamer. Napue filed a post-conviction petition after learning that, in a *coram nobis* proceeding, the prosecutor promised to recommend a reduction in Hamer’s sentence if Hamer testified against Napue. Napue alleged that Hamer, with the prosecutor’s knowledge, falsely testified that he had been promised no consideration for his testimony during the original trial. The Illinois Supreme Court, however, denied Napue relief.

But the Supreme Court of the United States reversed. To protect the due process rights of defendants who are convicted because of material incriminating false testimony, the Supreme Court, in [Napue v. Illinois](#) (1959) and its progeny, established a prosecutorial obligation. Prosecutors are now *required* to disclose any false testimony offered by their principal or material witnesses during trial.

However, the Court has yet to define the scope of defense counsel’s role in cases where defense counsel knows the prosecution’s witness gave false testimony at trial. More specifically, it remains an open question whether the defense’s conduct in such circumstances—or lack thereof—precludes the defendant from alleging *Napue* violations in post-conviction proceedings. This Essay argues that [Gomez v. Commissioner of Correction](#) (Conn. 2020) provides an appropriate, holistic framework for determining when defense counsel should be precluded from raising *Napue* arguments in post-conviction proceedings.

In Part I, this Essay begins by tracing the evolution of the prosecutorial obligation since *Napue*. Part II describes the current

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circuit split on whether defendants waive their right to bring *Napue* violations in post-conviction proceedings when the defense counsel knew about the false testimony in the original trial. Finally, Part III argues in favor of *Gomez's* approach for balancing defense counsel's incentives against the prosecution's obligations to correct known false testimony at a criminal trial so as to adequately protect a criminal defendant's right to a fair trial.

I. The Evolution of the Prosecutorial Obligation

A. The Prosecutorial Obligation to Correct Known False Testimony

The Supreme Court places a heavy premium on truth telling during judicial proceedings. *Napue* is the leading case on the prosecution's obligation to disclose or correct false testimony at trial. The conviction appealed in *Napue* was grounded on the jury's assessment of a witness's credibility. To avoid the defendant's wrongful loss of life and liberty, the Court sought to ensure that witness testimony was both reliable and truthful and that prosecutors did not secure convictions based on false testimony.

Hamer, a key witness at trial, received consideration from the Assistant State's Attorney ("ASA") trying *Napue's* case. The ASA promised to recommend a reduction in Hamer's sentence in exchange for Hamer's testimony. Yet at trial, in response to a question asked by the same ASA, Hamer testified that he had not been promised anything. The Court held that *Napue's* Fourteenth Amendment rights had been violated because the ASA did nothing to correct Hamer's false testimony at trial.

Thus, *Napue* established a prosecutorial obligation to correct known false testimony. The promise made to Hamer by the ASA was material to the jury's determination of Hamer's credibility. With that information, the jury could have concluded that the witness falsely testified in order to win the approval of the ASA who promised him consideration and was best positioned to implement that promise.

B. The Prosecutorial Obligation to Disclose Exculpatory Evidence

The Court similarly emphasized truth seeking in *Brady v. Maryland* (1963). In *Brady*, defense counsel requested extrajudicial statements made by Brady's accomplice from the prosecution. The prosecution, however, withheld statements in which the accomplice admitted to committing the murder—evidence that supported Brady's assertions that he was innocent. The Court held that a violation of the defendant's due process rights occurred when, in response to defense counsel's request, the prosecutor suppressed evidence that was favorable to the defendant and material to the outcome of the case—regardless of whether the prosecution acted in good or bad faith.

Brady was not a false evidence case because the statements were withheld and therefore not introduced at trial. Still, the Court viewed the case as one where the administration of justice was impeded; material information that could have given the jury a clearer picture of the facts and exculpated or reduced the defendant's sentence was intentionally withheld by the prosecution. Here, again, the Court pushed to uphold the integrity of judicial proceedings. Like falsely testifying against a defendant, omitting exculpatory information about a defendant that tends to mislead the jury and is material to the defendant's conviction is contrary to the fundamental goal of the U.S. criminal justice system to hold fair trials.

In *United States v. Agurs* (1976), the Court extended the prosecutorial obligation under *Brady* to cases where defense counsel did not request the exculpatory evidence. The Court held that the prosecution is not required to disclose all of the information it has gathered to defense counsel, but "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."

The Court found this obligation reasonable because defense counsel is often unaware of the existence of exculpatory evidence. In those cases, defense counsel cannot reasonably request exculpatory evidence or, indeed, make any request for evidence that gives the prosecution sufficient notice of what exculpatory evidence is sought. By placing this burden on the prosecution, the Court acknowledged that, in most cases, the prosecution is better positioned to reveal exculpatory information simply because the evidence is "in the hands of the prosecutor"—a benefit the defense lacks.

C. *Giglio*: When False Testimony Also Constitutes Nondisclosure of Exculpatory Evidence

The Court addressed whether a combination of undisclosed evidence and false testimony at trial results in a due process violation in *Giglio v. United States* (1972). In *Giglio*, the Court evaluated the question through the lens of both *Napue* and *Brady*. Following *Giglio*'s conviction, he discovered evidence that Taliento, the primary witness in the case, received a promise of prosecutorial immunity from DiPaolo, an Assistant United States Attorney ("AUSA"), if he testified against *Giglio*. However, the case was tried in district court by Golden, another AUSA. Before trial, Golden was assured by DiPaolo that no promises of leniency had been made to Taliento. At trial, both Taliento and Golden asserted that Golden had not promised Taliento any immunity.

The Court determined that there was a due process violation under *Napue* because the Government's case relied heavily on the false testimony of the primary witness: "Without [the testimony] there was no evidence to carry the case to the jury." The Court acknowledged that the government attorney who tried the case (Golden) was not aware of the false testimony because of the miscommunication from DiPaolo. However, it still found that DiPaolo's promises as an AUSA were attributable to the Government. According to the Court, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor" because "[t]he prosecutor's office is an entity and as such it is the spokesperson for the Government." Ultimately, the Court's decision created ex ante incentives for prosecutors to ensure complete communication of all material information to all lawyers involved with the case and to prevent prosecutors from keeping information from one another when they believe that potentially exculpatory information might create an obligation to disclose.

II. False Testimony and the Defense's Obligation Under *Napue*

Defense counsel's role in correcting known false testimony at trial has yet to be addressed by the Supreme Court of the United States. Currently, there is a circuit split on whether a defendant waives her post-conviction opportunity for relief when her defense counsel was aware of the *Napue* violation during the original trial. The Third, Fourth, and Seventh Circuits have held that, in such cases, the defendant waives her post-conviction opportunity for relief, while the Ninth Circuit has held the opposite. The Second Circuit and the D.C. Circuit have found exceptional circumstances where such waiver of a defendant's opportunity for post-conviction relief is inappropriate under the Fourteenth Amendment.

A. Failure to Raise the Issue at Trial *Does* Constitute a Waiver

In *United States v. Harris* (3d Cir. 1974), the defense had the opportunity to re-cross-examine a key witness that the defense knew had provided false testimony after the prosecution revealed at a sidebar during the trial that there was, indeed, an agreement between the government and the key witness. Defense counsel, however, failed to do so. Additionally, the defense could have discredited the prosecution and its witness by recalling the witness or putting the prosecutor who made the agreement with the witness on the stand, but again, the defense failed to do so. The Third Circuit held that "this inactivity by defense counsel following the 'revelation' by the Government constituted a waiver of their right to allege error on appeal." The court stated that both the prosecution and the defense have the obligation to eradicate errors that appear during the trial.

Since the defense also has this obligation, the defense should not be able to profit from its failure to take corrective measures during the trial by raising those issues only on appeal.

Similarly, in *United States v. Meinster* (4th Cir. 1980), the Fourth Circuit confronted this waiver question. Two investigations had been conducted regarding the case—the first in the Southern District of Florida and the second in the Eastern District of North Carolina, where the case was eventually tried. The court held that the defendants were precluded from the post-conviction relief they sought because the defense had learned, prior to the trial, that a deal had been struck in Florida but had then failed to inform the trial judge of the deal or to secure the Florida officials as witnesses in the case. The court reached this decision even though the North Carolina prosecutor denied the existence of a deal after the defense queried the prosecutor regarding the existence of any deals with the chief witness. Because the defense was informed about the deal by the Florida officials but did nothing to correct the false assertions during the trial, the court concluded, the defense had waived its ability to object to the witness’s testimony after the trial.

Similarly, in *Long v. Pfister* (7th Cir. 2017), Long was convicted of murder based on a key witness’s false testimony, which the prosecutor was aware of and was material to the jury’s decision. He argued that *Napue* and its successors entitled him to collateral relief because the prosecutor failed to *immediately* correct the false testimony. To him, *Napue*’s prosecutorial obligation always applied—regardless of whether the defense “already knows the truth.”

The court disagreed with Long’s assessment of *Napue*. Unlike in *Napue* and its progeny (where the defense was unaware of the false testimony), in *Long*, the defense knew of the false testimony. While the Seventh Circuit recognized that the scope of the defense’s obligation under such circumstances remained undefined because the facts in *Long* created a question that *Napue* had not directly addressed, the court ultimately found that the defense had a fair opportunity to discredit the primary witness at trial but failed to do so. The court stated that “[i]t is awfully hard to see why events that may have helped the defense [diminish the witness’s credibility] should lead to collateral relief in the absence of any clearly established legal transgression.”

B. Failure to Raise the Issue at Trial Does *Not* Constitute a Waiver

On the other side of the circuit split, the Ninth Circuit has consistently [held](#) that the prosecutorial obligation under *Napue* applies regardless of whether defense counsel knew about the false testimony.

In evaluating whether a *Napue* violation had occurred and could be raised on appeal, the Ninth Circuit emphasized the truth-seeking function of the courts. For example, in [United States v. LaPage](#) (9th Cir. 2000), the prosecution did not correct false testimony that its witness presented to the jury during the trial in which LaPage was convicted. In fact, despite knowing that the witness presented false testimony, the prosecution argued that he was credible during closing arguments. Defense counsel also plainly knew that the witness had offered false testimony. Nonetheless, the court held that the *Napue* prosecutorial obligation applied, and the defendant was not precluded from raising a *Napue* violation on appeal.

In [Sivak v. Hardison](#) (9th Cir. 2011), the Ninth Circuit went a step further. After being convicted of felony murder, Sivek argued that his due process rights under *Napue* and *Brady* had been violated because (1) the false testimony of a jailhouse informant went uncorrected, and (2) statements by another inmate about the murder were not disclosed to the defense. The court, quoting Ninth Circuit case law, stated that defense counsel's knowledge was "irrelevant" because defendants "c[an]not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system."

C. Exceptions to the Waiver Rule

The Second Circuit has taken a more nuanced approach to this question. In [United States v. Helmsley](#) (2d Cir. 1993), the court addressed whether to grant the defense's motion for a new trial based on alleged prosecutorial misconduct when the defense knew about the circumstances surrounding the misconduct during the trial. The court first stated that the established rule in the circuit was that the defense was barred from bringing up evidence of false testimony in post-conviction proceedings if defense counsel knew that the testimony was false during the trial.

The court then recognized that [exceptional circumstances](#) exist where the defense's knowledge of a prosecutor's intentional use of misleading information at trial does not preclude a collateral attack. The primary exception arises "where the prosecutor is claimed not merely to have been aware of circumstances indicating the falsity of a witness's testimony but to have been directly involved as a participant in the transaction about which the witness has allegedly lied." The Second Circuit in [United States ex rel. Washington v. Vincent](#) (2d Cir. 1975) had similarly stated that fairness demands that the defense be permitted to challenge "egregious and highly damaging prosecutorial misconduct" regardless of whether the defense had the opportunity to raise the issue at trial.

The D.C. Circuit faced a similar question in *United States v. Iverson* (D.C. Cir. 1981). The prosecution’s key witness had falsified testimony with the prosecutor’s knowledge, resulting in a conviction of the defendant. The court aligned itself with the Third, Fourth, and Seventh circuits, holding that the defense waived its ability to raise a *Napue* violation in subsequent proceedings because the defense was aware of a “deal” between the government and the witness but chose to not disclose it.

However, like the Second Circuit, the court recognized that there are exceptions to the rule in “unusual circumstances,” including situations where the defense is hindered by circumstances beyond its control, such as when there is (1) “inaccessibility at the time of trial of the information” or (2) “refusal of the trial court to permit inquiry into the matter.” In those situations, the court noted, a new trial is required to preserve the defendant’s due process rights.

III. Rethinking the Defense’s Obligation Using *Gomez v. Commissioner of Correction*

The waiver of a defendant’s ability to raise legitimate *Napue* violations in post-conviction proceedings due to defense counsel’s failure to correct known false testimony in the original trial may result in dire consequences for the defendant. As such, the *Helmsley* and *Iverson* exceptions discussed in Part II.C are important considerations in evaluating defense counsel’s obligation to correct known false testimony. This is particularly critical in scenarios, as *Iverson* noted, when (1) information related to the false testimony is inaccessible at the time of the trial or (2) the court refuses to permit, even for procedural reasons, defense counsel from inquiring into the issue at trial.

Allowing a criminal defendant to argue a *Napue* violation in a post-conviction proceeding, under the *Helmsley/Iverson* exceptions, does three things: First, it facilitates the truth-seeking function of the judicial process by ensuring that the jury, including in a new trial, more accurately assesses witness credibility by properly considering all the true, material facts that underlie a case. Second, consequently, it ensures that the criminal defendant receives a fair trial and that her due process rights are adequately protected. And third, importantly, the *Helmsley/Iverson* exceptions do so while preserving, except in unusual or exceptional cases, defense counsel’s incentive to correct known false testimony at trial. Therefore, the *Helmsley/Iverson* exceptions provide a good starting point for courts to determine whether a defendant waived the right to argue *Napue* violations in post-conviction proceedings.

However, the prosecution's obligation to correct known false testimony could be better balanced against defense counsel's incentive to do the same than current doctrine, including the categorical *Helmsley/Iverson* exceptions, provides for. Although the prosecution is usually best situated to correct false testimony by its witnesses at trial, defense counsel should also have a strong but flexible incentive to correct known false testimony, as well. A rule that classifies *Napue* arguments in post-conviction proceedings as either allowed or waived based on a relatively strict rule or set of factual circumstances, as even the *Helmsley/Iverson* exceptions do, lacks the necessary nuance. This Part explores a more holistic framework for courts to follow in assessing the prosecution and defense counsel's obligations and incentives even when a clear *Helmsley/Iverson* exception is not present.

A. *Gomez v. Commissioner of Correction*

Recently, the Supreme Court of Connecticut, in [Gomez v. Commissioner of Correction](#) (Conn. 2020), addressed whether a defendant's federal due process rights are violated "if the state knowingly presents the false testimony of a cooperating witness regarding the details of a cooperation agreement but also discloses the truth regarding that agreement to defense counsel." The court held that the defendant's knowledge that the state was planning to use false testimony against her to secure her conviction neither discharged the prosecutorial obligation to disclose the falsity nor immunized the state from *Napue* or *Giglio* due process violation claims.

The *Gomez* court explained that the prosecution was not relieved of its burden to correct false statements made by its witness during trial merely by disclosing the existence of a cooperation agreement to defense counsel. That disclosure, standing alone, was insufficient to discharge the prosecution of its *Napue* obligations because "sharing the truth with defense counsel, in itself, does nothing to disabuse the jury of any misconceptions created by the false testimony." While the court acknowledged that defense counsel shares a responsibility to correct false evidence harmful to the defendant, the court also recognized that attempts by defense counsel to discredit the false testimony of a witness for the prosecution could strategically backfire and negatively impact the criminal defendant in the eyes of the jury instead. The court, therefore, concluded that the prosecutor's mere disclosure to defense counsel of a cooperation agreement did not "repair the damage that is done to the efficient and fair administration of justice."

Despite this, the *Gomez* court did not completely absolve defense counsel of any obligation to correct known false testimony in all factual circumstances. Ultimately, the court emphasized the importance of ensuring that the jury is not misled by false testimony offered at trial;

that is, false testimony must be corrected by the prosecutor, the defense counsel, or both. Thus, the court adopted a case-specific approach for addressing when the prosecution has fulfilled its duty to disclose or correct known false testimony under *Napue* and when that obligation instead shifts to defense counsel.

The *Gomez* court’s approach considers several [factors](#) for determining when disclosure to defense counsel of a material falsehood in the prosecution’s witness’s statements discharges a prosecutor’s duty under *Napue*. First, under the *Gomez* approach, the court conducts an inquiry into the prosecution’s role in the falsehood. The court considers “whether it is the prosecution or the defense that elicits the false testimony, whether and how the prosecutor adopts and uses the false testimony, [and] the importance of the witness and his or her false testimony to the state’s case.” Then, the court looks specifically at defense counsel’s role, considering “whether—and to what effect—defense counsel tries to impeach the perfidious witness or whether counsel has a clear tactical reason for not doing so.”¹

B. The *Gomez* Factors Correctly Balance the Obligations of the Prosecution and Defense Counsel to Correct Known False Testimony

These *Gomez* factors are instructive on how courts should assess whether a *Napue* violation can be raised in a post-conviction proceeding even when the defense knew about a witness’s false statements at trial but did nothing to correct them. The *Gomez* factors reflect a totality of the circumstances approach that allows courts to determine, on a case-by-case basis, whether the jury ultimately learns the truth and who was in the better position to apprise the jury of that truth. By making these case-specific inquiries, the court can better assess whether a witness’s known false testimony could have been

¹ *Gomez*’s focus on the performance of defense counsel is at least evocative of the Sixth Amendment’s guarantee that a criminal defendant receives effective assistance of counsel in order to produce a just result at a criminal trial. See [Strickland v. Washington](#) (1984) (stating that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result”).

Gomez does not concretely tie its analysis as to whether a *Napue* violation has occurred to the line of cases analyzing a criminal defendant’s Sixth Amendment right to the effective assistance of counsel. Nonetheless, in future cases considering whether to permit a *Napue* violation argument in a post-conviction proceeding, Sixth Amendment effective assistance of counsel cases might provide useful data points as courts work through the *Gomez* factors, some of which expressly contemplate defense counsel’s strategic and tactical performance at trial.

corrected at the trial stage and whether both the prosecution and defense properly exhausted all reasonable options available during the trial.

Gomez's holistic analysis strikes a better balance between placing the correct burdens on the prosecution and creating the correct incentives for defense counsel than other possible frameworks. On one hand, a strict rule that always considers the defendant's ability to raise *Napue* violations in post-conviction proceedings waived, if the false testimony was disclosed to defense counsel—or a rule that construes and applies the *Helmsley/Iverson* exceptions too narrowly—undermines the very prosecutorial burden that *Napue* recognized, as *Helmsley* and *Iverson* later understood. Nor does such a rule account for the nuances that *Helmsley* and *Iverson* realized could affect the defense's ability to alert the court and jury to false witness testimony. Moreover, a rule that treats *Napue* claims in post-conviction proceedings, if based on false testimony disclosed to defense counsel, as unequivocally waived might in some cases simply be unreasonably harsh to criminal defendants, who would pay fines or spend time in prison on the basis of false testimony that their counsel could not reasonably correct.

But on the other hand, a rule that always allows a criminal defendant to raise *Napue* violation arguments in post-conviction proceedings, even when defense counsel knew about the false testimony at trial, risks unreasonably *lowering* defense counsel's incentive to at least attempt to correct known false testimony at trial. Strategic defense counsel, instead of making reasonable and straightforward attempts to correct known false testimony at trial, might simply preserve those arguments for appeal. But that gamesmanship creates judicial inefficiency, too, in situations where known false testimony can be more quickly and reasonably corrected at the initial trial, rather than in a *new* trial after a post-conviction proceeding. The *Napue* waiver rule should incentivize defense counsel to protect defendants against false testimony, too, in addition to preventing the prosecution from taking unfair advantage of false testimony.

Whether defense counsel has effectively waived the right to make a *Napue* violation argument on appeal should ultimately balance the harms caused to criminal defendants because of potential due process violations against the interests of judicial efficiency in fair and speedy trials. *Gomez's* holistic approach that balances “whether and how the prosecutor adopts and uses the false testimony” against whether “defense counsel tries to impeach the perfidious witness or whether counsel has a clear tactical reason for not doing so” places the correct burdens on the prosecution and creates the correct incentives

for defense counsel. Under *Gomez*'s framework, the prosecution retains the important burden recognized by *Napue*, but defense counsel will nonetheless be incentivized to exploit opportunities that fairly present themselves at trial to correct known false testimony. And the *Gomez* approach, in turn, further contributes to the truth-seeking function of the courts, while also preserving, as best as possible, the defendant's constitutional right to a fair trial. *Gomez* strikes, in short, the right balance.

Conclusion

In considering the defense's role in this calculus, courts should determine whether defense counsel waives her ability to raise *Napue* violations in post-conviction proceedings when defense counsel knew of the false testimony in the original trial by evaluating (1) whether a *Helmsley/Iverson* exception occurred or (2) in the absence of a *Helmsley/Iverson* exception, by assessing the *Gomez* factors. To secure a fair trial for criminal defendants, it is essential that courts maintain the truth-seeking function of the judicial system by placing appropriate obligations and incentives on both the prosecution and the defense to correct known false testimony and by ensuring that judges and juries have the requisite information to decide cases reliably and effectively. Ensuring truthful testimony at trial and preserving the constitutional rights of criminal defendants are not mutually exclusive. They work hand-in-hand. And in that joint effort, the *Gomez* approach correctly balances placing the burden of disclosure on the prosecution, as laid out in *Napue*, against creating appropriate incentives for defense counsel to play her part in correcting known false testimony at criminal trials.

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