

IF THE CONVICTIONS DON'T FIT, YOU MUST ACQUIT: EXAMINING THE CONSTITUTIONAL LIMITATIONS ON THE STATE'S PURSUIT OF INCONSISTENT CRIMINAL PROSECUTIONS

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ABSTRACT

This article provides a novel approach to the phenomenon of inconsistent prosecutions, which occur when the State's assertions in one case conflict with or directly contradict its assertions in a separate case arising out of the same transaction or occurrence. Resolution of this issue has become pressing due to the likelihood that the United States Supreme Court will soon be asked to review the Sixth Circuit Court of Appeals' decision in *Stumpf v. Houk*. The lower courts have almost uniformly reasoned that inconsistent prosecutions may violate a defendant's procedural due process right to a fundamentally fair trial if the prosecution's inconsistencies go "to the core" of the State's case.

This article rejects the fair trial framework for evaluating inconsistent prosecutions, which holds that the fundamental fairness of a defendant's trial cannot logically be affected by the State's actions in a separate, procedurally independent trial. In its place, this article offers substantive due process as a viable legal theory, since this constitutional protection bars certain governmental action regardless of the process afforded. This article concludes that maintaining truly incompatible convictions and sentences violates substantive due process under the "shocks the conscience" test. By its own irreconcilable actions, the government has undone the presumptions of guilt that traditionally attach to defendants following conviction. Thus, for the State to knowingly place its imprimatur on at least one wrongful conviction is arbitrary in the constitutional sense.

This article then sketches potential remedies for when a court finds a

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substantive due process violation. If there is no inference that the defendants collaborated in the crime, both convictions must be overturned and the State must choose which defendant to pursue on retrial. Co-defendants, where possible, should be retried jointly for the jury to properly assess each defendant's role in the offense and to reach a coherent outcome.

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I.
INTRODUCTION

For nearly four years, Antoine Bankhead was incarcerated in a Missouri prison. He stood convicted as an accomplice to the robbery and murder of a man at a grocery store.² The evidence gathered by the prosecutor established that two individuals committed the offense,³ yet Bankhead was the third person convicted of the crime.⁴ In all three proceedings, the prosecution maintained that an individual named Shadwick shot the victim following a physical altercation between the victim and Shadwick and his accomplice.⁵ One year after the killing, an individual named Washington pled guilty to, *inter alia*, second degree murder and first degree robbery as Shadwick's accomplice.⁶ Both Washington and the State affirmed at the plea colloquy that Shadwick and Washington were the two assailants.⁷

The same prosecutor later obtained first degree murder and robbery convictions against Shadwick.⁸ At trial, the prosecutor maintained that Shadwick and Washington committed the offense.⁹ Three of the six eyewitnesses called by the prosecutor corroborated Washington's involvement.¹⁰ The other three witnesses either could not identify the accomplice or were not questioned on this point.¹¹

During Bankhead's trial, the State called one of the witnesses who, in Shadwick's trial, had identified Washington as the accomplice. This time, the witness changed her testimony to implicate Bankhead.¹² The prosecutor did not call the other two witnesses who identified Washington in Shadwick's trial. Instead, he called the three eyewitnesses that did not identify the accomplice at Shadwick's trial.¹³ In closing, the prosecutor told the jury "[a]bsolutely nothing that you heard in this courtroom would contradict that" Shadwick and Bankhead were guilty of the murder-robbery.¹⁴ The jury subsequently convicted Bankhead.¹⁵ Had the Missouri

2. Bankhead v. State, 182 S.W.3d 253, 254, 259 (Mo. Ct. App. 2006).

3. *Id.* at 259.

4. *Id.* at 254–58.

5. *Id.* at 254, 259.

6. *Id.* at 254–55.

7. *Id.* at 255.

8. *Id.* at 255–57.

9. *Id.*

10. *Id.* at 256.

11. *Id.*

12. *Id.* at 257.

13. *Id.*

14. *Id.*

15. *Id.* at 257–58.

courts not overturned Bankhead's conviction on collateral review, he would have spent up to forty years in prison for the State's irreconcilable prosecutions.¹⁶

Prosecutors frequently argue inconsistent facts or theories of culpability, especially in cases involving co-defendants.¹⁷ Not all prosecutorial inconsistencies are as irreconcilable as that in *Bankhead*, but all raise serious questions about the criminal trial's ability to serve as a mechanism for uncovering truth. The prosecution's apparent indifference to the truth in cases like *Bankhead* severely undermines the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."¹⁸

At the heart of this article are those cases in which one government convicts multiple individuals in separate proceedings when the underlying bases for the convictions are inconsistent. Throughout this article, the term "inconsistent" will refer to the general class of prosecutions or convictions that are in tension with one another, but which are not necessarily mutually exclusive. "Irreconcilable" or "incompatible" will designate the narrower class of prosecutions or convictions that are mutually exclusive.

This article seeks to identify a coherent constitutional theory that restricts prosecutorial practices of the type illustrated by *Bankhead*. Key to this effort will be distinguishing between situations where the

16. *Id.* at 260.

17. Quantifying precisely how frequently this practice occurs is difficult. Recent opinions describing prosecutorial inconsistencies, however, provide a broad sense of practice. *See, e.g.*, *Sifrit v. Rowley*, No. RDB-08-2327, 2010 WL 4156376 (D. Md. Oct. 21, 2010) (state took inconsistent positions on which co-defendant controlled the murder weapon and was main perpetrator in crime); *United States v. O'Reilly*, No. 05-80025, 2010 WL 3001385 (E.D. Mich. July 28, 2010) (prosecution took inconsistent positions on accuracy of medical examiner's measurements of distance from which fatal gunshot wounds were fired); *McNeil v. Branker*, 601 F. Supp. 2d 694 (E.D.N.C. 2009) (prosecution took inconsistent positions as to which co-defendant was trigger-person for two separate shootings); *State v. Miller*, No. 2 CA-CR 2008-0042-PR, 2008 WL 4173827 (Ariz. Ct. App. Sept. 10, 2008) (state took inconsistent positions as to trigger-person); *Council v. Comm'r of Corr.*, 968 A.2d 483 (Conn. App. Ct. 2009) (prosecutor took inconsistent positions on which two of three co-defendants fired weapon); *State v. Pearce*, 192 P.3d 1065 (Idaho 2008) (state took inconsistent positions on credibility of witness used in co-defendants' separate trials); *Hearn v. Commonwealth*, No. 2005-SC-000708-MR, 2008 WL 3890035 (Ky. Aug. 21, 2008) (state took inconsistent positions regarding co-defendant's credibility and culpability); *State v. Bodden*, 661 S.E.2d 23 (N.C. Ct. App. 2008) (state took inconsistent positions on whether victim believed he would die to establish dying declaration exception to hearsay rule in Bodden's trial) (citing *State v. Leggett*, 519 S.E.2d 328 (N.C. Ct. App. 1999) (state took inconsistent positions as to credibility of two of codefendant's witnesses)); *State v. Skatzes*, Nos. 22322, 22484, 2008 WL 4603303 (Ohio Ct. App. Oct. 10, 2008) (state took inconsistent positions as to which of two co-defendants struck potentially fatal wound to victim's head). *See also* Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 *FORDHAM L. REV.* 525, 525 (1999).

18. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

convictions cannot be reconciled under any theory of culpability with those that, while factually inconsistent, are not mutually exclusive.

Identifying the proper constitutional grounds on which defendants convicted by the same sovereign may challenge inconsistent prosecutions is critical for the theory to withstand scrutiny from the Supreme Court.¹⁹ This search is particularly pressing given that the Court may eventually be asked to resolve this question in the wake of the controversial decision by the Sixth Circuit Court of Appeals in *Stumpf v. Houk*, in which a panel of the court vacated a death sentence due to the prosecution's incompatible assertions about which of two murder defendants was the trigger-person.²⁰ The panel's opinion has been vacated pending rehearing en banc, leaving its fate uncertain even within the Sixth Circuit.

When faced with inconsistent prosecutions, courts, including the Sixth Circuit in *Houk*,²¹ typically frame the issue as implicating the defendant's due process right to a fair trial. Courts that recognize a constitutional violation under this theory typically reason that a prosecutor's pursuit of incompatible theories of conviction is the functional equivalent of presentation of or failure to correct a known falsity.²²

This article rejects this approach by arguing that a prosecutor's reliance on inconsistent theories does not implicate a defendant's right to a fair trial. Because the right to a fair trial, which is rooted in the procedural component of the Due Process Clause of the Fourteenth Amendment, deals primarily with the protections afforded to a defendant at her trial, a defendant cannot invoke it where she seeks to challenge her conviction based on a separate, procedurally independent trial.

From this premise, this article concludes that, irrespective of how the State *obtained* the convictions, the proper inquiry is to what extent the State may *maintain* inconsistent convictions, an analysis that turns on the degree to which the convictions can be reconciled with one another. Because the analysis should focus on the results of the inconsistent proceedings, rather than on their underlying procedural fairness, the

19. Compare *Holland v. Illinois*, 493 U.S. 474 (1990) (holding that Sixth Amendment does not prohibit racially discriminatory use of peremptory strikes on jurors of a race other than defendant's race), with *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that Equal Protection Clause of Fourteenth Amendment does prohibit racially discriminatory use of peremptory strikes on jurors of a race other than defendant's race).

20. 653 F.3d 426 (6th Cir. 2011), *vacated pending rehearing en banc* (Oct. 26, 2011).

21. The Sixth Circuit in *Houk* also relied on the Eighth Amendment principle that death sentences be subject to more stringent scrutiny to satisfy the heightened need for reliability in such cases. *See id.* at 11 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985)).

22. *See, e.g., Nguyen v. Lindsey*, 232 F.3d 1236, 1240 (9th Cir. 2000) ("[A] prosecutor's pursuit of fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith.").

substantive component of due process offers the most plausible constitutional framework to challenge such convictions.

Under this paradigm, maintaining truly irreconcilable convictions violates substantive due process because it necessarily requires that a prosecutor knowingly enforce a wrongful conviction, an act that constitutes an arbitrary and irrational state action. Maintaining irreconcilable convictions also requires that the State treat its citizens solely as disposable means to the end of securing criminal convictions, rather than treating its citizens as ends by respecting the procedural and substantive rights the Constitution provides to defendants.

By failing these tests of rationality, discretion, and political morality, the state's continued enforcement of irreconcilable convictions "shocks the conscience" and therefore violates substantive due process. Under the same logic, if the convictions may be legally reconciled, mere inconsistency does not offend substantive due process.

Part I of this article briefly explores the problem of inconsistent prosecutions, identifying the situations in which they occur and the methods and motives that produce them. Part II analyzes the current state of the law on incompatible prosecutions, specifically, how the lower courts—operating without significant direction from the Supreme Court—have adopted a fair trial framework. Part III examines the weaknesses of the fair trial approach and concludes that inconsistent prosecutions do not offend the right to a fundamentally fair trial. Part IV proposes a theory of substantive due process to challenge truly irreconcilable convictions. Part V sketches how courts might structure a remedy upon finding a substantive due process violation.

II.

THE DIMENSIONS OF PROSECUTORIAL INCONSISTENCIES

Prosecutorial inconsistencies occur in a variety of ways: in the charges brought and sentences sought against multiple defendants, in the differing evidence the prosecutor introduces against the defendants, and in the prosecutor's arguments with respect to evidence introduced in multiple cases. Appreciating the dimensions of prosecutorial inconsistency first requires understanding the varying degrees of inconsistency that result from such pursuits and then examining the prosecutorial tactics that produce inconsistencies. Once these goals are accomplished, this Part will tackle the question of what motivates prosecutorial inconsistency.

A. The Differing Degrees of Prosecutorial Inconsistency

The most important dimension of prosecutorial inconsistency is the degree to which one may reconcile the prosecutions and convictions at

issue. This inquiry applies most directly to the determination of guilt, but may also have relevance to sentencing, particularly in capital cases²³ or noncapital cases raising the applicability of sentencing enhancements.²⁴

Assessing reconcilability principally requires identifying the alleged relationship among multiple defendants, i.e., whether the State asserts that the defendants acted in concert. Situations where the State does not allege collaboration among the defendants present the most fertile grounds for irreconcilable prosecutions. In these cases, the fact-finder is forced into an either/or proposition with respect to culpability. In other words, where one defendant's guilt logically precludes the possibility of the other defendant's guilt, the primary question becomes "who did it?"

The Eighth Circuit case *Smith v. Groose*²⁵ illustrates this concept. Jon Smith was convicted of first-degree felony murder for the death of a Missouri couple in their home.²⁶ The couple's home was burglarized by two separate sets of individuals.²⁷ Smith's group was the second to arrive.²⁸ At some point during the break-ins, the couple was killed with a butcher knife.²⁹ The evidence showed that either someone from Smith's group or the first group carried out the homicide; there was no suggestion that the death resulted from collaboration between the groups.³⁰ Thus, Smith's conviction for felony murder was entirely incompatible with the subsequent prosecution and conviction of a member of the first group for the same murder.³¹

Inconsistent prosecutions can often be more readily reconciled when the evidence allows for an inference of conspiracy. In these cases, culpability turns on the question of "who did what?" While ambiguities in the evidence often make resolution of this question difficult, state laws on accomplice liability frequently render the issue irrelevant by allowing conviction of the defendants for the same offense regardless of which acts they personally committed. For example, in *Ngyuen v. Lindsay*, the prosecution made contradictory assertions in separate trials about which defendants from rival gangs fired the first shot in a shootout.³² However, the Ninth Circuit ruled that this contradiction did not amount to a

23. See, e.g., *Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005) (allowing that prosecutor's inconsistent positions may have affected sentencing panel's decision to impose death penalty).

24. See, e.g., *Shaw v. Terhune*, 380 F.3d 473, 474 (9th Cir. 2003) (defendant challenged prosecution's inconsistent positions with respect to firearms enhancement).

25. 205 F.3d 1045 (8th Cir. 2000).

26. *Id.* at 1046–47.

27. *Id.* at 1047.

28. *Id.*

29. *Id.*

30. *Id.* at 1050.

31. *Id.* at 1050–51.

32. *Ngyuen v. Lindsey*, 232 F.3d 1236, 1237–38 (9th Cir. 2000).

fundamental inconsistency because both defendants could have been found guilty of voluntary mutual combat under California's provocative acts doctrine.³³

Matters of compatibility become more complex in the death penalty context. Capital sentencing schemes must reliably and rationally reserve the death penalty for "the worst of the worst" defendants.³⁴ Accomplishing this goal requires individualized consideration of the defendant's culpability.³⁵ Should the facts reveal only one defendant sufficiently culpable to deserve the death penalty—e.g., one of the two defendants clearly did not intend death but the evidence is inconclusive as to which defendant—yet the prosecutor obtains death verdicts for both co-defendants, those sentences could properly be characterized as irreconcilable.

Difficulty arises when a prosecutor argues inconsistently about the defendants' respective roles, yet both defendants remain eligible for a death sentence under state law.³⁶ In these cases, ambiguity on an issue, such as which defendant was the trigger-person, does not necessarily render the death sentences themselves irreconcilable. A sentencer could reasonably find that a defendant's conduct during the offense and the existence of other aggravating factors warrant a death sentence regardless of whether the defendant committed the ultimate act.

Whether at the culpability or sentencing phases, identifying the degree of inconsistency involved will be critical in evaluating whether a prosecutor's conduct is unconstitutional.

B. How Prosecutors Pursue Inconsistent Prosecutions

There are two general methods by which the prosecutor may pursue inconsistent theories. With the first, the prosecutor argues inconsistent inferences from the same basic evidence.³⁷ One such instance occurred in

33. *Id.* at 1240–41.

34. *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting). *See also* *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (death penalty decisions require heightened reliability (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion))).

35. *See* *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (rejecting death penalty for accomplice liability where state scheme allowed consideration of defendant's individual culpability).

36. *Cf. Fox v. Ward*, 200 F.3d 1286, 1294 (10th Cir. 2000) (noting that defendant may receive death penalty for major participation in capital offense with intent to kill or employ lethal force).

37. *See, e.g., Shaw v. Terhune*, 380 F.3d 473, 475–77 (9th Cir. 2003) (determining that "[t]he evidence presented at the two trials was thus almost identical"); *Parker v. Singletary*, 974 F.2d 1562, 1578 (11th Cir. 1992). *See also* Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853, 858 (2002) (referring to this tactic as "inconsistency by inference").

Drake v. Kemp from the Eleventh Circuit.³⁸ Henry Drake challenged his murder conviction and death sentence for killing a barbershop owner.³⁹ The State's primary witness against Drake was William Campbell, the individual the State previously convicted and sentenced to death for the same crime.⁴⁰ In Campbell's case, the prosecution's primary argument had been that Campbell killed the victim after a vicious, prolonged struggle,⁴¹ although the prosecution also implicated Drake as having "cased the barbershop."⁴² In Drake's case, the State asserted that Campbell was too frail to have successfully committed such a violent act on his own.⁴³ To support this contention, the State called Campbell to reiterate his testimony from his own trial, in which Campbell had asserted that Drake entered the barbershop and began beating the victim with a hammer.⁴⁴ Campbell's testimony was the only evidence linking Drake to the offense.⁴⁵ Thus, with essentially the same evidence introduced in both trials, the State presented the respective juries with radically divergent narratives of the offense.

The other basic tactic a prosecutor may employ involves submitting different quanta of evidence at the separate trials. As seen in *Bankhead*, which was discussed at length in the introduction, the prosecutor might rely on different sets of witnesses⁴⁶ or omit critical evidence from one or both of the trials.⁴⁷ Under this approach, the prosecution treats its witnesses as interchangeable units to be substituted, omitted, or added depending on the desired factual narrative. Unlike simply arguing different inferences from the same evidence, this approach more directly prevents the finder of fact from assessing the complete universe of relevant evidence.

C. Potential Motivations to Prosecute Inconsistently

What motivates prosecutors to act in the ways described above? As

38. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985).

39. *Id.* at 1451–52.

40. *Id.*

41. *Id.* at 1471–72 (Clark, J. concurring).

42. *Id.* at 1478.

43. *Id.* At 1472.

44. *Id.* at 1471–73.

45. *Id.* at 1472, 1475.

46. See, e.g., *Thompson v. Calderon*, 120 F.3d 1045, 1055–56 (9th Cir. 1997) (discussing prosecutor's reliance on different sets of jailhouse informants to prosecute co-defendants in separate trials), *rev'd*, 523 U.S. 538 (1998).

47. See, e.g., *In re Sakarias*, 106 P.3d 931, 936–37 (Cal. 2005) (discussing prosecutor's elicitation of medical examiner's testimony regarding postmortem injury in first trial but omission of this testimony in second trial).

will be discussed in the next section, this is a natural question upon which courts have heavily relied to determine the legality of inconsistent prosecutions. One answer suggested above is that the State might alter its theory of the case based on new evidence⁴⁸ or on a re-evaluation of existing evidence.⁴⁹ Barring such a change in the prosecutor's knowledge or evaluation of the facts, one can identify three basic types of prosecutors by their underlying motives: 1) the "win at all costs" prosecutor, 2) the agnostic prosecutor, and 3) the genuinely uncertain prosecutor.

Easily the most troubling of our prosecutors is the one who desires to win at all costs. A prosecutor with this perspective might prosecute two defendants even if she is able to assert with confidence which defendant should be exonerated. It is an unfortunate truth that our adversarial criminal justice system risks producing overzealous prosecutors who value winning over their duty to serve the interests of justice.⁵⁰ While it is difficult to imagine a prosecutor always placing winning over other relevant considerations, circumstances may present themselves that increase the risk of this sort of behavior; the most easily imaginable of which is when a prosecutor faces a particularly notorious crime and heightened public pressure to secure a conviction. One must therefore acknowledge that the drive to pursue inconsistent convictions may result from bad faith, slight though the risk may be.⁵¹

For the agnostic prosecutor, the obligation to avoid convicting the innocent typically ends with the establishment of probable cause to sustain a criminal charge.⁵² Indeed, the Model Rules of Professional Conduct require nothing more,⁵³ unless the prosecution "*knows* of new, credible and material evidence creating a reasonable likelihood that a

48. See, e.g., *United States v. Sharpe*, 193 F. 3d 852, 872 (5th Cir. 1999) (new evidence altered state's theory of which defendant was hired to perform contract shooting).

49. This was arguably the case in *Jacobs v. Scott*, 513 U.S. 1067 (1995). In its pursuit of inconsistent convictions the State explicitly informed the second jury that it now doubted the first conviction it obtained against Jacobs, who had previously been convicted and sentenced to death. *Id.* at 1067–68 (Stevens, J., dissenting). As this case illustrates, prosecutors risk appearing amoral when they adopt new views of the case absent new evidence. Less vulnerable to charges of deceptiveness would be a scenario where separate sovereigns, such as two states, different federal districts, or a state and the federal government, prosecute a case inconsistently from one another. See, e.g., *United States v. Hemmingson*, 157 F.3d 347, 356 (5th Cir. 1998). The inconsistency then results not from a single office merely changing its mind about a crime, but from two separate jurisdictions assessing the underlying facts differently.

50. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 351 (2001) ("The temptation for a prosecutor to believe that his job is to win is always present for people trained in the adversarial ethic.").

51. See Kelly Ksyzwienski, *Roadblock in the Search for Truth: What Are a Criminal Prosecutor's Constitutional and Ethical Obligations When the Evidence Supports Multiple, Inconsistent Theories of a Crime?*, 37 U. TOL. L. REV. 1111, 1115–16 (2006).

52. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361 (1997).

53. See MODEL RULES OF PROF. CONDUCT R. 3.8(a) (2000).

convicted defendant did not commit an offense of which the defendant was convicted.”⁵⁴ A prosecutor who abides by this philosophy generally rejects the proposition that the prosecutor must personally convince herself of the defendant’s guilt.⁵⁵ Thus, unless compelling exculpatory evidence later emerges, a good faith belief in the defendant’s guilt allows the agnostic prosecutor to focus on pursuing convictions while deferring responsibility for protecting innocence to the trial judge, defense counsel, and the jury.

The final type of prosecutor is one who is genuinely uncertain about the underlying facts. Such a prosecutor might ordinarily abstain from inconsistent proceedings, but find herself stymied by objectively ambiguous evidence from making a principled decision about how to proceed. Averse to risking the release of the guilty party by choosing incorrectly, the prosecutor might decide to prosecute both suspects. As with our agnostic, the uncertain prosecutor also leaves the ultimate question of guilt to the finder of fact.

This background discussion on inconsistent prosecutions allows for a better understanding in the next section of the existing precedent addressing the extent to which the Constitution constrains inconsistent prosecutions. The degrees of prosecutorial inconsistency, the manner in which the prosecutor pursued the inconsistent cases and the prosecutor’s motive for pursuing inconsistent theories are all important components of how courts have determined the extent to which inconsistent prosecutions run afoul of the Constitution.

III.

THE STATE OF THE CASE LAW

A. The Supreme Court

1. Bradshaw v. Stumpf

The United States Supreme Court has decided only one case involving inconsistent prosecutions, *Bradshaw v. Stumpf*, a case from the Sixth Circuit.⁵⁶ Along with co-defendant Clyde Wesley, John Stumpf stood accused of aggravated murder arising from the armed robbery of a couple in their Ohio home.⁵⁷ According to the prosecution, Stumpf

54. MODEL RULES OF PROF. CONDUCT R. 3.8(g) (2000) (emphasis added).

55. See Gershman, *supra* note 50, at 337–39; English, *supra* note 17, at 541–42 (1999).

56. 545 U.S. 175 (2005).

57. *Id.* at 178 (Stumpf was also indicted for attempted aggravated murder, aggravated robbery, and two counts of grand theft).

brandished a gun at the couple, allowing Wesley to search the home.⁵⁸ During the incident, Stumpf shot the husband twice in the head, rendering him unconscious.⁵⁹ When he came to, the husband, who survived, heard two male voices from a separate room, then four gunshots that resulted in his wife's death.⁶⁰

Stumpf admitted to participating in the robbery and shooting the male victim.⁶¹ However, he maintained that he did not shoot the female victim.⁶² Stumpf eventually pleaded guilty to aggravated murder in exchange for the State dropping two of the three aggravating circumstances making Stumpf eligible for the death penalty.⁶³ Subsequently, Stumpf appeared before a three-judge panel to determine his sentence.⁶⁴ One of Stumpf's main contentions against a death sentence was that Wesley shot the female victim, while Stumpf played a relatively minor role in the incident.⁶⁵ The State countered that Stumpf did shoot the female victim but also argued in the alternative that Ohio law permitted the death penalty for non-trigger persons. Under this alternative theory, Stumpf deserved death even if he did not fire the fatal shots because his participation in the robbery demonstrated an intent to kill.⁶⁶ The panel concluded that Stumpf "was the principal offender" in the wife's murder and sentenced him to death.⁶⁷

Wesley's case proceeded to a jury trial, with the same prosecutor and the same judge who presided over Stumpf's sentencing panel.⁶⁸ At trial, the prosecutor introduced new evidence from Wesley's cellmate Eastman, who testified that Wesley confessed to killing the female victim.⁶⁹ Claiming that Eastman was credible and did not have a motive to lie, the prosecutor argued that Wesley deserved a death sentence because he was the principal offender.⁷⁰ In his defense, Wesley submitted that the State had taken a contradictory position against Stumpf, who had received a death sentence.⁷¹ The jury convicted Wesley of aggravated murder,⁷² but

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 179. Stumpf also pleaded guilty to attempted aggravated murder, and the State dropped the bulk of the remaining charges. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 179–80.

67. *Id.* at 180.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Stumpf v. Mitchell*, 367 F.3d 594, 611 (6th Cir. 2004), *rev'd in part, vacated in part*,

voted for life.⁷³

Stumpf thereafter filed a motion in state court to withdraw his guilty plea or vacate his sentence.⁷⁴ Stumpf contended that the State's endorsement of the testimony from Wesley's cellmate Eastman rendered his own conviction and sentence unreliable.⁷⁵ Represented by the same prosecutor, the State argued that other evidence in the case undermined Eastman's testimony and suggested Stumpf was the primary shooter.⁷⁶ The State also reasserted its alternative argument that Stumpf could properly be sentenced to death even if he did not personally commit the homicide.⁷⁷ Without offering an explanation, the court denied Stumpf's motion.⁷⁸

Holding that the prosecution's inconsistent positions on who shot the deceased female victim denied Stumpf due process of law, the Sixth Circuit granted both conviction and sentencing relief.⁷⁹ The Supreme Court, however, reversed.⁸⁰ As to the conviction, the Supreme Court reasoned that there could be no constitutional violation because the identity of the deceased's actual shooter was irrelevant to Stumpf's aggravated murder conviction.⁸¹

Though it was arguably unnecessary to decide the issue, the Court additionally stated that "Stumpf has never provided an explanation of how the prosecution's postplea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea."⁸² This statement appears responsive to the Sixth Circuit finding a reasonable probability that Stumpf would have maintained his innocence had he known the State would later contend Wesley was the actual shooter.⁸³ The Court's statement suggests that, without any infirmity in the underlying process by which Stumpf agreed to plead guilty, the Court could not fathom how events external to Stumpf's case could invalidate the plea agreement.⁸⁴

Bradshaw v. Stumpf, 545 U.S. 175 (2005).

73. *Bradshaw*, 545 U.S. at 180.

74. *Id.*

75. *Id.* at 180–81.

76. *Id.* at 181.

77. *Id.*

78. *Id.*

79. *Stumpf v. Mitchell*, 367 F.3d 594, 616 (6th Cir. 2004), *rev'd in part, vacated in part*, *Bradshaw v. Stumpf*, 545 U.S. 175 (2005).

80. *Bradshaw*, 545 U.S. at 177.

81. *Id.* at 187.

82. *Id.*

83. *See Mitchell*, 367 F.3d at 616.

84. Justice Thomas, in a concurrence joined by Justice Scalia, almost certainly would have denied relief irrespective of the degree of inconsistency present. Relying on the fact that Wesley was able to alert the jury to the State's inconsistent position against Stumpf, Justice Thomas

The Court's conclusion that the prosecution's inconsistent arguments could not have invalidated Stumpf's guilty plea likely extends beyond the plea setting to any situation where the prosecution seeks inconsistent outcomes in separate proceedings. The Sixth Circuit had concluded that Stumpf's conviction violated fundamental fairness irrespective of the fact that the conviction was obtained pursuant to a plea agreement.⁸⁵ Consequently, the Supreme Court's rejection of the Sixth Circuit's broad ruling could directly undermine any defendant's assertion that the prosecution's inconsistent theories alone violated the defendant's right to a fundamentally fair trial.

As to Stumpf's death sentence, the Court took a different tack. Invoking the sentencing panel's judgment that Stumpf was the principal offender in the female victim's death, the Court allowed that, "[t]he prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence."⁸⁶ Citing ambiguity in the Sixth Circuit's opinion as to how it would have resolved the constitutionality of Stumpf's sentence had it not found the conviction invalid, the Court remanded for the Court of Appeals to consider the effect of Eastman's testimony and the prosecutor's inconsistent theories on Stumpf's sentence.⁸⁷

2. Bradshaw on Remand

On remand, the Sixth Circuit again vacated Stumpf's death sentence,

reasoned that the adversarial process and the requirement that conviction follow only when guilt has been established beyond a reasonable doubt "are more than sufficient to deter the State from taking inconsistent positions." *Bradshaw*, 545 U.S. at 191 (Thomas, J., concurring). Justice Thomas seemed poised to also deny relief as to sentencing, though he did not elaborate on this point. *Id.* ("Stumpf equally has never explained how the prosecution's use of postsentence inconsistent arguments—which were based on evidence unavailable until after Stumpf was sentenced—could have affected the reliability or procedural fairness of his death sentence.").

85. See *Mitchell*, 367 F.3d at 611, 616 (finding "the use of inconsistent, irreconcilable theories to convict two defendants for the same crime" to be a due process violation).

86. *Bradshaw*, 545 U.S. at 187.

87. *Id.* at 187–88. One struggles to identify the ambiguity relied upon by the Court for remand. Following a lengthy discussion of how the due process violation caused by the State's inconsistent theories affected both Stumpf's conviction and sentence, *Mitchell*, 367 F.3d at 612–16, the Sixth Circuit concluded:

First, there is a reasonable probability that, had the prosecution not pursued conflicting theories concerning who was the actual shooter, Stumpf either would not have pleaded guilty or the three-judge panel would not have found a factual basis for the specific intent element of aggravated murder [necessary to accept the plea]. Second, and perhaps more likely, there is a reasonable probability that, had the prosecution not pursued inconsistent theories, Stumpf would not have been sentenced to death.

Id. at 616 (emphasis added). This excerpt leaves little doubt that the Sixth Circuit would have invalidated Stumpf's sentence independently of the conviction. Indeed, the court strongly suggests that the inconsistency probably had a greater effect on the sentence. Providing further clarification on this matter of supposed confusion, the Sixth Circuit devotes the bulk of the opinion's remainder to articulating how the prosecution's inconsistent theories may have influenced the panel's sentencing determination. *Id.* at 616–18.

invoking both the heightened need for reliability in death cases under the Eighth Amendment and the right to a fair trial under the Fourteenth Amendment.⁸⁸ Reviewing the prosecution's shifting trigger-person theories from Stumpf's trial, Wesley's trial, and Stumpf's postconviction proceeding, the court concluded that "Stumpf's due process rights were violated by the prosecution's arguments leaving the impression with Stumpf's sentencers that the petitioner was the principal offender in the murder of [the victim], even though the state had evidence and a belief that co-defendant Wesley was actually the triggerman."⁸⁹ The court concluded that Stumpf was prejudiced because the State's tactics likely persuaded his sentencing panel to impose a death sentence.⁹⁰ It remains to be seen what will become of the court's opinion, as it has been vacated pending rehearing en banc.

B. The Courts of Appeals

Absent clear guidance from the Supreme Court,⁹¹ the courts of appeals have reached general agreement that, under certain circumstances, a prosecutor's pursuit of inconsistent theories of conviction can violate a defendant's due process right to a fair trial.

1. Leading Cases

One of the earliest and most influential inconsistent theory opinions in the lower courts comes from Judge Clark's special concurrence in the Eleventh Circuit case *Drake v. Kemp*.⁹² Recall that the State sent Drake to death row after disavowing the theory used to condemn his co-defendant Campbell in a previous trial.⁹³ Judge Clark found that the prosecutorial inconsistency implicated the defendant's Fourteenth Amendment right to a fundamentally fair trial.⁹⁴ Invoking the prohibition against a prosecutor's soliciting or failing to correct evidence known by the State to be false,⁹⁵ Judge Clark reasoned that the prosecutor's "theories of the

88. *Stumpf v. Houk*, 653 F.3d 426, 435 (6th Cir. 2011), *vacated pending rehearing en banc* (Oct. 26, 2011).

89. *Id.* at 439.

90. *Id.*

91. *Cf. Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229, 1235 (11th Cir. 2008) (finding that Supreme Court has not clearly established whether "the use of inconsistent theories in the prosecution of two defendants violates the right to due process").

92. *Drake v. Kemp*, 762 F.2d 1449, 1470 (Clark, J., concurring).

93. *Id.* at 1475, 1477.

94. *Id.* at 1478 (citing *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18 (1981); *Turner v. Louisiana*, 379 U.S. 466 (1965)).

95. *Id.* at 1479 (citing *Giles v. Maryland*, 386 U.S. 66, 87 (1967); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

same crime in the two different trials negate one another.”⁹⁶ While acknowledging that the prosecutor’s actual beliefs were impossible to discern, Judge Clark charged that the prosecutor’s incompatible positions required the State’s endorsement of a known falsity.⁹⁷ Addressing prejudice, Judge Clark concluded that the prosecutor’s actions prejudiced both defendants, since the State’s “flip flopping of theories” resulted in both convictions and death sentences for both men.⁹⁸

A plurality of the Ninth Circuit adopted Judge Clark’s reasoning twelve years later in *Thompson v. Calderon*.⁹⁹ In *Thompson*, the prosecutor initially convicted Thomas Thompson under the theory that Thompson, acting alone, raped the victim and then killed her to cover up the crime.¹⁰⁰ The prosecutor next sought and won a conviction against Thompson’s co-defendant David Leitch. For Leitch’s prosecution, the prosecutor asserted that Leitch enlisted Thompson’s help to kill the victim, who was Leitch’s ex-wife.¹⁰¹ Despite these conflicting theories, the prosecutor admitted that, even after Thompson’s conviction, he maintained his belief that Leitch masterminded the crime.¹⁰² Based on the similarities between Thompson’s case and *Drake*, the plurality concluded that the prosecution’s actions violated due process.¹⁰³ Further, the court found that Thompson, rather than Leitch, suffered prejudice from the State’s misconduct,¹⁰⁴ since in Thompson’s case the prosecution broke from its main theory that Leitch had the motive to kill and that both Leitch and Thompson, rather than just Thompson, were responsible.¹⁰⁵

Not long after *Thompson*, the Eighth Circuit, in *Smith v. Groose*, adopted Judge Clark’s and the *Thompson* plurality’s premise that a prosecutor’s factually contradictory theories of guilt can rob a defendant of a fundamentally fair trial.¹⁰⁶ Careful not to limit a prosecutor to the exact same evidence for two defendants in separate trials, and allowing that the passage of time may provide a legitimate excuse for variations in evidence, the court held that to prevail on a due process claim “an inconsistency must exist at the core of the prosecutor’s cases against defendants for the same crime.”¹⁰⁷ The court next concluded that the

96. *Id.* at 1479.

97. *Id.*

98. *Id.*

99. 120 F.3d 1045 (9th Cir. 1997), *rev’d*, 523 U.S. 538 (1998).

100. *Id.* at 1056.

101. *Id.* at 1055–56.

102. *Id.* at 1055.

103. *Id.* at 1059.

104. *Id.*

105. *Id.*

106. *Smith v. Groose*, 205 F.3d 1045, 1053–54 (8th Cir. 2000).

107. *Id.* at 1052.

prosecutor's actions prejudiced Smith since the State likely would not have prevailed against him had it not switched positions on the key witness's testimony.¹⁰⁸

2. Summary of the Lower Courts' Approach

The *Drake-Thompson-Groose* trilogy largely defines the boundaries of lower-court precedent on inconsistent prosecutions.¹⁰⁹ Courts typically find a due process violation if the factual inconsistencies go "to the core" of the prosecutor's case.¹¹⁰ Framing the State's actions as duplicitous in cases where the inconsistencies appear particularly problematic allows a court to more easily analogize inconsistent prosecutions with the knowing introduction of or failure to correct false testimony. Underlying this approach is the idea that prosecutors who pursue incompatible theories of guilt knowingly pervert the truth-seeking function of the trial and thereby undermine the trial's reliability.

The decisions granting relief under *Drake-Thompson-Groose* notwithstanding, courts, consistent with the Supreme Court's decision in *Bradshaw*, have proven far more prone to deny relief when they conclude that the prosecutor's theories are reconcilable even if arguably inconsistent.¹¹¹ This phenomenon appears especially prevalent when the defendants are alleged to have acted in concert. In these cases, the identity of the individual who personally committed the relevant acts—e.g., fired the gun resulting in death—often becomes irrelevant as a question of substantive guilt.¹¹² Courts routinely hold under these circumstances that a

108. *Id.* at 1052–53.

109. *See, e.g.*, *Clay v. Bowersox*, 367 F.3d 993, 1004 (8th Cir. 2004) (citing *Groose* and *Thompson*); *United States v. Higgs*, 353 F.3d 281, 326 (4th Cir. 2003) (relying on *Groose*); *United States v. Dickerson*, 248 F.3d 1036, 1043–44 (11th Cir. 2001) (citing *Thompson*, *Groose*, and *Drake*); *Nguyen v. Lindsey*, 232 F.3d 1236, 1240 (9th Cir. 2000) (citing *Thompson*).

110. *See, e.g.*, *State v. Miller*, 2008 WL 4173827, at *3 (Ariz. Ct. App. Sept. 10, 2008); *State v. Payne*, 199 P.3d 123, 141 (Idaho 2008); *Sifrit v. State*, 857 A.2d 65, 67–68 (Md. 2004); *Hall v. State*, 283 S.W.3d 137, 156 (Tex. App. 2009).

111. *See, e.g.*, *United States v. Boyle*, 283 F. App'x 825, 826 (2d Cir. 2007) (finding no due process violation because prosecutor's conflicting theories of guilt could be reconciled); *United States v. Frye*, 489 F.3d 201, 214 (5th Cir. 2007) (same); *Council v. Comm'r of Corr.*, 968 A.2d 483, 489–90 (Conn. App. Ct. 2009) (same); *Boyd v. United States*, 908 A.2d 39, 52 (D.C. 2006) (same); *State v. Dressner*, 45 So.3d 127, 141 (La. 2010) (same); *State v. Skatzes*, 2008 WL 4603303, at *8 (Ohio Ct. App. Oct. 10, 2008) (same); *State v. Housler*, 193 S.W.3d 476, 492–93 (Tenn. 2006) (same). *Accord* *Bradshaw v. Stumpf*, 545 U.S. 175, 186–87 (2005). *See also* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1468 (2001) ("A number of courts have expressed willingness to consider claims of prosecutorial inconsistency while rejecting defendants' attempts to invoke protection on the ground that no inconsistency exists.").

112. *See, e.g.*, *Nichols v. Scott*, 69 F.3d 1255, 1270–71 (5th Cir. 1995) ("Nor is it relevant that the indictment alleged that Williams killed Shaffer by shooting him, for under Texas law the indictment was clearly sufficient to support a conviction based on the law of parties with the fatal shot being fired by Nichols.") (citations omitted).

prosecutor may argue credible but inconsistent inferences from ambiguous evidence.¹¹³

Although there is general agreement among the courts on many core aspects of the fair trial analysis, significant disagreements persist. For instance, the Ninth Circuit only recognizes a violation where the prosecutor acts in bad faith.¹¹⁴ Jurisdictions relying on *Groose*, by contrast, tend to deem incompatibility sufficient.¹¹⁵ Whether or not courts require a bad faith showing, courts generally allow an inconsistent, second prosecution resulting from significant new evidence.¹¹⁶ Only the Sixth Circuit has held that a prosecutor must still move to correct its inconsistencies following the discovery of new evidence.¹¹⁷

Disharmony also persists over which defendant may assert prejudice from a prosecutor's pursuit of incompatible theories. Judge Clark concluded that "either both defendants' [rights] were prejudiced by the prosecutor's actions or neither's were."¹¹⁸ The Sixth Circuit has also endorsed this position.¹¹⁹ The California Supreme Court, by contrast, grants relief only to the defendant subjected to the false theory, if the true circumstances can be determined with sufficient confidence.¹²⁰ This approach offers a stronger version of the *Thompson* plurality's suggestion that a defendant establishes prejudice if the prosecution's theory in her trial departs from the State's principal theory of the crime.¹²¹

These differences aside, courts have plainly coalesced around the fair

113. *E.g.*, *State v. Holmes*, 5 So.3d 42, 65 (La. 2008); *Sifrit v. State*, 857 A.2d 65, 82 (Md. 2004); *State v. Watkins*, 659 N.W.2d 526, 532–33 (Iowa 2003); *People v. Caballero*, 794 N.E.2d 251, 263–64 (Ill. 2002).

114. *See Nguyen*, 232 F.3d at 1240 ("[A] prosecutor's pursuit of fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith."). *See also Payne*, 199 P.3d at 141 (adopting bad faith requirement of *Nguyen*).

115. *See, e.g.*, *Stumpf v. Mitchell*, 367 F.3d 594, 613 (6th Cir. 2004) ("Because inconsistent theories render convictions unreliable, they constitute a violation of the due process rights of any defendant in whose trial they are used."), *rev'd in part, vacated in part*, *Bradshaw v. Stumpf*, 545 U.S. 175 (2005); *Bankhead v. State*, 182 S.W.3d 253, 260 (holding that use of factually contradictory theories violated due process).

116. *See, e.g.*, *Nguyen*, 232 F.3d at 1240 (noting that new evidence may arise in a separate, inconsistent prosecution brought in good faith); *Hearn v. Commonwealth*, 2008 WL 3890035, at *7–8 (Ky. Aug. 21, 2008) (new evidence justified state's change in theory between trials (citing *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997), *rev'd*, 523 U.S. 538 (1998))).

117. *Mitchell*, 367 F.3d at 616 (holding that prosecutor must move to correct inconsistencies resulting from discovery of new evidence). *See also Stumpf v. Houk*, 653 F.3d 426, 435 (6th Cir. 2011), *vacated pending rehearing en banc* (Oct. 26, 2011).

118. *Drake v. Kemp*, 762 F.2d 1479, 1479 (11th Cir. 1985) (Clark, J., concurring).

119. *Mitchell*, 367 F.3d at 613.

120. *See In re Sakarias*, 106 P.3d 931, 947–48 (Cal. 2005) (citing *Thompson*, 120 F.3d at 1064 (Tashima, J., concurring)).

121. *Thompson*, 120 F.3d at 1059.

trial model to resolve such prosecutorial inconsistency claims.¹²² The following section explores why reliance on the fair trial analysis may be inappropriate.

IV. CRITIQUE OF THE FAIR TRIAL MODEL

The animating principle behind the widespread reliance on the fair trial model to evaluate inconsistent prosecutions is that, broad as the State's discretion in administering criminal justice may be,¹²³ "the State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth."¹²⁴ Because of the prosecutor's unique role as an impartial minister of justice,¹²⁵ and especially considering the State's tremendous advantages in resources over criminal defendants,¹²⁶ fundamental fairness would seem to require that prosecutors not manipulate the criminal trial to produce wrongful convictions.¹²⁷ To hold otherwise would make a farce of the adversarial process as a search for truth.

This instinct undoubtedly fuels the lower courts' adherence to principles of fundamental fairness in resolving claims of inconsistent prosecutions. Although the full requirements of fundamental fairness have been elusive,¹²⁸ the Supreme Court has carved out a number of protections for criminal defendants against wrongful conviction that place substantial limitations on the exercise of prosecutorial discretion. Among these protections are requirements that the State abstain from knowingly introducing false evidence,¹²⁹ correct false evidence when it appears,¹³⁰ and turn over material exculpatory evidence to the defense.¹³¹ Linking

122. Commentators also appear to have settled on the fair trial framework. *See, e.g.*, English, *supra* note 17, at 538–39; Ksyzewski, *supra* note 51, at 1125–27; Poulin, *supra* note 111, at 1425; Shatz & Whitt, *supra* note 37, at 886.

123. *See McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) ("Because [the State's] discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

124. *Smith v. Goose*, 205 F.3d 1045, 1051 (8th Cir. 2000).

125. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (1997).

126. *See English*, *supra* note 17, at 531–32 (citing Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124–29 (1998) and *Young v. United States*, 481 US 787 (1987)); Gershman, *supra* note 50, at 314.

127. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

128. *See Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 24 (1981) (describing fundamental fairness as "a requirement whose meaning can be as opaque as its importance is lofty").

129. *See Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935). *See also Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942).

130. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

131. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also Giglio v. United States*, 405

these precedents is the idea that a conviction obtained through pretense cannot stand, particularly where the criminal defendant has not been permitted every reasonable opportunity to vigorously contest the charges against her.¹³²

Though the fair trial framework seemingly offers an attractive perspective by which to evaluate inconsistent prosecutions, the next section argues that this approach deviates drastically from Supreme Court precedent demarcating the fair trial right, and is ultimately an inappropriate framework for protecting the due process rights of criminal defendants. The final section demonstrates how a faithful interpretation of the fair trial right requires rejecting the Sixth Circuit's grant of relief in *Stumpf v. Houk*.

A. The Challenge of Relying on the Fair Trial Framework

Though relying on a defendant's right to a fundamentally fair trial to analyze inconsistent prosecutions is intuitively appealing, this framework is ill-suited for the problems presented by inconsistent prosecutions. Most critically, in the fair trial cases condemning a prosecutor's presentation of demonstrably false evidence—the cases that form the bedrock of the fair trial analysis for inconsistent prosecutions—one can easily identify a defect within a particular defendant's trial. In *Mooney*, for example, the State knowingly used perjured testimony;¹³³ in *Napue*, the State failed to correct a witness's false testimony;¹³⁴ and, in *Brady*, the State suppressed an exculpatory confession by a co-defendant.¹³⁵ By contrast, the harm from an inconsistent prosecution “occurs because of the prosecutor's action in successive trials rather than within a single trial.”¹³⁶ Consequently, as the Supreme Court suggested in *Bradshaw*, a defendant raising a fair trial claim cannot articulate how the prosecutor's inconsistent theories affected the fairness of that particular defendant's trial because the prosecutorial act in question did not occur within that defendant's trial.¹³⁷

One response to this critique is that the fair trial analysis still applies despite the technical absence of an error within a particular defendant's

U.S. 150, 153–54 (1972).

132. Cf. *Mooney*, 294 U.S. at 112–13. Though *Mooney* dealt with an issue of deliberate deception, the Supreme Court has since removed any bad faith requirement. See *Brady*, 373 U.S. at 87.

133. 294 U.S. at 110.

134. 360 U.S. at 267–68.

135. 373 U.S. at 84.

136. English, *supra* note 17, at 553.

137. *Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005) (“Moreover, Stumpf has never provided an explanation of how the prosecution's postplea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea.”).

trial because the prosecutor has impermissibly risked convicting an innocent person.¹³⁸ Central to this view is the idea that inconsistent prosecutions create an unfair advantage for the prosecutor that is similar to cases involving the introduction of false evidence or the use of improper argument, in that prosecutorial inconsistencies render the defendant helpless to attack the falsity inherent in the State's case.¹³⁹

To forge a connection between the prosecutor's unfair advantage and a particular defendant's trial, adherents of this approach would grant relief if the defendant can establish a reasonable probability that the State's theory in the conflicting prosecution affected the outcome of the defendant's case.¹⁴⁰ By this reasoning, prejudice exists and relief is warranted if the result in one defendant's case would likely have been different had the prosecutor pursued the same theory against that defendant as she did against the other defendant.¹⁴¹

Upon closer inspection, this approach proves unworkable. Its primary shortcoming lies in failing to account adequately for the fact that the trials, while substantively related, remain procedurally independent events.¹⁴² It is therefore unsound to suppose that the government's theory in one case could directly affect the integrity of a separate case and render that separate proceeding fundamentally unfair. The theories can only affect the trials in which they are presented.¹⁴³

138. See, e.g., *id.*

139. Poulin, *supra* note 111, at 1465 (“[T]he prosecutor’s falsity is difficult to attack. The prosecutor enjoys presumptive credibility in the eyes of the jury and, unlike witnesses who take an oath and are subject to testing through cross-examination and impeachment, the prosecutor is rarely specifically so challenged.”).

140. See, e.g., *id.* at 1471 (arguing courts should find prejudice where “there is any reasonable likelihood that the inconsistent positions influenced the outcome of the case”). Cf. *Bankhead v. State*, 182 S.W.3d 253, 260 (Mo. Ct. App. 2006) (upholding new trial where prosecutor “violated the principles of due process” by using “theories that were factually contradictory to secure the convictions in this case for the same robbery and murder.”).

141. See *Stumpf v. Mitchell*, 367 F.3d 594, 616–17 (6th Cir. 2004) (setting aside plea and sentence where there was “reasonable probability” either would have come out differently had prosecution not pursued inconsistent theories), *rev’d in part, vacated in part*, *Bradshaw v. Stumpf*, 545 U.S. 175 (2005); Shatz & Whitt, *supra*, note 37, at 886 (“Accordingly, the prosecutor’s use of inconsistent theories, in whatever form, should constitute a due process violation whenever the defendant can establish materiality, i.e., that had the fact-finder heard the supporting evidence and the prosecutor’s argument from the ‘other’ case, there was a reasonable likelihood of a different result.”).

142. See Brian Netter, *A Quantitative Look at the Two-Suspect Scenario*, 115 YALE L.J. 1167, 1171–72 (2006) (discussing *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995)). See also *Nichols*, 69 F.3d at 1269 (“What happened in Williams’ trial—which the Nichols defense team was clearly aware of—did not affect the reliability or fairness of the fact finding process in either of Nichols’ trials.”).

143. Concluding that the prosecution’s inconsistent theories act independently of one another in separate trials would not preclude a defendant from relying on the fact of the State’s inconsistent position to discredit her prosecution. See *Kyles v. Whitley*, 514 U.S. 419, 445–50 (1995). In this context, a defendant could plausibly rely on *Kyles* to assert a *Brady* right to present evidence of the

To illustrate, suppose there are three witnesses to a crime. Witness 1 observes the events, but cannot identify the perpetrator. Witness 2 observes the events and identifies Suspect A. Witness 3 observes the events and identifies Suspect B. Thus, the prosecutor may decide that calling Witnesses 1 and 2, but excluding Witness 3, presents the best case of guilt against Suspect A. On the other hand, by calling Witness 3 instead of Witness 2, the prosecution could also convince a jury to convict Suspect B.

If the prosecutor only pursues Suspect A and discloses all three witnesses, Suspect A certainly could not complain if the State decides against calling Witness 3. Prosecutors retain wide discretion regarding how to build and present their cases,¹⁴⁴ and a defendant in this situation likely could call Witness 3 for her defense. If the State subsequently prosecutes Suspect B, the fact that the State calls Witness 3, excludes Witness 2, and obtains another conviction has no bearing on the result in A's trial. Presumably, the prosecutor would have omitted Witness 3 in A's trial irrespective of its actions with respect to B. Consequently, the results in the separate trials of Suspects A and Suspect B trials on their own tell us nothing of the underlying fairness of those trials.

Appreciating this dynamic requires considering the prosecutor's role in the criminal trial. As criminal trials are creatures of the evidence presented by both sides,¹⁴⁵ the prosecutor typically proves her case by arguing that the evidence establishes the truth of the State's allegations.¹⁴⁶ Doing so in a persuasive fashion requires that the prosecutor craft a coherent narrative of the alleged events.¹⁴⁷ Prosecutors consequently have a penchant for the "detective story's ingenious, albeit straightforward, logic-driven marshaling of clues culminating in closure and finality," as

inconsistent prosecution in order to attack the "thoroughness and even the good faith of the investigation." *Id.* at 445. The claimed injury in that case would be the State's failure to disclose the inconsistent investigation and prosecution, not the very existence of an inconsistent prosecution.

144. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) ("A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity."). See also *Marshall v. Jerrico*, 446 U.S. 238, 248 (1980) (discussing wide discretion of prosecutors in law enforcement).

145. See Henry L. Chambers, *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 667–68 (1998); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1362 (1985).

146. See *People v. Watts*, 91 Cal.Rptr.2d 1, 10 (Cal. Ct. App. 1999) ("[T]he prosecutor's argument is not that a particular set of facts is the true set of facts; but that the evidence shows that a particular set of facts is the true set of facts.").

147. See Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 40–41 (1994).

this form easily dovetails with the prosecutor's burden of proving guilt beyond a reasonable doubt.¹⁴⁸ The inherent problem is that advocating a linear picture of events invariably requires suppressing the possibility of other, potentially conflicting narratives.¹⁴⁹

Within our adversarial system, then, the prosecutor's effort to construct a persuasive narrative of events unavoidably risks distorting the trial's truth-finding purpose.¹⁵⁰ By focusing on the evidence most favorable to its case and undermining or excluding contrary evidence, one cannot always characterize what the prosecutor submits to the jury as a fair representation of the whole story.¹⁵¹ Consequently, a defendant's claim that the prosecutor has manipulated the evidence cannot, on its own, impugn the fundamental fairness of that defendant's trial. Some amount of manipulation comes with the territory. To establish that the State denied her a fundamentally fair trial, the defendant must still show that the State's omissions or commissions *in her case* crossed the line drawn by precedent barring the introduction of false evidence or the suppression of exculpatory evidence.

The fair trial approach faces another related complication where one defendant has had a full opportunity to confront the prosecution's inconsistencies. For instance, in cases like *Bradshaw* and *Drake*, the second defendant was able to present the prosecutor's inconsistency to the jury.¹⁵² In other cases, such as the Kentucky case of *Hearn v. Commonwealth*¹⁵³ or the District of Columbia case of *Hammond v. United States*,¹⁵⁴ the prosecution disclosed its inconsistencies to the jury. When these situations occur, the defendant cannot allege that the prosecution prevented her from vigorously contesting the State's falsity, which, under the false evidence cases, severely undermines the defendant's ability to assert that her trial was fundamentally unfair.

One could even argue that subsequently prosecuted defendants

148. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 688–89 (1994).

149. Sherwin, *supra*, note 147, at 41. See also Givelber, *supra* note 52, at 1361 (1997) (“Fighting fire-with-fire frequently translates into adopting the defendant’s approach of withholding from the factfinder relevant and influential evidence. Doubts submerge and inconsistencies disappear as the state puts forward its evidence proving the defendant guilty.”).

150. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996) (critiquing “binary, oppositional presentations of facts in dispute”).

151. See *id.* at 13.

152. *Bradshaw v. Stumpf*, 545 U.S. 175, 180 (2005); *Drake v. Kemp*, 762 F.2d 1449, 1475 (11th Cir. 1985).

153. 2008 WL 3890035, at *4 (Ky. Aug 21, 2008).

154. 880 A.2d 1066, 1106 (D.C. 2005), *abrogated in part on other grounds by* *Davis v. Washington*, 547 U.S. 813 (2006).

receive something of a windfall from the prosecutor's duplicity.¹⁵⁵ There are likely few more compelling defenses than informing one's jury that the prosecutor has already convicted someone else of the very same conduct. Disclosing inconsistent prosecutorial action in this manner better allows the jury to serve its traditional function of checking "the wrongful exercise of power by the State and its prosecutors,"¹⁵⁶ and further weakens the defense's assertion that the prosecution's tactics denied her a fundamentally fair trial.

As the above discussion indicates, the false evidence framework with which the lower courts and commentators have analyzed claims of inconsistent prosecutions in fact represents a significant departure from the false evidence cases. Based on this analysis, the following section proposes that the decision of the Sixth Circuit panel granting relief in *Stumpf* should be reversed.

B. Application to Stumpf v. Houk

Given the discussion in the previous section, a fair trial analysis of the sort most recently advanced by the Sixth Circuit in *Houk* seems unlikely to succeed on rehearing or at the Supreme Court. To review, the only fair trial violation identified by the Sixth Circuit was the State's inconsistency in its assertions as to whether Stumpf or Wesley was the trigger-person.¹⁵⁷ It is noteworthy, particularly for the discussion in the part to follow, that although the prosecution's *positions* on the trigger-person may have been mutually exclusive, Stumpf's and Wesley's *sentences* are legally reconcilable: Stumpf was sentenced to death by a panel that believed Stumpf fired the fatal shots, and Wesley received a life verdict from a jury that rejected the State's claim that Wesley was the trigger-person.¹⁵⁸

There are several critical flaws in the panel's application of the fair trial framework in granting sentencing relief. First, though acknowledging that the State's inconsistent positions resulted from evidence acquired after Stumpf's trial—i.e., testimony from Wesley's cellmate that Wesley confessed to being the trigger-person—the court ignores the fact that

155. See *Bradshaw*, 545 U.S. at 191–92 (Thomas, J., concurring) (“[A] prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder’s attention.”).

156. *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citing *Batson v. Kentucky*, 476 U.S. 79, 86 (1986)).

157. See *Stumpf v. Houk*, 653 F.3d 426, 437 (6th Cir. 2011) (“To allow a prosecutor to advance irreconcilable theories without adequate explanation undermines confidence in the fairness and reliability of the trial and the punishment imposed and thus infringes upon the petitioner’s right to due process.”), *vacated pending rehearing en banc*.

158. *Bradshaw v. Stumpf*, 545 U.S. 175, 188–89 (2005) (Souter, J., concurring) (“[T]he jury rejected the specification that named Wesley as the triggerman, and it recommended a sentence of life, not death.”).

Stumpf's postconviction sentencing panel was aware of the State's supposed duplicity.¹⁵⁹ This circumstance cuts sharply against the court's conclusion that Stumpf's sentencing was procedurally unfair because the prosecution's tactics either mislead the sentencing panel or prevented Stumpf from contesting the State's evidence against him.

The court also neglects to consider that the State alternatively argued for death in Stumpf's case even if the sentencing panel rejected the prosecution's trigger-person theory.¹⁶⁰ The prosecution's reliance on this alternative theory further weakens the court's assertion that the prosecutorial misconduct tainted Stumpf's sentencing. Considering that Stumpf's and Wesley's sentencing proceedings were independent and legally reconcilable, it becomes difficult to identify the foul blow¹⁶¹ suffered by Stumpf.

Further, while the court speculates that Wesley's life verdict may have resulted from the jury's awareness of the State's inconsistent theories,¹⁶² the court implicitly refuses to credit Stumpf's sentencing panel with the same vigilance. Assuming the panel was appropriately skeptical of the State's apparent inconsistencies, the simplest explanation for Stumpf's death sentence and Wesley's life sentence is that neither sentencer believed the State's newfound snitch.

As troubling as the State's actions may appear, Stumpf's sentencing likely did not suffer from a breakdown in the adversarial process that would render his death sentence unreliable,¹⁶³ even by the heightened standards required in capital cases. The following section examines whether a stronger constitutional basis exists to challenge inconsistent prosecutions.

V.

THE SUBSTANTIVE DUE PROCESS APPROACH

The failings of the fair trial framework suggest that the true problem with inconsistent prosecutions does not lie in the process afforded to the defendants. After all, "an innocent person may still be convicted and eventually executed without any constitutional violations at trial."¹⁶⁴ Similarly, a defendant subjected to an inconsistent prosecution may be

159. *Houk* at 442–43 (Boggs, J., dissenting).

160. *Id.* at 431.

161. *See id.* at 439.

162. *Id.* at 438.

163. *See Crane v. Kentucky*, 476 U.S. 683, 690–91 (1986) (right to fundamentally fair trial requires affording accused a "meaningful opportunity to present a complete defense"); *California v. Trombetta*, 467 U.S. 479, 485 (1984) (same).

164. Charles I. Lugosi, *Executing the Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J. C.R. & C.L. 473, 503 (2005).

unable to identify a specific harm she suffered at trial that is sufficient to raise a fair trial claim. If the inconsistent prosecutions remain objectionable no matter the process afforded, the fair trial framework cannot provide adequate protection. Instead, one must identify a basis for relief rooted in the outcomes of inconsistent prosecutions, which, as explained in detail below, suggests substantive due process as the proper framework.¹⁶⁵

The parts to come provide an overview of substantive due process doctrine, analyze inconsistent prosecutions under substantive due process, explore how the substantive due process framework applies in the sentencing context, and sketch how a defendant might articulate a claim based on substantive due process. As explained below, substantive due process would only provide a basis for relief if the prosecution attempted to maintain multiple convictions or sentences that could not be reconciled with one another. Conversely, merely pursuing an inconsistent prosecution, regardless of the degree of inconsistency, or maintaining reconcilable convictions or sentences, would not offend substantive due process.

A. Explanation of Substantive Due Process

The substantive component of due process bars “certain government actions regardless of the fairness of the procedures used to implement them.”¹⁶⁶ While the fair trial component of due process focuses on the reliability of the guilt determination as a function of the trial procedures afforded the defendant, substantive due process asks whether the prosecutor has abused her executive discretion in a manner divorced from acceptable law enforcement objectives.¹⁶⁷

165. See Kszywinski, *supra* note 51, at 1139–41 (“Though courts have analyzed [inconsistent convictions] under the framework of the Fourteenth Amendment’s procedural due process rights to a fundamentally fair trial, it is clear that what disturbs some courts—or individual judges—is the substantive result.”). See also *Thompson v. Calderon*, 120 F.3d 1045, 1072 (9th Cir. 1997) (Kozinski, J., dissenting) (“Whether or not one agrees . . . that the prosecutor committed misconduct . . . by presenting inconsistent theories, it still seems mighty troubling for the state to take a prisoner’s life after having publicly announced that it believes him to be innocent. I, however, would treat it as a denial of substantive due process rather than prosecutorial misconduct.”), *rev’d*, 523 U.S. 538 (1998). Cf. Lugosi, *supra* note 164 at 492 (“[T]he principle . . . [that] justice must always err on the side of protecting the innocent from wrongful conviction . . . [is] implied within the substantive meaning of the due process clauses . . .”). While Kszywinski comes the closest of any judge or commentator to articulating how substantive due process may govern inconsistent convictions, she ultimately proposes a due process/fair trial framework based on *Brady v. Maryland*. See Kszywinski, *supra* note 51, at 1142–46. The author agrees with Kszywinski’s basic description of the applicability of substantive due process, but departs from the notion that the right to a fair trial adequately protects the substantive rights of defendants facing incompatible convictions.

166. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

167. Cf. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (describing respondent’s

The United States Supreme Court has held that executive officials offend substantive due process when they engage in acts that go so beyond the pale as to “shock the conscience.”¹⁶⁸ In *Rochin v. California*, the Court’s first exposition of this standard, the Court invalidated a conviction obtained in part by police forcibly pumping the defendant’s stomach to secure evidence of drug possession.¹⁶⁹ The Court initially resisted limiting the scope of the shocks-the-conscious doctrine in the criminal context, explaining simply that “convictions cannot be brought about by methods that offend a ‘sense of justice.’”¹⁷⁰

Subsequently, the Court has attempted to constrain this open-ended inquiry. First, the Court has held that one cannot rely on substantive due process if another constitutional amendment more specifically protects against the governmental action at issue.¹⁷¹ Second, the Court has reserved the claim for those against whom the government has acted arbitrarily “in a constitutional sense.”¹⁷² The Court intended this latter measure to restrict substantive due process to only the most oppressive forms of governmental action,¹⁷³ rather than give constitutional dimension to common law tort claims for individuals claiming harm by state action.¹⁷⁴

B. Application of Substantive Due Process to Inconsistent Prosecutions

Using the principals described in the previous part, one may apply the substantive due process framework to inconsistent prosecutions. A prosecutor’s pursuit and maintenance of inconsistent convictions easily meets the first prong of the substantive due process test. Removing a prosecutor’s actions in this context from the fair trial model, as explored in the previous section, renders inapplicable those provisions of the Sixth and Fourteenth Amendments intended to protect the right to a

argument that the police officer’s engagement in a reckless high speed chase leading to Lewis’s death was “an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment.”).

168. *Rochin v. California*, 342 U.S. 165, 172 (1952).

169. *Id.* at 166.

170. *Id.* at 173 (citing *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936)).

171. See *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (“Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of substantive due process,’ must be the guide for analyzing these claims.”) (internal quotation marks omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

172. See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992).

173. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (“Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”) (quoting *Collins*, 503 U.S. at 129).

174. See *id.* at 848–49 (“[T]he constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law’s spectrum of culpability.”).

fundamentally fair trial.¹⁷⁵ It is difficult to imagine any other relevant constitutional guarantees that would apply.

The main challenge to applying substantive due process to inconsistent prosecutions, therefore, becomes establishing in what situations the prosecutor's actions may be considered constitutionally arbitrary. The parts that follow conclude that a prosecutor's mere pursuit of inconsistent prosecutions does not violate substantive due process, and that the State's maintenance of inconsistent convictions violates substantive due process only where the convictions are truly irreconcilable.

1. The Mere Pursuit of Inconsistent Prosecutions Does Not Constitute Arbitrary State Action

Prior writing on the subject of prosecutorial inconsistency suggests that a prosecutor who pursues inconsistent theories of convictions acts arbitrarily if the theories preclude one another. Kelly Ksyzwienski explains: "A's conviction necessarily excludes B's guilt. In the eyes of the law, B is innocent and pursuing criminal charges against him is tantamount to an arbitrary, wrongful government action."¹⁷⁶ Under this framework, Suspect B may challenge the very fact of his prosecution as unconstitutional based on Suspect A's conviction. Ksyzwienski roots her analysis in the Supreme Court's decision in *In re Winship*,¹⁷⁷ which established the fundamental principle of procedural due process that one may not be convicted of a crime unless the State proves every element of guilt beyond a reasonable doubt.¹⁷⁸

Ksyzwienski's formulation offers a compelling rationale for challenging inconsistent prosecutions under substantive due process since, if she is correct, she has identified a basis for characterizing the State's actions as constitutionally arbitrary. However, the criminal trial's inherent and well-recognized limitations in discerning truth require abandoning Ksyzwienski's assertion that *Winship*'s reasonable doubt standard requires the State to consider B innocent following A's conviction.

The central weakness of Ksyzwienski's approach is that, though a guilty verdict signals the jury's subjective belief that the defendant committed the crime charged, the verdict does not necessarily represent

175. Challenges to death sentences due to prosecutorial inconsistency may have to proceed under an Eighth Amendment analysis. See *Bradshaw v. Stumpf*, 545 U.S. 175, 189–90 (2005) (Souter, J., concurring); *infra* Part IV, Section C(2).

176. Ksyzwienski, *supra* note 51, at 1140–41 (internal quotations omitted).

177. See *id.* at 1139. Cf. English, *supra* note 17, at 554 ("Under the *Winship* principle, regardless of the prosecutor's subjective intent or knowledge, the conviction of an innocent defendant violates the Due Process Clause.").

178. *In re Winship*, 397 U.S. 358, 364 (1970).

what truly happened.¹⁷⁹ Factors such as the nature, quantity, and quality of the evidence presented, along with the jurors' abilities to comprehend that evidence and the applicable law, limit the objective reliability of the jury's final verdict.¹⁸⁰ Even if the jury carefully scrutinizes the evidence presented, faithfully applies the law, and reasonably reaches a sound verdict, there can be no absolute guarantee that the process has yielded a factually accurate result. In other words, "[w]hat a jury believes (as represented by the verdict) and what actually occurred may be quite different."¹⁸¹

This insight about the fallibility of the trial process tends to invalidate Kszwienski's proposition that A's conviction renders the prosecution's subsequent pursuit of B arbitrary. Understanding that a jury's conviction of A, though legally sound, may be factually inaccurate, a prosecutor could rationally decide that circumstances warrant further investigating the case and ultimately prosecuting B. As mentioned above in the discussion of various motives to prosecute inconsistently, potential justifications for the decision to prosecute B include the discovery of new evidence or a good faith reevaluation of the case by the district attorney's office. In any event, Kszywinski goes too far in asserting that the first defendant's guilt obligates the State to cease future endeavors to uncover the ever-elusive truth.¹⁸² As such, the prosecutor's mere pursuit of B almost certainly falls short of shocking the conscience.¹⁸³ It follows that substantive due process cannot prevent the State from pursuing an inconsistent prosecution.

2. *Maintaining Inconsistent Prosecutions May Violate Substantive Due Process*

The conclusion that substantive due process allows the State to *pursue* an inconsistent prosecution moves the inquiry to whether substantive due process prohibits the State from *maintaining* both convictions. On this

179. See Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 212 (2006); Shatz & Whitt, *supra* note 37, at 865.

180. Cf. Chambers, *supra* note 145, at 668 ("What the jury believes, based on the evidence presented and the credibility of witnesses, will also reflect the related events with varying degrees of accuracy. . . . Verdicts do not necessarily reflect the truth; they reflect the evidence presented.") (internal citations omitted); Nesson, *supra* note 146, at 1362 ("In the context of a trial, jurors only hear the statements of witnesses . . . and thus never have first-hand knowledge of the event.").

181. Chambers, *supra* note 145, at 668.

182. Indeed, it has been suggested that allowing the prosecution to pursue two defendants may, in the aggregate, yield more reliable verdicts. See Netter, *supra* note 142, at 1170 ("[S]o long as juries make some positive contribution to the truth-seeking process, dual prosecutions will result in fewer wrongful convictions than the alternatives.").

183. See *County of Sacramento v. Lewis*, 523 U.S. 833, 847–48, n.8 ("For executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law.").

point, the question of whether the State may maintain inconsistent prosecutions under substantive due process turns on the degree to which the State's actions defy rational justification.

To appreciate when the State crosses the critical line of rationality, one must first understand how the criminal justice system allocates burdens of proof in resolving a suspect's guilt or innocence. At trial, the law shields the defendant with a presumption of innocence.¹⁸⁴ Criminal law gives this presumption substance by allocating to the State the burden of proving a defendant's guilt beyond a reasonable doubt.¹⁸⁵ Once the State persuades the jury to convict and that decision becomes final on appeal, the presumption of innocence falls and the State may presume the defendant guilty.¹⁸⁶ The presumption of guilt following conviction must yield only in certain rare circumstances,¹⁸⁷ after the legally convicted individual has met her burden of overturning the presumption of guilt.¹⁸⁸

Identifying when a defendant may overcome the presumption of guilt provides critical insight into whether and when a prosecutor's maintenance of inconsistent convictions may be deemed constitutionally arbitrary. One means by which a defendant may undo the presumption of guilt is by showing that no rational juror could have concluded that the State proved guilt beyond a reasonable doubt,¹⁸⁹ a rule that establishes the baseline principal that the State may not enforce an irrational conviction. Similarly, in situations where two or more convictions cannot be reconciled, the attendant presumptions of guilt must also be discarded as irrational. This outcome follows because, by maintaining, as opposed to merely pursuing, irreconcilable convictions, the State asserts that both

184. *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."), *quoted in Winship*, 397 U.S. at 363.

185. *Winship*, 397 U.S. at 363; *Herrera v. Collins*, 506 U.S. 390, 398 (1993). *See also* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 341 (1995) ("When we speak of the presumption of innocence, . . . we are talking about a fundamental principle of our criminal procedure which imposes a burden on the prosecution of establishing the accused's guilt beyond a reasonable doubt.") (quoting JOHN A. ANDREWS & MICHAEL HIRST, CRIMINAL EVIDENCE 89 (1986)).

186. *Herrera*, 506 U.S. at 399 (citing *Ross v. Moffitt*, 417 U.S. 600, 610 (1974)); *Dist. Att'y's Office for the Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2320 (2009). *See also* Chambers, *supra* note 145, 659 (1998); Nesson, *supra* note 145, at 1366 (1985) ("The court accepts the jury's verdict as resolving such doubts. Indeed, the imposition of the moral stigma of guilt assumes that the defendant committed the crime, and not merely that the probability is high that he did so.").

187. *See* Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 954 (1994) ("[U]pon conviction the law reverses the hallowed presumption [of innocence] while not rendering [the reversal] irrebuttable.").

188. *Herrera v. Collins*, 506 U.S. 390, 443 (1993) (Blackmun, J., dissenting). *See also* Lugosi, *supra* note 164, at 485–86.

189. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

defendants are guilty beyond a reasonable doubt of an act only one could have committed. Reason cannot tolerate this position,¹⁹⁰ and the fact that the State would seek to enforce such an irrational outcome suggests that the State's actions shock the conscience.

Beyond being irrational, the State's untenable support of dueling presumptions of guilt shocks the conscience insofar as the tactic circumvents the traditional protections courts have imposed to safeguard the presumption of innocence.¹⁹¹ Indeed, the State's evisceration of the presumption of innocence through irreconcilable convictions is effectively an affront to basic human dignity, the Constitutional principal that animates the presumption of innocence.¹⁹²

Appreciating how irreconcilable convictions offend basic human dignity requires a deeper understanding of the role of the presumption of innocence in our criminal justice system. In essence, the presumption of innocence enforces the norm that the criminal justice system must treat the accused as an end, rather than simply as a means to an end.¹⁹³ To treat an individual as a means in the criminal justice system is to expose her to whatever arbitrary whim the State deems fit to achieve its goal of obtaining a conviction. By contrast, treating individuals as ends in the criminal justice system requires the State to recognize that individual liberty has value equal, if not superior, to the State's interest in conviction.¹⁹⁴

The Supreme Court has traditionally enforced this understanding of human dignity and individual self-worth within the criminal justice system.¹⁹⁵ Along with the presumption of innocence, the fair trial

190. Cf. Chambers, *supra* note 145, at 667 ("One who is justifiably certain of the truth of a proposition is not skeptical of the same proposition.").

191. Cf. Laufer, *supra* note 185, at 339–40 (detailing judicial protections against State action that frustrates the purposes of the presumption of innocence).

192. Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 272 (2002) ("the presumption of innocence is based mainly on grounds of public policy relating to political morality and human dignity"). See also Dr. Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking Apprendi*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501, 510–11 (2007) ("[N]o punishment may be imposed on [human beings] except upon the establishment of criminal guilt. The guilt requirement is an agent of the right to human dignity.").

193. Kitai, *supra* note 192, at 282. See also Saif-Alden Wattad, *supra* note 192, at 530–33 (arguing that the presumption of innocence and guilt requirement are "requirement[s] of the Due Process Clause, which requires that no criminal punishment may be imposed arbitrarily, if criminals are to be treated as ends and not as means to the end").

194. See Laufer, *supra* note 185, at 332–34; See also Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063–65 (1975).

195. See, e.g., *Portuondo v. Agard*, 529 U.S. 61, 76 (2000) (Stevens, J., concurring) ("[The Sixth Amendment right to confrontation] also reflects respect for the defendant's individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned."); *McNabb v. United States*, 318 U.S. 332, 343 (1943) ("A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process."), *abrogated by* 18 U.S.C. § 3501(a) (2006).

protections embodied in the Sixth and Fourteenth Amendments,¹⁹⁶ the restrictions on government search and seizure of private individuals and property contained in the Fourth Amendment,¹⁹⁷ and the privilege against self-incrimination secured by the Fifth Amendment¹⁹⁸ are all consistent with the ideal that the State may never treat a person only as a means to securing a conviction.

Against these moral and constitutional principles, the State treats defendants strictly as means to an end when it preserves irreconcilable convictions. Regardless of whether the prosecutor has pursued a second, inconsistent prosecution in good faith, vouching for both convictions signals the State's belief that, to resolve a criminal case, it may stigmatize defendants with the mark of conviction and rob them of liberty despite knowing that at least one innocent person's liberty is being sacrificed in the process. Even a prosecutor's subjective uncertainty about the true perpetrator cannot morally or legally justify this tactic.¹⁹⁹ Indeed, our criminal justice system was designed largely to prohibit such arbitrary methods of establishing guilt.²⁰⁰

Therefore, allowing incompatible convictions to stand places the very legitimacy of the criminal justice system in jeopardy.²⁰¹ If the criminal system permitted the State to preserve irreconcilable convictions, individuals could not trust that a guilty verdict reflected an accurate statement of the event, rather than simply a statement about what the

196. See *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.”).

197. See, e.g., *United States v. Katz*, 389 U.S. 347, 357 (1967) (“Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) (internal quotations, substitutions, and citations omitted).

198. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (“[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized.”).

199. Cf. *Kitai*, *supra* note 192, at 282 (“The presumption of innocence rests on a deontological moral theory, which prohibits sacrificing the individual for the sake of general utility, viewing her as an end in and of herself.”); *Wattad*, *supra* note 192, at 537 (“[F]or a criminal defendant to be an end, he may not be punished for the sake of deterrence; if he is so punished, he is being *used* as a means to achieve other goals.”). See also *Lugosi*, *supra* note 164, at 490 (discussing impropriety of punishing innocent on utilitarian grounds).

200. See *Chambers*, *supra* note 145 at 677 (examining profound impact of requirement that legal facts be proven through admissible evidence to a jury); *Laufer*, *supra* note 185, at 330–33 (describing “consensus that a number of fundamental interests and rights required that burdens of production and persuasion be shifted to the state”) (citation omitted).

201. *Herrera v. Collins*, 506 U.S. 390, 433–34 (Blackmun, J., dissenting) (“[T]he legitimacy of punishment is inextricably entwined with guilt.”); *Lugosi*, *supra* note 164, at 494 (“Nothing would undermine the moral force of the criminal law more than the discovery that, not only are innocent people found guilty of crimes they did not commit, but that they have been executed.”).

evidence showed.²⁰² Ruled by a sovereign willing to obtain potentially limitless convictions for the same offense, individuals could not trust that the government was committed to acquitting the innocent and convicting the guilty.²⁰³ Combined with the underlying irrationality of irreconcilable convictions, it is in this manner that the State's maintenance of incompatible prosecutions shocks the conscience.

The same reasoning dictates that where the convictions at issue are reconcilable, the State's actions do not offend the requirements of rationality and respect for individual dignity enforced by substantive due process. When the verdicts resolve the State's inconsistencies, the substantive results provide insufficient cause to upset the presumptions of guilt imposed upon the defendants. Instead, the defendant is left to argue that the appearance of impropriety casts doubt on the outcomes. Just as this argument cannot carry the day on a fair trial theory, it also fails in the much narrower context of substantive due process. Thus, regardless of how unseemly and self-contradictory the State's actions may appear, reconcilable verdicts of guilt render this consideration constitutionally meaningless.

C. Substantive Due Process as Applied to Sentencing

Substantive due process may also provide a valid, though limited, framework for evaluating incompatible sentences. As with convictions, whether substantive due process prevents a state from enforcing inconsistent sentences turns on whether the sentences can logically stand together. These determinations proceed differently in the capital and noncapital contexts, as discussed below.

I. Noncapital Cases

For noncapital cases, irreconcilable sentences could result where the State maintains incompatible positions regarding facts determinative of the defendants' ultimate sentences.²⁰⁴ Here, the defendants' rights to substantive due process would prevent the State from, for example, maintaining firearms enhancements against multiple defendants if the enhancement could only rationally be applied to one defendant.

202. See Nesson, *supra*, note 145, at 1362 (“[A] verdict that people understand as a statement about the evidence communicates a message that may undermine effective general deterrence.”). See also *id.* at 1372–73 (“Once the public has accepted a verdict, its acceptance should not be undercut lest the public become disinclined to place confidence in verdicts, thereby diminishing the strength of behavioral messages.”).

203. See *id.* at 1366–1367 (explaining that faith in factual justification of verdict is necessary for public confidence in imposition of sanctions).

204. Cf. *Shaw v. Terhune*, 380 F.3d 473, 474 (9th Cir. 2003) (defendant argued inconsistent prosecutorial assertions concerning personal use of a firearm were unconstitutional).

Substantive due process applies because the State's maintenance of irreconcilable positions concerning the enhancement defies rationality. Though both defendants may rightfully be incarcerated, at least one remains "actually innocent" of the enhancement.²⁰⁵ Overzealous pursuit of "false" sentences, lacking any reasonable connection to a legitimate aim of criminal justice, shocks the contemporary conscience.

2. *Capital Cases*

Death penalty cases present a far more nuanced challenge for the substantive due process analysis previously outlined. Because the Eighth Amendment primarily governs them, death sentences potentially may not be analyzed under substantive due process, as the Eighth Amendment arguably provides a more specific textual source for the protection sought.²⁰⁶ To the extent substantive due process applies, the doctrine may prevent the State from executing multiple defendants while maintaining irreconcilable judgments concerning their death eligibility. Most states narrow the class of defendants exposed to the death penalty by requiring a finding of at least one statutory factor that elevates the crime to a capital offense.²⁰⁷ As with sentencing enhancements, under substantive due process a prosecutor could not illogically apply a death-eligibility factor to multiple defendants. To then overcome a claim of harmless error, the defendant would have to establish the absence of other valid eligibility factors.²⁰⁸ Otherwise, the existence of other eligibility factors could permissibly keep the defendant exposed to the death penalty.

A scenario that might present the concern of an illogically applied death-eligibility factor would be if two defendants receive death sentences, but only one could have been exposed to the death penalty as the perpetrator who fired the fatal shot or shots. This hypothetical could arise in a state like Virginia, where the identity of the triggerman is often crucial to determining which defendants may be sentenced to death.²⁰⁹

Outside these narrow circumstances, substantive due process could

205. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 335 (1992) (recognizing petitioner's claim that he was "'actually innocent' of the death penalty").

206. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.") (quotations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

207. *See Brown v. Sanders*, 546 U.S. 212, 216 (2006).

208. *See Arizona v. Fulminante*, 499 U.S. 279, 306–10 (1991) (explaining that most forms of trial errors are subject to harmless error analysis).

209. *See Cheng v. Commonwealth*, 393 S.E.2d 599, 607–08 (Va. 1990) (reversing capital murder conviction where evidence was insufficient to conclude that mastermind of crime fired fatal shots); *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991) (distinguishing rule in *Cheng* as inapplicable where defendants jointly inflicted the fatal wounds).

not halt the State from enforcing sentencing judgments where, though the prosecutor may have argued inconsistently as to a sentencing factor, the resulting judgments remove any incompatibility. Applying this framework, a defendant would not be entitled to relief on her death sentence if a separate jury spared the life of her co-defendant. Society may have legitimate ethical and moral qualms about the State's tactics, but these qualms likely would not rise to a level that shocks the conscience. As such, the defendant in *Stumpf v. Houk* also could not obtain sentencing relief on a theory of substantive due process.²¹⁰

D. Constructing the Substantive Due Process Claim

1. The Basic Elements

From the above discussion, a defendant may construct the elements of a substantive due process claim against the State's maintenance of incompatible convictions. First, since the substantive component of due process does not prohibit a State from pursuing an inconsistent prosecution, the claimant must have already been convicted and bring a challenge based on a separate conviction. This requirement creates a critical distinction among defendants based on their order of conviction. While the second defendant convicted may assert the claim immediately upon conviction, either in a motion for new trial or on direct review of the judgment and sentence, the defendant tried and convicted first must await a later, irreconcilable conviction before her claim ripens. Proceeding in this fashion may produce unique procedural challenges for the first defendant convicted that will be addressed in the next section.

The second element of the substantive due process claim is that the separate conviction must be factually irreconcilable with the defendant's conviction. Simply asserting that the prosecution's theories of conviction are inconsistent would not suffice if a proper theory exists under which both defendants could properly be held culpable. This rule would doom a defendant like the one in *Bradshaw*,²¹¹ whose conviction was consistent with that of his co-defendant, but would still allow claims by defendants like those in *Groose*,²¹² whose convictions could in no way be squared

210. If the defendants cannot establish strict incompatibility with respect to their death sentences, the inquiry would proceed to whether inconsistent prosecutorial arguments concerning culpability, on their own, rob capital sentencing of the reliability required by the Eighth Amendment. See *Bradshaw v. Stumpf*, 545 U.S. 175, 189 (2005) (Souter, J., concurring). The argument would likely hinge on whether in capital cases the Eighth Amendment requires more than strict logical coherence, an unsettled question beyond the scope of this article. For a useful discussion of the relevant Eighth Amendment principles, see Shatz & Whitt, *supra* note 37, at 886–91.

211. *Supra* Part II, Section A(1).

212. *Supra* Part I, Section A.

with one another.

Third, should any defendant establish that her conviction is irreconcilable with one or more independent convictions, that defendant would automatically establish the prejudice necessary for relief.²¹³ Unlike defendants who rely on a fair trial framework but cannot point to an element of due process denied specifically to them, a defendant grounding her claim in substantive due process can assert that the prosecution, by its own actions, has undone the presumption of guilt in her case. Not only does this approach more precisely capture the harm sustained by a defendant whose conviction has been implicitly repudiated, but it also prevents the State from credibly invoking its interest in finality to sustain the judgments.²¹⁴ After all, a state truly concerned with finality would have abstained from irreconcilable prosecutions.

2. *The Challenge of Federal Habeas Corpus*

For an individual in state custody, if the temporal gap between convictions procedurally bars the first defendant from asserting the claim under state direct and collateral review, the defendant must resort to federal habeas corpus. In federal habeas, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) places strict limitations on substantive federal court review of state court judgments.²¹⁵ However, a claim challenging a later irreconcilable conviction may offer an avenue to bypass these limitations. If, as in this situation, a state court did not previously adjudicate the claim on the merits (because the claim was not and could not have been raised in a state proceeding), and if no process remains for the defendant to return to state court, the defendant would have a sound basis for *de novo* review on their first federal habeas application.²¹⁶

Should the defendant reach federal habeas before there is a subsequent irreconcilable conviction, the danger arises that the defendant could only assert her substantive due process challenge in a second or

213. *Cf. Hobby v. United States*, 468 U.S. 339, 347 (1984) (challenge to discriminatory selection of grand jury foreperson brought under Equal Protection Clause did not require individualized showing of prejudice unlike same claim brought under Due Process Clause); *Johnson v. Puckett*, 929 F.2d 1067, 1071 (5th Cir. 1991) (due process challenge to selection of grand jury foreperson affected fundamental fairness of trial, but challenge brought under equal protection did not because injury was stigmatization caused by racial discrimination).

214. *Cf. Lugosi, supra* note 164, at 502 (in the face of a procedural bar to collateral attack, “[C]onsiderations of finality should not keep a possibly innocent man in jail.” (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 163–64 (1970–1971))) (internal quotations omitted).

215. *See generally* 28 U.S.C. § 2254 (2006) (limiting federal review of state court judgments in criminal cases).

216. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (holding that federal courts review *de novo* a claim not adjudicated on the merits in a state court proceeding).

successive habeas petition. A defendant is not entitled to *de novo* review on such a successive petition, even when her claim could not have been presented previously.²¹⁷ Instead, federal courts may only grant relief “if . . . but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”²¹⁸

This limitation raises a difficult proposition for claimants. If this standard is limited to the question of whether a judge or jury made aware of the irreconcilable conviction would still convict, a defendant’s prospects for relief would be far from certain, since the mere existence of an irreconcilable conviction would not necessarily render a finding of guilt unreasonable.

Instead, a defendant challenging an irreconcilable conviction in a successive petition must assert a broader interpretation of the AEDPA standard. This broader interpretation must be based on the fact that the constitutional error with irreconcilable convictions does not occur within a particular defendant’s trial. It is therefore conceptually unsound simply to wind back the clock to the original trial. With irreconcilable convictions, the State undoes the presumption of guilt for both defendants through a process independent of either defendant’s trial. The necessary finding of fact in this context is whether the convictions at issue negate one another, rather than whether one with knowledge of the irreconcilable conviction could still reasonably convict. Thus, the relevant fact-finder ceases to be the judge or jury deciding guilt or innocence, and instead becomes the court tasked with assessing reconcilability. Should this view prevail—a proposition that is far from certain—the defendant’s burden on successive review would be significantly simplified.

To avoid these complications on federal review altogether, a defendant with notice of a pending or imminent inconsistent prosecution would be wise to assert her claim in the first habeas petition, despite the near certainty that the court will dismiss the claim as unripe. This tactic may prevent a federal court from deeming the petition successive when the defendant returns to federal court to reopen the ripened claim, thereby entitling the defendant to *de novo* review.²¹⁹

VI. REMEDY

Having established that substantive due process may provide a portal to challenge an irreconcilable conviction, the appropriate remedy must be

217. 28 U.S.C. § 2244(b)(2) (2006)

218. 28 U.S.C. § 2244(b)(2)(B)(i) (2006).

219. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–44 (1998) (defendant not required to seek permission to file successive petition when defendant presented claim in earlier petition and district court deemed claim premature).

considered. To this end, the remedy must meaningfully remove the core incompatibility across the convictions and give effect to the invalidated presumptions of guilt for both defendants. Consequently, both convictions must be overturned and the defendants again presumed innocent.

Following reversals, the proper proceedings on remand depend on the nature of the inconsistency, specifically, whether the defendants are alleged to have conspired in the crime. For situations lacking evidence of collaboration between or among the defendants, as in *Groose*, reversing the convictions would force the State to select which defendant to retry.²²⁰ Where new evidence emerges that significantly alters the prosecution's understanding of events and points clearly to a particular suspect, the State could claim no legitimate objections to this procedure.²²¹ The new evidence would presumably clarify the circumstances of the crime, thereby reducing or eliminating the State's doubts about the proper defendant to pursue.

If the State cannot resolve the contradiction with confidence, the equities become more complicated. Genuine doubts about which offender committed the act might prompt a prosecutor to object that, as certainly as an innocent person stands wrongfully convicted, the true perpetrator presently sits in jail. But the prosecution's qualms about releasing a potentially guilty inmate, though understandable, cannot control the remedy. This is because our system places more value on likely innocence than likely guilt. It also must be remembered that the prosecutor does not enter this phase with clean hands, as her actions caused the conundrum of which she now complains.

For situations like *Bankhead*, with possible collaboration among defendants, arranging for a joint trial may offer a reasonable alternative. Recall in *Bankhead* that the State had evidence that three individuals were proximate to the incident, but only two meaningfully participated in the homicide. The three individuals' roles—the question of “who did what”—had to be resolved. Trying the defendants separately allowed the State to arbitrarily dissect the evidence in a manner brazenly opposed to the truth-seeking purpose of the criminal trial. Hence, the prosecutor was able to tell jurors accurately that nothing they heard in court contradicted *Bankhead*'s guilt.

Proceeding in a joint trial would allow the jury in cases like *Bankhead*'s to hear all the evidence against all defendants, obtain a more

220. See *Thompson v. Calderon*, 120 F.3d 1045, 1071 (9th Cir. 1997) (Kozinski, J., dissenting), *rev'd*, 523 U.S. 538 (1998) (stating that where mutually inconsistent verdicts exist, the state should take the necessary steps to set aside or modify at least one of the verdicts).

221. Cf. *Hearn v. Commonwealth*, No. 2005-SC-000708-MR, 2008 WL 3890035, at *8 (Ky. Aug. 21, 2008) (stating that the state successfully pursuing a conviction against the defendant and later arguing that he was not involved would present serious questions of fundamental fairness).

informed view on the questions of fact, and determine the defendants' relative culpabilities without incompatibility.²²² This solution also aligns with the Supreme Court's endorsement of joint trials in the federal system because they "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."²²³

One significant difficulty with this arrangement is that many courts require severance when defendants present mutually antagonistic or irreconcilable defenses.²²⁴ Trying such defendants together would risk that the jury, rather than deciding whether the evidence demonstrated guilt beyond a reasonable doubt for either defendant, would simply select the defendant most likely to have committed the offense.²²⁵ Joint trials also introduce the threat that each defendant will face multiple prosecutors: the State and the other defendants attempting to lay blame on her.²²⁶

For its part, the State may consider joinder problematic where one or both defendants were responsible for severing the two trials originally. Granting a new trial under these circumstances could be considered inequitable sandbagging since both defendants would receive a proverbial second bite at a trial from their original efforts to avoid a joint proceeding.

These concerns notwithstanding, courts could have confidence in mandating joinder on remand to resolve whether and how the defendants acted in concert. On a practical level, where defendants present mutually antagonistic defenses, courts rarely find actual prejudice from joint trials.²²⁷ This stems partially from the trial court's broad authority to reduce the risk of harmful joinder by vigilantly guarding against potential sources of prejudice.²²⁸ Additionally, having already been convicted in separate proceedings largely shaped by the prosecution's selective presentation of facts, the defendants could not persuasively contend they are worse off with joinder. For the State, a new trial may appear wasteful,

222. See Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. Tol. L. Rev. 505, 541–43 (1995) (advocating joint trials to allow jury full picture of evidence).

223. *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (quoting *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)). See also *United States v. Marchant*, 25 U.S. (12 Wheat.) 480 (1827) (discussing common law roots of preference for joint trials).

224. See *Zafiro*, 506 U.S. at 538.

225. See FED. R. CRIM. P. 14(a); *Zafiro*, 506 U.S. at 539 (discussing risks of joining defendants with antagonistic defenses); Granholm, *supra* note 222, at 539.

226. See *United States v. Romanello*, 726 F.2d 173, 182 (5th Cir. 1984) ("[T]he dangers inherent in joint trials become intolerable when the co-defendants become gladiators, ripping each other's defenses apart. In their antagonism, each lawyer becomes the government's champion against the co-defendant, and the resulting struggle leaves both defendants vulnerable to the insinuation that a conspiracy explains the conflict.")

227. See *Zafiro*, 506 U.S. at 538 (finding courts have reversed relatively few convictions for failure to sever cases because of mutually antagonistic or irreconcilable defenses); Granholm, *supra* note 222, at 539–40.

228. See, e.g., *Richardson*, 481 U.S. at 210–11.

but the immorality and irrationality of maintaining a false conviction easily dwarfs this inconvenience.

For those cases where joinder still proves too prejudicial an option, thus making separate trials unavoidable, the court must require the State to eliminate the offending incompatibility in its subsequent charging decisions. Though the evidence revealing the defendants' relative roles may remain ambiguous, the prosecution could only go forward using reconcilable theories of guilt. To illustrate, this rule would at a minimum force the prosecution in *Bankhead* to charge only two of the three potential defendants, absent a lesser theory of culpability for the third alleged participant.

VII.

SUMMARY AND CONCLUSION

Situations like that presented in *Bankhead*, where a prosecutor pursues and obtains convictions that simply cannot be reconciled with one another, should be rare occurrences.²²⁹ Nonetheless, when irreconcilable convictions do occur, they raise critical concerns about the scope of executive authority within the criminal justice system. Those committed to the protection of individual rights and human dignity should view with great suspicion a government unwilling to yield in its maintenance of such an incoherent result. No matter how well-intentioned the prosecutor who obtains these conflicting convictions may be, knowingly incarcerating an innocent person directly contradicts our system's fundamental precept that respecting innocence must be valued over securing guilt.

The lower courts have wrongly concluded that inconsistent convictions implicate the defendant's right to a fundamentally fair trial. Though prosecutors' actions in such cases do seem intuitively unfair, the injustice does not stem from the process afforded the defendant. Rather, what most offends the contemporary conscience about irreconcilable convictions is that they exist at all.

Defendants challenging incompatible convictions must therefore rely on the substantive component of due process. Substantive due process provides a viable avenue for relief because the State's attempt to presume two defendants guilty for an act only one of them could have committed is both irrational and offensive to the constitutional principle of human dignity. Reversal based on substantive due process would force the State to eliminate the incompatibility and rescue the process from absurdity.

229. See *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000).