Journal of Criminal Law and Criminology

Volume 67 | Issue 4 Article 5

1977

Prosecutor's Failure to Disclose--Discovery: United States v. Agurs, 96 S. Ct. 2392 (1976)

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
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Vol. 67, No. 4
Printed in U.S.A

DISCOVERY—PROSECUTOR'S FAILURE TO DISCLOSE

United States v. Agurs, 96 S.Ct. 2392 (1976)

The United States Supreme Court recently handed down a decision in *United States v. Agurs*[1] that dealt with a prosecutor's failure to volunteer exculpatory evidence prior to trial.[2] The Court held that a prosecutor's failure to deliver to the defense certain unrequested background information concerning a murder victim, which may have tended to support the accused's self-defense claim, did not deprive the accused of a fair trial as guaranteed by the due process clause of the fifth amendment.[3] The Court explained that constitutional error occurs and a new trial would be required only if a nondisclosure results in a fundamentally unfair conviction. A conviction is unfair if the undisclosed evidence is found to be sufficiently "material" by a reviewing court.[4] The Court stated that the standard to determine materiality is whether the omitted evidence creates a reasonable doubt regarding the defendant's guilt that did not previously exist. The Court applied this standard to the facts of *Agurs* and did not find the nondisclosure to be material.

Agurs involved a case where the jury found the respondent, Linda Agurs, guilty of second degree murder. Agurs, a prostitute, and James Sewell registered in a motel. Circumstantial evidence indicated that Sewell left the room and returned to find Agurs in the process of going through his clothing and robbing him. A fight began, and after hearing Agurs screaming for help, three motel employees forcibly entered the room to find Sewell on top of her struggling for possession of a bowie knife.[5] Sewell died, and an autopsy revealed that he had several deep stab wounds and numerous slashes all over his body. When respondent surrendered to police, she was given a physical examination, revealing no cuts or bruises of any kind.

At trial, respondent offered a self-defense plea, based on the argument that Sewell had initially attacked her with a knife, and that her actions constituted an attempt to save her life.[6] Three months after respondent was convicted, defense counsel filed a motion for a new trial. The motion asserted, *inter alia,* that the prosecutor failed to disclose information concerning Sewell's prior criminal record that would have been further evidence of his violent character.[7] The district court denied the motion,[8] holding that the evidence of Sewell's prior criminal record was insufficiently material for its nondisclosure to require a new trial.[9] The court explained that a specific defense request for evidence is not essential to a materiality finding. Nevertheless, the court reasoned that the evidence in *Agurs* was not material, because Sewell's criminal record was merely repetitive of the other available evidence concerning his character. The court emphasized that regardless of this character evidence, respondent's self-defense claim was inconsistent with the medical evidence concerning the injuries received by both parties. The court of appeals reversed,[10] holding that the "evidence . . . is sufficiently material and important to the question of appellant's guilt or innocence . . . "[11] as to require a new trial, since the jury's

[1] 96 S.Ct. 2392 (1976).

[2] *Id.* at 2395.

[3] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . " U.S. CONST. amend. V.

The Court in *Agurs* stated that its construction of the due process clause "will apply equally to the comparable clause in the Fourteenth Amendement applicable to trials in state courts." 96 S.Ct. at 2399.

[4] Implicit in a finding of materiality is that the evidence is favorable to the defendant and relevant to the issues of guilt or punishment.

[5] When Sewell and Agurs registered at the motel, Sewell had the bowie knife and another knife in his possession, as well as $360. 96 S.Ct. at 2395

[6] The Court explained that:

> [S]upport for this self-defense theory was based on the facts that she had screamed for help, Sewell was on top of her when help arrived, and his possession of two knives indicated that he was a violence-prone person.

Id. at 2396.

[7] The defense argued that this evidence was admissible and relevant to the issue of who was the aggressor, regardless of defendant's knowledge of it, citing United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972). *Burks* held that evidence of a victim's violent character is admissible where a claim of self-defense is raised.

[8] 96 S.Ct. at 2396.

[9] The district court used the standard of materiality ultimately adopted by the Court.

[10] 510 F.2d 1249 (D.C. Cir. 1975). The circuit court found materiality without defining the term, but by stating that if Sewell's prior criminal record had been revealed to the jury, they would clearly have found that he was a violence-prone person. The court cited *Burks* to demonstrate that this evidence would have been admissible.

[11] 510 F.2d at 1254.

verdict might have been affected by the introduction of the evidence.[12]

The Supreme Court reversed the court of appeals, in a majority opinion delivered by Justice Stevens, stating that the circuit court had incorrectly interpreted the constitutional requirement of due process.[13] The majority opinion began with a discussion of three nondisclosure situations having the common element that information was discovered after trial which had been known to the prosecution but unknown to the defense. The Court explained that the general rule of *Brady v. Maryland*[14] can "arguably" be applied to each of these situations. *Brady* is the landmark decision concerning the suppression of evidence, where the Court held that:

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor.[15]

By demonstrating how the general rule is applied differently in each situation, the Court illustrated the necessity of the materiality standard which it ultimately applied to the facts in *Agurs*.

In the first situation, the undisclosed evidence demonstrates that the prosecution's case included perjured testimony, and that knowledge of the perjury can be imputed to the prosecutor. The Court cited a group of cases[16] that support the general rule that a conviction obtained through the use of knowingly false evidence is fundamentally unfair and therefore constitutes a due process violation. In this situation, a nondisclosure is material if there is any reasonable likelihood that the perjured testimony could have affected the decision of the jury.[17] This strict standard of materiality has been applied to perjury cases because they involve prosecutorial misconduct as well as a "corruption of the truth-seeking function of the trial process."[18] The Court found that this standard did not apply to *Agurs*, because "this case involves no misconduct, and there is no reason to question the veracity of any of the prosecution witnesses . . . ."[19]

The second situation is illustrated by the facts of *Brady*,[20] where the defense made a pretrial request for specific evidence, and the prosecutor failed to deliver it. The Court pointed out that implicit in the materiality requirement of the *Brady* holding is a concern that "the suppressed evidence might have affected the outcome of the trial."[21] A defense request is desirable because it gives the prosecutor notice of exactly what evidence the defense is interested in, and the Court emphasized the prosecutor's duty when such a request is made:

> Although there is ... no duty to provide defense counsel with unlimited discovery of everything known by the prosecution, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecution to respond either by furnishing the information or by submitting the problem to a trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.[22]

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[12] The court refused to rehear the case en banc. 96 S.Ct. at 2397 n. 6.

[13] *Id.* at 2397.

[14] 373 U.S. 83 (1964).

[15] *Id.* at 87.

[16] This area of perjury can be further divided into two categories. The first includes cases in which the prosecutor solicited perjured testimony: in Mooney v. Holohan, 294 U.S. 103 (1935), a radical labor leader claimed that his murder conviction was obtained through the use of manufactured physical evidence and testimony that the prosecutor knew to be fraudulent. The Supreme Court found in dicta that the alleged prosecutorial misconduct was inconsistent with the concept of a fair trial and constituted a denial of due process. In Pyle v. Kansas, 317 U.S. 213 (1942), the Court expressly proscribed the knowing use of perjured testimony.

The second category includes cases in which the prosecutor was aware that certain testimony was perjured, and although the testimony was not solicited by him, he allowed it to stand uncorrected: in Napue v. Illinois, 360 U.S. 264 (1959), an important witness falsely testified that he received no promise of consideration in return for his testimony, when in fact the Assistant State's Attorney had promised the witness consideration. In Alcorta v. Texas, 355 U.S. 28 (1957), a witness falsely denied having had intercourse with the accused's wife, and the prosecutor was aware of the truth. In Giglio v. United States, 405 U.S. 150 (1972), the government failed to disclose to the defense a promise made to a key witness that he would not be prosecuted if he cooperated with the government.

[17] Napue v. Illinois, 360 U.S. at 271–72.

[18] 96 S.Ct. at 2397.

[19] *Id.*

[20] 373 U.S. at 84–85. Brady was involved with Boblit in a robbery-murder, and was convicted and sentenced to death. The defense requested the statements that Boblit had made to the police, and the prosecutor disclosed to the defense all but one of the statements. In the withheld statement Boblit admitted that he had strangled the victim. The Maryland Court of Appeals ordered a new trial, but only on the issue of punishment. The court did not order a new trial on the issue of guilt because under the Maryland felony murder rule, Brady was guilty of murder, regardless of who did the actual killing. The Supreme Court upheld the Maryland court's restriction of the new trial to the issue of punishment.

[21] 96 S.Ct. at 2398.

[22] *Id.* at 2399.

The Court did not apply the materiality standard of *Brady* to *Agurs,* because *Agurs* did not involve an unanswered request for specific evidence.

The Court introduced the third situation to which *Brady* "arguably" applies, by admitting that it had not yet decided whether the prosecutor has a duty to disclose exculpatory information to the defense when no request has been made.[23] But even assuming the prosecutor does have a duty of disclosure, the test of materiality "is not necessarily the same as in a [specific] request situation."[24] The Court noted that under some circumstances the defense may not be aware that certain exculpatory evidence exists, and therefore will either not make a request or will make a general request for "anything exculpatory." The Court pointed out that neither a general request nor failure to request gives the prosecutor notice of what evidence the defense is interested in. Nevertheless, the Court explained that if the prosecutor has a duty to respond to a general request, "it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor."[25] If evidence is so "obviously exculpatory" that the prosecutor is given notice of a duty to produce, "that duty should equally arise even if no request is made."[26] By focusing on the prosecutor's duty to disclose as a function of the exculpatory nature of the evidence, the Court concluded that there is no significant difference between cases where there has been a general request for exculpatory evidence and cases where no request has been made, and that the prosecutor's duty of disclosure in both situations is identical.

The Court further analyzed the third situation, and considered whether the prosecutor has a constitutional duty to voluntarily disclose exculpatory evidence to the defense, and if so, what standard of materiality gives rise to that duty. The Court explained that the same standard of materiality applies prior to trial when the prosecutor must decide what evidence to voluntarily submit to the defense, as well as after trial when a reviewing court must decide whether a nondisclosure deprived the defendant of his due process right to a fair trial.[27] The Court emphasized the fact that the prosecutor's constitutional duty of disclosure would be violated only if the nondisclosure was material and thereby resulted in an unfair trial for the defendant. Therefore, although the Court discussed the possibility of procedural rules being developed to allow complete discovery, it concluded that the prosecutor does not have a constitutional obligation to disclose his entire files to the defense.[28]

In attempting to define the proper constitutional requirement of materiality in *Agurs,* Justice Stevens pointed out that the prosecutor's constitutional obligation is not measured by his moral culpability or willfulness,[29] since *Brady* expressly found the issue of prosecutorial good or bad faith to be irrelevant to the determination of materiality.[30] The character of the evidence rather than the character of the prosecutor determines whether the suppression of evidence results in constitutional error.

The defendant's burden of proof varies with the

[23] This third situation is the only one where the applicability of *Brady* is uncertain. Until this point, the Court had not yet decided if the prosecutor has a duty to disclose unrequested information to the defense.

A few of the circuits have in fact imposed a duty of disclosure on the prosecutor in the absence of a request: United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964).

[24] 96 S.Ct. at 2398.

[25] *Id.* at 2399.

[26] *Id.*

[27] *Id.*

[28] *But see* the circuit court's decision in *Agurs,* 510 F.2d at 1254, where the court decided that the prosecutor had a constitutional obligation to disclose any information which might affect the jury's verdict.

Nevertheless, the Supreme Court said that the jury's verdict might be affected by any evidence, regardless of whether it is trivial or material to the issue of guilt, and that a nondisclosure constitutes constitutional error only if the evidence is material.

> If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. 96 S.Ct. at 2400.

See Moore v. Illinois, 408 U.S. 786 (1972), where a similar conclusion was reached with regard to police investigatory work. In *Moore,* undisclosed evidence of a witness misidentification of the accused was found not to be material to the issue of guilt. In *In re* Imler, 60 Cal. 2d 554, 387 P.2d 6, 35 Cal. Rptr. 293 (1963), *cert. denied,* 379 U.S. 908 (1964), the court held that representatives of the state must only disclose evidence that is material.

[29] 96 S.Ct. at 2400. The Court discussed the prosecutor's general duty to be faithful to the state's overriding interest that "justice shall be done," citing the district court's statement regarding situations in which "evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific defense request." The prosecutor is therefore seen as having the dual task of convicting the guilty and ensuring that the innocent are protected from erroneous convictions.

[30] *See* note 15 and accompanying text *supra.*

materiality standard adopted. In cases where new evidence is discovered from a neutral source after trial, and a Rule 33 motion is made by the defense, a defendant usually has the severe burden of demonstrating that the newly discovered evidence would probably have resulted in an acquittal.[31] If new evidence is discovered in the prosecutor's possession, the Court felt that the defendant's burden should be less, in order to preserve the "special significance of the prosecutor's obligation to serve the cause of justice."[32]

Where error is present in the record, under the harmless error standard[33] the defendant's burden is quite small, since the reviewing judge must set aside the verdict unless he is "sure that the error did not influence the jury, or had but only slight effect."[34] Since almost all nondisclosed evidence might have more than a "slight effect" on the jury, and the Court had already rejected the prosecutor's duty of total disclosure, the Court concluded that the defendant in *Agurs* must prove more than "slight effect" in order to meet the constitutional standard of materiality.[35]

The Court concluded that the proper standard of materiality must reflect "our overriding concern with the justice of the finding of guilt."[36] Since a finding of guilt is permissible only if evidence supports it beyond a reasonable doubt, undisclosed evidence constitutes constitutional error only if it creates a reasonable doubt regarding a defendant's guilt that did not previously exist.[37] Support for this standard of materiality was found by the Court in the decisions of several of the circuits.[38]

After analyzing the language of the circuit courts,[39] Justice Stevens ultimately decided that the district court in the instant case applied the proper standard to the facts in *Agurs* by measuring the significance of Sewell's prior criminal record against the context of the entire trial.

> Stressing in particular the incongruity of a claim that Sewell was the aggressor with the evidence of his multiple wounds and respondent's unscathed condition, the trial judge indicated his unqualified opinion that respondent was guilty. . . . Sewell's prior record did not contradict any evidence offered by the prosecutor, and was largely cumulative of evidence that Sewell was wearing a bowie knife . . . and carrying a second knife in his pocket . . . .[40]

Since the undisclosed evidence would not have created a reasonable doubt regarding the guilt of the defendant which did not otherwise exist, nondisclosure did not deprive respondent of a fair trial.

The dissent agreed with the majority opinion insofar as it held that "the prosector's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence."[41] The dissent took issue, however, with the burden that the majority's standard imposes on a defendant. Justice Marshall, joined by Justice Brennan, interpreted the majority's standard as allowing a defendant relief "only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind."[42] The dissent agreed that where the prosecutor withholds evidence, a lesser burden should be imposed on the defendant

[31] FED. R. CRIM. P. 33 provides for the granting of a new trial on the grounds of newly discovered evidence. See Ashe v. United States, 288 F.2d 725 (6th Cir. 1961), and United States v. Thompson, 493 F.2d 305 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974), which demonstrate how Rule 33 is applied.

[32] 96 S.Ct. at 2401. *See also* Berger v. United States, 295 U.S. 78 (1935).

[33] FED. R. CRIM. P. 52(a) embodies the current harmless error standard. A similar standard was applied in Kotteakos v. United States, 328 U.S. 750 (1946).

[34] *Id.* at 764. The harmless error standard appears to be very similar to the standard adopted by the circuit court in *Agurs*.

[35] 96 S.Ct. at 2401.

[36] *Id.*

[37] *Id.*

[38] *See* Stout v. Cupp, 426 F.2d 881 (9th Cir. 1970) (evidence of a psychiatric examination report of the rape victim was not disclosed to the defense; held, the evidence was not material because the jury would not have reached a different result had the evidence been placed before it); Peterson v. United States, 411 F.2d 1074 (8th Cir.), *cert. denied*, 396 U.S. 920 (1969) (evidence concerning witnesses to a bank burglary was not disclosed to the defense; held: the evidence was not material, because it would not have aided the defense); Lessard v. Dickson, 394 F.2d 88 (9th Cir.), *cert. denied*, 393 U.S. 1004 (1968) (evidence that a motel telephone operator had informed the police that the murder victim had had a visitor was not disclosed to the defense; held: the evidence was not material because it did not have much force against the "inexorable array of incriminating circumstances with which the defendant was surrounded"); United States v. Tomaiolo, 378 F.2d 26 (2d Cir. 1967) (evidence regarding the identity of the perpetrator of an armed robbery was not disclosed to the defense; held: the evidence was not material because it was speculative and "wholly lacking in probative force").

[39] The Court explained that its statement of the materiality standard "describes the test which courts appear to have applied in actual cases although the standard has been phrased in different language." 96 S.Ct. at 2402.

[40] *Id.*

[41] *Id. Cf.* Justice Marshall's dissent in *Moore*, where he advocated the abolition of the request requirement. 408 U.S. at 807 (Marshall, J., dissenting).

[42] 96 S.Ct. at 2403.

than in a case where newly discovered evidence comes from a neutral source. But Justice Marshall felt that the standard enunciated by the Court imposed as great or even a greater burden on the defendant than that imposed in a Rule 33 case.[43] He argued that the prosecutor's duty to ensure that justice prevails is best fulfilled if all relevant evidence as to guilt or innocence is revealed to the jury. The dissent conceded that a new trial cannot be granted whenever the prosecutor fails to disclose evidence "of some value" to the defense, because there is a general interest in finality of judgments, stating that "even a conscientious prosecutor will fail to appreciate the significance of some items of information."[44] Nevertheless, the dissent failed to agree with the standard of materiality adopted by the majority.

One cause of disagreement with the majority's materiality standard was the dissent's belief that when the question of materiality is a close one, it may result in the prosecutor's concealing evidence from the defense.[45] According to Justice Marshall, the majority's rule "gives little incentive" to the prosecution to disclose evidence to the defense.[46] It can be inferred that the dissent believed that concealment would occur, because the defendant's burden is so heavy as to make a materiality finding unlikely. But the dissent's chief concern with the majority standard was that it "usurps the function of the jury as the trier of fact in a criminal case," since the standard "explicitly establishes the judge as the trier of fact with respect to evidence withheld by the prosecution."[47]

The dissent argued that the cases cited by the majority in support of the position that the federal courts have previously used its standard do not in reality support the standard.[48] The opinion quoted the language used in these cases, to demonstrate that it is different from the precise language used by the Court.[49] Accordingly, the dissent stated that the prevailing standard of materiality in the federal courts that arguably could apply to the facts in *Agurs* is whether

> there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. . . .[50]

This "jury effect" standard is very similar to the standard that the majority used in cases involving perjury. The dissent argued that the reasons for this lesser burden on the defendant in perjury cases[51] apply to any case where favorable evidence is withheld, regardless of whether the evidence is "directly contradictory to evidence offered by the prosecutor."[52] The dissent discussed an example offered by Justice Fortas, in his concurring opinion in *Giles v. Maryland,*[53] concerning the nondisclosure of information that blood found on a victim did not match the blood type of the victim or the accused. The dissent argued that the suppression of this evidence would corrupt the "truth-seeking process" as much as would the prosecutor's knowing use of perjured evidence. Although this reasoning seems to be appropriate for the facts in *Giles,* it appears in-

[43] Justice Marshall argued that the two standards would be satisfied by the same evidence. That is, if the evidence created a reasonable doubt as to guilt in the judge's mind (the Court's standard), it probably would have resulted in an acquittal (the Rule 33 standard). *Id.*

[44] *Id.*

[45] The majority opinion dealt with this practical question quite differently, by stating that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 2399.

[46] *Id.* at 2404.

[47] *Id.* Justice Marshall was arguing that the standard should be in terms of changing the mind of the jury, rather than that of the judge. It is interesting to note that one commentator has minimized the difference between the two, by saying that "...such speculation about effect on jury seems often to mean that the court believes that the defendant is guilty, and therefore assumes that a jury would agree." Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose,* 40 U. CHI. L. REV. 112, 129 (1972).

[48] *See* note 38 *supra.*

[49] One could argue that the dissent's disagreement with the cases used by the Court to support its standard is one of form rather than substance. The contention that these cases do not support the Court's standard because the language in the cases is different from the precise language used by the Court is refuted by the Court's interpretation of the language in these cases as supportive of its standard.

[50] 96 S.Ct. at 2404. The cases cited by the dissent as supporting this standard contain language different from the precise language of the standard. Yet this very difference in language was the basis of the dissent's criticism of the cases used by the majority to support its standard. *See* Woodcock v. Amaral, 511 F.2d 985 (1st Cir. 1974), *cert. denied,* 423 U.S. 841 (1975) (the court held that a new trial was not required, because the undisclosed evidence would not have created a reasonable possibility of a different result); Clarke v. Burke, 440 F.2d 853 (7th Cir. 1971), *cert. denied,* 404 U.S. 1039 (1972) (the court held that suppressed evidence must be "vital and material" in order for conviction to be reversed); United States v. Miller, 411 F.2d 825 (2d Cir. 1969) (the standard advocated by Justice Marshall was stated, but arguably the case was decided on the basis of a Rule 33 motion).

[51] *See* text accompanying note 16 *supra.*

[52] 96 S.Ct. at 2405.

[53] 386 U.S. 66, 100 (1967) (Fortas, J., concurring).

appropriate for the facts in *Agurs*. The "blood" example involves blatant prosecutorial misconduct, since the evidence was clearly exculpatory, yet these factors are absent in *Agurs*. It therefore seems doubtful whether the perjury standard can be used in all cases where there is a nondisclosure of evidence. However, by determining that prosecutorial misconduct was not a consideration in the perjury standard, the dissent found that this standard could appropriately be used in *Agurs*.[54]

The logic of the *Agurs* decision, therefore, points to three main conclusions: (1) undisclosed evidence can be found to be material regardless of whether the defense requested it; (2) a prosecutor does not have a constitutional duty to disclose the entire contents of his files to the defense; and (3) the defendant's burden in proving materiality varies according to the circumstances of the situation in which the nondisclosure occurs.

The Court's first conclusion concerning the nonessential nature of a request represents a break from an earlier position held by the Court regarding the significance of a request for information. The Court in *Brady* specifically included the element of a request in its holding that "the suppression of evidence by the prosecution of evidence favorable to an accused upon request violates due process...." [55] When the Court discussed the holding in *Brady* as it applied to the facts in *Moore v. Illinois*,[56] the request element was reiterated. But a closer reading of *Moore* demonstrates an erosion of the request requirement. If the Court had been strictly interpreting the request requirement in the *Brady* holding, it could have decided *Moore* by simply stating that since there was no request, there could not be materiality. Nevertheless, the Court looked at the actual merits of the undisclosed evidence, examining its importance and relevance, before deciding that it was not material to the issue of guilt.[57] Both the majority and dissenting opinions in *Agurs* recognized that strictly interpreting the request requirement would often result in harm to the defendant, as certain evidence unknown to the defense could have a tremendous bearing on the issues of guilt or punishment. It is interesting to note that the Court treated *Agurs* as a case involving a "general request" for evidence,[58] rather than a case involving no request, and attempted to demonstrate why the two are essentially the same. It therefore appears that the Court was reluctant to explicity reject the request element of the *Brady* rule, and it is still apparently valid in a case where a request has been made. But in the context of the Court's opinion in *Agurs*, it is clear that the Court has rejected, albeit implicitly, the request requirement as essential for a finding of materiality.

The Court's second conclusion regarding the limitation on the prosecutor's duty of disclosure seems to follow naturally from its decision in *Moore*, where it was found that all the police investigatory work need not be disclosed to the defense. Although the Court left open the possibility of complete disclosure being developed by means of procedural rules, it held that such broad discovery is not constitutionally required. Therefore, the prosecutor's duty of disclosure is clearly limited only to evidence that meets the materiality standard.

The Court's last conclusion is perhaps the least clear and yet the most significant. The Court attempted to define the concept of "materiality" which had been introduced over a decade ago in *Brady*.[59] In *Agurs*, the Supreme Court demonstrated that the materiality standard varies according to the situation in which the nondisclosure occurs. The Court restated a materiality standard that had been

[54] Perhaps Justice Marshall was attempting to put a lesser burden on the defendant to reflect his view of liberal discovery as set out in his dissenting opinion in *Moore v. Illinois*. He stated there that prosecutors should have the responsibility of producing all known relevant evidence tending to show innocence. 408 U.S. at 810 (Marshall, J., dissenting).

[55] 373 U.S. at 87.

[56] 408 U.S. 786 (1972).

[57] One commentator has argued that judicial repetition of the request requirement may only be intended to "emphasize the desirability of a request whenever feasible." Comment, *supra* note 53, at 117.

[58] 96 S.Ct. at 2399.

[59] *Brady* was the first case in which the Supreme Court found a denial of due process in a case that dealt with the nondisclosure of favorable evidence and that did not involve any type of perjured testimony. Although *Brady* set out the general rule for the prosecutor's duty to disclose evidence to the defense that is "material to the accused's guilt or punishment," the Court offered no explanation of what it meant by "materiality."

The Court was given a perfect opportunity to define the materiality standard in *Giles*, where the undisclosed evidence concerned the character of the rape victim. The introduction of new evidence allowed the Court to remand to the state court, and to avoid dealing with the definition of materiality. Nevertheless, Justice Fortas, in his concurring opinion, defined a materiality standard that supported disclosure of all evidence unless it was "merely repetitious, cumulative, or embellishing of facts otherwise known to the defense . . . or without importance to the defense." 386 U.S. at 98 (Fortas, J., concurring).

Moore also dealt with prosecutorial suppression of evidence, but the Court merely held that the evidence was

developed previously in perjury cases[60] and attempted to define materiality as it applies to two other factual situations: (1) where there has been a request and (2) where no request has been made. The Court's attempts may have been intended to aid prosecutors and courts in their determination of the constitutional duty of disclosure in these specific instances. But does the *Agurs* standard really lend specific practical guidance to prosecutors and courts, or rather does it provide a means of rank-ordering the defendant's burden of proving unfairness in various situations?

The Court recognized in *Agurs* that the prosecutor must disclose unrequested evidence to the defense only if the evidence is material. The Court's definition of materiality, which was an attempt to define an "inevitably imprecise standard,"[61] is so ambiguous and indefinite that its value to prosecutors and courts is questionable. The majority implied that the ultimate determination of whether evidence is material will be made by a reviewing court after a defendant has been convicted of a particular crime. Therefore, any determination of the practical effect of the standard in terms of actual disclosures can at most be speculative.

Since the Court's standard offers no guidelines or criteria, it can easily be seen how arbitrary these decisions will become, how little certainty there will be, and that the situation will be no different than before the *Agurs* decision. It is difficult to conceive of any definition short of explicit procedural rules or a requirement of complete discovery that would precisely describe the prosecutor's constitutional duty of disclosure. Considering the vagueness of the actual words of the Court's standard and the inevitable result that it will not be applied uniformly or consistently, it is doubtful that the Court's "judicial definition" of materiality is of any practical value. Rather, the significance of *Agurs* is that a court or prosecutor can rank-order the defendant's burden of proving unfairness according to the situation in which a particular nondisclosure occurred. That is, the majority opinion can be interpreted as a means of comparing "how much" a defendant must prove in order to establish materiality in accordance with the circumstances under which the nondisclosure occurred.

According to the harmless error standard, the reviewing judge must set aside the verdict in cases where there is an error in the trial record. The one exception is when the error "did not influence the jury or had but only a slight effect."[62] The Court did not believe that every nondisclosure of evidence should be regarded as reversible error, because there is no constitutional duty to disclose all evidence. It therefore stated that the constitutional standard of materiality in *Agurs* must impose a greater burden on the defendant than mere harmless error.[63]

In cases where the prosecutor's evidence at trial included perjured testimony, either directly solicited or knowingly uncorrected by the prosecutor, the standard for reversal is whether there is any reasonable likelihood that the false testimony affected the jury's decision. In cases of perjury, "the Court has *consistently* held that a conviction . . . is fundamentally unfair."[64] A reviewing court will almost always grant a new trial when a conviction is obtained through the use of false evidence.

The defendant's burden is arguably greater in cases where a request for specific evidence by the defense goes unanswered, but the burden is nevertheless slighter than in a case where there has not been a request. The Court explained that implicit in the materiality requirement in the *Brady* holding is a concern that the suppressed evidence affected the outcome of the trial. Nevertheless, the Court said, "When the prosecutor receives a specific and relevant request, the failure to make any response is *seldom, if ever* excusable."[65]

In the two situations of perjury and unanswered request, the prosecutor can be seen as being at fault. Although the Court in *Brady* explicitly rejected the prosecutor's good or bad faith in the determination of materiality, it can be argued that the Court meant that the absence of prosecutorial misconduct does not preclude a finding of materiality, but that its existence can nevertheless be used as consideration in a materiality finding. Since the Court's definition of materiality varies according to the circumstances,

"insufficiently material" to warrant a new trial. The Court therefore, only by negative implication addressed itself to a standard of materiality. Thus the Court in *Moore* again avoided the issue of defining the materiality standard, leaving courts and prosecutors without a means of determining the appropriate constitutional duty of disclosure.

[60] *See* note 16 and accompanying text *supra*.

[61] 96 S.Ct. at 2399.

[62] Kotteakos v. United States, 328 U.S. at 764.

[63] It must be pointed out that the harmless error standard is one of procedure, and the Court rejected its use in constitutional cases of nondisclosure of evidence by the prosecutor.

[64] 96 S.Ct. at 2397 (emphasis supplied). *See* note 16 and accompanying text *supra*.

[65] *Id.* at 2399 (emphasis supplied). *See* note 15 and accompanying text *supra*.

prosecutorial misconduct can be viewed as one of the circumstances that leads to a finding of materiality.

In the situation illustrated by the facts in *Agurs,* the prosecutor may not have been aware of the importance of the information to the defense, and the Court explicitly stated that the prosecutor was not at fault. In this situation, the defendant's burden is apparently greater than in the previous two situations, because in cases such as *Agurs* and *Moore* the Court did not find materiality sufficient for a reversal. It can be argued that these findings were very closely related to the lack of prosecutorial misconduct in these cases.[66]

In the situation where there is a Rule 33 motion for a new trial because evidence has been discovered from a neutral source, the Court found that the defendant's burden is the greatest. This can be explained because of the prosecutor's freedom from any blame.

Although the dissent believed that the actual standard is what made the defendant's burden greater in *Agurs* than in the perjury cases, it also can be argued that all the standards enunciated by the Court are the same. The different meanings inherent in the standards are due only to the different contexts in which they are applied. Although it is not the only circumstance considered when determining the degree of materiality necessary for a reversal, prosecutorial misconduct appears to be highly related to the defendant's burden. A court will also consider the relevance and favorableness of the undisclosed evidence as an important circumstance in the determination of materiality.

The guidelines provided by the Court in *Agurs* concerning the defendant's burden of proving materiality will probably be more of an aid to courts than to defense counsels and prosecutors. Although reviewing courts will probably not decide cases any differently after the *Agurs* decision, *Agurs* expressly allows them to find materiality where there has not been a defense request for specific evidence. It will only be after the courts have decided many cases according to the rank-ordering guidelines of *Agurs* that certain specific rules will emerge concerning the prosecutor's duty of disclosure in various situations.

Prior to *Agurs,* the situation most puzzling to both prosecutors and defense counsel was where the undisclosed evidence was neither requested nor indicative of perjury. Unfortunately, *Agurs* does not appear to give the prosecutor or defense counsel much additional guidance in this decision-making process. Although *Agurs* clarifies the defendant's burden of proving materiality in certain situations, it does not really give any practical assistance to the parties who must make decisions in nondisclosure situations.

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[66]Part of Justice Marshall's rejection of prosecutorial misconduct as a concern of the Court was based on his belief that the perjury standard, which puts a minimal burden on the defendant, applies to a very limited category of cases, not including those where the prosecutor deliberately suppressed evidence that was clearly relevant and favorable to the defense. Although the Court has never decided a case involving this kind of blatant prosecutorial misconduct, it can be argued that the perjury standard would apply to this situation.

Judge Friendly, in United States v. Keogh, 391 F.2d 138 (2d Cir. 1968), proposed three standards of materiality into which the question of blatant prosecutorial misconduct is subsumed. The "easy cases" are where the prosecutor's suppression is deliberate, including perjury cases as well as cases where there is a failure to disclose evidence "whose high value to the defense could not have escaped the prosecutor's attention." "Such cases rarely present a problem as to 'the degree of prejudice which must be shown'; almost by definition the evidence is highly material." *Id.* at 146–47.

The second standard applies where a request is made for evidence by the defense. Judge Friendly stressed the request as a means of "flagging the importance of the evidence for the defense," thus imposing on the prosecutor a duty to carefully examine the contents of his files. *Id.* at 147.

The third category of cases are those where there was not deliberate suppression of evidence and no request was made, but "hindsight discloses that the defense could have put the evidence to not insignificant use." *Id.* Judge Friendly believed that in these cases, the standard of materiality must be considerably higher because a prosecutor may not realize the usefulness of certain evidence to the defense, or may not be aware of its existence.

Judge Friendly conceded an interest in finality of judgments, but argued that his categorization took this interest into consideration. Few cases would be invalidated due to deliberate prosecutorial misconduct, which occurs rarely, and few reversals would occur when there is no prosecutorial misconduct, due to the heavy burden placed on the defendant. *Id.* at 148.