Journal of Criminal Law and Criminology

Volume 69
Issue 2 *Summer*

Article 5

Summer 1978

The Prosecutor's Duty of Disclose: From Brady to Agurs and beyond

Michael E. Rusin

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

 Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation
Michael E. Rusin, The Prosecutor's Duty of Disclose: From Brady to Agurs and beyond, 69 J. Crim. L. & Criminology 197 (1978)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

9901-4169/78/6902-0197$02.00/0
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 69, No. 2
Printed in U.S.A.
Copyright © 1978 by Northwestern University School of Law

THE PROSECUTOR'S DUTY OF DISCLOSE: FROM *BRADY* TO *AGURS* AND BEYOND

What information must the prosecution disclose to the defense to satisfy the demands of due process? This question arises and must be answered in every criminal case. The constitutional duty to disclose emanates from the due process clause of the Constitution which provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."[1] This constitutional duty has undergone substantial evolution over the last half-century and what began as a narrow, strictly defined restriction on prosecutorial misconduct has developed into a broad, affirmative duty to turn over materially favorable evidence to the defense. This comment will trace the history of the prosecutor's duty from its inception to its present form. Further, an analytic framework will be constructed for use by the prosecutors and courts in determining the scope and limitations of the prosecutor's duty. Finally, some recurring problems will be discussed and possible solutions examined in the light of recent Supreme Court decisions.

FROM ORIGINS TO AGURS

The origin of this duty can be traced to the United States Supreme Court's 1935 decision in *Mooney v. Holohan*.[2] In *Mooney*, the Court first established the general proposition that the prosecutor's knowing and intentional use of perjured testimony in obtaining a conviction violates the defendant's due process rights and denies him a fair trial.[3] This ruling was reaffirmed in *Pyle v. Kansas*,[4] where the Court held that "allegations that his [the defendant's] imprisonment resulted from perjured testimony, knowingly used by the state authorities to obtain his conviction's . . . sufficiently charge a deprivation of rights guaranteed by the Federal Constitution."[5]

The *Mooney* standard was first broadened by the Court in *Alcorta v. Texas*.[6] In *Alcorta*, the defendant was charged with the murder of his wife.[7] At trial, he sought only a reduction in the crime from murder to manslaughter, claiming that he killed his wife in the heat of passion caused by his wife's infidelity.[8] At trial, the alleged lover testified that he and the defendant's wife were just casual friends.[9] However, the alleged lover had told the prosecution before trial that he had had sexual relations with the defendant's wife on several occasions and the prosecutor failed to correct the trial testimony which he knew was false.[10] The Court granted a new trial and expanded the *Mooney* standard by holding that the prosecutor's knowing failure to correct inculpatory, perjured testimony also violated due process.[11]

In *Napue v. Illinois*,[12] the Court expanded the *Mooney* standard to its fullest extent. In *Napue*, the principal state witness testified that he had received no promises of consideration from the prosecution in return for his testimony.[13] However, the prosecutor had in fact promised him consideration but did nothing to correct the false testimony.[14] The Court granted a new trial, holding that the prosecutor's knowing failure to correct perjured testimony, relating solely to the credibility of the witness, constituted a violation of due process.[15] The court said:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain

[1] U.S. CONST. amend. V. *See* U.S. CONST. amend XIV, which guarantees due process in state proceedings.

[2] 294 U.S. 103 (1935).

[3] 294 U.S. at 112. The Court stated that the "deliberate deception of court and jury by the presentation of testimony known to be perjured . . . is . . . inconsistent with the rudimentary demands of justice." *Id.*

[4] 317 U.S. 213 (1942).

[5] *Id.* at 216. In neither *Mooney* nor *Pyle* did the Court consider the particular facts in issue. Consequently, it failed to consider whether the perjured testimony materially affected the conviction.

[6] 355 U.S. 28 (1957).

[7] *Id.* at 28.

[8] *Id.* at 28–29.

[9] *Id.* at 29.

[10] *Id.* at 30–31.

[11] *Id.* at 31–32. In *Alcorta*, the prosecutor did not have firsthand knowledge that the alleged lover was committing perjury when he testified because he did not witness any relationship between the witness and the defendant's wife. Whether such personal knowledge is necessary to support a finding of knowing use of perjury will be discussed at notes 126–34 *infra* and accompanying text. This issue did not arise in *Alcorta*, however, because the prosecutor admitted that he knew the witness' testimony was false.

[12] 360 U.S. 264 (1959).

[13] *Id.* at 265, 270–71.

[14] *Id.* at 265, 267–68.

[15] *Id.* at 269.

> a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.[16]

Thus, the *Mooney* standard, as extended, prohibited the prosecutor from knowingly and intentionally using or failing to correct any false testimony. These decisions were based primarily on the Court's rejection of prosecutorial misconduct that would mislead the jury as to the true facts.[17] Although the defendants in these cases had also alleged that the prosecutor suppressed favorable evidence,[18] such allegations had not been the basis of the Court's finding of a due process violation.[19]

Brady v. Maryland[20] marked a distinct shift in the Court's emphasis and analysis and a corresponding major alteration in the *Mooney* standard. Instead of focusing on the prosecutor's misconduct as the basis for a finding of violation of due process, the Court concentrated on the fairness of the proceedings to the defendant.[21]

In *Brady,* the defendant, charged with murder, admitted his participation in the crime but claimed that his companion, Boblit, who was tried separately, had done the actual shooting.[22] Defense counsel in summation confessed the defendant's participation and sought only a verdict without capital punishment.[23] Nevertheless, the jury rendered a verdict of guilty with capital punishment.[24]

Prior to trial, defense counsel had requested to inspect all of Boblit's extrajudicial statements. The prosecutor showed him several, but one which was not revealed contained Boblit's admission that he had done the actual shooting.[25] When defense counsel learned after the trial of this statement, he moved for a new trial, alleging suppression of evidence.[26] Focusing on the defendant's right to a fair trial,[27] the United States Supreme Court affirmed a Maryland Court of Appeals reversal of the conviction[28] and held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[29] In other words, the prosecutor must disclose to the defense favorable evidence which has been requested and is material either to guilt or punishment.[30]

The expansion and alteration of the *Mooney* standard by *Brady* placed new, significant disclosure requirements on the prosecutor, but it did so with few specific guidelines.[31] Two major questions remained. First, was a request for specific evidence a prerequisite to trigger the duty to disclose?[32] Sec-

---

[16] *Id.*

[17] United States v. Agurs, 427 U.S. 97, 104 n.10 (1976). *See* Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure,* 59 IOWA L. REV. 433, 435 (1975); Note, *Pretrial Identification Procedures: The Expanded Duty to Disclose Favorable Evidence,* 50 NOTRE DAME LAW. 508, 510 (1975); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 YALE L.J. 136, 138–39 (1964).

[18] Mooney v. Holohan, 294 U.S. at 110; Pyle v. Kansas, 317 U.S. at 216.

[19] *See* authorities cited in note 17 *supra.*

[20] 373 U.S. 83 (1963).

[21] *See* authorities cited in note 17 *supra.*

[22] 373 U.S. at 84.

[23] *Id.*

[24] *Id.*

[25] *Id.* The prosecutor had not disclosed this particular statement because it was unsigned and inadmissible at trial, so that he felt Brady would not have been prejudiced by its suppression. Brady v. State, 226 Md. 422, 427, 174 A.2d 167, 169–70 (1961). The statement was allegedly inadmissible because of a Maryland rule of law which prohibited the introduction of extrajudicial confessions or admissions of a third party that such party had committed the offense.

[26] 373 U.S. at 84–85.

[27] The Court stated: "The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* at 87.

[28] Brady v. State, 226 Md. 422, 174 A.2d 167 (1961). Since the fact that Boblit had done the shooting in no way mitigated Brady's guilt, the court felt it sufficient to remand solely to reconsider punishment. The court stated that "[t]he appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree. We, therefore, see no occasion to retry that issue." *Id.* at 428, 174 A.2d at 171. The United States Supreme Court concurred in this reasoning stating that further relief could only be based on a "sporting theory of justice." 373 U.S. at 90.

[29] 373 U.S. at 87.

[30] The *Brady* holding was foreshadowed by U.S. *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.), *cert. denied,* 350 U.S. 875 (1955), and U.S. *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), *cert. denied,* 345 U.S. 904 (1953).

[31] For a general discussion of Brady, see Comment, *Brady v. Maryland and the Prosecution's Duty to Disclose,* 40 U. CHI. L. REV. 112 (1972); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendants,* 74 YALE L.J. 136 (1964).

[32] Numerous courts and commentators following *Brady* were extremely critical of any specific request requirement. *See* Giles v. Maryland, 386 U.S. 66, 102 (1967) (Fortas, J., concurring); Moore v. Illinois, 408 U.S. 786 (1972) (Marshall, J., dissenting); U.S. v. Keough, 391

ond, what evidence is significant enough to be considered "materially" favorable?[33] Other questions relate to the timing of disclosure, whether there is a duty with respect to inadmissible evidence and whether there is an implied duty to preserve evidence.

For over a decade after *Brady*, the Supreme Court failed to resolve the major ambiguities of the *Brady* decision. The next case to reach the Court involving the *Brady* rule was *Giles v. Maryland*.[34] In *Giles*, a rape prosecution, the prosecutor failed to reveal to defense counsel evidence which would impeach the prosecutrix's credibility and would tend to support the defendant's theory of the case.[35] Although the unanswered questions of *Brady* were present in the case, the Court avoided them and vacated the conviction on the basis of new evidence which had not been considered by the lower courts.[36] Only Justice Fortas, in a concurring opinion, considered the *Brady* issues. He interpreted the *Brady* rule expansively in favor of disclosure.[37] According to Justice Fortas, the request requirement should be abolished,[38] the inadmissibility of the evidence should be irrelevant,[39] and the concept of materiality should be "generously conceived" to avoid "state suppression of information which may be useful to the defense."[40]

The next two Supreme Court cases where the *Brady* issue was raised, *Giglio v. United States*[41] and *Moore v. Illinois*,[42] were decided in 1972. In *Giglio*, one of the government's principal witnesses testified that he received no promises of consideration although in actuality he had been assured that he would not be prosecuted if he testified.[43] However, the promise was made by the prosecutor who presented the case to the grand jury—the trial prosecutor had no knowledge of it.[44] Thus, unlike *Napue*, where the trial prosecutor knew of the promise and failed to reveal it, the trial prosecutor in *Giglio* acted in good faith without knowledge of the perjury. Nevertheless, the Court made no distinction between the two cases, holding that the failure of the one prosecutor to inform the other is not controlling and that a "promise made by one attorney must be attributed ... to the Government."[45]

The sole issue remaining, therefore, was whether the failure to disclose the promise violated due process, and the Court held that it did "if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury.'"[46] Since this witness was crucial to the Government's case, the Court held that the undisclosed promise was sufficiently material to warrant a new trial.[47]

Since *Giglio* involved no bad faith, it more clearly establishes the *Brady* analysis based on fair trial considerations as opposed to prosecutorial misconduct and erects a standard of materiality to be applied when faced with the nondisclosure of perjured testimony. The undisclosed evidence is material if it "in any reasonable likelihood" could have affected the judgment of the jury.[48] However, the Court did not state that this standard should be applied in all *Brady*-type cases, including those where the nondisclosed evidence does not indicate perjury but is in some other way favorable to the defense. The nondisclosed evidence in *Moore* did not indicate perjury on the part of any witness, but instead allegedly tended to impeach one witness' identification of the defendant.[49]

F.2d 138 (2d Cir. 1968); Comment, 40 U. CHI. L. REV. 112, 115-17 (1972). *See also* note 83 *infra*.

[33] *See generally* Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480, 483; Note, *People v. Rutherford: The Prosecution's Duty to Disclose*, 6 GOLDEN GATE U.L. REV. 851, 859 (1976); Comment, *Materiality and Defense Requests: Aids in Defining The Prosecutor's Duty to Disclose*, 59 IOWA L. REV. 433, 436-37 (1973).

[34] 386 U.S. 66 (1967).

[35] *Id.* at 71-72. The prosecutor failed to disclose: (1) that in a juvenile court proceeding, prior to the alleged rape, a caseworker recommended that the prosecutrix be placed on probation because she was beyond parental control; (2) an occurrence five weeks after the alleged rape, in which the prosecutrix had sexual relations with two men, later took an overdose of sleeping pills and was hospitalized in a psychiatric ward (she also had told a friend that the men had raped her); and (3) a hearing in a juvenile court in which the prosecutrix was committed to a girl's school. The defendants claimed that the prosecutrix willingly submitted to sexual relations with them. *Id.* at 69-71.

[36] The new evidence consisted of police reports which tended to indicate perjury. *Id.* at 74-80.

[37] 386 U.S. at 98-102.

[38] *Id.* at 102.

[39] *Id.* at 98. The state may not be "excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial." *Id.*

[40] *Id.* at 98-99.

[41] 405 U.S. 150 (1972).

[42] 408 U.S. 786 (1972).

[43] 405 U.S. at 151-52.

[44] *Id.* at 152-53.

[45] *Id.* at 154.

[46] *Id.* (quoting Napue v. Illinois, 360 U.S. at 271).

[47] *Id.* at 154-55.

[48] *Id.* at 154.

[49] One of the Government's witnesses, Sanders, identified the defendant at trial as a man he had seen in a bar two days after the killing. The man had boasted that he had shot a bartender. 408 U.S. at 789. The prosecutor failed to disclose to the defense, after an arguably specific request, a pre-trial statement made by Sanders. The

Interpreting *Brady*, the Court said:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, when the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.[50]

Additionally, the Court indicated that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."[51] However, although the Court enumerated some factors to consider, it failed to complete its analysis and establish a general standard of materiality by which the prosecutor can gauge his conduct in determining what evidence to reveal. Nevertheless, in view of the strong evidence of guilt presented[52] and the speculative value of the undisclosed evidence to the defense,[53] the Court held that the evidence was not sufficiently material to require disclosure.[54]

In *United States v. Agurs*,[55] the Supreme Court finally addressed and resolved the two main questions left unresolved by *Brady*.[56] In *Agurs*, the defendant was convicted of second-degree murder for the stabbing death of one James Sewell.[57] Although the defense presented no evidence, defense counsel sought to establish in summation that Agurs had stabbed Sewell in self-defense.[58] The support for this theory was based primarily on the fact that Sewell carried two knives, one of which was a bowie knife, and that, therefore, he was a violent person.[59]

Several months after the conviction, defense counsel moved for a new trial on the grounds that the prosecution failed to disclose Sewell's past criminal record.[60] Sewell's prior record, which included two convictions, one for assault and carrying a deadly weapon and another for carrying a deadly weapon,[61] defense counsel argued, tended to prove Sewell's violent nature and support the defendant's theory of the case.[62] Defense counsel had not made a specific pretrial request for this evidence.[63]

The district court denied this motion, holding that the undisclosed evidence was not sufficiently material to warrant a new trial.[64] The court of appeals reversed and held the evidence was material "because the jury might have returned a different verdict if the evidence had been received."[65]

---

statement identified the man in the bar as "Slick," a person other than the defendant, whom Sanders had met six months earlier while the defendant was in prison. *Id.* at 791.

[50] *Id.* at 794–95.

[51] *Id.* at 795.

[52] Two other witnesses corroborated Sander's testimony that the defendant was present at the bar and two eyewitnesses testified that the defendant was the killer. *Id.* at 795–97.

[53] Since Sanders positively identified Moore at trial, the Court stated that the mistake of Sanders was as to the identification of Moore as "Slick" and not as to the presence of Moore at the bar. *Id.* at 795–96. However, following the United States Supreme Court decision Moore filed a second post-conviction petition in state court in which he contended that the Supreme Court was incorrect when it concluded that although Sanders was possibly wrong about identifying Moore as "Slick," he was not wrong in his identification of Moore as the person he heard brag about shooting a bartender. The Supreme Court of Illinois ordered another evidentiary hearing at which Sanders testified that if Moore was not the person he had known as Slick, then Moore was not the person who bragged about the shooting. The trial court denied relief and the Illinois Supreme Court affirmed the denial. 60 Ill. 2d 379, 327 N.E.2d 344 (1975). The United States Supreme Court denied certiorari, 423 U.S. 938 (1975), but Mr. Justice Stewart noted that the case was in a different factual posture, so that the prior United States Supreme Court decision would not necessarily bar federal habeas corpus relief. Moore subsequently filed a habeas petition which lost in the district court and is presently on appeal before the Seventh Circuit.

[54] 408 U.S. at 797.

[55] 427 U.S. 97 (1976).

[56] *See* notes 32–33 *supra* and accompanying text. For a general discussion of the holding and effect of the *Agurs* decision, see Recent Development, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence in The Absence of a Focused Request from the Defense—United States v. Agurs*, 14 AM. CRIM. L. REV. 319 (1976); 65 GEO. L.J. 201, 320 (1976); Note, *People v. Rutherford: The Prosecution's Duty to Disclose*, 6 GOLDEN GATE U.L. REV. 851 (1976); Note, *Discovery—Prosecutor's Failure to Disclose*, 67 J. CRIM. L. & C. 408 (1977); Note, *The Prosecutor's Duty to Disclose After United States v. Agurs*, 1977 U. ILL. L.F. 690; Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480.

[57] 427 U.S. at 98.

[58] *Id.* at 100.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 100–01. Both weapons were knives. *Id.* at 101.

[62] *Id.* at 100. The trial court assumed that evidence of the convictions would have been admissible. *Id.*

[63] *Id.* at 99.

[64] *Id.* at 101. However, the district court rejected the Government's argument that there was no duty to disclose material evidence unless requested to do so. *Id.*

[65] *Id.* at 102. *See* United States v. Agurs, 510 F.2d 1249 (D.C. Cir. 1975). The standard of materiality used by the District of Columbia Circuit was "whether the undisclosed evidence, if brought to the attention of the jury, '*might have led* the jury to entertain a reasonable doubt

The Supreme Court reversed, finding that the court of appeals applied an incorrect standard of review in determining the materiality of the undisclosed evidence.[66] In reaching this conclusion, the Court unravelled the web of issues left by *Brady*. The *Brady* rule, the Court said, "arguably applies in three quite different situations. Each involves the discovery after trial, of information which had been known to the prosecution but unknown to the defense."[67]

The first situation, as typified by *Mooney v. Holohan*,[68] involves the discovery of evidence which proves that the prosecution's case included perjured testimony and that the prosecution knew or should have known of the perjury.[69] For this type of case, the Court established a low or strict standard of materiality,[70] indicating a strong disapproval of the use of perjured testimony by the prosecution.[71] The Court stated that in the *Mooney*-type case a new trial should be ordered "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[72]

The other two situations identified by the Court involve the more common type of case in which the prosecution possesses evidence which is in some form favorable to the defense. These two situations, although they involve the same types of evidence are to be differentiated, the Court said, by the presence or absence of a pretrial request for the specific evidence in question.

Thus, the second category of cases identified by *Agurs* includes those in which the defense, as in *Brady*, has made a pretrial request for specific evidence.[73] A specific request, the Court stated, puts the prosecutor on notice of information considered important by the defense, and, therefore, the prosecutor is under a higher duty with respect to evidence requested than if no request or just a general request was made.[74] The Court reasoned that:

> Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, 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 prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.[75]

Based on this reasoning, it appears that the Court intended to establish a low standard of materiality for this second class of cases. However, the Court did not explicitly state what standard of materiality would be applied in the specific request, *Brady*-type case.[76] The Court did state earlier in its opinion that a "fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence *might have affected the outcome of the trial.*"[77] Consequently, several commentators have stated that "may have affected the trial outcome" is the standard to apply in specific request cases.[78]

---

about appellant's guilt.'" *Id.* at 1253 (quoting Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966) (emphasis added).

[66] 427 U.S. at 102.

[67] *Id.* at 103. If the defense knew of the undisclosed evidence at trial, his *Brady* claim must fail. *See* United States v. Craig, No. 76-2089 (7th Cir. Dec. 12, 1977); Stubbs v. Smith, 533 F.2d 64 (2d Cir. 1976); United States v. Riley, 530 F.2d 767 (8th Cir. 1976); Maglaya v. Buchkow, 515 F.2d 265 (6th Cir.), *cert. denied*, 423 U.S. 931 (1975); United States v. Callahan, No. 4-77-84 (D. Minn. Jan. 10, 1978); Pobliner v. Fogg, 438 F. Supp. 890 (S.D.N.Y. 1977); Smith v. State, 541 S.W.2d 831 (Tex. Crim. App. 1976).

[68] 294 U.S. 103 (1935).

[69] *Id.* at 103. The *Mooney*-type case involves all those in which the prosecution deliberately used perjured testimony or knowingly failed to correct perjured testimony. *See* Giglio v. United States, 405 U.S. 150 (1972); Miller v. Pate, 386 U.S. 1 (1967); Napue v. Illinois, 360 U.S. 264 (1959); Pyle v. Kansas, 317 U.S. 213 (1942).

[70] The characterization of this standard as low or strict means that it will be relatively easy for the defense to meet this standard and that, conversely, there will be an extremely heavy burden on the prosecutor to disclose this type of evidence.

[71] The Court believed a strict standard was appropriate in these cases primarily because "they involve a corruption of the truth-seeking function of the trial process." 427 U.S. at 104.

[72] *Id.* at 103. This standard is in accord with the standard established by the Court in the *Mooney*-type case of Giglio v. United States, 405 U.S. 150, 154 (1972), and is very similar to the standard used by the court of appeals in analyzing the *Agurs* circumstances. United States v. Agurs, 510 F.2d 1249, 1253 (D.C. Cir. 1975).

[73] 427 U.S. at 104.

[74] *Id.* at 106. Other lower courts before *Agurs* recognized a difference in the standard of materiality used depending on whether or not a specific request was made. *See* United States v. Keough, 391 F.2d 138 (2d Cir. 1968).

[75] 427 U.S. at 106.

[76] *See* Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480, 489.

[77] 427 U.S. at 104.

[78] Recent Development, *The Prosecutor's Duty to Disclose Exculpatory Evidence in the Absence of a Focused Request from the Defense—United States v. Agurs*, 14 AM. CRIM. L. REV. 319, 326 (1976); Note, *People v. Rutherford: The Prosecution's Duty to Disclose*, 6 GOLDEN GATE U.L. REV. 851, 880

This is most likely the correct conclusion. The Court stated that when faced with a specific request, the failure of the prosecutor to respond is seldom excusable.[79] This language clearly implies that a strict standard of materiality will be employed where the prosecutor makes no response.[80] However, if the prosecutor does respond by disclosure to the trial judge, what standard should he employ? *Agurs* does not say.[81]

The third situation identified by the Court is typified by the facts of *Agurs* wherein the prosecutor failed to disclose allegedly favorable evidence[82] that the defense had not specifically requested.[83] In these circumstances where the prosecutor has not received notice of what the defense would like, the Court held that the duty to disclose still arises, but only if "the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce."[84]

In these cases, the Court held, the standard of materiality applied will be high, for the prosecutor "will not have violated his constitutional duty to disclose unless his omission is of sufficient significance to result in a denial of the defendant's right to a fair trial."[85] To determine what standard of materiality would be proper, the Court reviewed other standards previously used by the lower courts.[86] The Court specifically rejected the District of Columbia Circuit's standard which would allow for a new trial, if the nondisclosed evidence "might affect the jury's verdict."[87] This standard, the Court held, was too low, for it approached the "sporting theory of justice" expressly rejected by *Brady*.[88] The Court noted that the Constitution does not demand that the prosecution "allow complete discovery of his files."[89]

On the other hand, the Court rejected as too burdensome the standard of Federal Rule of Criminal Procedure 33,[90] which has been interpreted to entitle a defendant to a new trial if the "newly discovered evidence probably would have resulted in an acquittal."[91] The Court distinguished between the normal Rule 33 case where new evidence is discovered from a neutral source and the *Agurs* case where the new evidence was in the hands of the prosecutor and held that:

> If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.[92]

However, the Court noted, although this extremely high standard should not be used, the mere fact that the nondisclosure cannot be characterized as "harmless error" does not necessarily mandate reversal.[93]

"The proper standard of materiality," the Court reasoned, "must reflect our overriding concern with the justice of the finding of guilt."[94] The finding of guilt will be "permissible only if supported by evidence establishing guilt beyond a reasonable doubt."[95] Therefore, the Court concluded:

(1976): Note, *Discovery—Prosecutor's Failure to Disclose*, 67 J. CRIM. L. & C. 408-10 (1977).

[79] 427 U.S. at 106.

[80] *See* Note, *The Prosecutor's Duty to Disclose after United States v. Agurs*, 1977 U. ILL. L.F. 690, 696. "The standard of materiality is apparently a lenient test for the defendant. The prosecutor's failure to respond raises a presumption that the evidence requested was material."

[81] See text accompanying notes 145-48 *infra* for further discussion of this issue.

[82] The non-disclosed evidence did not prove perjury on the part of any witness. 427 U.S. at 114.

[83] Prior to *Agurs*, the Court had not decided whether the prosecutor was constitutionally bound to disclose any favorable evidence absent a specific request. *Id.* at 106. However, after *Brady*, numerous courts and commentators advocated the abolishment of the specific request requirement. *See* United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); Castleberry v. Crisp, 414 F. Supp. 950 (N.D. Okla. 1976); Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972). Moreover, the *Agurs* trial court rejected the Government's claim that it need not disclose absent a specific request and said, "How can you request that which you don't know exists." 427 U.S. at 101 n.4.

[84] 427 U.S. at 107.

[85] *Id.* at 108.

[86] *Id.* at 108-13.

[87] *Id.* at 108.

[88] *Id.*

[89] *Id.* at 109. In Moore v. Illinois, 408 U.S. 786, 795 (1972), the Court stated that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work."

[90] FED. R. CRIM. P. 33 provides that: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice."

[91] 427 U.S. at 111. For cases applying this standard in a Rule 33 case, see United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975), and the cases cited in *Agurs*, 427 U.S. at 111 n.19.

[92] 427 U.S. at 111.

[93] *Id.* at 111-12.

[94] *Id.* at 112.

[95] *Id.*

> If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt whether or not the additional evidence is considered, there is no justification for a new trial.[96]

Applying this high standard[97] to the undisclosed evidence presented in *Agurs* and evaluating its importance in the context of the entire record, the Court concluded that the evidence was not material because it did not contradict any of the State's evidence and was only cumulative of other evidence of Sewell's allegedly violent nature.[98]

This reasoning and analysis is consonant with the Burger Court's focus on the primary substantive issue of innocence or guilt as opposed to the Warren Court's preoccupation with procedural technicalities which often lead to the suppression of valuable, reliable evidence.[99] In *Stone v. Powell*,[100] decided soon after *Agurs*, the Burger Court noted that undue emphasis on the procedural aspects of the trial intrudes on important values such as (1) the effective utilization of limited judicial resources, (2) the necessity of finality in criminal trials, and (3) the deterrent function of the law.[101] In *Agurs*, the Court recognized these important interests and attempted to redress the balance between society's right and the defendant's technical, procedural rights in favor of the common good.

Although *Agurs* expands the defendant's right to receive information in that it imposes upon the prosecutor a duty to disclose absent a specific request, the *Agurs* Court defined this duty in very narrow terms by applying a high standard in evaluating undisclosed evidence. However, since due process requires only that the defendant's guilt be proved beyond a reasonable doubt[102] and since the *Agurs* standard provides for a new trial if the undisclosed evidence creates a reasonable doubt as to guilt, the *Agurs* standard adequately protects the accused's due process rights.[103]

BEYOND AGURS

The importance of the *Agurs* opinion should not be underestimated, for it establishes a new framework with which to analyze the prosecutor's duty to disclose evidence. The Court identified the three different situations where the *Brady* rule arguably applies and created a standard of materiality to be used in determining whether the failure to disclose evidence warranted a new trial.

In the first situation, where the prosecutor knowingly uses or allows perjury to stand uncorrected, a new trial should be granted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[104] In the second situation, where the prosecutor receives a

[96] *Id.* at 112–13.

[97] In his dissent, Justice Marshall stated that this standard was too high and, in effect, was equivalent to the Rule 33 standard. *Id.* at 115–16. He stated that "[t]he burden thus imposed on the defendant [by the majority's standard] is at least as 'severe' as, if not more 'severe'" than, the burden he generally faces on a Rule 33 motion. *Id.* Other commentators have concurred with this statement. *See* Note, *The Prosecutor's Duty to Disclose after United States v. Agurs*, 1977 U. ILL. L.F. 690, 698–99.

[98] 427 U.S. at 114.

[99] *See* Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480, 481–82. *See generally* Shapiro, *Searches, Seizures and Lineups: Evolving Constitutional Standards Under the Warren and Burger Courts*, 20 N.Y.L.F. 217 (1974).

[100] 428 U.S. 465 (1976).

[101] *Id.* at 491.

[102] *In re* Winship, 397 U.S. 358 (1970).

[103] Some commentators have attacked the *Agurs* reasonable doubt standard as too strict, encouraging the prosecutor to suppress, not reveal evidence. *See* Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480, 492.

Such criticism, however, is unwarranted and lacks realistic insight. In the great majority of *Agurs*-type cases, the prosecutor does not know of or does not realize he has the allegedly favorable evidence. Therefore, the standard can hardly encourage suppression.

Furthermore, some commentators have argued that the bad faith of the prosecutor in failing to disclose favorable evidence should be considered in determining error. *See* Recent Development, 14 AM. CRIM. L. REV. 319, 331 (1976); Comment, *Prosecuter's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480, 492. However, the Court clearly stated with good reason that the good faith or bad faith of the prosecutor is immaterial in determining if the non-disclosure was error. The Court stated:

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. . . . [I]f evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

427 U.S. at 110. This concentration on the character of the evidence as opposed to the conduct of the prosecutor is clearly the correct concern, for the suppression of an immaterial fact does not in any way affect the correctness of the verdict no matter what the willfulness of the prosecutor may have been. This is consonant with the Court's focus on the guilt or innocence of the defendant, instead of considering irrelevant collateral issues.

[104] 427 U.S. at 103.

specific request for evidence and fails to respond, a new trial should be granted if the undisclosed evidence "might have affected the outcome of the trial."[105] Finally, in the third situation, where the defense made no request or just a general request and the prosecutor fails to disclose allegedly favorable evidence, a new trial need only be granted "if the omitted evidence creates a reasonable doubt that did not otherwise exist."[106]

Although the framework is straightforward, its application is difficult in some cases because the three situations are not always clearly distinguishable, and questions have arisen as to when each standard governs. For example, a prosecutor may know that a Government witness previously gave a story contrary to his trial testimony. Does this constitute the knowing use of perjury so that the low standard of materiality will be applied, or is the prior inconsistent statement merely a favorable piece of evidence the materiality of which is governed by the high *Agurs* standard? Similarly, how exact and precise need a request for evidence be in order to constitute a specific request for evidence and application of the lower *Brady* standard?

After it has been determined what standard is to be applied, another major issue left unresolved by *Agurs* is what factors to consider in determining whether a piece of evidence is material. Additionally, the problems of timing, admissibility and preservation were not discussed in the *Agurs* opinion. The remainder of this comment, therefore, will attempt to fill the gaps left by the *Agurs* decision in order to establish general guidelines for the prosecutor and the courts in deciding what evidence must be disclosed to satisfy the demands of due process.[107]

Which Standard Governs When?

One of the most crucial determinations which must be made in determining what evidence must be disclosed is the standard of materiality governing the particular case because disclosure will often depend on the standard used. Some commentators have mistakenly suggested that the *Agurs* framework is really only of practical use to the courts and not prosecutors.[108] A determination by the prosecutor as to what standard applies to a particular piece of evidence will greatly assist him in deciding whether to disclose it.[109]

What, therefore, are the parameters of the three different situations identified in *Agurs?* The first situation described in *Agurs* to which a low standard applies occurs where "the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury."[110]

To prove that this situation exists, the defendant must show first that the witness has committed perjury and second that the prosecutor knew or should have known of the perjury. It is clear that such a situation exists where (1) the prosecutor has instructed the witness to tell a falsehood,[111] (2) the witness tells the prosecutor one story before trial which the prosecutor personally knows is true and then testifies differently at trial,[112] or (3) the prosecutor has made a promise or threat to the witness and the witness denies such while testifying.[113] In each of these circumstances, the prosecutor had personal knowledge of the perjury without reference to any outside source.

Some commentators have suggested that the Court's "should have known" language implies that this situation involving possible perjury also exists where the prosecutor receives evidence exculpating the defendant and casting doubt on the credibility of a witness, thereby indicating the possibility of perjury.[114] In other words, this situation involves circumstances where the prosecutor possessed evidence impeaching a witness which, therefore, arguably tends to show the witness may be lying.[115] As a general rule, the lower courts have rejected claims of this type where the undisclosed evidence does not show beyond a reasonable doubt that a witness committed perjury.

In *Wilson v. State*,[116] the defendant claimed that the prosecutor's nondisclosure of an exculpatory statement, which differed significantly from the testimony of a State's witness, constituted a knowing failure by the prosecutor to correct perjured

[105] *Id.* at 104.

[106] *Id.* at 112.

[107] Primary emphasis will be placed on the third situation enumerated in *Agurs* because it is the most controversial.

[108] *See* Note, *Discovery—Prosecutor's Failure to Disclose*, 67 J. Crim. L. & C. 408, 415 (1977).

[109] The prosecutor who knows that the evidence is governed by a low standard of materiality will be extremely reticent to not disclose it, for fear of reversal later on grounds of suppression.

[110] 427 U.S. at 103.

[111] *See* Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

[112] *See* Alcorta v. Texas, 355 U.S. 28 (1957).

[113] Napue v. Illinois, 360 U.S. 264 (1959).

[114] *See* Note, *The Prosecutor's Duty to Disclose After United States v. Agurs*, 1977 U. Ill. L.F. 690, 696.

[115] *Id.*

[116] 372 A.2d 198 (Del. 1977).

testimony.[117] Relying on *Agurs,* the court rejected the defendant's assertions of prosecutorial misconduct, implying that the mere fact that the prosecutor possesses an exculpatory statement contradicting a witness does not establish the knowing use of perjury.[118]

Similarly, in *United States v. Hearst,*[119] the Government used a witness who had previously made statements inconsistent to the testimony he gave at trial.[120] Consequently, the defendant argued that "the government had reason to suspect that Shepard's [the witness'] trial testimony was 'false.'"[121] However, the court rejected this argument and held that "a prosecutor's use of a witness who has made prior inconsistent statements cannot and does not, in and of itself, constitute 'knowing use of false evidence.'"[122] Also, in *McDonald v. State,*[123] a Government witness, who failed to identify the defendant from a photographic spread held long before trial, testified at trial that he did not remember being shown any photographs.[124] In response to the defendant's claim that the prosecutor failed to correct perjured testimony, the court responded that the testimony that the witness could not remember does not amount to perjury.[125]

Thus, the "should have known" language of the *Agurs* opinion probably was not intended to impose a new requirement that the prosecutor avoid negligence in believing that his witness is truthful. The first situation identified by *Agurs* does not exist unless the prosecutor's conduct is intentional. Therefore, the mere fact that the prosecutor possesses evidence which only impeaches a Government witness is insufficient to constitute the knowing use of perjury. However, the line between impeaching evidence and evidence which proves perjury may be quite thin.

Generally, knowing use of perjury cases involve first-hand knowledge of the perjury by the prosecutor.[126] However, it is conceivable that the prosecutor could receive information from a third party or parties which clearly proves that the witness is committing perjury. Even though the prosecutor would not have first-hand personal knowledge of these facts, if they establish beyond a reasonable doubt that the witness is lying, the prosecutor's use of that witness should constitute knowing use of perjury. This result can and should be reached without resort to the "should have known" language of the *Agurs* Court.

The Court's use of "should have known" when describing the perjury situation was most likely an allusion of the circumstances involved in the *Giglio* case.[127] In *Giglio,* the trial prosecutor did not personally know that the Government's witness was lying when he said he received no promises of leniency, but the prosecutor who had presented the case to the grand jury had made a promise to the witness and, therefore, knew of facts indicating perjury.[128] Although the trial prosecutor did not know of the evidence indicating perjury, the Court held that he "should have known" of it because another member of the prosecution team possessed the evidence.[129] Generally, a prosecutor "should know" of a piece of evidence if it is in his possession or in the possession of any agency involved in the prosecution.[130] This includes other prosecutors in the office,[131] police[132] and any other investigative agencies involved in criminal prosecution.[133] However, "the prosecutor has no duty to disclose information in the possession of government agencies which are not investigative arms of the prosecution and have not participated in the case, even if such information might be helpful to the accused."[134]

[117] *Id.* at 200.

[118] *Id.*

[119] 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd,* 563 F.2d 1331 (9th Cir. 1977).

[120] *Id.* at 318.

[121] *Id.*

[122] *Id.*

[123] 553 P.2d 171 (Okla. Crim. App. 1976).

[124] *Id.* at 176-77.

[125] *Id.* at 177. *See also* United States v. Hedgeman, 564 F.2d 763 (7th Cir. 1977) (where the undisclosed evidence is not clearly contradictory to the witness' testimony, the defendant has not established a perjury situation).

[126] *See* notes 110-12 *supra* and accompanying text.

[127] *See* notes 41-48 *supra* and accompanying text.

[128] 405 U.S. 150, 153 (1972).

[129] *Id.* at 154.

[130] "The 'prosecution' involves all agencies of the federal government involved in any way in the prosecution of criminal litigation." United States v. McCord, 509 F.2d 334, 342 n.14 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 930 (1975). For similar holdings, see United States v. Trevino, 556 F.2d 1265, 1272 (5th Cir. 1977); United States v. Caldwell, 543 F.2d 1333, 1352 n.91 (D.C. Cir. 1974); United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971); Emmett v. Ricketts, 397 F. Supp. 1025, 1041 (N.D. Ga. 1975). *See also* ABA STANDARDS, DISCOVERY & PROCEDURE BEFORE TRIAL, § 2.1 (d) (1970).

[131] Giglio v. United States, 405 U.S. 150 (1972).

[132] Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); Evans v. Kropp, 254 F. Supp. 218 (E.D. Mich. 1966).

[133] United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972). *See also* authorities cited in note 128 *supra.*

[134] *Id.* at 358. *See also* United States v. Ehrlichman, 389 F. Supp. 95 (D.D.C. 1974) (transcripts in possession of Congressional subcommittee investigating Watergate conspiracy are not in possession of Government); United

Thus, the "should have known" language of *Agurs* probably refers to circumstances where information which would demonstrate perjury by a prosecution witness, although not known to the prosecutor, is imputed to his knowledge because it is possessed by an investigative arm of the prosecution.

The failure of the Court to address circumstances where the prosecutor obtains evidence from a third party which proves that a government witness committed perjury does not mean that that situation would not merit the low *Mooney* standard. It could be argued that unless the prosecutor has personal knowledge of the perjury, third-party information that the witness is lying would just be favorable evidence governed by the high *Agurs* standard. Such a result would be clearly unreasonable. If the defendant can prove beyond a reasonable doubt or at least by clear and convincing proof that the witness committed perjury and that the prosecutor was informed of the perjury (even though he did not have personal knowledge), a court should apply the low standard of materiality.

The second situation, identified by *Agurs,* is the *Brady*-type where, if the prosecutor receives a specific request for evidence and fails to respond, a low standard of materiality is used in evaluating whether the nondisclosure constituted error.[135] The third situation, where the high standard is used, is the *Agurs*-type where the defense makes no request or just a general request for favorable evidence, and the prosecutor does not disclose a piece of allegedly favorable evidence.[136] The sole difference between these two situations is the specificity of the request by defense counsel. Since a lower standard of materiality is applied where a specific as opposed to a general request is made, it is clearly to the defendant's advantage to characterize all requests as specific. However, unless a request is precise enough to "give the prosecutor notice of exactly what the defense" desires, the higher *Agurs* standard will apply.[137]

For example, a request for a particular witness' pretrial statements or for a certain piece of tangible physical evidence is specific.[138] However, a request for "a list of witnesses and copies of any written or oral statements" made by the State's witnesses is not a specific request.[139] Additionally, a defense request for "all *Brady* material" or for "anything exculpatory" is not specific.[140]

This distinction is not always clear, and some courts have held a request to be specific which did not direct the prosecutor's attention to a particular piece of evidence. For example, in *United States v. McCrane,*[141] the defense requested all exculpatory material and material which may be used to impeach Government witnesses, including but not limited to standards used in declining prosecution of Government witnesses in similar circumstances.[142] The government claimed that it had no *Brady* material and maintained this position in the face of the trial judge's admonition to submit any questionable materials *in camera.*[143] Under these circumstances, the court held that the request was specific, reasoning that it required "no profound intellectual analysis to perceive that the defense was seeking material that might provide a basis for a claim of prosecutorial favoritism or preferential treatment of government witnesses."[144]

This decision is difficult to reconcile with the language in *Agurs* that a specific request must give the prosecutor notice of exactly what the defense wants. The defense request in *McCrane,* however, was ambiguous and open-ended, in essence requesting all impeaching material. This type of request does not direct the prosecutor to a particular piece or even type of evidence. Instead, it would require a review of his entire file with a view towards attacking the credibility of his own witness. If such is the case, the request can hardly be considered specific. Thus, the amount of precision required to create a specific request is presently not clear. As a general guideline, however, if the request gives the prosecutor notice of exactly what

States v. Brooks, Crim. No. 26863 (N.D. Ga. Dec. 7, 1971).

[135] 427 U.S. at 104.

[136] *Id.* at 106–07.

[137] *Id. See also* United States v. Mackey, No. 77–1074 (7th Cir. Feb. 22, 1978); United States v. McCrane, 436 F. Supp. 760 (M.D. Pa. 1977).

[138] State v. Brown, 98 Idaho 209, 560 P.2d 880 (1977) (request for witness' pretrial statement is specific); State v. May, 339 So. 2d 764 (La. 1976) (request for a letter is specific); Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277 (1977) (Roberts, J., concurring) (request for all voice exemplars is specific).

[139] People v. Jones, 66 Ill. 2d 158, 361 N.E.2d 1104 (1977). *See* Wagster v. Overberg, 560 F.2d 735 (6th Cir. 1977).

[140] 427 U.S. at 106–07. *See also* United States v. McCrane, 436 F. Supp. 760 (M.D. Pa. 1977) (request for material which could be used to impeach Government witness is not specific and falls within the second category of *Agurs*).

[141] 547 F.2d 204 (7th Cir. 1976).

[142] *Id.* at 207.

[143] *Id.* at 207–08.

[144] *Id.* at 207.

the defense desires, it will be considered specific, thus triggering the lower standard of materiality.

One other gray area which no court as yet has considered is whether the low *Brady* standard of materiality should apply in cases where there has been a specific request and the prosecutor responds by submitting the requested evidence to the trial court for *in camera* inspection. The *Agurs* Court stated that where the defense specifically requests arguably favorable material, "it is reasonable to require the prosecutor to respond either by furnishing the information [to the defense] or by submitting the problem to the trial judge."[145] Therefore, the Court concluded that "the failure to make any response is seldom, if ever, excusable."[146]

It is relatively clear that the failure to respond at all to a specific request triggers the application of the low *Brady* standard in evaluating the materiality of the undisclosed evidence. However, if the prosecutor responds by submission to the trial court, and the trial court refuses to disclose, there is a question of what standard of materiality a reviewing court should employ to determine error. If the low standard of materiality applied in specific request cases is used to induce the prosecutor to make some responses and to deter misconduct, then it seems to follow that where the prosecutor does respond by submission to the court, the lower standard should no longer apply. However, if the rationale for the lower standard is that the prosecutor should be placed under a heavier burden at all times when he knows exactly what the defense wants, then the lower standard should apply to *all* evidence which is not disclosed.

It is unlikely that the *Agurs* Court intended that a higher standard be used in evaluating evidence which has been specifically requested simply because the prosecutor turned it over to the trial judge. The Court's reference to submitting the evidence to the trial judge[147] is, therefore, probably unwarranted. However, this question stems from a more basic defect in the Court's reasoning. The *Agurs* Court stressed that the character of the evidence and not the conduct of the prosecutor was paramount in determining whether disclosure was required.[148] If this is true, then there would seem to be no reason for differentiation between cases on the basis of whether or not a specific request is made. The presence or absence of a specific request in no way alters the character of the evidence; therefore, the standards of materiality should be the same for both. The reason for the difference in standards is probably that the Court did not want the prosecutor who knows that the defense wants a piece of evidence to deliberately withhold it hoping that after trial a reviewing court will hold it immaterial. When dealing with instances of no request or a general request, the prosecutor will not generally know of or recognize the value of allegedly favorable evidence so that the problem of deliberate withholding does not arise. However, if deliberate withholding is the basic reason it belies the Court's focus on the character of the evidence as opposed to the conduct of the prosecutor.

[145] 427 U.S. at 106.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 110.

The Factors of Materiality

After a determination has been made as to which standard of materiality applies, it must then be decided whether the evidence in question is of sufficient importance—materiality—to warrant disclosure. Generally, it is impossible to classify particular kinds of evidence as requiring or not requiring disclosure. Instead, the issue of disclosure must be determined on a case-by-case basis considering each piece of evidence separately. Whether or not disclosure will be required depends on a number of diverse considerations which may be called the "factors of materiality."

In each case, regardless of the standard of materiality, factors of materiality must be analyzed and weighed, for by this analysis the probative weight of materiality of the evidence can be determined. In each case the factors of materiality remain constant, while the standard of materiality may change. This does not affect the analysis, therefore, but only whether the evidence must be disclosed. By weighing the factors of materiality the importance of the evidence is determined, and then the court will apply the appropriate standard to decide whether the evidence must be disclosed.

Unfortunately, the *Agurs* Court failed to enumerate the factors of materiality which should be considered in analyzing the evidence. However, subsequent cases have established and applied the various factors which must be considered. Since most of today's controversy focuses on the *Agurs* standard of materiality, the remainder of this section is devoted the *Agurs* standard and the factors considered in determining whether evidence must be disclosed.

Favorability

It has been well established that there is no constitutional requirement that the prosecutor

open his files to defense counsel.[149] Due process requires only that the prosecutor disclose evidence which is materially favorable to the defense.[150] Favorable evidence is that evidence which tends to exculpate the defendant or support his theory of defense. Evidence which may be helpful to the defendant is not necessarily favorable and if it is not, it need not be disclosed. For example, knowledge of incriminating evidence might be helpful to the defendant in determining what defense to present and in preparing his witnesses. However, although inculpatory evidence may be helpful if disclosed, it is not favorable and cannot be a basis for a *Brady* claim.[151]

Therefore, unless the defendant can prove that the evidence in some way tends to support his case, it need not be disclosed.[152]

For example, in *Wagster v. Overberg*,[153] the defendant was convicted of second degree murder after a trial wherein he sought to establish self defense.[154] After trial the defendant claimed that the failure of the prosecutor to disclose one witness' statement, which contradicted the state's case as to the location of the shooting in the bar where the incident occurred, denied him due process.[155] The court rejected this claim and held that "even if the statement of ... [the witness] were somehow material as to the locale of the shooting, this cannot be said to constitute evidence of self defense. .... [T]he statement of ... [the witness] did not offer any significant support to any claim [of self-defense]. ..."[156] Thus, since the witness' statement did not advance the defendant's theory of the case, *Brady* did not require its disclosure.

Similarly, impeaching evidence need not be disclosed unless it actually impugns the credibility or veracity of a witness who incriminates the defendant. In *Ruiz v. State*,[157] the defendant claimed that the prosecutor's failure to disclose an agreement made with a State's witness violated his *Brady* rights.[158] However, the undisclosed agreement was only that the state would protect the witness from reprisals arising due to his trial testimony.[159] Since this agreement was "irrelevant to Ruiz's [the defendant's] guilt or innocence" and "was not exculpatory in any sense of the word," it need not be disclosed.[160] "Unless the evidence not disclosed is probative of innocence," the court said, "no duty to disclose arises."[161]

Some controversy has arisen with respect to "neutral" evidence, evidence which neither really inculpates nor exculpates the defendant, but which may form a basis for a favorable defense argument. In *Smith v. United States*,[162] a rape prosecution, the prosecutor failed to disclose a laboratory report which found that none of the defendant's pubic hairs were discovered after a combing had been taken from the victim.[163] In response to the defendant's assertion that the nondisclosure violated *Brady*, the court held that "the absence of appellant's hair at the scene is not indicative of innocence," and, therefore, the nondisclosure was not error.[164]

[149] United States v. Agurs, 427 U.S. 97, 106 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972); United States v. Miller, 529 F.2d 1125, 1129 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976); United States v. Baxter, 492 F.2d 150, 173 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); Lundy v. State, 139 Ga. App. 536, 228 S.E.2d 717 (1976); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); Commonwealth v. Royster, 372 A.2d 1194 (Pa. 1977); Ransonette v. State, 550 S.W.2d 36 (Tex. Crim. App. 1977). For a general discussion concerning the value and probability of an open file system in the future, see Note, *The Prosecutor's Duty to Disclose After United States v. Agurs*, 1977 U. ILL. L.F. 690, 715-18.

[150] Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

[151] United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 202 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); People v. Gott, 43 Ill. App. 3d 137, 356 N.E.2d 1102 (1976); Commonwealth v. Medina, 364 N.E.2d 203 (Mass. 1977).

[152] This requirement has been especially important where the defense has claimed that the failure of the Government to produce their informant violates *Brady*. In People v. Jenkins, 41 N.Y.2d 307, 310, 360 N.E.2d 1288, 1290, 392 N.Y.S.2d 587, 588 (1977), the court, relying on *Agurs*, held that "in order to compel production [of the informant], ... the defendant must ... demonstrate that the proposed testimony of the informant would tend to be exculpatory." For a similar result, see United States v. DeAngelis, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974). Similarly, in United States v. VanMaanen, 547 F.2d 50, 53-54 (8th Cir. 1976), the court held that the identity of an informant need not be disclosed unless the defense proved he had favorable, material evidence.

[153] 560 F.2d 735 (6th Cir. 1977).

[154] *Id.* at 740.

[155] *Id.* at 735-38.

[156] *Id.* at 740.

[157] 75 Wis. 2d 230, 249 N.W.2d 277 (1977).

[158] *Id.* at 232, 249 N.W.2d at 279.

[159] *Id.* at 238, 249 N.W.2d at 282.

[160] *Id.* at 238-40, 249 N.W.2d at 282-83.

[161] *Id.* at 241-42, 249 N.W.2d at 284. Similarly, denial of a defense motion requesting that the court examine the prosecutor's file is proper unless the defense can show that the inspection would reveal evidence helpful to the defense. Commonwealth v. Gartner, 381 A.2d 114 (Pa. 1977).

[162] 363 A.2d 667 (D.C. 1976).

[163] *Id.* at 668.

[164] *Id.* at 669. For similar factual circumstances and result, see Norris v. Slayton, 540 F.2d 1241, 1244 (4th Cir. 1976), where the court held that "the undisclosed

Similarly, in *United States v. Hauff*,[165] the Government failed to disclose a handwriting expert's report that was inconclusive as to whether or not the defendant had written the envelopes in question.[166] Although the defendant claimed the report was favorable, the court held that the "report was not exculpatory, ... [but] merely not inculpatory. We cannot agree with the District Judge's description of it as 'favorable.'"[167] Therefore, the failure to disclose was not error.[168]

On the other hand, in *Patler v. Slayton*,[169] the Government failed to disclose until trial results of laboratory tests which were done on clothing allegedly worn by the criminal and on clothing owned by the defendant. The tests were negative for the prosecution in that they failed to link the defendant with the clothing allegedly worn by the culprit.[170] Although the court recognized that the test results were "neutral" rather than exculpatory, it said that:

> [S]uch a characterization [as neutral] often has little meaning; evidence such as this may, because of its neutrality, tend to be favorable to the accused. While it does not by any means establish his absence from the crime, it does demonstrate that a number of factors which *could* link the defendant to the crime do not.[171]

While the lower courts have not concurred on how to treat "neutral" evidence, the reasoning of the *Patler* court seems compelling in at least some circumstances. A distinction might be made between test results which are negative as opposed to those which are inconclusive. Where results are negative in that they fail to associate the defendant with the crime, they should be considered favorable. However, where the results are inconclusive because, for example, there is insufficient material to test, then those results are of so innocuous a character that they need not be disclosed.

Finally, it must also be mentioned that the mere fact that an item might be helpful to the defense does not necessarily mean that it is favorable to the defense and must be disclosed.[172] For example, in *People v. Jones*,[173] the defendant claimed the prosecutor violated *Brady* by failing to disclose to him during plea bargaining that the complaining witness had died.[174] The court, however, denied the claim reasoning that although "such information might have assisted the defendant to prepare for trial ... [it] is not exculpatory evidence—evidence material either to guilt or punishment" and, therefore, it need not have been disclosed.[175] Similarly, in *United States v. Orzechowski*[176] and *United States v. Umentum*,[177] the courts held that the prosecutor was not required to disclose internal Drug Enforcement Administration memoranda relating to cocaine identification tests because although they would be helpful to the defendant in cross-examining the Government's expert, they were neither material nor exculpatory.[178] Thus, favorability is an important threshold factor in determining materiality, for unless a piece of evidence can be characterized as favorable it need not be disclosed.[179]

Admissibility

A second important factor to consider in determining materiality is whether the allegedly favor-

laboratory report, neutral in character as it was, would have played a completely innocuous role in petitioner's trial and would not have influenced the outcome of the case."

[165] 473 F.2d 1350 (7th Cir.), *cert. denied*, 412 U.S. 907 (1973).

[166] *Id.* at 1353–54.

[167] *Id.* at 1354.

[168] *Id.* at 1355. *See also* Commonwealth v. Satterfield, 364 N.E.2d 1260, 1264 (Mass. 1977), where the prosecutor failed to disclose the names of four witnesses, two of whom stated they saw nothing and two who could not be found, the court held that such evidence need not be disclosed because it was "empty rather than exculpatory."

[169] 503 F.2d 472 (4th Cir. 1974).

[170] *Id.* at 478–79 n.5.

[171] *Id.* at 479. *See also* United States *ex rel.* Raymond v. Illinois, 455 F.2d 62, 66 (7th Cir. 1971), *cert. denied*, 409 U.S. 885 (1972) (prosecutor required to disclose lab report that no sperm was discovered on clothing of alleged rapist).

[172] "The mere possibility that an item of undisclosed information might have helped the defense ... does not establish 'materiality' in the constitutional sense." 427 U.S. at 109–10.

[173] 87 Misc. 2d 931, 387 N.Y.S.2d 779 (1976).

[174] *Id.* at 934, 387 N.Y.S.2d at 782.

[175] *Id.* at 942, 387 N.Y.S.2d at 788.

[176] 547 F.2d 978 (7th Cir. 1976), *cert. denied*, 431 U.S. 906 (1977).

[177] 547 F.2d 987 (7th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

[178] 547 F.2d at 985; 547 F.2d at 989. In a similar vein see Terrell v. United States, 361 A.2d 207 (D.C. 1976), *cert. denied*, ___ U.S. ___ (Prosecutor need not disclose notes concerning past jury performances of prospective jurors. Although these notes would be helpful to defense counsel, they cannot in any way be considered favorable.).

[179] For other cases in this area, see Lundy v. State, 139 Ga. App. 536, 228 S.E.2d 717 (1976) (photographs exhibited to police officer to determine defendant's name need not be disclosed); State v. Owens, 338 So. 2d 645 (La. 1976) (statement to witness who saw and heard nothing need not be disclosed).

able evidence is admissible at trial. Unfortunately, a majority of the Supreme Court has never directly addressed this issue so that no general rule exists as to how to treat favorable but inadmissible evidence.[180] However, the language of some of the Court's decisions tends to indicate that admissibility is a prerequisite to triggering the duty of disclosure.[181] On the other hand, Justice Fortas, concurring in *Giles*, specifically rejected any admissibility requirement stating, "I do not agree that the state may be excused from its duty to disclose material facts ... solely because of a conclusion that they would not be admissible at trial."[182] The failure of the Supreme Court to provide guidance on the issue of admissibility has created widely divergent views in the lower courts.

Some courts and commentators, relying on the Supreme Court majority opinions in which the contested evidence was either found to be admissible or assumed to be so, have inferred therefrom a requirement that unless the evidence is admissible, it need not be disclosed.[183] For example, in *Thornton v. State*,[184] the defendant sought disclosure of the identity of a police tipster-informer under *Brady*. However, the court rejected this claim stating that if "the informer is a pure tipster, who has neither participated in nor witnessed the offense, any evidence he might offer would be hearsay and inadmissible. Thus, the tipster's identity could not be material to the guilt or innocence of the defendant under *Brady*."[185]

At the other extreme, some courts, relying on Justice Fortas' concurrence in *Giles*, have rejected admissibility entirely as even a factor to consider in determining materiality. For example, in *Emmett v. Ricketts*,[186] the prosecutor refused to disclose to the defense tapes of conversations between a State witness and a hypnotist made while the witness was under hypnosis.[187] The Georgia Supreme Court approved of the suppression, reasoning that since the tapes were inadmissible and since inadmissible evidence need not be disclosed under *Brady*, it was not error to deny the defense access to them.[188] However, the United States district court, on a petition for writ of habeas corpus, rejected the Georgia court's interpretation of *Brady* and held that "this court has never considered admissibility to be a factor under *Brady*."[189]

Similarly, in *State v. Peterson*,[190] the prosecutor failed to disclose a person's exculpatory statements because he believed they were hearsay and, therefore, inadmissible.[191] The court rejected this reason as a basis for the nondisclosure and held that "the defense was entitled to the exculpatory evidence in order to investigate it and to use it both in trial preparation and in the trial itself. It is no answer that the State ... believes it could reject to it when offered."[192] Other courts have also rejected any admissibility requirement. In *Shuler v. Wainwright*,[193] the court said that "even if favorable evidence is not admissible at trial, its suppression is constitutionally impermissible when it is 'favorable' because it is 'useful.'"[194]

Still other courts, instead of completely rejecting the admisibility requirement, have retained it in a highly modified form. Some have required the prosecutor to disclose inadmissible evidence only if it could logically lead to the discovery of admissible evidence. For example, in *United States v. Ahmad*,[195] the defendant sought among other things the disclosure of grand jury testimony.[196] The court, in explaining the parameters of the duty to disclose said, "it is the duty of the prosecutor to disclose exculpatory material which might not be eviden-

[180] In all the Supreme Court cases where the Court has considered the disclosure issues, the evidence in question was either admissible or assumed so, *arguendo*.

[181] *See* United States v. Agurs, 427 U.S. at 101 02; Giles v. Maryland, 386 U.S. at 74; Brady v. Maryland, 373 U.S. at 85.

[182] Giles v. Maryland, 386 U.S. at 98 (Fortas, J., concurring).

[183] *See* United States *ex rel.* Wilson v. State, 437 F. Supp. 407 (D. Del. 1977); United States v. Atkinson, 429 F. Supp. 880, 884 (E.D.N.C. 1977); *In re* Ferguson, 5 Cal. 3d 525, 534, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971); Recent Development, 14 AM. CRIM. L. REV. 319, 331 n.78 (1976); Note, *People v. Rutherford: The Prosecutor's Duty to Disclose*, 6 GOLDEN GATE L. REV. 851, 857 58 (1976) ("[B]efore a conviction will be reversed under the *Brady* rule, the defense must meet three conditions. First, the suppressed evidence must be admissible.").

[184] 238 Ga. 160, 231 S.E.2d 729 (1977).

[185] *Id.* at 165, 231 S.E.2d at 733.

[186] 397 F. Supp. 1025 (N.D. Ga. 1975).

[187] *Id.* at 1037 38.

[188] *Id.* at 1038. *See* Emmett v. State, 232 Ga. 110, 205 S.E.2d 231 (1974).

[189] 397 F. Supp. at 1039.

[190] 219 N.W.2d 665 (Iowa 1974).

[191] *Id.* at 674.

[192] *Id. Accord*, State v. Hall, 249 N.W.2d 843, 847 (Iowa 1977), *cert. denied*, ... U.S. ... ("information may be material and exculpatory even though inadmissible as evidence").

[193] 341 F. Supp. 1061 (M.D. Fla. 1972).

[194] *Id.* at 1072. *See also* Smith v. United States, 375 F. Supp. 1244, 1248 (E.D. Va. 1974) ("[I]t may be sufficient [to establish materiality] that the undisclosed information, though not admissible into evidence, would have been somehow useful to the defense in structuring its case.").

[195] 53 F.R.D. 186 (M.D. Pa. 1971).

[196] *Id.* at 192 93.

tiary itself but which might provide leads to other evidence."[197] Similarly, in *United States v. Wigoda*,[198] the defendant sought the disclosure of inadmissible witness' statements which might lead to the discovery of a witness involved in a related crime who could undermine the credibility of a Government witness.[199] The court noted that the admissibility of such impeachment would be doubtful, so that "[i]f they [the statements] did not lead to admissible evidence, the statements certainly could not have been material in the *Brady* sense."[200]

Among these divergent views, the best rule seems to be the latter, for it most closely accords with the tenor of the *Agurs* opinion. Obviously, an airtight rule eliminating the duty to disclose if the evidence is inadmissible is too harsh on the defendant. There will likely be times when favorable though inadmissible evidence could, through investigation, blossom into vital admissible defense evidence. In such a case, the inadmissibility of the initial evidence should not bar its disclosure.

On the other hand, a disclosure rule completely eliminating consideration of admissibility of the evidence would be too harsh on the prosecutor and inconsistent with the *Agurs* opinion. Favorable evidence if it is inadmissible and could not lead to admissible evidence can have no effect on the jury and could not create any reasonable doubt.[201] Therefore, a rule which would require its disclosure would go beyond the dictates of *Agurs* which requires the disclosure only of favorable evidence that would create reasonable doubt.

The best approach has been taken by the *Ahmad* and *Wigoda* courts. The fact that evidence is inadmissible should not preclude its disclosure unless it could not lead to any other admissible or favorable evidence. If it could act as a lead, then that admissible evidence should be weighed using the other factors of materiality. If it is material then the initial inadmissible evidence should have been disclosed. If it is not material, then disclosure is not mandated by *Agurs*.

Extent of Probative Value: Exculpatory v. Impeachment

The next factor which must be considered in determining the materiality of a favorable piece of evidence is the nature and the probative value of the evidence. In other words, how favorable is the evidence?

Favorable evidence can be divided into two broad categories: (1) evidence which exculpates the defendant and (2) evidence which impeaches Government witnesses. Generally, exculpatory evidence will be more important than impeaching evidence because it relates directly to the facts of the case whereas impeaching evidence relates only to the veracity and credibility of a witness. Based on this distinction, some courts have made a categorical distinction between exculpatory and impeaching evidence in terms of the standard of materiality. For example, in *Garrison v. Maggio*,[202] where the prosecutor failed to disclose a prior inconsistent statement of a victim-witness, the court held that since the undisclosed evidence was merely impeaching, it need not be disclosed unless the higher Rule 33 standard of materiality is met.[203] The court said that:

> [a] case such as this one, where the undisclosed evidence is useful only for impeachment, is significantly different from one like *Agurs*, where the undisclosed evidence was pertinent to the merits of a self-defense claim.... [W]e are free after *Agurs* to hold that an even stricter standard of materiality, one requiring petitioner to demonstrate that the new evidence probably would have resulted in acquittal, is appropriate before a new trial must be granted for the nondisclosure of purely impeaching evidence.[204]

Similarly, in *United States v. Figurski*,[205] where the defendant sought disclosure of a presentence report, the court held that "[i]f the report contains exculpatory material, that part of the report must be disclosed. If the report contains only material impeaching the witness, disclosure is required only when there is a reasonable likelihood of affecting the trier of fact."[206]

However, the majority of courts do not apply a different standard of materiality, depending on whether the evidence is exculpatory or merely impeaching. In *United States ex rel. Annunziato v. Manson*,[207] where the prosecutor failed to disclose promises of leniency made to a Government witness, the court specifically held that:

> [T]he same standard applies whether the nondisclosed evidence goes to the fact of the crime or tends

[197] *Id.* at 193.
[198] 521 F.2d 1221 (7th Cir. 1975).
[199] *Id.* at 1226–27.
[200] *Id.* at 1227.
[201] *But cf.* Smith v. United States, 375 F. Supp. 1244, 1248 (E.D. Va. 1974) (inadmissible evidence could be material if it would be useful in structuring the defendant's case).
[202] 540 F.2d 1271 (5th Cir. 1976).
[203] See notes 90–91 *supra* and accompanying text.
[204] 540 F.2d at 1273–74.
[205] 545 F.2d 389 (4th Cir. 1976).
[206] *Id.* at 391.
[207] 425 F. Supp. 1272 (D. Conn. 1976), *aff'd*, 566 F.2d 410 (2d Cir. 1977).

> to impeach a critical witness. . . . Although the Supreme Court considered only exculpatory evidence in *Agurs*, the Court's reasoning seems equally applicable to impeachment information withheld by the prosecution.[208]

Numerous other courts have also applied the *Agurs* standard to situations involving the nondisclosure of impeaching evidence.[209]

Though the *Agurs* Court did not specifically state that the standard of materiality should be the same for exculpatory or impeaching evidence, there is no indication in the opinion that any distinction should be made. The Court established different standards based on the circumstances in which the nondisclosure arose—request or no request—not based on the nature of the allegedly favorably evidence which was suppressed.[210] Therefore, the same standard of materiality should be applied regardless of whether the evidence is exculpatory or impeaching.

Applying the same standard, the court must then consider as an element of materiality the extent to which the evidence is likely to effect the trier of fact in favor of the defendant. Clearly, if the evidence in question is highly probative of innocence, it will more likely be considered material than evidence which is favorable but relatively insignificant. In Rule 33 cases, courts have generally distinguished between exculpatory and impeaching evidence and have held that newly discovered evidence which merely impeaches a Government witness is insufficient to entitle a defendant to a new trial.[211] This rigid distinction is not viable in *Brady-Agurs* cases, for impeaching evidence may in some circumstances be more probative of innocence than exculpatory evidence.[212] Therefore, the mere fact that favorable evidence is only impeaching does not mean that it will not be material.

In evaluating the importance of exculpatory evidence, the central issue to resolve is whether the evidence is clearly exculpatory or requires arguable inferences in order to be exculpatory. An example of clearly exculpatory evidence was presented in *Cannon v. State*,[213] where the prosecutor failed to disclose the existence of an eyewitness who positively identified the assailant as someone other than the defendant. Clearly, identification evidence that indicates the defendant is not the criminal is highly and plainly exculpatory and should be disclosed absent any mitigating factors.[214] Similarly, evidence which tends to corroborate the defendant's testimony must be disclosed.[215] On the other hand, if the exculpatory evidence is only of value if a number of inferences are accepted, the favorability of that evidence is greatly diminished and disclosure may not be required.[216]

In contrast to exculpatory evidence, the importance of impeaching evidence depends upon a variety of different factors, including the type of the impeachment, the extent of the impeachment and the importance of the witness to the Government's case.[217]

1. Type of Impeachment. As a general rule, impeachment evidence will be regarded as more important and, therefore, material if it relates directly to the facts of the case itself as opposed to generally impeaching the veracity of the witness.[218] This first type of impeachment includes evidence of (1) bias or interest on the part of the witness;[219] (2) a promise of leniency[220] or threat of prosecution[221] based on whether the witness testifies; and (3) a prior inconsistent statement as to important facts[222]

[208] *Id.* at 1280.

[209] *See* United States v. Washington, 550 F.2d 320 (5th Cir. 1977); United States v. Stassi, 544 F.2d 579 (2d Cir. 1976); United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977); Moynahan v. Manson, 419 F. Supp. 1139 (D. Conn. 1976); Jefferson v. State, 141 Ga. App. 712, 234 S.E.2d 333 (1977); People v. Jones, 66 Ill. 2d 152, 361 N.E.2d 1104 (1977); State v. Bennett, 341 So. 2d 847 (La. 1976); State v. Miller, 144 N.J. Super. 91, 364 A.2d 581 (1976).

[210] 427 U.S. at 106–07.

[211] See United States v. Curran, 465 F.2d 260, 264 (7th Cir. 1972). This type of reasoning has induced some courts even after *Agurs* to apply a higher standard of materiality to impeaching evidence. *See* cases cited in notes 199–203 *supra*.

[212] United States *ex rel.* Annunziato v. Manson, 425 F. Supp. at 1280.

[213] 558 F.2d 1211, 1213 (5th Cir. 1977).

[214] *Id.* at 1215–16. See Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976) (police report showing that witness hesitated in her identification of the defendant should have been disclosed). *But cf.* Wilson v. State, 372 A.2d 198 (Del. 1977) (where witness was extremely confused as to events of crime, exculpatory statement by witness need not be disclosed).

[215] State v. Schrieber, 115 Ariz. 555, 566 P.2d 1031 (1977).

[216] *See generally* United States v. Jackson, 536 F.2d 628 (5th Cir. 1976).

[217] *See* United States v. Figurski, 545 F.2d 389 (4th Cir. 1976).

[218] United States *ex rel.* Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1976), *aff'd*, 566 F.2d 410 (2d Cir. 1977).

[219] *Id.*

[220] United States v. McCrane, 547 F.2d 204 (3d Cir. 1976); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976); United States v. Smith, 538 F.2d 1332 (8th Cir. 1976).

[221] United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976); Moynahan v. Manson, 419 F. Supp. 1139 (D. Conn. 1976).

[222] Garrison v. Maggio, 540 F.2d 1271 (5th Cir. 1976);

or a prior misidentification.[223] Because these types of evidence directly impeach the witness' credibility as to the particular facts in issue, they are generally regarded as important.

On the other hand, impeachment evidence which only attacks the witness' credibility in general is considered less important. Impeachment of this type includes (1) evidence of prior bad acts;[224] (2) promises of leniency or rewards received in prior cases;[225] and (3) indictments or prior convictions on unrelated charges.[226]

This distinction was clearly explained in *United States ex rel. Annunziato v. Manson.*[227] In *Manson*, the prosecutor had disclosed to the defense a Government witness' prior convictions, former drug use and prior deals made with the Government in other cases.[228] However, the prosecutor failed to reveal promises of leniency made to the witness in return for his testimony at this particular trial.[229] The court held that the undisclosed evidence was not merely cumulative to the other impeaching evidence:

> [While the witness'] record of prior convictions and drug use may have borne on his general credibility, these bad acts did not show a continuing ulterior motive or bias for testifying.... There is a sharp difference between leniency afforded for convictions in the past and promises of more leniency in the future for additional offenses on which he was still open to conviction.[230]

Therefore, the court reversed the conviction for the failure to disclose this evidence.[231]

2. Extent of Impeachment. In addition to considering the type of impeachment, it is also necessary to determine the extent of the impeachment.[232] Obviously, if the impeaching evidence is devastating, proving the witness to be totally untrustworthy, that evidence is more important than impeaching evidence which is vague or equivocal or based on a series of extended inferences.

For example, the failure to disclose a prior inconsistent statement will normally violate *Agurs* if the inconsistency is pronounced and probative. However, if the inconsistencies between the prior statement and the trial testimony are slight, *Agurs* does not mandate its disclosure.[233] Similarly, if the evidence only partially or "arguably" impeaches a witness, it is less likely to be considered material.[234]

In *United States v. Hedgeman*,[235] a Government witness, Pearson, testified that he gave the defendant kickbacks on reconstruction contracts and produced documents containing notations as to the amounts paid by him to the defendant.[236] Pearson also testified that he had not had the documents tested to determine the age of the writing.[237] The prosecutor failed to disclose a statment made to him by a document examiner that there were spots on the documents indicating a "test for ink."[238] The defendant claimed that this statement contradicted Pearson's claim that he had not had the ink tested for age and showed that he had tested them for age. This fact, defense counsel argued, proved that Pearson fabricated the documents, made these notations at a later time and was checking to see if their age could be determined. The court rejected the defense contention that the failure to disclose violated *Agurs* because the undisclosed statement was not clearly contrary to Pearson's testimony[239] and its impeachment value was limited because it was based on a series of inferences not proven.[240] Thus, if impeaching evidence is not clearly impeaching, but only claimed so based on argument and inference, it is less likely to be considered material.[241]

3. Importance of the Witness. A third, extremely important consideration in determining the pro-

Carter v. State, 237 Ga. 617, 229 S.E.2d 411 (1976); Loveday v. State, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

[223] Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976); McDonald v. State, 553 P.2d 171 (Okla. Crim. 1976).

[224] United States v. Stassi, 544 F.2d 579 (2d Cir. 1976). *See also* United States *ex rel.* Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1976), *aff'd,* 566 F.2d 410 (2d Cir. 1977).

[225] United States v. Masri, 547 F.2d 932 (5th Cir. 1977).

[226] State v. Miller, 144 N.J. Super. 91, 364 A.2d 581 (1976).

[227] 425 F. Supp. 1272 (D. Conn. 1976), *aff'd,* 566 F.2d 410 (2d Cir. 1977).

[228] *Id.* at 1276.

[229] *Id.*

[230] *Id.*

[231] *Id.* at 1280-81.

[232] *See* United States v. Figurski, 545 F.2d 389, 392 (4th Cir. 1976).

[233] Jefferson v. State, 141 Ga. App. 712, 234 S.E.2d 333 (1977); People v. Jones, 66 Ill. 2d 152, 361 N.E.2d 1104 (1977).

[234] United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd,* 563 F.2d 1331 (9th Cir. 1977).

[235] 564 F.2d 763 (7th Cir. 1977).

[236] *Id.* at 764.

[237] *Id.*

[238] *Id.* at 765.

[239] Pearson testified that he had not tested the documents to determine the age of the writing. The document examiner stated that some test had been made; but he could not tell what kind of test. Therefore, the two are not necessarily inconsistent.

[240] *Id.* at 766-67.

[241] United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd,* 563 F.2d 1331 (9th Cir. 1977); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976).

bative value of the impeaching evidence is the importance of the witness against whom the impeaching evidence would be used.[242] If a Government witness is relatively unimportant to the Government's case or if the witness is corroborated by other witnesses, it is less likely that evidence which impeaches his credibility will be material.[243]

In *United States v. Lasky*,[244] a drug prosecution, a Government witness testified to the defendant's involvement in later drug transactions to establish the defendant's knowledge and intent.[245] Although the Government disclosed that the witness had made two prior trips to Mexico to import cocaine, it failed to disclose two additional trips wherein he smuggled marihuana.[246] The court held, however, that the failure to disclose this evidence did not violate the *Agurs* standard because the witness (1) was not involved in the crime on trial, (2) did not directly link the defendant with the particular crime and (3) only testified as to the defendant's knowledge and intent.[247] Since "other testimony, standing alone, clearly and convincingly established the defendant's guilt," the court held that any further evidence affecting the witness' credibility "would not create a reasonable doubt that did not otherwise exist."[248] Similarly, in *Brach v. United States*,[249] where the witness' testimony was not that inculpatory and was corroborated by three other witnesses, the court held that the prosecutor's failure to disclose that the witness was presently charged with a crime did not violate the *Agurs* standard.[250]

On the other hand, if the undisclosed evidence impeaches a crucial Government witness, it is much more likely that the evidence will be considered material. In *Ex parte Turner*,[251] where the prosecutor's case was based primarily on one agent, Harden, the court held that "any fact or circumstance from which a juror might reasonably infer motive for said Harden to fabricate or a willingness to do so or that might tend to corroborate petitioner's version was critical to petitioner's defense"[252] and must be disclosed. Similarly, other courts have considered the importance of the witness as a major factor in determining the materiality of impeaching evidence.[253]

Thus, the determination of the nature and probative value of the undisclosed evidence is an important consideration which is often quite complex. When dealing with exculpatory evidence which generally relates directly to the facts of the case, the determination may be relatively easy, for the court need only determine how probative the evidence is. However, when reviewing impeaching evidence, the analysis becomes more complicated as a number of factors must be considered to determine its probative value. Therefore, courts are generally willing to assign greater weight and therefore, materiality to exculpatory as opposed to impeaching evidence.

Cumulative Evidence

Another factor which is related to and assists in determining the value of a piece of evidence is whether the evidence is cumulative of other evidence already adduced at trial. The *Agurs* Court held that evidence is "material" is it "creates a reasonable doubt *that did not otherwise exist.*"[254] Based on this language, prosecutors have argued that if the undisclosed evidence is merely cumulative of evidence already presented at trial, then it is impossible for it to create any new reasonable doubt. Generally, the lower courts have refused to take this strict approach, but they do consider the cumulative nature of the evidence as one important factor limiting the duty to disclose.[255]

Numerous courts, when confronted with undisclosed evidence which is merely cumulative of evidence introduced at trial, have refused to hold it to be material. For example, in *Agurs*, the prosecutor failed to disclose the victim's criminal record.[256] However, since this evidence "was largely cumulative of the evidence that Sewell [the victim]

[242] United States v. Figurski, 545 F.2d 389, 391 (4th Cir. 1976).

[243] *See* United States v. Hedgeman, 564 F.2d 763 (7th Cir. 1977); United States v. Lasky, 548 F.2d 835 (9th Cir. 1977); Brach v. United States, 542 F.2d 4 (2d Cir. 1976); United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977); People v. Jones, 66 Ill. 2d 152, 361 N.E.2d 1104 (1977).

[244] 548 F.2d 835 (9th Cir. 1977).

[245] *Id.* at 838-40.

[246] *Id.* at 839.

[247] *Id.* at 839-40.

[248] *Id.* at 840.

[249] 542 F.2d 4 (2d Cir. 1976).

[250] *Id.* at 6-7.

[251] 545 S.W.2d 470 (Tex. Crim. App. 1977).

[252] *Id.* at 473.

[253] *See* United States v. McCrane, 547 F.2d 204 (3d Cir. 1976); United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976); United States *ex rel.* Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1976), *aff'd*, 566 F.2d 410 (2d Cir. 1977); Moynahan v. Manson, 419 F. Supp. 1139 (D. Conn. 1976).

[254] 427 U.S. at 112 (emphasis added).

[255] *See* United States v. Figurski, 545 F.2d 389 (4th Cir. 1976).

[256] 427 U.S. at 100-01.

was wearing a bowie knife in a sheath and carrying a second knife," it was not material.[257]

This issue of cumulative evidence most often arises in the area of impeaching evidence where the defense learns of other evidence after trial which could have been used to further impeach a government witness. Generally, where a witness has undergone substantial impeachment at trial, other impeaching evidence of the same character will not likely be material under *Agurs*.[258] For example, in *State v. Bennett*,[259] the prosecutor failed to disclose statements made by Meisner, a state witness, which defense counsel claimed showed that Meisner's identification of the defendant was initially weak.[260] However, defense counsel on cross-examination of Meisner, was able to establish the weakness of the initial identification.[261] Therefore, in response to defense counsel's claim that the failure to disclose these statements violated *Agurs*, the court held that "since defense counsel contends that the statements given to the police officer would only show that Meisner's identification was weak, an aspect already brought out, it cannot fairly be said that the omitted evidence 'creates a reasonable doubt that did not otherwise exist.' "[262]

Similarly, in *Carter v. State*,[263] where "there was abundant other evidence at trial which would impeach this witness' credibility," the failure to disclose a prior inconsistent statement removing the defendant from the scene of the crime "is not enough to conclude appellant was denied a fair trial."[264] Other courts have refused to reverse convictions where the undisclosed evidence was cululative of other impeachment at trial.[265]

If, on the other hand, the witness has not been subject to any prior impeachment of if the undisclosed evidence is of a different character than that adduced at trial, it will more likely be material. For example, in *Moynahan v. Manson*,[266] the prosecutor failed to disclose that one of its witnesses had been a target of the investigation but was never charged.[267] In finding that the undisclosed evidence was material, the court noted that "[g]iven the fact that Miller [the witness] was the State's only 'clean' witness, and that the prosecutor emphasized this in his argument, ... the suppressed evidence does give rise to reasonable doubt as to the petitioner's guilt."[268] Also, if the undisclosed evidence is of a different, more damaging character, it will not be cumulative, and, therefore, it will more likely be material.[269] Thus, the cumulative nature of the undisclosed evidence is an important factor limiting the duty to disclose. Where the evidence is only cumulative of other evidence presented at trial, the courts are reticent to hold that it "creates a reasonable doubt that did not otherwise exist."

Weight of the Evidence

The next extremely important factor to consider in determining materiality is the weight and the strength of the other evidence presented at trial. This consideration was clearly set forth in *Agurs* where the court said that:

> [T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.[270]

---

[257] *Id.* at 114. *See also* United States v. Miller, 529 F.2d 1125, 1129 (9th Cir. 1976) (witness' confession of completing a false tax return was cumulative where another witness already testified that the first witness prepared the return; nondisclosure was not error).

[258] But, if the new impeaching evidence is not of the same character it may not be cumulative. *See* United States *ex rel.* Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1976), *aff'd*, 566 F.2d 410 (2d Cir. 1977).

[259] 341 So. 2d 847 (La. 1976).

[260] *Id.* at 852.

[261] *Id.* at 853.

[262] *Id.*

[263] 237 Ga. 617, 229 S.E.2d 411 (1976).

[264] *Id.* at 619-20, 229 S.E.2d at 414.

[265] *See* Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977); United States v. Hedgeman, 564 F.2d 763 (7th Cir. 1977) (using lower standard); United States v. Brown, 562 F.2d 1144 (9th Cir. 1977); United States v. Washington, 550 F.2d 320 (5th Cir. 1977); United States v. Figurski, 545 F.2d 389 (4th Cir. 1976); Brach v. United States, 542 F.2d 4 (2d Cir. 1976); United States v. Smith, 538 F.2d 1332 (8th Cir. 1976); United States v. McCrane, 436 F. Supp. 760 (M.D. Pa. 1977); United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977); Frank v. State, 558 S.W.2d 12 (Tex. Crim. App. 1977).

[266] 419 F. Supp. 1139 (D. Conn. 1976).

[267] *Id.* at 1145.

[268] *Id.* at 1147.

[269] *See* United States *ex rel.* Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1976), *aff'd*, 566 F.2d 410 (2d Cir. 1977). *But cf.* United States v. Smith, 538 F.2d 1332 (8th Cir. 1976) (where the witness has been impeached by prior convictions, prior threats to the defendant and dropping of charges, evidence of deal made with the Government is cumulative and not material).

[270] 427 U.S. at 113.

Generally, lower courts have applied this analysis and have viewed the undisclosed evidence in the context of the entire record to determine if the additional evidence creates a reasonable doubt.[271]

The stronger and more conclusive the evidence presented at trial, the less likely that the undisclosed evidence will be material. This principle is clearly demonstrated by the facts in *State v. Miller*.[272] In *Miller*, a robbery and assault and battery prosecution, the defendant who robbed a store was seen and identified at trial by two eyewitnesses.[273] As the defendant ran from the store, he was pursued by two police officers who both later identified him at trial.[274] The defendant, while fleeing, also shot one of the officers.[275] Another witness, Joyner, saw the shooting and later identified the defendant at trial.[276] Also introduced at trial was the defendant's gun which was shown to have fired the bullet which struck the officer[277] and the defendant's confession.[278] After trial, defense counsel learned that Joyner was under indictment prior to the robbery and during trial, and defense counsel claimed that this impeaching evidence should have been disclosed under *Agurs*.[279] The court, however, rejected this contention based on an evaluation of the nondisclosure "in the context of the entire record," and said that, "[E]ven if Joyner were lying in expectation of favorable treatment by the State, the remaining evidence . . . was so great as to preclude any reasonable doubt about the defendant's guilt."[280] Thus the failure to disclose did not violate *Agurs*.

Consequently, if the evidence adduced at trial is extremely strong, even exculpatory evidence which is generally considered highly probative may not be held material.[281] Moreover, if the undisclosed evidence is merely impeaching and there is sufficient proof of guilt without the witness whose testimony would be impeached it is unlikely that the nondisclosure would violate *Agurs*. For example, in *United States v. Lasky*,[282] the court held that impeaching evidence was not material where "the other testimony, standing alone, clearly and convincingly established the defendant's guilt."[283]

On the other hand, where the evidence of guilt is relatively weak or is based primarily on the testimony of one witness, favorable evidence of relatively insignificant character may be considered material.[284] In *United States v. McCrane*,[285] one witness' testimony as to a conversation with the defendant five years earlier was the sole support for two counts of the indictment.[286] The prosecutor had failed to disclose the existence of letters written by the Government on the witness' behalf to the witness' prospective customers and defense counsel asserted a *Brady* violation.[287] The court reversed a lower court decision for the Government holding that since "this case is one where the verdict has only slight support and 'additional evidence of relatively minor importance might be sufficient to create a reasonable doubt,'" the Government should have disclosed these letters, for "prospects of favorable treatment or financial gain are matters which must be weighed."[288] Thus, where evidence adduced at trial is fairly weak, favorable evidence will much more likely be considered material.[289]

The weight of the evidence should be one of the most crucial considerations in determining materiality in that the primary concern of the *Agurs* Court was the "justice of the finding of guilt" in the case.[290] The Court focused not on the procedural rights of the defendant but rather on the central issue of guilt. Therefore, when evidence of guilt is strong, the undisclosed evidence must be extremely favorable before it will be considered material.

[271] *See* United States v. Washington, 550 F.2d 320 (5th Cir. 1977); Jefferson v. State, 141 Ga. App. 712, 234 S.E.2d 333 (1977); People v. Jones, 66 Ill. 2d 152, 361 N.E.2d 1104 (1977).

[272] 144 N.J. Super. 91, 364 A.2d 581 (1976).

[273] *Id.* at 92–93, 97, 364 A.2d at 582, 584.

[274] *Id.* at 93, 97, 364 A.2d at 582, 584.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.* at 93, 364 A.2d at 582. The prosecutor made no deals or promises to Joyner in return for his testimony.

[280] *Id.* at 97, 364 A.2d at 584. *See also* United States v. Corr, 434 F. Supp. 408 (S.D.N.Y. 1977).

[281] *See* 427 U.S. at 112–13 n.21; United States v. Oliver, No. 77-1181 (1st Cir. Feb. 17, 1978); Frank v. State, 558 S.W.2d 12 (Tex. Crim. App. 1977).

[282] 548 F.2d 835 (9th Cir. 1977).

[283] *Id.* at 840. For similar reasoning and result, see United States v. Hedgeman, 564 F.2d 763 (7th Cir. 1977); United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977); Loveday v. State, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

[284] *See* 427 U.S. at 113.

[285] 547 F.2d 204 (3d Cir. 1976).

[286] *Id.* at 206.

[287] *Id.*

[288] *Id.* at 206–07.

[289] *See* Cannon v. State, 558 F.2d 1211 (5th Cir. 1977); United States v. Sutton 542 F.2d 1239 (4th Cir. 1976); *Ex parte* Turner, 545 S.W.2d 470 (Tex. Crim. App. 1977).

[290] 427 U.S. at 112 ("The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt.").

Deference to the Trial Judge

Reviewing courts, in addition to considering the other factors of materiality, also give weight to the trial judge's decision and treat it as a factor in making their determination. This policy of deference to the trial judge's opinion probably stems from dicta in the *Agurs* opinion. In *Agurs*, the Court noted that since "the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal was thorough and entirely reasonable we hold" that the nondisclosure did not violate due process.[291]

In *Brach v. United States*,[292] the court stated that "the thrust of the *Agurs* majority view is that the unqualified finding by the trial judge that the respondent was guilty was enough to defeat the motion for a new trial."[293] Other courts have not interpreted *Agurs* to give that much deference to the trial judge; however, most do consider the trial judge's decision as a factor because of his firsthand observation.

In *McDonald v. State*,[294] the court in analyzing the materiality of certain evidence states, "[I]n making this determination we observe the trial judge ruled upon this issue with a firsthand appraisal of the credibility and the demeanor of Jenkins [the State's witness]."[295] Therefore, since there was neither specific request nor perjury, "we find no reason to disturb the trial judge's ruling."[296] Other courts have similarly affirmed the trial judge's decision where other factors were insufficient to warrant its change.[297]

Although it might be contended that deference should only be given to the trial judge in cases where there was a bench trial because only in such a case can the judge definitely weigh the effect of the new evidence on the trier of fact, the courts have not done so. Rather they have given deference in both jury and nonjury cases.[298] However, it must be made clear that this deference is merely one of the factors considered by the reviewing court. The trial judge's ruling bears with it no presumption of correctness which must be overcome by the opposing party.

Timing

Once it has been determined that a piece of evidence must be disclosed, a secondary issue which arises is when must that disclosure be made. Unfortunately, the Supreme Court has never addressed this issue and, therefore no definitive guidelines exist.[299]

Numerous courts have taken the position that *Brady* does not require pretrial disclosure. In *United States ex rel. Lucas v. Regan*,[300] the prosecutor failed to disclose until the second day of trial that the victim had previously identified someone other than the defendant as the man who had robbed her.[301] Although the defense claimed that this evidence should have been disclosed before trial to allow ample time to locate the other person, the court disagreed; "Neither *Brady* nor any other case we know of requires that disclosures under *Brady* must be made before trial."[302] Similarly, in *United States v. Zive*,[303] where the defendant moved for a pretrial order directing the prosecutor to disclose all favorable or exculpatory evidence, the court denied the motion and stated: "*Brady v. Maryland* did not deal in any way with pretrial discovery. . . . '[N]o pretrial remedies were intended to be created' by *Brady*."[304] Other courts have also rejected arguments that *Brady* requires pretrial disclosure.[305]

On the other hand, several commentators have

[291] 427 U.S. at 114.

[292] 542 F.2d 4 (2d Cir. 1976).

[293] *Id.* at 6.

[294] 553 P.2d 171 (Okla. Crim. App. 1976).

[295] *Id.* at 181.

[296] *Id.*

[297] *See* United States v. Mackey, No. 77-1074 (7th Cir. Feb. 22, 1978); United States v. Masri, 547 F.2d 932 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977); United States v. Jackson, 536 F.2d 628 (5th Cir. 1976).

[298] *See* United States v. Agurs, 427 U.S. 97 (1976) (jury); United States v. Masri, 547 F.2d 932 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977) (bench); Brach v. United States, 542 F.2d 4 (2d Cir. 1976) (jury); McDonald v. State, 553 P.2d 171 (Okla. Crim. App. 1976) (jury).

[299] *See* Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. Rev. 437, 452 (1972); Note, *The Prosecutor's Duty to Disclose after United States v. Agurs*, 1977 U. Ill. L.F. 690, 691; Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 117 (1972).

[300] 503 F.2d 1 (2d Cir. 1974), *cert. denied*, 420 U.S. 939 (1975).

[301] *Id.* at 2-3.

[302] *Id.* at 3 n.1.

[303] 299 F. Supp. 1273 (S.D.N.Y. 1969).

[304] *Id.* at 1274 (quoting United States v. Manhattan Brush Co., 38 F.R.D. 4, 7 (S.D.N.Y. 1965)).

[305] United States v. Moore, 439 F.2d 1107 (6th Cir. 1971); United States v. Conder, 423 F.2d 904 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Zirpolo, 288 F. Supp. 993 (D.N.J. 1968); United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967); United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965). *See also* Circuit Notes: Criminal, 65 Geo. L.J. 209, 320 n.715 (as a general rule, *Brady* is not a pretrial remedy).

suggested that in order for *Brady* to be effective, disclosure should be made before trial to allow the defense to fully investigate and develop the favorable evidence.[306] Furthermore, the ABA Standards Relating to Discovery and Procedure Before Trial provide that "[t]he prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused or would tend to reduce his punishment therefore."[307] "The prosecutor should perform these obligations *as soon as practicable* following the filing of charges against the accused."[308] Also, the ABA Standards Relating to the Prosecution Function and the Defense Function provide that "[i]t is unprofessional conduct for a prosecutor to fail to disclose to the defense *at the earliest feasible opportunity* evidence which would tend to negate the guilt of the accused or might mitigate the degree of the offense or reduce the punishment."[309]

Consequently, many courts recommend that the prosecutor disclose *Brady* material as soon as possible, preferably pretrial. In *United States v. Deutsch*,[310] where the defendant moved for production by the government of all exculpatory material, the court held " 'that evidence in the government's possession favorable to the defendant should be made available to him far enough in advance of trial to allow him sufficient time for its evaluation, preparation, and presentation at trial.' "[311] Similarly, in *United States v. Pollack*,[312] the court said that "[d]isclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure."[313] Other courts have also recommended early disclosure.[314]

It is generally agreed, however, that the mere fact that the prosecutor makes a late disclosure at trial does not automatically constitute error.[315] Although some courts have recommended pretrial disclosure of *Brady* material, later disclosure at trial[316] will be sufficient to satisfy the requirements of due process unless the defendant can prove that the delay prejudiced his case.[317] For example, in *United States v. Kaplan*,[318] the prosecutor disclosed documents which could be used to impeach a Government witness after that witness had testified.[319] Defense counsel was then given two days to review the documents and then used some of them to cross-examine and impeach the Government witness.[320] Although the defense claimed that the delayed disclosure violated *Brady*, the court held:

> Although the prosecution's turnover was late, we found no prejudice since it occurred during trial and the evidence was submitted to the jury. If exculpatory evidence can be effectively presented at trial and the defendant is not prevented by lack of time to make needed investigation, there is no re-

[306] *See* Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 118 (1972) (pretrial disclosure seems the best alternative); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 149 (1964) ("the only reasonable time for the prosecutor to reveal his evidence is during the pretrial period"); 8 MOORE'S FEDERAL PRACTICE ¶ 16.08 (2), 16–95 (on the basis of policy the *Brady* doctrine should be applied to pretrial discovery).

[307] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standards Relating To Discovery and Procedure Before Trial § 2.1(c) (Approved Draft, 1970).

[308] *Id.* at § 2.2(a).

[309] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standards Relating to the Prosecution Function and the Defense Function § 3.11(a) (Tentative Draft, 1970).

[310] 373 F. Supp. 289 (S.D.N.Y. 1974).

[311] *Id.* at 290 (quoting United States v. Partin, 320 F. Supp. 275, 285 (E.D. La. 1970)).

[312] 534 F.2d 964 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976).

[313] *Id.* at 973.

[314] United States v. Kaplan, 554 F.2d 577 (3d Cir. 1977); United States v. Bonnano, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); United States v. Elmore, 423 F.2d 775 (4th Cir. 1970); United States v. Houston, 339 F. Supp. 762 (N.D. Ga. 1972); United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972); United States v. Ahmad, 53 F.R.D. 186 (M.D. Pa. 1971); United States v. White, 50 F.R.D. 70 (N.D. Ga.), *aff'd*, 450 F.2d 264 (5th Cir. 1971); United States v. Ladd, 48 F.R.D. 266 (D. Alaska 1969); United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967).

[315] *See* United States v. Kaplan, 554 F.2d 577, 580 (3d Cir. 1977) ("A delayed disclosure by the prosecution is not per se reversible error."); United States v. Miller, 529 F.2d 1125 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976).

[316] Clearly, disclosure after the jury has retired will always be too late. *See* Hamric v. Bailey, 386 F.2d 390 (4th Cir. 1967).

[317] *See* United States v. Kaplan, 554 F.2d 577 (3d Cir. 1977); United States v. Pollack, 534 F.2d 964 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); United States v. Miller, 529 F.2d 1125 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976); Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974); United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); United States v. Stone, 471 F.2d 170 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Elmore, 423 F.2d 775 (4th Cir. 1970); United States v. McFarland, 371 F.2d 701 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); Commonwealth v. Ellis, 364 N.E.2d 808 (Mass. 1977).

[318] 554 F.2d 577 (3d Cir. 1977).

[319] *Id.* at 578.

[320] *Id.* at 579.

versible prosecutorial conduct in ill-timed presentation.[321]

This "prejudice" test is probably the best rule in light of *Agurs* and is generally applied by the courts. A strict rule not requiring disclosure until trial is too harsh on the defendant, for there are clearly situations where disclosure at trial comes too late for the defendant to make effective use of the favorable evidence. For example, in *Grant v. Alldredge*,[322] the Government failed to disclose to the defense until after Harris, the Government witness, had testified that Harris had previously identified a person other than the defendant as the perpetrator of the crime.[323] This information, the court held, "was without question '"specific, concrete evidence" of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense,'" ... because "the particular disclosure might have led, had it been made well in advance of trial, to other significant information."[324]

On the other hand, a rule requiring pretrial disclosure in all cases would be too harsh on the prosecutor, inconsistant with the *Agurs* opinion and unwise from a practical standpoint. The *Agurs* Court clearly interpreted *Brady* to establish a substantive right to a fair trial and not procedural rights of discovery.[325] Therefore, disclosure at anytime would satisfy *Brady* so long as the defendant still receives a fair trial. Furthermore, in some cases early disclosure may not be feasible if it might (1) present dangers to prospective witnesses, (2) enable the defense to bribe or prepare perjured witnesses or (3) enable the defense to create a tailored defense.[326] Moreover, often the favorability of a piece of evidence cannot be determined until the defendant presents his defense, so that pretrial disclosure would be an impossible guess. For example, if the prosecutor has information that the defendant is mentally unstable and the defense turns out to be self-defense then such information would be irrelevant and not favorable. Thus, the prejudice test as opposed to a strict rule requiring pretrial disclosure represents a fair balance between "the potential dangers of early discovery ... [and] the need that *Brady* purports to serve of avoiding wrongful convictions."[327]

In determining what type of evidence must be disclosed early and what types may be disclosed later without error, a possible distinction might be made between exculpatory and impeaching evidence. If the *Brady* material is exculpatory, it will generally require some investigation and preparation in order to present it effectively to the jury. For example, in *Alldredge* the evidence of misidentification would only be of substantial value if the defense could have expanded upon it.[328]

On the other hand, if the *Brady* material consists solely of impeaching evidence, a delay in disclosure until trial will rarely result in prejudice because it can generally be used effectively at trial on cross-examination without extensive investigation or preparation.[329] This distinction, however, has not been rigidly followed, for some courts have held that the late disclosure of exculpatory evidence is not error,[330] and others have held that the late disclosure of impeaching evidence is error.[331] The

[321] *Id.* at 580. *See* cases cited therein.

[322] 498 F.2d 376 (2d Cir. 1974).

[323] *Id.* at 379-80.

[324] *Id.* at 382 (quoting United States v. Gleason, 265 F. Supp. 880, 885 (S.D.N.Y. 1967)). *See* United States v. Deutsch, 373 F. Supp. 289 (S.D.N.Y. 1974); United States v. Partin, 320 F. Supp. 275 (E.D. La. 1970). *See also* Fambo v. Smith, 433 F. Supp. 590, 598 (W.D.N.Y. 1977) ("In order to maintain the integrity of the plea bargaining process and to assure that a guilty plea entered by a defendant is done so voluntarily, knowlingly and intelligently, a prosecutor has a duty, during the course of plea bargaining, to disclose to the defendant evidence that is as clearly exculpatory of certain elements of the crime charged as is the contested evidence in this case.").

[325] *Cf.* 427 U.S. at 107-08.

[326] *See* United States v. Pollack, 534 F.2d 964, 974 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); United States v. Gleason, 265 F. Supp. 880, 887 (S.D.N.Y. 1967); People v. Jones, 87 Misc. 2d 931, 387 N.Y.S.2d 779, 785 (1976).

[327] *See* United States v. Pollack, 534 F.2d 964, 974 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976).

[328] 498 F.2d at 381.

[329] *See* Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974); United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); United States v. McFarland, 371 F.2d 701 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); United States v. Sherman, 426 F. Supp. 85 (S.D.N.Y. 1976).

[330] United States v. Pollack, 534 F.2d 964 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); United States v. Miller, 529 F.2d 1125 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standards Relating to the Prosecution Function and the Defense Function § 3.11(a) (commentary) (Tentative Draft, 1970) ("clearly exculpatory evidence must be disclosed; as to material which would only substantially aid the defense"—area is too vague to establish standards of conduct).

[331] United States v. Dillard, 419 F. Supp. 1000 (N.D. Ill. 1976) (the prosecutor must inform the defendant of grants of immunity prior to trial). *But cf.* United States v. Sherman, 426 F. Supp. 85 (S.D.N.Y. 1976) (disclosure of promises of immunity is timely if given on the evening prior to the day the witness is to testify).

best approach remains a general one based on whether or not the delay created prejudice.

Another related timing issue which has caused controversy in federal cases concerns the relationship between *Brady* disclosures and Jencks Act disclosures.[332] The Jencks Act requires the prosecution to turn over to the defense any prior statements of a witness who testifies; however, the disclosure need not be made until after the witness has testified on direct examination.[333] If a Government witness has made a statement which contains favorable evidence to the defense, both the *Brady* rule and the Jencks Act apply, resulting in a peculiar timing problem as to which rule governs.[334] Few courts have considered the timing aspects of this conflict, and those which have are not in accord.

In *United States v. Dotson*,[335] the defendant sought but was denied the pretrial production of all exculpatory statements made by two of his accomplices.[336] Although the accomplices' statements were disclosed at trial before each witness testified and were used for impeachment purposes, the defendant claimed that *Brady* entitled him to earlier disclosure.[337] The court rejected this contention and held:

> [T]he appellant ignores the Jencks Act, which clearly prohibits the discovery of statements until *after* they have testified. 18 U.S.C. § 3500. This court and others have recognized that the rule announced in *Brady* is not a pretrial remedy and was not intended to override the mandate of the Jencks Act.[338]

Some courts, on the other hand, have determined that the *Brady* rule governs any timing conflict between the two rules. In *United States v. Gleason*,[339] the court stated in dictum:

> [T]here are kinds of exculpatory evidence of which a defendant should properly be apprised before trial in order to prepare and present an effective defense. If it should happen that such evidence is part of a statement covered by the Jencks Act, the statutory restrictions must be accommodated to the demands of due process.[340]

Other courts have adopted similar positions.[341]

Clearly, the *Gleason* approach is the better and more correct rule. Since *Brady* is predicated on constitutional grounds and the Jencks Act is merely a federal statute, *Brady* should override any restrictions placed on it by statute. Although *Brady* should govern when the two rules overlap, this does not mean that all *Brady*-Jencks material must be disclosed before the trial. *Brady* material, as stated before, need not be disclosed in advance of trial unless the delay would cause prejudice.[342] Therefore, if *Brady*-Jenecks material can be used effectively at trial, even though it is not disclosed until after the witness has testified, the delay of that disclosure would not be error.[343]

THE DUTY TO PRESERVE

A final question which, like the timing issue, the Supreme Court has not yet resolved, is how to treat a case where potential *Brady* material has been lost or destroyed by the Government. In other words, does the *Brady* duty to disclose imply a corresponding duty to preserve and, if so, what is the extent of the accompanying duty?

In *United States v. Augenblick*,[344] where the prose-

---

[332] 18 U.S.C. § 3500 (1970).

[333] 18 U.S.C. § 3500 reads as follows:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . .

[334] *See generally* Comment, *Brady v. Maryland and the Prosecution's Duty to Disclose*, 40 U. CHI. L. REV. 112, 118–20 (1972).

[335] 546 F.2d 1151 (5th Cir. 1977).

[336] *Id.* at 1152.

[337] *Id.* at 1152–53.

[338] *Id.* at 1153 (quoting United States v. Scott, 524 F.2d 465, 467–68 (5th Cir. 1975)). *See* United States v. Montos, 421 F.2d 215, 221 (5th Cir.), *cert. denied*, 397 U.S. 1022 (1970) ("due process does not require premature production at pretrial hearings on motions to suppress statements ultimately subject to discovery under the Jencks Act").

[339] 265 F. Supp. 880 (S.D.N.Y. 1967).

[340] *Id.* at 887.

[341] *See* United States v. Leichtfuss, 331 F. Supp. 723, 735 (N.D. Ill. 1971) ("If such notes . . . constitute 'statements of government witnesses' within the meaning of the Jencks Act, they are produceable [*sic*] at trial. If said notes [are] favorable to the accused within the meaning of *Brady*, the government is obligated to produce such evidence now [*i.e.*, pretrial]."). *See also* United States v. Trainor, 423 F.2d 263, 264 (1st Cir. 1970).

[342] *See* note 315 *supra* and accompanying text.

[343] *See* United States v. Trainor, 423 F.2d 263, 264 (1st Cir. 1970) ("there can be no reversible error unless the delay in disclosure was prejudicial"). *See also* United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967).

[344] 393 U.S. 348 (1969).

cutor lost tapes of an interrogation made of a Government witness, the Court implied that the Jencks Act duty to disclose a witness' pretrial statement imposes a duty on the prosecutor to preserve that statement. The Court said that "the Government bore the burden of producing [the tapes] or explaining why it could not do so."[345]

Analogizing to *Augenblick*, lower courts have generally agreed that *Brady* necessarily implies a duty to preserve to ensure the viability of the disclosure requirement. However, the scope of that duty to preserve and the sanctions imposed upon failure to preserve have not been clearly established.

The first court to establish the duty to preserve as an adjunct to the *Brady* disclosure duty was the District of Columbia Circuit in *United States v. Bryant*.[346] *In Bryant*, a drug prosecution, the Government had recorded conversations between the defendant and Pope, and undercover agent, concerning the drug transaction upon which the indictment was based.[347] In response to the defense's request for the tape, the Government replied that it had been lost.[348] Since the tape was no longer in the possession of the government, the prosecutor argued that "loss *per se* is enough to defeat the duty of disclosure"[349] because it would be impossible to evaluate whether the evidence was favorable to the defendant.[350] However, the court rejected this reasoning and stated that "[w]ere *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented ... by means of destruction rather than mere failure to reveal."[351] Therefore, the court held:

> [B]efore a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.... Accordingly, we hold that sanctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to *preserve all discoverable evidence* gathered in the course of a criminal investigation.[352]

With respect to what constitutes "discoverable evidence" in terms of *Brady*, the court explained that, "in framing their rules for evidence preservation, investigative agencies must define discoverable evidence very broadly, including any materials that 'might' be 'favorable' to the accused."[353]

Therefore, the preliminary duty to preserve, according to *Bryant*, is much broader than the duty to disclose, for the prosecutor must preserve all evidence which "might" be favorable. This standard is clearly much lower than even the lowest *Agurs* standard of materiality which requires disclosure of favorable evidence which might have affected the jury.[354]

Furthermore, in regard to the sanctions to be imposed, the court held that since the evidence was lost, a new trial would be a pointless remedy for no new evidence could be presented.[355] Therefore, the court remanded either to dismiss the indictment or affirm the conviction.[356] Finally, the court held that the preservation duty would be prospective only and that the trial court should decide whether or not to affirm this case by balancing "the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial."[357]

Although the *Bryant* court spoke of a prospective prophylactic rule requiring investigative agencies to establish preservation procedures or face sanctions, the District of Columbia Circuit has failed to follow its holding and continues to decide "lost" evidence cases on a case-by-case basis using the pragmatic balancing test set forth in *Bryant*.[358] Similarly, other courts have accepted the *Bryant* bal-

---

[345] *Id.* at 355–56.

[346] 439 F.2d 642 (D.C. Cir. 1971).

[347] *Id.* at 644–45.

[348] *Id.* at 646.

[349] *Id.* at 650.

[350] *Id.* at 648.

[351] *Id.*

[352] *Id.* at 651, 652 (emphasis added). For the most recent cases implying a duty to preserve, see Gov't of the Virgin Islands v. Testamark, No. 77-1567 (3d Cir. Dec. 7, 1977); United States v. Harris, 543 F.2d 1247 (9th Cir. 1976). *See generally*, Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542 (1972).

[353] *Id.* at 652 n.21. If a piece of evidence cannot meet this extremely low test, it need not be preserved. *See* United States v. Butler, 499 F.2d 1006 (D.C. Cir. 1974) (test results of urine test conducted one day after offense need not be preserved if test would not have created any meaningful data as to the defendant's blood alcohol content at the time of the offense.).

[354] 427 U.S. at 103.

[355] 439 F.2d at 653. *See also* Gov't of the Virgin Islands v. Testamark, No. 77-1567 (3d Cir. Dec. 7, 1977).

[356] *Id.*

[357] *Id.*

[358] *See* United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975) (failure to preserve FBI notes not error); United States v. Maynard, 476 F.2d 1170 (D.C. Cir. 1973) (remanded to determine if United States Attorney's failure to preserve police notes prejudiced the defendant); United States v. Bundy, 472 F.2d 1266 (D.C. Cir. 1972)

ancing test and have applied it in determining whether the failure to preserve resulted in error.[359]

Generally, the most important factor in this determination is the culpability of the prosecutor. If the prosecutor loses or destroys the evidence inadvertantly and in good faith, sanctions will rarely be imposed, especially where evidence of guilt is strong.[360] Where the destruction is deliberate and in bad faith, however, strict sanctions will be imposed.[361]

One factor which is generally absent from the *Bryant* balancing test is a consideration of the favorability of the lost evidence. Most courts do not require the defendant to show that the lost evidence would have been favorable. Instead, mere allegations of favorability seem to be sufficient where the lost evidence is important. In *People v. Harmes*,[362] the court stated that "[w]here . . . crucial material evidence is wholly destroyed by the prosecution, and the responsibility for such destruction cannot properly be imputed to the defense, any requirement that the defendant somehow demonstrate that the evidence was exculpatory becomes an absurdity and is not imposed."[363] Other courts and commentators have adopted this reasoning.[364]

Although the *Bryant* balancing rule has been generally applied in cases where the prosecutor loses notes or files or statements of witnesses, different rules and considerable controversy have developed in the area of Governmental losses of physical, scientific evidence. This problem has arisen chiefly in cases involving drunk drivers and usually concerns whether the test ampules used in the breathalyzer machine must be preserved.

The first case to deal with this issue was *People v. Hitch*.[365] In *Hitch*, the defendant was arrested for drunk driving and was given a breathalyzer test to determine the amount of alcohol in his system. After the test, the police officer intentionally, but non-maliciously, destroyed the test ampule and its contents which were used in the breathalyzer. The defendant moved to suppress the test results, claiming that the destruction of the ampule deprived him of due process.[366] The California Supreme Court agreed and held that the test ampules "constitute material evidence on the issue of guilt or innocence,"[367] and that if "there is a reasonable possibility that they would constitute favorable evidence . . . then such evidence must be disclosed."[368] Therefore, based on the lower court's finding that preservation of the ampules was feasible and that retests would lead to accurate results,[369] the court held that in the future the ampules must be preserved or test results would be suppressed.[370] The court said:

> [S]anctions shall in the future be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the test ampoule and its contents and the reference ampoule used in such chemical test.[371]

If the prosecutor fails to establish such procedures, the court held that "due process shall not require a dismissal of the action but shall require merely that the *results* of the breathalyzer test be excluded from evidence."[372]

(failure to preserve police notes not error). *See also* United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975) (failure to preserve tape recording of conversation between defendant and informant not error).

[359] Gov't of the Virgin Islands v. Testamark, No. 77-1567 (3d Cir. Dec. 7, 1977); Armstrong v. Collier, 536 F.2d 72 (5th Cir. 1976); United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975); United States v. Pollock, 417 F. Supp. 1332 (D. Mass. 1976); United States v. Ivanov, 342 F. Supp. 928 (D.N.J. 1972). *See also* United States v. Heiden, 508 F.2d 898 (9th Cir. 1974); United States v. Henry, 487 F.2d 912 (9th Cir. 1973).

[360] Gov't of the Virgin Islands v. Testamark, No. 77-1567 (3d Cir. Dec. 7, 1977); Armstrong v. Collier, 536 F.2d 72 (5th Cir. 1976); United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975); United States v. Bundy, 472 F.2d 1266 (D.C. Cir. 1972); United States v. Ivanov, 342 F. Supp. 928 (D.N.J. 1972).

[361] United States v. Pollock, 417 F. Supp. 1332 (D. Mass. 1976) (where agent's notes had been intentionally destroyed after being subpoenaed by the defendant, destruction was tantamount to bad faith and the indictment was dismissed).

[362] 560 P.2d 470 (Colo. App. 1976).

[363] *Id.* at 474.

[364] *See* United States v. Maynard, 476 F.2d 1170 (D.C. Cir. 1973); Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542 (1972). *But see* State v. Meyers, 29 Or. App. 217, 562 P.2d 1227 (1977).

[365] 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974).

[366] *Id.* at 645, 527 P.2d at 364, 117 Cal. Rptr. at 12.

[367] *Id.* at 652, 527 P.2d at 369, 117 Cal. Rptr. at 17.

[368] *Id.* at 649, 527 P.2d at 367, 117 Cal. Rptr. at 15.

[369] *Id.* at 645, 527 P.2d at 364, 117 Cal. Rptr. at 12. However, the lower court recognized that a retest would not be one hundred percent accurate. *Id.* at n.1.

[370] *Id.* at 652-53, 527 P.2d at 369, 117 Cal. Rptr. at 17.

[371] *Id.*

[372] *Id.* at 653, 527 P.2d at 370, 117 Cal. Rptr. at 18. This sanction is less severe than those recommended by the *Bryant* court. However, the *Hitch* court did warn that bad faith destruction of an ampule could result in a dismissal of the indictment. *Id.* at n.7.

The *Hitch* decision has been criticized on both scientific and legal grounds.[373] Some courts have rejected the scientific basis of *Hitch* that preservation is feasible and retests are accurate as totally incorrect. For example, in *Lauderdale v. State*,[374] the Alaska Supreme Court noted that "at the present time, it is not possible to rerun a test and obtain accurate results."[375] Consequently, if retests will not lead to evidence of any probative value, there is no need to preserve the ampule.[376]

More importantly, other courts have challenged the legal interpretations and reasoning of the *Hitch* decision. The *Hitch* court established a strict prophylactic rule that the prosecutor must maintain procedures to preserve the ampules or else test results would be suppressed. This ruling was based on an interpretation of *Brady* that the ampules must be disclosed if there was a "reasonable possibility" that the ampules would produce favorable evidence. In *State v. Michener*[377] and *State v. Reaves*,[378] pre-*Agurs* cases, the Oregon courts rejected the unqualified "reasonable possibility" language of *Hitch* as too broad and held that the *Brady* rule requires disclosure only when the "defendant establishes a reasonable possibility, *based on concrete evidence rather than a fertile imagination*, that it would be favorable to his cause."[379] This added requirement is not merely verbiage, for under this rule mere allegations that the evidence would have been favorable is insufficient. In *Michener*, where the defendant produced videotapes of himself which indicated that he was sober at the time of the arrest, the court held that that was a sufficient showing to create doubts about the breath test so that suppression was correct where the ampule was destroyed.[380] In *Reaves*, on the other hand, the court indicated that sworn testimony that the defendant was sober may not be sufficient to create a reasonable possibility of inaccuracy.[381]

Similarly, in *Edwards v. Oklahoma*[382] a post-*Agurs* decision, the court rejected the *Hitch* opinion's interpretation of *Brady* as too expansive. The court stated:

> [T]he *Hitch* court found that it sufficed that there was a "reasonable possibility" that they [the ampules] might constitute favorable evidence. This extension of the *Brady* Doctrine is not justified as a matter of constitutional law. *Brady* focused upon the harm to the defendant resulting from non-disclosure. *Hitch* diverts this concern from the reality of prejudice to speculating about contingent benefits to the defendant.[383]

Consequently, the Court held that the failure to preserve the evidence would not result in a denial of due process unless the defendant could show a high degree of prejudice as required by the *Agurs* Court.[384] Since the favorability of a retest would be speculative and there was other substantial evidence of guilt, the court held that the failure to preserve the ampule was not constitutional error.[385]

As is evident from this review of cases, the duty to preserve has been defined in different ways. Although the *Agurs* opinion did not address this issue directly, it should have some bearing on decisions involving "lost" evidence. As established by a number of courts, the defendant need not conclusively prove that the lost evidence will be favorable to him.[386] This the *Agurs* decision will probably not change, for if it did the duty to disclose would be a mere sham easily avoided by destruction of favorable evidence. It would be unfair to require the defendant to prove favorability of a piece of evidence he may never have had a chance to examine. Nevertheless, the defendant must at least show the lost evidence "might" be favorable and relevant.

However, the clear implication from *Agurs* is that the prosecution should not be penalized just because an inconsequential or immaterial piece of evidence is lost. Before a court engages in a *Bryant*-type balancing test, it should first engage in the *Edward*-type analysis. In other words, the court should first assume the evidence if available would be favorable to the defendant. Then it should consider whether if the evidence were presented, would it be of sufficient importance to meet the materiality requirements of *Agurs*. If it would not,

[373] For a general discussion of the impact of and the reaction to *Hitch*, see Newman, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine*, 75 COLUM. L. REV. 1355 (1975).

[374] 548 P.2d 376 (Alaska 1976).

[375] *Id.* at 379-80. Other courts have reached the same conclusion. *See* State v. Shutt, 116 N.H. 495, 363 A.2d 406 (1976); State v. Teare, 135 N.J. Super. 19, 342 A.2d 556 (1975).

[376] State v. Teare, 135 N.J. Super. 19, 342 A.2d 556 (1975).

[377] 25 Or. App. 523, 550 P.2d 449 (1976).

[378] 25 Or. App. 745, 550 P.2d 1403 (1976).

[379] 25 Or. App. at 532, 550 P.2d at 454 (emphasis added).

[380] *Id.*

[381] 25 Or. App. at 746, 550 P.2d at 1404.

[382] 429 F. Supp. 668 (W.D. Okla. 1976).

[383] *Id.* at 671.

[384] *Id.*

[385] *Id.*

[386] *See* notes 362-64 *supra* and accompanying text.

the inquiry is ended, for the nonpreservation could not violate *Brady* in that even if it were preserved it would not have had to be disclosed. If it would meet the *Agurs* standards then the court should engage in the *Bryant*-type balancing process, weighing the culpability of the prosecutor, the importance of the evidence lost and the strength of the evidence adduced at trial. This dual procedure must be used to avoid use by the court of the *Bryant* test in such a way that it will be divorcing the duty to preserve from the duty to disclose. Such a result would be illogical and incorrect because the preservation duty is predicated on the disclosure duty. Thus, *Agurs* mandates this dual procedure by its focus on substantive as opposed to procedural issues.

One final issue related to and which is an extension of the duty of preservation is whether the prosecutor has a duty to seek out or aid the defense in procuring favorable evidence. As a general rule, the prosecutor has no duty to seek out favorable evidence for the defense.[387] He need only disclose favorable, material evidence which he has in his possession. However, at least one court under an expansive reading of *Brady* has imposed such a duty on the prosecutor. In *Evans v. Superior Court of Contra Costa County*,[388] the defendant, arrested for bank robbery, moved for a pretrial lineup because the initial identification by the victim was allegedly faulty.[389] Relying on *Brady* the court held that the Government has a constitutional duty to provide the defendant with a lineup in cases where "eyewitness identification is shown to be in material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve."[390] The court analyzed the situation as follows: the defendant "seeks to compel the People to exercise a duty to discover material evidence which does not now, in effect, exist. Should petitioner be denied his right of discovery the net effect would be the same as if existing evidence were intentionally suppressed."[391]

No court before or after *Evans* has sought to expand *Brady* this far.[392] The *Evans* court itself recognized that it had no prior support for its holding.[393] This decision, possibly appealing from a policy standpoint, is actually an unwarranted extension of the *Brady* doctrine. Although the *Evans* court did not distinguish between a duty to disclose evidence already in the prosecutor's possession and a duty to seek out favorable evidence on behalf of the defendant, there is obviously a vast difference between the two in the degree of burden placed on the prosecutor and the kind of action required. The *Brady* doctrine as it has developed has sought only to require the prosecutor to fairly inform the defendant of any materially favorable evidence in his possession. Clearly, neither *Brady* nor any other Supreme Court decision ever envisioned the expansion by the *Evans* court. The prosecutor's due process duty to disclose should not encompass a duty to seek out favorable evidence for the defense.

CONCLUSION

Even after *United States v. Agurs* the prosecutor's duty to disclose remains a complex concept that lacks definitional uniformity. The *Agurs* Court sought to eliminate all of the unresolved issues left by *Brady v. Maryland* and to establish the different standards to be used in assessing the materiality of allegedly favorable evidence. However, although the Court erected these standards, it failed to provide an analytical framework for use in every case.

Nevertheless, in view of the foregoing discussion a complete framework with which to analyze the disclosure decision can be developed. Essentially, this framework consists of a two-tiered analysis. First, it must be determined into which of the three categories identified by *Agurs* the evidence fits. These are: (1) knowing use of perjury cases, (2) specific request cases, and (3) general or no request cases. Once the category is determined, the standard of materiality is then known, for the *Agurs* Court established a standard for each type of evi-

[387] United States v. Walker, 559 F.2d 365, 373 (5th Cir. 1977); United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975); Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966); Note, *Pretrial Identification Procedures: The Expanded Duty to Disclose Favorable Evidence*, 50 NOTRE DAME LAW. 508, 512 (1975).

[388] 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974).

[389] 11 Cal. 3d at 621, 522 P.2d at 683, 114 Cal. Rptr. at 123. The defendant claimed that at the initial identification the witness only saw a limited view of the defendant's head and shoulders from the rear, that the witness would be reluctant to change his identification, and that he would continue to identify the defendant because he is the accused and would be dressed in jail clothes. *Id.*

[390] *Id.* at 625, 522 P.2d at 686, 114 Cal. Rptr. at 126.

[391] *Id.*

[392] *But cf.* Adams v. Stone, 378 F. Supp. 315 (N.D. Cal. 1974) (it may be a denial of due process for police to refuse to give a breathalyzer test to defendant upon request where it is a standard test normally given).

[393] 11 Cal. 3d at 621, 522 P.2d at 684, 114 Cal. Rptr. at 124.

dence. For the first two categories, the standard to be applied is quite low. Essentially, the standard is, "Might the evidence affect the trier of fact's decision?" In the last situation, however, the standard is quite high. Essentially this standard is, "Does the evidence create a reasonable doubt as to guilt?"

Once the standard of materiality is known, a second, more complex analysis must be undertaken. This analysis consists of evaluating the evidence in the light of several factors of materiality to determine whether the evidence is sufficiently material to require disclosure. The factors of materiality which must be considered are: (1) favorability, (2) admissibility, (3) extent of probative value: exculpatory v. impeachment, (4) weight of the evidence and (5) deference to the trial judge. All these factors should be present in every case at some point in the proceedings. In order to achieve the most accurate decision all the factors must be considered.

Use of this construct by the courts will provide greater uniformity in their decisions and give the prosecutor a better idea of what evidence he must disclose. Presently, with each court analyzing the duty to disclose in a somewhat different manner, the prosecutor is caught in a guessing game as to the scope of his duty. In this way, therefore, much of the present uncertainty as to what evidence must be disclosed can be eliminated.

On the other hand, because the Supreme Court failed to address the other collateral issues surrounding the prosecutor's duty to disclose, such as timing and preservation, these areas are still shrouded in uncertainty as the lower courts have assumed contrary positions. However, although the *Agurs* Court did not specifically resolve these issues, the principle of the *Agurs* opinion should be applied in resolving them and should lead to more uniform results.

Agurs clearly established that the due process requirement that the prosecutor disclose material favorable evidence was not a procedural right of discovery on behalf of the defendant but rather only a fair trial guarantee. Therefore, any failure by the prosecutor to fulfill his disclosure duty should only be regarded as error if the failure in some material way deprived the defendant of a fair trial. In essence *Agurs* signifies a retreat from the prior broad expansion of the disclosure requirement based on a rebalancing of the individual defendant's procedural rights and society's interest in the conviction of the guilty. If future issues are resolved with this principle in mind, greater uniformity and equity can be achieved.

MICHAEL E. RUSIN