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THE WHOLE TRUTH AND NOTHING BUT THE TRUTH: IS THE TRIER OF FACT ENTITLED TO HEAR IT?

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"The object of a lawsuit is to get at the truth and arrive at the right result."[1]

I. INTRODUCTION

The fundamental goal of our adversarial system of litigation is to arrive at the truth through a fair presentation of the evidence.[2] However, in a criminal proceeding material evidence is frequently not as available to the defense as it is to the prosecuting attorney.[3] Consequently, rules have been developed which not only aid the defense in obtaining relevant information, but also assist the prosecution in fulfilling its ethical and constitutional obligations, chief

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1. D. PECK, THE COMPLEMENT OF COURT AND COUNSEL 9 (1954) (13th Annual Benjamin N. Cardozo Lecture). This article begins with this quotation because the author's own beliefs are in accord with Justice Peck's philosophy concerning our adversary scheme. Justice Peck's quotation ends by stating

> the adversary scheme of trying lawsuits is probably best calculated to getting out all the facts and elucidating the law. Diligent counsel devoted to a client's cause leave no stone unturned and pave the way to informed and intelligent decision, but zeal may develop unwarranted and unshared enthusiasms. The adversary scheme and concept and spirit of contest may play counsel false and add to the difficulty of decision.

Id.

2. Justice Stewart wrote in Tehan v. Shott, 382 U.S. 406, 416 (1966), "The basic purpose of a trial is the determination of truth. . . ." *See also* Commonwealth v. Stepper, 54 Lack. Jur. 205 (Pa. Ct. 1952) ("Our adversary system of inquiry is but a means to an end, discovery of truth.").

3. *See generally* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172 (1960); Young & Gray, *Trial by Ambush—The Case for Pre-trial Discovery in Criminal Law*, 25 NEV. STATE BAR J. 91 (1960); Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972); Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 WASH. U.L.Q. 480; Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

among which is to see that justice and due process are upheld.[4]

The prosecutorial obligation to disclose exculpatory information is based upon the premise that equitable treatment of the accused is necessary to ensure a fair trial.[5] The prosecutor, however, may view his role quite differently.[6] It is axiomatic that a defendant in a criminal case is deemed to have been deprived of due process of law if his conviction is founded, in whole or in part, upon exculpatory material which the prosecution fails to disclose to the defense.[7] Equally clear is the defendant's constitutional right to appeal a conviction when that conviction is based upon undisclosed

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4. *See* 18 U.S.C. § 3500 (1982); FED. R. CRIM. P. 16 (general disclosure rule which provides for disclosure upon request of any statement of the defendant, defendant's prior record, documents and tangible objects, and reports of examinations and tests; does not provide for the disclosure of prospective government witnesses); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (1980); ABA Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure before Trial 1, 3, 52-53 (1970); *see also* 2 ABA Standards for Criminal Justice §§ 11-2.1, 11-4.2 (2d ed. 1982); ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 100 (1970).

5. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Berger v. United States, 295 U.S. 78, 88 (1935).

6. Speaking on the role of the government prosecutor, the Supreme Court in *Berger*, 295 U.S. at 88, stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the service of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (the responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict); Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921.

7. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .").

The due process clause of the fifth amendment requires that the defendant receive a fair trial. There have been a variety of interpretations of due process. For an in-depth analysis, see G. GUNTHER, CONSTITUTIONAL LAW 459-669 (10th ed. 1980) (the due process clauses of the fifth and fourteenth amendments protect life, liberty and property as a unitary concept embracing all interests valuable to men). *See also* Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but . . . it does speak to the balance of forces between the accused and his accuser."); Goldberg v. Kelly, 397 U.S. 254 (1970) (due process not a technical conception with a fixed content, but is instead a flexible concept and calls for such procedural protections as the particular situation demands); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).

exculpatory material.[8]

In *Brady v. Maryland*[9] and *United States v. Agurs*,[10] the Supreme Court enunciated standards to govern the prosecution's duty to disclose exculpatory evidence to the defense. Despite the standards established in *Brady* and *Agurs*, prosecutors still have difficulty complying with their disclosure obligations, due in part to the reluctance of the courts to establish explicit guidelines. The purpose of this article is to clarify the standards which govern a prosecutor's duty to disclose. Part I of this article will examine relevant case law pertaining to the prosecutor's duty to disclose, and Part II will discuss the necessary timing of disclosures. Finally, several proposals to more effectively enforce prosecutorial disclosure are offered.

II. Judicial Development of the Duty to Disclose

A. Brady v. Maryland: *The Foundation*

A landmark 1963 Supreme Court decision, *Brady v. Maryland*, dealt with the issue of suppression of evidence.[11] In *Brady*, the defendant had been convicted of first degree murder and sentenced to death. In a separate trial, his accomplice, Boblit, was also convicted and sentenced to death. On appeal, both convictions were upheld by the Maryland Court of Appeals.[12]

During Brady's original trial, the State failed to enter into evidence an unsigned extrajudicial statement in which Brady's accomplice admitted to strangling the victim during the course of the robbery.[13] Brady had no knowledge of this statement. At trial, he had testified that, although he was a participant in the crime, his accomplice had been the actual killer. Clearly the extrajudicial statement would have corroborated Brady's testimony and might have reduced the sentence he received.

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8. *See* United States v. Agurs, 427 U.S. 97 (1976); Mooney v. Holohan, 294 U.S. 87 (1935); *see also* Dixon, *Criminal Appeals*, 9 Colum. Hum. Rts. L. Rev. 191 (1978).

9. 373 U.S. 83 (1963).

10. 427 U.S. 97 (1976).

11. 373 U.S. 83 (1963). The term "suppression" as used in *Brady* may be more precisely considered as "nondisclosure" of the evidence.

12. Brady v. Maryland, 226 Md. 422, 174 A.2d 167 (1961).

13. Prior to the trial, Brady's defense counsel requested permission to examine Boblit's extrajudicial statements. Several were shown, but the one in which the actual homicide was admitted did not come to the defense's notice until after Brady's conviction had been affirmed. *Id.*

Chief Justice Brune, writing for the majority of the Maryland Court of Appeals, wrote:

> We think that there was a duty on the State to produce the confession of Boblit that he did the actual strangling or at least to inform counsel for the accused of its existence. The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process.[14]

Despite its finding that Brady was prejudiced by the prosecution's actions,[15] the court found no reason to retry the case. However, the court remanded the case for a reconsideration of the sentence.[16]

Upon a writ of certiorari, the case went before the United States Supreme Court to determine whether Brady had been denied his fourteenth amendment due process rights when the Maryland Court of Appeals restricted his new trial to the question of resentencing.[17] The Supreme Court, relying on the per curiam decision in *Mooney v. Holohan*,[18] agreed that the suppression of the confession was a violation of the due process clause of the fourteenth amendment, but affirmed the decision of the Maryland Court of Appeals to limit review in a new trial to the narrow issue of sentencing.[19] The Court reasoned that Brady's claim of prejudice was only applicable to the punishment imposed; therefore, Boblit's confession could not have affected the determination of Brady's guilt. Since the suppression of the confession was not relevant to the issue of Brady's guilt or innocence, the trial did not violate his

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14. *Id.* at ___, 174 A.2d at 169.

15. *Id.*

16. *Id.* at ___, 174 A.2d at 171. On this point the court said, "Brady is entitled to have a jury empaneled to determine whether the finding already made of guilty of murder in the first degree should or should not be modified by the addition of the words 'without capital punishment.'" *Id.*

17. Brady v. Maryland, 373 U.S. 83 (1963).

18. 294 U.S. 103 (1935). Petitioner in *Mooney* charged that he was denied his right to due process because the prosecutor knowingly used perjured testimony to obtain his conviction. Petitioner argued that the suppressed evidence would have refuted the only evidence against him. Despite the prosecution's inappropriate behavior, the Court decided that the petitioner did not present evidence sufficient to prove his constitutional right to due process had been violated. The Court explained that only when there has been a denial of due process does the fourteenth amendment require the state to supply a remedy. *Id.*

19. The *Brady* court held that there was no infringement of the fourteenth amendment because [in Maryland cases] the jury is the judge of law and fact and the final verdict is its responsibility. 373 U.S. at 89. The Court also agreed with the Maryland Court of Appeals that there was nothing in the suppressed confession which would have reduced Brady's offense below murder in the first degree. *Id.* at 88.

due process rights. Justice Brennan, writing for the majority, quoted *Mooney* in explaining the prosecutor's duty to disclose:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. . . . [N]o matter from what source, whether it be official or otherwise, an act or omission emanates, if it operates to deprive the defendant of notice or of an opportunity to be heard, then there has been a denial of due process of law.[20]

Similarly the earlier case of *Pyle v. Kansas*[21] held that the deliberate suppression of evidence favorable to the defendant by state authorities violates due process. In *Pyle*, the Court stated:

> Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from the perjured testimony, knowingly used by state authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and if proven, would entitle petitioner to release from his present custody.[22]

In reaffirming the *Mooney* and *Pyle* decisions, the *Brady* court clearly recognized that suppression of evidence violates the defendant's right to due process guaranteed by the fifth and fourteenth amendments. *Brady* went a step further, however, and established a rule that the suppression by the prosecutor of evidence, requested by the defense and favorable to the accused, violates due process where the evidence is material either to guilt or to punishment, regardless of the good or bad faith of the prosecution.[23] Such evidence, once requested, must be disclosed.[24]

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20. *Brady*, 373 U.S. at 86 (quoting Mooney v. Holohan, 294 U.S. 103, 107, 112 (1935)).
21. 317 U.S. 213 (1942).
22. *Id.* at 215-16.
23. *Brady*, 373 U.S. at 87.
24. *Id.*

The *Brady* decision in essence established a four part test for determining when the suppression of evidence is sufficiently "material" to sustain a constitutional attack by the defendant. The four elements include: (1) the prosecutor has suppressed the evidence; (2) the evidence suppressed is favorable to the defendant; (3) the suppressed evidence is material to the defense's case; and (4) the evidence was unknown to the defendant.[25] The effect of *Brady* is that any material evidence requested by the defense must be disclosed.

The importance of *Brady* is that it establishes an affirmative obligation on the part of the prosecution to produce evidence that is materially favorable to the defendant. In *Brady*, the Court reasserted the importance of fairness in a criminal proceeding.[26] Yet, despite the expansive protection to defendants provided in *Brady*, the Court failed to specifically define the term "material" and offered little guidance as to whether failure to request exculpatory evidence (whether due to lack of knowledge, lack of skill, or other reasons) would prevent the defense from invoking the *Brady* rule.

The cases from *Pyle* to *Brady* indicate a shift in the Court's focus from the willful misbehavior of the prosecution to the harm caused to a defendant due to withheld evidence.[27] Cases after *Brady* focus on the materiality of the evidence requested, the situations requiring disclosure, and when to disclose.

B. *The Parameters of "Materiality"*—United States v. Agurs

In *United States v. Agurs*,[28] the Supreme Court refined the *Brady* decision and developed a three-pronged test for materiality. *Agurs* involved a prosecutor's failure to supply the victim's prior criminal record as material evidence.[29] Defense counsel contended

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25. The factors are not specifically spelled out, but are implicit in the holding. *See, e.g.*, U.S. v. Agurs, 427 U.S. 97 (1976).

26. "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." *Brady*, 373 U.S. at 87-88. For cases discussing the *Brady* rule of "fairness," see United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984); United States v. Starusko, 729 F.2d 256 (3d Cir. 1984); United States v. Campagnuolo, 592 F.2d 852, 859 (5th Cir. 1979); United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

27. Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 141-43 (1964).

28. 427 U.S. 97 (1976).

29. The victim's prior criminal record indicated he had pleaded guilty to one charge of

that had the victim's prior record been revealed, it would have supported the defendant's claim of self-defense. The federal prosecutor asserted that he did not disclose this information because the defense had not requested it. The court of appeals held that a request was unnecessary and that the suppressed evidence was material because the jury might have returned a different verdict had it been presented with the criminal record.[30] A new trial was ordered.

The Supreme Court reversed, holding that the court of appeals had incorrectly interpreted the constitutional requirements of due process. It found that the prosecution's failure to disclose this information did not deprive the defendant of a fair trial. The Court, while reaffirming the prosecution's obligation to produce evidence favorable to the accused,[31] ruled that a defendant will not automatically be granted a new trial solely on the grounds that the prosecution failed to produce unrequested information unless that information creates a "reasonable doubt"[32] on the issue of the de-

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assault and two separate charges of carrying a deadly weapon. *Id.* at 100.

30. *Agurs*, 510 F.2d 1249 (D.C. Cir. 1975), *rev'd*, 427 U.S. 97 (1976).

31. The obligation to disclose applies not only to the prosecutor himself, but to persons working as part of the prosecution team or to persons connected with the government case. *See infra* note 76 and accompanying text.

32. *Agurs*, 427 U.S. at 112. On the subject of reasonable doubt, Justice Frankfurter, in his dissenting opinion in an earlier case, Leland v. Oregon, 343 U.S. 790, 802-03 (1952), stated "[i]t is the duty of the government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" For a thorough examination of reasonable doubt, see S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 894-923 (1980); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1209-13 (1979). In the case of *In re* Winship, 397 U.S. 358 (1970), the Supreme Court concluded that proof beyond a reasonable doubt is a consitutional requirement in criminal proceedings. The Court stated:

> [u]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. . . . [W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id. at 364.

In a concurring opinion, Justice Harlan said, "[t]he requirement of proof beyond a reasonable doubt in a criminal case is . . . bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372.

But see 9 J. WIGMORE, EVIDENCE § 2497 (I. Chadbourn ed. 1981). Professor Wigmore adopts a more "skeptical-approach" theory on the possibility of achieving doubt, stating,

fendant's guilt. The court stated that a strict standard of materiality is applicable where there is prosecutorial misconduct.[33]

The *Agurs* Court presented a thorough analysis of the *Brady* rule and established a more precise standard of review regarding the prosecution's constitutional duty to disclose exculpatory information. In *Agurs*, the court found the *Brady* rule applies in three types of situations. The first such situation is where the evidence presented by the prosecutor contains perjured testimony and the prosecution knew or should have known of the perjury. A conviction obtained using such evidence is fundamentally unfair and must be set aside if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury.[34] A second situation involving *Brady* is where the prosecutor fails to disclose information specifically requested by the defendant. A request is considered "specific" under this category only if it precisely states the evidence sought by the defense counsel;[35] otherwise *Brady* will not apply.[36] The final *Brady* situation involves a prosecutor who

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"the truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly . . . a sound method of self-analysis for one's belief." *Id.* Perhaps Professor Wigmore's evaluation was more realistic than the majority opinion in *In re Winship*.

33. The court stressed that a strict standard of materiality is required here because these types of cases involve a corruption of the truth-seeking function of the trial process. *Agurs*, 427 U.S. at 104.

34. *See Agurs*, 427 U.S. at 103; *see also* Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 294 U.S. 103 (1935); United States v. Anderson, 574 F.2d 1347, 1352-53 (5th Cir. 1978); United States v. Brown, 562 F.2d 1144, 1150 (9th Cir. 1977); United States v. Hedgeman, 564 F.2d 763, 766 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978).

35. Justice Stevens wrote that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 106. *Accord* Monroe v. Blackburn, 605 F.2d 148 (5th Cir. 1979) (finding petitioner had been denied due process because of the prosecutor's failure to produce a robbery victim's statement which had been specifically requested by petitioner. The court concluded that such evidence could have affected the witnesses' credibility and therefore the verdict of the court). *See also* United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984); United States v. Goldberg, 582 F.2d 483, 489-90 (9th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979); United States v. Sutton, 542 F.2d 1239, 1242-43 (4th Cir. 1976).

36. *See, e.g.*, United States v. Mackey, 571 F.2d 376, 389 (7th Cir. 1978). "Contrary to defendant's contention, we conclude that this request was 'general' within the meaning of *Agurs*. At a minimum, we would require that defendant focus his request on a particular witness before we would hold the request to be 'specific.' " Having found the request general rather than specific, the court concluded that the omitted material did not deprive the defendant of his right to a fair trial. *Id. See also* United States v. DiCarlo, 575 F.2d 952, 959-60 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978); United States *ex rel.* Marzeno v. Gengler, 574 F.2d 730, 736 (3d Cir. 1978). General requests are often confused with specific requests. This confusion has resulted in differences of opinion in the appellate courts and has added to the *Brady* dilemma. *See* State v. Harvey, 358 So. 2d 1224 (La. 1978) (treating the *Brady* specific

fails to comply with defense counsel's general request for all exculpatory information or fails to voluntarily disclose exculpatory information.[37] The Court concluded that an obligation to disclose can exist even in the absence of a request by the defense, but the standard of materiality imposed places a greater burden on the non-requesting defense counsel.[38]

Since *Agurs*, a fourth situation in which the *Brady* rule applies has developed. Absent a specific request by the defense, the prosecution does not disclose evidence which is purely impeaching and which is unrelated to a substantive issue.[39] In each of these four situations where the *Brady* rule might require disclosure, the defendant has the burden of establishing that the suppressed evidence was material. Only after overcoming this burden can the defense argue that the suppression of the evidence is a violation of due process.[40]

The *Agurs* Court explicitly recognized the sensitive position in which the prosecution is placed because of the obligation to volunteer exculpatory material. The prosecutor must represent the state in the conviction of the wrongdoer which might ultimately lead to an unfair conviction, and he must also aid defense counsel in supplying exculpatory material which might ultimately lead to an unfair acquittal.[41] Thus, the Court rejected the theory that the prosecution has a constitutional obligation to disclose everything in its files to defense counsel.

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request as a general request). *Compare* United States v. Goldberg, 582 F.2d 483 (9th Cir. 1978) (where the court found the *Agurs* general request standard nebulous).

37. The Supreme Court has suggested that "[s]uch a [general] request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request, . . . it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor." *Agurs*, 427 U.S. at 106-07. *See also* State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); United States v. Alberico, 604 F.2d 1315 (10th Cir.), *cert. denied*, 444 U.S. 992 (1979); Ostrer v. United States, 577 F.2d 782 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); Cannon v. Alabama, 558 F.2d 1211 (5th Cir. 1977) (prosecutor failed to disclose to defense the existence of an eyewitness who would have identified assailant other than the accused; undisclosed eyewitness testimony would have created a reasonable doubt as to the defendant's guilt); Grant v. Allredge, 498 F.2d 376 (2d Cir. 1974); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).

38. *See infra* notes 44-45 and accompanying text.

39. *See, e.g.*, United States v. Butler, 567 F.2d 885 (9th Cir. 1978); Ostrer v. United States, 577 F.2d 782 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); United States v. Mackey, 571 F.2d 376 (7th Cir. 1977).

40. *See, e.g.*, United States v. Parker, 586 F.2d 422, 435 (5th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979); *see also* United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979).

41. *Agurs*, 427 U.S. at 111.

> If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much.[42]

The Court went on to note that the intent of the prosecutor and the culpability of his actions are not to be considered in determining whether evidence is wrongfully withheld.

> [We do not] believe the constitutional obligation is measured by the moral culpability, or the willfulness of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Conversely, if 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.[43]

Although the *Agurs* Court expressed the need for a precise standard to measure the "materiality" of non-disclosed evidence, the Court was apparently unable to agree on what a standard should be other than stating that if the omitted evidence would create "reasonable doubt," then a constitutional error had been committed. In an attempt to further clarify this area, the Court held that if the evidence "might have affected" the outcome of the trial, then it is impliedly material. Finally, the Court emphasized that the prosecution has no constitutional obligation to disclose evidence unless the suppression of the evidence was sufficiently significant to result in a violation of the defendant's right to a fair trial.[44]

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42. *Id.* at 109.

43. *Id.* at 110. The Court completed this analysis by restating the rule in *Brady* for procedural fairness in a trial:

> On the other hand, since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard.

Id. at 111-12.

44. *Id.* at 112.

In distinguishing the prosecution's duty to disclose from the harm to the defendant due to the non-disclosure of evidence, the majority in *Agurs* stated that there was no significant difference between a general request and no request at all; if the evidence in question is clearly supportive of the defendant's claim of innocence it must be disclosed. In stating this, however, the Court seemed to suggest that even though a request was not necessary in all cases, evidence would more likely be considered within the *Brady* rule and supportive of a due process claim if a request had been made.[45]

Justice Marshall, in a dissenting opinion joined by Justice Brennan, criticized the majority for failing to state an explicit standard of materiality. The dissenters concluded that the plurality opinion provided insufficient sanction if the prosecution failed to voluntarily examine its files to determine if they contained evidence helpful to the defense, and, in fact, offered incentive for the prosecution to overlook close questions of disclosure. In addition, the dissenters observed that the standards outlined lacked impact because they relied too heavily upon the court's determination of a hypothetical impact on the jury, an impact which would not be ascertainable in all cases.[46]

The fundamental weakness in *Agurs* lies in the majority's imprecise standard of materiality. The Court's opinion neglected situations where the importance of the material in question might not be established until the entire record is complete. Nevertheless, there is often a significant difference between the pre-trial determination of materiality by the prosecution and the post-trial determination by a judge. The net result is that, absent a significant omission resulting in a deprivation of the right to a fair trial, there can be no constitutional violation and therefore no breach of the prosecution's duty to disclose. It is evident that although the *Agurs* court strengthened the standards imposed by *Brady*, the Court left the prosecution with unilateral authority to determine the materiality of the evidence and thus failed to resolve the essential issue. In the event of a controversy over disclosure, defendants were left with the burden of establishing proof of materiality.

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45. *Id.* at 107. Earlier, in Giles v. Maryland, Justice Fortas addressed the necessity of a request and concluded that the duty to disclose should not be conditioned upon such a request. 386 U.S. 66 (1967) (Fortas, J., concurring).

46. *Agurs*, 427 U.S. at 117-19 (Marshall, Brennan, J.J., dissenting).

C. *"Materiality" After* Agurs

The majority and dissenting opinions in *Agurs* are characteristic of the fundamental tension between the prosecution's obligation to convict and its obligation to disclose under the *Brady* rule. If the prosecutor's general obligation to secure a conviction is repugnant to the rule of *Brady*, it was incumbent upon the courts to resolve this conflict. In *Agurs*, they failed to do so. Decisions subsequent to *Agurs* attempted to redefine the definitional contours of the Supreme Court's materiality standard. Any situation where disclosure may be warranted would require a careful analysis of the issues involved in the case and the weight of the materiality of the evidence in order to determine whether the defendant was denied his due process right to a fair trial by reason of the suppressed evidence.

In *United States v. Valenzuela-Bernal*[47] the Supreme Court broadened the scope of materiality. In *Valenzuela*, the Court reaffirmed that suppression of material evidence favorable to the defendant by the prosecution was a violation of due process. Although here the Court found that the particular omission was not material and therefore not a violation of the *Brady* standard, the majority recognized that the concept of materiality could differ in individual cases and held that the "determinations of materiality are often best made in light of all the evidence adduced at trial . . . ."[48] The Court extended its previous holding in this area, stating that

> the 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.[49]

The Supreme Court struggled in *Valenzuela* with the core problem of the *Brady* decision, i.e., a definition of materiality, explicit in its terms, which would have the compelling influence of regulating prosecutorial conduct in disclosure issues. Absent a strict stan-

47. 458 U.S. 858 (1982).
48. *Id.* at 874.
49. *Id.* at 868 (quoting United States v. Agurs, 427 U.S. 97, 112-13 (1976)).

dard of materiality, prosecutorial noncompliance would continue, limiting the effectiveness of the constitutional requirement of procedural fairness in criminal cases. It was apparent that further judicial assessment of the *Brady* doctrine was necessary.

Although the Supreme Court has delivered its opinion regarding the standard of materiality, other courts continue to struggle with the issue. A significant case in this area is the recent Third Circuit ruling in *United States v. Oxman*.[50] The prosecution in *Oxman*, despite a "specific request" from the defense counsel, withheld an immunity agreement;[51] the pivotal issue was whether the agreement was material. The government contended that the agreement was not material and thus the defense could not have used the evidence for impeachment purposes. The government further argued that defense counsel knew or should have known of the existence or contents of this agreement.[52]

The Third Circuit, in evaluating the facts, gave a "prospective," rather than a "retrospective," analysis of the materiality standard.[53] Using this approach, the court analyzed the law governing the scope of disclosure. It determined that *Agurs* encouraged prosecutors to take a retrospective view of materiality, i.e., to make a predetermined evaluation of the materiality of evidence. This approach allowed the prosecution, after trial, to claim it believed before trial that the evidence was not material, thus avoiding any obligation to disclose the evidence either before trial or upon a specific request. This claim by the prosecution had the effect of avoiding the *Agurs* mandate which obligated the prosecution to disclose material evidence even absent a request.[54] The *Oxman* court found this to be inconsistent with the thrust of *Brady* and *Agurs*, and strongly criticized the prosecution's unilateral decision-making authority concerning the appropriateness of disclosure and concluded that, "[i]f the *Brady* test is to work it must be capable of prospective application by the prosecutor before trial . . . . The standard to be applied by the prosecutor . . . cannot depend on considerations capable of ascertainment if at all only after the fact."[55]

Thus the court in *Oxman* rejected the argument that the undis-

50. 740 F.2d 1298 (3d Cir. 1984).
51. *Id.* at 1301.
52. *Id.* at 1311-15.
53. *Id.* at 1310-11.
54. *Id.* at 1310.
55. *Id.* at 1314.

closed evidence was not material for impeachment purposes[56] and found that there was no evidence to support the prosecution's claim that the defense knew of its existence. "[D]ue process requires, upon a specific request, disclosure of exculpatory material and a new trial must be granted if this standard is violated."[57]

The court criticized the majority in *Agurs* for its failure to establish a "specific request" test and rejected any per se standard of materiality. The court further held that the appropriate standard to be applied should be "whether, on the facts of each case, a substantial basis for claiming materiality exists."[58]

No doubt the majority in *Oxman* assumed that the standard it established was not à "per se" standard. The court's analysis is straightforward and appealing. However, upon closer examination, the prolonged and eloquent opinion, while attempting to add a new dimension to the materiality standard, actually does little more than reinforce the *Brady* rule. In actuality, the court was still left with the difficult task of establishing a viable definition of materiality, one that could prove capable of leading to strict enforcement of the *Brady* rule. However, even with the difficulties presented by *Brady*, the Third Circuit in *Oxman* made it abundantly clear that it is an avid proponent of the *Brady* ruling.[59]

A recent case from North Carolina, *State v. McDowell*,[60] exemplifies the struggle that the courts have had in attempting to conform with the Supreme Court's rulings, and particularly the "materiality standard" of *Agurs*.[61] In *McDowell*, the defendant was convicted of first degree murder and sentenced to death. The United States Supreme Court denied the defendant's petition to rehear the case and in May, 1981, a stay of execution was terminated. In December, 1981, the superior court awarded the defendant a new trial based upon the prosecution's failure to disclose certain information to the defendant before or during the trial.[62]

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56. *Contra* Carey v. Duckworth, 738 F.2d 875 (7th Cir. 1984) (holding that the terms of a "deal" between informant and drug agency were not material evidence and therefore a failure to disclose was not a violation of *Brady*).

57. *Oxman*, 740 F.2d at 1314.

58. *Id.*

59. *Id.*

60. 310 N.C. 61, 310 S.E.2d 301 (1984).

61. The *McDowell* court stated that the *Agurs* Court had provided "an imprecise standard of materiality, i.e., something more than a slight effect on the jury's decision but less than having a determinative effect." *Id.* at ___, 310 S.E.2d at 307.

62. The newly discovered evidence was that the state's only eyewitness to the crimes had

The court examined the materiality of the evidence withheld to determine whether it would have established a reasonable doubt of the defendant's guilt if presented to the jury. In evaluating the effect of the nondisclosed evidence, the court weighed the strength of the suppressed evidence against the evidence the jury heard. The court also considered whether the omitted evidence would have affected the outcome of the trial. The court found no distinction between affecting the outcome of a trial and creating a reasonable doubt (assuming a guilty verdict is given only when the evidence supports it beyond a reasonable doubt).[63]

After an assessment of relevant case law, the *McDowell* court adopted the following standard to determine whether exculpatory evidence (known to the prosecution, not requested by the defense, and not revealed by the prosecution) is material: "Would the evidence, had it been disclosed to the jury which convicted defendant, and in light of all other evidence which that jury heard, likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt?"[64] In applying this standard, the court concluded that, here, the prosecution had in its possession unrequested evidence which was material and remanded the case for reconsideration de novo based upon the new explications.[65]

Although the court apparently made an effort to narrowly define the materiality standard enunciated in *Agurs*, its impact is negligible because the standard it used is barely distinguishable from the *Agurs* standard. By defining material evidence as that evidence which might influence a finding of reasonable doubt, both courts merely exchanged one unascertainable criterion for another. Still lacking was a clear, concise definition of materiality, a standard so precise that it would be difficult for the average prosecutor to sidestep the *Brady* rule.

Consequently it is of little importance to the trier of fact whether the standard to be applied is "might have affected," "likely to have created a reasonable doubt," or "a substantial basis". All three approaches are equivalent in their inference and are so vague in their language that they are difficult to apply. The new

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initially reported that the assailant was white (while the defendant was black). The witness had also testified that she did not know the defendant, although in fact she was well acquainted with him. *Id.* at ___, 310 S.E.2d at 304.

63. *Id.* at ___, 310 S.E.2d at 309.

64. *Id.*

65. *Id.* at ___, 310 S.E.2d at 310.

materiality standard announced in *Oxman* and *McDowell* merely incorporated the *Agurs* and *Brady* standards. Whether the new standards are more workable than their predecessors depends upon their interpretations by prosecutors and lower courts. Nevertheless, it is apparent that courts have struggled in establishing an explicit materiality standard. This is one of the essential bases to the enforcement of the *Brady* rule. Broadly speaking, "material evidence" required to be disclosed under the *Brady* rule is evidence which may be exculpatory. Material evidence under this category may include both evidence which is overtly exculpatory, and evidence which may lead to the discovery of exculpatory evidence.[66]

D. *Obviously Exculpatory Material*

In *Grant v. Alldredge*,[67] the Second Circuit Court of Appeals emphasized the importance of disclosing certain obviously exculpatory material while at the same time differentiating it from marginal *Brady* material. In *Grant*, the appellant was charged with and convicted of bank robbery. A bank teller was asked to identify Grant from fourteen photographs and identified someone else as the robber. The prosecution failed to disclose this fact to defense counsel.

The Second Circuit expressed shock at the prosecution's position that this was, at best, only marginal material evidence, and agreed with the appellant that this evidence should have been revealed well before the commencement of the trial to allow for full exploration and exploitation by the defense. Vacating the conviction, the

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66. For an examination of "material" or "relevant" theories, see GREEN & NESSON, EVIDENCE 1-91 (1983); *see also* D. LOUISELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 46-75 (4th ed. 1981); Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty to Disclose*, 59 IOWA L. REV. 433 (1973). As discussed previously, earlier cases enunciated the following standards for determining materiality for disclosure purposes: (1) evidence which may be merely helpful to the defense; (2) evidence which raises a reasonable doubt as to defendant's guilt; and (3) evidence which is of such a character as to create a substantial likelihood of reversal. *See supra* notes 47-63 and accompanying text.

In Brady v. Maryland, 373 U.S. 83, 86 (1963), the Supreme Court held that the failure to reveal the existence of a co-defendant's confession would constitute grounds for reversal because such evidence obviously tends to exculpate the defendant. In United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969), the Second Circuit devised a standard of materiality for granting a new trial: "Whether . . . there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." Later, in Moore v. Illinois, 408 U.S. 786, 794 (1972), the Supreme Court limited the government's disclosure obligation to exculpatory material that is "material either to guilt or to punishment."

67. 498 F.2d 376 (2d Cir. 1974).

court held:

> the Government's failure upon pretrial request fully to disclose information which could have led trial counsel to uncover additional exculpatory evidence so pertinent that its presentation at trial might have induced a reasonable doubt of defendant's guilt in the minds of the jurors constituted a violation of the rule of *Brady v. Maryland*.[68]

Similarly, physical evidence substantially corroborating the innocence of the defendant must be disclosed.[69] In *Barbee v. Warden*,[70] the defendant was convicted of assault with intent to kill. The defendant's .32 calibre revolver was admitted into evidence, linking him to the crime. The prosecution failed to disclose (either through lack of knowledge or otherwise) a police department ballistics and fingerprint test which revealed that another revolver, not owned by the defendant, was used in the commission of the crime. The prosecution asserted that the defendant failed to show that (1) this evidence had probative value, (2) defense counsel had requested this information, (3) the prosecution had any knowledge of it, and (4) prejudice resulted from this nondisclosure.[71]

The Fourth Circuit Court of Appeals concluded that these police reports had substantial evidentiary significance. In response to the

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68. *Id.* at 379.

69. *See, e.g.*, Anderson v. State, 709 F.2d 887 (4th Cir. 1983). In *Anderson*, South Carolina appealed from a judgment of the United States District Court for the District of South Carolina which had granted a writ of habeas corpus to the defendant, who had been convicted of a 1965 murder. *Id.* at 887. The Fourth Circuit Court of Appeals found that petitioner had been denied due process by the prosecution's failure to furnish an autopsy and two police reports upon counsel's requests. *Id.* at 888. The state contended that the victim was drowned and had sustained bruises on the upper arm during the incident. The state prosecutor instructed all investigators not to turn over any materials to defense counsel. Additionally, the autopsy report revealed that the bruise marks were sustained several days prior to the death of the victim. *Id.* The court of appeals concluded that the autopsy report could have affected the outcome of the trial and that the police reports, if disclosed, could have created a reasonable doubt. *Id.* at 888-89.

Additionally, the prosecutor has the obligation to disclose favorable results of a physical or mental examination. *See, e.g.*, Orr v. United States, 386 F.2d 988 (D.C. Cir. 1967) (petitioner tried without the insanity defense being raised by the court, although prosecutor knew that the hospital report indicated petitioner was mentally deficient, and that he had been diagnosed as a sociopath); *see also* Hilliard v. Spalding, 719 F.2d 1443 (9th Cir. 1983) (prosecutor's failure to produce potentially exculpatory body fluid sample is presumed prejudicial to the defendant); Walker v. Mitchell, 587 F. Supp. 1432, 1444-45 (E.D. Va. 1984) (defining when evidence omitted in a trial is "material" for purposes of overturning a conviction).

70. 331 F.2d 842 (4th Cir. 1964).

71. *Id.* at 844.

state's argument that the prosecutor had no knowledge of these reports, the court stated that the obligation to disclose belongs to the state and this duty passes through to the acts of the prosecuting attorney. In effect, the *Barbee* court said that the prosecution's knowledge of the existence of these tests was of little importance. The police are part of the prosecutorial system, and although a prosecutor may become a victim of police suppression of evidence, the state's failure to disclose cannot be excused.[72] The court concluded that the *Brady* requirement was extended to anyone who could be viewed as an arm of the prosecution.[73]

> Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State Attorney, were guilty of the nondisclosure . . . . "The cruelest lies are often told in silence."[74]

Evidence tending to impeach must also be disclosed under *Brady*.[75] In *United States v. Butler*,[76] the basic issue before the

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72. *Id.* at 846.

73. *See, e.g.*, Fulford v. Maggio, 692 F.2d 354, 358 (5th Cir. 1980), *rev'd on other grounds*, 482 U.S. 111 (1983) (information in hands of police and other state officers is subject to *Brady* regardless of the prosecutor's knowledge and without imposing that state officer be an arm of the prosecution); United States v. Morell, 524 F.2d 550 (2d Cir. 1975) (duty of disclosure extends to persons working as part of the prosecution team or intimately connected with the government's case even if they are not employed in the prosecutor's office); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973); Pina v. Henderson, 586 F. Supp. 1452 (E.D.N.Y. 1984) (concealed information known to police or state probation service should be treated as known to prosecutor). See also State v. Curcio, Brief for Defendant in Support of Motion for Review of Grand Jury Testimony, No. 29,023 (Conn. Super. Ct., Fairfield County) (motion filed Mar. 21, 1984), where defense counsel, on a pretrial motion, moved to have the transcript of the state grand jury evidential proceedings released for examination. The state refused and, applying a state statute, contended that the defense was not entitled to see the transcript unless there had been an indictment. The superior court held that where a state statute and *Brady* conflict, *Brady* must prevail, and granted the request of the defense. Thus, the court has the same obligation to disclose material upon a request as the prosecutor does.

74. *Barbee*, 331 F.2d at 846 (citations omitted).

75. Impeaching material may be construed as any material which would bear on the witnesses' propensity to testify truthfully, or anything of probative value, which might shed light on the tendency of the witness to testify truthfully and with veracity. For a discussion on this topic, see J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW (1947),

> Impeach is a lawyer's word of art which may not be quite clear on first encounter. It really means something like "derogate from credibility." One impeaches a witness, for example by seeking to show that he has a poor reputation for truth and veracity, . . . or is affected by some sort of bias with respect to the present litigation.

Id. at 42.

76. 567 F.2d 885 (9th Cir. 1978).

court was whether the government was required to disclose material evidence relating to the credibility of the government's witness. Here a key government witness was promised prior to trial that all charges against him would be dismissed if he testified for the prosecution.[77] At trial the witness's credibility was attacked. When asked by defense counsel if, in consideration of his testimony, charges against him were to be dropped, he replied in the negative.[78] The prosecution still failed to disclose the prior arrangement with the witness.

The Ninth Circuit Court of Appeals reversed the conviction, stating "the government is obliged to disclose pertinent material evidence favorable to the defense and this applies not only to matters of substance, but to matters relating to the credibility of government witnesses."[79] The *Butler* opinion relied heavily on two prior holdings, *Giglio v. United States*[80] and *Napue v. Illinois*,[81] in which the Supreme Court held that undisclosed arrangements between the government and its key witnesses constituted relevant *Brady* material and nondisclosure of such arrangements was a violation of due process rights. The Ninth Circuit in *Butler* found that the *Giglio* court focused more on the quality of the evidence withheld rather than on the outcome of the case. The *Butler* court, however, settled on a broader and more pragmatic approach, concluding that a new trial should be required whenever the evidence withheld might have reasonably affected the jury's judgment and

77. *Id.* at 886.

78. *Id.* at 887.

79. *Id.* at 888 (quoting United States v. Gerard, 491 F.2d 1300, 1302 (9th Cir. 1974)).

80. 405 U.S. 150 (1972). In *Giglio*, the government failed to disclose a promise made to its key witness (co-conspirator and only witness linking petitioner to the crime of forgery) that he would not be prosecuted if he testified for the government. The government asserted that the witness had received no promises of leniency. *Id.* at 152. The Burger Court found the government's case relied solely on its key witness and his credibility; therefore, such an "agreement" had relevance to the witness's credibility. The court then reversed the conviction and remanded it for further proceedings. *Id.* at 155.

81. 360 U.S. 264 (1959). In *Napue*, a principal state witness, the co-defendant, failed to testify that he would receive consideration for his testimony. The prosecutor failed to correct that testimony. The Supreme Court disagreed with the lower court that there was no constitutional infirmity by virtue of the false statement. *Id.* at 268. The Court held that the failure of the prosecutor to correct the testimony of the witness, which he knew to be false, was a violation of petitioner's due process rights. *Id.* at 272.

not only when the evidence might have only altered the jury's verdict.[82]

The *Butler* decision is not only in harmony with the *Brady* requirements, but it rearticulates the concerns expressed in *Giglio* and *Napue*.[83] *Butler* made it clear that the prosecutor has a duty to disclose any agreement it has with its witnesses.[84] Such information, the court felt, is critical to enable the judge or jury to effectively assess a witness's credibility, particularly when conviction hinges upon testimonial evidence. This is particularly true since the trier of fact, in weighing credibility, not only relies upon the truthfulness of the witness's testimony but also upon any knowledge of any circumstances surrounding that witness's testimony.[85] Absent the facts necessary to make an effective assessment of a witness's credibility, a fair trial is impossible.

E. *Circumstances Where Failure to Disclose is Excused*

Although *Brady* and its progeny have provided explicit standards to govern the prosecution's obligation to disclose exculpatory evidence (except in regard to materiality), courts have indicated a limited number of instances in which this obligation is excusable. The first such instance occurs when the suppressed evidence is not within the government's control. In this case the prosecution is not required to divulge its existence.

In *United States v. Flores*,[86] the defendant was convicted of conspiracy to possess and distribute a narcotic drug. The defense, for the purpose of impeaching the government's informant, requested that the government disclose the names and numbers of the prior

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82. *Butler*, 567 F.2d at 890.

83. "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." *Napue*, 360 U.S. at 269.

84. *But see* United States v. Navarro, 737 F.2d 625 (7th Cir. 1984) (mere speculation about the undisclosed agreement is not sufficient to require reversal for a new trial).

85. *See* People v. Savvides, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854, 154 N.Y.S.2d 885, 887 (1956), where the New York Court of Appeals concluded that

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. . . . The district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

86. 540 F.2d 432 (9th Cir. 1976).

cases in which the informant had previously testified on behalf of the government. The informant had testified in almost one hundred cases, most of which were in Mexico. Therefore, the names and numbers of these cases were not within the custody and control of the government. On defendant's appeal, the Ninth Circuit Court of Appeals, affirming the lower court decision, held that the government was not required to furnish information which was not within its custody and control.[87]

A second exception excuses the prosecution from furnishing material or information of which it is reasonably unaware. In *United States v. Quinn*,[88] the prosecutor stated that a government witness had no criminal convictions and that he had no knowledge of any arrest record. Two weeks later, it was announced that this witness had been indicted for stock fraud under a sealed indictment which had not been made available at the time. In response to appellant's contention that the prosecution had willfully failed to reveal this information, the court stated

> [A]ppellants take the completely untenable position that "knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor" and that "he [the New York prosecutor] must be deemed to have had constructive knowledge of this evidence . . . ." The Department of Justice alone has thousands of employees in the fifty States of the Union. Add to these many more thousands of employees of "any part of the government." Appellants' argument can be disposed of on a "reductio ad absurdum" basis.[89]

A third exception to *Brady* states that the prosecution is not obligated to disclose evidence or witnesses already available to the defendant.[90] In *United States v. Craig*,[91] the defendant claimed a

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87. *Id.* at 437-38. "*Brady* only requires that the government supply a defendant with exculpatory information of which it is aware . . . . [T]he government stated that the information sought was not within its custody or control." *Id.* at 438.

88. 445 F.2d 940 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971).

89. *Id.* at 944 (citations omitted) (quoting in part Appellants' Brief).

90. *See, e.g.*, United States v. Brown, 628 F.2d 471 (1980).

> Regardless of whether the request was specific or general, and regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the court is his lack of reasonable diligence, the defendant has no *Brady* claim.

Id. at 473. *See also* United States v. Shelton, 588 F.2d 1242 (9th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); United States v. Steward, 513 F.2d 957 (2d Cir. 1975).

91. 573 F.2d 455 (7th Cir. 1977).

violation of his due process rights because the government did not make available the pretrial declarations of several Illinois state senators. The defendant contended that the contents of these declarations would have, in addition to other uses, aided in the cross examination of a government witness. The circuit court, while recognizing the potential value of these declarations to the defendant, held that since the defendant was able to obtain these declarations prior to trial without the assistance of the prosecution, and was indeed aware of their existence, the prosecution's refusal to disclose these declarations did not invoke the *Brady* rule.[92] In doing so, the court reiterated the holding of *Agurs* that exculpatory evidence, to come within the *Brady* ruling, must be unknown to the defendant.

A final exception to the *Brady* rule pertains to evidence which has been lost by state officials.[93] In *United States v. Johnston,*[94] the defendant appealed his conviction claiming that the government had improperly suppressed the results of a breathalyzer test which would have proved that, during the bank robbery, he had been voluntarily intoxicated and therefore lacked the specific intent to commit the offense. The prosecution claimed the test results had been lost and asserted that it had supplied the defense with the name of the officer who had administered the test. Since the prosecution provided the defense with equal, albeit indirect, access to the test results, the defendant was in no worse position than the prosecution. The Eighth Circuit Court of Appeals held that where evidence has been lost while in the custody of the police department, the government is deemed to have not suppressed that evidence.[95]

While the *Johnston* court made it clear that the government is not deemed to have suppressed evidence when that evidence has

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92. The record indicates that Walker [defendant] was aware prior to the trial of the testimonial evidence which the nine senators were capable of furnishing and which he claimed at trial was suppressed . . . . Walker was offered the opportunity by the district judge to subpoena the senators and to conduct a hearing outside the presence of the jury to ascertain the information he sought. Walker declined the district court's offer.

Id. at 492.

93. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

94. 543 F.2d 55 (8th Cir. 1976).

95. "The government cannot be held to have suppressed *Brady* material, where the material sought was unavailable to either the government or the defendant because of its loss by state police officials." *Id.* at 57.

been lost,[96] the court failed to distinguish between evidence lost accidentally and evidence that is deliberately lost. Absent a distinction between these two situations, the former may ultimately lead to the latter.[97]

III. Time to Disclose

Another question not answered in *Brady* is at what point must the prosecution deliver to the defense potentially exculpatory information. Several lower courts have stated that the appropriate time is prior to trial,[98] while others have suggested that the proper time for such disclosure is only at the trial.[99] The United States District Court for the Eastern District of Louisiana was one of the first to discuss this issue in depth. In *United States v. Partin*,[100] the prosecution contended that the proper time to make a *Brady* disclosure was only after it had rested its case. The court, relying on a previous Fifth Circuit Court of Appeals opinion,[101] held that disclosure should be made to the defense far enough in advance of trial to allow sufficient time for the defense to evaluate the disclosed material and prepare its presentation.[102] The court recognized that if this were not the rule, a trial might have to be inter-

96. For a more recent holding, see California v. Trombetta, 105 S. Ct. 2548 (1984), where the Court concluded that the due process clause of the fourteenth amendment does not require law enforcement agencies to preserve breath samples in order to introduce breath analysis at trial.

97. Finally, once the government has stated that it has complied with all its obligations under the *Brady* rules, the courts will not require it to supply the defense with all the material in its possession. *See* United States v. Azzarelli Constr. Co., 459 F. Supp. 146 (E.D. Ill. 1978) (all the evidence in the government's possession need not be given to defendants); *see also* United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980) ("Truth, justice and the American way do not, however, require the government to discover and develop the defendant's entire defense.").

98. *See, e.g.*, United States v. Kaplan, 554 F.2d 577, 578 (3d Cir. 1977); United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir.), *cert. denied*, 428 U.S. 924 (1976); Grant v. Alldredge, 498 F.2d 376, 383 (2d Cir. 1974); Government of Virgin Islands v. Ruiz, 495 F.2d 1175, 1179 (3d Cir. 1974); Williams v. Dutton, 400 F.2d 797, 800-01 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969); 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).

99. *See, e.g.*, United States v. McPartlin, 595 F.2d 1321, 1346 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); United States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976); United States v. Allain, 671 F.2d 248 (7th Cir. 1972); United States v. Moore, 439 F.2d 1107 (6th Cir. 1971); United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965).

100. 320 F. Supp. 275 (E.D. La. 1970).

101. Williams v. Dutton, 400 F.2d 797, 800-01 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969).

102. *Partin*, 320 F. Supp. at 285.

rupted for the defense to make preparations based upon the disclosure. While clearly recognizing the potential dangers inherent in mid-trial disclosure, the *Partin* court failed to offer guidance beyond stating that disclosure must be made "far enough in advance." Such vague terminology was destined to lead to future confusion.

In *United States v. Deutsch*,[103] a New York district court acknowledged and discussed the problems which might result from the production of exculpatory material only at trial. In *Deutsch*, defense counsel properly made pretrial demands for *Brady* material. The prosecution responded by saying that *Brady* imposed no such pretrial obligation of production upon the government.[104] The court, relying on the *Partin* opinion, ordered the prosecution to promptly provide the material, stating that "[i]t should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is given only at trial and that effective implementation of *Brady v. Maryland* must therefore require earlier production in at least some situations."[105] The *Deutsch* court limited its decision to the facts at hand; consequently, a clear standard for when the prosecutor's duty to disclose arises is still lacking.

The Court of Appeals for the District of Columbia Circuit, in *United States v. Pollack*,[106] attempted to elaborate on the question of the appropriate time for disclosure. Here the court recognized the emasculating effects of both late and early disclosure and elected to use a balancing approach.[107] The court concluded that since the defense had been fully apprised, in a timely manner, of the material it requested, the prosecution met the requirements of *Brady*:

> Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the

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103. 373 F. Supp. 289 (S.D.N.Y. 1974).

104. *Id.* at 290.

105. *Id.* The court continued:

> [e]vidence 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 . . . . To allow routinely . . . a "more lenient disclosure burden on the government would drain *Brady* of all vitality."

Id. at 290-91 (quoting United States v. Elmore, 423 F.2d 775, 779 (4th Cir. 1970)).

106. 534 F.2d 974 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976).

107. *Id.* at 973-75.

> preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure . . . . Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions.[108]

Although the *Pollack* court's balancing approach seems to offer an objective criterion, it does require a case-by-case determination. The net result is the opposite of what the courts had hoped to avoid, i.e., the unnecessary use of court time.

While the *Partin, Deutsch* and *Pollack* courts suggest that early disclosure is preferable and conducive to fairness, other authorities have disagreed, suggesting that *Brady* material need not be produced until trial.

In *United States v. McPartlin*,[109] the prosecution waited until early in the trial to reveal *Brady* material. The Seventh Circuit Court of Appeals, in dealing with this issue, attempted to formulate a general standard, stating:

> There is nothing in *Brady* or *Agurs* to require that such disclosures be made before trial, and we have explicitly held this in the past . . . . Thus, even though evidence might be material or might create a reasonable doubt as to guilt, Due Process, albeit requiring eventual disclosure, does not require that in all instances this disclosure must occur before trial. The appropriate standard to be applied in a case such as this is whether the disclosure came so late as to prevent the defendant from receiving a fair trial.[110]

Four years later, the Third Circuit Court of Appeals also adopted this position. In *United States v. Higgs*,[111] the dispositive question before the court was at what time disclosure was necessary to ensure a defendant a fair trial. Here the *Brady* material sought was to be used to challenge the credibility of the prosecution's witnesses. The prosecution refused to furnish this informa-

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108. *Id.*

109. 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

110. *Id.* at 1346. *See also* United States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) ("We reiterate that *Brady* does not require pretrial disclosure. As long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of the evidence, Due Process is satisfied.").

111. 713 F.2d 39 (3d Cir. 1983), *cert. denied sub nom.* Kemp v. United States, 104 S. Ct. 725 (1984).

tion before trial because of threats made against these witnesses. The district court held that this information should have been supplied to defense counsel and barred the witnesses from testifying.[112]

On appeal, the government contended that the district court abused its discretion in requiring the material to be disclosed a week before trial. The Third Circuit agreed, holding that disclosure on the day of testimony was sufficient for its "effective use" by the defense and met the *Brady* requirements.[113]

In a contrary finding, the Eighth Circuit Court of Appeals in *United States v. Olson*[114] examined whether the prosecutor's disclosure was made so late in the trial that the defendant could not benefit from the evidence in the absence of a continuance. Here the prosecution did not disclose material evidence until the final stages of the trial. After learning of the disclosure, the defense requested a continuance which was denied by the trial court. On appeal, the circuit court focused its attention on whether defense counsel was given sufficient time to examine and effectively utilize the material. The court concluded that the defense had not been given such an opportunity and therefore had been materially prejudiced by the late disclosure. The court further held that the district court's denial of a "continuance has the same prejudicial impact upon due process" as does no disclosure at all, and is thus improper.[115]

Most recently, the Third Circuit Court of Appeals again addressed the timing issue. In *United States v. Starusko*,[116] the district court, at the request of the defense, issued a disclosure order to the prosecution requiring it to deliver all exculpatory material evidence relating to the credibility of the government's witnesses. The order provided that in the event disclosure was not made within two weeks of the commencement of trial, the witnesses would be barred from testifying. The prosecution failed to comply with this order within the prescribed time, and the defense filed a motion requesting that the witnesses be barred from testifying. The motion was granted.[117]

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112. *Id.* at 40.
113. *Id.* For a similar holding, see United States v. Peters, 732 F.2d 1004 (1st Cir. 1984).
114. 697 F.2d 273 (8th Cir. 1983).
115. *Id.* at 275-76.
116. 729 F.2d 256 (3d Cir. 1984).
117. *Id.* at 256-57.

On appeal, the prosecution argued that the material requested was not *Brady* material and noncompliance was therefore not prejudical to the defense.[118] The prosecution further argued that the district court had no authority to require disclosure prior to trial. The appellate court held that the material was exculpatory and fell within *Brady*. However, the court concluded that the defendant suffered no prejudicial harm from the prosecution's failure to comply with the lower court's order since the material had been disclosed sufficiently in advance of the trial to enable the defense to effectively utilize it.[119]

In finding that the lower court had abused its discretion in this instance, the *Starusko* court noted that: (l) it is the district court, and not the government, that has the authority to decide when *Brady* material should be produced; (2) the precise time for the production of *Brady* material is governed by existing case law; and (3) when the government feels that the material requested is not exculpatory or should not be produced at the time ordered, it should submit its objections to the trial judge for a determination. In its opinion, the court soundly condemned tardy disclosure and emphasized the importance of prompt and timely disclosure.[120]

While the *Starusko* decision reaffirmed previously discussed case law by condemning late disclosure, its major significance lies in its pronouncement that it is the district court, and not the prosecution, which decides when *Brady* material must be released. Absent an abuse of discretion, the government must comply with the court's decision. In making this determination, the court refused to overlook the conduct of the prosecutor, saying "Some prosecutors continue to play games with both the district courts and defense counsel, unmindful of their ethical obligations as 'ministers of justice.' "[121]

As in other cases, the *Starusko* court failed to clearly set forth a specific time for disclosure. It did, however, provide serious judicial warnings to prosecutors that they must make timely and prompt disclosure when ordered by the courts.[122] The court rejected the theory that the United States Attorney was immunized from disciplinary action, stating that the judiciary must take the necessary

118. *Id.* at 260.
119. *Id.* at 263.
120. *Id.* at 263-64.
121. *Id.* at 264.
122. *Id.* at 264-65.

steps to insure justice.[123] The court concluded that the court of appeals and the district court must monitor the future conduct of government prosecutors for the benefit of justice.[124] *Starusko* presented the court with an opportunity to do more than summarily reverse a district court decision. At the very least, the *Starusko* court affirmatively reminded prosecutors that it is an absolute condition of their office to disclose exculpatory material to the defense counsel in a timely manner.[125]

The *Starusko* opinion, by using existing case law as a determinant of appropriate timing for disclosure, offered at best an ambiguous standard. In doing so, it reemphasized the complexities of this area of law. The courts have been severely split on this issue and an effective analysis has yet to be offered. In assessing this issue, some courts have focused on factors such as allowing sufficient time for the evaluation, preparation and presentation of material by the defense,[126] while others have paid more attention to the prejudicial impact of late disclosure on the rights of the accused.[127] Still others have attached primary importance to the time needed for the effective use of the material sought.[128] In analyzing these factors on a case-by-case basis, an effective use methodology may be vaguely discernible, but not wholly perspicuous. Overall the courts remain split on the issue of when disclosure is required, but all agree that a critical issue is whether the delayed disclosure had prejudicial impact on the defendant.[129] Although neither *Brady* nor *Agurs* require discovery prior to trial, fairness dictates that the appropriate time to disclose exculpatory material is during pretrial discovery to allow preparation of all necessary evidence.

IV. Conclusion

In *Brady*, the Warren Court expanded the principle of *Mooney* that a defendant is entitled to a fair trial by holding that suppres-

123. *Id.* at 264.
124. *Id.* at 265.
125. *Id.* at 261.
126. *See* United States v. Pollack, 534 F.2d 964 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); 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).
127. *See* United States v. Olson, 697 F.2d 273 (8th Cir. 1983); United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980).
128. *See* United States v. Higgs, 713 F.2d 39 (3d Cir. 1983).
129. *See* United States v. Starusko, 729 F.2d 256 (3d Cir. 1984).

sion by the prosecution of evidence favorable to the accused after a defense request is a violation of due process.[130] Although it failed to go further than to enunciate this principle, *Brady* imposed at least a minimum prosecutorial obligation to insure fairness in a criminal trial. However, it did not create a general constitutional right to discovery in a criminal case. *Brady* imposed only a general standard of prosecutorial obligation, and thus left prosecutors uncertain of their obligations in the absence of a request.

While *Agurs* extended *Brady* by articulating situations in which to apply *Brady*, its broad definition of materiality and its failure to dictate when exculpatory disclosures must be made seriously weakened the decision. Years later, the *McDowell* and *Oxman* courts attempted to modify the materiality standards and state them in more precise language, but did little more than shape the basic foundation laid down by the Warren Court. The *Starusko* court clearly recognized all of the problems left unanswered by *Brady* and *Agurs*, and reaffirmed the necessity of prosecutorial compliance. Neither *Starusko* nor *Oxman* represent a significant advance in the clarification of *Brady*, but they do serve as a clear message that prosecutorial noncompliance will no longer be tolerated.[131]

The *Agurs* standards are replete with vague definitions of materiality requiring constant judicial clarification,[132] and have resulted in a plethora of suppression cases coming before the appellate courts. These standards have been additionally weakened because they are not easily enforceable.

Accomplishing the task of insuring that the accused receives a fair trial requires that the prosecution and the lower courts act

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130. The court had previously held that

> [i]f the acts or omission of a prosecuting attorney "have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the prosecuting attorney may be regarded as *resulting* in a denial of due process of law.

Mooney v. Holohan, 294 U.S. 103, 112 (1935) (quoting brief of the Attorney General).

131. "What we can no longer tolerate is the prosecutor's guess before trial that the evidence after trial will not prove to have been material and the consequent decision to conceal it even from the trial court." United States v. Oxman, 740 F.2d 1298, 1314 (3d Cir. 1984).

132. Federal appellate courts have been burdened by an obligation to make an independent review of lower court findings on the issue of what qualifies as exculpatory material under *Brady*. The de novo review is necessary because the Supreme Court has not yet provided precise materiality guidelines for prosecutors.

with a mature understanding of the need for procedural fairness.[133] The standard of materiality developed in *Agurs* does not safeguard against convictions of the innocent nor does it shield against prosecutorial avoidance. However, *Brady* and *Agurs* do demonstrate that the fifth and fourteenth amendments provide safeguards regarding disclosure of exculpatory materials, and that this constitutional protection must be more carefully formulated in order to achieve procedural fairness.[134] Without this protection, an excessive risk remains that an unfair trial will prevail, ultimately resulting in a loss of liberty.

What is needed is a clear measure of materiality—one that can be easily interpreted into fair and lenient standards. Hopefully, in attempting to clarify these standards, courts will remember that the Constitution requires that the defendant receive a fair trial. Beyond this heightened emphasis on the materiality standard and the proper timing of disclosure lies a national concern that the integrity of the criminal justice system be preserved. Nonetheless, it is crucial to the effective implementation of *Brady* that materiality be clearly defined and the timing of disclosure be fair. Absent a suitable standard of materiality and a consensus as to the proper timing of disclosures, both the prosecution and the defense are handicapped.

Under the *Brady* ruling, "full disclosure" by the prosecution is not yet required. "Full disclosure," however, would bring us closer to achieving fundamental fairness, which is the goal of our criminal justice system.[135]

In one context or the other, judges have been analyzing the im-

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133. In Smith v. Phillips, 455 U.S. 209 (1982), Justice Rehnquist said that due process simply means "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 215. Clearly Justice Rehnquist was referring not only to the avoidance of suppressed evidence and the rectification of such incidents if they should take place, but also to the necessity of a fair trial.

134. "Society wins not only when the guilty are convicted but when criminal trials are fair. . . ." *Brady*, 373 U.S. at 87.

135. Chief Justice Burger has stated:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . .

United States v. Nixon, 418 U.S. 683, 709 (1974).

portance of disclosure of exculpatory material since 1807.[136] Despite these analyses, the cases have provided a false resolution to the problems since they deal only with the symptoms and not the real cause, i.e., enforcement of the duty to disclose. While it is undoubtedly true that the prosecution must vigorously represent the government, the prosecutor cannot forget his special obligation as an officer of the court,[137] which is to seek out the truth so that the trier of fact may arrive at a conclusion based on all the relevant evidence. Even assuming that the Third Circuit Court of Appeals has intimidated the prosecution into making more timely disclosures, the problem remains in having evidence emerge from the secret files of the government. Appellate courts must now direct their attention to implementing measures strictly enforcing the *Brady* rule in order to eliminate all disclosure problems, making it clear that the courts will no longer excuse the prosecution's games.

It is difficult to predict the number of disclosure cases that courts will continue to hear. One can only hope that both the prosecutor and the defense will come to terms with the basic concepts of fairness and equity so that the criminal procedure system will not continue to be "haunted by the ghost of the innocent man convicted."[138] The critical point is that the courts must properly recognize the need for fairness so that the trier of fact can hear all relevant evidence from both sides and thus come to a fair verdict, one more properly consistent with the goals of the Constitution.[139]

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136. Brennan, *supra* note 3, at 286.

137. "The function of a prosecuting attorney is to prosecute, to act as accuser, to be a partisan, to present the evidence on one side of the case. He has no power to adjudge, to sentence, or, by his order, to deprive anyone of life, liberty or property. He is not a part of the tribunal but merely a pleader before the tribunal. The court is the tribunal.

Mooney, 294 U.S. at 108.

138. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

139. "[I]t is immaterial who brings forth the evidence; what is important is that the full story be developed." Pye, *supra* note 5, at 940.