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People v. Ruthford: The Prosecution's Duty to Disclose

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PEOPLE V. RUTHFORD: THE PROSECUTION'S DUTY TO DISCLOSE

The origin of the principle that the deliberate suppression of evidence favorable to the accused by the prosecution constitutes a denial of due process can be traced back to the case of *Mooney v. Holohan*.[1] Since that decision in 1935, the United States Supreme Court has expanded on the above principle but has yet to develop a comprehensive guideline with respect to the constitutional duty of the prosecution to disclose evidence favorable to the criminal defendant. Absent such a guideline, other courts have evolved their own standards, usually in a piecemeal fashion.[2]

This Comment will outline the federal constitutional development of the prosecution's duty to disclose. It will then examine the current status of this prosecutorial duty in California in light of the recent California Supreme Court decision in *People v. Ruthford*.[3] Finally, this Comment will undertake the examination of an area which has not yet been fully analyzed by the courts, namely whether an inquiry into the motive of the prosecution for withholding evidence should be conducted when determining the effect on a conviction of any failure to disclose.

I. FEDERAL CONSTITUTIONAL STANDARDS

In *Mooney v. Holohan*, the United States Supreme Court held that, where the prosecution presents testimony known to be perjured, the criminally accused is denied a fair trial.[4] The Court has also reversed convictions, on due process grounds, in cases where the prosecution either knowingly suppressed evidence favorable to the accused[5] or had misrepresented evidence at trial.[6]

1. 29 U.S. 103 (1935). Preceding the *Mooney* decision were a number of state cases dealing with the prosecution's duty of disclosure. *See e.g.*, Fincher v. State, 58 Ala. 215 (1877); State v. Belland, 59 Mont. 540, 197 P. 841 (1921); State v. Bethune, 104 S.C. 353, 89 S.E. 153 (1916).

2. *See, e.g.*, Annot., 34 A.L.R.3d 16 (1970). *See also* Comment, *Brady v. Maryland and the Prosecution's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972) [hereinafter cited as Comment, *Brady v. Maryland*].

3. 14 Cal. 3d 399, 534 P.2d 1341, 121 Cal. Rptr. 261 (1975).

4. 29 U.S. at 103, 109, 111.

5. *See* Pyle v. Kansas, 317 U.S. 213, 216 (1942).

6. *See* Miller v. Pate, 386 U.S. 1 (1967).

For example, in *Napue v. Illinois*[7] it was held that even where the prosecution has not deliberately presented false evidence, its failure to correct testimony known to be false was ground for a new trial. In so holding, the *Napue* Court stated that a reversal of the conviction is required if the false testimony would have had an effect on the outcome of the trial.[8]

The principle that emerges from *Mooney* and its progeny is that the prosecution will be held accountable, as a matter of due process, for its knowing suppression, misrepresentation, or failure to correct material evidence.

A. The *Brady* Rule and Its Subsequent Interpretation by the Court

In *Brady v. Maryland*,[9] the defendant petitioner was convicted of homicide and sentenced to death. His companion, who was tried separately, had admitted the actual killing in an extrajudicial statement.[10] The statement was withheld from the defendant by the prosecution until he had been sentenced. The Maryland Court of Appeal held that the prosecution's suppression of the statement denied the defendant due process of law and remanded the case for retrial on the question of punishment,[11] but not on the question of guilt.[12] On certiorari, the United States Supreme Court, in an opinion by Justice Douglas, affirmed the decision of the state court, holding that the defendant had not been denied a federal right by the restriction of the retrial to the issue of punishment. The Court further announced the rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

7. 360 U.S. 264, 269 (1959). *Napue* was preceded by Alcorta v. Texas, 355 U.S. 28 (1957). In both cases, the testimonies in question were those of state witnesses.

8. 360 U.S. at 272.

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

10. The statement containing the admission of the actual killing was a retraction of an earlier statement made available to the defense. As the earlier statement also implicated the defendant and thus was entitled to substantial credibility, arguably the prosecution's withholding of the later statement was not deliberately prejudicial to the defendant. Similarly, it could not be said that the prosecution, in presenting the earlier statement, had deceived the court and jury or had permitted false evidence to go uncorrected in violation of the rules set forth in Alcorta v. Texas, 355 U.S. 28 (1957), and Miller v. Pate, 386 U.S. 1 (1967). Apparently it was these reasons which led the *Brady* Court to hold that the good or bad faith of the prosecution was irrelevant.

11. There was a possibility that the sentence could be reduced to life imprisonment upon retrial. 373 U.S. at 88.

12. *Id.* at 85.

either to guilt or to punishment,[13] irrespective of the good faith[14] or bad faith[15] of the prosecution."[16] Justice Douglas considered the *Brady* ruling an extension of *Mooney*[17], and cited the axiom that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair . . . ."[18] The conviction was not reversed because, as the Court read the state court decision, the suppressed evidence would not have been admissible at the original trial on the issue of guilt, therefore the verdict would not have been affected.[19]

Justice White, who concurred in the judgment, took exception to the rule set forth by Justice Douglas above, asserting that

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13. This rule may have originated with Alcorta v. Texas, 355 U.S. 28 (1957). In that case, the defendant had been convicted of first degree murder of his wife and sentenced to death. At trial, the prosecutor's principal witness testified and gave the false impression that he did not have sexual relations with the wife. Had the witness testified truthfully, he would have supported the defendant's contention that he murdered his wife in a fit of passion, after discovering her kissing the witness in her car late one night. The *Alcorta* Court held that the prosecution's failure to correct this testimony known to be false was ground for reversal. The Court reasoned that, had the jury been informed of the true facts and believed them, the defendant might have been found guilty of murder without malice and there would have been no death penalty imposed.

14. In *Napue v. Illinois*, a state witness had denied at trial that he had been offered leniency by the prosecution. The denial was known to the prosecution to be false. The Court held that due process was violated when the prosecution knowingly allowed perjured testimony to go uncorrected, and it was immaterial that the silence of the state representative had not been "the result of guile or a desire to prejudice . . . ." 360 U.S. at 270. *Napue* foreshadowed the *Brady* language that good faith of the prosecution is irrelevant.

15. None of the *Mooney* line of cases ever stated that the bad faith of the prosecution was irrelevant. *See generally* the discussion of *Brady* at notes 104-15 *infra* and accompanying text.

16. 373 U.S. at 87.

17. Insofar as *Brady* holds that the good faith of the prosecution is irrelevant, *id.* at 86, it is an extension of *Mooney*. The *Brady* court explained that the due process principle of *Mooney* was "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* at 87. However, the *Brady* language stating that the prosecution's bad faith is also irrelevant, taken at face value, would detract from the intent of *Mooney* to restrain willful prosecutorial misconduct. Furthermore, under *Brady*, the suppressed evidence is required to be favorable, whereas in *Mooney* and its progeny, the prosecution is held responsible for misrepresenting or suppressing material evidence, whether it is favorable or not. To this extent, *Brady* is more limited than *Mooney*.

For discussions of *Brady* and *Mooney* see A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES—II § 317, at 2-247 to -248 (2d ed. 1971); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 121-23 (1974); Comment, *Brady v. Maryland*, *supra* note 2, at 113-15 (1972); Comment, *The Prosecutor's Constitutional Duty To Reveal Evidence To The Defendant*, 74 YALE L.J. 136 (1964).

18. 373 U.S. at 87.

19. *Id.* at 90. Moreover, because of Maryland's felony murder rule, the defendant could not escape conviction even if he did not commit the actual killing.

the case did not justify a "broad rule of criminal discovery."[20] Justices Harlan and Black dissented on the ground that the case should be remanded to the state court to ascertain the admissibility of evidence at the original trial;[21] they did not disagree with the principle expressed in the majority opinion.

Four years later, in *Giles v. Maryland*,[22] the Court confronted, in the words of Justice Fortas, an "immensely troubling"[23] case, and was unable or unwilling to define the boundaries of the *Brady* rule. The *Giles* case concerned three men convicted of rape. The questions before the Court were whether the prosecution had suppressed exculpatory evidence and/or had knowingly used perjured testimony against the accused. One of the defendants contended that he had been denied knowledge and access to useful evidence by the state's non-disclosure and obstruction. The evidence allegedly suppressed consisted of the following: (1) a recommendation of probation by the complaining witness' juvenile court caseworker a month prior to the alleged rape; (2) the sexual promiscuity and false complaint of another rape by the same witness five weeks after the rape in question; (3) a suicide attempt by the complaining witness and her subsequent confinement to a psychiatric ward; and (4) the complaining witness' commitment to a correctional institution following her release from the psychiatric ward. The defense had not made a pre-trial request for the above evidence.[24]

Given the complex and conflicting array of facts, the Court decided to remand the case but it was unable to agree on a majority opinion or to give any clear-cut instructions to the state court.[25] The plurality opinion of three Justices stated that the prosecution's suppression, if any, did not rise to the level prohibited under the *Mooney* principle.[26] The opinion further recognized but explicitly declined to rule on the broad question "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and [what] degree of prejudice . . . must be shown to make necessary a new trial."[27] The three Justices nevertheless decided to remand

20. *Id.* at 92.
21. *Id.* at 93-94.
22. 386 U.S. 66 (1967).
23. *Id.* at 96.
24. *Id.* at 73.
25. The state court order affirming the conviction was vacated. *Id.* at 82.
26. *Id.* at 73.
27. *Id.* at 74.

because the prosecution might have failed to correct the testimony of police officers which was known to be false.[28]

Justice White disagreed that the case presented a false testimony issue,[29] but he would have remanded to determine if the state had suppressed evidence of nymphomania or mental disturbance of the prosecutrix.[30] Justice Fortas' concurring opinion took the most unequivocal position. In his view, the state owed a constitutional duty not only to correct false testimony, but also to voluntarily disclose "material in its exclusive possession which is exonerative or helpful to the defense."[31] For this reason Justice Fortas felt the *Brady* rule should apply even if the evidence is inadmissible and there is no request for disclosure from the defense.[32]

The dissenting opinion of Justice Harlan, representing the view of four Justices, would have affirmed the conviction, in part for the following reasons: (1) the prosecution had disclosed its own file fully to the defense; and (2) the allegedly suppressed evidence might not be admissible, and had, in any event, no effect on the outcome of the trial.[33] Responding to Justice Fortas, Justice Harlan contended that the broad rule announced in *Brady* was merely dictum,[34] at least to the extent that it departed from the principle set forth in cases following *Mooney*.[35] Justice Harlan asserted that Justice Fortas' expansive reading of *Brady* would

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28. The police officers testified that the prosecution had told them that all three defendants had entered her during the alleged rape. The defense contended that the officers' testimony was perjured. The plurality opinion thought the possibility that false testimony was used raised "questions sufficient to justify avoiding decision of the broad constitutional issues presented." *Id.* at 81. A remand would also avoid "unnecessary constitutional adjudication and minimize federal-state tensions." *Id.* at 82.

29. *Id.* at 82.

30. *Id.* at 96.

31. *Id.* at 101-02.

32. *Id.* at 98, 102.

33. *Id.* at 111-12.

34. *Id.* at 116-17. Note that Justice Harlan had not disagreed with the principle in *Brady* and in fact had espoused a more vigorous application of that principle. *See* text accompanying note 21 *supra*.

35. Justice Harlan stated:

> [The due process] standard is well calculated to prevent the kinds of prosecutorial misconduct which vitiate the very basis of our adversary system, and yet provide a firm line which halts short of broad, constitutionally required, discovery rules.
>
> . . . *Mooney* simply imposes sanctions upon specified forms of prosecutorial misconduct.

386 U.S. at 117-18 (Harlan, J., dissenting).

impose broad discovery rules on the states and "swallow" the more narrow federal rules.

Restricting the Scope of Brady

Decisions subsequent to *Giles* have affirmed the *Brady* rule,[36] although it is clear that there is substantial sentiment in the Supreme Court that *Brady* should not be interpreted broadly, lest it preempt the area of criminal discovery.[37] Indeed, the Court took a step towards restricting the *Brady* rule in *Moore v. Illinois*.[38] In *Moore*, the defense had moved for the prosecution to produce all statements relevant to the litigation. The prosecution thereupon disclosed its entire file to the defense. However, some statements, held by the police, were not turned over to the defense until the post-conviction hearing. The defense argued on appeal that the *Brady* rule should apply even though no specific request for the missing statements had been made. The *Moore* Court rejected this argument and further stated that "[w]e know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."[39] The majority opinion concluded that the allegedly suppressed evidence was not material within the meaning of *Brady*,[40]

36. *See* DeMarco v. United States, 415 U.S. 449 (1974); Moore v. Illinois, 408 U.S. 786 (1972); Giglio v. United States, 405 U.S. 150 (1972).

37. For a discussion of the relationship between *Brady* and pre-trial criminal discovery as a constitutional right see Comment, *Brady v. Maryland*, *supra* note 2, at 117-20, and authorities cited therein.

Although a full discussion of this question is beyond the scope of this Comment, the California cases seem to take the position that there is no constitutional right to pre-trial discovery unless the absence of discovery results in a denial of a fair trial. *See* Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 897 (1968), and authorities cited therein. *See generally* Schatz, *California Criminal Discovery: Eliminating Anachronistic Limitations Imposed on the Defendant*, 9 U.S.F.L. REV. 259 (1974).

38. 408 U.S. 786 (1972). The very complicated facts in *Moore* may be briefly stated as follows. The defendant Moore was convicted of murder on the testimonies of two eyewitnesses and one Mr. Sanders. Sanders testified that two days after the murder, he had talked with a certain person, known to him as Slick, who boasted about the murder, and Sanders identified Moore as that person at trial. Moore was charged with killing his victim shortly after an altercation in a bar. At trial, Moore produced a witness to the altercation who testified that Moore was not the person in the bar.

Prior to trial, the defense had asked for the statements of all witnesses. The prosecution disclosed the statements of all testifying witnesses except for the statement by Sanders. Sanders' statement, and those of other witnesses who did not testify, were not revealed to the defense. Had they been made available, they would have shown that the man identified by Sanders as Slick could not have been Moore. Additionally, a diagram attached to one of the statements indicating the seating arrangement at the bar would cast doubt on the testimony of one of the two eyewitnesses to the crime.

39. *Id.* at 795.

40. The Court felt that the missing statements related only to the misidentification of

and the conviction was affirmed.[41] Although some language in the majority opinion in *Moore* suggests that the defense must make a specific request before the *Brady* rule can be applied, that language is arguably only dictum since the *Moore* decision turned on the finding that the missing statements were not material. Thus it is an open question whether a new trial would be necessary in the absence of a specific request, if the suppressed evidence is material.[42]

The dissenting opinion in *Moore* stated that the conviction should be reversed because the prosecution had knowingly suppressed exculpatory material evidence and had knowingly permitted false evidence to go uncorrected.[43] The three dissenting Justices felt that it was constitutionally incumbent on the prosecution to disclose the statements since they were held by the police officers assisting the prosecution at trial.[44]

To some extent, recent decisions of the United States Supreme Court such as *Moore* and *Giglio v. Maryland*[45] have answered the broad questions raised by the plurality opinion in *Giles*.[46] It appears that, before a conviction will be reversed under

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Slick and did not challenge the positive identification of Moore as the killer by the two eyewitnesses at trial. In light of all the facts, the Court believed that the suppressed evidence could not affect the verdict. *Id.* at 797. *See generally* note 56 *infra*.

41. The defendant's death sentence was reversed on other grounds. 408 U.S. at 800.

42. In *Brady*, the defense had made a specific request for certain evidence, 373 U.S. at 84, and on the facts of that case, the *Brady* rule can be construed to require a specific request. The question whether a general request for evidence would also satisfy the *Brady* requirement was not before the Court.

In *Moore*, the Court reaffirmed the importance of the specific request. 408 U.S. at 794. Since the dissent in *Moore* contended that there was already a request by the defense, *id.* at 807-08, and that the withheld evidence was material, it also did not reach the question whether a general or a specific request is mandated by *Brady* in all cases. *See* Comment, *Brady v. Maryland*, *supra* note 2, at 116 & n.18.

43. 408 U.S. at 808.

44. *Id.* at 810. The dissent pointed out that a police lieutenant, who had a file containing all the missing statements, was assisting the prosecution and sat at the prosecutor's table at trial. *Id.* at 809.

45. 405 U.S. 150 (1972).

46. In one respect, though, *Moore* is inconsistent with *Giglio*. In *Giglio*, a government attorney had made an unauthorized promise of immunity to the principal state witness to induce his testimony. The promise was not disclosed either to the defense or to the prosecuting trial attorney until the defendant had been convicted. The *Giglio* Court held that the suppression of the promise made to the witness by one attorney was attributable to the entire prosecution office; the good faith of the prosecuting attorney at trial was no excuse. Hence, the conviction was reversed. But in *Moore*, the majority decided that the prosecution was not responsible for the undisclosed statements held by the police.

It is possible to distinguish *Giglio* from *Moore* on the basis that, in the former case, it was an attorney of the government who was held accountable for the supression of

the *Brady* rule, the defense must meet three conditions. First, the suppressed evidence must be admissible.[47] Second, the defense should make a general and perhaps even a specific request for that evidence.[48] Third, a new trial will be granted only if the suppressed evidence could "in any reasonable likelihood have affected the judgment of the jury."[49]

In summary, the constitutional rule may be thus stated:[50] the suppression by the prosecution of evidence favorable to an accused upon specific request[51] violates due process and requires a new trial where the evidence is admissible and material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution, if the evidence might have affected the outcome of the trial.

B. Weaknesses of the *Brady* Rule

If the above rule represents the current position of the United States Supreme Court, it has left various criticisms of *Brady* and its progeny unanswered.[52] Commentators have noted that the *Brady*

evidence. However, this is hardly a convincing distinction, and its reasoning is contrary to the cases cited by the *Moore* dissent (S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972), Santobello v. New York, 404 U.S. 257 (1971), and Barker v. Wingo, 407 U.S. 514 (1972)).

47. The conclusion that the admissibility of evidence is a requisite is inferred from the *Brady* opinion wherein the Court discussed the reasons why the evidence was not admissible as to punishment, 373 U.S. at 85. *See also* the discussion of admissibility in the plurality opinion in *Giles*, 386 U.S. at 75-76, and the separate opinion of Justice White in *Giles*, 386 U.S. at 82-86.

It is true, however, that the plurality opinion in *Giles* raised the question "whether the prosecution's constitutional duty to disclose extends to all evidence admissible . . .," but no answer was given. *Id.* at 74. Justice Fortas' opinion in the same case asserted that the prosecution's disclosure should include inadmissible evidence. *Id.* at 98, 102.

Since the *Giles* opinions are inconclusive on the issue of admissibility, the inference from *Brady* that the withheld evidence must be admissible should still hold true. This inference may be supported by the criterion that the evidence "may have had an effect on the outcome of *trial*." Napue v. Illinois, 360 U.S. 264, 272 (1959) (emphasis added). *See* text accompanying note 8 *supra*. However the admissibility issue has not yet been directly resolved by the United States Supreme Court.

48. *See* note 40 *supra* and accompanying text.

49. Napue v. Illinois, 360 U.S. 264, 271 (1959), *cited in* Giglio v. United States, 405 U.S. 150, 154 (1972). The *Giglio* opinion states that due process does not automatically require a new trial whenever "the combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Id.* at 154, *quoting* United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968). A finding of materiality of the evidence is still required.

50. For important changes of the constitutional rule brought about by the recent decision of *United States v. Agurs* see discussion at text accompanying notes 125-29 *infra*.

51. *See* text accompanying notes 38-42 *supra*.

52. Among some of the unresolved issues are the relation of *Brady* to the rules of

rule is not self-implementing in the sense that it conditions the prosecution's duty to disclose upon a request by the defense.[53] Critics have argued that the request requirement imposes an unrealistic burden on the defense, which cannot ask for evidence it does not know exists.[54] Furthermore, under *Moore*, the prosecution does not have to produce all police investigatory work or take responsibility for the police file. Thus, a loophole exists for the withholding of evidence. On the other hand, if the prosecution in good faith fails to disclose evidence it believes immaterial and subsequently finds itself in error, a hard won conviction may be put in jeopardy.[55]

The more fundamental questions, however, concern the criteria for determining the materiality of withheld evidence and the likelihood of a change in the outcome of the trial were the suppressed evidence made available. Here, in practice, the criteria for materiality and "changing the verdict" are likely to be the same, since by definition immaterial evidence would not change the verdict and there will be no new trial unless the suppressed evidence is material.[56] Functionally, both criteria some-

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criminal discovery, the timing of the prosecution's disclosure of evidence, and a definitive standard of materiality. *See generally* Comment, *Brady v. Maryland*, *supra* note 2. A full discussion of the implications of *Brady* lies outside the scope of the Comment.

53. *See* authorities cited in Annot., 34 A.L.R.3d 16, 28 (1970). The cases that dispense with the request requirement include: Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967); Barbee v. Warden, Me. Penitentiary, 331 F.2d 842 (4th Cir. 1964); United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955).

In United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972), the Court of Appeals for the Ninth Circuit also eliminated the request requirement, holding that due process can be denied simply by failure to disclose where the undisclosed evidence prevented the accused from receiving a constitutionally guaranteed fair trial. The fact that there was no specific request, that a diligent defense counsel could have discovered the evidence on his own, and that the prosecution did not act in bad faith, was found not to be conclusive.

54. *See* Giles v. Maryland, 386 U.S. 66, 102 (1967) (Fortas, J., concurring); Barbee v. Warden, Me. Penitentiary, 331 F.2d 842 (4th Cir. 1964); Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963); People v. Moore, 42 Ill. 2d 73, 89-90, 246 N.E.2d 299, 306 (1969) (Schaefer, J., dissenting).

55. One possible solution of this dilemma is for the prosecution to present the evidence in question to the trial court in camera for a determination of materiality. This view was expressed by the state court in *Giles* and noted in the plurality opinion without comment. 386 U.S. at 80. *See also* Comment, *Brady v. Maryland*, *supra* note 2, at 120, and cases cited therein; *The Ninth Circuit Review–Criminal Law and Procedure*, 20 HASTINGS L.J. 949, 974 (1969) [hereinafter cited as *Ninth Circuit Review*].

56. This would seem to be the logical conclusion in light of the "changing the verdict" language in *Napue*, *Giglio*, and *Moore*. The California Supreme Court has stated:

> [I]f the defense has failed to establish that the suppressed evidence is material, the court may reach the conclusion that

times merely serve to rationalize the conclusion of the reviewing court regarding the probability of a defendant's guilt in light of all the facts.[57] The United States Supreme Court thus far has not elaborated a standard, but if the *Moore* case is indicative of a trend, the threshold of materiality will be high.

C. *United States v. Keogh*: A Comprehensive Analysis of the Duty of Disclosure

Some of the lower federal courts, notably the court in *United States v. Keogh*,[58] have attempted a more comprehensive analysis

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> its nondisclosure did not affect the fairness of the trial and therefore did not constitute a denial of due process. Conversely, if the defense has established that the suppressed evidence is material, the court may then conclude that there has been a denial of due process, that the conviction should be reversed and that the cause be remanded for a new trial at which defendant will be able to present his defense with full acess to the material information.

People v. Hitch, 12 Cal. 3d 641, 647, 527 P.2d 361, 365, 117 Cal. Rptr. 9, 13 (1974). However, materiality may also be a function of prosecutorial misconduct. *See* the discussion of United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) at text accompanying notes 58-69 *infra*.

It should be emphasized that, at least in some cases, courts have found the withheld evidence to be material within the meaning of the "changing the verdict" test, yet they would not reverse the defendant's conviction if they conclude that the prosecution's error is harmless beyond reasonable doubt under Chapman v. California, 386 U.S. 18, 24 (1967). As an alternative to the *Chapman* test, courts may decline to reverse the conviction where the evidence against the accused is "overwhelming." Harrington v. California, 395 U.S. 250, 254 (1969). For example, the court in Lessard v. Dickson, 394 F.2d 88 (9th Cir. 1968), probably had the "overwhelming evidence" notion in mind when it stated:

> [The suppressed testimony], if it had been brought out on the trial, *would have materiality*, but it could hardly be regarded as being able to have much force against the inexorable array of incriminating circumstances with which [the defendant] was surrounded.

Id. at 91 (emphasis added).

For a clarification of the conceptual distinction between materiality and the weighing of prejudice to the accused after materiality has been found see the discussion of *People v. Ruthford* at text accompanying notes 92-96 *infra*.

57. For a criticism of cases which first determine the defendant's probable guilt and then rationalize their decisions in terms of materiality see Comment, *Brady v. Maryland*, *supra* note 2, at 125-31.

58. 391 F.2d 138 (2d Cir. 1968). The facts in *Keogh* are as follows. The defendant *Keogh* was charged with conspiring to obstruct justice and with accepting a bribe. At trial, the government produced corroborated testimonies that the bribe was delivered to Keogh, but the money allegedly received by him was never located. His defense was that he was the victim of a frame-up, and that the money had actually been pocketed by the courier in the bribery scheme. Keogh was convicted and served his term.

Keogh then petitioned to the trial court for a writ of error coram nobis; the petition

of the prosecution's duty to disclose. The *Keogh* case will be discussed here in order to highlight the issues involved in *People v. Ruthford*, discussed subsequently.

In *Keogh*, the court classified the circumstances in which suppression of evidence is at issue into three categories. The first category involves the prosecution's "deliberate" suppression, either in the sense that there is willful suppression or misrepresentation of evidence, or there has been inexcusable neglect in that the value of the undisclosed evidence could not have escaped the prosecution's attention.[59] Almost by definition, the evidence in cases of the first category is highly material.[60] Though the *Keogh* court did not so state, it may be safely assumed that where this type of deliberate suppression takes place, a request for evidence by the defense would not be a prerequisite to a new trial.

In the second category of cases, the value of the undisclosed evidence to the defense is not necessarily obvious to the prosecution.[61] Here a request for evidence is relevant because "[i]t serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check of his files."[62] The *Keogh* opinion implies that in this type of situation there are two possible results: (1) if there has not

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was denied. On appeal, one of the issues involved whether the prosecution had knowingly withheld the records of the bank account and other financial transactions of the courier. The defense argued that those records would have established that the courier had kept the alleged bribe in his bank and never delivered it to the defendant.

The *Keogh* court stated that the suppressed evidence might have been used effectively by the defense for cross-examination purposes, and that it might also have significantly altered the trial strategy of the defendant. As the records before the court were not sufficient for a determination of the facts and the materiality of the evidence, the *Keogh* court remanded the case for an evidentiary hearing. The denial of the writ coram nobis was affirmed.

Judge Friendly, author of the *Keogh* opinion, has been identified as the leading proponent of a multiple standard of materiality. Comment, *Brady v. Maryland*, *supra* note 2, at 130. *Keogh* is said to have contributed significantly to the development of the supression-of-evidence doctrine. Annot., 34 A.L.R.3d 16, 27 (1970). However, the *Keogh* case is selected for comment here primarily to provide a perspective and comparison to the California decisions discussed below.

59. 391 F.2d at 146-47. Though the *Keogh* opinion did not employ the term "inexcusable neglect" specifically, it seems clear from the discussion that the court included that type of situation in the first category. This is demonstrated by the court's statement that "deliberate" suppression includes "a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention." *Id.* at 147.

60. *Id.* This notion in *Keogh* is cited by the dissent in *Moore*, 408 U.S. at 806 n.4, to buttress the argument holding the withheld evidence material.

61. 391 F.2d at 147.

62. *Id.*

been a request by the defense for the undisclosed evidence, a new trial will not be granted; and (2) if a request has been made but it is not honored by the prosecution, the court will order a new trial.[63] The first result is justified only if the evidence is of marginal value and the defense has not requested it. The second result, however, is of debatable merit. If the evidence is obviously immaterial or of marginal materiality, it will not have, definitionally, any effect on the outcome of the trial. To grant a new trial merely because the prosecution failed to honor a request seems to run counter to the *Brady* rule which requires the evidence to be material irrespective of the good faith or bad faith of the prosecution. On the other hand, if the evidence is possibly material and the new trial order turns on the prosecution's failure to honor the defense request, this failure amounts to a special type of deliberate misconduct or inexcusable neglect, and should be included within the first category of cases mentioned above.[64]

The third type of situation outlined in *Keogh* arises when the suppressed evidence is potentially material, though the materiality may not be obvious to the prosecution. Here there is neither deliberate suppression by the prosecution nor a request for evidence by the defense, but "hindsight discloses that the defense could have put the evidence to not insignificant use."[65] Since there is no request, the conviction is reversed only if a higher standard of materiality is met.[66] The *Keogh* court reasoned that to invalidate a conviction because a "combing of the prosecutor's file after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties."[67] In a close case, therefore, the absence of a request may tip the balance in favor of the prosecution.

63. There is no explicit statement in the *Keogh* opinion that the conviction will be reversed whenever the defense's specific request is not honored, but this result may be inferred from the court's language that "[t]he request cases also stand on a special footing; the prosecution knows of the defense's interest and, if it has failed to honor this even in good faith, it has only itself to blame." *Id.* This inference finds support in the opinion of Judge Friendly in Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), which stresses the importance of deterring prosecutorial misconduct. *See* note 117 *infra*.

Notwithstanding the foregoing, on the face of the *Keogh* opinion it can be argued that the conviction may be affirmed for lack of materiality even if the prosecution has not honored the defense request. One commentator has suggested that the conviction will be reversed only in a close case. Comment, *Brady v. Maryland*, *supra* note 2, at 130.

64. *See* text accompanying notes 59-60 *supra*.

65. 391 F.2d at 147.

66. *Id.*

67. *Id.* at 148. This language is cited with approval in Giglio v. United States, 405 U.S. 150, 154 (1972).

The unique feature of the framework of analysis in *Keogh* is a fluid standard of materiality, which in turn is a function of the prosecutorial conduct and the absence or presence of a request by the defense for evidence.[68] The court will decide the standard of materiality to be applied after considering all the circumstances of the case, including the request by the defense and the good or bad faith of the prosecution. Its concern is that, although prosecutorial abuse is not to be tolerated, a judgment carefully arrived at should not be easily disturbed. While the *Keogh* analysis has the merit of balance and flexibility, it has unnecessarily commingled materiality with the request requirement and the prosecution's behavior. Conceptually, materiality is measured by the weight and relevance of the evidence and the likely effect of that evidence on the verdict. By interjecting the request element and prosecutorial conduct into its calculus of materiality, the *Keogh* court confuses rather than clarifies the conceptualization of the problem.[69] However, the *Keogh* case is instructive at least insofar as it provides a basis of comparison with the position taken by the California Supreme Court discussed below.

II. THE CALIFORNIA SUPREME COURT AND THE PROSECUTOR'S DUTY OF DISCLOSURE

The leading California case on the issue of the suppression of evidence is *In re Ferguson*.[70] This case involved charges of kidnap-

68. Several courts have applied a variable standard of materiality similar to that in *Keogh*. *See* Clarke v. Burke, 440 F.2d 853 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972); Kyle v. United States, 297 F.2d 507 (2d Cir. 1961); United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Smith v. United States, 277 F. Supp. 850, 860 (D. Md. 1967); Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962).

For cases upholding the most liberal test of materiality, requiring a new trial when the withheld evidence suggests the possibility, however slight, that the verdict will be reversed see Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967); Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Hamric v. Bailey, 386 F.3d 390 (5th Cir. 1967).

The premise of this liberal test is that the relevance and weight of the undisclosed evidence are not for the reviewing court but for the triers of fact to decide. United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972); Lessard v. Dickson, 394 F.2d 88, 94-95 (9th Cir.) (Ely, J., dissenting), *cert. denied*, 393 U.S. 1004 (1968); United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 767 (3d Cir. 1955).

69. *See* discussion of materiality at notes 56-57 *supra*. It has been suggested that the "harmless error" test provides an equally flexible but better framework in which the court applies a variable standard to the determination of the harmlessness and the effect of error on the verdict. Comment, *Brady v. Maryland*, *supra* note 2, at 132 & n.95.

In California, however, the "harmless error" test is applicable only when the evidence withheld is impeachment evidence. Thus it is suggested in this Comment that the fair trial concept furnishes the best framework in which flexibility can be exercised. *See* discussion at text accompanying note 118 *infra*.

70. 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971). Cases preceding *Ferguson*

ping and rape. Prior to trial, the district attorney had disclosed his entire file to the defense attorney without a formal request. The defense alleged that there was consent by the rape victim and her husband, who was in fact pandering his wife. The husband testified as a principal witness for the prosecution, but his criminal record and a conviction for sexual degeneracy were not contained in the prosecutor's file and did not become available to the defense until the trial had been concluded.

The California Supreme Court held that the suppression of material evidence by the prosecution constituted a denial of a fair trial to the accused. The judgment below was vacated and a new trial was ordered. The court declared that "in some circumstances the prosecution must, without request, disclose substantial material evidence favorable to the accused."[71] In deciding whether the evidence was material, a court should look to the entire record and consider not only other evidence of guilt, but also any other defense evidence which might have caused a different verdict, including evidence to which a disclosure of the suppressed evidence would logically lead.[72] However, the *Ferguson* court indicated that only admissible evidence would be taken into consideration.[73]

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include: *In re* Lessard, 62 Cal. 2d 497, 399 P.2d 39, 42 Cal. Rptr. 583 (1965); *In re* Imbler, 60 Cal. 2d 554, 387 P.2d 6, 35 Cal. Rptr. 293 (1963), *cert. denied*, 379 U.S. 908 (1964); People v. Kiihoa, 53 Cal. 2d 748, 349 P.2d 673, 3 Cal. Rptr. 1 (1960); *In re* Razutis, 35 Cal. 2d 532, 219 P.2d 15 (1950).

71. 5 Cal. 3d at 532, 487 P.2d at 1239, 96 Cal. Rptr. at 599, *citing In re* Lessard, 62 Cal. 2d 497, 509, 387 P.2d 39, 47, 42 Cal. Rptr. 583, 591 (1965).

72. 5 Cal. 3d at 533, 487 P.2d at 1240, 96 Cal. Rptr. at 600. The meaning of the phrase "logically lead" was not elaborated on by the *Ferguson* court, although this is obviously a matter of great importance. In the *Ferguson* case, the court was referring to the fact that "if the defense was aware that [the witness] has a prior sexual record, it would make substantial efforts to discover the extent and nature of that record." *Id.* Though it is not mentioned in *Ferguson*, the testimony of a witness which results from a disclosure of his identity should also fall into the "logically lead" category. *See* People v. Kiihoa, 53 Cal. 2d 748, 752, 349 P.2d 673, 675, 3 Cal. Rptr. 1, 4 (1960).

73. 5 Cal. 3d at 534, 487 P.2d at 1240, 96 Cal. Rptr. at 600. The court discussed the liberal admissibility of the withheld evidence in impeaching a prosecution witness where the defendant was tried for a sex offense. The implication is that admissibility is at least a factor to be considered. *See also* People v. Kidd, 56 Cal. 2d 759, 366 P.2d 49, 16 Cal. Rptr. 793 (1961). There was no discussion of the admissibility issue in *Ruthford*, as it was not called for by the facts of the case.

If admissibility is a general requirement, it would follow that the suppression of inadmissible evidence will not constitute ground for reversing a conviction even if that evidence could have changed significantly the defendant's trial strategy. On the other hand, if the inadmissible evidence could have led to other evidence which is admissible and material, the prosecution's suppression may be a denial of due process. At least this is a plausible argument in light of the "logically lead" language in *Ferguson*. *See* note 69 *supra*. The California cases have not discussed this issue in any way.

A. *People v. Ruthford*

With the important exception that the request requirement may be dispensed with, the *Ferguson* opinion generally followed the rule announced in *Brady v. Maryland*. Then, in *People v. Ruthford*,[74] the California Supreme Court further elaborated its position. In *Ruthford*, the defendant was named by the principal prosecution witness as an accomplice in a robbery and was subsequently convicted. Before testifying, the witness had an understanding with the prosecution that his cooperation would result in a more lenient sentence for his wife, who had also been convicted. The understanding which induced the witness to testify was not disclosed by the prosecutor, who moreover represented to the trial court in an evidentiary hearing that there had been no promise made to the defendant.

On appeal, the California Supreme Court reversed the conviction without remand, holding that even without request, the prosecution was under a constitutional duty to disclose "all substantial material evidence *favorable to an accused*, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness."[75] A failure to discharge this duty, either intentionally or negligently, would violate due process within the meaning of the fourteenth amendment and require an automatic reversal of the conviction in cases where the evidence went directly to the issue of guilt.[76] The same result would occur if the evidence was relevant to the credibility issue unless a court could declare that the nondisclosure was harmless beyond a reasonable doubt.[77] Thus stated, the *Ferguson-Ruthford* rule is clearly more expansive than the position taken by the current United States Supreme Court.

The Expansive Scope of the Ruthford *Decision*

The California Supreme Court in *Ferguson* recited the familiar principle that the ultimate goal of the criminal justice system is to ascertain the truth.[78] The prosecution's duty is not to obtain con-

In Shatz, *supra* note 37, at 275, it is noted that admissibility is not a prerequisite for granting criminal discovery in California. The criminal discovery area, however, should be distinguished from the suppression-of-evidence issue; the former is not a constitutional question (*see* note 37 *supra*), while the latter is.

74. 14 Cal. 3d 399, 534 P.2d 1341, 121 Cal. Rptr. 261 (1975).

75. *Id.* at 406, 534 P.2d at 1346, 121 Cal. Rptr. at 266 (emphasis in the original).

76. *Id.* at 406-07, 534 P.2d at 1346, 121 Cal. Rptr. at 266.

77. *Id.* at 408-09, 534 P.2d at 1347-48, 121 Cal. Rptr. at 267-68.

78. 5 Cal. 3d at 531, 487 P.2d at 1238, 96 Cal. Rptr. at 598; 14 Cal. 3d at 405, 534 P.2d at 1345, 121 Cal. Rptr. at 265.

victions, but to fully and fairly present material evidence to the court and jury.[79] In the interest of furthering the pursuit of truth, restraints may be placed on the prosecution and the adversary system to circumscribe the prosecution's potential abuse of its superior resources vis-à-vis the defense.[80] Presumably, the duty to disclose is one of these restraints, to be enforced by reversing the conviction where this duty is not properly discharged. The *Ruthford* decision elaborated on the principle announced in *Ferguson* and served notice on the criminal justice system of California that the court intends to strictly enforce the prosecution's duty of disclosure.[81]

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79. 5 Cal. 3d at 531, 487 P.2d at 1238, 96 Cal. Rptr. at 598. It has been noted that, "[o]n the one hand, the prosecutor represents the state and is seeking to enforce its laws; and on the other hand, he has a duty to see that an accused receives a fair trial. The problem is to determine the amount of evidence the prosecutor can disclose without violating his duty to the state while . . . not withholding such evidence as would violate the rights of the accused." *Ninth Circuit Review, supra* note 55, at 977 and authorities cited therein (footnote omitted). *Ferguson* made it clear that, in California at least, considerations of fair trial predominate over the adversary role of the prosecution. 5 Cal. 3d at 531, 487 P.2d at 1238, 96 Cal. Rptr. at 598.

80. 5 Cal. 3d at 531, 487 P.3d at 1238, 96 Cal. Rptr. at 598. In Evans v. Superior Court, 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974), the court imposed an affirmative duty on the prosecution to utilize means not available to the defendant in order to obtain evidence for his or her defense. The implication is that the prosecution's duty to disclose is greater when the evidence cannot be otherwise obtained by the defense.

81. For additional evidence of this intent see Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975). In *Johnson*, the defendant was charged with the sale of narcotics. At the preliminary hearing, the defendant testified that he was working for the district attorney as an informer when the sale took place. The prosecution would not call the district attorney to rebut the defendant's testimony, and the court dismissed the charge.

The defendant was then indicted by a grand jury. At the grand jury hearing, the prosecution failed to disclose the defendant's testimony at the preliminary hearing. Moreover, it made an inappropriate reference to the defendant's silence when he was questioned after the arrest and created the false impression that the defendant would refuse to testify if called by the grand jury.

On appeal, the California Supreme Court dismissed the indictment, without prejudice. The court held that, when the district attorney seeking the indictment was aware of evidence reasonably tending to negate guilt, he was obligated to voluntarily inform the grand jury of its nature and existence, so that the grand jury could exercise its power under section 939.7 of the California Penal Code to have the evidence produced. Although the *Johnson* decision was based on statutory grounds, the court reprimanded the district attorney for his misconduct. Noting that *Ferguson* and *Ruthford* placed a limit on the adversary nature of the criminal proceeding at trial where the prosecution had a duty to disclose exculpatory material evidence, the *Johnson* court stated that the adversary system had no place in a grand jury hearing.

Justice Mosk, writing in a separate opinion with Chief Justice Wright concurring, would have gone much farther than the majority opinion. Justice Mosk stated that the grand jury was an anomaly within the criminal justice system. He doubted its constitutionality and suggested that California institute a post-indictment preliminary hearing

The *Ruthford* opinion has broken new ground in two respects. First, the court explicitly added that the prosecution's duty includes the disclosure of favorable material evidence "relevant . . . to the credibility of a material witness."[82] On its face, the court's language appears to be either surplusage or simply stating the obvious. By definition and by case law, it would appear that impeachment evidence has already been subsumed under the generic term "material evidence."[83] Second, the court has adopted a two-step analysis in determining when a criminal conviction should be reversed. If the suppressed evidence bears directly on the issue of guilt or innocence, and the evidence is material in that it might have changed the verdict, the conviction of the defendant who has been denied a fair trial by the prosecution's non-disclosure will be automatically reversed.[84] It is not necessary to reach the question whether the suppressed evidence may have had an effect on the outcome of the trial.

However, a second procedure applies if the suppressed evidence is relevant to the credibility of a material witness. Here, even if the court finds the evidence to be material and the defendant has been denied a fair trial, the conviction will not be vitiated without a second step: the weighing of prejudice. Under *Ruthford*, the test for prejudice is the "harmless error" test[85] rather than the "changing the verdict" test employed by the Supreme Court in *Napue*. If a court finds that the suppression of material

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to assure the accused of his constitutional guarantees unavailable to him at the grand jury hearing. Justice Tobriner, in a brief opinion, stated that he believed that the facts of the *Johnson* case did not warrant the resolution of the important issue brought up in Justice Mosk's opinion. Justice Tobriner would have preferred to discuss the issue at a more opportune occasion.

82. 14 Cal. 3d at 406, 534 P.2d at 1346, 121 Cal. Rptr. at 266.

83. *Giglio*, *Napue* and *Ferguson* have all involved the suppression of impeachment evidence. In *Napue*, the Court stated that the "reliability of a given witness may well be determinative of guilt or innocence." 360 U.S. at 269. In Alcorta v. Texas, 355 U.S. 28 (1957), the Court indicated that the distinction between impeachment and substantive evidence is not relevant. *But see* Link v. United States, 352 F.2d 207 (8th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966), in which the court suggested that, when the suppressed evidence went to the credibility of a witness, a higher degree of materiality is required before a conviction will be vitiated.

84. 14 Cal. 3d at 406-07, 534 P.2d at 1346, 121 Cal. Rptr. at 266.

85. *Id.* at 409-09, 534 P.2d at 1347-48, 121 Cal. Rptr. at 267-68. In applying the harmless error standard to the supression of impeachment evidence, *Ruthford* indicated that the suppression of evidence, as a violation of the federal constitution, is to be taken more seriously than other violations of fair trial such as a prosecutor's improper method of cross-examination. In the latter instance, only the "prejudicial error" test is applied when the court weighs the prejudice to the accused. People v. Wagner, 13 Cal. 3d 612, 532 P.2d 105, 117 Cal. Rptr. 457 (1975), *cited at* 14 Cal. 3d at 409 n.3, 534 P.2d at 1347 n.3, 121 Cal. Rptr. at 267 n.3.

evidence relevant to the credibility of a witness is harmless beyond a reasonable doubt, the defendant's conviction will not be reversed. The *Ruthford* court noted that the United States Supreme Court in *Napue* employed the "changing the verdict" test,[86] but concluded, without explanation, that it would follow the probably more rigorous "harmless error" test in weighing the prejudice to the defendant.[87]

Since the *Ruthford* opinion did not articulate its reasons for distinguishing between evidence bearing directly on guilt and that which is relevant to the credibility of a witness, one is left to speculate. In all probability the *Ruthford* court believed that impeachment evidence tends to have a more indirect impact on the verdict than substantive evidence; therefore a reversal of a judgment of conviction will be granted less frequently where evidence bearing on the credibility of a witness is suppressed by the prosecution.[88] There are other possible explanations, such as the court's interest in retaining some flexibility regarding the remedy granted to the accused, but the *Ruthford* opinion offers few hints on this matter.[89] Because this is an important constitutional issue,

86. 282 U.S. at 272.

87. 14 Cal. 3d at 408-09, 534 P.2d at 1347-48, 121 Cal. Rptr. at 267-68.

88. *See* note 81 *supra*.

89. A case that was briefly mentioned in *Ruthford* may hold the key to the understanding of the harmless error issue discussed in the opinion. In People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974), the defendant was arrested for driving under the influence of intoxicating liquor. A breathalyzer test was administered, and the results of the test recorded. Pursuant to customary procedures, the investigatory officials then disposed of the test ampoule, its contents, and the reference ampoule. Had those ampoules not been destroyed they could be retested. Upon a pre-trial motion by the defendant to supress the results of the breathalyzer test, the trial court held that the government's destruction of such valuable evidence constituted a denial of due process to the defendant. On this basis, the action was dismissed.

The California Supreme Court reversed and remanded the case for a new trial. It stated that the destruction was distinguishable but closely related to the suppression of evidence cases such as *Brady* and *Ferguson*. *Id.* at 649, 527 P.2d at 367, 117 Cal. Rptr. at 15. The court went on to hold that the ampoules were potentially important evidence which could impeach the results of the tests presented by the prosecution. The destruction of the ampoules therefore denied the defendant due process of law. However, the court stated that

> where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions 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.

the *Ruthford* opinion could have been more instructive on this point.

B. Materiality and Harmless Error

It is important that the conceptual framework of the California Supreme Court's reasoning on the issues of materiality and harmless error be clarified. Absent a comprehensive discussion by that court, this conceptual framework has to be constructed by analysis of several decisions. Hence, the following analysis is derived in part from the *Ferguson* decision, and in part from that portion of the *Ruthford* opinion which interprets *Ferguson*.

When confronted with a suppression-of-evidence issue, the first question which arises under *Ferguson* is whether the withheld evidence is material. Materiality is determined by looking to

> the entire record because materiality can only be determined in the light of the circumstances. Thus we must consider not only the other evidence of guilt but also any other defense evidence which might have caused a different verdict.[90]

Though this language was not cited in *Ruthford*, that court apparently applied the same test for materiality.[91]

If the evidence is found to be material in the sense that it might have changed the verdict, the *Ferguson* opinion indicated that the conviction would be reversed and a new trial would be ordered. However, as the *Ruthford* court construed the *Ferguson* case, there was actually a two-step analysis. According to *Ruthford*, after the *Ferguson* court found materiality, it proceeded to weigh the prejudice to the defendant.[92] The test of prejudice was, once again, whether the suppressed evidence might have changed the verdict. While this test appears to duplicate the test for materiality, the two are conceptually distinguishable under

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Id. at 652-53, 527 P.2d at 369, 117 Cal. Rptr. at 17. The court concluded that, on the facts of the case, the prosecution had acted in good faith, and the destruction of the ampoules had been the usual practice in the state. The error was found to be harmless beyond reasonable doubt, and no sanction was called for.

Although the *Hitch* case involves a unique set of facts, it is important to point out that the opinion applied the harmless error test in weighing the prejudice to the accused in a situation which resembled the suppression of impeachment evidence cases. To that extent, the *Hitch* decision set a precedent for the *Ruthford* opinion.

90. 5 Cal. 3d at 533, 487 P.2d at 1240, 96 Cal. Rptr. at 600.

91. *See generally* 14 Cal. 3d at 409-10, 534 P.2d at 1348-49, 121 Cal. Rptr. at 268-69.

92. *Id.*

Ruthford's interpretation.[93] The test for prejudice, analytically, was not concerned with materiality; its purpose was to decide if the prejudice resulting from the suppression of material evidence rose to the level requiring the reversal of the conviction.[94]

On its face, the interpretation of *Ferguson* by the *Ruthford* court appears artificial and tortuous in view of the fact that the purported two-step analysis in *Ferguson*—tests for materiality and for prejudice—employ the same "changing the verdict" language. This approach becomes more tenable if it is assumed that the "changing the verdict" language, when applied to the materiality question, calls for a less stringent standard than when it is applied to the prejudice issue. An alternative and more probable explanation is that the two-step analysis was imputed to the *Ferguson* case by the *Ruthford* court so that the approaches in both opinions would become consistent.

A literal reading of *Ferguson* actually suggests that the *Ferguson* case was reversed and remanded without the additional step of weighing the prejudice.[95] If *Ferguson* stands for the proposition that the suppression of favorable material evidence bearing on the credibility of a witness is reversible error per se, the application of the harmless error test in *Ruthford* to similar facts is more restrictive than *Ferguson*. Note, however, that the measure taken in *Ruthford* to protect the defendant was more forceful; the conviction there was reversed without a new trial.[96] On balance, *Ruthford* is more solicitous of the defendant's constitutional right than its predecessors. Moreover, by conceptually distinguishing materiality from the weighing of prejudice, *Ruthford* has advanced the inquiry of the suppression-of-evidence issue in future cases.

C. Request for Evidence

The second significant aspect of the *Ruthford* decision involves a broadening of *Ferguson*. In the latter case, the court indi-

93. *Id.*

94. *Id.* at 408, 534 P.2d at 1347, 121 Cal. Rptr. at 267. *See* note 95 *infra* and accompanying text.

95. In asserting that a weighing of prejudice is required even after materiality has been established, the *Ruthford* court cited *Ferguson, Napue* and *Giglio*. A close reading of those cases demonstrates that the *Ruthford* argument is not persuasive. Note, for example, the language in *Napue* that was cited in part by the *Ruthford* court: "[T]he false testimony . . . may have had an effect on the outcome of the trial. *Accordingly*, the judgment below must be *reversed*." 360 U.S. at 272 (first emphasis added).

96. On the face of the *Ruthford* opinion, it cannot be determined whether the court will reverse without remand in all cases. Since *Ruthford* can be distinguished from *Fer-*

cated that "in some circumstances," the prosecution is under the duty to disclose evidence even without request.[97] In *Ruthford*, the qualification "in some circumstances" is omitted. Thus *Ruthford* appears to have laid to rest, at least in California, the criticism that the request requirement in *Brady* imposes an unrealistic burden on the defense.[98]

In dropping the request requirement altogether, the California Supreme Court disagreed not only with the interpretation of the *Brady* rule by the United States Supreme Court,[99] but also with the the position taken by the Court of Appeals for the Second Circuit in *Keogh*. The California court reasoned in *Ferguson* that dispensing with the request requirement would alert the prosecution to its constitutional duty of disclosure independent of any action taken by the defense. The trial court as well as the defense will be spared the long and complex discovery motions necessary to assure the prosecution's complete disclosure.[100] Though this reasoning has not been reiterated in *Ruthford*, one may presume that the court adheres to the same view.

As we have seen, the *Keogh* reasoning is different. The court there stated that the need for maximization of protection of convicted defendants must be balanced against the risk of imposing impossible burdens on prosecutors and "the need to preserve the finality of convictions rendered after trials as nearly faultless as human frailties will permit."[101] Thus, in cases in which the suppressed evidence is potentially material and the prosecution's suppression is not deliberate, the *Keogh* court would not insist on the request requirement but at the same time would impose a higher standard of materiality on the defense.[102]

In light of the *Keogh* rationale, can the California court be criticized for giving too little consideration to the judicial interest in the preservation of the finality of convictions? There is probably merit to this criticism, at least to the extent that *Ferguson* and

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guson in that the prosecution in the former case had affirmatively deceived the trial court, it may be argued that the *Ruthford* court will reverse without a retrial only in cases where there is an affirmative misrepresentation by the prosecution. *See* text accompanying notes 122-24 *infra*.

97. 5 Cal. 3d at 532, 487 P.2d at 1239, 96 Cal. Rptr. at 599.

98. *See* notes 53-54 *supra*.

99. For the most recent interpretation of the *Brady* rule by the United States Supreme Court see discussion of *United States v. Agurs* at text accompanying notes 125-29 *infra*.

100. 5 Cal. 3d at 532-33, 487 P.2d at 1239, 96 Cal. Rptr. at 599.

101. 391 F.2d at 146.

102. *Id*. at 147-48.

Ruthford failed to mention this judicial interest. However, it appears that the preservation of the finality of convictions is sufficiently protected by the requirement that the suppressed evidence must be material and favorable to the accused before the conviction will be reversed. Even if this protection is inadequate, the California position is still preferable to that of *Keogh*.

The type of situation discussed above where the *Keogh* court would impose a higher standard of materiality on the defense is relatively rare, but the discovery procedure concerns every criminal litigation. Viewed quantitatively, and acknowledging that both *Keogh* and the California cases have merit, the interest of judicial economy should favor the more unequivocal California rule which lends itself to the simplification of criminal discovery. Additionally, the California rule has the advantage of setting up a more uniform standard of materiality than has *Keogh*.

Under *Ruthford*, therefore, where evidence is found to have been made unavailable to the defense through some act attributable to the state, the defense will be able to assert that there has been a constitutional infringement, provided that the withheld evidence is favorable, material, and admissible. The greatest hurdle to raising the defense is, however, that the evidence must be found material, assuming that it is uncovered at all. Obviously, the issue of materiality is to be determined on the facts of each case, and the California Supreme Court has not laid down any well defined rules in this area.

Although one of the avowed purposes of the *Ferguson* and *Ruthford* decisions is to simplify criminal discovery procedure, the extent to which that purpose has been accomplished is open to question. It is a truism that to prepare for trial the defense needs access to all relevant evidence, be it unfavorable, neutral, or exculpatory. Even trivial evidence, taken cumulatively, may have an important bearing on the litigation. The *Ferguson-Ruthford* rule assures the defense that favorable, material evidence will be forthcoming without request, yet as a practical matter this assurance is unlikely to deter the defense from making all conceivably useful discovery motions. An empirical study will be required before the impact of *Ferguson* and *Ruthford* on criminal discovery can be measured.

Far more significant may be the impact the above cases have on the regulation of prosecutorial conduct in California. Those cases, along with the recent decision in *Johnson v. Superior*

Court,[103] forcefully demonstrate to the criminal justice system that the adversary system is always subordinated to the demands of justice, and that constitutional guarantees will be strictly enforced. By eliminating the *Brady* request requirement, the court in *Ruthford* has taken an important step towards the clarification of an important constitutional issue. Yet the *Ruthford* opinion does not contain a comprehensive analysis of all possible facets of the prosecution's duty to disclose. The following discussion will make an attempt to explore one of the areas on which the *Ruthford* court has not expressed a definitive opinion: the relationship of prosecutorial conduct to the materiality of the suppressed evidence.

III. PROSECUTORIAL CONDUCT AND FAIR TRIAL

Historically, the line of cases from *Mooney v. Holohan* to *Napue v. Illinois* has focused its inquiry on prosecutorial misconduct within the context of due process and a fair trial. *Brady v. Maryland*, with its language about materiality and the irrelevance of the good or bad faith of the prosecution, has shifted the emphasis of the inquiry to a consideration of the materiality of the evidence.[104] *Brady* has also been hailed as providing a broad constitutional base for criminal discovery.[105] However, logic and a survey of case law suggest at least four possible interpretations of *Brady*[106] in light of which the California cases can be evaluated.

A. A Variable Standard Based on the Prosecution's Motive

The first interpretation would read *Brady* literally to stand for the proposition that the court will not inquire into the motive or intent of the prosecution as long as there is withholding of exculpatory material evidence.[107] The focus of the inquiry is a more or

103. 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).

104. *See, e.g.*, Comment, *Brady v. Maryland*, *supra* note 2, at 113-14; Westen, *supra* note 17, at 121-23.

105. Westen, *supra* note 17, at 121-23. *See* Moore, *supra* note 37, at 896 & n.158, and authorities cited therein.

106. The following interpretations are constructed on the basis of the facts and holding of *Brady*. The cases cited under each interpretation may serve to illustrate a specific point, but they do not necessarily adopt the interpretation. The purpose of this discussion, however, is precisely to show that the cases relying on *Brady* often do not articulate a comprehensive framework of analysis, or follow the logical conclusions to which their reasoning leads.

107. The *Brady* opinion states that the due process principle of *Mooney* was "not *punishment* of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S. at 87 (emphasis added). *See* discussion at note 17 *supra*.

less "objective" evaluation of the materiality of the evidence and its likely impact on the verdict. Under this interpretation, the good faith of the prosecution is irrelevant, since it does not alleviate the prejudice to the defendant.[108] But if this literal interpretation of *Brady* is followed to its logical conclusion, it may lead to the perhaps unintended result that the prosecution's bad faith, however flagrant, will be disregarded, provided the materiality of the withheld evidence does not rise to the level prohibited by due process.[109] This result will be inconsistent, at least in spirit, with the *Mooney* line of cases which invariably turn on the knowing commission or omission of an act by the prosecution.[110]

Under the second interpretation, the prosecution's good or bad faith is relevant, depending on the circumstances. This is the position represented by *United States v. Keogh*.[111] After considering all the circumstances, *Keogh* would adjust the standard of materiality relative to the absence or presence of a request and the good or bad faith of the prosecution. The *Keogh* type of variable materiality is not applicable in California which has done away with the request requirement, but the *Keogh* rationale is not without merit.[112]

A third interpretation would read *Brady* as a case involving the deliberate misconduct of the prosecution. Under this interpretation, the *Brady* rule will be controlling only when the prosecution's non-disclosure of evidence is deliberate or in bad faith, in which event the usual standard of materiality must still be met before a conviction is reversed.[113] If the prosecution has acted in

108. *See* Giles v. Maryland, 386 U.S. 66, 102 (1967) (Fortas, J., concurring). *But cf.* Fahy v. Connecticut, 375 U.S. 85, 86 (1963), where the prosecution's good faith in erroneously admitting prejudiced evidence was held immaterial to the determination of the fairness of the trial.

For cases that have emphasized the need of the defense to obtain evidence for trial see Jackson v. Wainwright, 390 F.2d 288, 299 (5th Cir. 1968); Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966); and cases cited at note 50 *supra*. By paying relatively little attention to the prosecutorial misconduct issue, these courts may have unwittingly undermined the deterrent purpose implicit in *Brady*.

109. For a discussion of cases that de-emphasize the punitive aspect of *Brady* see Moore, *supra* note 37, at 896-97. *See also* United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963); United States *ex rel.* Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963).

110. *See* notes 5-8 *supra* and accompanying text.

111. 391 F.2d 138 (2d Cir. 1968). Since *Keogh* holds that both the prosecution's good and bad faith are relevant, it overlaps in part with the third and fourth interpretations below.

112. The *Keogh* analysis is not only flexible, but also takes into consideration prosecutorial misconduct in determining materiality.

113. In Marshall v. United States, 355 F.2d 999 (9th Cir. 1966), the court included

good faith and/or the due process violation is only a result of negligence, the courts following the third interpretation will apply the *Brady* rule but will impose a more stringent standard of materiality before a conviction is reversed. Under this interpretation, the prosecution's good faith is relevant, though its bad faith is not.[114]

While the third interpretation is not an unreasonable one, it ignores the language in *Brady* which states that the prosecution's non-disclosure was not "the result of guile."[115] Clearly the *Brady* court did not view the prosecution's conduct to be in bad faith. More important, the third interpretation set forth above is not responsive to the argument that the good intention of the prosecution is of little comfort to a defendant who has been denied crucial evidence.

A court following the fourth interpretation will apply the usual standard of materiality irrespective of the prosecution's good faith. But the corollary of this proposition—the same standard will be applied even if the prosecution is in bad faith—will not be accepted. Thus, under the fourth interpretation, if the prosecution has acted in bad faith either in the sense of deliberate suppression of favorable evidence, deception or misrepresentation, the *Brady* rule will be even more rigorously enforced. The court will either relax its standard of materiality or require a lesser showing of prejudice to reverse the defendant's conviction. In short, the prosecution's bad faith is relevant, though its good faith is not.[116] Both logic and public policy favor this interpretation.

Brady among cases where the government, knowing the testimony was false, introduced it before the jury or permitted it to go into evidence. *Brady*, the *Marshall* court stated, involved a prosecutor knowingly withholding from the defense information about a confession. *Id.* at 1011.

It has also been suggested that "[t]he language of Brady v. Maryland . . . about good or bad faith of the prosecution being irrelevant seems unnecessary to the decision in that case, for no prosecutor who gives that kind of misleading, partial disclosure could be acting in good faith." Moore, *supra* note 37, at 897 n.161 (citation omitted). Compare this interpretation with those discussed at notes 10 and 35 *supra*.

114. Courts which will impose a greater showing of materiality or prejudice on the defense when the prosecution's suppression of evidence is merely a result of negligence include: Barbee v. Warden, Me. Penitentiary, 331 F.2d 842 (4th Cir. 1964); Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961); Smith v. United States, 277 F. Supp. 850, 860 (D. Md. 1967); United States v. Poole, 379 F.2d 645 (7th Cir. 1967); and United States v. Miller, 411 F.2d 825 (2d Cir. 1969). No case has stated unequivocally that the bad faith of the prosecution is never to be taken into consideration in weighing the materiality of the evidence.

115. 373 U.S. at 88.

116. There are no cases articulating this position specifically, although it may be

The fourth interpretation correctly reads *Brady* to be a case involving a prosecution that has acted in good faith. Hence, to the extent that it is not supported by the facts of the case, the *Brady* language concerning bad faith being irrelevant is dictum and not controlling. In particular, the fourth interpretation is more consistent with the spirit of due process. The line of cases from *Mooney* to *Napue* have two expressed or implied purposes: (1) the accused must be given the evidence material to his defense; and (2) prosecutorial misconduct or abuse are to be constrained.[117]

Of the four interpretations discussed above, the first emphasizes the availability of exculpatory evidence but, in holding the bad faith of the prosecution irrelevant, weakens the deterrent effect of *Brady*. The second interpretation does not lack merit, but its multiple standards of materiality present conceptual difficulties. The third interpretation misreads the facts in *Brady*. Moreover, it tends to favor the prosecution when the defense already bears the onerous burden of showing that the withheld evidence is favorable, material, and admissible. Only the fourth interpretation accomodates the purposes implicit in the cases from *Mooney* to *Brady*.

Under the fourth interpretation, where there is suppression of favorable, material evidence, a conviction will be reversed under the *Brady* rule, irrespective of the good faith of the prosecu-

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adopted in practice. *See, e.g.*, the California cases discussed at notes 120-24 *infra* and accompanying text.

117. The policy that prosecutorial conduct is to be punished without regard to the actual prejudice to the defense was articulated in Kyle v. United States, 297 F.2d 507 (2d Cir. 1961):

> Sometimes only a small showing of prejudice, or none, is demanded because that interest is reinforced by the necessity that "The administration of justice must not only be above a reproach, it must also be beyond the suspicion of reproach," and by the teachings of experience that mere admonitions are insufficient to prevent repetitions of abuse.

Id. at 514 (citations omitted). *See also* Comment, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960):

> It is possible that the confusion about the necessity of showing prejudice results from the possibility that the courts may not be using prejudice in the sense of injury to the defendant's interest, but rather are attempting to determine, without always saying so, the point at which the conduct of the prosecutor becomes so offensive to our traditional sense of justice that it fails to achieve the minimum standard that is requisite to a fair trial.

Id. at 864.

tion. Where the prosecution affirmatively misrepresents evidence or deceives the court and jury, the same reversal results under *Mooney* and its progeny, independent of *Brady*. But in a close case, where the materiality of evidence, considered alone, does not suffice to "change the verdict," and prosecutorial misconduct, viewed separately, is not so egregious as to invoke the *Mooney-Napue* rule, a court accepting the fourth interpretation will consider their combined effect, liberally construed,[118] to determine if a fair trial has been denied the accused. Thus, courts will move away from the singular concern with materiality, which *Brady* has been interpreted to suggest. The proper context in which materiality and prosecutorial conduct are scrutinized should be the fairness of the trial, thereby avoiding the conceptualization problem encountered in *Keogh*. The facts and opinions of California Supreme Court cases suggest that the court substantially agrees with the rationales underlying the fourth interpretation.

B. The California Supreme Court's Consideration of Prosecutorial Bad Faith

Ferguson held that intent may be imputed to the prosecution's inadvertent suppression of exculpatory evidence where the prosecution knew, or should have known, what it was doing; subjective good faith does not exonerate its conduct.[119] In *People v. Kiihoa*,[120] the prosecution deliberately withheld the identity of an informer from the defendant until the informer had left the jurisdiction. In reversing the defendant's conviction, the California Supreme Court stated that "however praiseworthy was the prosecution's motive in protecting the informer from the threat of reprisal . . . [s]uch motives and purposes cannot prevail when . . . they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial."[121]

While the good faith of the prosecution could not excuse the violation of due process,[122] the facts and language in the Califor-

118. *See* note 68 *supra* and cases cited therein.

119. *In re* Ferguson, 5 Cal. 3d 525, 533, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971).

120. 53 Cal. 2d 748, 754, 349 P.2d 673, 676, 3 Cal. Rptr. 1, 5 (1960).

121. *Id.* at 754, 349 P.2d at 676, 3 Cal. Rptr. at 5, *cited in In re* Ferguson, 5 Cal. 3d 525, 532, 487 P.2d 1234, 1239, 96 Cal. Rptr. 594, 599 (1971).

122. In evaluating the position of the California Supreme Court on the issue of the prosecution's good or bad faith in relation to the suppression of evidence, attention should be given to *People v. Hitch*, discussed at note 89 *supra*. It will be recalled that in the *Hitch* case, the court held that the non-preservation of breathalyzer test samples

nia cases indicate that the bad faith of the prosecution will not be overlooked by the court in determining whether a fair trial has been denied to the criminal defendant.[123] At least this is the proposition advanced in the fourth interpretation discussed above. If that interpretation represents the view of the California Supreme Court, the California judiciary needs only to develop the point made in *Ferguson*:

> We must look to the entire record because materiality can only be determined in the light of the circumstances . . . . The basis of the rule requiring disclosure by the prosecution . . . is that the defendant may otherwise be deprived of a fair trial, and thus we must consider all of the matters bearing on the ultimate question of the fairness of the trial.[124]

CONCLUSION

This Comment has surveyed federal and California law regarding the prosecution's constitutional duty to disclose. The United States Supreme Court appears to have left certain issues unresolved, including the definition of materiality and the requirement of a specific request for evidence before the constitutional duty of disclosure can be invoked. These uncertainties permit the lower federal courts to arrive at their own interpretations. The California position is more unequivocal. In *In re Ferguson* and *People v. Ruthford* the California Supreme Court held that the prosecution has a constitutional duty to disclose exculpatory

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violated due process, but the error was declared to be harmless beyond a reasonable doubt in view of the good faith of the prosecution. The court said that it was not necessary to impose sanctions; neither a dismissal of the action nor the exclusion of the breathalyzer test result which was tainted by the non-preservation was required. In so holding, the court stated that its decision was limited to the situation where the destruction of evidence was non-malicious and pursuant to well-established practices. If the destruction of evidence had merely been the result of prosecutorial negligence, the court would exclude the result of the breathalyzer test but would not dismiss the action. However, if there had been prosecutorial bad faith, the court intimated that the action would be dismissed.

Although the discussion above was found only in the footnotes of the *Hitch* opinion, it gives some indication that the good or bad faith of the prosecution is at least relevant to the judicial determination of the sanction to be imposed. *Cf.* note 114 *supra*.

123. In *Ruthford* and Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975), the California Supreme Court reprimanded what it thought was willful prosecutorial misconduct unbefitting the requisites of a fair trial. It is apparent that the conduct of the prosecution was an important factor in the decisions of the above cases.

124. 5 Cal. 3d at 533, 487 P.2d at 1240, 96 Cal. Rptr. at 600.

material evidence without request. The court emphasized the purpose of the criminal justice system in ascertaining the truth, the prosecution's superior resources in criminal investigation, and the importance of simplifying discovery procedure in reaching this conclusion. The fact that the conviction in *Ruthford* was reversed without remand further indicates that the California Supreme Court will enforce the duty to disclose rigorously. The principles of due process demand no less.

ADDENDUM

As this Comment went to press, the United States Supreme Court decided the case of *United States v. Agurs*[125] and elaborated the constitutional requirements of the prosecutor's duty to disclose. Since it is this writer's judgment that the *Agurs* decision represents a culmination rather than a superseding of previous Supreme Court cases on the disclosure issue, *Agurs* is discussed in this concluding section.

In *Agurs*, a woman was convicted of second degree murder for stabbing a man with whom she had gone to a hotel. The evidence presented at trial indicated that the man had carried two knives with him, one of which was used by the defendant for the killing. The defendant was unscathed during the fight and her claim of self-defense did not prevail at trial.

During the discovery stage, the defense attorney had not requested from the prosecution any criminal record of the murder victim because he believed that such evidence would have been inadmissible. After the conviction, however, the defense discovered its error and moved for a new trial, partly on the ground that the prosecution had failed to disclose voluntarily the criminal record of the deceased, which included a conviction for assault and carrying a dangerous weapon, and another conviction for carrying a dangerous weapon. In both instances, the weapon had been a knife. The defense's contention was that, by withholding that record, the prosecution had denied the defendant a fair trial under the rule of *Brady v. Maryland*. Had the record been presented at trial, claimed the defense, it might have led the jury to believe that the victim had a penchant for violence and that the defendant had acted in self-defense.

The trial court denied the defendant's motion for a new trial

125. 44 U.S.L.W. 5013 (U.S. June 24, 1976).

because it considered the withheld evidence immaterial. The court noted that the victim's criminal convictions added little to the undisputed evidence at trial concerning his character and his possession of two knives when the fight ensued. Furthermore, despite the defendant's assertion of self-defense, she had not suffered any injury. In light of all the facts, the trial court stated that it remained convinced of defendant's guilt beyond a reasonable doubt. The Court of Appeals for the D.C. Circuit reversed the ruling of the trial court, holding that the withheld evidence was sufficiently material as to overcome any lack of diligence on the part of defendant's counsel, and that the case should be remanded for a determination of whether the undisclosed evidence, if presented at trial, "might have led the jury to entertain a reasonable doubt about the defendant's guilt."[126]

The United States Supreme Court then reversed the court of appeals decision and affirmed the defendant's conviction. According to the Court, there are three categories or types of situations to which the *Brady* rule arguably applies. The first type of situation, exemplified by *Mooney v. Holohan* and its line of cases, concerns the prosecution's use of testimony which was known or should have been known to be perjured for convicting a criminal defendant. In those cases, the prosecution's willful misconduct, which corrupts the truthseeking function of the trial process, calls for an imposition of a strict standard of materiality. The conviction must be vitiated "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[127]

The *Brady* decision itself represents a prime example of the second category of cases. In this category, if the prosecution has not responded to a defendant's specific request for exculpatory evidence which is either material, or if a substantial basis for claiming materiality exists, the prosecution's conduct is "seldom, if ever, excusable."[128] Apparently, the test for materiality in this second type of situation is identical to that in the first category.

126. 510 F.2d 1249, 1253 (D.C. Cir. 1975). The *Agurs* Court, however read into the opinion of the circuit court an assumption that the prosecutor has a constitutional obligation to disclose any information that "might" affect the jury's verdict. The Court held that this assumption was unwarranted because it would have required the prosecution to disclose everything that conceivably "might" influence the jury's verdict; the result will amount to a complete discovery of the prosecution's file. The Court stated that no such broad discovery was constitutionally mandated.

127. 44 U.S.L.W. at 5015.

128. *Id.* at 5016. The Court indicated that the proper response by the prosecution to a specific request for exculpatory evidence is either to furnish the information or submit the problem to the trial judge.

Belonging to the third category are cases where the defense either has not requested the evidence or has only made a general request, and there has been no prosecutorial misconduct. The absence of a specific request does not preclude the prosecution's duty to disclose, but only if the withheld evidence is "obviously exculpatory" is disclosure required. The *Agurs* Court reasoned that, without a specific request, the prosecution would not be on notice with respect to the importance of the evidence. Hence, before a conviction is reversed, a more rigorous standard of materiality than the harmless error test will be imposed on the defense. The Court distinguished between a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, which is based on the discovery of new evidence from a neutral source, and a similar motion on the ground of the prosecution's non-disclosure. Under Rule 33, a new trial is granted only if the defense can demonstrate that the newly discovered evidence would probably lead to an acquittal. In the non-disclosure case, however, the Court held that less burden should be put on the defense since the "new" evidence was in fact held by the prosecutor all along. Thus, if the trial court is able to entertain reasonable doubt about the defendant's guilt after reviewing the suppressed evidence in the context of the entire record, there will be a new trial. The Court concluded that, since *Agurs* involved no specific request and no perjured testimony, the trial court had applied the correct standard of materiality, and thus affirmed the defendant's conviction.

The three-tier analysis in *Agurs* bears a striking resemblance to the analysis in *United States v. Keogh*, and the comments in *Keogh* in the foregoing discussion by and large also apply to the *Agurs* opinion. As in *Keogh*, the *Agurs* Court dispensed with a defendant's request for evidence as an absolute prerequisite to invoking the *Brady* rule; at the same time *Agurs* would also impose a more rigorous standard of materiality on the defense where there had been no specific request. Unlike *Keogh* (indeed unlike any previous Supreme Court case), the *Agurs* opinion is more specific in defining the test of materiality and its applicability. The following discussion will attempt to summarize the Court's position.

At the risk of over-simplification, the Court's analysis of the materiality issue may be characterized as the objective approach.[129] According to the *Agurs* Court, the premise of the pros-

129. The *Agurs* Court noted:

> [I]f the suppressed evidence actually has no probative sig-

ecutor's constitutional duty to disclose material exculpatory evidence is that the defendant may otherwise be deprived of a fair trial. The proper standard of materiality must reflect the overriding concern with the justice of the finding of guilt and not with the impact of the undisclosed evidence on the defendant's ability to prepare for trial, or the moral culpability of the prosecutor. The Court stated that a strict standard of materiality was applicable in *Mooney* and its progeny not only because of prosecutorial misconduct but, more importantly, because those cases involve a corruption of the truth-seeking function of the trial process. Thus, in determining whether a prosecutor's non-disclosure is material, the proper test for the trial court is to see whether the withheld evidence calls into question the defendant's conviction. Where the suppressed evidence is trivial or unimportant, the prosecution's willful non-disclosure, even when it is in bad faith, will not overturn a guilty verdict.

Two observations may be made at this point. First, the *Agurs* Court has limited the *Mooney* line of cases to those involving the prosecution's use of perjured testimony at trial, and thus tends to foreclose any extension of the *Mooney* principle. Insofar as the Court discussed the concept of fair trial, it is more concerned with the fairness of the verdict than the fairness of the process which leads to the verdict.

Second, as noted above, the *Agurs* Court implied, without elaboration, that there is a distinction between penalizing prosecutorial misconduct, such as deliberate non-disclosure of exculpatory evidence, and deterring the corruption of the truth-seeking function of the trial process, for example, by the use of perjured testimony. Arguably, one distinction is that the use of perjured testimony at trial affects directly the trial process, whereas the non-disclosure of evidence takes place before trial. But if that were a valid distinction, and if the Court has already disavowed the importance of punishing prosecutorial misconduct of that variety, what then accounts for the application of a severe test of materiality when the prosecution, before trial, has ignored

> nificance at all, no purpose would be served by requiring a new trial simply because an inept prosecution 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.

Id. at 5017. Note that the California Supreme Court in *Ruthford* would have reversed the conviction without a new trial if the prosecution had engaged in such deliberate misconduct.

a specific request for evidence by the defense? This severe test appears to be a form of punishment for the prosecution. It appears that, while the *Agurs* Court wishes to de-emphasize the deterrent purpose implicit in the constitutional duty to disclose, in practice the prosecution's misconduct will be taken into consideration.

Turning to the standard of materiality itself, the *Agurs* opinion specifies two tests. The first test raises the question whether there is any reasonable likelihood that the false testimony or suppressed evidence would have affected the judgment of the jury. The second test is for the court to determine for itself, before remanding, if the evidence gives rise to a reasonable doubt about the defendant's guilt. Although the first test on its face does not have the force of the harmless error test, it is at least consistent with the standard expressed in prior Supreme Court cases. The second test of materiality, however, appeared only for the first time in *Agurs* and sparked Justice Marshall's dissenting opinion, with which Justice Brennan concurred. The dissent contended that this second test permits the trial judge to usurp the prerogative of the jury. Further, this test unduly burdens the defense, inasmuch as it has to convince the judge and then the jury of its innocence before there can be a new verdict. Justice Marshall's dissenting opinion also argued that the majority's distinction between the requirement for a new trial under Rule 33 of the Federal Rules of Criminal Procedure and the presumably less stringent second test of materiality is an illusory one: if the undisclosed evidence is sufficiently material to create reasonable doubt in the judge's mind about the conviction, surely it will also lead the judge to conclude that the evidence will probably change the verdict on re-trial. The dissent's position is that the prosecution's non-disclosure of material evidence is in and of itself a misconduct, and should be judged by the same standard as that in the perjured testimony cases—whether the suppressed evidence would have affected the jury's verdict.

Though the *Agurs* decision cannot be exhaustively analyzed in this Comment, the basic outline of the Court's position is clear. The *Agurs* Court will demand from the defense a very substantial showing of materiality before a conviction will be reversed as a matter of constitutional law. As the standard set forth by the United States Supreme Court is only the minimum threshold, the California judiciary is unfettered in fashioning a more stringent code of conduct for the prosecution. Without further belaboring

the point, it is the conclusion of this Comment that the concept of fair trial is the proper vehicle for broadening the rights of criminal defendants.

Kei-On Chan