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Prosecutor's Duty to Disclose Evidence

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I. INTRODUCTION

A prosecutor has an affirmative duty to disclose exculpatory, material evidence to a defense attorney, even absent a request.[1] This duty hinges on the materiality of the suppressed evidence. If the suppressed evidence is determined to be material to the defendant's guilt or innocence, then the prosecutor has breached his duty to disclose. Thus, the particular test of materiality, applied by a judge in a post-conviction proceeding, determines the scope of a prosecutor's duty to disclose.

In *State v. McDowell*,[2] the North Carolina Supreme Court articulated, for the first time, the proper standard of materiality that gives rise to a prosecutor's duty to volunteer favorable evidence to a defense attorney. *McDowell* holds that where the prosecutor fails to disclose evidence, which is likely to create a reasonable doubt in the jury's mind as to the defendant's guilt, a new trial is required.[3] The *McDowell* court implicitly rejects the pro-prosecution standard of materiality[4] proffered in *United States v. Agurs*,[5] which requires reversal only where there is a "strong likelihood that the undisclosed favorable evidence would have affected the verdict."[6] Consequently, in North Carolina, a defense attorney has a pro-defense standard of materiality to meet in establishing that the prosecutor's failure to volunteer favorable evidence denied the defendant a fair trial. The pro-defense standard only requires a "reasonable chance that a jury hearing it would decide the case differently."[7]

The purpose of this note is threefold. First, this note will trace the development of the prosecutor's duty to disclose evidence to the defense

1. For a discussion of the prosecutor's duty to volunteer favorable evidence, see *infra* notes 46-68 and accompanying text.

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

3. *Id.*

4. For the purposes of this note, pro-prosecution standard of materiality will refer to a standard that is less likely to result in reversals of convictions for failure to disclose. A pro-defense standard of materiality will refer to a standard that is more likely to result in reversals of convictions for failure to disclose. For an explanation of these terms, see Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1148 n.52 (1982). Finally, "test of materiality" and "standard of materiality" will be used interchangeably.

5. 427 U.S. 97 (1976).

6. Babcock, *supra* note 4, at 1148 (Pro-prosecution standard places the burden on the defendant to show the strong "likelihood that the verdict would have been affected") (citing *Agurs*, 427 U.S. at 104).

7. *Id.* at 1147 (citing United States v. Agurs, 510 F.2d 1249 (D.C. Cir. 1975), *rev'd*, 427 U.S. 97 (1976)).

attorney. Second, this note will examine the *McDowell* court's deviation from established tests of materiality regarding the prosecutor's duty to volunteer evidence. Finally, this note will postulate the effects of a pro-defense test of materiality.

II. THE CASE

A jury convicted Robert Henry McDowell for the first degree murder of Carol Ann Hinson and the felonious assault of Patsy Ann Mason.[8] McDowell was sentenced to death and to twenty years, respectively.[9] The North Carolina Supreme Court affirmed both the conviction and sentence.[10]

Subsequently, McDowell filed a motion for a new trial based, in part, on a denial of due process because of the prosecutor's failure to disclose material, exculpatory evidence.[11] The suppressed evidence consisted primarily of the following: Patsy Mason had originally reported to the police that her assailant was white. McDowell is black.[12] The superior court concluded that the prosecutor's failure to volunteer the evidence "raise[s] sufficient constitutional and due processs questions [and there is a] substantial likelihood of a federal court requiring a new trial at some distant future date . . . ."[13] The court awarded McDowell a new trial.[14] The state appealed.

The North Carolina Supreme Court granted certiorari to consider what standard of materiality trial judges should apply in post-conviction proceedings when assessing the effect of the prosecutor's nondisclosure of

8. McDowell, was tried, convicted, and sentenced in the Criminal Session of the Superior Court of Johnston County, the Honorable Donald Smith, Superior Court Judge presiding. The state introduced evidence to show that McDowell entered the bedroom shared by Carol Hinson and Patsy Mason. The victims were four and fourteen years old respectively. McDowell allegedly struck each girl repeatedly with a two-foot long machete. Brief for Appellant at 3, State v. McDowell, 301 N.C. 279, 282, 271 S.E.2d 286, 289 (1980), *cert. denied*, 450 U.S. 1025, *reh'g denied*, 451 U.S. 1012 (1981).

9. *McDowell*, 301 N.C. at 284, 271 S.E.2d at 290.

10. *Id.* at 293-94, 271 S.E.2d at 295-96. McDowell was granted a motion for stay of execution by the North Carolina Supreme Court. State v. McDowell, 310 N.C. 61, 63, 310 S.E.2d 301, 303 (1984).

11. *McDowell*, 310 N.C. at 63, 310 S.E.2d at 303. McDowell filed his motion during the Criminal Special Session of Lee Superior Court, the Honorable Judge Collier presiding. *Id.* McDowell filed his original motion on the grounds of newly discovered evidence pursuant to N.C. GEN. STAT. § 15A-1415 (1978), *amended by* N.C. GEN. STAT. § 15A-1415 (Cum. Supp. 1981). *McDowell*, 310 N.C. at 63-64, 310 S.E.2d at 303-04. For a discussion distinguishing a statutory right to relief based on newly discovered evidence from a common law right to relief because of the prosecutor's failure to disclose evidence, see *infra* notes 92-96 and accompanying text.

12. Brief for Appellee at 11. Also, the state knew that Patsy Mason had met McDowell prior to the crime but she had testified to the contrary. *Id.* at 18. Furthermore, the state knew of prior white intruders in the Mason home prior to the date of the crime. *Id.* at 14. Finally, the state was aware of an eleven-year-old witness at the scene, who reported seeing a black man on a bicycle approach the Mason home on the night of the offense. *Id.* at 17.

13. *McDowell*, 310 N.C. at 63, 310 S.E.2d at 303.

14. *Id.* at 65, 310 S.E.2d at 304.

unrequested exculpatory evidence at trial.[15] The court held that the proper test of materiality is whether the suppressed evidence is likely to create a reasonable doubt in the jury's mind as to the defendant's guilt.[16] The court vacated the lower court's order and remanded the case to the superior court for a hearing *de novo*.[17]

III. BACKGROUND

In examining the impact of *State v. McDowell*, it is necessary to discuss the common law development of the prosecutor's duty to disclose. The case law can be categorized into three situations. Each area involves the post-trial discovery of evidence known to the prosecutor but unknown to the defense attorney. The first concerns the prosecutor's knowing use of perjured testimony. The second involves the prosecutor's failure to disclose evidence after the defense attorney has made a specific request. The third regards the prosecutor's failure to disclose evidence absent a specific request.

A. *The First Situation: Prosecutor's Knowing Use of Perjury*

The origin of the prosecutor's duty to disclose derived from cases involving the prosecutor's knowing use of perjured testimony.[18] The United States Supreme Court has consistently held that the prosecutor's knowing use of perjury,[19] or failure to correct testimony known to be false,[20] denied the defendant a fair trial. Thus, where the prosecutor sup-

15. *Id.* at 69, 310 S.E.2d at 306.
16. *Id.* at 73, 310 S.E.2d at 309.
17. *Id.* at 75, 310 S.E.2d at 310.
18. Common to these cases is the early courts' focus on willful prosecutorial misconduct as opposed to the detrimental effect of the perjured testimony on the defendant. *See Agurs*, 427 U.S. at 104 n.10; *see generally* Comment, Brady v. Maryland *and The Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972) (discussion of the development of the courts' justifications for appropriate standards of materiality).
19. *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (prosecutor's knowing use of perjury to obtain a conviction denied defendant due process); Pyle v. Kansas, 317 U.S. 213 (1942) (affirming *Mooney* standard); Miller v. Pate, 386 U.S. 1 (1967) (in rape conviction, prosecutor's deliberate misrepresentation that defendant's shorts had victim's blood stains on them when he knew they only had paint stains denied defendant due process).
20. Alcorta v. Texas, 355 U.S. 28, 31-32 (1951) (where defendant asserted fit of passion at trial for murder of his wife, prosecutor's failure to correct state witness' testimony, known to be false, denied defendant due process); Napue v. Illinois, 360 U.S. 264, 269 (1959) (extended *Alcorta* in holding prosecutor's failure to correct perjury going to credibility of state witness denied defendant fair trial); *see also* People v. Savvides, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854-55, 154 N.Y.S.2d 885, 887 (1956).

> [I]t is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon a defendant's guilt. A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.

Id.

presses evidence indicating that he knew or should have known of the use of perjured testimony, a new trial may be ordered.

The Court has applied a pro-defense standard of materiality in determining whether a new trial is warranted. That standard is whether the false testimony is likely to have affected the judgment of the jury.[21] Early decisions have justified the pro-defense test by focusing on intentional prosecutorial misconduct.[22] Subsequent cases have focused upon the corruption of the integrity of the judicial process[23] as well as the detrimental effect upon the defendant.[24]

Therefore under the pro-defense standard, in those cases where the prosecutor fails to make a disclosure of the false statement, the defense attorney has a lesser burden to meet to receive a new trial. First, the defense attorney must establish the use of perjury. Second, the defense attorney must prove that the prosecutor knew[25] or should have known of the perjury.[26] Finally, the false evidence must be likely to have affected the judgment of the jury. If all three are established, the defendant is entitled to a new trial.

B. *The Second Situation: Failure to Disclose After a Specific Request and the Origin of a Third Situation*

The *Brady v. Maryland*[27] decision and its progeny mark a clear deviation in the development of the prosecutor's duty to disclose. In *Brady*, the Supreme Court directly addressed the issue of whether a prosecutor

21. United States v. Agurs, 427 U.S. 97, 103 (1976). *See also* Giglio v. United States, 405 U.S. 150, 154 (1972) (announcing a similar standard: "if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.").

22. For a discussion of the early justifications for a pro-defense standard, see *Agurs*, 427 U.S. at 104 n.10.

23. *Id.* at 104.

24. For a discussion of the subsequent justifications for a pro-defense standard, see Comment, *supra* note 18, at 135.

25. For a discussion of fact situations which fall within the confines of the prosecutor's knowing of the use of perjury, see Comment, *The Prosecutor's Duty to Disclose: From* Brady *to* Agurs *and Beyond*, 69 J. CRIM. L. & CRIMINOLOGY 197, 204 (1978).

26. The phrase, "should have known of the perjury" refers to those cases where a prosecutor is imputed to know of a perjury where another member of the prosecutor's staff has knowledge of it. *See Giglio*, 405 U.S. at 150 (imputed knowledge of the other prosecutor); United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974) (prosecution is comprised of all those agencies involved in prosecution of criminals); Barbee v. Warden, Md. Penitentiary, 331 F.2d 842 (4th Cir. 1964) (imputed knowledge of police). The term "should have known" has not been held to refer to the prosecutor's knowledge of prior inconsistent statements. *See* United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977) (prosecutor's knowledge of prior inconsistent statement did not constitute the knowing use of perjury); Wilson v. State, 372 A.2d 198 (Del. 1977) (prosecutor's knowledge of an exculpatory statement contradicting witness did not constitute the knowing use of perjury); *accord* McDonald v. State, 553 P.2d 171 (Okla. Crim. App. 1976). *But see* Note, *The Prosecutor's Duty to Disclose After* United States v. Agurs, 1977 ILL. L.F. 690, 996 (proposition that a prosecutor knowingly uses false evidence where he allows a witness to testify despite the fact that prosecutor possesses evidence of witness' prior inconsistent statements).

27. 373 U.S. 83 (1963).

has a duty to disclose evidence and determined that such a duty did exist. However, in subsequent cases, the Court struggled with the inadequacies of the *Brady* decision—namely, whether a specific request is a condition precedent to the application of the duty and what is the appropriate standard of materiality. Finally, the decision of *United States v. Agurs*[28] and its progeny attempted to resolve the unanswered questions in *Brady*. The *Agurs* Court articulated a third situation that consists of a failure to disclose *absent* a specific request.[29] These cases mark the transition of the duty to disclose from an inference to an articulable standard.

1. The *Brady* Rule

In *Brady v. Maryland*,[30] the Supreme Court altered the *Mooney* standard[31] to encompass a prosecutor's duty to disclose material, favorable evidence, which had been specifically requested by the defense attorney.[32] The *Brady* Court justified the duty by placing emphasis upon a defendant's right to a fair trial as well as the proper administration of justice.[33] Thus, the Court announced that an affirmative duty to disclose evidence, material to the defendant's guilt or innocence, exists where the defense attorney has made a specific request for the information.

However, the *Brady* Court failed to consider certain practical problems in applying this rule. *Brady* neglected to articulate whether a specific request was a condition precedent to the application of the rule.[34]

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

29. *Id.*

30. 373 U.S. 83 (1963). In *Brady*, the defendant was charged with first degree murder. Although he admitted participation in the murder, defendant claimed that Boblit had done the actual killing. Prior to the trial, the defense attorney made a specific request to the prosecution for all of Boblit's extra-judicial statements. The prosecutor withheld Boblit's admission that he had committed the offense. Subsequent to defendant's conviction, the defense attorney filed a motion for a new trial. *Id.* at 84-87.

31. Mooney v. Holohan, 294 U.S. 103, 112 (1935). *See supra* note 19 and accompanying text.

32. *Brady*, 373 U.S. at 87. The Court stated: "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*

33. *Id.* The Court noted: "[S]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* The Court's imposition of the duty, "irrespective of the good faith or bad faith of the prosecution," impliedly rejects prosecutor misconduct as a justification. *Brady* was not the first departure from the *Mooney* rationale. *See* United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955) (focusing on effect of prosecutor's acts upon the defense rather than prosecutorial malfeasance in holding that prosecutor's failure to disclose favorable evidence denied defendant due process); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961) (emphasis on effect of prosecutor's negligent suppression of evidence at defendant's trial).

34. *See* Giles v. Maryland, 386 U.S. 66, 102 (1967) (Fortas, J., concurring) (expansive reading of *Brady*, stating: "I see no reason to make the result turn on the adventitious circumstance of a request."); Moore v. Illinois, 408 U.S. 786, 800 (1972) (Marshall, J., concurring) (request requirment satisfied by a general pretrial request). *But see id.* at 794-95 (retreatist reading requiring a special request for favorable, material evidence). Some early courts of appeals held that a specific

Furthermore, that Court never articulated a standard of materiality by which the effect of the undisclosed evidence[35] could be assessed.[36] Thus, the *Brady* opinion provided few guidelines for subsequent decisions applying the *Brady* test.

2. *Agurs'* Resolution of *Brady*'s Inadequacies

In *Agurs*, the Supreme Court confronted and resolved the unanswered questions of *Brady*. *Agurs* proffered that the *Brady* rule applies in three situations: prosecutors's use of perjury, failure to disclose after a specific request, and failure to disclose absent a specific request.[37] Furthermore, *Agurs* articulated the precise standard of materiality applicable in the specific request situation. That standard is the pro-defense standard of whether the suppressed evidence might have affected the outcome of the trial.[38] The Court justified this lesser standard on the grounds that a specific request puts the prosecutor on notice, and failure to disclose may lead the defendant to believe the evidence is nonexistent.[39]

However, there are several requirements which a defense attorney must meet in order to establish that the prosecutor's failure to disclose evidence requested by the defendant warrants a new trial.[40] First, *Agurs* requires that the defense attorney make a specific pre-trial request for the

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request is not a condition precedent to the application of the *Brady* rule. *See* Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 845 (4th Cir. 1964); Meers v. Wilkins, 336 F.2d 135 (2d Cir. 1964) (same grounds).

35. The Supreme Court has generally held that nondisclosure of impeaching evidence may warrant a new trial. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) ("when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule") (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)). Fourth Circuit Court of Appeals' decisions have also recognized no distinction. *See* Ingram v. Peyton, 367 F.2d 933, 936-37 (4th Cir. 1966) (unintentional withholding of prior convictions of key witness required reversal); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976) (nondisclosure of police promise of leniency to key witness required reversal). For a similar discussion in non-request cases, see *infra* notes 36-45 and accompanying text.

36. Various tests of materiality have been applied. *See Giglio*, 405 U.S. at 154-55 (applying the *Napue* standard: a reasonable likelihood of the evidence affecting the outcome of the trial); *cf. Giles*, 386 U.S. at 116 (Harlan, J., dissenting) (applying the *Mooney* test: suppressed evidence having an outcome on the trial). *But see id.* at 101-02 (Fortas, J., concurring) (suppressed evidence helpful to the jury); *cf. Moore*, 408 U.S. at 809 (Marshall, J., dissenting) (evidence helpful to the defense).

37. United States v. Agurs, 427 U.S. 97, 103 (1976). "[*Brady*] arguably applies in three quite different situations. Each involves the discovery after trial of information which had been known to the prosecutor but unknown to the defense." *Id.*

38. *Id.* at 104. "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is the concern that the suppressed evidence might have affected the outcome of the trial." *Id.*

39. *Id.* at 106. *See* United States v. Mackey, 571 F.2d 376 (7th Cir. 1978) (unless a request is precise enough to give the prosecutor notice of exactly what the defendant seeks, it will be treated as no request or a general request). *But see* United States v. McCrane, 547 F.2d 204 (3d Cir. 1975) (request for all exculpatory and impeaching material is specific).

40. The *Agurs* Court reasoned that where a defendant makes a general request, the duty to disclose arises from the exculpatory evidence as opposed to the request. *Agurs*, 427 U.S. at 106. But some cases hold that if the evidence is so obviously important to the defense, the prosecution would

information.[41] Numerous lower courts have struggled with whether a vague pre-trial request should be considered a specific one under the circumstances giving rise to the pro-defense standard of materiality.[42] Second, the nondisclosed evidence must be favorable.[43] Third, the nondisclosed evidence must be material.[44] Fourth, some courts have required that the suppressed evidence be admissible.[45] Finally, some courts have required that the defense attorney make a showing of due diligence.[46] Where a defense attorney can meet these requirements it can usually be shown that the undisclosed evidence would have likely affected the verdict and a new trial will be granted.

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certainly have been on notice; suppression should be treated as a specific request. United States v. Morrel, 524 F.2d 550 (2d Cir. 1975); United States v. Kahn, 472 F.2d 272 (2d Cir. 1972).

41. A specific request must be precise enough "to give the prosecution notice of exactly what the defendant seeks." *Agurs*, 427 U.S. at 106.

42. For lower court decisions interpreting requests as too vague to be treated as specific, see Ostrer v. United States, 577 F.2d 782 (2d Cir.) (request for material in possession of the government bearing on credibility of state witness not specific), *cert. denied*, 439 U.S. 1115 (1978); United States v. Laskey, 548 F.2d 835, 839 n.2 (9th Cir.) (request for "all information regarding police reports, . . . promises or communications with government witnesses not specific"), *cert. denied*, 434 U.S. 821 (1977); Smith v. State, 248 Ga. 507, 509, 284 S.E.2d 406, 408 (1983) (prosecutor was justified in treating a request for a complete accounting of all police investigatory work in the case as not specific). These holdings were justified on the ground that the requests were so vague as to place the prosecutor in no better position of discerning what the defense wanted as no request at all. *But see* Chavis v. North Carolina, 637 F.2d 213, 220 (4th Cir. 1980) (request for "psychiatric or other reports which might tend to reflect on the credibility or competency of any . . . prospective witnesses . . ." held specific); *McCrane*, 547 F.2d at 207 (request for impeaching evidence of state witness was specific).

43. *See, e.g.*, State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983) (evidence must be favorable to defendant); Duncan v. State, 103 Ga. App. 148, 294 S.E.2d 365 (1982) (duty to disclose only exculpatory evidence); Ruiz v. State, 75 Wis. 2d 230, 249 N.W.2d 277 (1977) (no duty to disclose unless evidence is probative of guilt or innocence).

44. *Alston*, 307 N.C. at 337, 298 S.E.2d at 642 (defendant failed to show that the suppressed evidence was material and what effect, if any, the nondisclosure would have had on outcome of the trial); *see also Duncan*, 103 Ga. App. at 148, 294 S.E.2d at 367 ("of course [defendant] had not seen the statement . . . but the burden was nevertheless to show how the statement was expected to be material to his defense . . . ."); *see also* State v. Hardy, 293 N.C. 105, 127, 235 S.E.2d 828, 842 (1977) (where defense attorney makes a request for evidence and neither he nor the prosecutor can definitely say it is material, judge should order an in camera inspection of the requested information).

45. *See* Thornton v. State, 238 Ga. 160, 231 S.E.2d 729 (1977) (disclosure of informant's identity is inadmissible and thus immaterial); *accord* United States v. Atkinson, 429 F. Supp. 880 (E.D.N.C. 1977). *But see* State v. Peterson, 219 N.W.2d 665 (Iowa 1974) (rejected admissibility requirement); United States v. Ahmad, 53 F.R.D. 186 (M.D. Pa. 1971) (duty to disclose inadmissible evidence which may lead to admissible, favorable evidence).

46. *See, e.g.*, United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980) ("regardless of whether a request was specific or general, and regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial, and his only reason for not obtaining . . . the evidence . . . is his lack of reasonable diligence, the defendant has no *Brady* claim"); United States v. Shelton, 588 F.2d 1242 (9th Cir. 1978) (defendant did not exercise due diligence in obtaining information the prosecutor had obtained).

C. *The Third Situation: Failure to Disclose Absent a Specific Request*

Case law regarding a prosecutor's duty to disclose evidence, absent a specific request, has been developed by lower courts' application of the rules set forth in *Agurs*. This is the third situation articulated by *Agurs*. The landmark Supreme Court decision of *United States v. Agurs*, recognized that an affirmative duty to disclose exists in some situations, and addressed the proper tests of materiality that give rise to that duty.[47]

1. The *Agurs* Rule

In *Agurs*, the Court attempted to dispel the confusion among lower courts regarding the prosecutor's duty to disclose favorable, material evidence to the defense attorney, even absent a specific request for the information.[48] *Agurs* recognized[49] that a prosecutor has a constitutional duty to disclose based on the defendant's right to a fair trial guaranteed by the due process clause.[50] Thus, the language of the United States Constitution, as opposed to the statutory authority of the Federal Rules of Criminal Procedure, mandates a duty to disclose.[51]

By indirection, *Agurs* established a pro-prosecution standard of materiality to be applied in cases in which there has been no specific request. The opinion proffers the proper standard by expressly rejecting alternative standards. The first standard rejected is the rule 33 motion under the Federal Rules of Criminal Procedure requiring a new trial if the evidence *probably* would have resulted in an acquittal.[52] The Court noted that the rule 33 test was unduly harsh under circumstances where there has been no request.[53] The second standard rejected was the "harmless error" test requiring a new trial unless the judge is sure that the error did not have an effect on the jury.[54] The Court concluded that the "harmless error" standard was too lenient and would result in automatic rever-

47. United States v. Agurs, 427 U.S. 97 (1976).

48. Agurs was charged with the murder of Sewell but claimed self-defense. Subsequent to her conviction, Agurs made a motion for a new trial on the ground that the prosecutor failed to volunteer evidence of Sewell's past criminal record that would have supported her self-defense theory. *Id.* at 99-100.

49. *Id.* at 107.

50. U.S. CONST. amend XIV, § 1.

51. *Id.* Rule 33 of the Federal Rules of Criminal Procedure provides for a retrial based on newly discovered evidence. Federal courts have held that the essential requisites for a new trial are: (i) newly discovered evidence, (ii) defense attorney must exercise due diligence, (iii) evidence is material to the issues, (iv) evidence is of such a nature that it would probably produce an acquittal in the event of retrial. *See* United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975).

52. *Agurs*, 427 U.S. at 109; *see generally* United States v. Thompson, 493 F.2d 305, 310 (9th Cir. 1974) (defining burden for establishing grounds for a new trial based on newly discovered evidence), *cert. denied*, 419 U.S. 834 (1975).

53. *Agurs*, 427 U.S. at 110. Furthermore, the Court distinguished between the typical rule 33 action where the newly discovered evidence derives from a neutral source and the present action where the evidence is in the hands of the prosecutor. *Id.* at 111.

54. *Id.* at 112. *See generally* Kotteakos v. United States, 328 U.S. 750, 764 (1946).

sals.[55] After focusing on the criminal law standard of finding guilt beyond a reasonable doubt,[56] the Court stated:

> This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.[57]

Thus, where the prosecutor fails to volunteer favorable, exculpatory evidence to a defense attorney, a new trial is required if that evidence would have created a reasonable doubt about the defendant's guilt.

In a blistering dissent, Justice Marshall, joined by Justice Brennan, argued that a pro-defense standard of materiality should apply.[58] Essentially, the standard applied by the majority was whether the suppressed evidence was likely to create a reasonable doubt as to guilt in the minds of the jurors who convicted the defendant. The dissent offered several reasons for rejecting the reasonable doubt test.[59] First, the dissent noted that there is no significant difference between the reasonable doubt test and the rule 33 test rejected by the majority.[60] Second, the dissent argued that a pro-prosecution standard is inconsistent with the concept that evidence showing innocence should be brought to the jury's attention.[61] Third, the reasonable doubt test abrogates the jury's traditional function as the trier of fact, by allowing the judge to assess the materiality in his own mind.[62] Thus, the dissent advocated a pro-defense test of

55. *Agurs*, 427 U.S. at 112-14. The Court reasoned that since the prosecution need not open all its files to the defendant, every nondisclosure should not be treated as error. *See generally* Moore v. Illinois, 408 U.S. 786, 798 (1972); *In re* Imbler, 60 Cal. 2d 554, 556, 287 P.2d 6, 14, 35 Cal. Rptr. 293, 301 (1963) (prosecutor is under no duty to report sua sponte to the defense attorney all that he learns about the case and about his witnesses).

56. *Agurs*, 427 U.S. at 112.

57. *Id.* at 112-13. The Court, in evaluating the nondisclosed evidence in the context of the entire record, held that Agurs had not been denied due process since one could remain convinced of defendant's guilt beyond a reasonable doubt. *Id.*

58. *Id.* at 114 (Marshall, J., dissenting). The dissent argued that the proper test of materiality in non-request cases for disclosure should be "[whether] there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *Id.* at 121-22. *See generally* United States v. Miller, 411 F.2d 825 (2d Cir. 1969) (conviction reversed in absence of request for disclosure since significant chance existed that new evidence could have induced reasonable doubt); United States *ex rel.* Fein v. Deegon, 410 F.2d 13 (2d Cir. 1969) (same grounds); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) (applying a similar standard and recognizing the necessity to balance interests between the defendant, the prosecutor, and the judicial system).

59. *Agurs*, 427 U.S. at 114 (Marshall, J., dissenting).

60. *Id.* at 116. ("[S]urely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the court's standard) he would also conclude that the evidence 'probably would have resulted in an acquittal' (the rule 33 standard).").

61. *Id.* at 117.

62. *Id.* at 118.

materiality that would allow the evidence to be assessed in terms of how it would have affected the jury.

2. The Application of *Agurs*

The lower courts generally have been deferential to the "reasonable doubt" test of materiality implicit in *Agurs*. The courts of appeals generally have held that the materiality of the nondisclosed evidence is assessed by the "reasonable doubt" test.[63] On the other hand, some courts of appeals have held that the reasonable doubt should be raised in the jury's, as opposed to the judge's, mind.[64] Several circuits have recognized a harsher test of materiality regarding the nondisclosure of impeachment evidence.[65] However, the majority rule recognizes no distinction between impeachment evidence and exculpatory evidence.[66] Furthermore, state courts consistently have applied a variation of the

63. *See, e.g.*, United States v. Martorano, 663 F.2d 1113, 1115 (1st Cir. 1981) (evaluation of record in its entirety did not create a reasonable doubt); United States v. Sutherland, 656 F.2d 1181, 1204 (5th Cir. 1981) (failure to disclose impeaching evidence not sufficient "to create a reasonable doubt that did not otherwise exist"); Briggs v. Raines, 652 F.2d 862, 863 (9th Cir. 1981) (where defendant makes a general request, or no request, the evidence is not material within the meaning of *Brady* "unless it [is] sufficient to create a reasonable doubt about defendant's guilt"); United States v Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980) (recognizing *Brady* applied in three different situations); Chavis v. North Carolina, 637 F.2d 213, 222 (4th Cir. 1980) (test of materiality is "whether suppressed evidence [is] of sufficient probative value to create a reasonable doubt of guilt . . . where none theretofore existed."); United States v. Ramerez, 608 F.2d 1261, 1266 (9th Cir. 1979) (prosecutor's failure to disclose witness' statement that he had not been threatened, where witness testified that he had been threatened, did not create a reasonable doubt of defendant's guilt); United States v. Brown, 562 F.2d 1144, 1150 (9th Cir. 1978) (government's failure to disclose that key witness admitted to testifying falsely did not create a reasonable doubt that would not otherwise exist).

64. *See, e.g.*, Cannon v. Alabama, 558 F.2d 1211, 1216 (5th Cir. 1977) (materiality of suppressed evidence should be weighed in the jury's mind), *cert. denied*, 434 U.S. 1087 (1978); *accord* United States v. Librach, 609 F.2d 919 (8th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980); *but see* Ostrer v. United States, 577 F.2d 782, 788 (2d Cir. 1978) (judge is to determine whether the suppressed evidence creates a reasonable doubt in his mind rather than the jury's mind), *cert. denied*, 439 U.S. 1115 (1979). For another case expounding the proposition that the judge weighs the materiality of the evidence in his own mind, see *supra* note 60.

65. *See, e.g.*, Talamonte v. Romero, 620 F.2d 784 (10th Cir. 1980), *cert. denied*, 449 U.S. 877 (1981); United States v. Imbruglia, 617 F.2d 1, 6-7 (1st Cir. 1980) ("courts have expressed some uncertainty about granting new trials when the *Agurs* 'reasonable doubt' standard applies and the materiality of the newly discovered evidence rests upon its impeaching character"); United States v. Bracy, 566 F.2d 649, 656 (9th Cir. 1977) (lesser duty of prosecutor to disclose impeachment evidence), *cert. denied*, 439 U.S. 818 (1978); Garrison v. Maggio, 540 F.2d 1271 (5th Cir. 1976) (court applied the rule 33 standard where prosecution failed to disclose prior inconsistent statement), *cert. denied*, 431 U.S. 940 (1977).

66. *See, e.g.*, United States v. Laskey, 548 F.2d 835 (9th Cir. 1977) (failure to disclose prior similar offenses of witness did not create a reasonable doubt as to defendant's guilt); United States *ex rel.* Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1976) (prosecutor's failure to disclose leniency agreements with witness showing bias could have created reasonable doubt), *aff'd*, 566 F.2d 410 (2d Cir. 1977). The *Annunziato* court stated that, while the evidence in *Agurs* was not impeachment evidence, neither was it directly exculpatory evidence. Thus, the analysis utilized by the Court in *Agurs* does not support the application of a different standard to *Brady* claims on the basis of the character of the undisclosed evidence. *Id.* at 1280.

"reasonable doubt" test.[67]

Thus, case law since *Agurs* has established multiple tests of materiality to be used in assessing the effect of the prosecutor's suppression of evidence. In summary, when a prosecutor knowingly uses perjured testimony, a pro-defense test of materiality applies. When a prosecutor fails to disclose favorable, material evidence after a specific request, a pro-defense standard applies. Finally, when a prosecutor fails to volunteer favorable, material evidence, absent a specific request, a pro-prosecution standard applies. Once the duty-to-disclose category is identified, the appropriate test of materiality can be applied.

IV. ANALYSIS

In *State v. McDowell*,[68] the North Carolina Supreme Court articulated a pro-defense test of materiality to be used by trial judges in assessing the effect of material evidence which was undisclosed by the prosecutor and unrequested by the defense attorney. The court held that due process requires a new trial if the suppressed evidence likely would have created a reasonable doubt as to the defendant's guilt in the jury's mind.[69] *McDowell* recognized that this holding stemmed from the resolution of two separate questions. The first question concerned the proper test of materiality.[70] The second question was whether the materiality was to be assessed in the eyes of the judge or the jury.[71] Although the *McDowell* court repeatedly contended that its test of materiality was within the confines of *Agurs*, the *McDowell* test unquestionably deviated from the test in *Agurs*.[72]

There are several unavoidable, but beneficial, consequences of the *McDowell* holding. First, the court terminated the inherent inconsistency perpetuated by the *Agurs* progeny in adopting the "likely to create a rea-

67. *See, e.g.*, Radford v. State, 251 Ga. 50, 302 S.E.2d 555, 559 (1983) (state's failure to disclose evidence impeaching credibility of witness testifying against defendant's co-conspirator not sufficient to create a reasonable doubt); Timberlake v. State, 246 Ga. 488, 494, 271 S.E.2d 792, 798 (1980) (prosecutor's failure to disclose recent photo of suspect did not create a reasonable doubt); Payne v. Commonwealth, 220 Va. 601, 607, 260 S.E.2d 247, 251 (1979) (failure to disclose prior inconsistent statement to police not sufficient to create a reasonable doubt as to defendant's guilt); State v. Hatfield, 286 S.E.2d 402, 411 (W. Va. 1982) (failure to disclose ownership of gun not sufficient to create reasonable doubt as to defendant's guilt, where defendant asserts self-defense).

68. 310 N.C. 61, 310 S.E.2d 301 (1984).

69. *Id.* at 73, 310 S.E.2d at 309.

70. *Id.* at 69, 310 S.E.2d at 307.

71. *Id.*

72. The *McDowell* court stated that its test of materiality was within the extremes noted in *Agurs*. "Between the obviously opposite poles of no reasonable doubt, and verdicts 'already of questionable validity' lies a broad inevitably imprecise . . . area." *McDowell*, 310 N.C. at 70, 310 S.E.2d at 307. *Agurs* has been interpreted as profferring a "reasonable doubt" test of materiality. *Agurs*, 427 U.S. at 112. *McDowell* proffered a "likely to create a reasonable doubt" test which is a pro-defense test. *McDowell*, 310 N.C. at 73, 310 S.E.2d at 309.

sonable doubt" test.[73] Second, the court restored the jury to its traditional role as fact finder by requiring that the reviewing court assess the evidence through the eyes of the jury as opposed to accepting the trial judge's determination.[74] Third, *McDowell* effectively emasculated the pro-prosecution standard in *Agurs* which resulted in a test of materiality that weakened the defendant's interest in obtaining a full disclosure of all relevant evidence.[75]

A. *Terminating the Inherent Inconsistency in* Agurs

The *Agurs* "reasonable doubt" standard of materiality perpetuates an inconsistency. The *McDowell* "likely to create a reasonable doubt" standard alleviates this inconsistency in reasoning.

1. The Inconsistency

Agurs established a standard of materiality by expressly rejecting alternative standards.[76] The Supreme Court rejected the standard of materiality for a new trial based on newly discovered evidence[77] pursuant to Federal Rules of Criminal Procedure Rule 33. The rule 33 standard provides that a new trial is required where the new evidence would *probably* result in an *acquittal.*[78] *Agurs* characterized the rule 33 standard as too severe under the circumstances.[79] The Court noted that a stronger pro-prosecution standard would not give the prosecution the incentive to disclose exculpatory evidence since the likelihood of a reversal would be slim.[80] Instead, *Agurs* applied a "reasonable doubt" standard.[81]

The inconsistency in the *Agurs* rationale now becomes apparent because the "reasonable doubt" standard is as severe as the rule 33 standard.[82] From a functional analysis, to require that evidence create a reasonable doubt that did not otherwise exist is equivalent to requiring

73. Justice Marshall in his dissent recognized the flawed analysis. *See Agurs,* 427 U.S. at 104 (Marshall, J., dissenting).

74. Cases arguing that the evidence should be assessed in the jury's eyes are discussed *supra* note 64 and accompanying text.

75. *See supra* note 63 (discussion of the weighing of these factors in formulating a test of materiality in different situations).

76. 427 U.S. at 107-12 (rejecting "harmless error" and rule 33 standards of materiality).

77. *Id.* at. 107.

78. *Id.*

79. *Id.* at 111.

> [T]he fact that [in failure to disclose cases] such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial [in newly discovered evidence cases]. For that reason, the defendant should not need to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in an acquittal.

Id.

80. *Id.*

81. *Id.* at 114.

82. *See id.* at 115-16 (Marshall, J., dissenting). "Surely if a judge is able to say that evidence

the evidence to result in an acquittal. A defendant obtains an acquittal by showing the existence of a reasonable doubt as to his guilt. Thus, the rationale underlying the "reasonable doubt" standard is flawed in that it rejects a rule 33 standard as too harsh, but adopts a "reasonable doubt" standard that is equally severe.

2. Removing the Inconsistency

The *McDowell* court read *Agurs* as representing the extremes of an indefinite standard of materiality.[83] The *McDowell* court stated that the "likely to create a reasonable doubt" standard was a moderate standard functionally equivalent to the "likely to have affected the outcome of the trial" materiality standard.[84]

The "likely to have affected the outcome of the trial" standard is substantially less severe than the "probably would have resulted in an acquittal" standard of rule 33. The phrase "affected the outcome of the trial" encompasses a broader range of possibilities than "would have resulted in an acquittal."[85] The former includes the possibilities for a defendant to obtain a hung jury, to be found guilty of a lesser included offense, or to create a reasonable doubt as to his guilt. The latter includes only the possibility for the defendant to create a reasonable doubt as to his guilt.

Consequently, *McDowell* accomplished that which *Agurs* failed to do. *McDowell* articulated a test of materiality that is not only less severe than the rule 33 standard, but that also satisfies the reasoning of *Agurs*.[86]

B. *Restoring Jury to Traditional Rule*

The *McDowell* test of materiality, in allowing the evidence to be assessed in the minds of the jury that convicted the defendant, properly restored the jury to its traditional role as fact finder.[87] First, *McDowell* recognized the paramount concern, in any test of materiality, is the overall effect of the nondisclosed evidence on the outcome of the trial.[88] Since the jury determines the outcome of the trial, the impact of the evidence should be evaluated as it would affect the jury. Second, the use of the jury as the forum through whose eyes the materiality is assessed is consistent with the "likely to create a reasonable doubt" test of material-

actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence 'probably would result in an acquittal' (the rule 33 standard)." *Id.*

83. State v. McDowell, 310 N.C. 61, 69, 310 S.E.2d 301, 307 (1984).

84. *Id.* at 71 & n.4, 310 S.E.2d at 308 & n.4.

85. *Id.* at 70, 310 S.E. 2d at 307.

86. *Agurs*, 427 U.S. at 111 (discussion of the policy behind *Agurs*' rejection of rule 33). This analysis supports the *McDowell* test.

87. *McDowell*, 310 N.C. at 73, 310 S.E.2d at 309-10.

88. *Id.* at 73, 310 S.E.2d at 310 (citing *Agurs*, 427 U.S. at 107).

ity. To require a finding by the judge that the undisclosed evidence was likely to create a reasonable doubt in the minds of twelve jurors is constructively sound.[89] But, in North Carolina, unlike the federal system, the judge who considers post-conviction appeals is generally not the judge who tried the original case.[90] Thus, the suppressed evidence should be weighed in the eyes of the original fact finder at trial as opposed to the case-hardened eyes of the reviewing judge.[91]

C. *Ramifications of* McDowell*'s Pro-Defense Standard*

McDowell effectively emasculated the *Agurs* pro-prosecution test of materiality. *McDowell* expressly adopted a standard of materiality for non-request cases which is equivalent to the traditional pro-defense standard for request cases.[92] The pro-defense test of materiality strikes a new balance among three significant factors.[93] The first concerns the defendant's right to a fair trial. The second concerns the substantial burden of disclosing evidence imposed on the prosecutor by the new pro-defense test of materiality. The third concerns the administrative interest in the finality of judgments. *McDowell* properly strikes the balance in favor of the first factor at the expense of the other two.

1. Protecting Defendant's Right to a Fair Trial

The right to a fair trial requires the prosecutor to disclose evidence to the defendant that is probative of the defendant's guilt or innocence[94] even though it is detrimental to the prosecutor's case.[95] Yet, fairness does not require the prosecutor to give the defense attorney full discovery of his files. Materiality hinges on the strength or probative value of the undisclosed evidence.[96] Thus, the defendant's right to a fair trial is relative to the definition of materiality.

The pro-defense test of materiality enhances the defendant's right to a fair trial. A test of materiality relates to the probative value of the undisclosed evidence. The probative value of the evidence in a pro-defense test

89. For a general discussion of this consistency in construction, see Babcock, *supra* note 4, at 1179.

90. *McDowell*, 310 N.C. at 72, 310 S.E.2d at 309.

91. *Id.*

92. The traditional pro-defense test of materiality for cases involving the failure to disclose after a specific request is "whether the evidence might affect the outcome of the trial." *Agurs*, 427 U.S. at 104. *McDowell* adopted a standard which is expressly stated as equivalent to "whether the evidence would likely have affected the outcome of the trial." *McDowell*, 310 N.C. at 71 & n.4, 310 S.E.2d at 308 & n.4. Thus, the *McDowell* test is a pro-defense test.

93. For a discussion of these three factors, see United States v. Keogh, 391 F.2d 138 (2d Cir. 1968).

94. *See* Brady v. Maryland, 373 U.S. 83 (1963).

95. *See* Comment, *supra* note 18, at 132.

96. *McDowell*, 310 N.C. at 69, 310 S.E.2d at 308. *McDowell* also noted that materiality hinged upon the "magnitude of the evidence of guilt which the convicting jury heard." *Id.*

more closely resembles a relevance requirement[97] as opposed to an exculpatory requirement. A pro-defense test of materiality encourages the prosecutor to disclose evidence, which has a lower probative value than would be required under a pro-prosecution test. Consequently, with more relevant evidence at his disposal, the defendant can prepare a stronger case.

2. Burdens on the Prosecutor

A pro-defense test of materiality imposes substantial burdens on the prosecutor. This results from the scope of the prosecutor's duty to disclose hinging upon the test of materiality applied by the reviewing court. Thus, a pro-defense test of materiality creates burdens on the prosecutor that would not necessarily exist with a pro-prosecution test.

The first burden involves the prosecutor's obligation to divulge more information that is less crucial to the defendant's case.[98] By definition, a pro-defense test of materiality forces the prosecutor to disclose evidence that would not neccessarily be considered material by a reviewing court using a pro-prosecution standard.[99] In so doing, a prosecutor is required to scrutinize all evidence in his possession with an eye toward disclosing any item which might be remotely favorable to the defense.[100] This obligation more closely resembles the characteristics of the inquisitorial system of justice rather than the adversarial system.[101] Thus, the prosecutor is compelled not only to seek convictions, but also to aid his adversary by divulging any evidence of less than significant value to the defense.[102]

Another burden concerns the use of a remand as a sanction for enforcing the prosecutor's duty to disclose.[103] Prosecutors, who do not want their hard earned convictions to be remanded, will be encouraged to make good faith efforts to divulge. Yet the sanction is imposed if the suppressed evidence is deemed material[104] regardless of whether the prosecutor acted in good faith. The sanction unjustifiably attaches to intentional as well as unintentional acts of prosecutorial misconduct. Consequently, the remand may appear arbitrary to the prosecutor.

97. Comment, *supra* note 18, at 132.

98. *Id.* at 133.

99. For a discussion of the distinction between a pro-defense standard and a pro-prosecution standard, see *supra* note 4 and accompanying text.

100. The prosecutor is not under a duty to relinquish his files sua sponte to the defense attorney. *In re* Imbler, 60 Cal. 2d 554, 559, 387 P.2d 6, 14, 35 Cal. Rptr. 293, 298 (1963); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (no common law right to discovery), *cert. denied*, 377 U.S. 978 (1964).

101. For a general discussion of the effect of disclosure requirements on the adversarial system of justice, see Babcock, *supra* note 4, at 1133.

102. Comment, *supra* note 18, at 134-35.

103. *Id.* at 133.

104. For a discussion of a transition in the courts' focus from prosecutorial misconduct to the defendant's interest in a fair trial, see *Agurs*, 427 U.S. at 104 n.10.

However, the use of in camera inspections by the court[105] mitigates the prosecutor's burdens while preserving the defendant's fair trial guarantees. In borderline cases, the prosecutor may delegate the decisions regarding the propriety of disclosure to the court, without opening up his entire file to the defense attorney. Furthermore, the in camera inspection determines the duty to disclose contemporaneously with the trial, instead of retrospectively by a reviewing court in a post-conviction proceeding.[106] Therefore, the capriciousness of the remand, as a sanction, is removed.

3. Finality of Judgments

On its face, a pro-defense test appears to unjustifiably ignore the administrative interest in the finality of judgments. The likelihood that a prosecutor will fail to volunteer some item of favorable evidence, coupled with the retrospective application of a pro-defense test of materiality in a post-conviction proceeding, would tend to increase remands.[107]

However, the *McDowell* test is justifiable. Our system of jurisprudence has never been adverse to recognizing that the individual's right to a fair trial prevails over the interest in obtaining convictions. Furthermore, the use of an in camera inspection[108] or other mechanism during trial[109] would avoid the possibility of reversal in a post-conviction proceeding. Thus, although the *McDowell* test of materiality has the potential for administrative disadvantages, those disadvantages can be avoided.

V. CONCLUSION

In *State v. McDowell*,[110] the North Carolina Supreme Court rejected the pro-prosecution standard of materiality implicit in *United States v. Agurs*,[111] and proffered a pro-defense standard. The court held that the proper test of materiality, in assessing the effect of the prosecutor's failure to volunteer exculpatory evidence to a defense attorney, is whether the suppressed evidence is likely to create a reasonable doubt of guilt in the jury's mind.[112]

105. For a discussion of the use of in camera inspections, see *supra* note 44. There is no reason why this or a similar mechanism cannot be used in non-request cases.

106. *See supra* note 44.

107. *Cf.* United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) (the likelihood of deliberate prosecutorial misconduct in suppressing favorable evidence is remote. However, the unintentional failure to volunteer evidence which is deemed favorable at a post-conviction proceeding is more probable).

108. *See supra* note 44 and accompanying text.

109. Another possible mechanism is a broadening of the scope of pretrial criminal discovery to allow the opposing parties to examine questionable material evidence.

110. 310 N.C. 61, 310 S.E.2d 301 (1984).

111. 427 U.S. 97 (1976).

112. *McDowell*, 310 N.C. at 73, 310 S.E.2d at 309.

The *McDowell* holding is appropriate for several reasons. First, the *McDowell* test of materiality effectively eliminates the inherent inconsistency in the *Agurs* test of materiality.[113] In *Agurs*, the Supreme Court attempted, but failed, to articulate a test of materiality that was less severe than the "likely to result in an acquittal" test.[114] The "likely to create a reasonable doubt" test articulated in *McDowell* is less severe.[115] Second, the *McDowell* test properly restores the jury to its traditional role as fact finder by assessing the materiality in the eyes of the jury that convicted the defendant. Third, *McDowell* justly strikes a new balance between the defendant's right to a fair trial, the burdens imposed on the prosecutor, and the administrative interest in the finality of judgments.[116] *McDowell* gives preferential treatment to the defendant's interest in having all favorable exculpatory evidence disclosed at trial, at the expense of the latter two factors.

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113. For a discussion of the *Agurs* inconsistency, see *supra* notes 76-86 and accompanying text.
114. *Agurs*, 427 U.S. at 107.
115. For a discussion of the pro-defense *McDowell* test, see *supra* notes 92-93 and accompanying text.
116. For a discussion of the striking of a new balance among these factors, see *supra* notes 93-109 and accompanying text.

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