Notre Dame Law Review

Volume 50 | Issue 3 Article 7

2-1-1975

Pretrial Identification Procedures: The Expanded Duty to Disclose Favorable Evidence

Patrick T. Duerr

PRETRIAL IDENTIFICATION PROCEDURES: THE EXPANDED DUTY TO DISCLOSE FAVORABLE EVIDENCE

I. The *Evans* Case

On June 5, 1974, the Supreme Court of California held in *Evans v. Superior Court of Contra Costa County*[1] that the government is constitutionally obliged to supply the criminal defendant with a pretrial lineup. The court limited its holding to cases in which eyewitness identification is a "material issue" and "there exists a reasonable likelihood of a mistaken identification which the lineup would tend to resolve."[2]

In *Evans,* the defendant and a companion allegedly entered the drive-in restaurant of James Liddle, confronted him with a .45 caliber pistol, and forced him to hand over the cash register money, his wallet, and the wallet of a customer. Police officers, responding to a radio call, observed two men who fit the description of the robbers running from the vicinity of the restaurant. After a pursuit and a search which revealed two wallets, a substantial amount of money, and a .45 caliber pistol, the police placed the suspects in the back seat of the patrol car and returned to the restaurant. Outside the restaurant, Liddle identified the suspects through the back window of the police vehicle. Although the suspects never left the car and Liddle viewed only the backs of their heads and shoulders, he claimed that they appeared to have the same physical builds as the men who had robbed him.[3] The defendant later moved for a pretrial lineup to test the accuracy of the eyewitness identification but the trial court denied this request. The Supreme Court of California reversed and granted defendant's motion.[4]

The *Evans* court based its decision on *Brady v. Maryland's*[5] due process prohibition of prosecutorial suppression of evidence.[6] *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[7] Initially, it may be difficult to perceive the connection between the prohibition of prosecutorial suppression of evidence favorable to the defense and the requirement of providing the defendant with a pretrial identification procedure. The court was concerned, however, about evidence which would tend to demonstrate the accuracy of the eyewitness identification. It feared that the "inherently suggestive" atmosphere of the in-court identification could not produce such evidence. The suggestion created by the defendant's position at the defense table would

1 —— Cal. ——, 522 P.2d 681, 114 Cal. Rptr. 121 (1974).
2 *Id.* at ——, 522 P.2d at 686, 114 Cal. Rptr. at 126.
3 *Id.* at ——, 522 P.2d at 683, 114 Cal. Rptr. at 123.
4 *Id.* at ——, 522 P.2d at 686, 114 Cal. Rptr. at 126.
5 373 U.S. 83 (1963).
6 —— Cal. at ——, 522 P.2d at 686, 114 Cal. Rptr. at 126.
7 373 U.S. at 87.

virtually dictate to the eyewitness whom he was to identify.[8] Because of these facts, the court contended that if the defendant were denied the pretrial lineup as an opportunity for discovery, "the net effect would be the same as if existing evidence were intentionally suppressed,"[9] thereby denying the defendant a fair trial under *Brady*.

Without the protection of a pretrial identification procedure, a defendant would be forced to bear the damaging effect of an in-court identification rife with suggestion while he is unable to obtain evidence indicating the weakness of that eyewitness identification. The question remains whether the prosecutor's duty to disclose favorable evidence is the proper vehicle for resolution of this problem.[10] The California court obliges the prosecutor to establish procedures at the pretrial stage which will enable the defense to develop evidence which at that time is nonexistent. Furthermore, the evidence, once developed, may not be favorable to the accused.

The prosecutor's duty to disclose has never been so broadly construed. The *Brady* statement of the principle does not indicate that the duty is applicable at the pretrial stage. *Brady* also appears to contemplate only disclosure of existing, favorable evidence and does not oblige the prosecutor to search for evidence. However, these objections to *Evans*' broad application of the duty to disclose may be overcome. Using the policy of fairness which underlies the duty to disclose as a touchstone, it is apparent that the duty to disclose may validly be construed to include the duty to provide identification procedures to the defendant.

II. The Prosecutor's Duty to Disclose Favorable Evidence: The Policy of Fairness

The Supreme Court first planted the seeds of the prosecutor's constitutional duty to disclose favorable evidence in *Mooney v. Holahan*[11] and *Pyle v. Kansas*.[12] In each of these cases, the prosecution knowingly procured perjured testimony in the presentation of its case. In the dicta of *Mooney*, which later became the holding of *Pyle*, the Court observed that the prosecution violates the due process rights of a defendant when it deprives the "defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."[13] Although the Court was concerned about the effect of such prosecutorial acts on the defendant's case, the primary concern of *Mooney* and *Pyle*

8 As to the effect of suggestive circumstances on eyewitness identification *see generally*, E. M. BORCHARD, CONVICTING THE INNOCENT (1932); N. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS (1972); P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES (1965); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 PA. L. REV. 1079 (1973).

9 —— Cal. at ——, 522 P.2d at 686, 114 Cal. Rptr. at 126.

10 The typical due process issue concerning identification procedures is the fairness of the procedure itself. *See generally*, Neil v. Biggers, 409 U.S. 188 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); Foster v. California, 394 U.S. 440 (1969); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967). This line of Supreme Court cases is not applicable in the *Evans* context, however. *Evans* required an identification procedure on the basis of due process. It did not address the fairness of the procedure itself.

11 294 U.S. 103 (1935).

12 317 U.S. 213 (1942).

13 294 U.S. at 112; *see* 317 U.S. at 216.

was the reprehensible nature of the prosecutor's conduct. The Court refused to become a party to "deliberate deception" and sought to reprimand the prosecution for its misdeeds.[14]

The initial shift of the Court's emphasis from the nature of the prosecutor's act is found in *Napue v. Illinois*.[15] The defendant claimed that the prosecutor violated his due process right by failing to correct the testimony of his accomplice which the prosecutor knew to be false.[16] *Napue* is significant for several reasons. The Court found a due process violation despite the fact that the prosecutor had not actually procured false testimony.[17] Furthermore, the falsity of the testimony did not directly relate to the guilt of the defendant but merely to the credibility of the witness.[18] Finally, the Court implied in its reference to *People v. Savvides*[19] that the proper inquiry in determining whether the prosecutor's failure to disclose violates due process is the resulting impact of the nondisclosure on the proceeding and not the nature of the prosecutor's act: "That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact is the same, preventing, as it did, a trial that could in any real sense be termed fair."[20]

The *Napue* decision, then, created a dramatic shift from *Mooney's* and *Pyle's* focus on the reprehensible character of the prosecutor's conduct. *Napue* uncontestably signals that the critical inquiry in a nondisclosure objection is the fairness of the proceeding. *Brady v. Maryland* specifically sanctions this shift in emphasis by holding that the "good faith" or "bad faith" of the prosecution is not determinative of the due process question. The Court elaborated, stating that the underlying principle of its holding "is not punishment of society for the misdeeds of a prosecutor, but the avoidance of an unfair trial to the accused."[21]

Finally, *Giglio v. United States*[22] offers uncompromising support to *Napue's* contention that the critical inquiry in nondisclosure cases is the fairness of the trial. *Giglio* held that the failure of the government to apprise the defense of the fact that an adverse witness who was also the defendant's accomplice was offered immunity from prosecution violated the government's duty to disclose favorable evidence. The Court found this due process violation despite strong evidence which indicated that an officer of the government other than the attorney prosecuting the case made the offer of immunity and despite the fact that the officer did not communicate this fact to the prosecuting attorney. The Court focused on the resulting fairness of the proceeding and rejected the contention that such negligence did not violate the government's duty to disclose.[23]

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14 317 U.S. at 216; 294 U.S. at 112; *cf.*, White v. Ragen, 324 U.S. 760 (1945) where the Court stated that a conviction secured by the use of perjured testimony known to be such by the prosecutor is a denial of due process.

15 360 U.S. 264 (1959).

16 *Id.* at 267. The false testimony was the witness' contention that he was not offered assistance by the government in exchange for his testimony.

17 *Id.* at 269; *cf.* Giles v. Maryland, 386 U.S. 66, 74 (1967).

18 *Id.* at 270.

19 1 N.Y. 2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).

20 *Id.* at 557, 136 N.E.2d at 854-55, 154 N.Y.S.2d at 887.

21 373 U.S. at 87; *cf.* Note, *Government Has Duty to Implement Effective Guidelines to Preserve Discoverable Evidence*, 1971 DUKE L.J. 644, 645.

22 405 U.S. 150 (1972).

23 *Id.* at 152, 153.

The shift from *Mooney* and *Pyle* is, then, complete. It is not the nature of the prosecutor's conduct which is dispositive of the due process question but rather the resulting fairness of the trial. Indeed, as indicated by *Giglio,* even a seemingly "innocent" act on the part of the government may violate due process if a ramification of that act is an unfair proceeding. This underlying policy of fairness greatly assists the sketching of the contours of the prosecutor's duty to disclose favorable evidence. It is the touchstone through which the obstacles to *Evans'* broad application of the duty to disclose may be overcome. It provides the basis for interpreting the duty to disclose as including the government's duty to supply the defense with identification procedures.

III. Objections to Interpreting the Duty to Disclose as Including the Duty to Provide Pretrial Identification Procedures

A. *The Prosecutor's Duty to Disclose and the Pretrial Stages*

Evans treated the defendant's request for a pretrial lineup as a request for discovery. The court granted this motion on the basis of the constitutional duty of the prosecutor to disclose favorable evidence.[24] *Brady,* however, in its enunciation of the disclosure principle did not specify the stage of the proceedings at which the government must disclose exculpatory evidence. Several courts consequently have held that the duty to disclose does not apply to the pretrial stage.[25] Although *Brady* is not explicit on the matter, the spirit of *Brady* dictates that the timing of the disclosure be determined by the defense's ability to capitalize on such evidence.[26] The underlying policy of the prosecutor's duty to disclose is fairness to the defendant. In order to implement this policy, the duty must be operative at whatever time necessary to assure usefulness to the defendant. In the case of evidence indicating the weakness of eyewitness identification, this stage is pretrial.

B. *The Prosecutor's Duty to Disclose Only Favorable Evidence*

A pretrial identification procedure may incriminate the defendant as well as exculpate him, depending upon the outcome of that procedure. The objection then may arise that the principle of prosecutorial disclosure applies only to favorable evidence and therefore does not govern the case in which the nature of the evidence is undetermined. In *United States v. Bryant,*[27] however, Judge Skelley Wright exposed the shallowness of this reasoning. The defendant Bryant was

24 —— Cal. at ——, 522 P.2d at 684, 114 Cal. Rptr. at 124.

25 United States v. Moore, 439 F.2d 1107, 1108 (6th Cir. 1971); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Gardner, 308 F. Supp. 425 (S.D.N.Y. 1969); United States v. Zive, 299 F. Supp. 1273, 1274 (S.D.N.Y. 1969); United States v. Zirpolo, 288 F. Supp. 993 (D.N.J. 1968).

26 Note, *Brady v. Maryland and the Prosecutor's Duty to Disclose,* 40 CHI. L. REV. 112, 117 (1973); Note, *The Prosecutor's Duty to Disclose Exculpatory Evidence,* 19 OKLA. L. REV. 425, 429 (1966); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 YALE L.J. 136, 145 (1964); United States v. Cobb, 271 F. Supp. 159, 163 (S.D.N.Y. 1967); United States v. Gleason, 265 F. Supp. 880, 884-85 (S.D.N.Y. 1967).

27 439 F.2d 642 (D.C. Cir. 1971).

convicted for the sale of narcotics. In the course of the investigation, a police agent made tape recordings of the narcotics transaction between himself and Bryant but the recordings were misplaced and therefore could not be produced upon request of the defense counsel. Since the contents of the tapes were crucial to the question of guilt or innocence and since they may have been "significantly 'favorable' " to the defendant, the D.C. Circuit held that these recordings were within the scope of the prosecutor's constitutional duty to disclose.[28] Judge Wright held that the due process requirement of *Brady* demands the disclosure of evidence if the suppression "might" harm the defendant. A contrary determination would unjustifiably disadvantage the defendant by precluding the constitutional necessity of disclosure simply because the government has lost or misplaced such evidence and therefore is unable to determine if that evidence is "favorable" to the accused.[29]

The similarities between *Bryant* and *Evans* indicate that the *Bryant* contention that "favorable" means "might be favorable" should be binding in the *Evans* context. In each case, the type of evidence sought bears heavily on the proof of the defendant's innocence or guilt. A properly conducted pretrial identification procedure provides the "unavoidable possibility" that the evidence therefrom will be "significantly favorable" to the defendant.[30] In *Evans* as in *Bryant,* if the prosecutor's duty to disclose does not apply because the nature of the evidence is undetermined, then a pedestrian act by the government would preclude the defendant from procuring the evidence. The fact that the evidence sought in *Evans* "might be favorable," then, is sufficient to justify the application of the prosecutor's duty to disclose "favorable" evidence.

C. *The Duty to Disclose and the Search for Evidence*

Without exception, the cases which have required the prosecutor to disclose favorable evidence have concerned factual situations in which the evidence sought actually existed either at or prior to the time of the request and the government had actual possession of the evidence at one point in time. It was the deliberate or negligent nondisclosure of this evidence which gave rise to the violation of the prosecutor's constitutional duty. No case before *Evans* has held that the duty to disclose obliges the prosecution to develop evidence for the accused. On the contrary, the courts and commentators have unanimously held that *Brady* does not require that the prosecution search for evidence on behalf of the defense.[31] The one case that might be cited in favor of the proposition that the government is required to search for evidence is *People v. Hocker.*[32] The defendant was convicted of murder while claiming that the deceased had committed suicide. The defense contended that there was a suppression of evidence concerning the suicide

28 *Id.* at 648.
29 *Id.*
30 *Id.*
31 *See, e.g.,* Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966); State v. Reyna, 92 Idaho 665, 448 P.2d 762 (1968); Ginsburg, *Disclosure to the Defense in Criminal Cases,* 57 ILL. BAR J. 194, 206-07 (1968); Note, *Disclosure of Favorable and Material Evidence Required Although Procurable by Diligent Defense Counsel,* 42 N.Y.U. L. REV. 764, 768 (1967).
32 423 F.2d 960 (9th Cir. 1970).

claim because the police had failed to conduct fingerprint, ballistic, and paraffin tests. The court, while noting that a better investigation by the police would have aided the jury, maintained that the investigation was not so poor as to amount to a suppression of evidence and a consequent denial of due process.[33] One may conceivably draw the inference that an investigation could be of such low quality as to amount to a suppression of evidence. Recognition of the ultimate holding of *Hocker,* together with the authority to the contrary, however, renders this implication of the case tenuous precedent for the *Evans* proposition that a duty to disclose includes a duty to provide a pretrial identification procedure.[34]

1. *Evans* and the Prosecutor's Duty to Search for Evidence

The prosecution is generally not obliged to search for evidence. In *Evans* the defense did not request the government to seek additional evidence but only sought a procedure, which is peculiarly within the government's control,[35] through which the defense might develop its own evidence. *Gregory v. United States*[36] provides authority for this distinction. There, the defendant's counsel was unable to interview eyewitnesses to a murder because the prosecutor had instructed them not to speak with anyone unless he was present. The court noted that there was no direct suppression of evidence as contemplated by *Brady.* "But there was unquestionably a suppression of the means by which the defense could obtain evidence."[37] The D.C. Circuit recognized that without such interviews the defense could not know the content or the strength of the eyewitness testimony. The prosecutor's advice had frustrated this effort and denied the defendant a fair trial.[38] Although the prosecutor in *Evans* did not advise against a lineup, the fact that the trial court refused to provide such a procedure combined with the fact that the procedure was peculiarly within the control of the government rendered the government's action even more prohibitive than the advice of the prosecutor to his witness in *Gregory.* Moreover, the application of the disclosure principle in *Evans* is more appropriate than its application in *Gregory.* The court in *Gregory* found a violation of the duty to disclose even though allowing the interview of the eyewitnesses without the prosecutor present could encourage tampering with evidence and suborning of perjury.[39] No such competing interests need be overcome in *Evans.* The lineup would have taken place in the laboratory-like conditions of the police station in full view and under the control of police officials and the prosecutors.[40]

33 *Id.* at 964.
34 There are no cases which cite *Hocker* to this effect.
35 —— Cal. at ——, 522 P.2d at 687, 114 Cal. Rptr. at 127. Here, the *Evans* court notes that the defendant has neither the facilities nor the experience to conduct a lineup. *Id.*
36 369 F.2d 185 (D.C. Cir. 1966), *cert. denied,* 396 U.S. 865 (1969).
37 *Id.* at 188-89.
38 *Id.*
39 *Id.*
40 An analogous line of cases has held that due process requires the government to afford the defendant charged with public intoxication an opportunity to have the alcohol level of his blood tested. *See, e.g.,* State v. Snipes, 478 S.W.2d 299, 303 (Mo. 1972), *cert. denied,* 409 U.S. 979 (1972); State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971); State v. Tietz, 107 N.J. Super. 176, 257 A.2d 726 (1966); State v. Munsey, 152 Me. 198, 127 A.2d 79 (1956).

2. The Duty to Disclose and the Performance of Affirmative Acts

Although *Gregory* indicated that there is a distinction between searching for evidence and providing procedures through which favorable evidence might be obtained, it did not determine the scope of the prosecutor's duty to provide such procedures. The *Gregory* court prohibited prosecutorial acts that effectively destroy the *means* by which the defense can obtain evidence. *Evans,* on the other hand, required the government to perform affirmative acts in supplying the defense with such means. To what extent does the prosecutor's duty to disclose require affirmative acts such as providing an identification procedure?

The D.C. Circuit in *United States v. Bryant* directly addressed the issue of whether nonpreservation of evidence by the government amounts to an unconstitutional suppression, as does a bad faith destruction or withholding of evidence by the prosecution.[41] The government contended that since the requested evidence was lost and therefore not in its possession, it could not produce such evidence and consequently its duty to disclose was not violated. The court regarded this argument as much too facile and indicated that the maintenance of a meaningful safeguard may require additional affirmative acts on the part of the prosecutor to insure disclosure. Judge Wright reasoned that because the effect on the fairness of the proceeding is the same when the evidence is lost and therefore unavailable as it would have been had the prosecutor withheld existing evidence, the duty to disclose necessarily contemplates an additional duty of preservation. Any alternative rule would encourage the prosecution to be careless in its maintenance of evidence at the expense of the accused.[42] *Bryant* indicates, then, that the policy of fairness underlying the duty to disclose demands that the prosecutor not only disclose favorable evidence but also take affirmative steps to preserve such evidence.

United States v. Heath[43] and *Trimble v. State*[44] embellish *Bryant's* holding that a duty to disclose may include affirmative acts by the prosecutor to preserve evidence. In *Heath,* the defendant, who was charged with willfully evading payment of income tax, claimed that the government's loss of his income tax record was an effective suppression that denied him due process. The court, focusing on the policy of fairness underlying the government's duty to disclose, maintained that the government must take affirmative steps to preserve favorable evidence. While conceding that the government did not willfully withhold evidence, the court held, however, that this fact was of no comfort to the accused in the preparation of his case and because of the resulting prejudice due process was violated.[45] In *Trimble,* the police had seized a letter from the defendant's house and subsequently misplaced it. The contents of the letter may have substantiated a claim of self-defense against a murder charge. The court admitted that this was not strictly a suppression case as that term is generally employed. The court reasoned, however, that the effect of the officer's action was as damag-

41 439 F.2d at 644.
42 *Id.* at 650.
43 147 F. Supp. 877 (D. Hawaii 1957).
44 75 N.M. 183, 402 P.2d 162 (1965).
45 147 F. Supp. at 878, 879.

ing to the defendant as if the evidence were known to the prosecution and not to the defendant.[46] The court consequently found a violation of due process based on a violation of the government's duty to actively preserve evidence.

Finally, in *Giglio v. United States*[47] the Supreme Court sanctioned affirmative action by the government to enable it to comply with its duty to disclose favorable evidence. The Court stated that to the extent that its finding of a due process violation based on negligent suppression of evidence placed a heavy burden on large prosecutors' offices, these offices could promulgate procedures and regulations to assure the communication of all relevant information.[48] The Court implied, then, that the fairness policy of *Brady* was sufficiently strong to compel the government's adoption of techniques to preserve the defendant's due process rights. The question of whether the government must, in addition to mere disclosure, take affirmative action to preserve evidence is, then, answered. When steps are necessary to effectively implement the policy of fairness underlying the duty to disclose, they must be taken. The fact that the defendant in *Evans* requested the government to take affirmative action in supplying him with an identification procedure cannot therefore be considered an insurmountable objection to his request based on the government's duty to disclose favorable evidence.

3. Affirmative Action and Evidence Not Presently Existing

The *Gregory* court indicated that a suppression of the "means" to obtain evidence not yet in existence may be a violation of the prosecutor's duty to disclose. *Bryant, Heath, Trimble,* and *Giglio* maintain that the duty to disclose evidence may implicitly require that the prosecution take affirmative steps to preserve such evidence. The *Evans* application of the duty to disclose principle is a synthesis of these two contentions. As noted by the California Supreme Court, there is no case which has employed such an extreme application of the prosecutor's duty to disclose.[49] The cases and commentators indicate that the disparity between the prosecution's and the defense's investigative tools is a major cause of the unfairness that results from the government's failure to disclose favorable evidence.[50] Because the defense "does not have the manpower or resources available to the state in its investigation of the crime,"[51] it is at an initial disadvantage in its effort to garner favorable evidence. The constitutional duty of the government to disclose favorable evidence is fashioned to mitigate this inherent unfairness in the criminal proceedings. If the disclosure principle is aimed at alleviating the unfairness created by the comparative dearth of defense investigative tools, the requirement of providing identification procedures

46 402 P.2d at 164, 165; *cf.* Lee v. United States 368 F.2d 834 (D.C. Cir. 1966).
47 405 U.S. 150 (1972).
48 *Id.* at 154.
49 —— Cal. at ——, 522 P.2d at 684, 114 Cal. Rptr. at 124.
50 Levin v. Katzenbach, 363 F.2d 287, 294 (D.C. Cir. 1966) (Burger, J., dissenting); Ellis v. United States, 345 F.2d 961, 963 (D.C. Cir. 1965); Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962); Note, *The Prosecutor's Duty to Disclose Exculpatory Evidence,* 19 OKLA. L. REV. 425, 428 (1966); Note, 74 YALE L.J. 136, 143 (1964).
51 Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962).

to the defendant falls naturally within that principle. The cases support the obligation of the government to affirmatively act in order to preserve evidence and they prohibit actions on the part of the government which effectively destroy "means" by which the defense may obtain evidence. The policy underlying the disclosure principle provides the necessary link which permits the synthesis of these two lines of cases. The government may be obliged to affirmatively act so as to provide the defendant with the "means" to obtain favorable evidence.

D. *The Burden of Providing Identification Procedures*

The final objection to interpreting the prosecutor's duty to disclose as including the duty to provide the defense with an identification procedure is that such a requirement would overburden the prosecutor. A consideration of the negligent suppression cases exposes the fallacy of the objection. The overwhelming majority of cases hold that due process is violated just as certainly if the government negligently suppresses evidence as if it intentionally suppresses it.[52]

The factual basis of these decisions indicates that the burden placed on the prosecutor is much greater than that which would be imposed by requiring the government to provide the defense with an identification procedure. *United States v. Consolidated Laundries Corp.*[53] held that the failure of the government to properly maintain a witness' file and thus render that file inaccessible at the time of the trial was an effective suppression of evidence. The court determined that the government was responsible for maintaining the evidence in such a way that would be available at trial even though the negligent act was committed by a mere employee of the antitrust division. The fact that someone from the division had not properly cared for the evidence was sufficient to cause a suppression of evidence.[54]

In *Ingram v. Peyton,*[55] the prosecutor had misstated the name of the government's chief witness in the indictment. Consequently the defense was unable to locate any previous convictions of the witness for impeachment purposes. The court rejected the argument that because the misstatement was not intentional no violation of due process occurred. "The question is whether the defendant was deprived of an effective defense because the critical information was unavailable. . . ."[56]

The courts have further extended the negligent suppression principle to cases in which the exercise of due diligence by the defense counsel would prob-

52 United States v. Miller, 411 F.2d 825 (2d Cir. 1969); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); United States v. Ahmad, 53 F.R.D. 186 (M.D. Pa. 1971); Hanson v. Cupp, 484 P.2d 847 (Ore. 1971); Means v. State, 429 S.W.2d 490 (Ct. Crim. App. of Tex. 1968); Hale v. State, 230 N.E.2d 432 (Ind. 1967). *But see,* United States v. Sanders, 322 F. Supp. 947 (E.D. Pa. 1971); State v. Kahinu, 53 Hawaii 36, 498 P.2d 635 (1972), *cert. denied,* 409 U.S. 1126 (1973); Geelan v. State, 182 N.W.2d 311 (S.D. 1970) (holding that an intentional suppression is necessary to create a violation of due process).

53 291 F.2d 563 (2d Cir. 1961).

54 *Id.* at 570.

55 367 F.2d 933 (4th Cir. 1966).

56 *Id.* at 936.

ably have uncovered the "suppressed evidence."[57] In *Levin v. Katzenbach*,[58] the defendant was charged with grand larceny. A key part of the government witness' testimony indicated that the defendant refused to receive the $35,000 entrusted to him in one thousand dollar denominations. The witness purportedly returned to the bank where he received the 35 $1,000 bills and exchanged them for a like amount in $20 denominations.[59] The prosecutor, however, neglected to disclose to the defense that the bank official failed to recall such an exchange. The court held that such a failure was a suppression of evidence and a violation of due process.[60] It did so despite the fact that the defense counsel had interviewed the bank official and failed to inquire about the incident, that the defense counsel never requested such information of the prosecutor, and that every rational inference indicated to the prosecutor that the defense had such information at his disposal.[61] The court reasoned that defendant's claim of relief based on the prosecutor's duty to disclose challenges the fairness and therefore the validity of the proceeding. Relief therefore cannot depend on whether more diligent counsel would have discovered the evidence on his own.[62]

These cases indicate that the burden placed on the prosecutor in order to avoid negligent suppression far exceeds that which would be imposed upon him by requiring identification procedures.[63] The government's duty may be breached by a clerical error of lower echelon personnel,[64] a spelling mistake in the indictment,[65] or a failure by the prosecutor to disclose information to the defense in circumstances that indicate that the defense had the information or at least access to it.[66] The true significance of these cases, however, is not found in the argument that they place a larger burden on the prosecutor than would be required for identification procedures. They are significant because they indicate that the critical inquiry in a due process disclosure question is not the resulting burden on the prosecution any more than it is the nature of the prosecutor's act. It is the fairness and therefore the validity of the proceedings and not the resulting burden on the prosecutor which determines the scope of the prosecutor's duty to disclose.

IV. Conclusion

The prosecutor's duty to disclose provides a valid constitutional basis for requiring the government to supply the defendant with a pretrial identification

57 This is a significant step considering that the disclosure principle has been analyzed as a response to the disparity between the defendant's and the prosecution's investigative tools. *See* note 49 *supra*.

58 363 F.2d 287 (D.C. Cir. 1966).

59 *Id.* at 289.

60 *Id.* at 292.

61 *Id.* at 295 (Burger, J., dissenting).

62 *Id.* at 291; *cf.* Barbee v. Warden Maryland Penitentiary, 331 F.2d 842, 845-46 (4th Cir. 1964); Note, *Prosecutor's Failure to Disclose Evidence Equally Available to the Defense May Constitute a Violation of Due Process*, 42 NOTRE DAME LAWYER 264 (1966).

63 *See* Evans v. Superior Court of Contra Costa County, —— Cal. ——, 522 P.2d 681, 687, 114 Cal. Rptr. 121, 127 (1974), where the court notes that the burden of providing an identification procedure is a nominal one.

64 United States v. Consolidated Laundries, 291 F.2d 563, 570 (2d Cir. 1961).

65 Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966).

66 Levin v. Katzenbach, 363 F.2d 287, 295 (D.C. Cir. 1966) (Burger, J., dissenting).

procedure upon the defendant's request. Although an initial consideration of the duty may suggest that such a requirement is beyond the scope of the duty, a closer analysis indicates the contrary. The development of the underlying policy of fairness provides a touchstone for determining the parameters of the disclosure duty. The objections to interpreting the duty to disclose as including the duty to provide identification procedures are refuted by a consideration of the court's interpretation of the duty in other contexts.

Using fairness as a touchstone, the contentions that the disclosure principle does not apply to the pretrial stage, that it applies only to existing favorable evidence, and that its application in *Evans* would overburden the prosecutor become untenable. The result of this theoretical analysis is also consistent with practical considerations which surround identification in the criminal trial. If the criminal proceeding is viewed as an effort to determine factual guilt, the strength of identification evidence should be properly tested. The defense should be afforded the opportunity to display the inability of the eyewitness to select the defendant in a formally conducted identification procedure.[67] It is merely this opportunity that the *Evans* court seeks to supply. The court's implementation of the disclosure principle in this effort, although novel, is both valid and defensible.

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67 — Cal. at —, 522 P.2d at 685, 114 Cal. Rptr. at 125.