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Daniel J. Crothers

THE CONSTITUTIONAL DIMENSION OF DISCOVERY IN DWI CASES

DANIEL J. CROTHERS*

I. INTRODUCTION

Recently national attention has focused on the victims of drunk drivers — the physically injured and society.[1] The public finally seems committed to removing alcohol impaired drivers from the nation's roadways. The concern is justified. Recent statistics show that more than half of all traffic fatalities and injuries involve a drinking driver.[2] The economic and emotional impact of this alcohol induced nightmare is beyond measure.

To combat the problem of the drunk driver, states have increased efforts to prosecute persons operating motor vehicles while under the influence of alcohol.[3] Congress has thrown its

*B.A., University of North Dakota, 1979; J.D., University of North Dakota, 1982; Law Clerk, New Mexico Court of Appeals, Santa Fe, New Mexico, 1982-1983.

1. *See, e.g.*, Haddon & Blumenthal, *Foreword* to H. ROSS, DETERRING THE DRINKING DRIVER at xiii-xx (1982) (concern for the carnage caused by alcohol related accidents has prompted the legislatures to promulgate strict laws that attempt to deter individuals from driving while intoxicated).

2. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 52 (1982); NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, FATAL ACCIDENT REPORTING SYSTEM 1979, 27-28 (1981). The National Highway Traffic Safety Administration's 1979 figures show that 28.7% of the drivers involved in fatal crashes had been drinking. *Id.* at 27-28. Controlled studies indicate, however, that one-third to one-half of the deaths are alcohol related. *Id.* The National Highway Safety Administration's explanation for this discrepancy is that only 57% of the fatally injured drivers were tested for alcohol: surviving drivers were rarely tested. *Id.* The Administration also stated that the official figures are lower due to incomplete and subjective accident reports. *Id.*

3. *See generally* H. ROSS, DETERRING THE DRINKING DRIVER 1-10 (1982) (examines the effectiveness of the deterrence model for driving-while-intoxicated offenses).

support behind the states' efforts by considering legislation[4] that would provide financial aid to states that improve enforcement of driving-while-intoxicated (DWI) laws.[5]

Concomitant with vigorous enforcement of the law comes the legitimate concern that the "get tough" DWI laws may unduly infringe upon the driver's rights. To the legal profession this concern signifies a duty to be more than cheerleaders for the DWI crackdown. Rather, increased enforcement means that defendants must have an opportunity to ensure that their rights and liberties have not been wrongfully impinged. Constitutional due process constraints require that the DWI defendant's rights be protected.

An important aspect of protecting a defendant's interests is the employment of competent counsel. This Article provides lawyers with a general discussion of the law of discovery in DWI cases. Major emphasis is on discovery of breathalyzer test and reference ampoules.[6]

II. DISCOVERY IN DWI CASES

A. HISTORY OF DWI DISCOVERY

The starting point in a discussion of discovery in DWI cases is

4. *See, e.g.*, H.R. 6170, 97th Cong., 2d Sess., 128 CONG. REC. 1591, 1625 (1982) (grants to states with programs reducing driving-while-intoxicated hazards); S. 2158, 97th Cong., 2d Sess., 128 CONG. REC. 541, 1387 (1982) (national driver's registry for collection of individual driving records); S. 2159, 97th Cong., 2d Sess., 128 CONG. REC. 541, 1387 (1982) (bill to amend the Bankruptcy Act to prohibit discharge of debts resulting from liability based on driving-while-intoxicated offenses).

5. Operation of motor vehicles while under the influence of alcohol is referred to by different names in different jurisdictions. *See, e.g.*, CAL. VEH. CODE § 23153 (West Supp. 1982) (driving while intoxicated); N.D. CENT. CODE § 39-08-01 (Supp. 1981) (driving under the influence of intoxicating liquor); OR. REV. STAT. § 487.540 (1981) (driving while under the influence of intoxicants). For uniformity within this Article, operation of a motor vehicle while under the influence of alcohol will be referred to as "driving while intoxicated" or as "DWI."

6. The California Supreme Court explained in *People v. Hitch* how breathalyzers and ampoules determine whether an individual is legally intoxicated. *See* People v. Hitch, 12 Cal. 3d 641, 644, 527 P.2d 361, 363, 117 Cal. Rptr. 9, 11 (1974). The *Hitch* court stated:

> The breathalyzer used in the test is an electrically powered apparatus designed to calculate the extent of alcohol in the suspect's circulatory system. The suspect blows into a tube and a sample of his breath is trapped inside the machine. The trapped sample is then permitted to bubble through a glass test ampoule containing three cubic centimeters of 0.025 percent potassium dichromate in a 50-percent-by-volume sulphuric acid solution which acts as a reagent to any alcohol suspended upon the suspect's breath. If alcohol is present in the sample, it produces a change in the color and the light transmissibility of the solution. Upon the passage of a light beam through the test ampoule, the relative light transmissibility of the solution is registered on a meter which calculates the percent of alcohol in the suspect's blood.
>
> The machine is calibrated so as to provide a reading by establishing a correlation between the test ampoule and a reference ampoule which is identical in specification. It is essential to the accuracy of the test that a quantity of exactly three cubic centimeters of the solution be present in each. This is checked by a gauge in the machine and a test ampoule not meeting the requirement is discarded.

Id.

the 1974 California Supreme Court case of *People v. Hitch*.[7] In *Hitch* the defendant was arrested for driving a motor vehicle while under the influence of intoxicating liquor.[8] The arresting officer administered a breathalyzer test, which revealed a blood alcohol level of 0.20%.[9] After the test the officer followed department procedure by discarding the test ampoule.[10]

Prior to trial, the defendant moved to suppress the results of the breathalyzer test, alleging that destruction of the ampoule and its chemical contents denied him due process of law.[11] The California Supreme Court agreed with the defendant, stating that

7. 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974).

8. People v. Hitch, 12 Cal. 3d 641, 644, 527 P.2d 361, 363, 117 Cal. Rptr. 9, 11 (1974).

9. *Id.* The states have adopted statutory breath alcohol levels that are presumptive of legal intoxication. *See* ALA. CODE § 32-5A-194 (Supp. 1982) (0.10%, presumption of intoxication); ALASKA STAT. § 28.35.033 (Supp. 1982) (0.10%, presumption of intoxication); ARIZ. REV. STAT. ANN. § 28-692 (Supp. 1982) (0.10%, presumption of intoxication); ARK. STAT. ANN. § 75-1031.1 (1979) (0.10%, presumption of intoxication); CAL. VEH. CODE § 23126 (West 1971) (0.10%, presumption of intoxication); COLO. REV. STAT. § 42-4-1202 (Supp. 1982) (0.10%, presumption of intoxication); CONN. GEN. STAT. § 14-227 (1981) (0.10%, prima facie evidence of intoxication); DEL. CODE ANN. tit. 11, § 3505 (1979) (0.10%, prima facie evidence of intoxication); D.C. CODE ANN. § 40-609a (1973) (0.10% prima facie proof of intoxication); FLA. STAT. § 322.262 (1981) (0.10%, prima facie evidence of intoxication); GA. CODE ANN. § 68A-902.1 (Supp. 1982) (0.10%, presumption of intoxication); HAWAII REV. STAT. § 291-5 (1976) (0.10%, presumption of intoxication); IDAHO CODE § 49-1102 (1980) (0.08%, presumption of intoxication); ILL. ANN. STAT. ch. 95½, § 11-501 (Smith-Hurd 1979) (0.10%, presumption of intoxication); IND. CODE ANN. § 9-4-1-54 (Burns Supp. 1982) (0.10%, prima facie evidence of intoxication); IOWA CODE § 321.281 (1981) (0.10%, presumption of intoxication); KAN. STAT. ANN. § 8-1005 (1975) (0.10%, presumption of intoxication); KY. REV. STAT. ANN. § 189.520 (Bobbs-Merrill 1980) (0.10%, presumption of intoxication); LA. REV. STAT. ANN. § 32:662 (West Supp. 1982) (0.10%, presumption of intoxication); ME. REV. STAT. ANN. tit. 29, § 1312 (1978) (0.10%, prima facie evidence of intoxication); MD. CTS. & JUD. PROC. CODE ANN. § 10-307 (Supp. 1982) (0.08%, prima facie evidence of impairment; 0.13% prima facie evidence of intoxication); MASS. ANN. LAWS ch. 90, § 24 (Michie/Law. Co-op. Supp. 1982) (0.10%, presumption of intoxication); MICH. COMP. LAWS ANN. § 257.625a (Supp. 1982) (0.10%, presumption of intoxication); MINN. STAT. ANN. § 169.121 (West 1980) (0.10%, prima facie evidence of intoxication); MISS. CODE ANN. § 63-11-39 (Supp. 1982) (0.10%, presumption of intoxication); MO. REV. STAT. § 557.037 (Supp. 1982) (0.10%, prima facie evidence of intoxication); MONT. CODE ANN. § 61-8-401 (1981) (0.10%, presumption of intoxication); NEB. REV. STAT. § 39-669.07 (Supp. 1982) (0.10%, prima facie evidence of intoxication); NEV. REV. STAT. § 484.381 (1981) (0.10%, presumption of intoxication); N.H. REV. STAT. ANN. § 265:89 (1982) (0.10%, prima facie evidence of intoxication); N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1982) (0.10%, presumption of intoxication); N.M. STAT. ANN. § 68-8-110 (Supp. 1982) (0.10%, presumption of intoxication); N.Y. VEH. & TRAF. LAW § 1192 (Consol. Supp. 1982) (0.10%, presumption of intoxication); N.C. GEN. STAT. § 20-139.1 (Supp. 1981) (0.10%, presumption of intoxication); N.D. CENT. CODE § 39-20-07 (1980) *amended by* S. 2373, 48th Leg., ___ N.D. Sess. Laws ___ (effective July 1, 1983) (0.10%, prima facie evidence of intoxication); OHIO REV. CODE ANN. § 4511.19 (Page 1982) (0.10%, presumption of intoxication); OKLA. STAT. ANN. tit. 47, § 756 (West Supp. 1982) (0.10%, prima facie evidence of intoxication); OR. REV. STAT. § 487.545 (1981) (0.10%, per se intoxication); PA. CONS. STAT. ANN. § 1547 (Purdon 1977) (0.10%, presumption of intoxication); P.R. LAWS ANN. tit. 9, § 1041 (Supp. 1975) (0.15%, presumption of intoxication); R.I. GEN. LAWS § 31-27-2.1 (Supp. 1982) (0.10%, presumption of intoxication); S.C. CODE ANN. § 56-5-2950 (Law. Co-op. 1977) (0.10%, presumption of intoxication); S.D. COMP. LAWS ANN. § 32-23-7 (1969) (0.15%, presumption of intoxication); TENN. CODE ANN. § 55-10-408 (1980) (0.10%, presumption of intoxication); TEX. REV. CIV. STAT. ANN. art. 6701L-5 (Vernon 1977) (0.10%, presumption of intoxication); UTAH CODE ANN. § 41-6-44 (Supp. 1981) (0.08%, presumption of intoxication); VT. STAT. ANN. tit. 23, § 1204 (Supp. 1982) (0.10%, presumption of intoxication); VA. CODE § 18.2-269 (1982) (0.10%, presumption of intoxication); WASH. REV. CODE ANN. § 46.61.506 (1970) (0.10%, presumption of intoxication); W. VA. CODE § 172(331a) (1961) (0.15%, prima facie evidence of intoxication); WIS. STAT. ANN. § 885.235 (West Supp. 1982) (0.10%, presumption of intoxication); WYO. STAT. § 31-5-233 (1977) (0.10%, presumption of intoxication).

10. *Hitch*, 12 Cal. 3d at 644, 527 P.2d at 363, 117 Cal. Rptr. at 11.

11. *Id.* at 645, 527 P.2d at 364, 117 Cal. Rptr. at 12.

the test ampoule, its contents, and the reference ampoule constitute material evidence pertaining to a defendant's guilt.[12] The *Hitch* court declared that it would impose sanctions for the intentional, though nonmalicious, destruction of ampoules.[13] The court stated that the only permissible exception to the promulgated rule of preservation and disclosure occurs when the prosecution can prove that governmental agencies attempted, in good faith, to adhere to the procedures designed to preserve the ampoules.[14]

In reaching its conclusion the *Hitch* court relied on the trial court's detailed findings of fact.[15] Those findings concluded that the ampoules were indeed retestable and that the retesting would produce reliable results.[16] Since the *Hitch* decision, courts faced with this issue have reached divergent results. A minority of courts follow *Hitch*.[17] Most courts, however, have held that ampoules are not discoverable.[18] The *Hitch* decision thus invites consideration of

12. *Id.* at 652, 527 P.2d at 369, 117 Cal. Rptr. at 17. The *Hitch* court found the ampoules to be material evidence because of the presumption of legal intoxication upon a breathalyzer reading of 0.10% blood alcohol. *Id.* at 647, 527 P.2d at 365, 117 Cal. Rptr. at 13.

13. *Id.* at 652, 527 P.2d at 369, 117 Cal. Rptr. at 17.

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

15. *Id.* at 645 n.1, 527 P.2d at 364 n.1, 117 Cal. Rptr. at 12 n.1.

16. *Id.* The court summarized the trial court's findings of fact as follows:

> [I]t is always possible to retest the ampoule and contents to determine if it conforms to specifications and if it contained the requisite three cubic centimeters of solution; that it is always possible to determine whether there was in fact a 0.025 percent potassium dichromate solution; that optical defects in the glass of the test ampoule and of the reference ampoule may have an effect on the accuracy of the test; and that the accuracy of a retest will depend upon factors such as the time elapsed since the actual test, the manner in which the test ampoule and solution have been stored, and the continued chemical change in the contents of the test ampoule and that upon a retest the original test cannot be duplicated with 100 percent accuracy.

Id.

17. The following cases have adopted the position that ampoules are discoverable: Lauderdale v. State, 548 P.2d 376 (Alaska 1976); Scales v. City Court, 122 Ariz. 231, 594 P.2d 97 (1979); Garcia v. District Court, 197 Colo. 38, 589 P.2d 924 (1979); People v. Richter, 102 Misc. 2d 285, 423 N.Y.S.2d 610 (Crim. Ct. 1979); State v. Michener, 25 Or. App. 523, 550 P.2d 449 (Ct. App. 1976); State v. Booth, 98 Wis. 2d 20, 295 N.W.2d 194 (Ct. App. 1980).

18. The following cases have not adopted the position that ampoules are discoverable: State v. Cantu, 116 Ariz. 356, 569 P.2d 298 (Ct. App. 1977) (ampoule not discoverable because request for ampoule was made 85 days after breathalyzer test); People v. Hedrick, 192 Colo. 37, 557 P.2d 378 (1976) (ampoule not discoverable because request for ampoule was made nearly three months after breathalyzer test); People v. Godbout, 42 Ill. App. 3d 1001, 356 N.E.2d 865 (App. Ct. 1976) (ampoule not discoverable because defendant presented insufficient proof of ampoule retestability); State v. Southerburg, 402 A.2d 1294 (Me. 1979) (ampoule not discoverable because Kozelka-Hine gas chromatograph machine was used and the chemicals were consumed during the test); People v. Stark, 73 Mich. App. 332, 251 N.W.2d 574 (Ct. App. 1977) (ampoule not discoverable because discovery request was made 72 days after breathalyzer test); State v. Preston, 585 S.W.2d 569 (Mo. Ct. App. 1979) (ampoule not discoverable because defendant presented insufficient proof that retesting ampoule would produce exculpatory evidence); State v. Shutt, 116 N.H. 495, 363 A.2d 406 (1976) (ampoule not discoverable because defendant presented insufficient proof that retesting ampoule would produce material evidence); State v. Teare, 129 N.J. Super. 562, 324 A.2d 131 (Essex County Ct. 1974), *rev'd*, 133 N.J. Super. 338, 336 A.2d 496 (Super. Ct. App. Div.), *aff'd*, 135 N.J. Super. 19, 342 A.2d 556 (Super. Ct. App. Div. 1975) (ampoule not discoverable because defendant presented insufficient proof that ampoule, once used, was retestable); People v. LePree, 105 Misc. 2d 1066, 430 N.Y.S.2d 778 (Ct. Cl. 1980) (ampoule not discoverable because defendant presented insufficient proof that retesting ampoule would produce material evidence); State v. Larson, 313 N.W.2d 750 (N.D. 1981) (ampoule not discoverable because defendant presented

general criminal discovery principles and of decisions regarding the discovery of ampoules.

B. DISCOVERY IN CRIMINAL CASES: THE BRADY-AGURS TEST

At common law discovery was not permitted in criminal cases.[19] Criminal discovery started in England in the 1830s[20] and came to the United States some years later.[21] The principles of discovery in criminal cases as recognized by the legal profession today were largely established in the United States Supreme Court case of *Brady v. Maryland.*[22] In *Brady* the Court allowed discovery when necessary to protect a defendant's constitutional right to due process.[23] After *Brady* the promulgation of statutes and court rules also fostered disclosure by permitting discovery in criminal cases.[24] The federal government and most states have adopted these statutes and rules.[25] A common feature of the statutes and rules, however, is that they are applicable only to discovery of tangible things still in the government's possession.[26] Because breathalyzer test ampoules are usually discarded after a test, the rules and

insufficient proof that retesting would produce material evidence); State v. Watson, 48 Ohio App. 2d 110, 355 N.E.2d 883 (Ct. App. 1975) (ampoule not discoverable because defendant presented insufficient proof that retesting ampoule would produce material evidence); Edwards v. State, 544 P.2d 60 (Okla. Crim. App. 1975), *aff'd sub nom.* Edwards v. Oklahoma, 429 F. Supp. 668 (W.D. Okla. 1976) (no constitutional error absent a showing that ampoule retesting would establish a reasonable doubt); State v. Reaves, 25 Or. App. 745, 550 P.2d 1403 (Ct. App. 1976) (ampoule not discoverable because defendant failed to prove that retesting the ampoule would produce favorable evidence); State v. Newton, 274 S.C. 287, 262 S.E.2d 906 (1980) (ampoule not discoverable because defendant failed to prove that retesting the ampoule would provide reliable results); State v. Helmer, 278 N.W.2d 808 (S.D. 1979) (retesting ampoules cannot constitute exculpatory evidence and cannot, therefore, be material); Turpin v. State, 606 S.W.2d 907 (Tex. Crim. App. 1980) (right to obtain independent test protects due process rights); State v. Canaday, 90 Wash. 2d 808, 585 P.2d 1185 (1978) (routine destruction and disposal of used breathalyzer test ampoules does not violate due process).

19. *See* 2 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 16:3 (1966).

20. *See id.*

21. *See id.* § 16:5.

22. *See* Brady v. Maryland, 373 U.S. 83 (1963). For a discussion of the principles of *Brady,* see *infra* text accompanying notes 28-33.

23. 373 U.S. at 87. The United States Supreme Court held in *Brady* that "suppression by the prosecution of evidence favorable to an accused upon request violates due process rights where evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id. See* U.S. CONST. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property without due process of law").

24. *See, e.g.,* FED. R. CRIM. P. 16(a) (disclosure of evidence by the government); N.D.R. CRIM. P. 16 (a) (discovery and inspection).

25. *See, e.g.,* N.D.R. CRIM. P. 16(a).

26. *See, e.g.,* FED. R. CRIM. P. 16 (a) (1) (C). Rule 16 (a) (1) (C) provides as follows:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id.

statutes generally are useless in breathalyzer cases.[27] Accordingly, this Article emphasizes the requirements of *Brady* and the constitutional dimension of discovery in criminal cases.

In *Brady* the defendant appealed his first-degree murder conviction.[28] At trial the defendant admitted to participating in the murder, but claimed that his companion had done the actual killing.[29] Defendant's counsel had requested from the prosecution the extrajudicial statements of the companion.[30] The prosecution, though giving defendant's counsel some of the statements, withheld the statement in which the companion admitted that he, not the defendant, had actually killed the victim.[31]

The United States Supreme Court held that when an accused made a specific request for information, prosecutorial suppression of the requested evidence was a denial of the accused's right to due process of law.[32] The Court concluded that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[33] *Brady* was refined in the subsequent United States Supreme Court decision of *United States v. Agurs*.[34]

In *Agurs* the defendant, after a brief interlude in a motel room, repeatedly stabbed James Sewell.[35] The defendant claimed that she acted in self-defense, even though she received no physical injuries.[36] After being convicted of second-degree murder, the defendant moved for a new trial, alleging that the prosecutor's failure to inform her of Sewell's prior convictions materially harmed her self-defense claim.[37] The district court denied her motion for a new trial, stating that the undisclosed evidence of Sewell's prior convictions was not material evidence.[38] The district court noted that there was evidence at trial that Sewell had two

27. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 254, at 64 (1982) ("government cannot be required to disclose evidence that does not exist nor evidence that it does not have or control").

28. *Brady*, 373 U.S. at 88.

29. *Id.* at 84.

30. *Id.*

31. *Id.*

32. *Id.* at 87.

33. *Id.* In reaching its decision the *Brady* Court shifted from concern for the prosecutor's misbehavior to the harm to the defendant resulting from nondisclosure of certain evidence. *Id. See* United States v. Agurs, 427 U.S. 97, 104 n.10 (1976). The Court in *Agurs* stated that "[i]f 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 110.

34. 427 U.S. 97 (1976).

35. United States v. Agurs, 427 U.S. 97, 98 (1976).

36. *Id.* at 100.

37. *Id.*

38. *Id.* at 101-02.

knives and that the defendant's self-defense claim was inconsistent with Sewell's fatal injuries and the defendant's lack of injury.[39] The court of appeals disagreed, finding that the nondisclosed evidence was material.[40] The United States Supreme Court reversed the court of appeals decision, holding that the prosecution's failure to provide the defendant with Sewell's criminal record did not deprive her of her constitutional right to due process.[41]

In *Agurs* the Court stated that prosecutorial disclosure is not required unless the omission would result in a denial of the defendant's right to a fair trial.[42] Rather than absolute disclosure, due process requires disclosure of "material" evidence.[43] Furthermore, materiality under *Agurs* is not evidentiary materiality, but materiality in the constitutional sense.[44] The Court in *Agurs* stated that evidence is constitutionally material if its omission "creates a reasonable doubt that did not otherwise exist."[45] The Court added that it would evaluate the omission with respect to the entire record.[46]

Accordingly, *Brady* and *Agurs* provide a rule of constitutional law permitting criminal discovery if the defendant can establish four elements: his request is for specific evidence;[47] the specific evidence is, or has been, in the prosecutor's possession; the requested evidence is favorable to him; and the evidence is material to his guilt or punishment.[48] These four elements lay the theoretical foundation of the defendant's constitutional right to discovery.

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39. *Id.* at 102.

40. *Id.*

41. *Id. See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

42. 427 U.S. at 108.

43. *Id.* at 106.

44. *Id.* at 107.

45. *Id.* at 112. The *Agurs* Court explained its acceptance of the materiality standard by discussing the problems of using another standard. *Id.* at 112 n.20. The Court rejected a standard that would require a court to examine "the impact of the undisclosed evidence on the defendant's ability to prepare for trial." *Id.* The latter standard, according to the Court, presented two problems: The standard would include both incriminating and exculpatory evidence, and it would change the traditional interpretation of due process notice by requiring the Court to examine notice of evidentiary support for the charge rather than notice of the charge alone. *Id.*

46. *Id.* at 112.

47. *Id.* at 106-07. The Court in *Agurs* stated that a request for specific evidence need not be made when evidence is obviously exculpatory. *Id.* The Court used the extreme example of fingerprint evidence that proves the defendant could not have fired the fatal shot. *Id.* at 110 n.18. To be cautious, lawyers should request, however, what may seem to be "obvious" exculpatory evidence.

48. *Id.* at 106-14; *Brady*, 373 U.S. at 87. Discussion of the procedure for discovery in a DWI case assumes that the breathalyzer test results will be admissible at trial. In North Dakota the foundational requirements for introduction of test results are that the test was (1) fairly administered; (2) performed according to the methods and with devices approved by the state toxicologist; and (3) performed by an individual possessing a certificate of qualification to administer the test issued by the state toxicologist. State v. Ghylin, 248 N.W.2d 825, 830 (N.D. 1976). *See* Keel v. State, 609 P.2d 555, 558 (Alaska 1980) (State's failure to prove proper calibration precluded admission of test results). *But see* Sullivan v. Municipality of Anchorage, 577 P.2d 1070 (Alaska 1978) (results of blood test performed at hospital admissible notwithstanding State's failure to show how and by whom the blood was handled).

1. Requirement That Defendant Make a Specific Request

In a DWI prosecution the defendant easily satisfies the first requirement, a request for specific evidence,[49] because he is usually interested in discovering the breathalyzer test and reference ampoules. A defendant also should request evidence of the proper functioning of the breathalyzer,[50] the operator's qualifications,[51] the breathalyzer "checklist,"[52] and the video or audio tapes of the defendant performing sobriety or breathalyzer tests.[53]

2. Requirement That Evidence Is in Prosecutor's Possession

The second element of the *Brady-Agurs* test, that evidence was in the possession of the prosecution at some time,[54] is also easily met. The *Hitch* court discussed this requirement, stating that "the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question."[55] The court emphasized that "*the duty of disclosure is operative as a duty of preservation.*"[56]

If the duty to disclose attaches when the government takes control of the evidence, this duty should not be thwarted by the police suppressing the evidence. Accordingly, when the government takes control of evidence, the courts should find that the evidence is in the prosecutor's possession.

Less easily satisfied are the other two requirements of the *Brady-Agurs* test, that the requested evidence is favorable and that

49. *See* 427 U.S. at 101 n.4. The *Agurs* Court quotes the district court's record, which reveals that an attorney must specifically request evidence. *Id.*

50. *See, e.g.*, State v. Ghylin, 248 N.W.2d 825 (N.D. 1976) (one element of a proper foundation for the use of test results is proof that the breathalyzer was in proper working order).

North Dakota law provides that upon request, full information about tests performed at the direction of a law enforcement officer shall be made available to the person tested. N.D. CENT. CODE § 39-20-02 (1979).

51. *See, e.g.*, State v. Entze, 272 N.W.2d 292 (N.D. 1978) (for the test results to be admissible, the State must show that the operator possessed a certificate qualifying him to administer the test).

52. *See, e.g.*, State v. Ghylin, 248 N.W.2d 825 (N.D. 1976) (test must be performed according to methods approved by a state toxicologist).

53. *See, e.g.*, State v. Peters, 39 Or. App. 109, 591 P.2d 761 (Ct. App. 1979); Seattle v. Fettig, 10 Wash. App. 773, 519 P.2d 1002 (1974). In *Fettig* the negligent destruction of a video tape of the defendant performing a sobriety test violated the defendant's due process rights when the defendant showed by a "reasonable possibility" that the tape would cast doubt on the police testimony and would support the defendant's testimony. 10 Wash. App. at 776, 519 P.2d at 1005. In *Peters*, an audio tape was discoverable under Oregon's discovery statute. 39 Or. App. at ____, 591 P.2d at 762. The court in *Peters* noted, however, that the material was not discoverable under a constitutional claim because the defendant failed to show that the requested evidence was favorable or material to his guilt or punishment. *Id.* at ____, 591 P.2d at 763.

54. *See Brady*, 373 U.S. at 87. The *Brady* Court implies the presence of the second element, that evidence is or has been in the prosecution's possession, when it ignores the good faith of the prosecution in failing to disclose evidence. *Id.*

55. *Hitch*, 12 Cal. 3d at 650, 527 P.2d at 367, 117 Cal. Rptr. at 15.

56. *Id.* (emphasis in original). A court's reluctance to require police and prosecutors to recognize their duty to preserve and disclose ampoules appears to relegate the due process guarantees of *Brady* and *Agurs* to an empty promise.

the requested evidence is material to the defendant's guilt or punishment.[57] The difficulty in meeting these two requirements has prompted most courts to refuse to follow the California Supreme Court's decision in *Hitch*.[58]

3. *Requirement That Evidence Is Favorable*

In *Hitch* the court sought a principle that would aid it in determining whether the destruction of ampoules denied a defendant his right to disclosure of favorable evidence.[59] The court decided that an analogous situation was the failure or refusal of the prosecution to identify an informant.[60] To establish the prosecution's duty to identify an informant, the *Hitch* court noted that a defendant is required to demonstrate " 'a reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in exoneration.' "[61]

The same rationale applies to DWI prosecutions. The *Hitch* court recognized that "if, given the availability of the test ampoule and its contents, and the reference ampoule, there is a *reasonable possibility* that they would constitute favorable evidence on the issue of guilt or innocence, then such evidence must be disclosed."[62] Other courts presented with the discovery question in DWI cases also have decided whether lost, destroyed, or suppressed ampoules constitute favorable evidence.

In *State v. Michener*[63] the Oregon Court of Appeals addressed claims that the destruction of breathalyzer test ampoules deprived the defendants of their due process rights.[64] Concerning whether the ampoule was favorable to the defendants, the court stated that *Brady*[65] "requires disclosure of material evidence where a defendant establishes some reasonable possibility, based on concrete evidence rather than a fertile imagination, that it would be favorable to his cause."[66]

The rule in *Michener* requiring a "reasonable possibility" of favorableness was expressly adopted by North Dakota.[67] In *State v. Larson*[68] the defendant claimed that destruction of the ampoule used

57. *See Agurs*, 427 U.S. at 112-13; *Brady*, 373 U.S. at 87.
58. For a list of courts that have not followed the *Hitch* rule, see *supra* note 18.
59. *Hitch*, 12 Cal. 3d at 648, 527 P.2d at 366, 117 Cal. Rptr. at 14.
60. *Id.* at 648-49, 527 P.2d at 366, 117 Cal. Rptr. at 14.
61. *Id.* at 649, 527 P.2d at 366, 117 Cal. Rptr. at 14 (citations omitted by the court).
62. *Id.* at 649, 527 P.2d at 367, 117 Cal. Rptr. at 15 (emphasis added).
63. 25 Or. App. 523, 550 P.2d 449 (Ct. App. 1976).
64. State v. Michener, 25 Or. App. 523, ____, 550 P.2d 449, 450 (Ct. App. 1976).
65. *See Brady*, 373 U.S. at 87.
66. *Michener*, 25 Or. App. at ____, 550 P.2d at 454.
67. *See* State v. Larson, 313 N.W.2d 750, 756 (N.D. 1981).
68. 313 N.W.2d 750 (N.D. 1981).

during his breathalyzer test denied him due process of law.[69] The North Dakota Supreme Court ruled in *Larson* that the defendant failed to demonstrate that the ampoules, if available, would have provided material evidence favorable to the defendant at trial.[70] Nonetheless, by clear implication, the court in *Larson* made it known that to successfully further a constitutional discovery claim the defendant must establish that the requested evidence has a reasonable possibility of being favorable.[71]

In contrast to the *Hitch* and *Michener* decisions, several courts have established more stringent standards for showing favorableness.[72] For example, in *State v. Helmer*[73] the South Dakota Supreme Court equated the *Agurs* requirement of "favorable evidence" to "exculpatory evidence."[74] Defining "exculpatory" as "clearing or tending to clear from alleged fault or guilt,"[75] the court in *Helmer* concluded that an ampoule, even if available and retestable, could only be used to challenge the credibility of the breathalyzer machine or its operation.[76] With this narrow view of admissibility a court would never find an ampoule to be exculpatory evidence.[77] An ampoule simply would not be discoverable pursuant to the due process concerns developed in *Brady* and *Agurs*.

If a court adopts the *Helmer* court's semantic distinction between favorable and exculpatory evidence, no defendant could meet the *Brady-Agurs* requirements. No defendant could thus compel discovery. By taking this position a court forecloses attack on the breathalyzer, even when it is the only evidence of intoxication. A more tenable idea, as suggested by one student comment,[78] would be to permit discovery of impeaching or

69. State v. Larson, 313 N.W.2d 750, 752 (N.D. 1981).

70. *Id.* at 755-56. One court defined "favorable evidence" as that which would lead juries to entertain reasonable doubt about a defendant's guilt. People v. Richter, 102 Misc. 2d 285, ____, 423 N.Y.S.2d 610, 613 (Crim. Ct. 1979). The Colorado Supreme Court, however, adopted a standard less stringent than favorableness. Garcia v. District Court, 197 Colo. 38, ____, 589 P.2d 924, 929 (1979). The *Garcia* court required that the requested evidence should not be merely "incidental" to the prosecution's case or to the defendant's affirmative defense. *Id.* The defendant must state only that the requested material might be favorable. *Id.*

71. 313 N.W.2d at 756.

72. *See, e.g.*, State v. Canaday, 90 Wash. 2d 808, 585 P.2d 1185 (1978) (constitutional error occurs when nondisclosed evidence would create a reasonable doubt that otherwise did not exist).

73. 278 N.W.2d 808 (S.D. 1979).

74. State v. Helmer, 278 N.W.2d 808, 811 (S.D. 1979).

75. *Id.* at 811-12 (quoting BLACK'S LAW DICTIONARY 508 (5th ed. 1979)).

76. 278 N.W.2d at 812 (citing, for example, Edwards v. Oklahoma, 544 P.2d 60 (Okla. Crim. App.) (retesting of evidence can only attack credibility of the operator's performance and the test's results, not the defendant's guilt), *habeas corpus petition denied,* 429 F. Supp. 668 (W.D. Okla. 1976)).

77. 278 N.W.2d at 812. The court in *Helmer* stated that "exculpatory" evidence is that which extrinsically negates guilt or supports the innocence of the accused, while favorable evidence is collateral or impeaching; the former compels discovery, while the latter does not. *Id.*

78. Comment, *Breathalyzers: Should the State Be Required to Preserve the Ampoules?,* 15 LAND & WATER L. REV. 299 (1980).

"favorable" evidence when the breathalyzer test is the only evidence against the accused.[79] This rule, however, is better left as a second choice. The preferred view is the rule developed in *Michener*,[80] which recognized that due process requirements are fulfilled if the accused can show a reasonable possibility that the evidence sought to be discovered is favorable.[81] Yet, the discussion of favorableness is only part of the constitutional hurdle; the Court in *Brady* and *Agurs* also required that the defendant establish that the requested evidence is material.[82]

4. Requirement That Evidence Is Material

In *Brady* and *Agurs* the Court held that a prosecutor's constitutional duty to disclose arises upon a showing of materiality.[83] The Court did not define materiality, but in *Agurs* the Court did specify what is not materiality.[84] The *Agurs* Court stated that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[85] The Court also stated that unless the prosecutor's nondisclosure "deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose."[86]

In *Hitch* the California Supreme Court also expressly recognized the requirement of materiality.[87] It held that because the results of the breathalyzer test give rise to a presumption of legal intoxication, "the *results* of the breathalyzer test by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving."[88] Other courts have reached the same result using similar reasoning.[89]

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79. *Id.* at 302.
80. *See* State v. Michener, 25 Or. App. 523, 550 P.2d 449 (Ct. App. 1976).
81. *Id.* at 532, 550 P.2d at 454.
82. *Agurs*, 427 U.S. at 109-10; *Brady*, 373 U.S. at 87.
83. *Agurs*, 427 U.S. at 109-10; *Brady*, 373 U.S. at 87.
84. 427 U.S. at 109-10.
85. *Id.*
86. *Id.* at 108.
87. *Hitch*, 12 Cal. 3d at 647, 527 P.2d at 365, 117 Cal. Rptr. at 13.
88. *Id.* (emphasis in original). The California Supreme Court in *Hitch* based its conclusion on federal and California discovery cases that found that the suppression of evidence bearing on the credibility of key witnesses was suppression of material evidence. *Id.* (referring to Giglio v. United States, 405 U.S. 150 (1972); *In re* Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971)).
89. *See, e.g.*, Scales v. City Court, 122 Ariz. 231, ____, 594 P.2d 97, 100 (1980) (destruction of ampoules is prejudicial to the defense); Garcia v. District Court, 197 Colo. 38, 46, 589 P.2d 924, 929 (1979) (when ampoules are destroyed, a defendant can merely assert that the ampoules might have been favorable).

The apparent reason for the materiality holding in *Hitch* is that without the ampoule, a defendant cannot rebut the breathalyzer results.[90] Without the ability to attack the results, a defendant cannot rebut the presumption of intoxication.[91] Destruction of the ampoule would therefore deprive a defendant of his right to due process.

Other courts, however, have found that the results of ampoule retesting are not sufficiently reliable to be admissible in court.[92] These courts have adopted the position that if scientific retesting of the ampoules cannot produce admissible evidence, then the ampoules themselves cannot rise to the level of material evidence.[93]

In *State v. Canaday*[94] the Washington Supreme Court considered whether the destruction of breathalyzer ampoules denied defendants their due process rights.[95] The court stated that the first issue was whether the used ampoule could be used to impeach the breathalyzer results.[96] Impeachment would apparently require expert testimony from the scientist who analyzed the used ampoule.[97] A threshold question is whether the expert's testimony would be admissible at trial.[98]

The traditional test[99] for whether scientific tests are admissible at trial was established in *Frye v. United States*.[100] The *Frye* standard requires that the scientific principles upon which the expert's testimony are based must be sufficiently established to have gained general acceptance in the particular field.[101]

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90. *See Hitch*, 12 Cal. 3d at 654, 527 P.2d at 370, 117 Cal. Rptr. at 18.
91. *Id.*
92. *See, e.g.*, State v. Canaday, 90 Wash. 2d 808, ____, 585 P.2d 1185, 1188 (1978).
93. *See, e.g.*, State v. Larson, 313 N.W.2d 750, 753-56 (N.D. 1981).
94. 90 Wash. 2d 808, 585 P.2d 1185 (1978).
95. *Id.* at ____, 585 P.2d at 1186.
96. *Id.* at ____, 585 P.2d at 1187.
97. *Id.*
98. *Id.*
99. *Id.* at ____, 585 P.2d at 1188. *But see* FED. R. EVID. 702. Rule 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualifed as an expert . . . may testify thereto . . ." *Id. See also* J. WEINSTEIN, EVIDENCE ¶ 702[03] (1982). Professor Weinstein states that "[a] number of . . . courts have responded to the enactment of Rule 702 by rejecting the *Frye* standard,-but . . . a number of the [courts] still predicate the admission of scientific evidence on general acceptance in the community." *Id.* Those courts that reject the *Frye* standard determine whether the scientific evidence will be admissible based upon a determination of the evidence's relevancy and prejudice. *Id.* Whether or not the scientific principles involved have been generally accepted by experts in the field may still have a bearing on the reliability and probative value of the evidence. *Id.* A test unable to gain *any* support within the scientific community will be found unreliable by the court. *Id.* (emphasis in original).

N.D.R. EVID. 702, *construed in* South v. National R.R. Passenger Corp., 290 N.W.2d 819 (N.D. 1980) (expert testimony is admissible where the matters are not within the common knowledge of the jurors and the tetimony will assist them in understanding concepts helpful to a determination of fact); State v. Larson, 313 N.W.2d 750 (N.D. 1981) (courts will not take judicial notice of a fact that has not been accepted in the scientific community).

100. 293 F. 1013 (D.C. Cir. 1923).
101. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). The *Frye* court explained the difficulty in determining the standard for admitting expert testimony as follows:

The Washington Supreme Court in *Canaday*[102] applied the *Frye* standard and held that substantial evidence supported the lower court's finding that ampoule retesting procedures had not achieved general acceptance in the scientific community.[103] Accordingly, the Washington Supreme Court concluded that expert testimony regarding the retesting of breathalyzer ampoules was not admissible evidence.[104]

Similarly, in *State v. Teare*[105] the defendant moved to suppress evidence of the breathalyzer test results when the state failed to produce the breathalyzer test ampoule.[106] In support of his motion, the defendant produced a chemist who testified that qualitative and quantitative factors, such as the chemical contents and the characteristics of the test and reference ampoules, had a direct bearing on the validity of the breathalyzer test results.[107] The trial court agreed with the defendant and suppressed the evidence.[108]

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. The apparent rationale behind the *Frye* standard is to ensure that finders of fact are presented with specialized knowledge only when the proponent of that knowledge can show reliability. Reliability exists when a scientific community accepts the scientific theory underpinning the opinion. *See* United States v. Franks, 511 F.2d 25, 33 (6th Cir. 1975) (trial judge has considerable discretion in admitting or refusing to admit evidence based on scientific processes).

102. *See* State v. Canaday, 90 Wash. 2d 808, 585 P.2d 1185 (1978).

103. *Id.* at ____, 585 P.2d at 1188.

104. *Id.* In concluding that the retesting of ampoules was not admissible, the court in *Canaday* noted that decisions holding ampoules to be discoverable have not addressed the admissibility of expert testimony regarding the retesting of ampoules. *Id. See* People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974); State v. Michener, 25 Or. App. 523, 550 P.2d 449 (Ct. App. 1976).

105. 129 N.J. Super. 562, 324 A.2d 131 (Essex County Ct. 1974) *rev'd*, 133 N.J. Super. 338, 336 A.2d 496 (Super. Ct. App. Div.), *aff'd*, 135 N.J. Super. 19, 342 A.2d 556 (Super. Ct. App. Div. 1975).

106. State v. Teare, 129 N.J. Super. 562, ____, 324 A.2d 131, 132 (Essex County Ct. 1974), *rev'd*, 133 N.J. Super. 338, 336 A.2d 496 (Super. Ct. App. Div.), *aff'd*, 135 N.J. Super. 19, 342 A.2d 556 (Super. Ct. App. Div. 1975).

107. 129 N.J. Super. at ____, 324 A.2d at 132-33.

108. *Id.* at ____, 324 A.2d at 133. The trial court's findings of fact were as follows:

> 1. The exact volume of the ampule is critical to the accuracy of the test and the exact volume can later be determined by independent test of the ampule.
> 2. The alcoholic content of the ampule is converted into acetic acid by a chemical reaction.
> 3. The amount of acetic acid can later be determined by means of a chemical procedure known as Vapor Phase Chromatography (VPC).
> 4. By means of VPC a qualitative and quantitative analysis of the contents of the ampule can be later determined.
> 5. By determining the amount of acetic acid in an ampule the amount of blood alcohol in the person tested can later be determined.
> 6. In order to prevent deterioration of the contents of a test ampule for later examination, it should be stored in an amber-colored bottle to prevent light from entering, and tightly capped to prevent oxidation.
> 7. If properly stored, the contents of a test ampule would not deteriorate within a

On appeal the New Jersey Superior Court remanded the *Teare* case for evidentiary hearings on the feasibility of preserving the ampoules.[109] The court further ordered that if the ampoules were found to be preservable, the trial court must also determine whether scientifically useful data could be derived from retesting them.[110]

On remand the trial court conducted a hearing and found that the ampoules could not be preserved, that they could not be accurately retested, and that the theories relied upon by the defendant's expert had not been generally accepted by the scientific community.[111]

On a second appeal the New Jersey Superior Court held that the trial court's second findings of fact were supported by substantial evidence and must be upheld.[112] Thus, through application of the *Frye* standard the courts in *Teare* concluded that the ampoules were not sufficiently retestable to constitute material evidence.[113]

The feasibility of retesting ampoules also has been addressed by the Supreme Court of North Dakota.[114] In *State v. Larson*[115] two questions were certified to the North Dakota Supreme Court from a county court of increased jurisdiction.[116] The first question was whether the state must, at the time of the breathalyzer test, preserve a sample of the defendant's breath.[117] The court answered

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reasonable period of time.

8. Because the test reading of the breathalyzer is made shortly after the ampule is breathed into, the chemical reaction of alcohol to acetic acid has not been fully completed at the time of the test reading. A reading or other test taken at a later time would be likely to have a slightly higher reading. Therefore, if the later test were to show a result less than or equal to the test conducted by the police officer, this second test result would at least rebut the prima facie presumption raised by the breathalyzer test.

9. The amount of sulphuric acid in the ampule is critical to the accuracy of the test and this amount can later be determined.

10. Because breathalyzer apparatus can be calibrated to correct itself for certain inaccuracies in the ampules, an expert would need both the test ampule and the reference ampule at a later examination to be certain that the breathalyzer test was accurate.

Id. at ____, 324 A.2d at 132-33.

109. 133 N.J. Super. at ____, 336 A.2d at 497.

110. *Id.* The prosecutor in the first trial failed to present expert testimony rebutting the defendant's claim that the ampoules were retestable. *Id.* In view of the fact that the trial court already found the ampoules to be retestable, the appellate court remanded the case to give the prosecutor a second opportunity to prove that preservation of test ampoules is not feasible or practical. *Id.*

111. 135 N.J. Super. at ____, 342 A.2d at 558.

112. *Id.*

113. *Id.*

114. *See* State v. Larson, 313 N.W.2d 750 (N.D. 1981).

115. 313 N.W.2d 750 (N.D. 1981).

116. State v. Larson, 313 N.W.2d 750, 751 (N.D. 1981). Chapter 32-24 of the North Dakota Century Code permits a trial court to certify questions involving the interpretation or construction of the law. N.D. CENT. CODE § 32-24-01 (Supp. 1981).

117. 313 N.W.2d at 752.

in the negative, holding that the failure to preserve a breath sample did not deprive the defendant of his due process right to a fair trial.[118] The court found two facts to support its holding: the breathalyzer machine was not equipped to store or produce a separate breath sample[119] and the defendant was statutorily entitled to obtain independent breath, blood, or urine tests.[120]

The second question certified to the court in *Larson* was whether the state was required to produce the test ampoule for the defendant's independent testing.[121] The court held that the state need not preserve the used test ampoule.[122] It employed the *Brady* standard and stated that, as applied to the facts in *Larson,* the defendant's due process rights had not been violated by the destruction of the ampoule.[123] The court determined that the defendant had failed to establish that the ampoules could be scientifically retested, and if retestable, that they would produce favorable and material evidence.[124] The court stated that it could not take judicial notice of the fact that ampoules could be retested.[125] It found that the scientific community had not so clearly accepted the proposition that retesting could either support or challenge the results of a breathalyzer examination that judicial notice could be taken of the fact.[126] Accordingly, the court declared that the proponent of the discovery claim bears the burden of establishing retestability as a preliminary step to proving materiality.[127]

In *Larson* the only evidence of retestability was a state forensic toxicologist's deposition.[128] The toxicologist testified that an ampoule could not be analyzed to produce evidence reflecting upon the accuracy of the test.[129] The defendant offered no evidence to

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118. *Id.* at 753.
119. *Id.* at 755.
120. *Id.* at 752-53. *See* N.D. CENT. CODE § 39-20-02 (1980). The statute provides as follows:

> The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of the test or tests taken at the direction of law enforcement officer.

Id.
121. 313 N.W.2d at 753.
122. *Id.* at 756.
123. *Id.*
124. *Id.* at 753-56.
125. *Id.* at 755 (citing State v. Bryan, 133 N.J. Super. 369, 336 A.2d 511 (Super. Ct. Law Div. 1974); Edwards v. Oklahoma, 544 P.2d 60 (Okla. Crim. App. 1975)).
126. 313 N.W.2d at 755.
127. *Id.*
128. *Id.*
129. *Id.* The *Larson* court supported its conclusion that the State has no duty to preserve an ampoule by quoting as follows from the toxicologist's deposition:

rebut the toxicologist's opinion.[130] The *Larson* court concluded that the defendant had failed to prove that retesting an ampoule could produce material evidence that challenged the accuracy of the test results.[131] The defendant therefore failed to meet the materiality requirement of Brady.[132] Accordingly, the court held that the state was not required to preserve, nor to produce upon request, the ampoule used in the defendant's breathalyzer test.[133]

The *Larson* court's holding suggests three conclusions. First, the court has not foreclosed new attempts to establish that ampoules

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"A. As far as I am concerned to correlate back a later analysis to the amount of alcohol in a person's breath would be absolutely meaningless.

. . . .

"A. The ampoule when it is received is a sealed glass vial. You break off the glass vial, the only effective way to save this ampoule would be to seal that glass vial up with a cutting torch or glass blowing type torch which would be impossible. The way the ampoule is shaped has destroyed the neck of the ampoule and would be impossible to draw the glass back out to seal it up.

. . . .

"A. Again, the analysis of the components of the ampoule could be redone, the volume could be remeasured, all of these would have absolutely no effect or no value as far as interpreting back a Breathalyzer result or a blood alcohol concentration at the time of the test.

. . . .

"Q. Your insistence that it is really not scientifically feasible to keep the test ampoule and run tests as to volume and so forth as we have discussed leads me to ask you this question: Do you then state that there is no way that the test ampoule once used could be tested again or could be measured again?

"A. Oh, not at all.

"Q. To accurately measure volume?

"A. Not at all.

"Q. It could be then?

"A. Yes, sir.

"Q. All right. How about measuring the glass itself or testing the glass itself or optical defects, could that be done again?

"A. If you so desired.

"Q. All right. How about the proportion then of the chemicals contained in the ampoule?

"A. Could do that too.

"Q. But you would need access to the particular ampoule used if you were going to make those tests?

"A. If you were to perform the tests which you have just described there would be no way of determining that back to whether or not an accurate Breathalyzer test had been administered."

Id.

130. *Id.* In fairness to defense counsel it must be noted that the record was sparse because the certified questions went to the supreme court before trial on the merits. *See id.* at 754.

131. *Id.* at 755.

132. *Id.*

133. *Id.* at 756.

are discoverable.[134] Second, defendants who argue that they are constitutionally entitled to discovery of the ampoules have the burden of showing, with a "reasonable possibility," that retesting the ampoules can, and would, produce favorable evidence.[135] Finally, defendants must establish constitutional materiality by proving that recognized scientific procedures produce reliable retesting results.[136]

Clearly, it is incumbent upon defense counsel to meet the four requirements of *Brady*.[137] The requirements most easily satisfied are a request for specific evidence and proof that the evidence is, or was, in the prosecutor's possession.[138]

The third requirement, favorableness, can be satisfied by showing a reasonable possibility that the requested evidence is favorable to the defendant's case.[139] According to the court in *People v. Richter,*[140] evidence is favorable when it leads the finder of fact to entertain reasonable doubt about the defendant's guilt.[141] Because the presumption of legal intoxication generally arises with a breath alcohol content reading of 0.10%,[142] a defendant would be asserting a clearly dubious claim of favorableness when he had drunk hard liquor for hours and registered 0.30% on the breathalyzer. In a close case, however, there may be reason to doubt the validity of the breathalyzer test results.[143] Thus, a reasonable possibility of favorableness often can be shown when the breathalyzer reading is near 0.10%.[144]

Along with favorableness, the *Brady-Agurs* test requires a fourth element, materiality.[145] The essence of favorableness is that the pertinent evidence will cast doubt on the defendant's guilt.[146] Materiality, however, requires a showing that ampoules can be

134. *Id.*
135. *Id.*
136. *Id.*
137. *See supra* text accompanying notes 22-48.
138. *See supra* text accompanying notes 48-57.
139. *See, e.g., Larson,* 313 N.W.2d at 756 (defendant must produce "evidence which would establish a reasonable probability that an analysis of the test ampoule would have provided material evidence favorable to him").
140. People v. Richter, 102 Misc. 2d 285, 423 N.Y.S.2d 610 (Crim. Ct. 1979).
141. *Id.* at ____, 423 N.Y.S.2d at 613.
142. *See, e.g.,* N.D. CENT. CODE § 39-20-07 (1980) (presumption of intoxication arises upon a blood alcohol reading of 0.10%) *amended by* S. 2373, 48th Leg., ____ N.D. Sess. Laws ____ (a blood alcohol reading of 0.10% is prima facie evidence of legal intoxication (effective July 1, 1983)).
143. *See, e.g.,* State v. Boehmer, 613 P.2d 916, 918-19 (Hawaii Ct. App. 1980) (reversed the DWI convictions of two defendants who had test results of 0.10% and 0.11% because the breathalyzer tests contained a stipulated error factor of 0.0165%).
144. *See id.*
145. *Agurs,* 407 U.S. at 109-10; *Brady,* 373 U.S. at 87.
146. *See, e.g., Richter,* 102 Misc. 2d at ____, 423 N.Y.S.2d at 613 (favorable evidence leads a jury to entertain a reasonable doubt about defendant's guilt).

scientifically retested to produce reliable, useful results.[147] But if retesting is a useless act, then the evidence obtained from the retesting cannot cast doubt on the defendant's guilt.[148] With the belief that ampoules cannot be retested to produce useful information, courts effectively preclude a defendant from establishing materiality and favorableness. The requirements of favorableness and materiality thus intertwine to defeat a defendant's right to discovery. To prevail the defendant must focus his attention on meeting the intertwined requirements of favorableness and materiality.[149] A more detailed examination of materiality suggests that the defendant assumes a difficult task in proving materiality.

III. MEETING THE REQUIREMENT OF MATERIALITY: THE DEFENDANT'S DIFFICULT TASK

An elementary proposition in the proof of materiality is that a defendant cannot hope for success in furthering a claim by bare reliance on cases such as *Hitch* and *Michener.*[150] Rather, courts have required that a defendant provide independent proof of materiality.[151] This burden has most often been met by the use of experts.[152] Once the defendant has located the necessary expert, his next task is to determine what constitutes material evidence.

The materiality requirement of *Brady-Agurs,* as applied to the discovery of ampoules, has been interpreted to require a defendant to prove that the retesting of ampoules is not only scientifically reliable,[153] but also that the retesting produces useful information.[154] Proof of both requirements can be established through detailed test results and the testimony of an expert.[155] The results must be obtained through accepted scientific procedures.[156]

147. *See, e.g., Teare,* 135 N.J. Super. at ____, 342 A.2d at 558 (preservation of ampoule would not give any scientifically reliable, material information).

148. *Id.*

149. *See, e.g., Larson,* 313 N.W.2d at 756. In *Larson* the North Dakota Supreme Court related materiality to favorableness. *Id.* The court reasoned that material evidence is evidence favorable to a defendant, negating his guilt. *Id.*

150. *See, e.g.,* State v. Booth, 98 Wis. 2d 20, 28, 295 N.W.2d 194, 199 (Ct. App. 1980).

151. *E.g., Booth,* 98 Wis. 2d at 28, 295 N.W.2d at 199 (defendant offered substantial expert testimony to demonstrate that a used test ampoule can either corroborate or refute the original test results).

152. *See, e.g., id.*

153. *See* State v. Canaday, 90 Wash. 2d 808, ____, 585 P.2d 1185, 1188 (1978) (court adhered to "the rule that reliability of scientific evidence must be shown as a prerequisite to its admission").

154. *See* State v. Irvin, 46 Or. App. 559, ____, 612 P.2d 326, 327-28 (Ct. App. 1980) (retesting of the used ampoule can produce meaningful evidence three and one-half months after administration of the test).

155. *See, e.g.,* People v. Richter, 102 Misc. 2d 285, ____, 423 N.Y.S.2d 610, 613 (Crim. Ct. 1979) (expert testified that ampoules can be preserved).

156. *See, e.g.,* State v. Canaday, 90 Wash. 2d 808, 585 P.2d 1185 (1978) (test results must be

In establishing materiality the defendant may need to demonstrate that ampoules can be retained and preserved without undue procedures or expense.[157] In *People v. Richter*[158] the defendant's expert testified that ampoules could be preserved.[159] The trial court concluded that an ampoule could be preserved in a number of ways.[160] For example, the test operator could preserve the ampoule by placing it in a dark plastic container in which there is a vacuum or by placing the ampoule under a blanket of nitrogen.[161]

The packaging used to store the ampoule is also important. For instance, in *State v. Gibford*[162] the Oregon Court of Appeals held that an ampoule stored in tin foil could not produce, upon retesting, material evidence.[163] The holding was based on test results showing that the foil caused retest readings to be six times higher than the original breathalyzer test results.[164] Therefore, when establishing that the retesting of ampoules can produce material evidence, the defendant should prove that the ampoule was properly preserved after the original test was performed.

In addition to establishing the proper preservation of the ampoule, the defendant will need to prove that retesting produces scientifically reliable results.[165] In *State v. Booth*[166] the Wisconsin Court of Appeals held that, while the original breath test cannot be recreated, reliable results can be obtained from retesting ampoules.[167] The holding was based on the trial court's findings that properly preserved ampoules could be remeasured to determine whether they contained the proper volume and concentration of chemicals; that the volume of solution in the test ampoule is critical to the accuracy of the breathalyzer; and that it always is possible to determine whether the proper percentage of potassium dichromate

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obtained by scientific means). Vapor phase chromatography and quantitative measurement of the chemicals are common scientific procedures for the analysis of test results. Jones, *How Breathing Technique Can Influence the Results of Breath-Alcohol Analysis,* 22 MED. SCI. L. 275, 276 (1982).

157. *See, e.g.,* People v. Richter, 102 Misc. 2d 285, ____, 423 N.Y.S.2d 610, 613 (Crim. Ct. 1979).

158. 102 Misc. 2d 285, 423 N.Y.S.2d 610 (Crim. Ct. 1979).

159. *Id.* at ____, 423 N.Y.S.2d at 613.

160. *Id.*

161. *Id. See* State v. Michener, 25 Or. App. 523, ____, 550 P.2d 449, 452 (1976) ("The storage of the ampoule is both economically and scientifically feasible and would not place a burden upon the police agencies."); State v. Booth, 98 Wis. 2d 20, ____, 295 N.W.2d 194, 196 (Ct. App. 1980) ("Capping a used ampoule is not technically difficult or costly.").

162. 40 Or. App. 77, 594 P.2d 858 (Ct. App. 1979).

163. State v. Gibford, 40 Or. App. 77, ____, 594 P.2d 858, 859 (Ct. App. 1979).

164. *Id.*

165. *See, e.g.,* State v. Canaday, 90 Wash. 2d 808, 585 P.2d 1185 (1978) (defendant failed to demonstrate that retesting produces scientifically reliable results).

166. 98 Wis. 2d 20, 295 N.W.2d 194 (Ct. App. 1980).

167. State v. Booth, 98 Wis. 2d 20, 22, 295 N.W.2d 194, 196 (Ct. App. 1980).

solution was present in the test ampoule.[168]

The appellate court in *Booth* explained in general terms the significance of the trial court's scientific findings.[169] The trial court made four general chemical observations concerning ampoule retesting.[170] First, if the solution in an ampoule is insufficient, the test would produce an erroneously high result.[171] Second, if the used ampoule lacked acetic acid, the ampoule would signify that the suspect's breath sample did not contain ethyl alcohol.[172] Third, the lack of chromium sulfate in the used ampoule would similarly signify the absence of alcohol in the breath sample.[173] Finally, retesting would also indicate whether the ampoule contained the required 0.025% of potassium dichromate.[174] In short, the appellate court agreed with the experts at the suppression hearing who stated that "the volume of the solution and the particular concentration of chemicals in the ampoule are critical to the accuracy of the breathalyzer test."[175] The court added that the expert testimony indicated that preserving an ampoule would not be difficult; an ampoule could be easily stored by capping it.[176]

Courts have also discussed the effect of dirty, distorted, or fogged glass on ampoules. In *Lauderdale v. State*[177] the Alaska Supreme Court recognized that the character of the glass of the ampoule bears directly on the accuracy of the breathalyzer test.[178] The court stated that either incorrect thickness or imperfections in the glass would tend to distort the test results.[179] This distortion would result in less light passing through the ampoule and cause a

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168. *Id.* Commenting on the significance of sulfuric acid and potassium dichromate in the ampoule, the *Booth* court stated:

> When the sulfuric acid in the ampoule solution interacts with the alcohol in the suspect's breath, the reagent divides into acids and sulfate. Although other organic materials may produce a breathalyzer reading, the absence of acetic acid would mean an absence of alcohol in the suspect's breath.
>
> The interaction of alcohol with the potassium dichromate in the ampoule produces chromium sulfate. Its absence, therefore, indicates an absence of alcohol in the test.

Id. at 23 nn.3-4, 295 N.W.2d at 196 nn.3-4. For a technical discussion of ampoule retesting, see Wilkinson, Sockrider, Bartsch, Kataoka & Zettle, *The Trapping, Storing, and Subsequent Analysis of Ethanol in In-Vitro Samples Previously Analyzed by a Nondestructive Technique,* 26 J. FORENSIC SCI. 671 (1981).

169. 98 Wis. 2d at 23, 295 N.W.2d at 196.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. 548 P.2d 376 (Alaska 1976).

178. Lauderdale v. State, 548 P.2d 376, 379 (Alaska 1976). For a review of the operation of the breathalyzer, see *supra* note 6.

179. 548 P.2d at 379.

higher reading on the breathalyzer machine.[180]

Finally, courts have recognized that foreign material in the defendant's mouth or in the test ampoule would distort the breathalyzer reading.[181] In *Scales v. City Court*[182] the Arizona Supreme Court stated that foreign particles composed of hydrocarbons found inside the test ampoule would produce results resembling the reaction between the ampoule chemicals and alcohol.[183] The presence of these foreign particles would cause the test results to be incorrect.[184]

In summary, to establish materiality in an attempt to discover ampoules the moving party must show that the ampoules can be preserved. Moreover, the moving party must also show that examination and testing will reveal the contents of the ampoule, the thickness and clarity of the glass walls, and the presence or absence of foreign particles in the ampoule. With these elements of proof established the ampoule should be discoverable. When a court permits discovery, it will then be protecting the DWI defendant's right to due process.

IV. CONCLUSION

The intensified creation and enforcement of DWI laws require that attention be paid to the defendant's due process rights. Part of that attention must go to ensuring that breath testing machines used in DWI prosecutions are accurate. In this light, criminal discovery procedures have been applied to breathalyzer test and reference ampoules. To compel discovery the defendant must make a request for the ampoule, demonstrate that the ampoule is in the prosecutor's possession or control, show that discovery of the ampoule is favorable to him, and indicate that the discovery is material to his guilt or punishment.

While few courts have found ampoules to be discoverable, it is hoped that with study and application of the judicial decisions highlighted throughout this Article, more defendants will be entitled to discovery — to the protection of their constitutional right to due process.

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180. Scales v. City Court, 122 Ariz. 231, ____, 594 P.2d 97, 100 (1979).
181. *Id.*
182. 122 Ariz. 231, 594 P.2d 97 (1979).
183. *Id.* at ____, 594 P.2d at 100.
184. *Id.*