# STANDARDS OF MATERIALITY GOVERNING THE PROSECUTORIAL DUTY TO DISCLOSE EVIDENCE TO THE DEFENSE

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## I. INTRODUCTION

The United States and Alaska Constitutions guarantee criminal defendants the right to a fair trial as an essential element of due process of law.[1] Courts have interpreted the fair trial requirement to impose a duty on prosecutors to disclose to defendants material evidence within the prosecutors' possession or control.[2] This note addresses the United States Supreme Court and Alaska Court of Appeals decisions regarding the prosecutors' duty to disclose evidence, focusing on how prosecutors determine what, if any, evidence they must disclose to the defense.[3] Prosecutors must measure the evidence against the appropriate standard of materiality and then disclose accordingly.[4] This



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1. U.S. CONST. amend. V; ALASKA CONST. art. I, § 7.

2. *See, e.g.,* United States v. Bagley, 473 U.S. 667 (1985) (plurality opinion) (duty to disclose under United States Constitution); Maloney v. State, 667 P.2d 1258 (Alaska Ct. App. 1983) (duty to disclose under Alaska Constitution).

3. Commentators have suggested that the United States Supreme Court adopt a total disclosure rule, thereby avoiding some of the problems with materiality standards, prosecutorial bad faith, and prosecutorial discretion. *See, e.g.,* Beatty, *The Ability to Suppress Exculpatory Evidence: Let's Cut Off the Prosecutor's Hands,* 17 IDAHO L. REV. 237, 238-39 (1981); Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose,* 40 U. CHI. L. REV. 112, 135-40 (1972). This development is very unlikely because the Court has rejected the total disclosure option at least four times as not required by due process. United States v. Bagley, 473 U.S. 667, 675 (1985); California v. Trombetta, 467 U.S. 479, 488 n.8 (1984); United States v. Agurs, 427 U.S. 97, 109 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972). Lower courts are almost uniformly hostile to the proposition. *See* Note, *The Prosecutor's Duty to Disclose After* United States v. Agurs, 1977 U. ILL. L. F. 690, 718.

4. Materiality standards are used at two different phases of litigation. First, prosecutors use them to determine what evidence to disclose to defendants voluntarily. Second, trial and appellate courts use materiality standards to decide claims of prosecutorial due process violations. United States v. Agurs, 427 U.S. 97, 107-08 (1976).

note discusses the standards of materiality as they relate to both voluntary disclosure and disclosure in response to requests by defense counsel.

The discussion will trace the development of the federal materiality standard in United States Supreme Court decisions, the Alaska Court of Appeals' interpretation of the federal standard, and the development of the standard of materiality under the Alaska Constitution. The Alaska Court of Appeals interpreted United States Supreme Court decisions to apply a materiality standard more favorable to defendants when they make specific, timely requests for evidence.[5] The same court interpreted the Alaska Constitution as also permitting a more lenient standard for specific requests that are untimely, yet justifiably so.[6] The Supreme Court has since collapsed the distinction between specific requests and general/no requests,[7] and announced a new standard of materiality applicable to all disclosure questions. It remains to be seen whether Alaska courts will follow the Supreme Court or retain the distinction between specific and non-specific requests under the Alaska Constitution. The discussion concludes with an analysis of the appropriate standard in light of the Alaska Court of Appeals' concerns stated in the cases.

The United States Supreme Court first explicitly recognized the duty to disclose material evidence in 1963 in *Brady v. Maryland*;[8] however, the Court did not define materiality. In 1976 the Court again addressed the duty in *United States v. Agurs*,[9] and found that the duty recognized in *Brady* applied to three situations: when prosecutors offer perjured testimony, when prosecutors fail to disclose material evidence despite a specific request from defendants, and when prosecutors fail to disclose material evidence to defendants who have made a general request or no request at all.[10] *Agurs* defined materiality for cases of perjury and general/no requests, but arguably not for specific requests.[11] In perjury cases, evidence is material if there is a "reasonable likelihood" that the undisclosed evidence would have affected the verdict.[12] In general/no request cases, however, a narrower definition of materiality is applied: the appropriate inquiry is whether the undisclosed evidence would have created a "reasonable doubt" that did not otherwise exist as to defendant's guilt.[13]

5. Maloney v. State, 667 P.2d 1258 (Alaska Ct. App. 1983).
6. *Id.*
7. United States v. Bagley, 473 U.S. 667 (1985).
8. 373 U.S. 83 (1963).
9. 427 U.S. 97 (1976).
10. *Id.* at 103-07.
11. *Id.* at 103-12. *See also Bagley*, 473 U.S. at 681 & n.12.
12. *Agurs*, 427 U.S. at 103.
13. *Id.* at 112-13.

Until 1984, the Supreme Court had never addressed the issue of whether prosecutors have a constitutional duty to gather and preserve evidence and what standard of materiality would govern this situation. Since 1976, the Alaska courts have imposed on prosecutors a duty to gather and preserve evidence, judging materiality by the same standard as in a case of failure to disclose evidence.[14] In 1984, the United States Supreme Court held that constitutional due process obligates prosecutors to gather and preserve certain evidence.[15] The Supreme Court also held, however, that the same materiality standard for failure to disclose did *not* apply in cases where prosecutors had failed to gather or preserve evidence.[16] The Alaska cases that will be discussed involve a duty to gather and preserve evidence, but since Alaska treats the two situations as equivalent, this note analyzes the cases to determine the materiality standard for the duty to disclose.

In 1983, the Alaska Court of Appeals held in *Maloney v. State*[17] that *Agurs* had set the proper standard of materiality under the United States Constitution for specific requests as the reasonable likelihood standard applied in perjury cases.[18] The court also treated the question of materiality standards for general/no requests under the Alaska Constitution and declared itself in accord with the *Agurs* application of the stricter reasonable doubt standard for certain cases.[19]

*Maloney,* however, had interpreted the *Agurs* holding regarding specific requests in a manner inconsistent with the Supreme Court's later holding in *United States v. Bagley.* In *Bagley,* the Court held that the new "reasonable probability" standard applied to *both* specific and general/no requests.[20] The Alaska Court of Appeals has determined that the reasonable probability standard would fall toward the lenient side of the spectrum of materiality standards, as would harmless error.[21] The court applied the reasonable probability standard to a specific request in a due process claim under the Alaska Constitution. It is uncertain whether the Alaska courts will also apply the reasonable probability standard to general/no requests, or whether the timeliness

14. Lauderdale v. State, 548 P.2d 376 (Alaska 1976). *See infra* note 99.

15. California v. Trombetta, 467 U.S. 479 (1984); *see also* Arizona v. Youngblood, — U.S. —, 109 S. Ct. 333 (1988). In *Youngblood,* the Court shifted its focus from the evidence to whether the police acted in bad faith.

16. *Trombetta,* 467 U.S. at 488. Instead, the court stated that the "duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.*

17. 667 P.2d 1258 (Alaska Ct. App. 1983).

18. *Id.* at 1264-65.

19. *Id.* at 1265 & n.7.

20. 473 U.S. 667, 682 (1985).

21. St. John v. State, 715 P.2d 1205, 1212 (Alaska Ct. App. 1986).

and specificity of requests will continue to be relevant factors in choosing among materiality standards under the Alaska Constitution. Two considerations may prove relevant to these issues. First, the *Maloney* court perceived the reasonable doubt standard as very difficult for defendants to meet. Second, by treating late requests less favorably than timely requests, the courts may discourage defendants from making untimely requests.

## II. THE PROSECUTORIAL DUTY TO DISCLOSE EVIDENCE UNDER THE UNITED STATES CONSTITUTION

### A. *Brady v. Maryland*: Recognizing the Duty to Disclose Evidence

In *Brady v. Maryland,*[22] the United States Supreme Court first recognized that prosecutors have an affirmative constitutional duty to disclose to criminal defendants upon request any favorable evidence which is material to guilt or punishment.[23] In that case, defendant Brady's attorney requested before trial all statements made by Brady's co-defendant, Boblit, who was being tried separately for the same murder.[24] In one of his statements, Boblit had admitted to strangling the victim, but he denied this action at trial and in his other statements.[25] The prosecutor withheld the statement in which Boblit confessed from Brady's attorney, although he disclosed Boblit's other statements.[26]

22. 373 U.S. 83 (1963).

23. *Id.* at 87. "The prosecutor's constitutional duty to disclose exculpatory evidence was derived from a previously established constitutional obligation of the prosecutor to correct false testimony. Although the two obligations are arguably distinct, the Supreme Court has treated them as based on similar principles and governed by analogous standards." W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 19.5(a), at 753 (1985).

The following cases discuss the prosecutor's obligations concerning false testimony. In each case, the defendant's due process rights were found to have been violated: Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) (prosecutor knowingly permitted false testimony); Pyle v. Kansas, 317 U.S. 213, 215-16 (1942) (prosecutor coerced witnesses to perjure themselves or refrain from testifying, knowingly presented perjured testimony of witnesses, and suppressed evidence favorable to defendant); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam) (prosecutor knowingly presented perjured testimony in a criminal trial). The Court later expanded this holding to include the situation in which the testimony concerns only the credibility of a witness. Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

Subsequent to *Brady,* the Court held that the *Brady* rule bound *all* members of the prosecutor's office who were aware that the witness' testimony was false. Giglio v. United States, 405 U.S. 150, 154-55 (1972).

24. *Brady,* 373 U.S. at 84. For a more detailed statement of the facts of the case than that given by the Supreme Court, see Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel,* 34 STAN. L. REV. 1133, 1142 (1982).

25. Babcock, *supra* note 24, at 1142.

26. *Brady,* 373 U.S. at 84.

The undisclosed statement had obvious exculpatory value to Brady, who first learned of it after he was sentenced to death for first-degree murder.[27] The trial court denied Brady's motion for a new trial based on the prosecutor's suppression of Boblit's statement.[28] Nevertheless, the Maryland Court of Appeals held that the state had denied Brady due process of law when the prosecutor suppressed Boblit's statement.[29] The court remanded the case for retrial as to punishment, but not as to guilt.[30]

The United States Supreme Court granted certiorari on the issue of whether the due process clause of the fourteenth amendment of the United States Constitution required that Brady be granted a new trial on the issue of guilt.[31] The Court held that the prosecutor's suppression of Boblit's confession violated due process,[32] but that a new trial on the issue of punishment was all that due process required. The Court held 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 to punishment, irrespective of the good faith or bad faith of the prosecution."[33] This holding has become known as "the *Brady* rule."[34] A new trial on the merits was not required because the court of appeals had found that nothing in Boblit's confession indicated that the prosecution had failed to prove all the elements

27. *Id.*

28. Brady appealed this decision to the state court of appeals, which dismissed the appeal without prejudice. Brady v. State, 222 Md. 442, 160 A.2d 912 (1960). The appeal was dismissed because case law and the Maryland Post Conviction Procedure Act barred appellate review of the trial court's ruling on Brady's motion. *Id.* at 445-46, 160 A.2d at 915-16. While forbidding such review, the Act provided that any convicted person claiming a violation of, for example, the United States Constitution, could initiate a proceeding at the lowest court level to set aside or correct the sentence. Maryland Post Conviction Procedure Act, Code (1959 Cum. Supp.), art. 27, § 645A(a) (as cited in Brady v. State, 222 Md. at 446, 160 A.2d at 915). Brady filed a petition pursuant to the Act but the court dismissed it. Brady appealed the dismissal, and the Maryland Court of Appeals reversed, holding that the suppression of Boblit's statement denied Brady due process. Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), *aff'd,* 373 U.S. 83 (1963).

29. Brady v. State, 226 Md. at 427, 174 A.2d at 169. Suppression and nondisclosure are synonymous in the context of this note and are used interchangeably throughout.

30. 226 Md. at 431, 174 A.2d at 172.

31. Brady v. Maryland, 371 U.S. 812 (1962).

32. Brady v. Maryland, 373 U.S. 83, 86 (1963). Justices Black, Harlan, and White found it unnecessary to reach this due process issue in deciding the case. *Id.* at 91, 92 n.1 (White, J., concurring; Black, Harlan, J.J., dissenting).

33. *Id.* at 87 (emphasis added).

34. United States v. Bagley, 473 U.S. 667, 675, 676 (1985); United States v. Agurs, 427 U.S. 97, 103, 107 (1976).

of first-degree murder beyond a reasonable doubt.[35] Thus, Boblit's statement was material to punishment but not to guilt.

Prosecutorial suppression of material evidence favorable to a defendant[36] violates fifth or fourteenth amendment due process because it denies the defendant the right to a fair trial.[37] Due process is concerned with preventing unfair trials, not punishing society for prosecutors' misconduct.[38] Thus, the good or bad faith of prosecutors in withholding evidence is irrelevant and new trials are required only when prosecutors suppress evidence *material* to defendants. The major issue left unanswered by *Brady* was how to define materiality for the purpose of triggering the prosecutor's duty to disclose evidence. Perhaps because Boblit's inculpatory statement was obviously favorable to Brady, the Court neither defined materiality nor provided the quantum of proof necessary to establish materiality.[39]

### B. *United States v. Agurs*: The First Standard of Materiality

Thirteen years after *Brady,* the Supreme Court elaborated on the duty of prosecutorial disclosure in *United States v. Agurs*[40] by defining

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35. *Brady,* 373 U.S. at 90.

36. The evidence must be favorable to the defendant for the *Brady* rule to apply. *Id.* at 87. Prosecutors owe no duty to defendants to disclose inculpatory or neutral evidence. Evidence that is favorable to defendant has been described as evidence that is "favorable on its face—*i.e.,* directly exculpatory or mitigating evidence." Note, *A Defendant's Right to Inspect Pretrial Congressional Testimony of Government Witnesses,* 80 YALE L.J. 1388, 1400 (1971). Favorable evidence includes evidence relevant to the credibility of witnesses and prior inconsistent statements of government witnesses. *Id.* at 1401-02. There is no constitutional difference between exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). In vacating a similar case on other grounds, however, the Supreme Court implied that evidence which is merely useful to defendant may not be favorable for purposes of the *Brady* rule. Giles v. Maryland, 386 U.S. 66 (1967).

37. The *Brady* holding was based on fourteenth amendment due process because Brady was tried in state court. *Brady,* 373 U.S. at 86. In federal criminal trials, fifth amendment due process guarantees defendants the right to a fair trial. *Agurs,* 427 U.S. at 107. Both amendments guarantee the same right to a fair trial so all Supreme Court cases on prosecutorial disclosure apply equally to state and federal criminal defendants. *Id.*

38. "The principle of *Mooney v. Holohan* [that knowing presentation of perjured testimony violates due process] [*see supra* note 23] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady,* 373 U.S. at 87.

39. For a discussion of the different standards of materiality applied by lower courts after *Brady,* see Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure,* 59 IOWA L. REV. 433, 447-51 (1973).

40. 427 U.S. 97 (1976). For critiques of United States v. Agurs, see Babcock, *supra* note 24, at 1145-55 (the criminal trial as a regulated game); Capra, *Access to*

materiality. The Court began its analysis by stating that the *Brady* rule arguably applied to three different fact situations and that the standard of materiality was "not necessarily the same" for each.[41] First, the *Brady* rule applies if the prosecutor knew or should have known that the state's case included perjured testimony.[42] Second, the *Brady* rule applies when the prosecutor possesses exculpatory evidence unknown to a defendant who makes only a general request or no request at all for evidence.[43] Finally, the rule applies in cases like *Brady* where there is a pretrial request for specific evidence that is not disclosed although it exists.[44]

Writing for seven members of the Court in *Agurs,* Justice Stevens clarified *Brady* by defining materiality as it related to two of the above fact situations—perjury and general/no requests for evidence. In the first fact situation, when the prosecutor knew or should have known that his witness had committed perjury, the Court held that the "reasonable likelihood" standard of materiality applied.[45] The conviction must be overturned if there is "any reasonable likelihood that the false testimony could have affected"[46] the verdict. The defendant need not have requested the evidence that indicated perjury was committed.[47] This standard of materiality is a broad definition from the defendant's perspective.[48]

The general/no request situation is similar to the facts of *Agurs.* Agurs was on trial for murder.[49] Despite a general request by Agurs' attorney for all favorable material evidence, the prosecutor did not disclose the victim's criminal record.[50] Defense counsel discovered the criminal record after the trial and moved for a new trial based on the

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*Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review,* 53 FORDHAM L. REV. 391 (1984) (advocating pretrial determination of discoverability by trial court through in camera inspection of the prosecutor's file). The drawbacks of judicial in camera review are discussed in Note, *supra* note 36, at 1402 n.67.

41. *Agurs,* 427 U.S. at 106.

42. *Id.* at 103; *see supra* note 23.

43. 427 U.S. at 106-07.

44. *Id.* at 104.

45. *Id.* at 103.

46. *Id.* The Court called this a "strict" standard of materiality as viewed from the prosecutor's perspective. *Id.* at 104. Conversely, it is a lenient standard from the defendant's standpoint because he need show only that the incorrect testimony was reasonably likely to have affected the verdict. This note characterizes the materiality standards from defendant's perspective.

47. *Id.* at 103-04.

48. A more detailed treatment of the perjury aspect of due process is beyond the scope of this note, which focuses instead on the prosecutor's duty to disclose exculpatory evidence to the defense, not the prosecutor's duty to prevent perjury.

49. 427 U.S. at 98.

50. *Id.* at 100-01.

prosecutor's nondisclosure.[51] Agurs contended that the criminal record would have supported her theory of self-defense by showing the victim's violent character.[52] The Court held that the defendant in a general/no request situation must show that the evidence meets a stricter materiality standard than in perjury cases to require disclosure of evidence.[53] The Court concluded that the proper standard of materiality was the "reasonable doubt" standard: whether the suppressed evidence "creates a reasonable doubt that did not otherwise exist . . . in the context of the entire [trial] record."[54] Since the *Agurs* trial court had correctly applied this standard, the Court affirmed the trial court's ruling that the victim's prior criminal record was merely cumulative and did not create a reasonable doubt as to Agurs' guilt.[55]

The Court also addressed the hypothetical situation in which defense counsel does not request any evidence from the prosecutor. The Court stated that a general request for evidence was the same as making no request at all.[56] Both situations require the same standard of materiality because neither gives the prosecutor notice of what evidence to disclose.[57] The prosecutor's duty to disclose arises from the exculpatory character (if any) of the evidence, not from whether or not

51. A motion for a new trial based on the suppression of evidence is distinguishable from a motion for a new trial under Federal Rule of Civil Procedure 33 based upon newly discovered evidence. In the case of newly discovered evidence, neither defendant nor prosecutor have knowledge or possession of the evidence during trial. The majority and dissent in *Agurs* agreed that this difference necessitates different standards of review. *Id.* at 111, 115. In a Rule 33 motion, defendant must prove the "evidence probably would have resulted in acquittal." *Id.* at 111 n.19. When defendant moves for a new trial based on prosecutorial suppression a less burdensome standard applies because of the prosecutor's active distortion of the trial. *Id.* at 111, 114-15. The dissent stated that the majority's standard does not succeed on this point and that the standard applied actually holds defendant to a higher standard than the majority states it does. *Id.* at 115-16 (Marshall, J., dissenting).

52. *Id.* at 100.

53. *Id.* at 106-07.

54. *Id.* at 112. In its search for the appropriate materiality standard the Court rejected two standards. First, it rejected the "might have affected the verdict" standard: "The 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." *Id.* at 109-10. This standard of materiality was rejected because it would have required the prosecutor to disclose the entire file to the defense. *Id.* at 109. Complete disclosure of files conflicts with the work product doctrine. The Court also rejected the standard of whether the prosecutor acted in good or bad faith, as the *Brady* Court had, because the goal is to provide fair trials, not to punish prosecutors. *Id.* at 110 & n.17; *see supra* note 40.

55. *Agurs*, 427 U.S. at 114.

56. *Id.* at 106-07.

57. *Id.*

the defense made a request.[58] Thus, the reasonable doubt standard of materiality applies to the general/no request situation.[59]

The last fact situation to which the *Brady* rule might apply consists of a specific request by defense counsel,[60] as in *Brady.* Brady's counsel made a pretrial request for specific evidence (any statements made by the co-defendants), and the prosecutor disclosed all but one statement made by Brady's co-defendant.[61] The *Agurs* Court repeated the *Brady* rule, that due process imposes a duty on prosecutors to disclose material evidence in a specific request situation, but the Court did not clearly indicate whether one of the standards of materiality promulgated in *Agurs* applied to specific requests.[62]

The Alaska Court of Appeals read *Agurs* as stating a standard of materiality for cases in which defense counsel makes a specific request for evidence, as in *Brady.*[63] The *Agurs* Court stated that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."[64] The Alaska Court of Appeals read *Agurs* to mean that the more lenient materiality standard that applies to perjury cases was also to be applied in specific request cases.[65] The standard of materiality for perjury is whether there is a "reasonable likelihood" that the suppressed evidence "could have affected" the verdict or punishment.[66] This is a less strict standard than

58. *Id.* at 107.
59. *Id.* at 112.
60. *Id.* at 104.
61. *Id.*
62. *Id.* In its discussion of the specific request situation, the Court ambiguously stated that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.* Consequently, the federal circuit courts of appeal interpreted this language in a variety of ways. *See, e.g.,* United States v. Farid, 733 F.2d 1318, 1321 (8th Cir. 1984) (the reasonable doubt standard applies to specific requests); United States v. Sperling, 726 F.2d 69, 72 (2d Cir.) (the reasonable likelihood standard applies to specific requests), *cert. denied,* 467 U.S. 1243 (1984); United States v. Flaherty, 668 F.2d 566, 587 (1st Cir. 1981) (standard is whether "the suppressed evidence 'might have affected the outcome of the trial.' "); United States v. Weidman, 572 F.2d 1199, 1204 (7th Cir.) (*Agurs* did not establish a materiality standard for specific requests), *cert. denied,* 439 U.S. 821 (1978). *See infra* notes 71-74 and accompanying text.

In United States v. Bagley, 473 U.S. 667 (1985), the Court adopted the view of appellant, the United States Solicitor General, that *Agurs* did not announce a standard of materiality for specific requests. *Bagley,* 473 U.S. at 681 & n.12. *See* Brief for the United States, United States v. Bagley, 473 U.S. 667 (1985) (No. 84-48) for the Solicitor General's argument.

63. Maloney v. State, 667 P.2d 1258 (Alaska Ct. App. 1983).
64. *Id.* at 1264-65 (citing *Agurs,* 427 U.S. at 103-05).
65. *Id.* at 1264-65.
66. *Id.* (citing 427 U.S. at 103).

that used for general/no requests; therefore, prosecutors have a greater duty to disclose when perjury or a specific request is involved.[67] Evidence that is material under the perjury standard may not rise to the requisite level of materiality if the defendant makes a general/no request. The general/no request standard is whether the nondisclosed evidence creates a reasonable doubt that did not otherwise exist in the context of the entire trial record.[68] Under this standard it it less likely that evidence will be deemed material than under the standard for perjury situations.

### C. *United States v. Bagley*: The Present Standard of Materiality

In 1985, the United States Supreme Court again addressed the prosecutorial duty to disclose evidence in *United States v. Bagley*[69] and resolved the issue that had been left unanswered by both *Brady* and *Agurs*: the standard of materiality for specific request situations. The ambiguity in *Agurs* regarding this standard had caused confusion among the circuit courts of appeal. Several courts determined that the *Agurs* Court had set the standard for specific requests as whether "the

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67. *See supra* notes 48-50 and accompanying text.

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

69. 473 U.S. 667 (1985). *See supra* text accompanying note 64. The plurality opinion in *Bagley* states that *Agurs* "merely explains the meaning of the term 'materiality'." 473 U.S. at 681 n.12. The *Agurs* opinion did not establish a standard of materiality because it did not "indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome." *Id.* Justice Powell did not participate in the decision and three Justices dissented. Justice Blackmun wrote for the five-member majority in Parts I and II. Those parts dealt with the issue of whether nondisclosure of requested impeachment evidence (in the form of an inducement from the state to a witness) denied Bagley due process. *Id.* at 669-78. In Bagley v. Lumpkin, 719 F.2d 1462 (9th Cir. 1983), the Ninth Circuit had reversed Bagley's narcotics conviction because the government's suppression of material evidence violated Bagley's right to confront adverse witnesses. 719 F.2d at 1464. The Supreme Court reversed this decision and remanded the case for the court of appeals to determine whether there was a reasonable probability that the verdict would have been different had the inducement been disclosed. 473 U.S. at 684. In Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986), the Ninth Circuit held that the government's suppression undermines confidence in the outcome of the trial and therefore requires reversal of the narcotics conviction. 798 F.2d at 1302.

Only Justice O'Connor joined Justice Blackmun in Part III of *Bagley*. The three other majority members declined to join in Part III, regarding the specificity of the defense's request as irrelevant because the materiality standard of reasonable probability was "sufficiently flexible" to apply to all nondisclosure situations. 473 U.S. at 685. They did, however, agree with the rest of Part III, including the part which stated that the correct standard of materiality is one of "reasonable probability." *Id.* Although *Bagley* is a persuasive plurality opinion, five Justices agreed that only one standard of materiality applies to both specific and general/no requests.

suppressed evidence might have affected the outcome of the trial."[70] Two courts read *Agurs* as extending the reasonable likelihood standard to specific requests,[71] while another court held that the reasonable doubt standard applied.[72] Yet another court determined that *Agurs* had not established a materiality standard for specific requests at all.[73] The Alaska Court of Appeals read *Agurs* as holding that the reasonable likelihood standard of perjury cases also applied to specific requests.[74] In *Bagley,* the Supreme Court held that the proper standard of materiality for specific requests for evidence is whether there is a "reasonable probability" that the trial verdict would have been different had the evidence been admitted at trial.[75]

In *Bagley,* defense counsel had made a pretrial request for any evidence of inducements made to prosecution witnesses in exchange for their testimony.[76] The request was both timely and specific.[77] The two principal state witnesses had signed contracts with a federal investigative agency which promised them payment for their testimony, but the prosecutor did not reveal the contracts to the defense counsel.[78] Five justices agreed that the standard of materiality for general/no request situations also applies to specific requests.[79] According to the *Agurs* decision, the reasonable doubt standard of materiality applied to general/no requests, but the *Bagley* Court formulated a new standard

70. United States v. Warhop, 732 F.2d 775, 778 (10th Cir. 1984); United States v. Montoya, 716 F.2d 1340, 1346 (10th Cir. 1983); United States v. Flaherty, 668 F.2d 566, 587 (1st Cir. 1981); Monroe v. Blackburn, 607 F.2d 148, 151 & n.5 (5th Cir. 1979) (a specific request inquiry is similar to the "reasonable likelihood" standard), *cert. denied,* 446 U.S. 957 (1980); *but see* United States v. Goldberg, 582 F.2d 483, 488-89 & n.7 (9th Cir. 1978) (synonymous with the harmless error standard of "reasonable possibility of effect on the verdict;" not the same as the reasonable likelihood standard), *cert. denied,* 440 U.S. 973 (1979).

71. United States v. Sperling, 726 F.2d 69, 72 (2d Cir.), *cert. denied,* 467 U.S. 1243 (1984); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980).

72. United States v. Farid, 733 F.2d 1318, 1321 (8th Cir. 1984).

73. United States v. Weidman, 572 F.2d 1199, 1204 (7th Cir.), *cert. denied,* 439 U.S. 821 (1978).

74. Maloney v. State, 667 P.2d 1258, 1264-65 (Alaska Ct. App. 1983).

75. 473 U.S. at 682. The Court discussed both the "reasonable likelihood" and the "reasonable probability" standards and found that the "reasonable probability" standard was "sufficiently flexible" to cover all request cases. *Id.*

76. *Id.* at 669-70. For a more detailed statement of the facts of the case, see Casenote, *Criminal Law—Discovery—Nondisclosure Of Prosecutorial Evidence That Can Be Used For Impeachment Purposes Is Constitutional Error Requiring Reversal If There Is A Reasonable Probability That The Outcome Of The Trial Is Affected,* 17 ST. MARY'S L.J. 1105, 1105-07 (1986).

77. *Bagley,* 473 U.S. at 669-70.

78. *Id.* at 671.

79. *Id.* at 682, 685. *See supra* note 69.

that replaced it. The new standard is whether there is a "reasonable probability" that the trial verdict would have been different.[80]

Part III of the opinion, which was accepted only by Justices Blackmun and O'Connor, permits the trial court to make an additional inquiry in specific request cases.[81] When the defendant's request for evidence is specific, the court should consider, in addition to the reasonable probability that the verdict would have been different, any adverse effects the prosecution's withholding may have had on the defendant's case.[82] The two justices were concerned that in a specific request situation the defense is more likely to be misled into believing that the requested evidence did not exist than in cases of general/no requests. A majority of the Court, however, did not consider this inquiry necessary. Thus, the only majority holding promulgated by *Bagley* is that the new reasonable probability standard of materiality applies to all requests for evidence regardless of their specificity.[83]

## D. "Reasonable Doubt" vs. "Reasonable Probability"

An important issue raised, but unanswered, by *Bagley* is whether the reasonable probability standard of materiality is the same as the reasonable doubt standard for general/no requests under *Agurs.*[84] A comparison of the Court's language describing the materiality standards in *Agurs* and *Bagley* reveals different wording. In *Agurs,* the standard for general/no requests was whether the evidence withheld by the prosecutor created a reasonable doubt that did not otherwise exist, looking at the entire trial record.[85] The *Bagley* Court called this "stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard [of Federal Rule of

80. 473 U.S. at 682.

81. *Id.* at 682-83. For commentary on Part III of the *Bagley* opinion, see Wyrsch & Hunt, *Specific Requests for Exculpatory Evidence After* United States v. Bagley, 55 UMKC L. REV. 50, 56 (1986) (Court failed to make clear how a specific request is relevant to the reasonable probability standard); Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of* United States v. Bagley, 1986 DUKE L.J. 892 (the additional inquiry in specific request situations is futile.)

82. 473 U.S. at 683. It is unclear whether the inquiry is optional or mandatory, because Justice Blackmun states both that the trial court "may" and "should" make the inquiry. *Id.* at 683. It would seem that the inquiry is optional because only two justices joined in this part of the opinion.

83. *Id.* at 685 (White, Burger, and Rehnquist, J.J., concurring in part and concurring in the judgment).

84. *Bagley* reaffirmed the determination in *Agurs* that the standard for the perjury situation is that the verdict will be overturned if there is a reasonable likelihood that the perjury would have affected the verdict. 473 U.S. at 678-80. In other words, perjured testimony "is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Id.* at 680.

85. *See supra* note 55 and accompanying text.

Civil Procedure 33]."[86] As stated in *Bagley,* however, the materiality standard for specific and general/no requests is that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[87] A " 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[88]

In *Bagley,* the plurality states that the *Agurs* standard had undergone reformulation[89] but does not say whether *Bagley*'s reasonable probability standard is part of the reformulation. Thus, one must question whether the reasonable probability standard, which the *Bagley* Court chose as the correct standard, represents a substantive change in the standard or a simple rewording. It is unclear whether the Court considers the *Bagley* formulation the same as "a reasonable doubt that did not otherwise exist." Justice Stevens, the author of *Agurs,* stated that the standards were the same in his dissent in *Bagley.*[90] If this is true, then *Bagley* stands for the principle that *Agurs*' reasonable doubt standard for general/no requests applies also to specific requests.[91]

Two facts, however, point to the opposite conclusion—that the *Bagley* reasonable probability standard is different from the *Agurs* reasonable doubt standard. First, the difference in the wording, itself, supports the argument that the standards are different. The Court would have little need to rename the standard unless it was also changing the standard substantively. Second, the standards dictate different roles for the trial judge. The reasonable doubt test requires the judge "to make a personal judgment based upon his view of the total evidentiary picture . . . . A judge may reach this result even though he believes it probable that not all of the jurors would have reached the same conclusion."[92] The majority opinion in *Agurs* supports this view; the Court reviewed the trial court's ruling using the correct reasonable doubt standard and found that "in the context of

86. 473 U.S. at 681.

87. *Id.* at 682.

88. *Id.*

89. *Id.* at 681.

90. *Id.* at 713-14 (Stevens, J., dissenting).

91. Wyrsch & Hunt, *supra* note 81, at 56-58. A survey of federal district and appellate court opinions revealed that the specificity of a request is still regarded as relevant in determining what effect the evidence would have had on the verdict. *Id.* at 58. For a model specific request discovery motion, see *id.* at 66-68.

92. W. LAFAVE & J. ISRAEL, *supra* note 23, § 19.5(b), at 758. *See* United States v. Agurs, 427 U.S. 116, 117-18 (1976) (Marshall, J., dissenting). *Cf.* Babcock, *supra* note 25, at 1179 & nn.173-74 (*Agurs* did not specify whether the judge was to search his own mind or the jury's for reasonable doubt, and not surprisingly, both methods were used by lower courts).

the entire [trial] record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt."[93] In jury trials, however, the *Bagley* reasonable probability standard "does not appear to be tied exclusively to the judge's own evaluation of the evidentiary picture."[94] The judge looks to whether there is a reasonable probability that the jury verdict would have been different, and, when a jury takes a long time to reach a guilty verdict, a judge could find a reasonable probability in the jurors' minds even if not in his own.[95]

Although *Bagley* resolved the ambiguity in *Agurs* over the standard of materiality for specific requests, the new reasonable probability standard is, itself, ambiguous in its relationship to the *Agurs* reasonable doubt standard. The Court in *Bagley* failed to make clear whether the reasonable probability standard is more favorable to the defendants than the reasonable doubt standard, or whether the two standards are the same. As this discussion indicates, both conclusions are reasonable.

## III. THE PROSECUTORIAL DUTY TO GATHER AND PRESERVE EVIDENCE

Before discussing the Alaska cases dealing with materiality standards, it must be noted that these cases may appear out of place in a note discussing the prosecutorial duty to disclose evidence. In each case, defendants alleged a violation of the state's duty to gather and preserve evidence, not a violation of the prosecutors' duty to disclose. Since 1976, the Alaska Constitution has been interpreted to impose a duty on the state to gather and preserve certain evidence.[96] The

93. *Agurs,* 427 U.S. at 114.

94. W. LAFAVE & J. ISRAEL, *supra* note 23, § 19.5(b), at 58 (Supp. 1987).

95. *Id.* at 58-59 (Supp. 1987). *See* Babcock, *supra* note 25, at 1179. This commentator concludes that the *Agurs* trial court might very well have determined that there was a reasonable probability that the jury, had it known about the victim's prior criminal record indicating a violent nature, would have believed Agurs' self-defense theory. *Id.* at 1179-80.

96. Lauderdale v. State, 548 P.2d 376, 382 (Alaska 1976) (state must preserve ampoules used in breathalyzer test because ampoules were relevant and material to the preparation of the defense to a driving while intoxicated charge). *See also* Putnam v. State, 629 P.2d 35 (Alaska 1980); Torres v. State, 519 P.2d 788 (Alaska 1974). The test and burden of proof for a claim of failure to preserve evidence was described in State v. Contreras, 674 P.2d 792 (Alaska Ct. App. 1983), *rev'd on other grounds,* 718 P.2d 129 (Alaska 1986). The court said that where the prosecutor never possessed the evidence defendant requests and defendant had the opportunity to preserve it, the burden is on defendant to show that the prosecutor breached his duty of preserving the evidence. *Id.* at 821. *See also* Gudjonnson v. State, 667 P.2d 1254 (Alaska Ct. App. 1983); Bradley v. State, 662 P.2d 993 (Alaska Ct. App. 1983).

United States Supreme Court had suggested that such a duty also existed under the United States Constitution but did not squarely address the issue until 1984, when it analyzed the duty and its limitations in *California v. Trombetta.*[97] The duty of disclosure is related to and dependent upon the duty to gather and preserve evidence.[98] Although the duty to preserve and gather evidence is different from the duty to disclose evidence,[99] the Alaska courts treat them the same in terms of materiality standards. For example, in the subsequently decided cases of *Maloney v. State* and *Kwallek v. State,* the court looked to *Brady* and *Agurs* for the appropriate materiality standard, even though both defendants appealed on the grounds of prosecutorial failure to gather and preserve evidence.

In *California v. Trombetta,* the United States Supreme Court held that any duty that fourteenth amendment due process imposed on the states to gather and preserve evidence was subject to certain limits.[100] In discussing the limitations on the duty, the Court speaks from the premise that such a duty exists in certain cases. In *Trombetta,* the Court held that the *Brady-Agurs* materiality standard did *not* apply to the duty to gather and preserve evidence, but that prosecutors are obliged to preserve evidence only if the evidence has "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[101] One would have expected the Alaska courts to apply *Trombetta* to appeals alleging grounds of violations of the duty to gather and preserve evidence under the United States Constitution. To date, however, Alaska courts have not analyzed any failure-to-gather-and-preserve cases under the *Trombetta* materiality standard.[102]

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97. 467 U.S. 479 (1984). Evidence in this case was not such that would have played a role in the suspect's defense and thus did not give rise to the duties. More recently, the Court affirmed the existence of a duty to preserve in Arizona v. Youngblood, — U.S. —, 109 S. Ct. 333 (1988).

98. A duty to gather and preserve any reasonably apparent material evidence that might play a significant role in the suspect's defense is necessary to give the prosecutor's duty to disclose any meaning. Absent the duty to gather and preserve, the state could easily circumvent the duty to disclose by destroying, intentionally losing, or not gathering material evidence favorable to defendants.

99. The duty to gather and preserve evidence applies to state and local investigative personnel, while the duty to disclose evidence involves prosecutors. This clear-cut line is often blurred because the prosecutors and investigators work so closely together. *See, e.g.,* State v. Kwallek, No. 883, slip. op. (Alaska Ct. App. July 24, 1985) (per curiam).

100. 467 U.S. at 488.

101. *Id.* at 489.

102. The Alaska Court of Appeals cited *Trombetta v. California* in Kwallek v. State, No. 883, slip op. (Alaska Ct. App. July 24, 1985) (per curiam), but not as controlling precedent. The court also cited *Trombetta* in Best v. Municipality of

It is unclear from Alaska opinions why the courts continue to apply the standards of materiality from *Agurs* and *Bagley* (instead of *Trombetta*) to cases involving the state's failure to gather and preserve evidence. *Kwallek* is a failure-to-gather-and-preserve case decided after *Trombetta,* yet the court applied the *Agurs* standard of materiality instead of *Trombetta.* The Alaska courts are free to incorporate these materiality standards into the test for materiality under the Alaska Constitution. This note focuses on the standards of materiality used by the Alaska courts and does not explore why the Alaska courts have ignored *Trombetta.* In the following discussion of *Maloney* and *Kwallek,* therefore, this note assumes that for purposes of due process claims under the Alaska Constitution the two types of cases are identical.

## IV. MATERIALITY STANDARDS UNDER THE ALASKA CONSTITUTION

At the same time that the United States Supreme Court was developing the prosecutorial duty to disclose, the Alaska Court of Appeals was interpreting the Court's decisions, as well as developing the disclosure duty under the Alaska Constitution. Alaska courts took a more pro-defendant view of the disclosure duty than did the Supreme Court.[103] In *Maloney v. State,*[104] decided before both *Bagley* and

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Anchorage, 712 P.2d 892 (Alaska Ct. App. 1985). The court declined to overrule or even reconsider *Lauderdale v. State,* which held that the police must preserve breath samples from breathalyzers. 712 P.2d at 894. The court correctly stated that because *Lauderdale* was based on state due process grounds, it stood despite *Trombetta* because *Trombetta* was decided on fourteenth amendment grounds. *Id. See Trombetta,* 467 U.S. at 491 n.12 ("State courts and legislatures, of course, remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution. *See, e.g.,* Lauderdale v. State, 548 P.2d 376 (Alaska 1976).").

The Alaska Supreme Court cited *Trombetta* in Stephan v. State, 711 P.2d 1156 (Alaska 1985). The issue was whether the police were required by due process to record the custodial interrogation of criminal suspects. The court held that the fourteenth amendment did not so require pursuant to *Trombetta,* but that state due process did. 711 P.2d at 1160. Reiterating what the United States Supreme Court stated in *Trombetta,* the court stated, "as we have done on previous occasions, we construe Alaska's constitutional provisions, in this instance, as affording rights beyond those guaranteed by the United States Constitution." *Id.*

It is yet to be seen whether the recent United States Supreme Court decision in Arizona v. Youngblood, — U.S. —, 109 S. Ct. 333 (1988) will similarly be ignored by the Alaska courts. *Youngblood,* like *Trombetta,* is concerned with a federal due process claim; therefore, it will likely be ignored.

103. The due process rights articulated by the United States Supreme Court are the minimum requirements under the federal Constitution. The states are free to expand, but not contract, principles of due process provided by their own constitutions. As *Trombetta* pointed out, from 1976 to 1985, *United States v. Agurs* and its predecessors

*Trombetta,* the Alaska Court of Appeals determined that *Agurs* applied the more lenient reasonable likelihood materiality standard in cases of specific requests.[105] Based on this assumption, the court developed precedent interpreting the duty to disclose under the United States Constitution and decided that, with a mitigating modification,[106] the same materiality standard would apply under the Alaska Constitution.[107] In 1985, however, the United States Supreme Court decided in *Bagley* that the reasonable likelihood standard did *not* apply to specific requests, but that reasonable probability would be the standard for all specific and general/no requests.[108]

Since *Trombetta* and *Bagley,* no Alaska court has explicitly overruled the previous interpretaton of federal precedent. Alaska courts will eventually have to acknowledge that the standard they are applying to claims under the United States Constitution must comport with the Supreme Court's holdings. The question then remains as to how strictly Alaska courts will interpret the *Bagley* reasonable probability standard as compared to the reasonable likelihood standard. Answering this question requires an examination of Alaska cases.

### A. *Maloney v. State*: Alaska Constitution Mitigates Harshness of the Reasonable Doubt Materiality Standard

In *Maloney v. State,*[109] defendant Maloney made a specific but untimely request for evidence. The court considered this request equivalent to a general/no request and therefore applied the reasonable doubt standard.[110] This standard is defined as whether the evidence would have created a reasonable doubt that did not otherwise exist.[111] The court, however, mitigated the harshness of this standard by holding that the Alaska Constitution requires an additional inquiry into whether the defense had a reasonable explanation for the lateness of the request.[112]

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defined the minimum duty that due process imposed upon prosecutors to disclose evidence in their possession to defendants. 467 U.S. at 489.

104. 667 P.2d 1258 (Alaska Ct. App. 1983).

105. *Id.* at 1264-65.

106. *Id.* at 1266 n.7; Kwallek v. State, No. 883, slip op. at 6 (Alaska Ct. App. July 24, 1985) (Echoing the *Maloney* court's focus on the defendant's failure to make a *timely* request, the *Kwallek* court also reasoned that in such cases the accused bears the burden of establishing that the evidence would have been exculpatory and would have raised a reasonable doubt.) (per curiam).

107. *Maloney,* 667 P.2d at 1265-66.

108. *Bagley,* 473 U.S. 667, 682 (1985).

109. 667 P.2d 1258 (Alaska Ct. App. 1983).

110. *Id.* at 1265.

111. *Id.*

112. *Id.* at 1266 n.7.

Maloney had been convicted of second-degree murder.[113] He had beaten his girlfriend in their apartment, cleaned up some of the ensuing mess, and spent the rest of the night drinking with friends at a local bar.[114] When he returned to the apartment the girlfriend was dead.[115] Doctors determined she had been alive for two hours after the fatal assault.[116] Maloney maintained that after he had left the apartment an intruder inflicted the fatal puncture wounds.[117]

Just before the closing argument, defense counsel requested production of several pieces of evidence, including hair found in the apartment wastebasket, an electric fan, and the shard broken off the fan that may have served as the murder weapon.[118] Defense counsel also requested the results of any tests performed on the decedent's hands.[119] The prosecution could not honor the request because the items either had not been gathered or had been lost before trial, and because no tests had been performed on the decedent's hands.[120]

Maloney appealed his conviction on the ground that the police's failure to gather and preserve this evidence violated his right to a fair trial[121] guaranteed by due process under both the United States and the Alaska Constitutions.[122] The court of appeals affirmed the conviction.[123]

In response to Maloney's appeal on federal constitutional grounds, the Alaska Court of Appeals interpreted *Agurs* as requiring that the reasonable likelihood standard applicable to perjury cases be applied to the specific request situation.[124] The court determined that defense counsel's request, coming as it did just before closing argument, was untimely.[125] Thus, although the request was very specific, the court found that its untimeliness rendered it more analogous to the general/no request situation.[126] Under the reasonable doubt standard,

113. *Id.* at 1260.
114. *Id.* at 1259-61.
115. *Id.* at 1260.
116. *Id.*
117. *Id.* at 1260-61.
118. *Id.* at 1263-64.
119. *Id.* at 1263.
120. *Id.*
121. *Id.* Maloney also claimed that the state's failure to preserve evidence violated his right to confront and cross-examine the state's witnesses. The court did not reach the merits on these issues because they had not been properly preserved for appeal. *Id.* at 1267.
122. U.S. CONST. amend. V; ALASKA CONST. art. I, § 7.
123. *Maloney,* 667 P.2d at 1259.
124. *Id.* at 1264-65.
125. *Id.* at 1265.
126. *Id.* The court seems to have extended the Supreme Court's reasoning that a general request is the same as no request to mean that an untimely request, even if specific, is the same as no request.

Maloney had the burden of proving that the undisclosed evidence, when considered in light of all the evidence presented at trial, created a reasonable doubt as to his guilt.[127] The court of appeals affirmed the trial court's ruling that the presentation of this evidence to the jury would not have produced a verdict of not guilty.[128]

Responding to Maloney's due process appeal under the state constitution, the court of appeals applied a slightly different analysis but reached the same result. In delineating the due process requirements of the Alaska Constitution, however, the court made an additional inquiry, which was not required by *Agurs* for the United States Constitution. Before deciding to apply the stricter reasonable doubt standard rather than the reasonable likelihood standard, the Alaska court inquired whether defense counsel had a reasonable explanation for the lateness of the request.[129] In this case, the court held that Maloney had no excuse because counsel could have made the same request before trial.[130] The court noted that if Maloney had exercised his right to pretrial examination of available evidence,[131] he would have learned before the trial what evidence had been tested and what evidence should have been independently tested.[132]

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127. *Id.* at 1265-66.

128. *Id.* at 1266-67.

129. *Id.* at 1266 & n.8.

130. *Id.*

131. Rule 16 of the Alaska Rules of Criminal Procedure provides for mutual discovery of available evidence and sanctions for noncompliance. Section (b)(1) lists the evidence which, if it is in the possession or control of the prosecutor, his staff or investigators, must be disclosed to defendant. ALASKA R. CRIM. P. 16(b)(1). This includes the names, addresses, and statements of defendants, co-defendants, persons with knowledge of relevant facts, and experts. *Id.* Prosecutors must also disclose experts' reports, defendant's property which will be used in court, and lists of prior criminal convictions of all witnesses. *Id.* The prosecutor must disclose information provided by informants and electronic surveillance. ALASKA R. CRIM. P. 16(b)(2). Information not included within this list must be disclosed if it tends to negate defendant's guilt or reduce punishment. ALASKA R. CRIM. P. 16(b)(3). The rule states that in these instances the prosecutor "shall disclose" the evidence, apparently not requiring defendant to make a request. The only sections which require defendant to make a request provide for discretionary disclosure of discoverable evidence not in the prosecutor's control upon a showing of materiality to the court. ALASKA R. CRIM. P. 16(b)(5-7).

Sections (c)(4) and (c)(5) specify the information the court may order the defense to disclose to the prosecutor. ALASKA R. CRIM. P. 16(c)(4), (5). Also, the rule imposes a continuing duty to disclose on both parties. ALASKA R. CRIM. P. 16(d)(2). The court has the power to remedy parties' failure to comply with its orders or the rules, and to sanction counsel if the violation is willful. ALASKA R. CRIM. P. 16(e)(1), (2).

132. *Maloney,* 667 P.2d at 1265.

This additional inquiry serves two purposes.[133] First, there are situations in which a timely request is impossible because defense counsel could not reasonably have been expected to be aware that the favorable evidence even existed.[134] The court was particularly concerned that under *Agurs* the defense could be the victim of bad faith destruction of evidence by the state and still be "punished" for an untimely request by the application of the stricter standard.[135] An inquiry into counsel's reason for the late request would prevent this unfair result. The second purpose of the inquiry is to prevent defense counsel from purposefully delaying requests for evidence in order to create an appealable issue.[136] The court apparently believed that the additional inquiry into the reason for the late request would strike a balance between unfairness to defendants caused by prosecutorial bad faith and the potential for abuse of the mechanism if defendants were encouraged to make unjustifiably late requests for evidence.

*Maloney v. State* indicates a concern, also expressed in the *Agurs* dissent,[137] for the harshness of the reasonable doubt standard. The *Maloney* court stated that it was not deciding whether the reasonable doubt standard should be applied to all untimely request cases because a blanket application would be unduly harsh.[138] Acting on this concern, the court inquired whether the untimeliness of defense counsel's request was excused on the grounds that it was caused by events beyond counsel's control.[139] Because the court determined that there was no reason Maloney should not have known that the state possessed the evidence wanted for independent testing,[140] the court applied the reasonable doubt standard.[141] Presumably, however, had Maloney shown a justifiable excuse, the court would have applied the

133. The Alaska Supreme Court has not explicity ruled on the propriety of the additional inquiry. In Contreras v. State, 718 P.2d 129, 130 n.1 (Alaska 1986), the Alaska Supreme Court approved the result of the appellate court's analysis in State v. Contreras, 674 P.2d 792 (Alaska Ct. App. 1983), which included asking whether defendant's request for evidence was timely.

134. *Maloney,* 667 P.2d at 1265 n.7.

135. *Id.*

136. *Id.* at 1266 n.9.

137. United States v. Agurs, 427 U.S. 97, 115-16 (1976) (Marshall, J., dissenting).

138. *Maloney,* 667 P.2d at 1265 n.7.

139. *Id.* at 1266.

140. "Under Alaska's broad rules of criminal discovery, Maloney had the right to pretrial examination of the state's photographs, of all other physical evidence in the possession of the state, and of all police and expert witness reports concerning such evidence. *See* ALASKA R. CRIM. P. 16(b)(1)(v). . . . He should have been able to determine what evidence had been tested, and he should have been capable of requesting that specific evidence be made available for his own independent testing." *Id.* at 1265. *See supra* note 133.

141. *Id.* at 1265-66.

less strict reasonable likelihood standard of materiality for specific requests.[142]

B. *Kwallek v. State*

In *Kwallek v. State,*[143] the Alaska Court of Appeals applied the test for due process under the Alaska Constitution that it had expounded in *Maloney.* Although *Kwallek* was decided one year after *Trombetta* and twenty-two days after *Bagley,* the court mentioned only *Trombetta* and continued to analyze the federal standard as it had in *Maloney.* The court reaffirmed the requirement for the additional inquiry into the reasonableness of the untimely request. Since the late request was reasonably justified, the court declined to apply the more stringent reasonable doubt standard.[144] By negative implication, then, the court determined that the applicable standard for materiality in these circumstances would be that used in specific requests: whether there was a reasonable likelihood that the verdict would have been affected.[145] If, however, the untimely request was inexcusable, the stricter standard applicable to general/no request situations would apply. That is, the verdict would be overturned only if the evidence would have created a reasonable doubt that did not otherwise exist.[146]

Kwallek had appealed her conviction for first-degree murder on the ground that the state's failure to gather and preserve evidence denied her due process under the federal and state constitutions.[147] The police did not preserve fingerprints on the murder weapon although it was possible to have done so.[148] Defense counsel did not request any fingerprints until after the start of the trial.[149] The court excused the untimely request because it found that the state had inexcusably delayed performing ballistics tests on the weapon, thus preventing the defense from learning any details of fingerprints on the gun.[150] Therefore, implicitly adopting the reasonable likelihood standard of materiality pursuant to *Agurs,* the court found no denial of due process

142. *See supra* note 128 and accompanying text.

143. No. 883, slip op. (Alaska Ct. App. July 24, 1985) (per curiam). This case was decided 22 days after the Supreme Court handed down its decision in *United States v. Bagley,* 473 U.S. 667 (1985). *Kwallek* does not state why *Bagley* is not controlling; indeed, it does not mention the case.

144. *Kwallek,* slip op. at 8 n.7.

145. *Id.* at 6 & n.6.

146. *Id.* at 2 n.1.

147. *Id.* at 8-9.

148. *Id.* at 8 n.7.

149. *Id.*

150. *Id.* at 8-9. The outcome of the case did not turn on the due process question, however. The court ultimately found that Kwallek never demonstrated that the police actually destroyed a usable fingerprint. *Id.* at 10.

because the fingerprints would have been unlikely to result in a different verdict.[151] Kwallek had often handled the weapon and lent it to other persons, so the presence of her prints and those of others would not have been surprising.

As required by *Maloney,*[152] however, the *Kwallek* court applied the stricter reasonable doubt standard of materiality to Kwallek's request for a bloody palm print found at the scene of the crime.[153] Defense counsel did not request the print until after the trial had started and gave no explanation for the delay.[154] The court held the untimely request inexcusable and consequently, under the stricter standard of materiality, found that the palm print would not have created a reasonable doubt.[155]

The reasoning in *Maloney* and *Kwallek* is based partly on the Alaska court's resolution of the ambiguity left by *Agurs* about whether the Supreme Court had stated a standard of materiality for specific requests. The Alaska Court of Appeals read *Agurs* to mean that the reasonable doubt standard of materiality applied to general/no requests and that the less strict reasonable likelihood standard applied to specific requests. Based on this interpretation of the requirements of the United States Constitution, the court created an additional due process test under the Alaska Constititution. The court perceived the reasonable doubt standard as too strict when the defendant's specific request was untimely for reasons beyond his or her control. Thus, when faced with an untimely specific request, the court would apply the less strict reasonable likelihood standard if the defense gave a reasonable explanation for its untimeliness.

Since this additional inquiry is required only by the Alaska Constitution, the court would use it only upon hearing an appeal for denial of state constitutional due process. An appeal based on the United States Constitution would not receive this extra consideration. Since the reasonable likelihood standard of materiality is less strict than the reasonable doubt standard, using the former instead of the latter would mean that prosecutors have a greater obligation to disclose the evidence they possess or control. Therefore, the court of appeals established that the Alaska Constitution imposes a greater duty of disclosure on prosecutors than does the United States Constitution.

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151. *Id.* at 8-9.
152. *See supra* note 143 and accompanying text.
153. *Kwallek,* slip op. at 6 & n.6.
154. *Id.*
155. *Id.* at 6-7 & n.6.

## V. THE IMPACT OF *BAGLEY* ON THE ALASKA MATERIALITY STANDARD FOR SPECIFIC REQUESTS

The United States Supreme Court's decision in *United States v. Bagley* had a threefold impact on *Maloney.* First, *Bagley* showed that *Maloney,* insofar as it purported to interpret the materiality standard for specific requests required by *Agurs,* was wrong.[156] Second, *Maloney* held that the materiality standard for specific requests was not the same as the standard for general/no requests.[157] *Bagley* held that one standard of materiality applies to both specific requests and general/no requests.[158] Third, *Maloney* held that the materiality standard for specific requests was less strict than the reasonable doubt standard applied to general/no requests.[159] The *Bagley* opinion states that *Agurs* had "suggested" that specific requests triggered a less strict standard of materiality than general/no requests.[160] The Court abandoned this suggestion in *Bagley* in favor of a uniform standard.[161] Two members of the Court wanted to treat specific requests more favorably, so they instructed the trial court to inquire into adverse effects that the prosecutor's failure to fulfill the specific request might have on the defense.[162]

In *Maloney* and *Kwallek,* the Alaska Court of Appeals was concerned with the specificity and timeliness of defendants' requests. Since the Alaska court understood that the United States Constitution requires the same higher standard of materiality for general/no requests and untimely specific requests, the court determined it would be unfair to apply this higher standard to a specific request that was untimely for reasons beyond the defendant's control. Now that the United States Supreme Court, in *Bagley,* has decided that the same reasonable probability standard applies to specific requests and general/no requests, it remains to be seen whether Alaska courts will continue to consider the specificity and timeliness of a request when hearing due process claims under the Alaska Constitution. In other words, the question arises as to whether Alaska courts will treat specific, timely requests more favorably than general/no requests under the Alaska Constitution.

The answer to that question depends on how stringent the Alaska courts perceive the *Bagley* standard of materiality to be. If they view the reasonable probability standard of materiality as identical to the

156. *Bagley,* 473 U.S. 667 (1985).
157. *Maloney,* 667 P.2d 1258, 1264-65 (Alaska Ct. App. 1983).
158. 473 U.S. at 682.
159. 667 P.2d at 1265.
160. 473 U.S. at 681. *See supra* note 69 and accompanying text.
161. 473 U.S. at 682-83.
162. *Id.* at 681-84.

reasonable doubt standard (formerly applicable to general/no request situations), this stricter reasonable doubt standard would, in the courts' eyes, govern both specific and general/no request situations. In that event, the Alaska Court of Appeal's concern voiced in *Maloney*[163] still exists: that the reasonable doubt standard is too harsh when the defendant's specific request is untimely through no fault of counsel. Implicit in this concern is that the reasonable doubt standard is also too harsh for timely, specific requests, although the court never stated why this is so. It may be that the court was concerned that, as Justices Blackmun and O'Connor recognized in *Bagley,* nondisclosure upon a specific request is more likely to mislead the defense into believing that the requested evidence does not exist than in cases of general/no requests.[164] One would expect the Alaska courts, on state constitutional grounds, to apply a more lenient standard to timely specific requests and untimely requests that are justifiable.

In order to afford defendants sufficient protection, Alaska courts might choose to retain the analysis set forth in *Maloney* as the standard under the Alaska Constitution. Thus, the more lenient reasonable likelihood standard would apply to specific requests under the Alaska Constitution. If the court of appeals perceives the United States Constitution as requiring a stronger showing than reasonable likelihood to meet the reasonable probability standard, then the Alaska Constitution would provide more protection to defendants who make timely specific requests for evidence or whose untimely requests can be reasonably excused. An alternative to *Maloney* would be to adopt Justice Blackmun's suggestion that courts consider any adverse effects that nondisclosure after a specific request would have on the defense.[165]

In order to evaluate whether Alaska courts will continue to treat specific, timely requests for evidence more favorably than general/no requests, one must also consider the other possible interpretation of *Bagley.* The Alaska courts might not perceive the reasonable probability standard to be similar to the reasonable doubt standard. If Alaska courts perceive the *Bagley* reasonable probability standard to be less strict than the reasonable doubt standard and more akin to the reasonable likelihood standard, then the reasonable probability standard might not be perceived as too harsh for defendants whose specific

163. *See supra* text accompanying notes 20-21.

164. *See supra* note 82 and accompanying text.

165. One commentator has concluded that the additional inquiry in cases of specific requests fails on two grounds. Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of United States v. Bagley,* 1986 DUKE L.J. 892. First, adverse effects are just as likely to occur after a general request as after a specific request. *Id.* at 913. Second, the inquiry does not assist the defense in proving materiality. *Id.*

requests are timely or excusably late. The *Maloney* court was also concerned that a lenient standard for untimely requests would give defendants an incentive to postpone requests so as to create an issue for appeal. If the Alaska courts remain troubled by this possibility they could develop a harsher materiality standard for requests that are inexcusably late, thereby deterring such requests.

It appears that the Alaska Court of Appeals perceives the reasonable probability standard as more like reasonable likelihood than reasonable doubt. The court recently applied the reasonable probability standard in a specific request case. In *St. John v. State,*[166] defendant St. John was injured in a car accident and taken to the hospital where, in the regular course of treatment, a blood sample was taken from him and tested for alcohol.[167] At trial, the prosecutor presented the positive result of the test, and St. John was convicted of manslaughter and second-degree assault.[168]

On appeal, St. John argued that the state's failure to procure and preserve his blood sample taken by the hospital denied him due process under the Alaska and United States Constitutions.[169] Even though the case involved a failure to preserve evidence and the *Trombetta* materiality standard should have been applied, the court applied *Bagley*'s reasonable probability standard[170] and found no denial of federal due process.[171]

For purposes of the state due process claim, the court stated that the reasonable probability standard was *similar* to that of the materiality standard under the Alaska Constitution.[172] The state standard is whether the evidence "would probably have affected the outcome" of the trial.[173] The court described this standard as "essentially one of harmless error."[174] While the reasonable probability standard may be *similar* to the harmless error standard, the United States Supreme Court has never described it as such, and the Court expressly rejected the harmless error standard in favor of a stricter one in *Agurs.*[175] The Supreme Court has described the standard for perjury cases as one of harmless error: "[T]he fact that testimony is perjured is considered

166. 715 P.2d 1205 (Alaska Ct. App. 1986).
167. *Id.* at 1211.
168. *Id.* at 1207, 1211.
169. *Id.* at 1211.
170. *Id.* at 1212. The court actually seemed to collapse the concerns of preservation of evidence with those of disclosure in its application of the *Bagley* reasonable probability standard.
171. The court reversed and remanded for a new trial on other grounds. *St. John,* 715 P.2d at 1213.
172. *Id.* at 1212.
173. *Id.*
174. *Id.* (citing Carman v. State, 604 P.2d 1076, 1080-81 (Alaska 1979)).
175. United States v. Agurs, 427 U.S. 97, 108-09 (1976).

material unless failure to disclose it would be harmless beyond a reasonable doubt."[176] Only two dissenting Justices in *Agurs* and *Bagley* have argued that this standard should be adopted for all disclosure situations.[177] Given the Court's repeated rejection of the harmless error standard, it seems unlikely that it would describe the reasonable probability standard as similar to harmless error.

If *St. John* is the harbinger of future Alaska court decisions, then, under the Alaska Constitution, the least strict reasonable likelihood standard, under the guise of the reasonable probability standard, will apply to specific requests. It is unclear whether this standard will also be applied to general/no requests under the Alaska Constitution. The Alaska courts would be required to abandon their less favorable treatment of general/no requests and adopt the Supreme Court's view that specificity is not a basis for distinguishing between requests. Arguably, the Alaska courts could adopt the reasonable probability standard for all requests and make the additional inquiry described in *Bagley* when the defendant makes a specific request. Doing so would make the materiality standard more favorable to defendants than it was before.

Assuming that the Alaska courts continue to treat general/no requests less favorably than specific requests, there remain the issues of what materiality standard should apply to general/no requests and whether the untimeliness of a specific request should result in its being treated as a general/no request. Although the reasonable probability standard, applied to specific requests, resolves *Maloney*'s concern that the reasonable doubt standard was too harsh for defendants, it does not solve the court's other concern. The court made this distinction based on timeliness to deter defendants from creating an appealable issue by requesting evidence after the start of trial. Therefore, it is quite possible that Alaska courts will impose a harsher standard than reasonable probability on defendants whose requests are unjustifiably late.

## VI. CONCLUSION

The analysis of the development of the prosecutorial duty to disclose under the United States and Alaska Constitutions indicates that the Alaska courts must take three actions. First, they must apply the standard announced in *Trombetta* to claims of failure to gather and preserve evidence under the United States Constitution. As the Supreme Court stated in that case, states are free to adopt more liberal

176. United States v. Bagley, 473 U.S. 667, 680 (1985).

177. *Agurs,* 427 U.S. at 114-22 (Marshall and Brennan, J.J., dissenting); *Bagley,* 473 U.S. at 691-709 (Marshall and Brennan, J.J., dissenting). *See* Casenote, *supra* note 76.

standards under their state constitutions. Second, Alaska courts should review the assertion in *St. John* that the reasonable probability standard is quite similar to the harmless error standard. In light of the Supreme Court's statements about the harmless error standard, the reasonable probability standard is more stringent than *St. John* suggests. Thus, Alaska courts should construe reasonable probability more strictly than in *St. John* when addressing federal constitutional claims.

Finally, the courts must decide whether the reasonable probability standard will apply to general/no requests under the Alaska Constitution. *St. John* applied this standard to a timely, specific request. Under the United States Constitution, this standard should apply to all requests. Alaska courts, however, have yet to decide whether, under the Alaska Constitution, they will apply a uniform standard that disregards the specificity of requests, or a higher standard than reasonable probability for general/no requests. If the courts choose to continue to apply different materiality standards based on the specificity of the request, they must also decide whether untimely, specific requests will be treated as general/no requests absent any justification. The decision should be made only after considering the concerns raised by the Alaska Court of Appeals in *Maloney.* One concern was that the reasonable doubt standard of materiality was too harsh for defendants with specific requests. Since *Bagley* replaced that standard with the reasonable probability standard, which the court of appeals has interpreted favorably to defendants, this is no longer a viable concern. The other concern was that it seemed unfair to apply the harsher materiality standard to specific requests that were untimely for reasons beyond defendant's control. Defense counsel could not be expected to make a timely, specific request when unaware that the discoverable evidence even existed. Distinguishing between timely and untimely specific requests also serves a deterrent function by discouraging defense counsel from intentionally delaying requests for evidence until trial in order to preserve an issue for appeal. Obviously, at least two materiality standards are required to address these concerns of deterrence and fairness.

If the Alaska courts agree that these two concerns are legitimate, then one can expect to see the courts apply a stricter standard to general/no requests and inexcusably late specific requests. In these cases, defendants would not appeal on state constitutional grounds but rather on federal constitutional grounds to avail themselves of the reasonable probability standard while escaping the harsher state standard. This preference for the federal constitution did not exist before *Bagley,* when defendants preferred state constitutional claims because of the advantages afforded by *Maloney.* If the courts, however, do not

perceive these concerns as important enough to warrant a stricter materiality standard, one can expect the courts to apply the reasonable probability standard to all requests. In that case, appellate review of failure to disclose claims would be the same under the United States and Alaska Constitutions, and defendants would have no advantage or disadvantage in framing their claim under the Alaska Constitution. Whichever course the Alaska courts take, it will no longer be advantageous for defendants to make their claim under the Alaska Constitution.