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# The Duty of the Prosecutor to Disclose Unrequested Evidence: United States v. Agurs

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# Case Notes

## The Duty of the Prosecutor to Disclose Unrequested Evidence: *United States v. Agurs*

The constitutional duty of a prosecutor to disclose to an accused evidence which might exculpate him has been a recurring issue before the United States Supreme Court over the past four decades[1] and the subject of a great deal of legal commentary.[2] Once again the Supreme Court has addressed itself to the subject of prosecutorial disclosure in the recent case of *United States v. Agurs*.[3]

The *Agurs* decision is of particular importance to those persons presently engaged in the operation of our criminal adversary system for it establishes a new constitutional rule of law, while simultaneously attempting to clarify prior decisions which have been the basis of much of the previously mentioned legal commentary. The decision in *Agurs* once again brings to

1. *E.g.*, Moore v. Illinois, 408 U.S. 786 (1972); Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967); Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103, *rehearing denied*, 294 U.S. 732 (1935).

2. *E.g.*, Note, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure*, 59 IOWA L. REV. 433 (1973); Comment, *Suppression: The Prosecution's Failure to Disclose Evidence Favorable to the Defense*, 7 U. SAN FRAN. L. REV. 348 (1973); Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972); Comment, *Disclosure and Discovery in Criminal Cases: Where Are We Headed?*, 6 DUQUESNE U.L. REV. 41 (1967-1968); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense*, 74 YALE L.J. 136 (1964); Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960).

3. 96 S. Ct. 2392 (1976).

the forefront the broader issue of the overall role of the prosecutor in our criminal justice system.[4]

To place the principle enunciated in the *Agurs* decision into perspective, it will first be necessary, through prior case law, to trace the development of the duty to disclose.[5] The *Agurs* case itself will then be discussed with particular emphasis on the new rule espoused by the majority opinion and the dissenting opinion's objections to it. Finally, implications of the decision will be examined, as will the broader issue of the role of a prosecutor in today's criminal justice system.

## Development of the Constitutional Duty to Disclose

Early cases dealing with the disclosure of evidence by the prosecution dealt with situations involving the prosecution's intentional use of known perjured testimony to obtain a conviction.[6] Such prosecutorial misconduct was held to be inconsistent with the concept of a fair trial and to constitute a denial of due process.[7]

Later cases adopted the position that where the perjured testimony of a witness was known to be false by the prosecution, although not suborned by him, and though the perjured testimony did not bear directly on the accused's guilt or innocence, the prosecutor's failure to disclose such facts would constitute a denial of due process.[8] The Court's focus in these early cases was not the harm suffered by the accused, but rather it was the misconduct of the prosecutor which warranted a reversal of the conviction.[9]

In the landmark case of *Brady v. Maryland*,[10] the Court considered the question of whether the suppression of favorable evidence by the prosecution alone would be a violation of due process. Unlike the earlier cases, there was no claim of the use of perjured testimony. The defense had requested to examine pretrial statements of the defendant's companion in the crime. One of these statements contained an admission that the com-

4. *See, e.g.*, Berger v. United States, 295 U.S. 78 (1934); JACKSON, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940); CAREY, *The Role of a Prosecutor in a Free Society*, 12 CRIM. L. BULL. 317 (1976).

5. For an indepth analysis of case law prior to the *Agurs* decision see authorities n.2.

6. Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942).

7. 294 U.S. at 112; 317 U.S. at 216.

8. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959).

9. 74 YALE L.J. 136, 138-39 (1964), *supra* n.2.

10. 373 U.S. 83 (1963).

panion had done the actual killing. The prosecutor disclosed to the defense all statements by the companion, except the crucial admission of the killing itself. The failure to disclose this statement was the result of a good faith mistake by the prosecutor who believed the evidence was inadmissible at trial and thus that disclosure was not required. In holding the defendant had been denied due process of law, the Court espoused a new constitutional standard:

> 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.[11]

The rule enunciated in *Brady* left open a number of questions.[12] Of particular importance was whether a request by the defense was a condition precedent to the constitutional duty to disclose, and whether the constitutional duty to disclose material evidence extended to all evidence admissible and useful to the defense?[13] Included in the latter question was the corrollary question of what degree of prejudice must be shown to make a new trial necessary.

Three pertinent cases followed the *Brady* decision.[14] Each examined the prosecutorial disclosure issue, but each, in its majority opinion, failed to define what constituted "materiality" under the *Brady* standard.[15] Thus, when the Supreme Court

11. *Id.* at 87.
12. 40 U. CHI. L. REV. 113 (1972), *supra* n.2.
13. *Id.*
14. Giles v. Maryland, 386 U.S. 66 (1967) which involved allegations by the defendant in a rape case that the state unconstitutionally suppressed evidence favorable to the defense. The alleged suppressed evidence related primarily to the credibility of the prosecution; Giglio v. United States, 405 U.S. 150 (1972) which involved allegations by the defendant that the state's failure to disclose to the defense that the prosecution's key witness linking the defendant to the crime had been promised immunity from government prosecution constituted a deprivation of due process; Moore v. Illinois, 408 U.S. 786 (1972) which involved allegations by the defendant in a murder case that post conviction relief was required due to the state's unconstitutional suppression of evidence favorable to the defense. The alleged suppressed evidence consisted of a prior misidentification of the defendant by a state's witness and a withheld police diagram of the murder scene.
15. Although the Court established the general principle of disclosure in *Brady*, the majority of Justices have consistently avoided defining the materiality standard. In *Giles* new evidence was introduced negating the need to define materiality. In *Giglio* the Court simply reaffirmed the broad terminology previously stated in *Brady*, *Napue*, and other Supreme Court decisions. Similarly in

addressed the issued in *Agurs*, those unanswered questions raised by *Brady v. Maryland* were again confronted. This time, however, the Court attempted to answer them.

*United States v. Agurs*

The defendant, Linda Agurs, was convicted of second degree murder for the killing of James Sewell and was sentenced to a term of five to twenty-five years' imprisonment.

Sewell and Agurs had registered at a motel as man and wife and had been assigned a room without a bath. Approximately fifteen minutes later the desk clerk and two other employees heard a woman's scream from the room occupied by Sewell and Agurs. Upon forcing their way into the room, they discovered the two on the bed struggling with a knife. The employees separated them and summoned an ambulance for Sewell who was suffering from knife wounds. Agurs left the building at that time, but surrendered voluntary to the police the next day. Sewell died from stab wounds in his chest and abdomen. Additional wounds on his arms and hands suggested an attempt by him to repel an attack.

The prosecution's theory at trial was that the defendant was a prostitute who had picked Sewell up and had taken him to the motel to ply her trade; that after rendering her services, and while Sewell was in the bathroom down the hall, she rummaged through his clothing and removed the money she found there; and, that Sewell, returning, caught her in the act and attempted to retrieve his money whereupon she stabbed him with a knife, which lay amongst his clothes.

The defense argued that the wounds were inflicted in self-defense; that this defense was supported by the fact that she had screamed for help; that upon entering the room the clerk and employees saw the victim on top of the defendant; and that the victim had been in possession of two knives the day of the incident—a bowie knife and a pocket knife—indicating he was a violence-prone person.

Defense counsel had become aware of the possibility that Sewell had been arrested or convicted of violent crimes in the past. However, under the mistaken belief that the victim's prior convictions[16] would be inadmissible to prove self defense if it

*Moore*, the Court adhered to the principles of *Brady* and *Napue*, but found that the evidence was not material enough to warrant a new trial. It did not attempt to define materiality. . . . 59 IOWA L. REV. 433, 436-441 (1973), *supra* n.2; *accord*, 40 U. CHI. L. REV. 113, 125-129 (1972), *supra* n.2.

16. United States v. Agurs, 510 F.2d 1249, 1251 (D.C. Cir. 1975). Sewell had

could not be shown that the defendant had been aware of them, her counsel failed to initiate a search for any such prior record. No formal request for discovery was made, and the prosecution did not advise the defense of the victim's criminal record. Three months after her conviction, the defendant's counsel, discovering that such evidence was admissible even if not known to the defendant at the time of the act,[17] immediately filed a motion for new trial on the ground of newly discovered evidence.

The government opposed the motion arguing that the prosecution was under no duty to disclose the victim's prior record since the defense had made no request as required by *Brady v. Maryland*; that the evidence was not newly discovered since it was readily discoverable in advance of trial; and, that the victim's prior record was immaterial in the present case.

The district court denied the defense motion holding that although there was a duty to disclose material evidence despite the absence of a defense request, the victim's prior record was not "material" in this case.[18] Thus the court concluded that the defendant's right to a fair trial, as guaranteed by the due process clause of the fifth amendment, had not been violated.

After dismissing the claim by the defense that her defense counsel's failure to bring the victim's record of conviction before the jury had deprived her of her sixth amendment right to effective assistance of counsel,[19] the court of appeals reversed the district court, finding that the evidence was material and that its nondisclosure required a new trial because the jury might have returned a different verdict if the evidence had been received.[20] Citing two earlier decisions[21] the court enunciated one of the tests of materiality which had been developing in the lower courts since *Brady v. Maryland*:

> . . . whether the undisclosed evidence, if brought to the attention of

been convicted in 1963 for assault and carrying a dangerous weapon and in 1971 for carrying a dangerous weapon. The weapon in each instance had been a knife.

17. *Id.* at 1251. *See*, United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972).

18. Testimony at trial had revealed the victim's character, and the jury knew he had been carrying two knives on the day of the murder.

19. *Id.* at 1251-1253.

20. *Id.* at 1254.

21. Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966); Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967).

the jury, *might* have led the jury to entertain a reasonable doubt about the appellant's guilt.[22]

## THE SUPREME COURT'S RESPONSE

After reviewing the facts of the case and its treatment in the lower courts,[23] Mr. Justice Stevens, writing for the majority of the Court, addressed the issues of the case with an analysis of the *Brady* rule:

> The rule of *Brady v. Maryland*, arguably, applies in *three quite different situations*. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.[24] (emphasis added)

In the first situation, where the prosecution has knowingly used perjured testimony, a reversal of the conviction is warranted, ". . . if there is any *reasonable likelihood* that the false testimony could have affected the judgment of the *jury*."[25] The majority would apply this strict standard of materiality to the rule of *Brady v. Maryland*[26] in cases involving the known use of perjured testimony.[27]

In the second situation, where the prosecution has failed to act on a defense request for specific information, a reversal is warranted if the subject matter of the request is "material." The Court never directly defined what was a "material request" in this second situation, but it did state:

> . . . implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial . . . when the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.[28]

In contrast to the second situation, where there has been a request for specific information, the third situation discussed by the Court involves only a general request for all "discoverable material or evidence" or no defense request at all. In the former situation the prosecution is on notice of the specific

22. United States v. Agurs, 510 F.2d at 1253 (1975) (emphasis added). *See, e.g.*, Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966) (if the evidence withheld would have a substantial possibility of affecting the decision, it is deemed material to warrant a new trial); Weaver v. United States, 418 F.2d 475 (8th Cir. 1969) (If there is any doubt that the suppressed evidence might have made a difference); Moore v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966) (Evidence which may be merely helpful to the defense).

23. 96 S. Ct. 2392, 2395-2397 (1976).

24. *Id.* at 2397.

25. *Id.* (emphasis added).

26. The Court stated the rationale for the strict standard of materiality was " . . . not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." 96 S. Ct. at 2397.

27. *E.g.*, Mooney v. Holohan, 294 U.S. 103 (1935).

28. 96 S. Ct. at 2398-2399 (1976).

evidence sought by the defense. However, in the latter situation, the evidence itself must furnish the notice to the prosecution which gives rise to a duty to disclose it to the defense. Therefore, in the absence of a request, a stronger showing of materiality is required to warrant a new trial.[29] In this regard, the *Agurs* Court noted:

> The duty to respond to a general request or no request at all is dependant on the evidence itself . . . if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.[30]

Thus, the Court had negatively answered one of the major questions unresolved by *Brady*—the duty to disclose is *not* conditioned on the presence of a defense request, but rather on the evidence itself.

However, the Court rejected the standard of materiality applied by the court of appeals to give rise to that duty. The court of appeals had required disclosure of any information that "might" affect the jury's verdict; however, the United States Supreme Court stated:

> 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 consitutional sense . . .[31]

Instead the majority held that the proper test of materiality to invoke the constitutional duty of the prosecution to volunteer exculpatory evidence to the defense is "*whether the omitted evidence created a reasonable doubt that did not otherwise exist.*"[32] (emphasis added)

The Court placed the burden of determining materiality on both the prosecution and the trial judge. The prosecution must decide, both prior to and during the trial, what information in his possession, which is unknown to the defense, must be volunteered by asking the question, "If I fail to disclose this information to the defense, will I prevent the jury, in the opinion of the

29. "The test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made." 96 S. Ct. at 2398, *citing*, 40 U. CHI. L. REV. at 115-117 (1972), *supra*, n.2.

30. *Id.* at 2399.

31. *Id.* at 2400. The Court noted that such a standard of materiality would require the prosecutor to open his files to the defense as a matter of routine practice which the Constitution does not demand.

32. *Id.* at 2401.

trial judge, from entertaining a reasonable doubt as to the guilt of the defendant which would not otherwise have existed?" If answered affirmatively, the prosecutor must volunteer such information. However, where the prosecution either intentionally, negligently, or innocently fails to produce such evidence to the defense, and its existence and content is discovered following conviction of the defendant, it is the duty of the trial judge to evaluate the omitted evidence in the context of the entire record to answer the question," Am I still convinced beyond a reasonable doubt of the defendant's guilt?"[33]

Mr. Justice Stevens applied this test of materiality to the facts in the *Agurs* case, noting that the trial judge had evaluated the victim's prior convictions in light of the entire trial record and still remained convinced of the defendant's guilt beyond a reasonable doubt.[34] Therefore, the Court reversed the court of appeals decision and reinstated the conviction concluding that since the victim's prior record was not "material" in the context of the entire trial, its nondisclosure did not deprive the defendant of a fair trial.[35]

The dissenting opinion by Mr. Justice Marshall, with whom Mr. Justice Brennan joined, took issue with the majority opinion on two grounds. First, Justice Marshall argued that the burden imposed on the defendant to show constitutional error was too severe; second, he maintained that the majority rule usurped the function of the jury as the trier of fact in a criminal case.[36] According to the dissenters the burden on the defendant to show that the omitted evidence created a reasonable doubt which did not otherwise exist is as severe, if not more severe, than the burden on the defendant to show that evidence newly discovered from a neutral source after trial probably would have resulted in acquittal—this latter test having been recognized by the majority as being too severe a burden in situations where the evidence was already in the State's possession.[37]

The dissent would ease the burden on the defendant to a showing:

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33. *Id.* at 2404.

34. The Court noted the criminal record of the victim would be largely cumulative in light of the testimony already indicating that the victim had been carrying two knives when he checked into the motel. *Id.* at 2404. For a discussion of the effects of cumulative evidence on the trier of fact *see*, 40 U. CHI. L. REV. 112, 129-130 (1972), *supra* n.2.

35. 96 S. Ct. at 2404 (1976).

36. *Id.* at 2405-2406.

37. *Id.*

> . . . that there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of jurors to avoid a conviction.[38]

and took issue with the majority's rule that:

> . . . so long as the evidence does not create a reasonable doubt in the mind of the judge, regardless of whether the evidence is such that reasonable men could disagree as to its import . . .[39]

no constitutional error was committed. He argued that the rule developed in the federal courts, unlike that of the majority opinion, recognized that the determination of materiality of the evidence must be in terms of the impact of such evidence on the jury, not on the mind of the judge.[40] Applying the lesser burden of the dissent, Justice Marshall would have affirmed the court of appeals judgment that there was a significant chance that the evidence withheld would have induced a reasonable doubt in the minds of enough jurors to avoid the conviction.[41]

## CONCLUSION

The *Agurs* decision represents the Court's attempt to define what it meant in its earlier decision of *Brady v. Maryland* by the use of the term "material evidence." While attempting to explain the *Brady* rule, the Court has expanded it to encompass a duty to disclose material exculpatory evidence despite the lack of the defense request. The removal of the requirement of a defense request as a prerequisite to the constitutional duty to disclose would appear to be an expansion of the prosecutor's role. However, analysis of the Court's method in defining "materiality" reveals a hindsight approach which provides no practical guide for prosecutors in assessing the character of evidence in their files. While this approach can be applied by the trial judge "after the damage" has or may have occurred, the Court's rule does not provide a practical method for "damage prevention" prior to and during trial. The standard, as it stands now, involves pure speculation on the part of the prosecutor as to whether non-disclosure will lead to reversal.

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38. *Id.* at 2406. This was basically the test imposed by the court of appeals. 510 F.2d at 1253 (D.C. Cir. 1975).

39. *Id.* at 2406.

40. For those federal court decisions establishing this rule *see* 96 S. Ct. at 2407 & n.5.

41. *Id.* at 2407.

The Court has made clear that there is no duty on the prosecutor to provide the defense with unlimited discovery of the everything known by the prosecutor, thus rejecting the argument of some commentators for disclosure of all "relevant" information.[42] The Court fails to recognize, however, that application of the rule enunciated in *Agurs* will have the practical effect of requiring prosecutors to do what the Court states they are not required to do, i.e., disclose all relevant information, for the Court noted, ". . . the significance of an item of evidence can seldom be predicted until the entire record is complete."[43]

The duty to disclose evidence material to the defense is a departure from the traditional adversary role of the prosecutor. The central figure in the charging process is the prosecutor, and for a variety of reasons prosecutors do not charge people they believe to be innocent.[44] Once charged, however, the prosecutor has made a decision which represents a commitment of his resources to convict the accused. To require a prosecutor to re-orient his perspective in evaluating the evidence in his possession as to its potential favorable impact on the defense's case is an impractical, if not impossible, requirement.[45]

The *Agurs* decision is important in that it once again brings into focus the broader, recurring issue of the key role of the prosecutor in today's criminal justice system.[46] If the role of the prosecutor in criminal prosecutions remains " . . . not that it shall win a case, but that justice shall be done"[47] and " . . . to seek justice not merely convict"[48], it is difficult to perceive how full disclosure of evidence which "might affect the outcome of the case" to the defense would impair such a role.

The Court's rationale for applying a strict standard of materiality in cases where convictions were obtained through the known use of perjured testimony was not based upon prosecutorial misconduct, but upon the reasoning that such convictions involve a "corruption of the truth-seeking process."[49] It

42. *Id.* at 2399. *See*, 40 U. CHI. L. REV. at 132, *supra* n.2.
43. *Id.* at 2399.
44. *See, e.g.*, F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 347 (1969).
45. For a discussion of the arguments for and against an open file policy to alleviate the prosecutor's duty of determining materiality *see*, 40 U. CHI. L. REV. at 136-137 (1972), *supra* n.2.
46. CAREY, *Role of a Prosecutor in a Free Society*, 12 CRIM. L. BULL. 317 (1976).
47. Berger v. United States, 295 U.S. 78, 88 (1934).
48. ABA, CODE OF PROFESSIONAL RESPONSIBILITY CANON 5, EC 7-13.
49. 96 S. Ct. at 2397 (1976).

seems equally obvious that suppression of evidence, whether intentional, negligent, or innocent, corrupts the truth-seeking process. Thus, the standard in evidence suppression cases should be the same as in the perjury cases; "the conviction must be set aside if there is any reasonable likelihood that the false testimony (or suppressed evidence) could or did affect the judgment of the jury."[50] Despite the Court's rejection of this line of reasoning as a "sporting theory of justice, not required by the Constitution",[51] for the prosecution to adhere to its duty to "seek justice and not merely convict" while simultaneously applying the rule in *Agurs*, the net practical effect will be full disclosure of all relevant material.[52]

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50. *Id.*
51. *Id.* at 2400.
52. Ignoring the traditional duty of the prosecutor to "seek justice and not merely convict", Justice Marshall points out that the majority role (by itself) reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment. *Id.* at 2397.