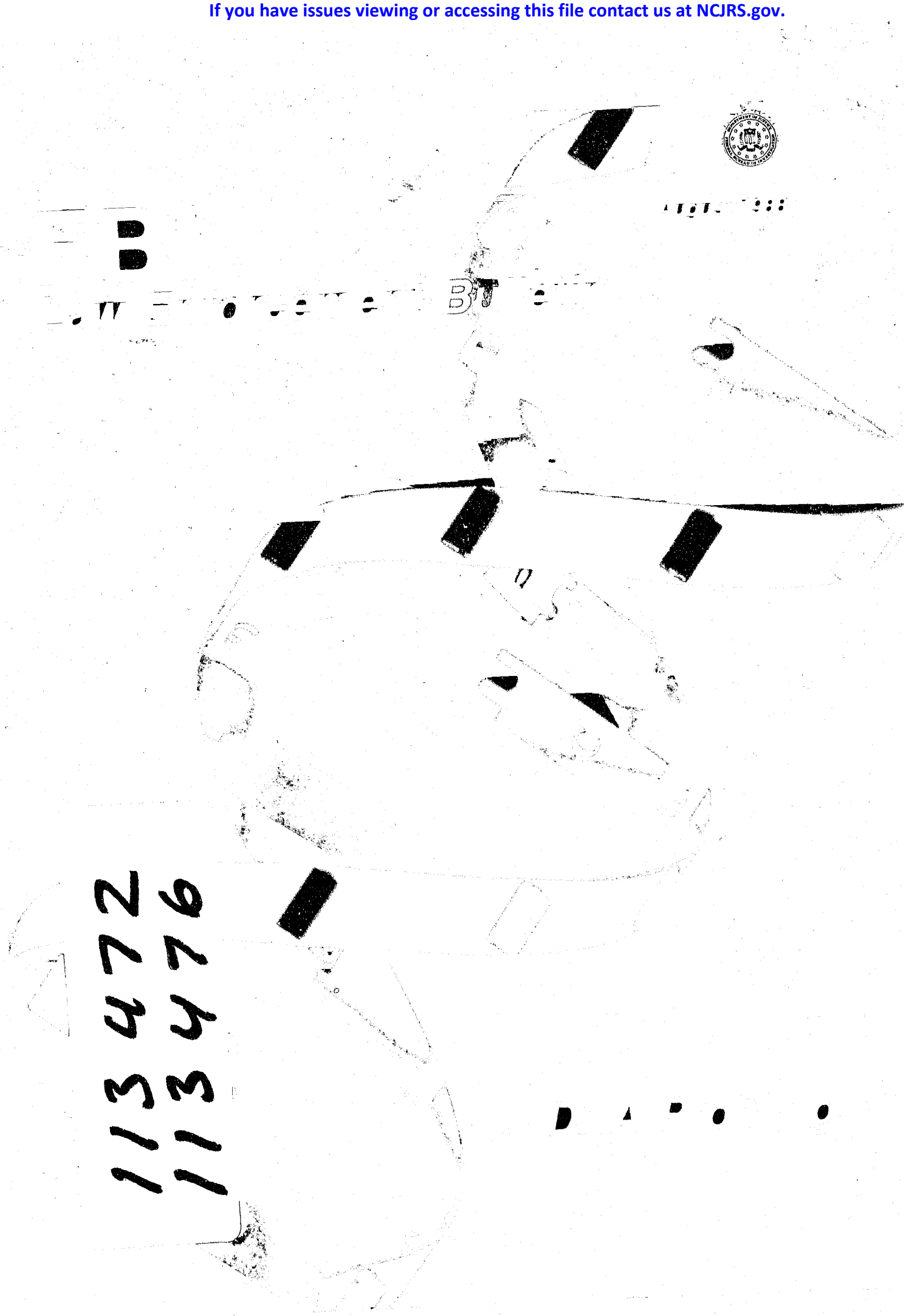

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The Constitutional Right to Discovery

A Question of Fairness

". . . society wins '. . . not only when the guilty are convicted but when criminal trials are fair; our system of . . . justice suffers when any accused is treated unfairly.' "

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

In the legal context, "discovery" is the means by which one party to a legal action seeks to learn as much as possible about the opposing party's case in order to devise an appropriate trial strategy. The Supreme Court once explained the purpose and effect of the discovery process as follows:

> "[Discovery rules] are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial."[1]

By reducing the possibility of surprise, discovery "enhances the fairness of the adversary system."[2]

Notwithstanding the enhanced fairness presumably produced by the discovery process, the Federal Constitution is silent on the issue. Consequently, the development of discovery rules in criminal cases has been relatively recent — and primarily legislative — in origin, with the Congress and the State legislatures fashioning rules to govern discovery within their respective jurisdictions.

Then, in the 1963 decision of *Brady* v. *Maryland*,[3] the Supreme Court held that in a criminal case, the accused has a *constitutional* right to discover exculpatory evidence, i.e., favorable evidence possessed by the prosecution that is material to the outcome of the proceeding.

The *Brady* decision clearly recognized a *constitutional right of discovery* for the defense in criminal cases and a corresponding constitutional duty of the

Special Agent Hall

government to disclose. This article will examine the case law that led to that decision and then analyze that decision and the subsequent developments which more clearly define the defendant's right and the government's duty.

THE HISTORICAL UNDERPINNINGS OF *BRADY* — 1935-1963

The doctrinal seeds from which the *Brady* rule sprouted were sown long before that decision, in the Supreme Court's interpretation of the Due Process Clause. The Constitution guarantees that no person can be deprived of life, liberty, or property without due process. Although the Due Process Clause is specifically set forth in both the 5th and 14th amendments — and is therefore applicable to both Federal and State governments — it is not defined in either. In the absence of a specific definition, the Supreme Court has characterized due process, in general terms, as "fundamental fairness."[4] It is this ingeniously flexible definition of due process which made the *Brady* decision possible, if not inevitable. That decision was the culmination of a theme which had begun to appear in U.S. Supreme Court decisions almost 30 years earlier, and the salient developments of which may be briefly summarized in the following cases.

1935 — *Mooney* v. *Holohan*[5]— Perjured Testimony Solicited

The defendant, Mooney, who was serving a life term in prison for first-degree murder, asserted that the sole basis for his conviction was perjured testimony knowingly used by the prosecuting authorities. Furthermore, he alleged that the prosecutor deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him.

The Supreme Court held that the prosecutor violated due process by contriving to deprive a defendant of liberty "through a deliberate deception of court and jury by the presentation of testimony known to be perjured."[6] The constitutional violation was not simply the knowing use of perjured testimony at the trial; it included the withholding of that critical information from the defendant. The *Mooney* decision marks the first time that the Supreme Court recognized the existence of a *constitutional* obligation of the government to disclose information to an accused.

1942 — *Pyle* v. *Kansas*[7]—Perjured Testimony/Intimidation of Witness

Pyle, the defendant in a murder trial, appealed his conviction, alleging that the prosecutor knowingly solicited perjured testimony from two witnesses on threat of prosecution and suppressed by intimidation the testimony of other witnesses whose evidence would have been favorable to his case.

The Supreme Court remanded the case for a determination of the facts, but suggested that if the defendant's allegations were proven, they would "sufficiently charge a deprivation of rights guaranteed by the Federal Constitution . . . ."[8]

In both *Mooney* and *Pyle*, the alleged constitutional violations were two-fold: First, that the prosecutors knowingly and deliberately used perjured testimony, and second, that the suppression of information deprived the defendants of the opportunity to effec-

"The Brady decision clearly recognized a constitutional right of discovery for the defense in criminal cases and a corresponding constitutional duty of the government to disclose."

tively impeach the government witnesses or to introduce favorable evidence in their behalf.

1957 — *Alcorta* v. *Texas*[9]—Perjured Testimony - Unsolicited and Uncorrected

Alcorta was convicted of first-degree murder and sentenced to death in the slaying of his wife. His defense claim of "sudden passion" — which, if successful, would have reduced both the offense and the penalty — was rejected by the jury, following the testimony of the key prosecution witness who denied having an affair with the defendant's wife. The prosecutor allowed the testimony to stand, even though the witness had previously told the prosecutor that he had in fact engaged in sexual intercourse with the defendant's wife on several occasions. Unlike the *Mooney* and *Pyle* cases, the prosecutor had not solicited the false testimony; he simply allowed it to stand uncorrected.

The Court held that the prosecutor's failure to correct the false testimony constituted a violation of due process. The Court reasoned that disclosure of the facts concerning the true relationship between the witness and the defendant's wife could have affected the jury's evaluation of the defendant's "sudden passion" claim. Accordingly, it could have resulted in conviction for a lesser offense than first-degree murder and imposition of a less severe punishment than death.

1957 — *Roviaro* v. *United States*[10]—Informant Identity

The *Roviaro* case, decided the same year as *Alcorta*, raised an issue that was quite different in character, but one that is still relevant to the development of the concept of due process discovery.

In *Roviaro*, the defendant was seeking disclosure of the identity of a confidential government informant who was a major participant in a drug transaction involving the accused and was — the defense contended — a material witness to the issue whether the accused knowingly transported the drugs as charged.

The Supreme Court recognized the government's privilege to withhold from disclosure the identity of confidential informants, but held that "the fundamental requirements of fairness" demand that the privilege give way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . ."[11] The Court declined to establish a fixed rule governing the right of an accused to discover an informant's identity, choosing instead to adopt a balancing test which would weigh "the public interest in protecting the flow of information against the individual's right to prepare his defense."[12]

The *Roviaro* decision represents a significant extension of an accused's due process right to discovery; for, unlike the earlier cases, there is no suggestion of prosecutorial wrongdoing in soliciting or permitting perjured testimony or in suppressing substantive information that might be favorable to the defense. The information sought is the identity of the government's informant, and the request for disclosure is based on the argument that the substance of the informant's testimony is crucial to the defense.

1959 — *Napue* v. *Illinois*[13]—Impeachment Evidence

At the defendant's murder trial, the principal prosecution witness, then serving a prison term for the same murder, testified in response to the prosecutor's direct question that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised consideration, but did not correct the witness' testimony. Unlike the *Alcorta* case, where the uncorrected testimony of the witness related directly to the question of the defendant's guilt, here the relationship was indirect, focusing instead on the *motivation* underlying the witness' testimony.

The Supreme Court invalidated the defendant's conviction, holding that just as the use of false testimony which goes to the issue of defendant's guilt violates due process, the use of false testimony which goes to the *credibility* of the witness may also. The Court noted that the jury's evaluation of a witness' truthfulness and reliability may well affect the determination of innocence or guilt, and ". . .it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend . . .[T]he false testimony used by the State in securing the conviction . . . may have had an affect on the outcome of the trial."[14]

These cases illustrate that a limited constitutional basis for discovery in criminal cases had been recognized even before the 1963 decision of *Brady* v. *Maryland*. Thus, the significance of *Brady* lies not in the originality of its concept but in the breadth of its application. Whereas the cases which preceded it dealt with specific and

" '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. . . . ' "

relatively narrow categories of evidence — e.g., perjured testimony, witness impeachment evidence, or informant identity — *Brady* extended the defendant's constitutional right of discovery to include much more.

THE LANDMARK DECISION— *BRADY* v. *MARYLAND*[15]

Brady was tried for first-degree murder in the State of Maryland, found guilty, and sentenced to death. At his trial, he took the witness stand and admitted his participation in the crime, but claimed that a companion, Boblit, did the actual killing. Prior to his trial, Brady had requested the opportunity to examine any statements made by Boblit that were in the possession of the prosecutor. Although several statements were disclosed, the one in which Boblit admitted strangling the victim was not. In fact, Brady did not learn of the latter statement until he had already been tried, convicted, and sentenced. On appeal, the State appellate court ordered a new trial on the grounds that the prosecutor's failure to disclose the requested information denied Brady due process of law as guaranteed by the 14th amendment to the U.S. Constitution. Concluding, however, that nothing in the withheld statement would have reduced Brady's offense below first-degree murder, the court limited the scope of the new trial to the issue of punishment. That decision was appealed to the U.S. Supreme Court.

The Supreme Court was asked to decide the narrow question of whether Brady was denied due process by the State appellate court's restriction of the new trial to the question of punishment. The Supreme Court affirmed the decision, but took the opportunity to elaborate on the Federal constitutional right of a defendant in a criminal prosecution to discover evidence possessed by the prosecution. 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. . . ."[16]

Although *Brady* v. *Maryland* was not the first case in which the Supreme Court found a constitutional basis for discovery in a criminal case, the decision is nevertheless a landmark in the Court's interpretation of due process. "Brady material" has entered the vocabulary of lawyers and law enforcement officers alike as a generic description of exculpatory evidence, i.e., evidence that is favorable to the defense, and the "Brady rule" is universally recognized in legal circles as signifying the government's obligation to disclose such evidence to the defense.

APPLICATION AND SCOPE OF THE *BRADY* RULE

Any assessment of the application and scope of the *Brady* rule should begin with the recognition that the Constitution does not provide the defendant with access to "everything known to the prosecutor"[17] or to "all police investigatory work on a case."[18] In other words, as the Supreme Court has succinctly stated:

> "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[19]

On the other hand, there is a constitutional right to discover exculpatory evidence, i.e., *favorable evidence* that is *material* to the issues of guilt or punishment. The scope of the rule is to be found in the meaning of those terms.

Favorable Evidence

The government's constitutional duty to disclose information to the defense does not encompass evidence that is neutral or incriminating. However, evidence that tends to support the defense position is a different matter and may well be subject to disclosure.

Illustrations of favorable evidence may be seen in several of the Supreme Court cases previously discussed. For example, evidence that a principal prosecution witness committed perjury when testifying on the issue of the defendant's guilt is clearly favorable to the defense.[20] Similarly, evidence which sheds light on a witness' motivation to testify, such as a prosecutor's promise to a codefendant for special consideration in return for his testimony, may assist the defense in challenging the credibility of that witness.[21] Likewise, the existence and identities of witnesses whose testimony casts doubt on the defendant's guilt are favorable evidence,[22] as is the confession of another person to the commission of a crime with which the defendant is charged.[23]

In addition to these examples, there might be numerous pieces of information in the files of the prosecution and the police that would be potentially favorable to the defense, and prudence would suggest that they should be disclosed. However, a failure to disclose such evidence rises to the level of a constitutional violation only when "the omission deprived the defendant of a

fair trial. . . ."[24] Describing its holding in the *Brady* case, the Supreme Court recently stated:

> "The holding in *Brady* v. *Maryland* requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.' "[25]

Thus, the full impact of the *Brady* rule — invalidation of the trial — is felt only when the favorable evidence suppressed by the prosecution is also *material*.

Materiality

The pre-*Brady* discovery cases provided scant instruction as to the standard used by the Court in weighing the significance of the undisclosed evidence. For example, in *Napue* v. *Illinois*,[26] the Court ordered a new trial because the nondisclosed evidence of promises made by the prosecution to a key witness "might well have" led the jury to conclude that the witness fabricated his testimony to curry favor with the prosecutor, and thus, "may have had an effect on the outcome of the trial."[27]

The Standard Established — *Brady* and *Agurs*

In the *Brady* decision, the Court described the standard as one of *materiality*, although the Court did not define the standard. Applying the standard to the facts of that case, the Court held that the undisclosed confession of Brady's codefendant was material, but only to the issue of punishment. In reaching that decision, the Court adopted the State appellate court's assessment of the significance of Boblit's confession. The Maryland court stated:

> "There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim . . . Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck . . . [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady."[28]

Because the Court concluded that knowledge of Boblit's confession "might have affected" the jury's determination of the proper punishment to be meted out to Brady, the confession was deemed to be material, and a new trial ordered on that issue.

The broad language of the *Brady* decision could be read to suggest that all favorable evidence is also material, if there is a *possibility* that it could influence the jury or affect the outcome of the trial. However, the Court has specifically rejected a "sporting theory of justice,"[29] explaining:

> "If everything that *might* influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice."

The Court concludes:

> "Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much."[30]

In *United States* v. *Agurs*,[31] the Court distinguished three situations that might arise and which could affect the standard of materiality:

1) The prosecution knowingly uses perjured testimony or fails to disclose that such testimony was used to convict the defendant. *Standard of Materialty*: Is there "any reasonable likelihood that the false testimony could have affected the jury's judgment?"[32]

2) The prosecution fails to volunteer favorable evidence in response to a general defense request, or no request at all. *Standard of Materiality*: Did the nondisclosure create "a reasonable doubt that did not otherwise exist?"[33]

3) The prosecution fails to respond to a specific defense request. *Standard of Materiality*: Is there any reason to believe that the nondisclosure "might have affected the outcome of the trial?"[34]

Considering the facts in *Agurs* to fall within the second situation, the Court held that the nondisclosure of evidence of a homicide victim's prior criminal record was not material, even though the defendant asserted that such information supported her claim of self-defense. The Court explained its decision as follows:

> "The proper standard of materiality must reflect our overriding concern

" '. . . the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.' "

with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that *if the omitted evidence creates a reasonable doubt that did not otherwise exist*, constitutional error has been committed . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." [35] (emphasis added)

Although the *Agurs* decision provided some guidance as to the manner in which the materiality standard should be applied, the suggested formula is relatively complex and can be affected by such things as the nature of the evidence or the specificity of the defense request.

The Standard Defined—*Bagley*

A major step toward clarity was taken in the 1985 decision of *United States* v. *Bagley*.[36] Bagley asserted that the government failed to disclose the existence of a promise to pay two key prosecution witnesses for their testimony and thus denied him access to effective impeachment evidence.

The Court remanded the case to the Federal appellate court to determine if the nondisclosed evidence was *material*. But, more importantly, the court offered a simplified formulation of the standard.

Noting that the *Brady* rule requires disclosure of evidence that is both *favorable* to the defense and *material* to either guilt or punishment, the Court observed that the rule is based on the requirement of due process and is designed to "ensure that a miscarriage of justice does not occur." [37] Thus, the question is not whether the government failed to turn over all favorable evidence to the accused, but rather, did that failure "deprive the defendant of a fair trial." The Court concluded:

> ". . . a constitutional error occurs and the conviction must be reversed, only if the evidence is material in the sense that its *suppression undermines confidence in the outcome* of the trial." [38] (emphasis added)

In one portion of the opinion, Justice Blackmun suggested a single standard of materiality to cover all three of the eventualities envisioned by the Court in *Agurs*:

> "The evidence is material only if there is *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (emphasis added)

Furthermore:

> "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." [39]

This formulation was accepted by a majority of the Court and has been followed by most lower courts.

For example, in *United States* v. *Burroughs*,[40] the defense alleged that the government's failure to disclose a deal made with a key witness' wife, as well as threats to take away their children, violated *Brady* and required a new trial. The Federal appellate court rejected the defense argument and held that even though that information was "favorable" to the defense, the witness' testimony was corroborated by the testimony of numerous others, and there was no "reasonable probability . . . that this additional information . . . would have resulted in a different outcome." [41]

Similarly, in *United States* v. *Page*,[42] the government failed to disclose certain ledgers containing information favorable to the defense. The Federal appellate court rejected the defense argument that the nondisclosure violated the *Brady* rule. The court reasoned that the evidence was cumulative, the defense could have readily acquired it from the accountant who prepared the ledgers, and the evidence of guilt was very strong. In sum, there was not a "reasonable probability" that disclosure would have changed the outcome of the case.

Having considered the scope of evidence encompassed by the *Brady* rule of discovery, it is necessary to focus on the nature of the obligation imposed by the rule on the prosecution and police. The government action that offends due process under the *Brady* rule is *nondisclosure* of exculpatory evidence.

Nondisclosure

The Prosecutor's Duty

In the context of the *Brady* rule, nondisclosure refers to a failure of the government to provide exculpatory, i.e., favorable/material, information to the defense. The obligation to do so is dependent on the government's possession of, or access to, the evidence sought. Clearly, there can be no obligation to provide information to the defense which the government either does not possess or of which it could

not reasonably be imputed to have knowledge or control.[43] Neither does the government have an obligation to search for exculpatory evidence that is not already within its possession or control,[44] nor to disclose evidence which the defense already possesses or to which he has ready access.[45] Moreover, there is no requirement that disclosure precede trial, unless delay would deny the defendant a fair trial.[46]

Although the issue of nondisclosure in some cases may turn upon whether a specific defense request for the evidence has been made, a request is not necessary in all cases to trigger the obligation. 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." [47] Similarly, if perjured testimony is given by a prosecution witness, the obligation to disclose that fact does not depend on a defense request.[48]

In the *Agurs* case, the Court noted that the issue of disclosure can arise at two different points—prior to trial, when the prosecution must decide what evidence is to be disclosed, and following the trial, when the jury may be required to decide if there was failure to disclose properly. Although the legal standard is the same in both situations, the Court recognized that there is "a significant practical difference between the pretrial decision of the prosecutor [what should be disclosed] and the post-trial decision of the judge [what should have been disclosed]." The Court observed that given the "imprecise standard" that governs disclosure, and the fact that the significance of an item of evidence can seldom be predicted prior to trial, "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[49]

Unfortunately, sometimes "doubtful questions" can be even further complicated by the emergence of legitimate governmental interests against disclosure. As previously noted, that is true whenever the defense is seeking the identities of confidential government informants. It can be true of other information as well. When it occurs, one possible resolution of the prosecution's dilemma is to submit the problem to the trial judge. The Court suggested that alternative in the *Agurs* case as a means of resolving close issues, and the propriety of that approach was affirmed more recently in the case of *Pennsylvania* v. *Ritchie*.[50]

Ritchie was convicted of several counts of sexually abusing his young daughter. On appeal, he asserted that he had been denied access to the confidential investigative files of the Children and Youth Services (CYS) — a State agency created to investigate allegations of child abuse — and that the files might have contained the names of favorable witnesses, as well as other unspecified, exculpatory evidence. The Pennsylvania Supreme Court remanded the case with instructions to allow defense counsel inspection of the entire file to search for any useful evidence.

The U.S. Supreme Court affirmed the remand, but reversed the State court's holding on the proper means of resolving the conflict of interest. Reaffirming the materiality standard of "reasonable probability" offered in *Bagley*, the Court rejected the suggestion that a defendant's right to discover exculpatory evidence includes "the unsupervised authority to search through the Commonwealth's files."[51]

The Court held that the competing interests of the defense (to discover exculpatory evidence) and the State (to protect the confidentiality of child-abuse investigative files) could be properly balanced by an *in camera* review of the files by the trial judge. The Court stated:

> "An in camera review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations."[52]

One particularly burdensome aspect of the duty to disclose exculpatory information to the accused is that it operates "irrespective of the good or bad faith of the prosecution."[53] In *Agurs*, the Court emphasized this point by stating:

> "Nor do we believe the constitutional obligation is measured by the moral culpability, or willfulness, of the prosecutor . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[54]

The Court reasoned that nondisclosure of evidence favorable to the defense and material to the issue of guilt or punishment deprives the defendant of a fair trial, notwithstanding the good or bad faith of the prosecutor. Because the culpability of the prosecutor is not the issue, his actual knowledge of the existence of exculpatory evidence is not required to impose the obligation to disclose.

". . . nondisclosure of evidence favorable to the defense and material to the issue of guilt or punishment deprives the defendant of a fair trial, notwithstanding the good or bad faith of the prosecutor."

In *Giglio* v. *United States*,[55] the Court imputed to the prosecutor who tried the case the knowledge of a promise made to a witness by a different prosecutor. In doing so, the Court held that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor . . . A promise made by one attorney must be attributed, for these purposes, to the Government."[56]

The Investigator's Responsibility

The rule places a corresponding burden on the law enforcement officer to recognize potentially exculpatory evidence in the investigative files and assure that the prosecutor is actually aware of its existence. Withholding *Brady* material deprives the defendant of a fair trial, regardless of whether the error is that of the prosecutor or the investigator. The investigating officer generally knows more about the case and the evidence than anyone else; the prosecutor depends heavily upon the knowledge and candor of the investigator to assure that the case is effectively prosecuted and that the government's legal obligations are satisfied. A close-knit relationship between prosecutor and investigator is essential to assure that valuable evidence is not suppressed or a prosecution jeopardized through ineffective communication. It is clearly a case of "what you don't know can hurt you."

CONCLUSION

Brady v. *Maryland* recognizes the constitutional right of an accused to discover exculpatory evidence that is within the possession or control of the government. That right is limited in scope to evidence that is both favorable to the defense and material to the issue of either guilt or punishment.

The *Brady* rule imposes a substantial burden on the prosecution and the police to be alert to the existence of such evidence in their files and to be sensitive to the importance of the obligation to disclose. A violation of the duty, if discovered, results in the invalidation of the proceeding and requires a new trial. By the same token, an undetected violation results in an unfair trial, thus denying the accused due process. In *Brady*, the Supreme Court observed that society wins ". . . not only when the guilty are convicted but when criminal trials are fair; our system of . . . justice suffers when any accused is treated unfairly."[57]

The same point is captured in the following statement inscribed on the walls of the U.S. Department of Justice:

> "The United States wins its point whenever justice is done its citizens in the courts."

Footnotes

[1]*Wardius* v. *Oregon*, 412 U.S. 470, 473 (1973).
[2]*Id.* at 474.
[3]373 U.S. 83 (1963).
[4]*See, e.g., Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Powell* v. *Alabama*, 287 U.S. 46 (1932); and *Palko* v. *Connecticut*, 342 U.S. 165 (1952).
[5]294 U.S. 103 (1935).
[6]*Id.* at 112.
[7]317 U.S. 213 (1942).
[8]*Id.* at 216.
[9]355 U.S. 28 (1957)
[10]353 U.S. 53 (1957).
[11]*Id.* at 60-61.
[12]*Id.* at 62.
[13]360 U.S. 264 (1959).
[14]*Id.* at 269, 272.
[15]373 U.S. 83 (1963).
[16]*Id.* at 87.
[17]*United States* v. *Agurs*, 427 U.S. 97, 106 (1976).
[18]*Moore* v. *Illinois*, 408 U.S. 786, 795 (1972).
[19]*Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977).
[20]*Mooney, supra* note 5.
[21]*Napue, supra* note 13.
[22]*Pyle, supra* note 7.
[23]*Brady, supra* note 15.
[24]*Agurs, supra* note 17, at 106.
[25]*United States* v. *Bagley*, 473 U. S. 667, 674 (1985).
[26]*Napue*, supra note 13.
[27]*Id.* at 272.
[28]*Brady, supra* note 15, at 88.
[29]*Agurs, supra* note 17, at 108.
[30]*Id.* at 109.
[31]*Id.*
[32]*Id.* at 103-104.
[33]*Id.* at 104.
[34]*Id.* at 112.
[35]*Id.* at 112-113.
[36]473 U.S. 667 (1985).
[37]*Id.* at 675.
[38]*Id.* at 678.
[39]*Id.* at 682; *see also, Pennsylvania* v. *Ritchie*, 94 L.Ed.2d 40 (1987).
[40]830 F.2d 1574 (11th Cir. 1987).
[41]*Id.* at 1580.
[42]828 F.2d 1476 (10th Cir. 1987); *see also, United States* v. *Srulowitz*, 765 F.2d 382 (2d Cir. 1986); *United States* v. *Adams*, 759 F.2d 1099 (3d Cir.), *cert. denied*, 106 S.Ct. 336 (1985); *Bond* v. *Procunier*, 780 F.2d 461 (4th Cir. 1986); *United States* v. *Christian*, 786 F.2d 203 (6th Cir. 1986); *United States* v. *Jackson*, 780 F.2d 1305 (7th Cir. 1986); *United States* v. *Risken*, 788 F.2d 1361 (8th Cir.), *cert. denied*, 107 S.Ct. 329 (1986); *Landano* v. *Rafferty*, 670 F.Supp. 570 (D.N.J. 1987); and *United States* v. *Alberici*, 618 F.Supp. 660 (D.C. Pa. 1985).
[43]*See, e.g., Morgan* v. *Salamack*, 735 F.2d 354 (2d Cir. 1984); *United States* v. *Messerlian*, 832 F.2d 778 (3d Cir. 1987) (medical evidence in possession of doctor, not prosecution); *United States* v. *Mitchell*, 777 F.2d 248 (5th Cir. 1985) (information requested was sealed by court order, not within prosecution's possession or control); and *United States* v. *Alderdyce*, 787 F.2d 1365 (9th Cir. 1986) (medical evidence possessed by hospital not within knowledge or control of prosecution).
[44]*See, e.g., United States* v. *Guerrerio*, 670 F.Supp. 1215 (S.D.N.Y. 1987) (evidence possessed by local grand jury, Federal prosecutor not required to acquire through court order and provide to defense).
[45]*See, e.g., Government of Virgin Islands* v. *Martinez*, 831 F.2d 46 (3d Cir. 1987) (no violation when prosecution did not advise defense counsel that defendant had confessed to investigators since defendant obviously knew and should have told his attorney); *see also, United States* v. *Janis*, 831 F.2d 773 (8th Cir. 1987) (defense already knew of nondisclosed agreement between prosecution and witness); *United States* v. *Wilson*, 787 F.2d 375 (8th Cir.), *cert. denied*, 107 S.Ct. 197 (1986) (evidence concerning FBI interview of defendant's wife already known to defendant who called wife as witness); and *United States* v. *Davis*, 787 F.2d 1501 (11th Cir.), *cert. denied*, 107 S.Ct. 184 (1986) (discrepancy between prosecution witness' grand jury and trial testimony was readily discoverable by defense who knew witness' identity prior to trial).
[46]*See, e.g., United States* v. *Johnston*, 784 F.2d 416 (1st Cir. 1986); *United States* v. *Mitchell*, 777 F.2d 248 (5th Cir. 1985); *United States* v. *Browne*, 829 F.2d 760 (9th Cir. 1987); *United States* v. *Blandin*, 784 F.2d 1048 (10th Cir. 1986); *United States* v. *Vastola*, 670 F.Supp. 1244 (D.N.J. 1987); *United States* v. *Schwimmer*, 649 F.Supp. 544 (E.D.N.Y. 1936); *United States* v. *Dwyer*, 647 F.Supp. 1440 (M.D. Pa. 1986); and *United States* v. *Nakashian*, 635 F.Supp. 761 (S.D.N.Y. 1986).
[47]*Agurs, supra* note 17, at 107.
[48]*Mooney, supra* note 5.
[49]*Agurs, supra* note 17, at 108.
[50]94 L.Ed.2d 40 (1987).
[51]*Id.* at 58.
[52]*Id.* 60.
[53]*Brady, supra* note 15, at 87.
[54]*Agurs, supra* note 17, at 110.
[55]405 U.S. 150 (1972).
[56]*Id.* at 154.
[57]*Brady, supra* note 15, at 87.