PROSECUTORIAL DUTY TO DISCLOSE UNREQUESTED IMPEACHMENT EVIDENCE: THE FIFTH CIRCUIT'S APPROACH

The American Bar Association Code of Professional Responsibility states that the primary duty of a prosecuting attorney "is to seek justice, not merely to convict."[1] The prosecutorial duty to disclose exculpatory evidence is founded on this principle.[2] Serving as both adversary and officer of the court,[3] the prosecutor has an affirmative duty to ensure that the criminally accused receives a fair trial at which all material evidence is presented.[4] To compensate for the inherent inequity created by the government's vastly superior investigative resources,[5] and

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1979). The ABA Standards Relating to the Prosecution Function similarly describe the prosecutor's unique position. "Although the prosecutor operates within the adversary system, it is fundamental that his obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Rule 1.1 Comment (1970). Moreover, the United States Supreme Court has recognized that the prosecuting attorney is the representative of "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). *Accord* Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring) ("The state's pursuit is justice, not a victim."). *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 79-80 (1975); Alderstein, *Ethics, Federal Prosecutors, and the Federal Courts: Some Recent Problems,* 6 HOFSTRA L. REV. 755 (1978); Note, *Discovery and Disclosure: Dual Aspects of the Prosecutor's Role in Criminal Procedure,* 34 GEO. WASH. L. REV. 92 (1965).

2. *See* Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations,* 50 N.C.L. REV. 437, 452 (1972).

3. *See supra* notes 1-2 and accompanying text. *See also* Comment, *Suppression: The Prosecution's Failure to Disclose Evidence Favorable to the Defense,* 7 U.S.F.L. REV. 348, 348 (1973).

4. *See infra* note 7 and accompanying text.

5. Many courts and commentators argue that the imbalance caused by the state's sophisticated information-gathering facilities undermines the criminal defendant's right to a fair trial. *See, e.g.,* Bursey v. Weatherford, 528 F.2d 483, 487 (4th Cir. 1975), *rev'd on other grounds,* 429 U.S. 545 (1977); Grant v. Alldredge, 498 F.2d 376, 381-82 (2d Cir. 1974); Raymond v. Illinois, 455 F.2d 62, 66 (7th Cir.), *cert. denied,* 409 U.S. 885 (1972); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969); Jackson v. Wainwright, 390 F.2d 288, 297 (5th Cir. 1968); *In re* Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149, 1172-98 (1960); Nakell, *supra* note 2, at 439-42; Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 YALE L.J. 136, 142-43 (1964); Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose,* 40 U. CHI. L. REV. 112, 112 (1972). *See also* M. FREEDMAN, *supra* note 1, at 81 ("There are very few of us against whom a determined prosecutor could not make a 'plausible' case once the mighty investigatory resources of the government have been brought to bear. . . .").

to safeguard a defendant's constitutional right to due process,[6] the prosecutor is obligated to surrender to the defense certain information in his possession.[7]

The Supreme Court first established a prosecutorial duty to disclose exculpatory evidence in 1963 in *Brady v. Maryland*.[8] The *Brady* Court held that, upon request, the prosecutor must disclose to the defense favorable evidence that is material either to guilt or to punishment.[9] Failure to do so, stated the Court, constitutes a violation of due process, regardless of the prosecutor's good or bad faith.[10] Subsequently, the Supreme Court expanded *Brady* to include an obligation by the prose-

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6. The fifth amendment to the United States Constitution provides, in part: "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. V. In addition, the fourteenth amendment guarantees due process in state proceedings. U.S. CONST. amend. XIV.

One commentator recently suggested that due process as it applies to a criminal defendant requires a state of affairs in which "nothing more can be done, within reason, to assure that the trial process results in objectively correct factual determinations." Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond* Brady, 53 N.Y.U. L. REV. 835, 848 (1978). Similarly, Justice Fortas, writing for a majority in *In re Gault*, stated:

> [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.

387 U.S. 1, 21 (1967). *See also* Griffin v. United States, 336 U.S. 704, 707-09 (1949); Betts v. Brady, 316 U.S. 455, 462 (1942), *overruled on other grounds,* Gideon v. Wainwright, 372 U.S. 335 (1963); Berger v. United States, 295 U.S. 78, 88 (1935).

7. *See* Brady v. Maryland, 373 U.S. 83, 86-88 (1963). There is, however, no constitutional requirement of complete disclosure of prosecution files to the defense. *See* United States v. Agurs, 427 U.S. 97, 109 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972). *See infra* notes 86-88 and accompanying text.

Other sources of the prosecutorial duty to make certain disclosures, apart from the due process clauses of the fifth and fourteenth amendments, include Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act (18 U.S.C. § 3500 (1976)). Rule 16 provides generally for disclosure upon request of any relevant statement of the defendant, the defendant's prior criminal record, documents or other tangible objects, and reports of examinations and tests. FED. R. CRIM. P. 16(a)(1)(A)-(D). The Jencks Act provides for disclosure to the defense by the government of any statement made by a government witness. The Act stipulates, however, that the prosecutor must turn over such material only after the witness has testified on direct examination, and pursuant to a motion of the defendant. 18 U.S.C. § 3500 (1976).

The Jencks Act is a codification of Jencks v. United States, 353 U.S. 657 (1957), in which the Supreme Court held that in federal cases, after a prosecution witness has testified at trial, the defendant is entitled to inspect pretrial reports made to the government by the witness. *Id.* at 668, 672.

8. 373 U.S. 83 (1963).

9. *Id.* at 87.

10. *Id.* For a discussion of *Brady*, see *infra* notes 29-40 and accompanying text.

cutor to turn over to the accused all information that might be materially helpful to the defense of his case,[11] including evidence useful only for impeachment of the credibility of government witnesses.[12]

In 1976, the Supreme Court in *United States v. Agurs*[13] refined the *Brady* rule by recognizing a prosecutorial duty to disclose exculpatory evidence even absent a focused defense request.[14] The *Agurs* Court held that a defendant is entitled to reversal on the ground that the prosecutor failed to volunteer unrequested information, however, only when the undisclosed evidence creates a "reasonable doubt" about the defendant's guilt.[15]

In *Garrison v. Maggio*,[16] decided shortly after *Agurs*, the Fifth Circuit confronted a fact situation in which the prosecutor failed voluntarily to disclose evidence that the defense could have used to challenge the credibility of the government's only witness.[17] The Fifth Circuit went a step beyond *Agurs*, holding that when the defense fails to make a specific request for evidence useful solely for impeachment purposes and the prosecutor does not volunteer such evidence, a new trial will be granted only if disclosure "probably would have resulted in an acquittal."[18]

Although the Fifth Circuit consistently reaffirms its *Garrison* holding,[19] other courts are generally unreceptive to it.[20] The Supreme

11. The state is under no obligation to disclose evidence that is not favorable to the defense. *See, e.g.*, United States v. Gorel, 622 F.2d 100, 104 (5th Cir. 1979) (documents not related to any witness' testimony need not be disclosed), *cert. denied,* 445 U.S. 943 (1980); United States v. Izzi, 613 F.2d 1205, 1212-13 (1st Cir. 1980) (grand jury testimony of prosecution witnesses that varied only slightly with trial testimony need not be disclosed); United States v. Zicree, 605 F.2d 1381, 1390 (5th Cir. 1979) (no duty to alert defendant to arguably exculpatory nature of witness' testimony) *cert. denied,* 445 U.S. 966 (1980); United States v. Wencke, 604 F.2d 607, 612 (9th Cir. 1979) (per curiam) (defendant must demonstrate exculpatory nature of undisclosed evidence in order to obtain a reversal).

12. United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967); Miller v. Pate, 386 U.S. 1 (1967).

13. 427 U.S. 97 (1976).

14. *Id.* at 106-07. For a more detailed discussion of *Agurs*, see *infra* notes 54-68 and accompanying text.

15. 427 U.S. at 111-13.

16. 540 F.2d 1271 (5th Cir. 1976), *cert. denied,* 431 U.S. 940 (1977).

17. *Id.* at 1272-73.

18. *Id.* at 1274.

19. *See infra* notes 122-25 and accompanying text.

20. *See infra* notes 129-42 and accompanying text.

Court has not reviewed the Fifth Circuit's approach.[21]

This Note first traces the origin and development of the *Brady* rule in the Supreme Court, and examines the policy considerations that underlie the nondisclosure rule. It then focuses on the specific problem of prosecutorial nondisclosure of unrequested impeachment evidence, placing particular emphasis on the Fifth Circuit's decision in *Garrison v. Maggio*. Finally, the Note analyzes the validity of *Garrison* in light of both prior Supreme Court decisions and the policies underlying the prosecutor's disclosure duty. It concludes that the Fifth Circuit erred in implementing a separate standard of review for impeachment evidence.

I. EVALUATION OF THE *BRADY* RULE

A. Origin and Development in the Supreme Court

The prosecutorial duty to disclose evidence favorable to the accused is traceable to the 1935 Supreme Court case of *Mooney v. Holohan*.[22] In *Mooney*, the Supreme Court stated that the prosecutor's knowing and intentional use of perjured testimony to procure a conviction is repugnant to fundamental notions of justice and constitutes a violation of due process.[23] After reaffirming this holding in several subsequent decisions,[24] the Supreme Court broadened the *Mooney* principle in

21. The petitioner in *Garrison* appealed the Fifth Circuit's decision to the Supreme Court, but was denied certiorari. 431 U.S. 940 (1977).

22. 294 U.S. 103 (1935). In *Mooney*, the defendant, convicted of first degree murder, sought a writ of habeas corpus claiming that the prosecutor had knowingly used fabricated testimony. *Id.* at 109-10. Investigations proved that the defendant's allegations were accurate. *See* Z. CHAFEE, W. POLLAK & C. STERN, THE MOONEY-BILLINGS REPORT 185-86 (1932). The Mooney-Billings Report, which was prepared by the Section on Lawless Enforcement of the Law to the Wickersham Commission after an extensive examination of the evidence in the *Mooney* trial, concluded that:

> Witnesses were produced at the trials with information in the hands of the prosecution that seriously challenged the credibility of the witnesses but this information was deliberately concealed. Witnesses were permitted to testify at the trials despite such knowledge in the possession of the prosecution of prior contradictory stories told by those witnesses, as to make their mere production a vouching for perjured testimony.

Id. at 242-43.

23. 294 U.S. at 112-13. The Court stated that the "deliberate deception of court and jury by the presentation of testimony known to be perjured . . . is . . . inconsistent with the rudimentary demands of justice." *Id.* The Court noted that the prosecuting authorities, besides knowingly using perjured testimony to obtain a conviction, also "deliberately suppressed evidence which would have impeached . . . the testimony given against [the defendant]." *Id.* at 110, 112. The Court, however, reached its holding without confronting the issue raised by the suppressed impeachment evidence.

24. *See, e.g.*, White v. Ragen, 324 U.S. 760 (1945); Pyle v. Kansas, 317 U.S. 213 (1942). In

1957 in *Alcorta v. Texas*.[25] The *Alcorta* Court held that a denial of due process accrues whenever a prosecutor knowingly fails to correct unsolicited perjured testimony.[26] Shortly thereafter, in *Napue v. Illinois*,[27] the Court expanded *Mooney* still further, finding that a prosecutor's knowing failure to correct perjured testimony that does not affect the merits of a case, but relates solely to the credibility of a key prosecution witness, sufficiently taints a conviction to warrant a new trial.[28]

In *Brady v. Maryland*,[29] the Supreme Court ruled on the broad issue of the prosecutor's failure to disclose exculpatory evidence.[30] Rather than focusing on the prosecutor's misconduct in obtaining convictions, as it had in the earlier cases,[31] the Court emphasized the overriding importance of assuring the criminal defendant a fair trial.[32]

In *Brady*, the petitioner and his companion, tried separately, were each convicted of murder and sentenced to death.[33] Despite pretrial requests by petitioner's counsel that he be permitted to inspect all of the

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Pyle, the Supreme Court held that the prosecutor's misconduct in soliciting perjured testimony to obtain a conviction "sufficiently charge[d] a deprivation of rights guaranteed by the Federal Constitution" rendering void the defendant's conviction for murder and robbery. *Id.* at 216.

25. 355 U.S. 28 (1957).

26. *Id.* at 31. The *Alcorta* Court granted a new trial even though the perjured testimony was inculpatory and did not result from the prosecutor's own efforts. The Court deemed sufficient the prosecutor's knowing failure to correct the perjured testimony, and the relevance of the testimony to the punishment assigned. *Id. See also* United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), *cert. denied,* 345 U.S. 904 (1953).

27. 360 U.S. 264 (1959). In *Napue*, the state's key witness falsely testified that the state had promised him no consideration in return for his testimony. *Id.* at 265, 270-71. Although the prosecuting attorney knew that this testimony was false, he failed to correct it. *Id.* at 265, 267-68.

28. *Id.* at 269.

29. 373 U.S. 83 (1963). For a general discussion of *Brady,* see Note, *supra* note 5. For an historical account of the *Brady* case and the life of the defendant, John Brady, see R. HAMMER, BETWEEN LIFE AND DEATH (1969).

30. 373 U.S. at 84.

31. *See supra* notes 22-28, *infra* notes 69-71, and accompanying text. *See generally* Rusin, *The Prosecutor's Duty of Disclosure: From Brady to Agurs and Beyond,* 69 J. CRIM. L. & C. 197, 198 (1978); Comment, *supra* note 5, at 114.

32. Several lower courts had already undergone this shift in emphasis. *See, e.g.,* Kyle v. United States, 294 F.2d 507, 514 (2d Cir. 1961) (if nondisclosure is sufficiently harmful to defendant's case, a new trial is required notwithstanding the existence of prosecutorial misconduct), *cert. denied,* 377 U.S. 909 (1964); United States v. Consolidated Laundries Corp., 291 F.2d 563, 569-70 (2d Cir. 1961) (defendant was granted new trial due to negligent suppression of government documents material to the conduct of his defense); United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 767 (3d Cir.) (court ignored prosecutorial misconduct in nondisclosure of testimony tending to corroborate defendant's exonerating claim of intoxication, focusing instead on defendant's ability to present defense), *cert. denied,* 350 U.S. 875 (1955).

33. 373 U.S. at 84.

companion's extrajudicial statements, the prosecutor failed to disclose a statement in which the companion had confessed to the homicide.[34] The *Brady* Court directly examined the impact of the nondisclosure on the defendant's ability to present his defense.[35] Affirming the Maryland Court of Appeals' reversal of the conviction,[36] the Supreme Court ruled that irrespective of a prosecutor's good or bad faith, due process is denied if the requested, yet undisclosed, evidence is favorable to an accused and material either to guilt or punishment.[37]

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34. *Id.* Although the petitioner admitted his participation in the crime, he maintained that his companion had actually killed the victim. Proof of this allegation was crucial because the jury could then mitigate petitioner's punishment to life imprisonment rather than death, pursuant to a Maryland statute. *Id.* at 85.

Although the prosecutor had tendered all other extrajudicial statements to the defense counsel, he failed to disclose the companion's unsigned confession because he interpreted a Maryland rule of law to deem the confession inadmissible at trial. Brady v. State, 226 Md. 422, 427, 174 A.2d 167, 169-70 (1961). Apparently, the prosecutor had made a good faith mistake, believing the disclosure requirement to apply only to admissible evidence. *See* Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure,* 59 IOWA L. REV. 433, 436 (1973).

Since the decision in *Brady v. Maryland*, courts have generally declined to require admissibility as a prerequisite to triggering the duty of disclosure. *See, e.g.,* United States v. Corr, 543 F.2d 1042, 1058 (2d Cir. 1976); United States v. Jordan, 399 F.2d 610, 615 (2d Cir.), *cert. denied,* 393 U.S. 1005 (1968); North Am. Rockwell Corp. v. NLRB, 389 F.2d 866, 873 (10th Cir. 1968); Emmett v. Ricketts, 397 F. Supp. 1025, 1037-38 (N.D. Ga. 1975). *But see* United States *ex rel.* Wilson v. State, 437 F. Supp. 407 (D. Del. 1977); *In re* Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971); Thornton v. State, 238 Ga. 160, 231 S.E.2d 729 (1977); Comment, People v. Rutherford: *The Prosecutor's Duty to Disclose,* 6 GOLDEN GATE L. REV. 851, 857-58 (1976) (in order to obtain reversal, defense must show that undisclosed evidence is admissible).

Some courts require the prosecutor to disclose inadmissible evidence only if it might lead to the discovery of admissible evidence. *See, e.g.,* United States v. Wigoda, 521 F.2d 1221 (7th Cir. 1975), *cert. denied,* 424 U.S. 949 (1976); United States v. Ahmad, 53 F.R.D. 186 (M.D. Pa. 1971).

A majority of the Supreme Court has never directly confronted the issue of admissibility. Justice Fortas, however, concurring in *Giles v. Maryland*, rejected the idea of an admissibility requirement: "[t]he state may not be excused from its duty to disclose material facts . . . solely because of a conclusion that they would not be admissible at trial." Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring). *See generally* Rusin, *supra* note 31, at 209-10.

35. 373 U.S. at 87. The petitioner did not learn of the undisclosed evidence until he was convicted and sentenced. Most cases, including *Brady*, do not reveal how the defendant discovered the nondisclosure. Undoubtedly, it is not unusual for the undisclosed evidence to go unnoticed indefinitely. United States *ex rel.* Hill v. Deegan, 268 F. Supp. 580 (S.D.N.Y. 1967), exemplifies the element of chance involved in uncovering undisclosed evidence. In *Deegan*, a key prosecution witness testified at trial and subsequently informed the prosecutor that he had made a mistake in his testimony. When the prosecutor refused to take any remedial action, the witness himself came forward to correct the error. *Id.* at 585-86.

36. Brady v. State, 226 Md. 422, 174 A.2d 167 (1961).

37. 373 U.S. at 84-87, 91. Specifically, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

Although *Brady* clearly established a prosecutorial duty of disclosure, the Court failed to define the extent of its new rule or to enunciate specific guidelines for its implementation.[38] Two major questions left unanswered were whether a defense request for specific information was necessary to trigger operation of the *Brady* rule,[39] and what type of evidence was sufficiently significant to be considered "material."[40]

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material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Justice Douglas enunciated the rationale behind the Court's decision:

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . . .

Id. at 87-88.

38. *See* Note, *Implementing* Brady v. Maryland*: An Argument for a Pretrial Open File Policy*, 43 U. CIN. L. REV. 889, 889 (1974); Comment, *supra* note 5, at 115; 1976 WASH. U.L.Q. 480, 483.

39. The defense in *Brady* had made a request for the undisclosed evidence. 373 U.S. at 84. Without addressing the question directly, the *Brady* Court implied that a defense request may be essential to finding a breach of the prosecutor's duty. Numerous post-*Brady* lower court decisions, however, held that a defense request was unnecessary to trigger application of the *Brady* rule. *See, e.g,* Davis v. Heyd, 479 F.2d 446 (5th Cir. 1973); United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967); Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966); Barbee v. Warden, Md. Penitentiary, 331 F.2d 842 (4th Cir. 1964); United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Castleberry v. Crisp, 414 F. Supp. 945 (N.D. Okla. 1976). *See also* Comment, *supra* note 5, at 117 ("To hold a request indispensable would allow the prosecutor to suppress even evidence crucial to the defense so long as the defense was unaware of it."). *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE § 20.02, at 398 (1980).

In 1967, the Supreme Court reversed a conviction in the absence of a defense request. Giles v. Maryland, 386 U.S. 66 (1967). In his plurality opinion, Justice Brennan stated that the trial court had "ordered a new trial, despite the absence of a pretrial request of defense counsel for disclosure of the evidence suppressed." *Id.* at 73. Justice Fortas, in a concurring opinion, concluded that the duty to disclose should not depend on the existence of a request: "I see no reason to make the result turn on the adventitious circumstance of a request." *Id.* at 102 (Fortas, J., concurring). Finally, in *United States v. Agurs*, the Burger Court held that the absence of a defense request does not automatically render a *Brady* claim invalid. *See infra* notes 61-64 and accompanying text.

40. *See generally* Comment, *supra* note 5, at 125-31 ("The most difficult problem created by the Brady decision has been that of materiality." *Id.* at 125).

Other questions left unanswered by *Brady* relate to the timing of disclosure, who should decide what evidence must be disclosed, whether there is an implied duty to preserve the evidence, and whether the duty applies to inadmissible evidence. *See generally* C. WHITEBREAD, *supra* note 39, § 20.03 at 398-406; Note, *The Prosecutor's Duty to Disclose After* United States v. Agurs, 1977 U. ILL. L.F. 690, 691; Comment *supra* note 5, at 112, 117-25; Comment, *supra* note 3, at 349.

The point in the proceedings at which the prosecutor must reveal exculpatory evidence continues to be an area of debate. Courts and commentators are divided between pretrial disclosure and disclosure at trial. *Compare* United States v. Pollack, 534 F.2d 964 (D.C. Cir.) (favoring pretrial disclosure), *cert. denied,* 429 U.S. 924 (1976); United States v. Bonanno, 430 F.2d 1060 (2d Cir.) (same), *cert. denied,* 400 U.S. 964 (1970); United States v. Trainor, 423 F.2d 263 (1st Cir. 1970)

Appeals by defendants alleging due process violations because of prosecutorial nondisclosure of exculpatory evidence immediately inundated the lower courts.[41] The lower courts' interpretations of the *Brady* rule reflected an expansionist trend,[42] exemplified by holdings relaxing

(same); United States v. Polisi, 416 F.2d 573 (2d Cir. 1969) (same); United States v. Deutsch, 373 F. Supp. 289 (S.D.N.Y. 1974) (same); Note, *supra* note 5, at 149 ("[t]he only reasonable time for the prosecutor to reveal his evidence is during the pretrial period) *and* Comment, *supra* note 5, at 118 ("because of the multiple uses to which defendants can put undisclosed information in preparing their defense, pretrial disclosure seems the desirable alternative") *with* United States *ex rel.* Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974) (*Brady* requires disclosure at trial), *cert. denied,* 420 U.S. 939 (1975); United States v. Moore, 439 F.2d 1107 (6th Cir. 1971) (same); United States v. Conder, 423 F.2d 904 (6th Cir.) (same), *cert. denied,* 400 U.S. 958 (1970) *and* 65 GEO. L.J. 209, 320 (1976-77) (*Brady* should not be a pretrial remedy). *See also* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL §§ 2.1(c), 2.2(a) (Tent. Draft, May 1969) ("prosecutor should perform these obligations as soon as practicable following the filing of charges against the accused"); AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.11 (1970) (prosecutor's failure to disclose exculpatory evidence "at the earliest feasible opportunity constitutes unprofessional conduct"). Among all courts and commentators, however, the central concern is prejudice to the defendant resulting from the prosecutor's delay in disclosure. C. WHITEBREAD, *supra* note 39, § 20.03, at 401. The Supreme Court has yet to confront the issue.

Moreover, the Supreme Court has not addressed the issue of who—the defense counsel, the trial judge, or the prosecution—must determine what evidence is favorable and material under *Brady*. Courts uniformly exclude the defense as a possibility, as this would require the prosecutor to disclose his entire file to the defense. *See infra* notes 91-93 and accompanying text. In addition, courts generally reject *in camera* examination by the trial judge, usually out of considerations of judicial economy. Another objection to such a procedure is that the judge cannot identify what evidence is favorable to a defendant's case as easily as the prosecutor can, especially during the pretrial stages of a proceeding. Thus, by default courts usually require the prosecution to determine what evidence must be disclosed under *Brady*. Unfortunately, this places the prosecutor in the awkward position of having to view the evidence from the perspective of the defense. One commentator suggested that "it may be unrealistic to suppose that an adversary can act with the objectivity that this requires." Comment, *supra* note 5, at 121. *See generally* C. WHITEBREAD, *supra* note 39, § 20.05, at 403; Note, *supra* note 5, 138-40; Comment, *supra* note 5, at 120-21.

The Supreme Court also has not resolved the problem of lost or destroyed potential *Brady* material. Lower courts generally agree that the duty to disclose encompasses a duty to preserve. Any other conclusion would undermine the spirit of *Brady*. The breadth of the duty, however, and the availability of sanctions for nonconformance with it are not clearly defined. The problem of sanctions is peculiar: application of the usual sanction for nondisclosure—a new trial—would be ineffective given that the evidence no longer exists. *See* United States v. Bryant, 439 F.2d 642, 653 (D.C. Cir. 1971) (prosecutor obligated to preserve any evidence that might be favorable). *See generally* Rusin, *supra* note 31, at 220-24.

Finally, the Supreme Court has not addressed the question of whether potential *Brady* material must be admissible at trial. *See supra* note 34 and accompanying text.

41. *See infra* notes 43-45 and accompanying text.

42. *See* Comment, *Defendant Not Entitled to New Trial Unless Evidence Suppressed by Prosecution Probably Would Have Resulted in an Acquittal,* 48 MISS. L.J. 647, 649 (1977); Comment, *supra* note 5, at 115-32.

defense request requirements,[43] and holdings extending the prosecutor's disclosure duty to favorable evidence within any "arm of the government."[44] These courts, however, reached inconsistent results on many of the important post-*Brady* issues.[45]

The Supreme Court did not directly confront another nondisclosure case until nearly a decade after *Brady*,[46] when it decided *Giglio v. United States*.[47] The *Giglio* Court relied on both *Napue*[48] and *Brady* to hold that undisclosed evidence tending to impeach the testimony of a

43. *See* cases cited *supra* note 39.

44. *See, e.g.*, United States v. Deutsch, 475 F.2d 55, 57-58 (5th Cir. 1973) (disclosure of postal employee's personnel file required); Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969) (prosecutor responsible for suppression by police); Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964) (prosecutor responsible for suppression of favorable ballistics report, notwithstanding his noninvolvement).

45. Post-*Brady* courts adopted essentially two standards of materiality by which a prosecutor could gauge his disclosure obligation. The standard generally applied to situations in which the prosecutor deliberately suppressed evidence favorable to the accused was whether such evidence *might have affected* the judgment of the jury. *See, e.g.*, Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966) (reversal mandated if evidence "might have led the jury to entertain a reasonable doubt about [defendant's] guilt"). *See also* Giglio v. United States, 405 U.S. 150, 154-55 (1972); Woodcock v. Amaral, 511 F.2d 985, 989-93 (1st Cir. 1974), *cert. denied,* 423 U.S. 841 (1975); United States v. Pfingst, 490 F.2d 262, 275-78 (2d Cir. 1973), *cert. denied,* 414 U.S. 919 (1974); United States v. Diaz-Rodriguez, 478 F.2d 1005, 1007 (9th Cir. 1973). Deterrence of prosecutorial misconduct was a prime concern in these cases.

Post-*Brady* courts employed a stricter materiality standard for cases in which the prosecutor in good faith neglected to disclose exculpatory evidence. Typically, the reviewing court would mandate a new trial if "there was a significant change that this added item [of evidence], developed by a skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). *See also* United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976), *cert. denied,* 430 U.S. 929 (1977); United States v. Marrero, 516 F.2d 12 (7th Cir.), *cert. denied,* 423 U.S. 862 (1975); United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975), *cert. denied,* 429 U.S. 1043 (1977); United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), *cert. denied,* 421 U.S. 949 (1975), *vacated in part,* 413 F. Supp. 845 (S.D.N.Y. 1976); Evans v. Janing, 489 F.2d 470 (8th Cir. 1973); Ross v. Texas, 474 F.2d 1150 (5th Cir.), *cert. denied,* 414 U.S. 850 (1973); United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968). In the passive good faith nondisclosure cases, courts weighed the policy interest in the finality of convictions against the goal of safeguarding the defendant's right to due process. *See* 1976 WASH. U.L.Q. *supra* note 38, at 486.

46. In 1967, however, the Supreme Court in *Giles v. Maryland* had an opportunity to examine major ambiguities of *Brady*; specifically, what type of evidence is sufficiently material to require disclosure, and whether a defense request is a prerequisite to disclosure. The petitioner in *Giles*, following a conviction for rape, sought a new trial alleging that the prosecutor failed to reveal evidence that would impeach the credibility of the prosecutrix. With the introduction of new evidence that the lower courts had not considered, however, the Supreme Court was able to remand the case without examining the *Brady* issues. Giles v. Maryland, 386 U.S. 66 (1967).

47. 405 U.S. 150 (1972).

48. *See supra* notes 27-28 and accompanying text.

key prosecution witness was sufficiently material to the defense to warrant a new trial because there existed a "reasonable likelihood that the evidence could have affected the judgment of the jury."[49] The Court, however, did not render this standard generally applicable to all *Brady* situations, but rather implied that it should be confined to situations in which the undisclosed evidence revealed perjured testimony.[50]

In *United States v. Agurs*,[51] the Supreme Court attempted to address the major issues left unresolved by *Brady*. The defendant in *Agurs*, convicted of murder, moved for a new trial on the ground that the prosecutor failed to disclose the murder victim's prior criminal record.[52] The defendant asserted that such evidence, which tended to prove the victim's violent character, supported her self-defense theory of the case.[53] The defense attorney, however, had made no pretrial request for the evidence.[54]

The *Agurs* Court enunciated a multi-tiered standard of review for determining the materiality of undisclosed evidence,[55] defining three possible situations in which the prosecutor's failure to disclose might

49. 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. at 271). The prosecutor who had presented the case to the grand jury promised the witness that he would not be prosecuted if he agreed to testify. The state's witness, however, testified at trial that he had received no promises of consideration in exchange for his testimony. The trial prosecutor, having no knowledge of the prior exchange, failed to reveal that such a promise had in fact been made. *Id.* at 152-54. The Court's reversal of the conviction notwithstanding the prosecutor's good faith reaffirmed the view that the possibility of harm to the defendant rather than the prosecutor's misconduct is determinative in ascertaining whether constitutional rights of due process have been satisfied.

50. 405 U.S. at 154. *See also* Moore v. Illinois, 408 U.S. 786 (1972). In *Moore*, decided in the same term as *Giglio*, the Supreme Court held that information tending to impeach one of the state's key witnesses was not sufficiently material to require disclosure, because of the strong evidence of guilt and the speculative nature of the undisclosed evidence. *Id.* at 797.

51. 427 U.S. 97 (1976).

52. *Id.* at 100-01. The victim's prior record included two convictions, one for assault and carrying a deadly weapon and the other for carrying a deadly weapon. *Id.*

53. *Id.* at 100. The basis of the self-defense theory was that the defendant screamed for help, and that the victim had two knives in his possession. *Id.*

54. *Id.* at 99.

55. *Id.* at 103-08. Prior to *Agurs*, the Second Circuit had developed its own multiple standard of materiality for nondisclosure cases. United States v. Keogh, 391 F.2d 138 (2d Cir. 1968). Judge Friendly, writing for the majority in *Keogh*, grouped cases involving undisclosed evidence into three categories: (1) deliberate prosecutorial suppression of obviously exculpatory evidence with intent to harm the defense (convictions in this category "clearly require a reversal"); (2) deliberate suppression of specifically requested evidence with no intent to harm the defense (convictions in this category are "mandated"); (3) passive nondisclosure of unrequested evidence which in hindsight could have benefitted the defense (standard of materiality must be considerably higher). *Id.* at 146-48.

result in a due process violation.[56] In the first situation, if the undisclosed evidence reveals that the state's case included perjured testimony and that the prosecutor knew or should have known of the perjury,[57] the nondisclosure is material and a new trial should be granted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[58] In the second situation, if the prosecutor fails to respond to a specific pretrial request by the defense,[59] a conviction must be set aside if the undisclosed evidence "might have affected the outcome of the trial."[60]

The third situation arises when the prosecutor fails to disclose exculpatory evidence that the defense did not specifically request.[61] The Court asserted that the standard of materiality applied in such a situation should be stringent, because the prosecutor will not have violated his constitutional duty to disclose unless his omission is of "sufficient significance to result in denial of the defendant's right to a fair trial."[62] The Court concluded that when the defense makes only a general request[63] or no request at all for the exculpatory evidence, a new trial will

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56. *Id.* at 103-08. The Court noted that each of the three situations concerns the post-trial discovery of information previously known to the prosecution but not to the defense. *Id.* at 103. The defendant's awareness at trial of the existence of the undisclosed evidence is fatal to his *Brady* claim. *See* Stubbs v. Smith, 533 F.2d 64 (2d Cir. 1976); United States v. Riley, 530 F.2d 767 (8th Cir. 1976); Maglaya v. Buchkoe, 515 F.2d 265 (6th Cir.), *cert. denied,* 423 U.S. 931 (1975).

57. *See, e.g.,* Mooney v. Holohan, 294 U.S. 103 (1935); *supra* notes 22-23 and accompanying text. *See also* Miller v. Pate, 386 U.S. 1 (1967) (prosecution deliberately used perjured testimony); Napue v. Illinois, 360 U.S. 264 (1959) (prosecutor knowingly failed to correct perjured testimony); Pyle v. Kansas, 317 U.S. 213 (1942) (same).

58. 427 U.S. at 103-04. *Accord* Giglio v. United States, 405 U.S. 150, 154 (1972). *See supra* text accompanying note 49. The standard of materiality for this type of nondisclosure is most lenient, because the *Agurs* Court viewed it as "a corruption of the truth-seeking function of the criminal process." 427 U.S. at 104.

59. *See, e.g.,* Brady v. Maryland, 373 U.S. 83 (1963).

60. 427 U.S. at 104. The Court reasoned that because a focused defense request puts the prosecutor on notice that exculpatory information could be in his possession, his failure to disclose is "seldom, if ever, excusable." The Court stated further that:

> Although there is no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.

Id. at 106.

61. *See, e.g., id.*; Garrison v. Maggio, 540 F.2d 1271 (5th Cir. 1976), *cert. denied,* 431 U.S. 940 (1977).

62. 427 U.S. at 108.

63. After *Brady v. Maryland*, defense attorneys routinely began to file motions requesting pretrial production of "all *Brady* material"—that is, any evidence favorable to the accused that is

be mandated only if the evidence creates a "reasonable doubt" about guilt or punishment.[64]

Before adopting its "reasonable doubt" standard, the *Agurs* Court specifically rejected as too burdensome the standard of Federal Rule of Criminal Procedure 33, which entitles a defendant to a new trial based on newly discovered evidence if the evidence "probably would have resulted in an acquittal."[65]

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material either to guilt or to punishment. Some courts refer to this motion as a "fishing expedition." *See, e.g.,* United States v. McCarthy, 292 F. Supp. 937 (S.D.N.Y. 1967); United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967). In most cases, courts mandate no disclosure beyond that to which the defendant is entitled under Rule 16. *See supra* note 7. *See generally* Comment, *Prosecutor's Constitutional Duty of Disclosure: Developing Standards Under Brady v. Maryland,* 33 U. PITT. L. REV. 785 (1972).

64. 427 U.S. at 112-13. After applying this high standard to the undisclosed evidence presented in the case before it, the *Agurs* Court held that the evidence was not material because, in the context of the entire record, the trial judge had remained convinced of the defendant's guilt beyond a reasonable doubt. *Id.* at 114. The Supreme Court's holding in *Agurs* clarified the post-*Brady* controversy over the necessity of a defense request. *See supra* note 39 and accompanying text.

65. 427 U.S. at 111. *See* FED. R. CRIM. P. 33. Rule 33 provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7 day period.

Id. Although Rule 33 itself does not employ the "probable acquittal" language, courts have traditionally interpreted the rule to require a showing that the newly discovered evidence would probably produce an acquittal on retrial. This standard was first enunciated in Berry v. Georgia, 10 Ga. 511, 527 (1851):

> Upon the following points there seems to be a pretty general concurrence of authority, viz: that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz; speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

Id.

See also United States v. Curran, 465 F.2d 260, 264 (7th Cir. 1972); United States v. Rodriguez, 437 F.2d 940, 941-42 (5th Cir. 1971); United States v. Martinez, 436 F.2d 12, 15 (9th Cir. 1970), *cert. denied,* 401 U.S. 959 (1971); United States v. Craft, 421 F.2d 693, 695 (9th Cir. 1970); Edgar v. Finley, 312 F.2d 533, 536-37 (8th Cir. 1963). Rule 33 applies only to evidence discovered from a neutral source after trial; prosecutorial misconduct is not at issue. FED. R. CRIM. P. 33.

B. Policy Considerations

The early nondisclosure cases, typified by *Mooney* and *Alcorta*,[66] were based on a policy of deterrence of prosecutorial misconduct.[67] The Supreme Court sought to discourage prosecutors from obtaining convictions through the deliberate use of perjured testimony or the knowing failure to correct it.[68]

Brady v. Maryland[69] marked a departure from the deterrence rationale: the Supreme Court began to focus on the effect of the nondisclosure on the defendant's capacity to present his defense, rather than on the prosecutor's malfeasance.[70] *Brady* and its progeny reasoned that a prosecutor's failure to disclose exculpatory evidence deprives a defend-

66. *See supra* notes 22-26 and accompanying text.

67. *See also* Pyle v. Kansas, 317 U.S. 213, 214 (1942); Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382, 387 (N.D. Ill. 1949); People v. Savvides, 1 N.Y.2d 554, 556-57, 136 N.E.2d 853, 854-55, 154 N.Y.S.2d 885, 887 (1956). *See generally* Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 121-23 (1974).

68. *See supra* notes 22-28 and accompanying text. By finding such conduct inconsistent with a defendant's fifth amendment due process right, the *Mooney* line of cases prevented prosecutors from easily manipulating or controlling trial evidence. *See* Westen, *supra* note 67, at 121-23.

69. 373 U.S. 83 (1963). For a discussion of *Brady*, see *supra* notes 29-40 and accompanying text.

70. *See* Brady v. Maryland, 373 U.S. at 87. The *Brady* Court stated that the unfairness, and hence the violation of due process, inherent in the prosecutor's failure to disclose material exculpatory evidence, stems from his role as an "architect of a proceeding" who helps to "shape a trial that bears heavily on the defendant." *Id.* at 88. *See also* United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972); Clarke v. Burke, 440 F.2d 853 (7th Cir. 1971), *cert. denied,* 404 U.S. 1039 (1972); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); Barbee v. Warden, Md. Penitentiary, 331 F.2d 842 (4th Cir. 1964). The Supreme Court recently reaffirmed this position in Smith v. Phillips, 102 S. Ct. 940, 947-48 (1982), when it held that prosecutorial misconduct alone, without a concurrent impairment of the defendant's right to a fair trial, did not require a reversal. For a collection of decisions in the area, see Annot., 34 A.L.R. 3d 16 (1980). *See generally* Nakell, *The Effect of Due Process on Criminal Defense Discovery,* 62 KY. L.J. 58 (1973).

The Supreme Court's decision in United States v. Agurs, 427 U.S. 97, arguably signifies a resurrection of the deterrence rationale initiated in the 1930s and a simultaneous withdrawal from exclusive concentration on the defendant's due process right to present all material exculpatory evidence. Although the Court explicitly disclaimed any reliance on prosecutorial misconduct in establishing its three-tier materiality test, *see id.* at 110, the *Agurs* decision implicitly applied the principle espoused in *Mooney* that the prosecutor's culpability is a critical factor in a due process violation. *See supra* notes 66-68 and accompanying text. Both the prosecutor's knowing use of perjured testimony and his intentional concealment of exculpatory evidence seem to affect equally the defendant's ability to develop his defense, as both types of conduct have the effect of concealing the truth. The *Agurs* Court, nevertheless, distinguished the former fact situation, applying a stricter standard of materiality to it. 427 U.S. at 103-06. *See supra* notes 57-60 and accompanying text. The Court apparently found the prosecutor's intentional presentation of false testimony more reprehensible. For a similar analysis, see Recent Development, *The Prosecutor's Constitu-*

ant of a fair trial, regardless of whether the nondisclosure is intentional[71] or merely negligent.[72]

The Supreme Court's shift in emphasis between *Mooney* and *Brady* can be traced to the trend, commencing in the early 1960's, toward broadened defense discovery in criminal cases[73] and the corresponding expansion of procedural rights of the criminally accused.[74] Proponents

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tional Duty to Disclose Exculpatory Evidence in the Absence of a Focused Request from the Defense—United States v. Agurs, 14 AM. CRIM. L. REV. 319, 332 (1976).

Emphasis on prosecutorial malfeasance also explains the Court's differing standards for the second and third categories of cases presented. *See supra* notes 59-64 and accompanying text. According to *Agurs*, the defendant who fails to make a specific request for exculpatory evidence bears a greater burden of showing materiality than the defendant who makes such a request. *See* 427 U.S. at 104-07. Again, the defendant's presentation of his case is equally impaired under either scenario. Thus, if the Court had focused strictly on the defendant's right to a fair trial, it would not have distinguished the two situations.

Within each of the three nondisclosure situations, however, the *Agurs* Court continued to focus on the fairness of the proceedings to the defendant by framing each standard in terms of the effect of the undisclosed evidence on the outcome of the trial. *See supra* notes 58, 60, 61 & 63 and accompanying text.

71. Courts have defined "deliberate" nondisclosure as including not only a premeditated decision to suppress material exculpatory evidence with specific intent to harm the defendant's case, but also a failure to disclose favorable evidence whose blatant significance to the defense could not have escaped the prosecutor's attention. *See* United States v. Keogh, 391 F.2d 138 (2d Cir. 1968). *See also* M. v. Superior Court, 70 Cal. App. 3d 782, 144 Cal. Rptr. 418 (1977) (intentional suppression of material evidence that may be favorable to defendant, despite request, constitutes violation of due process irrespective of good or bad faith of prosecutor).

72. *See* cases cited *supra* note 73.

The phrase "negligent nondisclosure" is used interchangeably with "passive suppression." Since the Supreme Court's decision in *Brady*, numerous lower federal courts have recognized that even a prosecutor's negligent failure to disclose material exculpatory evidence on the part of the prosecutor could provide grounds for reversal. *See, e.g.,* United States v. McCrane, 527 F.2d 906 (3d Cir. 1975); United States v. Fried, 486 F.2d 201 (2d Cir. 1973), *cert. denied,* 416 U.S. 983 (1974); United States v. Miller, 411 F.2d 825 (2d Cir. 1969); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966); United States v. Aprea, 358 F. Supp. 1126 (S.D.N.Y. 1973); Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969), *cert. denied,* 400 U.S. 865 (1970). *See also* Giglio v. United States, 405 U.S. 150 (1972).

73. *See* Nakell, *supra* note 2, at 437-38. Criminal discovery did not exist at common law. Rex v. Holland, 100 Eng. Rep. 1248 (K.B. 1792).

74. The Warren Court enunciated a series of procedural safeguards which served to constitutionalize standards of broad discovery. *See, e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (sixth amendment right to compulsory process); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right of confrontation); Escobedo v. Illinois, 378 U.S. 478 (1964) (sixth amendment right to counsel); Brady v. Maryland, 373 U.S. 83 (1973) (fourteenth amendment right to due process); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment protection against unlawful search and seizure). *See generally* Pye, *The Warren Court and Criminal Procedure,* 67 MICH. L. REV. 249 (1968).

of liberal discovery[75] contrasted the state's elaborate fact-gathering mechanisms[76]—including police investigations,[77] formal pretrial procedures for obtaining evidence,[78] and discovery directly from the accused[79]—with the haphazard investigative resources available to the

75. Proponents of broad discovery include Supreme Court Justice Brennan, Justice Traynor (former Chief Justice of the California Supreme Court), Professors Wigmore, Goldstein, Louisell, and Pye, the American Law Institute, and the American Bar Association. *See* People v. Riser, 47 Cal. 2d 566, 585-86, 305 P.2d 1, 13 (1956), *cert. denied,* 353 U.S. 930 (1957); State v. Tune, 13 N.J. 203, 227-35, 98 A.2d 881, 894-98 (1953) (Brennan, J., dissenting), *cert. denied,* 349 U.S. 907 (1955); 6 J. WIGMORE, EVIDENCE §§ 1850-1855a (3d ed. 1940); ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., THE PROBLEM OF DISCOVERY IN CRIMINAL CASES (1961); ABA ADVISORY COMM. ON PRETRIAL PROCEEDINGS, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Tent. Draft, May 1969); Brennan, *Remarks on Discovery,* 33 F.R.D. 56 (1963); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U.L.Q. 279; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CALIF. L. REV. 56 (1961); Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law,* 14 VAND. L. REV. 921 (1961); Pye, *The Defendant's Case for More Liberal Discovery,* 33 F.R.D. 82 (1963); Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U. L. REV. 228 (1964). *Contra* Grady, *Discovery in Criminal Cases,* 1959 U. ILL. L.F. 827.

76. *See supra* note 5 and accompanying text.

77. For instance, in many cases police arrive at the scene of the crime almost immediately and begin gathering physical and testimonial evidence. Thus, the state promptly obtains an advantage over the accused from the time of preliminary investigation until evidence is sufficient to establish probable cause to bring charges. In addition, the government is well equipped with trained and experienced staff, laboratory and technical facilities, the mutual aid of other law enforcement agencies, and the aid of informants. *See* Nakell, *supra* note 2, at 439-40; Note, *supra* note 5, at 836. In addition, Professor Nakell points out that most citizens, including witnesses to crime, have a natural inclination to cooperate with police officers conducting an investigation. Nakell, *supra* note 2, at 440.

78. For example, the grand jury procedure, which is attended only by grand jurors, the prosecuting attorney, and the testifying witness, enables the state to compel testimony and production of physical and documentary evidence. Although the original purpose behind the fifth amendment right to a grand jury indictment in federal felony proceedings was to ensure that a person would not be prosecuted unless a body of citizens first found probable cause to charge him, the grand jury practice evolved into a highly important investigative mechanism, deriving significance from its power of compulsory process. *See* Nakell, *supra* note 2, at 440-41. Moreover, the grand jury inquiry is not restricted by the rules of evidence, and the accused has no right to appear before the grand jury and confront witnesses. Accordingly, one court has described the grand jury's investigative function as a "fishing expedition." Schwimmer v. United States, 232 F.2d 855, 862-63 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956). Although indictment by grand jury is not constitutionally mandated in state proceedings, a majority of states retains this pretrial mechanism as a means of establishing the existence of probable cause. *See generally* C. WHITEBREAD, *supra* note 42, §§ 19.01-.07, at 375-91; Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings,* 36 MO. L. REV. 193 (1971).

Professor Nakell delineates several other formal pretrial information-gathering devices, including the coroner's inquest in homicide cases and the preliminary hearing. Nakell, *supra* note 2, at 441.

79. Within the limits of appropriate constitutional provisions, the prosecution may search the

often-indigent defendant.[80]

Commentators argued specifically that the prosecutor, in his role as administrator of justice, could expedite the truth-seeking process by presenting any available exculpatory evidence to the defense.[81] Such a practice not only would permit the innocent defendant to prepare properly to meet the issues at trial,[82] but would also allow the guilty defendant to assess intelligently his plea bargaining position.[83] In addition, proponents argued that broad defense discovery would preserve the finality of convictions by limiting the number of appeals stemming from alleged due process violations.[84]

Although the Supreme Court consistently has acknowledged the necessity of providing the accused with an adequate opportunity to pre-

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accused and seize physical evidence from his possession, may interrogate the accused and may derive evidence from the accused through electronic eavesdropping and wiretapping. Moreover, the state may compel the defendant to provide fingerprints and handwriting and voice exemplars for identification, and to participate in a properly conducted lineup. Finally, a prosecutor may obtain blood or urine samples from the accused for scientific analysis. *See generally* Nakell, *supra* note 2, at 441-42.

80. *See generally* ALI-ABA JOINT COMM., *supra* note 80, at 4-6; Nakell, *supra* note 2, at 439-42; Pye, *supra* note 75, at 86.

81. Nakell, *supra* note 2, at 443. *See also* People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956) ("To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts." *Id.* at 586, 305 P.2d at 13.).

Many supporters of liberal criminal discovery also advocate open file disclosure on the part of the prosecutor. *See, e.g.,* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U.L.Q. 279; Goldstein, *supra* note 80, at 1152; Pye, *supra* note 80, at 830; Traynor, *supra* note 80, at 228; Comment, *supra* note 5, at 113. *See also* 2 ABA STANDARDS FOR CRIMINAL JUSTICE § 11-2.1 (2nd ed. 1980) (providing in part that, "(a) upon request of the defense, the prosecuting attorney shall disclose to defense counsel all the material and information within the prosecutor's possession or control. . . ."). This ABA standard is only very narrowly restricted, granting discretion to the court to "deny, delay, or otherwise condition disclosure . . . if it finds that there is a substantial risk . . . of physical harm, intimidation, or bribery resulting from such disclosure which outweighs any usefulness to the defense counsel." *Id.* at § 11-2.5. In addition, no disclosure is required of a prosecutor's work product, of an informant's identity (except under unusual circumstances), or when disclosure threatens national security. *Id.* at § 11-2.6.

82. In support of its proposition for open file disclosure, the ABA argues that not only would open file disclosure "provide the defendant with access to information necessary to test the credibility of prosecution witnesses," but it would also "suggest to the defendant the appropriate course and scope of his defense, thus contributing to the defendant's ability to exercise intelligently the constitutional right to compulsory process." *Id., Commentary* to § 11-2.1(a) at 17-18.

83. Williams v. Florida, 399 U.S. 78, 105-06 (1970) (Burger, C.J., concurring); 2 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 81, *Commentary* to § 11-2.1(a), at 18.

84. *See* 2 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 81, *Commentary* to § 11-2.1(a), at 18.

sent all exculpatory evidence,[85] the Court has not maintained that the prosecutorial duty to disclose mandates complete relinquishment of the prosecutor's files.[86] The Supreme Court's reluctance to require open file disclosure may be attributed to traditional fears that such disclosure will lead to subornation of perjury, bribery or intimidation of witnesses and victims, and loss or destruction of physical evidence.[87] Thus, the prosecutor must disclose only evidence that is both favorable to the defendant and material to the outcome of the trial.[88]

II. APPLICATION OF THE *BRADY* RULE TO UNREQUESTED IMPEACHMENT EVIDENCE: *GARRISON V. MAGGIO*

A. The Decision

The *Agurs* decision resolved a number of issues left open by *Brady* and its progeny and established workable guidelines by which prosecutors can assess their disclosure duties. Presented with a great variety of fact situations, however, lower courts have frequently encountered difficulty in determining which *Agurs* standard to apply.[89] In *Garrison v.*

85. *See* United States v. Agurs, 427 U.S. 97, 106-08 (1976); Moore v. Illinois, 408 U.S. 786, 794-95 (1972); Giglio v. United States, 405 U.S. 150, 154-55 (1972); Brady v. Maryland, 373 U.S. 83, 87-88 (1963); Napue v. Illinois, 360 U.S. 264, 269 (1959).

86. United States v. Agurs, 427 U.S. 97, 106 (1976) ("there is . . . no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor"); Moore v. Illinois, 408 U.S. 786, 795 (1972) ("[w]e know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

87. *See* Traynor, *supra* note 80, at 228-29. Comment, *supra* note 5, at 137-39. *See* Flannery, *The Prosecutor's Case Against Liberal Discovery,* 33 F.R.D. 74 (1963); Comment, *supra* note 63, at 788. Some authorities, however, suggest that such fears are unjustified because of the availability of protective orders for exceptional cases in which disclosure would cause harm to victims, witnesses, or evidence. *See, e.g.,* H.R. REP. NO. 94-247, 94th Cong., 1st Sess. 12, 14 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 674, 686 (comments of the United States Attorney for the Southern District of California before the House Committee on the Judiciary, Federal Rules of Criminal Procedure Amendments Act). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 81, *Commentary* to § 11-2.1(a), at 17. Another means of eliminating these fears would be to allow full disclosure only after the pretrial stages of a proceeding. For some types of evidence, such as evidence impeaching witness' credibility, delayed disclosure would have no effect on the defendant's case. Waiting until trial to disclose substantive exculpatory evidence, however, would prevent a defendant from properly preparing and investigating his defense. Rusin, *supra* note 31, at 218. This problem possibly could be overcome through a defense motion for a continuance. *See also* 6 J. WIGMORE, EVIDENCE, § 1863, at 488 ("The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself").

88. Brady v. Maryland, 373 U.S. 83, 84-85 (1963).

89. *See, e.g.,* United States v. Gaston, 608 F.2d 607 (5th Cir. 1979) (court applied third rather than second *Agurs* standard to case in which defense made specific request for exculpatory mate-

Maggio,[90] the Fifth Circuit found that the facts before it corresponded with none of the three situations set forth in *Agurs*, and accordingly formulated a separate materiality standard for what it perceived as a fourth type of nondisclosure case. That situation, according to *Garrison*, arises when a prosecutor does not disclose voluntarily evidence useful solely for impeachment purposes, and the defense fails specifically to request such evidence.[91]

The petitioner in *Garrison*, convicted in a state proceeding for armed robbery, filed a federal habeas corpus action alleging that the prosecutor had failed to disclose a police report of an interview with the robbery victim.[92] At trial, the victim positively identified the petitioner as the first of two robbers.[93] The victim's description of the first robber in the police report, however, was entirely inconsistent with the petitioner's actual physical appearance.[94] Nevertheless, the victim indicated that the description he had given to investigating police officers during the interview was consistent with his trial testimony.[95] The petitioner's trial counsel was unaware of the report and had made no pretrial request for disclosure of any exculpatory evidence.[96]

The district court granted relief, holding that the prosecutor's failure to disclose the exculpatory information to the petitioner violated the due process requirements espoused in *Brady v. Maryland*.[97] The Fifth Circuit, however, reversed the lower court's decision.[98]

The circuit court began its analysis by recognizing the three catego-

rial); United States v. McCrane, 547 F.2d 204 (7th Cir. 1976) (court held that prosecutor's knowing failure to correct prior inconsistent statement amounted to favorable piece of evidence rather than knowing use of perjury and applied third *Agurs* standard).

90. 540 F.2d 1271, 1274 (5th Cir. 1976), *cert. denied,* 431 U.S. 940 (1977).

91. *Id.* at 1274.

92. *Id.* at 1272-73. At the state habeas corpus proceeding, the prosecutor testified that he did not remember whether the police report had been in his trial file. The Fifth Circuit, however, assumed that the prosecutor had possessed and read the report prior to trial. *Id.* at 1273.

93. *Id.* at 1272-73.

94. *Id.* In the police report, the victim described the first robber as "about 6'1" " with a "slender build." He identified this robber as the one who beat him with a shovel. He described the other robber as "shorter" and "stocky." At trial, the victim identified the petitioner as being the assailant. The petitioner, however, was "about five feet, five inches in height and stocky in build." *Id.* at 1272-73.

95. *Id.* at 1273.

96. *Id.*

97. *Id.* at 1272. The district court, in an unpublished opinion, relied on both Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), in reaching its holding. *Id.*

98. 540 F.2d at 1272.

ries of nondisclosure cases enunciated by the Supreme Court in *Agurs*.[99] The majority summarily dismissed the first two *Agurs* standards as inapplicable.[100] Because the prosecutor failed to disclose voluntarily evidence favorable to the defense, the court concluded that the third *Agurs* situation most closely resembled the *Garrison* facts.[101]

Rather than applying the reasonable doubt standard set forth in *Agurs*, however, the Fifth Circuit enunciated an even stricter materiality standard, adopted from the test applied in Federal Rule of Criminal Procedure 33 motions for a new trial based on newly discovered evidence.[102] The court reasoned that the substantive exculpatory evidence suppressed in *Agurs* should be distinguished from the undisclosed impeachment evidence in the case before it.[103] Mandating prosecutorial disclosure of evidence going to the merits of a case, argued the court, enhances the truth-seeking function of the trial court by maximizing the amount of relevant evidence before the jury.[104] In contrast, a requirement of voluntary disclosure of evidence useful only for impeachment purposes may make government witnesses reluctant to testify, thereby inhibiting complete presentation of relevant evidence to the jury.[105] Thus, the court found that before a new trial can be granted for the nondisclosure of purely impeaching evidence, the defense must demonstrate that disclosure of the evidence "probably would have resulted in an acquittal."[106]

Judge Wisdom, dissenting,[107] rejected the majority's adaptation of the materiality standard used in Rule 33 motions to cases dealing with prosecutorial nondisclosure of impeachment evidence.[108] He argued

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99. *See supra* notes 55-64 and accompanying text.

100. 540 F.2d at 1273. The case involved neither the prosecutor's failure to correct testimony he knew to be false nor his failure to disclose requested exculpatory evidence.

101. *Id.* This category includes cases in which the prosecutor fails voluntarily to disclose unrequested or only generally requested exculpatory evidence. *See supra* notes 61-65 and accompanying text.

102. *See supra* note 65.

103. 540 F.2d at 1273-74.

104. *Id.* at 1274. *See supra* note 85 and accompanying text.

105. 540 F.2d at 1274. The court reasoned that Government witnesses would be "less open with the prosecutor" and might even be totally unwilling to testify voluntarily. *Id.*

106. *Id. See also* FED. R. CRIM. P. 33. The majority concluded that because the victim's trial identification was "unequivocal," the undisclosed evidence satisfied neither the "probable acquittal" standard nor the less severe reasonable doubt standard of *Agurs*. 540 F.2d at 1274.

107. *Id.* at 1274 (Wisdom, J., dissenting).

108. *Id.* at 1275. Judge Wisdom explained in his dissenting opinion that the *Agurs* Court had considered and rejected the Rule 33 standard because the undisclosed evidence had been in the

that in order to safeguard a defendant's right to a fair trial, courts should focus on the *impact* rather than on the *type* of undisclosed evidence.[109] He concluded that such a focus would command application of the *Agurs* standard to impeachment as well as to substantive exculpatory evidence.[110] The dissent reasoned that because substantive evidence generally has greater probative value than impeachment evidence, it is more likely to precipitate a reasonable doubt in the minds of jurors. Thus, even if both types of evidence were subjected to the *Agurs* reasonable doubt standard, the nondisclosure of impeachment evidence would mandate a new trial less frequently.[111]

In addition, Judge Wisdom repudiated the majority's characterization of the undisclosed evidence in question as "purely impeaching."[112] He asserted that beyond its value for impeachment purposes, the witness' prior inconsistent statement would have supported the petitioner's substantive alibi defense.[113] The dissent argued that by using the police report to impeach the government's only witness, the petitioner could have undermined the prosecution's entire case.[114] Thus, the dissent concluded that the petitioner's conviction should have been reversed under the *Agurs* reasonable doubt standard.[115]

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possession of the prosecutor, who affirmatively decided not to reveal it, and not simply discovered from a neutral source after trial. *Id. See supra* note 68. The dissent argued that because this same reasoning is applicable to impeaching evidence, the "probable acquittal" standard should be rejected here as well. *Id.*

109. 540 F.2d at 1276.

110. *Id.* Judge Wisdom stated, "I cannot acquiesce in the majority's view that due process is not violated where the prosecution fails to disclose evidence within its control that 'creates a reasonable doubt that did not otherwise exist' simply because the evidence is deemed 'impeaching' rather than 'exculpatory.'" *Id.* (footnote omitted).

111. *Id.*

112. *Id.* at 1277.

113. *Id.* at 1276-77. Petitioner's sole defense was alibi. He claimed that he was at his sister's house during the entire morning that the shooting took place. Petitioner's testimony was corroborated by that of his sister and her two daughters. The prosecutor testified that he thought the petitioner's alibi witnesses were credible. *Id.* at 1276.

114. *Id.* at 1277. Judge Wisdom stated:

> Characterization problems similar to the one in this case will undoubtedly arise whenever the evidence undisclosed by the prosecution involves a statement by an important prosecution witness that conflicts with his testimony at trial. Thus, the distinction the majority draws between exculpatory and impeaching evidence, for purposes of prosecutorial disclosure, is not only unnecessary; it is largely unworkable.

Id.

115. *Id.* at 1277-78.

B. Reception in the Circuits

Prior to *Garrison* many courts, including the Fifth Circuit, held that undisclosed evidence not directly material to guilt or punishment, but only to the credibility of a prosecution witness, could constitute a *Brady* violation.[116] Additionally, Supreme Court as well as lower court decisions frequently recognized the significant effect that impeachment evidence could have on the outcome of a trial.[117] Although these decisions generally considered the nature of the undisclosed evidence in determining whether the nondisclosure constituted a reversable error,[118] they did not apply separate materiality standards to impeachment evidence.[119] Not surprisingly, then, the circuits disagree on whether to follow the Fifth Circuit's lead by applying the probable acquittal standard of materiality to cases dealing with unrequested,[120] un-

116. *See, e.g.*, United States v. McCrane, 547 F.2d 204 (3d Cir. 1976); United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976); United States v. Pacelli, 491 F.2d 1108, *cert. denied,* 419 U.S. 826 (1974); United States v. Fried, 486 F.2d 201 (2d Cir. 1973), *cert. denied,* 416 U.S. 983 (1974); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973); Corpus v. Beto, 469 F.2d 953 (5th Cir. 1972); United States v. Harris, 462 F.2d 1033 (10th Cir. 1972); Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968); Loraine v. United States, 396 F.2d 335 (9th Cir.), *cert. denied,* 393 U.S. 932 (1968). The factual situations of these cases demonstrate, however, that the impeachment evidence must go to a key prosecution witness in order to be considered sufficiently material.

117. *See, e.g.*, Giglio v. United States, 405 U.S. 150 (1972) (jury's estimate of truthfulness and reliability of a key witness may well be determinative of guilt or innocence); Napue v. Illinois, 360 U.S. 264 (1959) (same); United States v. Hildebrand, 506 F.2d 406 (5th Cir.) (*Brady* applies to both exculpatory and impeaching evidence given that both can affect verdict), *cert. denied,* 421 U.S. 968 (1975); United States v. McGovern, 499 F.2d 1140 (1st Cir. 1974) (same); United States v. Kaplan, 470 F.2d 100 (7th Cir. 1972) (same).

118. *See, e.g.*, Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) (unsolicited perjured testimony typed as impeaching); United States v. Crockett, 534 F.2d 589, 601 (5th Cir. 1976) (evidence of witness' prior criminal record typed as impeaching); Shuler v. Wainwright, 491 F.2d 1213, 1222-23 (5th Cir. 1974) (evidence of victim's prior inconsistent statement typed as impeaching). *See also supra* cases cited at note 117. *See generally* Comment, *supra* note 63, at 790-95 (author distinguishes among eyewitnesses testimony, physical evidence, impeachment evidence, and evidence of witness' inconsistent statements). The results in cases involving undisclosed evidence vary depending on the type of evidence disclosed.

119. *See supra* cases cited notes 117-18. *See also* United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973); Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968); United States v. Hearst, 424 F. Supp. 307, 313 (N.D. Cal. 1976), *aff'd,* 563 F.2d 1311 (9th Cir. 1977).

120. All circuits agree that when a specific defense request is made for impeachment evidence, the second *Agurs* materiality test should be applied. A new trial will be mandated if the suppressed impeachment evidence "might have affected the outcome of the trial." *See* Scurr v. Niccum, 620 F.2d 186, 189-91 (8th Cir. 1980) (failure to disclose evidence impeaching sole accomplice despite specific defense request requires reversal); Monroe v. Blackburn, 607 F.2d 148, 151-52 (5th Cir. 1979) (failure to disclose impeachment evidence addressing substantive issue upon request mandates reversal), *cert. denied,* 446 U.S. 957 (1980); United States v. DiFrancesco, 604 F.2d 769,

disclosed impeachment evidence.[121]

The Fifth Circuit continues routinely to follow its *Garrison* holding.[122] Recently, in *United States v. Mesa*,[123] the court found that nondisclosure of evidence impeaching a government informant's good character did not warrant a new trial because it satisfied neither the *Agurs* reasonable doubt standard nor the probable acquittal standard enunciated in *Garrison*.[124] Although the Fifth Circuit has applied the *Garrison* standard to numerous cases, it has never reversed a defendant's conviction on the ground that the undisclosed evidence probably would have produced an acquittal.[125]

In *United States v. Jackson*,[126] the Tenth Circuit indicated approval[127] of the Fifth Circuit's approach by holding that a prosecutor's failure to disclose voluntarily evidence of payment to a government witness did not require a new trial, because the evidence probably would not result in an acquittal on retrial.[128] The Tenth Circuit, however, has never expressly adopted the *Garrison* standard.

Other circuit courts remain unreceptive to the Fifth Circuit's separate standard of materiality for impeachment evidence.[129] The First Circuit has repeatedly decided to leave the question open,[130] frequently

774 (2d Cir. 1979) (failure to disclose witness' comments pursuant to a specific request does not demand new trial where comments did not sufficiently impeach witness so as to affect the outcome of trial), *cert. granted,* 444 U.S. 1070 (1980).

121. *See infra* notes 121-42 and accompanying text.

122. *See* United States v. Mesa, 660 F.2d 1070, 1076-77 (5th Cir. 1981); Hughes v. Hopper, 629 F.2d 1036, 1039 (5th Cir. 1980); Monroe v. Blackburn, 607 F.2d 148, 151 (5th Cir. 1979), *cert. denied,* 446 U.S. 957 (1980); United States v. Parker, 586 F.2d 422, 435 (5th Cir.), *cert. denied,* 441 U.S. 962 (1978); Galtieri v. Wainwright, 582 F.2d 348, 363 (5th Cir. 1978) (en banc); United States v. Anderson, 574 F.2d 1347, 1354 (5th Cir. 1978); United States v. Crisp, 563 F.2d 1242, 1245 (5th Cir. 1977); Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1976); United States v. Blalock, 449 F. Supp. 916, 920 (N.D. Ga. 1978).

123. 660 F.2d 1070 (1981).

124. *Id.* at 1076.

125. *See supra* cases cited at note 122.

126. 579 F.2d 553 (10th Cir.), *cert. denied,* 439 U.S. 981 (1978).

127. The *Jackson* court did not explicitly cite the Fifth Circuit's decision in *Garrison v. Maggio*.

128. *Id.* at 560. The court noted that the Rule 33 probable acquittal standard is not generally applied to cases involving nondisclosure of impeachment evidence, but nevertheless proceeded to adopt the standard. The court did not reveal its reasoning in making this determination. *Id.* at 557. In reaching its holding, the court reasoned that the witness' testimony was well-corroborated by other witnesses and documentation.

129. *See infra* notes 130-41 and accompanying text.

130. *See* United States v. Talavera, 668 F.2d 625, 632 (1st Cir.), *cert. denied,* 102 S. Ct. 2245 (1982); Zeigler v. Callahan, 659 F.2d 254, 266 (1st Cir. 1981); Mains v. Butterworth, 619 F.2d 83,

finding that the undisclosed evidence satisfies neither *Agurs* nor *Garrison*.[131] A majority of the circuits that have considered the issue, however, have explicitly rejected *Garrison*, choosing instead to retain the *Agurs* reasonable doubt standard.[132]

In *United States ex rel. Annunziato v. Manson*,[133] for instance, the United States District Court for the District of Connecticut adopted the Supreme Court's standard, asserting that although *Agurs* dealt only with substantive evidence withheld by the prosecution, its holding should apply equally to undisclosed impeachment evidence.[134] Citing both *Napue v. Illinois*[135] and *Giglio v. United States*,[136] the court reasoned that impeachment evidence is often as significant as substantive exculpatory evidence in determining a defendant's guilt or innocence.[137] The Second Circuit affirmed the district court's holding, thereby adopting the *Agurs* materiality standard.[138]

While the Eighth and Ninth Circuits employ similar rationales in applying *Agurs* rather than *Garrison*,[139] the Seventh Circuit reached the same result by asserting that the distinction between the two standards is "chimerical."[140] Evidence that creates a reasonable doubt as to a defendant's guilt, reasoned the court in *Ruiz v. Cady*, should produce an acquittal.[141] State courts that have confronted the issue also refuse to implement a different materiality standard for impeachment evidence.[142]

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86 (1st Cir.), *cert. denied,* 449 U.S. 864 (1980); United States v. Imbruglia, 617 F.2d 1, 7 (1st Cir. 1980); United States v. Strahl, 590 F.2d 11, 13 (1st Cir. 1978).

131. The First Circuit typically acknowledges the *Garrison* standard and proceeds to state that a decision between *Garrison* and *Agurs* is unnecessary, as the undisclosed evidence in question satisfies neither test. *See, e.g.,* Mains v. Butterworth, 619 F.2d at 86.

132. *See infra* notes 134-41 and accompanying text.

133. 425 F. Supp. 1272 (D. Conn. 1976), *aff'd,* 566 F.2d 410 (2d Cir. 1977). In *Annuziato*, the prosecutor failed to disclose promises of leniency made to a state's witness. *Id.* at 1272-73.

134. *Id.* at 1280. The court argued that, "the same standard applies whether the nondisclosed evidence goes to the fact of the crime or tends to impeach a critical witness. . . ." *Id.*

135. 360 U.S. 264, 269 (1959). *See supra* notes 27-28 and accompanying text.

136. 405 U.S. 105, 154 (1972). *See supra* notes 47-50 and accompanying text.

137. 425 F. Supp. at 1280. The court held that had the undisclosed evidence been introduced to the jury, it "would have created a reasonable doubt as to petitioner's guilt." *Id.*

138. United States *ex rel.* Annuziato v. Manson, 566 F.2d 410 (2d Cir. 1977).

139. *See* United States v. Young, 618 F.2d 1281, 1287 (8th Cir.), *cert. denied,* 449 U.S. 844 (1980); United States v. Ramirez, 608 F.2d 1261, 1266 (9th Cir. 1979); United States v. Lasky, 548 F.2d 835, 839 (9th Cir. 1977); United States v. Hearst, 435 F. Supp. 29, 31 (N.D. Cal. 1977).

140. Ruiz v. Cady, 635 F.2d 584, 587 (7th Cir. 1980), *rev'd,* 660 F.2d 337 (1981).

141. *Id.* at 586-87.

142. *See, e.g.,* Strickland v. United States, 389 A.2d 1325, 1328 (D.C. Ct. App. 1978); Williams

III. ANALYSIS

United States v. Agurs[143] provides no support for the Fifth Circuit's distinction between types of evidence and its implementation of a separate materiality standard for impeachment evidence. Although *Agurs* does not explicitly hold that the standard of materiality should be identical whether the evidence is substantively exculpatory or purely impeaching, neither does it distinguish between the two types of evidence. The *Agurs* Court based its delineation of materiality standards on the circumstances surrounding the particular nondisclosure, not on the type of undisclosed evidence.[144]

Following the Supreme Court's reasoning, lower courts should apply the same standard of materiality regardless of whether the undisclosed evidence is substantive or impeaching in nature. Because impeachment evidence is characteristically less likely to affect the defendant's guilt or punishment,[145] nondisclosure will rarely command a reversal, even under the *Agurs* standard of review.[146]

Nevertheless, the *Garrison* majority argued that impeachment evidence warrants a stricter materiality standard because the probative value of such evidence is less than that of substantive evidence.[147] This argument overlooks the well-established notion that impeachment evidence can be as exculpatory as evidence going directly to the merits of

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v. Commonwealth, 569 S.W.2d 139, 143 (Ky. 1978); State v. Falkins, 356 So. 2d 415, 419 (La. 1978); State v. Eldridge, 412 A.2d 62, 67 (Me. 1980); Commonwealth v. Ellison, 376 Mass. 1, 24, 372 N.E.2d 560 (1978); Cassibry v. State, 404 So. 2d 1360, 1371 (Miss. 1981); Lee v. State, 573 S.W.2d 131, 133 (Mo. Ct. App. 1978); Quinones v. Texas, 592 S.W.2d 933, 941 (Tex.), *cert. denied,* 444 U.S. 893 (1980).

143. 427 U.S. 97 (1976).

144. *See supra* notes 51-65 and accompanying text. *See also* Rusin, *supra* note 31, at 212.

145. Evidence directly impeaching a witness' credibility as to one of the facts in issue often has as much probative value as substantive exculpatory evidence. More frequently, however, impeachment evidence serves to attack the witness' credibility in general. Nondisclosure of this type of evidence in most cases will have little effect on the outcome of a case. *See* Garrison v. Maggio, 540 F.2d 1271, 1276 (1976), *cert. denied,* 431 U.S. 940 (1976) (Wisdom, J., dissenting). *See generally infra* notes 146-58 and accompanying text.

146. *See* 540 F.2d 1271, 1274 ("even under the reasonable doubt standard of *Agurs*, the [undisclosed evidence] does not pass the test"). *See also* Mains v. Butterworth, 619 F.2d 83, 86 (1st Cir.) (nondisclosure of evidence indicating witness' intoxication did not require reversal under reasonable doubt standard), *cert. denied,* 449 U.S. 864 (1980); United States v. Gloria, 494 F.2d 477, 484 (5th Cir. 1974) (undisclosed evidence of prior misdemeanor convictions does not constitute reasonable doubt as to defendant's guilt), *cert. denied,* 419 U.S. 995 (1974); Link v. United States, 352 F.2d 207, 212 (8th Cir.) (nondisclosure of witness' prior misidentification not grounds for reversal under reasonable doubt standard), *cert. denied,* 383 U.S. 915 (1965).

147. 540 F.2d at 1274. *See supra* notes 102-06 and accompanying text.

the case.[148] Numerous lower courts, for example, have held that undisclosed evidence satisfies the *Brady* materiality standard if such evidence can be used to impeach the credibility of a key prosecution witness.[149]

Moreover, the Supreme Court has repeatedly acknowledged the critical role impeachment evidence may play in a criminal proceeding.[150] In *Napue v. Illinois*,[151] for instance, the Court observed that the duty to disclose does not cease merely because the undisclosed evidence relates only to the credibility of a witness.[152] The jury's characterization of the veracity of a particular witness, argued the Court, may determine the outcome of a case.[153]

In addition, evidence affecting a witness' credibility may simultaneously constitute substantive exculpatory evidence.[154] In *Giles v. Maryland*,[155] for example, an undisclosed police report contained statements that were inconsistent with the prosecutrix's rape allegation.[156] The Supreme Court held that this evidence was relevant not only to the

148 *See supra* note 117 and accompanying text.

149. *See supra* notes 116, 133 & 134 and accompanying text. *See also* United States v. Poole, 379 F.2d 645, 649 (7th Cir. 1967) (*Brady* materiality requirement met where substantial likelihood evidence impeaching credibility of key state witness would have affected outcome of trial); Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966) (same); Link v. United States, 352 F.2d 207, 212 (8th Cir. 1965) (evidence impeaching key witness can be "of such inherent significance as to represent fundamental unfairness"); *Ex parte* Turner, 545 S.W.2d 470, 473 (Tex. Crim. App. 1977) (*Brady* materiality requirement met where state failed to disclose knowledge of key witness' motivation to fabricate testimony).

150. *See infra* notes 151-153 and accompanying text.

151. 360 U.S. 264 (1959). *See supra* notes 27-28 and accompanying text.

152. 360 U.S. at 269.

153. *Id. See also* Giglio v. United States, 405 U.S. 150, 154 (1972) (Court adopts verbatim argument in *Napue*). *See generally supra* notes 47-50 and accompanying text.

154. *See supra* notes 155-59 and accompanying text. Prior inconsistent statements in particular are often relevant to the material facts in issue. *See, e.g.,* Garrison v. Maggio, 540 F.2d 1271, 1277 (5th Cir. 1976) (Wisdom, J., dissenting) ("[T]he notion that a witness' prior inconsistent statements may constitute substantive exculpatory evidence, in addition to being useful for impeachment, is not a new one"), *cert. denied,* 431 U.S. 940 (1977).

155. 386 U.S. 66 (1967). *See supra* note 46.

156. 386 U.S. at 71-72. The police report revealed that: (1) the prosecutrix was on probation at the time of the alleged rape for juvenile delinquency; (2) five weeks after the alleged rape the prosecutrix had sexual relationships with two men and later took an overdose of sleeping pills; (3) the prosecutrix's boyfriend testified that he and the prosecutrix were engaging in sexual relations in the back of his automobile when the two alleged rapists approached the car; (4) the prosecutrix had admitted that in the previous two years she had had sexual relations with numerous men, some of whom she did not know; and (5) the prosecutrix had previously been hospitalized in a psychiatric ward. *Id.* at 69-71.

credibility of the prosecution witnesses, but also to the material fact at issue of "whether [the defendant] had raped the girl."[157] Similarly, the Fifth Circuit itself previously found that evidence capable of impeaching a witness' testimony was also material to a defendant's principle defense.[158]

Assuming arguendo the validity of the *Garrison* distinction, however, it is not clear that the Fifth Circuit accomplished its goal. The *Garrison* majority sought to adopt a stricter standard of materiality for unrequested impeachment evidence than for unrequested substantive evidence.[159] The *Garrison* court naturally looked to the *Agurs* opinion[160] for guidance in determining what sort of standard to implement.[161]

In defining the third level of materiality, applicable in the absence of a specific request for exculpatory information,[162] the *Agurs* Court discarded as too stringent the probable acquittal standard customarily used in Rule 33 motions for a new trial based on newly discovered

157. *Id.* at 77. *See also* Alcorta v. Texas, 355 U.S. 28, 31-32 (Court acknowledges substantive value of prior inconsistent statements).

158. Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973). The *Garrison* court, however, failed to recognize that impeachment evidence can have a substantive effect on an alibi defense.

The material value of impeachment evidence, of course, ultimately depends on a myriad of considerations, including the nature of the impeachment, the severity of the impeachment, and the significance of the witness involved to the particular case. For instance, evidence that may directly impeach a witness' credibility on material facts in issue, such as evidence of prior inconsistent statements about important facts, prior misidentifications, and bias, will satisfy the *Brady* materiality requirement far more frequently than evidence attacking only the general character of a witness. *Compare* Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976) (nondisclosure of witness' prior misidentification required reversal under *Brady*) *and* Carter v. State, 237 Ga. 617, 229 S.E.2d 411 (1976) (nondisclosure of witness' prior inconsistent statement required reversal under *Brady*) *with* United States v. Stassi, 544 F.2d 579 (2d Cir. 1976) (nondisclosure of evidence of bad acts on part of witness not material within meaning of *Brady* rule). Similarly, impeachment evidence that completely devastates the veracity of a witness is more probative than evidence that reveals only minor inconsistencies. *See, e.g.,* United States v. Hedgeman, 564 F.2d 763 (7th Cir. 1977) (no disclosure required where evidence only arguably impeaches a witness); United States v. Hearst, 424 F. Supp. 307 (N.D. Cal. 1976) (no disclosure required where evidence only partially impeaches the witness), *aff'd,* 563 F.2d 1331 (9th Cir. 1977); Jefferson v. State, 141 Ga. App. 712, 234 S.E.2d 333 (1977) (no disclosure required if inconsistencies between prior statement and trial testimony only slight). Finally, the nondisclosure of evidence that impeaches a critical government witness is more likely to require a new trial than is evidence of a witness that is corroborated by other witnesses. *See supra* cases cited at notes 116 & 149. *See generally* E. CLEARY (ed.), McCormick on Evidence § 41, at 81-82 (2d ed. 1979); Rusin, *supra* note 31, at 212-14.

159. *See supra* notes 102-06 and accompanying text.

160. *See supra* notes 99-101, *infra* notes 162-65 and accompanying text.

161. 540 F.2d 1271, 1273-74 (1976).

162. *See supra* notes 61-65 and accompanying text.

evidence.[163] The *Agurs* Court reasoned that a more flexible standard of materiality should apply to newly discovered evidence found in the possession of the prosecutor who is under a special disclosure duty than to evidence discovered from a neutral source, to whom no such duty attaches.[164] Thus, the Supreme Court proceeded to adopt the reasonable doubt standard, which it perceived as less strict.[165]

Whether the Rule 33 "probable acquittal" standard is in fact more stringent than the reasonable doubt standard, however, is debatable. The *Agurs* dissent argued that the two standards are coterminus.[166] The majority's test, that the evidence in the context of the entire record must raise a reasonable doubt about the defendant's guilt in the mind of the judge, inevitably would require a showing that the evidence probably would have produced an acquittal.[167] The Seventh Circuit reiterated this argument in *Ruiz v. Cady*.[168]

Not only is the Fifth Circuit's approach logically inconsistent with prior Supreme Court holdings[169] and of questionable validity as a "stricter" materiality standard,[170] it is also contrary to the policies underlying *Brady* and its progeny.[171] Because lower courts are naturally inclined to adopt the Supreme Court's appraisal of the relative stringency of the reasonable doubt and the probable acquittal standards,[172] they will continue to interpret the latter as more stringent. As the post-

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163. *See supra* note 65 and accompanying text.

164. 427 U.S. at 111. In reaching this conclusion, the *Agurs* Court reasoned that if the Rule 33 standard were applied "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Id.* One commentator argues, however, that ordinary witnesses have a civic obligation to come forward with any evidence they may possess in order to ensure that justice is achieved in the courts. *See* 14 AM. CRIM. L. REV. 319, *supra* note 70, at 328 n.67.

165. 427 U.S. at 111.

166. *Id.* at 116.

167. *Id.* Justice Marshall, writing for the dissent, stated:

> [T]he burden . . . imposed [by the majority] is at least as severe . . . as the burden [the defendant] generally faces on a Rule 33 motion. Surely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence 'probably would have resulted in acquittal' (the general Rule 33 standard).

Id.

168. Ruiz v. Cady, 635 F.2d 584, 587 (7th Cir. 1980), *rev'd,* 660 F.2d 337 (1981). For a discussion of *Ruiz,* see *supra* notes 140-41 and accompanying text.

169. *See supra* notes 143-58 and accompanying text.

170. *See supra* notes 140, 141, 167 & 168 and accompanying text.

171. *See supra* notes 69-88 and accompanying text.

172. *See, e.g.,* cases cited at notes 122, 130, 133, 138-40 & 142. *See also* Garrison v. Maggio, 540 F.2d 1273, *cert. denied,* 431 U.S. 940 (1977).

Garrison decisions illustrate, courts implementing the probable acquittal standard very rarely require reversals for prosecutorial nondisclosure of impeachment evidence.[173] Being virtually certain that their failure to reveal exculpatory impeachment evidence to the defense will not be successfully challenged on appeal, prosecutors will have no incentive to fulfill their disclosure duties. Thus, not only will the Fifth Circuit's approach destroy the defendant's opportunity to present all favorable evidence to the jury, but it will encourage prosecutorial misconduct as well.

IV. CONCLUSION

The Fifth Circuit's distinction between impeaching and substantive exculpatory evidence, apart from being of questionable validity, is unsupported by previous Supreme Court decisions. Recognizing that impeachment evidence can be as exculpatory as substantive evidence and that it may even directly affect the material facts in issue, the Supreme Court delineated materiality standards based on the circumstances in which the nondisclosure arose, not on the nature of the undisclosed evidence. Moreover, the Fifth Circuit's approach is inconsistent with the policies underlying the disclosure duty. Implementation of the probable acquittal standard is repugnant not only to the deterrence rationale emphasized in the early nondisclosure cases, but also to the Supreme Court's focus in *Brady* and its progeny on the defendant's right to a fair trial. Thus, the criminal defendant's constitutional interests will best be served if courts continue to reject the Fifth Circuit's approach to undisclosed, unrequested impeachment evidence.

D. Jeanne Knowles

173. *See supra* note 125 and accompanying text.