**Washington University Law Review**

Volume 1976 | Issue 3

January 1976

# Prosecutor's Duty to Disclose Reconsidered, United States v. Agurs, 96 S. Ct. 2392 (1976)

# COMMENTS

## PROSECUTOR'S DUTY TO DISCLOSE RECONSIDERED

### *United States v. Agurs*, 96 S. Ct. 2392 (1976)

In *United States v. Agurs*,[1] the Supreme Court extended the prosecutor's constitutional duty to disclose material evidence to the defendant in the absence of a specific request, but adopted a harsh standard of materiality reflective of the Court's changing attitude toward the requirements of procedural due process. Charged with second degree murder for the stabbing death of one Sewell, respondent sought to establish at trial that Sewell had a violent character, and that she had stabbed him in self-defense.[2] Several months after her conviction,[3] her attorney moved for a new trial, alleging that the prosecutor's failure to reveal Sewell's past criminal record[4] denied her due process under the fifth amendment.[5] After the District Court for the District of Columbia denied respondent's motion,[6] the Court of Appeals for the District of Columbia Circuit reversed, holding that the prosecutor's failure to reveal material evidence to the defense constituted a denial of the respondent's constitutional right to a fair trial despite the absence of a specific request during the trial for such information.[7] The court found decedent's prior criminal record sufficiently material to merit a a new trial because "if brought to the attention of the jury, '[it] might have led the jury to entertain a reasonable doubt about appellant's guilt.' "[8] The Supreme Court reversed, and *held*: The due process

1. 96 S. Ct. 2392 (1976).
2. *Id.* at 2395-96.
3. *Id.* at 2395.
4. *Id.* at 2396. Sewell's prior criminal record included a guilty plea to a charge of assault and carrying a deadly weapon in 1963 and to a charge of carrying a deadly weapon in 1971.
5. *See* notes 11-20 *infra* and accompanying text.
6. The court found that the evidence was not material. *See* United States v. Agurs, 510 F.2d 1249, 1253 (D.C. Cir. 1975), *rev'd*, 96 S. Ct. 2392 (1976).
7. *Id.*
8. *Id., citing* Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966). The Supreme Court inaccurately described the District of Columbia Circuit's standard:

[I]ts nondisclosure [referring to Sewell's prior criminal record] required a new

clause of the fifth amendment requires a prosecutor to disclose voluntarily to the defense material exculpatory evidence.[9] The standard of materiality is whether the undisclosed evidence, evaluated in the context of the entire trial record, creates in the mind of the reviewing judge a reasonable doubt of defendant's guilt or innocence.[10]

The fifth and fourteenth amendments mandate that no person be denied life, liberty, or property without due process of law.[11] Traditionally, denial of due process in a criminal trial was "the failure to observe that fundamental fairness essential to the very concept of justice."[12] Due process was violated only when the act complained of fatally infected the fairness of the conviction or shocked the "universal sense of justice."[13] The Warren Court considerably expanded the specific procedural rights due a criminal defendant[14] because it consid-

trial because the jury might have returned a different verdict if the evidence had been received.

United States v. Agurs, 96 S. Ct. 2392, 2397 (1976).

9. United States v. Agurs, 96 S. Ct. 2392, 2401 (1976).

10. *Id.* at 2401-02.

11. Brady v. Maryland, 373 U.S. 83, 87-88 (1963); Griffin v. United States, 336 U.S. 704, 708-09 (1950); Betts v. Brady, 316 U.S. 455, 462, 473 (1941); Berger v. United States, 295 U.S. 78, 88 (1935); Mooney v. Holohan, 294 U.S. 103, 110-14 (1935).

12. Lisenba v. California, 314 U.S. 219, 236 (1941). *See also* Feldman v. United States, 322 U.S. 487, 492-94 (1943); Betts v. Brady, 316 U.S. 455, 462, 473 (1941); Mooney v. Holohan, 294 U.S. 103, 110-13 (1935).

13. Betts v. Brady, 316 U.S. 455, 463 (1941). *Accord*, Lisenba v. California, 314 U.S. 219, 236-38 (1941). *See, e.g.*, Chambers v. Florida, 309 U.S. 103 (1939) (inducing defendant by threats to testify against himself); Brown v. Mississippi, 297 U.S. 278 (1935) (extorting testimony by physical torture); Mooney v. Holohan, 294 U.S. 103 (1935) (suborning perjured testimony by prosecution); Moore v. Dempsey, 261 U.S. 86 (1922) (trial dominated by mob violence).

14. The Warren Court articulated a series of specific procedural safeguards embodied within the Bill of Rights intended not merely to protect the accused from overreaching by the state, but also to protect the integrity of the judicial system. Its decisions developing the prosecutor's duty to disclose gave substance to the fifth and fourteenth amendment guarantee of procedural due process. *See* Brady v. Maryland, 373 U.S. 83 (1963) (fifth and fourteenth amendment fair trial requirement). *See also* Spinette v. United States, 393 U.S. 410 (1969) (fourth amendment warrant provisions); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment jury trial clause); Washington v. Texas, 388 U.S. 14 (1967) (sixth amendment compulsory press clause); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment confrontation of witness clause); Escobedo v. Illinois, 378 U.S. 478 (1964) (sixth amendment assistance of counsel clause); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment search and seizure provision). *See generally* Fahringer, *Has Anyone Here Seen Brady?: Discovery in Criminal Cases*, 9 CRIM. L. BULL. 325 (1973); George, *From Warren to Burger to Chance—Future Trends in the Administration of Criminal Justice*, 12 CRIM. L. BULL.

ered the procedural aspects of the trial to be as important as the accuracy of the factfinding process.[15] The traditional "fundamental fairness" standard, in the Warren Court's view, was too vague to ensure the requisite procedural fairness.[16]

The Burger Court has significantly retreated from this position in articulating a constitutional philosophy consonant with more traditional concepts of due process.[17] Under this approach the central concern in criminal proceedings is the ultimate question of guilt or innocence,[18] and procedures are simply a means to achieve the ultimate goals of the legal system, truth and justice.[19] Unlike its predecessor, the present Court has focused predominantly on the accuracy of the verdict. Accordingly, the Court has been reluctant to overturn convictions because of constitutionally deficient procedures absent a showing of fundamental injustice in the result or procedures that shock the conscience of the Court.[20]

In *Brady v. Maryland*,[21] the Warren Court found that the fair trial requirement implicit in the fourteenth amendment required the pros-

253 (1976); Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968); Rosen, *Contemporary Winds and Currents in Criminal Law, with Special Reference to Constitutional Criminal Procedure: A Defense and Appreciation*, 27 MD. L. REV. 103 (1967).

15. *See* notes 80-85 *infra* and accompanying text.

16. *See* note 14 *supra*.

17. *See* notes 12 & 13 *supra* and accompanying text. *See, e.g.*, Stone v. Powell, 96 S. Ct. 3037, 3049-50 (1976); United States v. Russell, 411 U.S. 423, 434-36 (1973).

18. Stone v. Powell, 96 S. Ct. 3037, 3049-50 (1976); United States v. Agurs, 96 S. Ct. 2392, 2401 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 274 (1973) (concurring opinion). *See generally* Nakell, *The Effect of Due Process on Criminal Defense Discovery*, 62 KY. L.J. 58, 58, 59 (1973); Shapiro, *Searches, Seizures and Lineups: Evolving Constitutional Standards Under the Warren and Burger Courts*, 20 N.Y.L.F. 217 (1974); Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 422-26 (1974).

19. United States v. Agurs, 96 S. Ct. 2392, 2401-02 (1976). The Burger Court has noted that undue consideration of the procedural aspects of the trial intrudes on three important values: 1) effective maintenance of limited judicial resources; 2) the necessity of finality in criminal trials; and, 3) the deterrent function of the law. Stone v. Powell, 96 S. Ct. 3037, 3049-50 (1976). *See* note 18 *supra*.

20. *See, e.g.*, Stone v. Powell, 96 S. Ct. 3037 (1976) (fourth amendment search and seizure); Michigan v. Tucker, 417 U.S. 433 (1974) (fifth amendment privilege against self-incrimination); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (fourth amendment search and seizure clause); United States v. Russell, 411 U.S. 423 (1973) (entrapment); Moore v. Illinois, 408 U.S. 786 (1972) (fifth amendment fair trial requirement).

21. 373 U.S. 86 (1963).

ecution to disclose material evidence requested by the defense.[22] Defense counsel in *Brady* had specifically requested all extrajudicial statements made by the defendant's accomplice;[23] the prosecution disclosed several statements, but withheld an extrajudicial confession favorable to the defendant.[24] The Supreme Court held that

> [t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution.[25]

Although earlier cases had concentrated on the willful misbehavior of the prosecutor,[26] the *Brady* Court focused on the harm to the defendant resulting from the nondisclosure of the evidence by the prosecution.[27] Consequently, the materiality of the undisclosed evidence assumed overriding significance. The *Brady* opinion, however, did not set forth a standard of materiality to govern the prosecutor's constitutional duty to disclose.[28]

Many courts[29] and commentators[30] argue that the prosecutor's duty

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22. *Id.* at 87-88.

23. *Id.* at 84.

24. *Id.*

25. *Id.* at 87.

26. *See* Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); White v. Ragen, 324 U.S. 760 (1945); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935). *See also* Giglio v. United States, 405 U.S. 150 (1972); Miller v. Pate, 386 U.S. 1 (1967).

27. Brady v. Maryland, 373 U.S. 83, 87 (1963).

28. Although the Court found a violation of due process when the evidence was material as to guilt or punishment, the Court failed to articulate a standard by which courts and prosecutors alike could measure the significance of a particular item of information. The same criticism can be leveled against the *Agurs* Court's standard. *See* notes 30 & 77-79 *infra* and accompanying text.

29. *See* Bursey v. Weatherford, 528 F.2d 483, 487 (4th Cir. 1975); 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); Williams v. Dutton, 400 F.2d 797, 801 (5th Cir. 1968), *adhered to sub. nom.* Evans v. Dutton, 441 F.2d 657 (5th Cir. 1971); Jackson v. Wainwright, 390 F.2d 288, 297 (5th Cir. 1968); *In re* Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962).

30. Fahringer, *supra* note 14, at 327; Note, *Discovery and Disclosures: Dual Aspects of the Prosecutor's Role in Criminal Procedure*, 34 GEO. WASH. L. REV. 92, 105 (1965); Note, *Implementing Brady v. Maryland: An Argument for a Pretrial Open File Policy*, 43 U. CIN. L. REV. 889, 890 (1974); 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).

to disclose arises from the government's superior discovery resources. These authorities reason that this practical imbalance in investigative resources causes inherent unfairness to the defendant in a criminal trial.[31] To redress this imbalance and ensure that a defendant receives a fair opportunity to use all favorable evidence, the prosecutor is obligated to make certain affirmative disclosures.[32] This duty to disclose neither requires full disclosure[33] nor permits a "combing of the prosecutors' files" for all information conceivably useful to the defendant.[34] Courts have, therefore, required prosecutors to disclose only evidence favorable to an accused[35] and material to the question of guilt or punishment[36] or affecting the credibility of a key prosecution witness.[37]

Prior to *United States v. Agurs*,[38] courts employed essentially three standards of materiality when a defendant first discovered favorable evidence after his conviction. When the prosecutor deliberately suppressed evidence favorable to the accused, knowingly relied on false testimony, or otherwise acted in bad faith, courts have adopted an almost per se rule of materiality.[39] The standard generally applied is whether the suppressed evidence "*might* in any reasonable likelihood *have affected* the judgment of the jury."[40] To deter prosecutorial misconduct which by itself undermines the integrity of the judicial system,

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31. *See* notes 29 & 30 *supra* and accompanying text.

32. Brady v. Maryland, 373 U.S. 83, 87-88 (1963). *See generally* authorities cited note 30 *supra.*

33. Moore v. Illinois, 408 U.S. 786, 795 (1972) ("We 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"); United States v. Bowles, 488 F.2d 1307, 1313 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); United States v. Brumley, 466 F.2d 911 (10th Cir. 1972), *cert. denied*, 412 U.S. 929 (1973).

34. United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975), *quoting* United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968).

35. Moore v. Illinois, 408 U.S. 786 (1972); Brady v. Maryland, 373 U.S. 83 (1963); United States v. Crow Dog, 532 F.2d 1182, 1190 (8th Cir. 1976); United States v. Donatelli, 484 F.2d 505, 508 (1st Cir. 1973).

36. Moore v. Illinois, 408 U.S. 786, 795 (1972); Brady v. Maryland, 373 U.S. 83, 87 (1963); United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 765 (3d Cir. 1955).

37. Giglio v. United States, 405 U.S. 150, 154-55 (1972); Napue v. Illinois, 360 U.S. 264 (1959); United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972).

38. 96 S. Ct. 2392 (1976).

39. *See* cases cited note 26 *supra.*

40. Giglio v. United States, 405 U.S. 150, 155 (1972) (emphasis added). *See* Napue v. Illinois, 360 U.S. 264 (1959); White v. Ragen, 324 U.S. 760 (1945); Curren v. Delaware, 259 F.2d 707 (3d Cir.), *cert. denied*, 358 U.S. 948 (1958). *See* cases cited note 26 *supra.*

courts have liberally applied the "might have affected" standard.[41] On occasion, some courts have found that deliberately suppressed information is material almost by definition.[42] Thus, the presence of prosecutorial misconduct often reduces the defendant's burden of proving materiality.[43]

When the prosecutor in good faith fails to disclose favorable evidence, courts have imposed a more stringent standard of materiality.[44] The standard widely adopted by lower federal courts was whether "there was a significant chance that this added item [the nondisclosed evidence], developed by *skilled counsel* as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid conviction."[45] Good faith materiality standards are the product of con-

41. *See* Giglio v. United States, 405 U.S. 150, 155 (1972); Miller v. Pate, 386 U.S. 1, 6-7 (1966); Napue v. Illinois, 360 U.S. 264, 271 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). *See also* Woodcock v. Amaral, 511 F.2d 985, 989 (1st Cir. 1974), *cert. denied*, 423 U.S. 841 (1975); United States v. Pfingst, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 414 U.S. 919 (1974); United States v. Diaz-Rodriguez, 478 F.2d 1005, 1007 (9th Cir. 1973).

42. United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968) (deliberate suppression also includes failure to disclose information whose high probative value to the defense could not have escaped the prosecutor's attention). The Second Circuit has adopted this approach. *See* United States v. Polisi, 416 F.2d 573, 577-78 (2d Cir. 1969).

43. Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. McCord, 509 F.2d 334, 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975) (recognizing rule); United States v. Gerard, 491 F.2d 1300, 1302 (9th Cir. 1974); United States v. Keogh, 391 F.2d 138, 147-48 (2d Cir. 1968) (recognizing rule).

44. United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976); United States v. Marrero, 516 F.2d 12 (7th Cir.), *cert. denied*, 423 U.S. 862 (1975); Woodcock v. Amaral, 511 F.2d 985 (1st Cir. 1974), *cert. denied*, 423 U.S. 841 (1975); United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975); Grant v. Alldredge, 498 F.2d 376 (2d Cir. 1974); United States v. Pfingst, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 414 U.S. 919 (1974); 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); Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967); United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966). Negligent nondisclosure and good faith passive nondisclosure have been used synonomously. Regardless of the label used, cases in which the prosecutor in good faith fails to reveal evidence favorable to the accused have been analyzed in a similar fashion. *See, e.g.*, United States v. Rosner, 516 F.2d 269, 273 (2d Cir. 1975) (inadvertent failure to disclose); Woodcock v. Amaral, 511 F.2d 985, 991 (1st Cir. 1974), *cert. denied*, 423 U.S. 841 (1975) (innocent miscalculation of utility of the evidence to defendant); United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968) (failure to disclose where hindsight reveals that the defense could have put the evidence to not insignificant use); Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967) (good faith negligence).

45. United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969) (emphasis added). For other Second Circuit decisions adopting this standard, see United States v. Morell,

flicting goals. While the deterrent aim is paramount in deliberate suppression cases, it is of minimal importance in good faith nondisclosure situations, so that the policy underlying the finality of judgments assumes a more prominent role. This policy aim must be balanced against the constitutional goal of ensuring fairness to the defendant in criminal proceedings.[46]

In determining whether a good faith nondisclosure was material, many recent decisions have extended the scope of the prosecutor's duty to disclose information material to the defendant's trial preparation.[47] These courts have reasoned that the prosecutor's nondisclosure, even though in good faith, may have foreclosed to defense counsel significant

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524 F.2d 550, 553 (2d Cir. 1975); United States v. Hilton, 521 F.2d 164, 166 (2d Cir. 1975); United States v. Rosner, 516 F.2d 269, 273 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357, 1365 (2d Cir. 1975); United States v. Sperling, 506 F.2d 1323, 1339 (2d Cir. 1974); Grant v. Alldredge, 498 F.2d 376, 382 (2d Cir. 1974); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969). For other federal circuit court decisions adopting this standard, see United States v. Crow Dog, 532 F.2d 1182, 1191 (8th Cir. 1976); Woodcock v. Amaral, 511 F.2d 985, 991 (1st Cir. 1974), *cert. denied*, 423 U.S. 841 (1975); Shuler v. Wainwright, 491 F.2d 1213, 1223, (5th Cir. 1974). Decisions from federal circuits other than the above have applied various standards. *See, e.g.*, United States v. Marrero, 516 F.2d 12 (7th Cir.), *cert. denied*, 423 U.S. 862 (1975) (might have led the jury to entertain a reasonable doubt about defendant's guilt); United States v. Baxter, 492 F.2d 150 (7th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974) (relevant evidence tending to exculpate); Clay v. Black, 455 F.2d 667 (6th Cir. 1972) (material to guilt or punishment); Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966) (might have led the jury to entertain a reasonable doubt). No recent federal court decision has applied the *Agurs* majority standard.

46. The due process clause of the fifth amendment requires that defendants receive a fair trial. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Griffin v. United States, 336 U.S. 704, 707-09 (1950); Betts v. Brady, 316 U.S. 445, 462 (1941); Berger v. United States, 295 U.S. 78, 88 (1935). *See also* Giles v. Maryland, 386 U.S. 66, 99-102 (1967) (Fortas, J., concurring).

47. *See, e.g.*, United States v. Marrero, 516 F.2d 12 (7th Cir.), *cert. denied*, 423 U.S. 862 (1975); Grant v. Alldredge, 498 F.2d 376 (2d Cir. 1974); United States v. Bowles, 488 F.2d 1307 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); United States v. Donatelli, 484 F.2d 505 (1st Cir. 1973); United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); United States *ex rel.* Raymond v. Illinois, 455 F.2d 62 (7th Cir. 1972); Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966). In United States v. Polisi, 416 F.2d 573 (2d Cir. 1969), the Second Circuit noted:

> The significance of Brady was its holding that the concept out of which the Constitutional dimension arises in [non-disclosure] cases, is prejudice to the defendant measured by the effect of the suppression upon defendant's preparation for trial . . . .

*Id.* at 577.

lines of inquiry, thereby prejudicing defendant's constitutional right to a fair trial.[48]

Courts apply the most stringent standard of materiality when evidence favorable to an accused is newly discovered from a neutral source after trial.[49] Rule 33 of the Federal Rules of Criminal Procedure authorizes applications for a new trial on the basis of newly discovered evidence.[50] The sole purpose of Rule 33 is to allow a convicted defendant to secure a new trial when previously undiscovered evidence suggesting innocence is uncovered from a neutral source after trial.[51] To merit relief a defendant must show that this evidence would probably lead to an acquittal upon retrial.[52] Prosecutorial misconduct and constitutionally inadequate proceedings are not at issue in newly discovered evidence cases.[53]

In *United States v. Agurs*,[54] the majority and the dissent differed on

48. *See* notes 30 & 47 *supra.*

49. *See, e.g.*, United States v. Curran, 465 F.2d 260, 265 (7th Cir. 1972); United States v. De Sapio, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); United States v. Rodriguez, 437 F.2d 940, 942 (5th Cir. 1971); Edgar v. Finley, 312 F.2d 533, 536 (8th Cir. 1963); Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928).

50. FED. R. CRIM. P. 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 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.

51. *See* 58 Am. Jur. 2d *New Trial* § 164 (1961). Newly discovered evidence applications are generally disfavored by courts because the defendant has generally had the opportunity to prepare his case carefully and to secure evidence before trial. United States v. Curran, 465 F.2d 260, 265 (7th Cir. 1972).

52. United States v. De Sapio, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972). In a Rule 33 situation the defendant must show that:

> 1) the evidence could not with due diligence have been discovered until after the trial;
> 2) the evidence is material to the factual issues at the trial and not merely cumulative and impeaching;
> 3) the evidence would probably produce a different result in the event of a new trial.

*Id.* *See* cases cited note 49 *supra.*

53. *See* notes 49-52 *supra* and accompanying text. *See also* United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); United States v. Polisi, 416 F.2d 573, 576-77 (2d Cir. 1969). In *Agurs*, the majority explicitly stated that the Rule 33 standard was not appropriate when the nondisclosed evidence resided in the possession of the prosecution. 96 S. Ct. 2392, 2401 (1976).

54. 96 S. Ct. 2392 (1976).

the appropriate standard of materiality governing the prosecutor's duty to disclose. The majority reasoned that the standard should reflect society's overriding interest in the accuracy of the conviction.[55] It therefore rejected a standard that concentrated on the impact of the nondisclosed information on the defendant's ability to prepare for trial, and fashioned one that focuses on the question of defendant's guilt or innocence.[56]

The dissent accurately noted that the majority's standard, despite a disclaimer, is coterminous with that applied in newly discovered evidence cases:[57] "Surely if a judge is able to say that the 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 Rule 33 standard]."[58] The dissent also noted that the primary concern in nondisclosure cases is the defendant's right to a fair trial.[59] A basic element of fairness in criminal proceedings is that evidence tending to show innocence as well as guilt be fully aired before the jury.[60] The dissent reasoned that the test of materiality should be designed to encourage disclosures by the prosecution of evidence favorable to a defendant[61] and suggested as an appropriate standard the "skilled counsel" formulation.[62]

The majority and the dissent agreed that a specific defense request was not necessary to trigger the prosecutor's duty to disclose,[63] a view previously endorsed by most courts[64] and commentators.[65] The major-

55. *Id.* at 2401.

56. *Id.* *See* note 10 *supra* and accompanying text.

57. *Id.* at 2403. Under the majority's standard in assessing materiality the fact that the evidence was in the possession of the state becomes meaningless. In both the Rule 33 and good faith nondisclosure situations the defendant now has the burden of convincing the reviewing judge that the evidence creates a reasonable doubt of guilt. Indeed, the majority's standard may be more severe than the general Rule 33 standard. Under the latter formulation the defendant need only show that a new trial would "probably" result in a different verdict. United States v. Agurs, 96 S. Ct. 2392, 2401 (1976).

58. *Id.* at 2403.

59. *Id.*

60. *Id.* *See* Moore v. Illinois, 408 U.S. 786, 810 (1972) (Marshall, J., dissenting).

61. 96 S. Ct. at 2404.

62. *Id.* at 2404-05. *See* cases cited note 45 *supra* and accompanying text.

63. *See* cases cited note 29 *supra.*

64. *See* authorities cited note 30 *supra.*

65. United States v. Agurs, 96 S. Ct. 2392, 2399, 2402-03 (1976).

ity noted that prosecutors were required to respond to a specific,[66] relevant defense request either by furnishing the information or by asking the trial judge for a determination of materiality.[67] The Court neglected to establish the standard of materiality a judge should apply in such a situation. Presumably, a trial judge should apply the majority's standard for nondisclosure cases.[68]

The *Agurs* opinion is consistent with the Burger Court's basic philosophical approach in determining the constitutional rights of a defendant in a criminal trial.[69] *Agurs* reaffirms the Burger Court's belief that the social interest in conviction of criminals and finality of judgments outweighs the importance of specific procedural protections designed to ensure procedural fairness to a defendant. For the Burger Court, a trial is procedurally fair if it accurately determines the defendant's guilt or innocence.[70] *Agurs* reflects this concept of procedural fairness.[71]

The result of the *Agurs* holding is threefold. First, the standard of materiality in good faith nondisclosure cases is now the same as that in newly discovered evidence cases.[72] Second, previous lower court decisions in good faith nondisclosure cases,[73] and their corresponding materiality standards,[74] have essentially been eliminated. Third, the Court's standard may also be applied by trial judges when they must resolve the materiality of evidence specifically requested by the defense before trial.[75] These results are unsatisfactory for several reasons.

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66. The majority distinguished a specific defense request from a general defense request for all exculpatory evidence. *Id.* at 2399.

67. *Id.*

68. The majority reasoned that the same standard of materiality must logically apply in two different contexts: the pretrial decision of the prosecutor, and the post-trial decision of the judge. Presumably, the same standard would apply to the trial judge's decision in an ongoing trial as well. *Id.* at 2399-2400.

69. *See* notes 17-20 *supra* and accompanying text.

70. *See* notes 17-20 *supra* and accompanying text.

71. The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt . . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.

United States v. Agurs, 96 S. Ct. 2392, 2401-02 (1976).

72. *See* notes 57 & 58 *supra* and accompanying text.

73. *See* notes 44-46 *supra* and accompanying text.

74. *See* note 45 *supra* and accompanying text.

75. *See* note 68 *supra* and accompanying text.

First, the *Agurs* standard of materiality does not properly guard against erroneous convictions. Employing the Rule 33 standard applicable to newly discovered evidence cases to determine the materiality of *Brady* requests overlooks the substantial difference in the Government's investigative efforts. After conviction the Government usually terminates its investigation of the crime and consequently, vis-a-vis the defendant, has no comparative advantage in unearthing new evidence. Before trial, however, the Government's superior investigative resources place the defendant at an inherent disadvantage in trial preparation.[76] Prosecutors might not appreciate the value or significance of a piece of information as fully as defense counsel,[77] so that, even acting in good faith, they may fail to reveal valuable information. The danger, of course, is that the nondisclosure of a questionably valuable piece of information may foreclose significant lines of inquiry to the defense counsel.[78] A more lenient standard of materiality would avert this problem.[79]

Similarly, courts should apply a more lenient materiality standard when reviewing evidence furnished them pursuant to a specific defense request. Indeed, the argument for application of a lenient standard is strongest in this situation. The policy in favor of finality of judgments, prominent in nondisclosure cases, is not applicable in the context of an ongoing trial. Trial judges in such situations should therefore be liberal in their assessments of materiality.

Second, the *Agurs* standard assigns undue weight to the factfinding element of a criminal trial at the expense of equally important procedural requirements. Trial procedures are more than merely a means to determine guilt or innocence; they represent independently significant values. The appearance of a fair trial is as important to society as the correct result.[80] More importantly, many of the procedures de-

76. *See* notes 29-32 *supra* and accompanying text.

77. *See* notes 29-32 *supra* and accompanying text.

78. *See* notes 29-32 *supra* and accompanying text. *See also* Griffin v. United States, 336 U.S. 704, 708-09 (1950) (speculative nature of review in nondisclosure cases).

79. *See* note 30 *supra* and accompanying text.

80. "There is a tremendous psychological need for the appearance of justice which a fair trial creates in the public mind." Arnold, *The Criminal Trial as a Symbol of Public Morality*, in CRIMINAL JUSTICE IN OUR TIME 137, 140 (A. Howard ed. 1965). *See, e.g.*, Rosen, *supra* note 14, at 113:

> [I]n structuring and operating the system, the quest for truth . . . is only one goal that we pursue. Among other things, we also seek public morality . . . .

signed to ensure a "fair trial" represent a fundamental commitment to the integrity of each individual and to the overriding importance of individual liberty.[81] They reinforce "society's ability to resist the temptation to treat innocent individuals as ultimately expendable when the 'total good' can be enhanced by their sacrifice—the sort of treatment that transgresses first principles of mutual respect and common humanity."[82] Fair procedures are thus an end in themselves, an end that often interferes with the factual adjudication of guilt or innocence. The constitutional requirement of proof beyond reasonable doubt,[83] for instance, necessarily increases the likelihood of erroneous acquittal.[84] Society accepts the increased chance of error because, while the "final balance sheet obviously matters, . . . the *process* by which it is achieved matters more."[85]

The Burger Court's disregard of the procedural aspects of the trial risks undermining these values. To condition the prosecutor's duty to disclose material evidence on a reviewing judge's assessment of the defendant's guilt smacks of collusion and jeopardizes apparent fairness in criminal proceedings. Likewise, a standard of materiality that equates the discovery of evidence in the possession of the prosecutor with discovery of evidence from a neutral source does little to promote the ideal that the state's primary aim in a criminal proceeding is to "seek justice above victory."[86] Additionally, the standard adopted in *Agurs* fails to

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> Confidence in the substance of the system is thus wedded to confidence in its appearance or illusion.

For a discussion of the importance of the appearance of fairness in criminal proceedings and the ritualistic function of the trial, see Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1372-93 (1971).

81. Speaking for the Court, Justice Fortas observed:

> Due process of law is the primary and undispensible foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise. As Mr. Justice Frankfurter has said, "The history of American freedom is, in no small measure, the history of procedure."

*In re* Gault, 387 U.S. 1, 20-21 (1967). *See* Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting) ("[I]n the development of our liberty, insistence upon procedural regularity has been a large factor").

82. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 386-87 n.65 (1970).

83. *In re* Winship, 397 U.S. 359 (1970).

84. 1975 WASH. U.L.Q. 1092, 1103-04 nn.40-41.

85. Tribe, *supra* note 82, at 387 (emphasis original).

86. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Berger v. United States, 295 U.S. 78, 88 (1935); Mooney v. Holohan, 294 U.S. 103, 108 (1935).

induce prosecutors to make actual voluntary disclosures because the burden of proving materiality imposed on the defendant is extremely high. A more lenient standard that prompts prosecutors to resolve close questions in favor of defendants would reaffirm the fundamental values embodied in the concept of procedural due process and would not impair the factual accuracy of the trial. Indeed, by increasing the information base available to the trier of fact, it would probably increase the accuracy of the factfinding process.[87]

Finally, the *Agurs* standard may provide insufficient checks on bad faith nondisclosures by the prosecutors. In the Rule 33 situation, prosecutorial misconduct is not an issue when evidence is discovered from a neutral source after trial.[88] On the other hand, when prosecutors hold the information, as they do in nondisclosure cases, bad faith actions by them are always possible. In close cases it will often be difficult to distinguish between good and bad faith prosecutorial decisions, so that the most effective way to deter bad faith actions by prosecutors is to apply a lenient standard of materiality.

In *Brady v. Maryland*,[89] the Warren Court found that prosecutors were constitutionally obligated to safeguard a defendant's right to a fair trial by disclosing material evidence favorable to his cause.[90] This duty reaffirmed society's commitment to the concept of procedural fairness to defendants.[91] The majority's opinion devalues that commitment. By fashioning a standard of materiality that focuses solely on the accuracy of the verdict, the Burger Court has unfortunately eliminated the spirit, if not also the substance, of the prosecutor's constitutional duty to disclose.

87. *See* notes 76-79 *supra* and accompanying text.
88. *See* note 53 *supra* and accompanying text.
89. 373 U.S. 83 (1963).
90. *Id.* at 87.
91. *See* notes 29-30, 80-85 *supra* and accompanying text.