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'Materiality' Limits Prosecutors' Duty to Disclose Exculpatory Evidence to Defense

James K. Knight Jr.

'Materiality' Limits Prosecutors' Duty to Disclose Exculpatory Evidence to Defense

In *United States v. Agurs*,[1] the U.S. Supreme Court held for the first time that criminal prosecutors have a constitutional duty to voluntarily disclose exculpatory evidence to a defendant even when the defense doesn't request such evidence. The Court, however, limited the scope of this new obligation by narrowly defining the category of material evidence to which it applies. It held that the duty arises only when the exculpatory evidence is so material that had it been disclosed, its use at trial would have created a reasonable doubt of the defendant's guilt that did not otherwise exist.

Respondent Agurs was convicted of second degree murder in the U.S. District Court for the District of Columbia. At trial she asserted that she had acted in self-defense in the knife slaying of the victim. The evidence at trial showed that the victim had been carrying two knives, one of which was the murder weapon, immediately before he was killed. After the respondent was convicted, her attorney discovered that the prosecutor had been aware of the victim's criminal record before the trial. The victim had a history of convictions for violent crimes, including assault and carrying a deadly weapon. Agurs moved for a new trial on the ground that the victim's prior criminal record supported her claim of self-defense and thus should have been disclosed by the prosecution.

The district court denied the motion on the ground that the suppressed evidence, although favorable to the accused, was not material. The court found that even if the information had been made available to the defense for use at the trial, the jury would not have reached a different result. The court emphasized the belief that the victim's record would have shed no light on the victim's character not already apparent from the evidence at trial. The Court of Appeals for the District of Columbia Circuit reversed.[2] It found that the suppressed evidence was both favorable and material and that a new trial was required, since the jury *might* have returned a different verdict if the evidence had been disclosed by the prosecution and used by the defense at the original trial.[3] The Supreme Court granted certiorari and reversed on the ground that the evidence was not material within the rule of *Brady v. Maryland*.[4]

The nature and extent of discovery allowed a defendant in a criminal case may significantly affect his ability to prepare for trial.[5] For this rea-

1. ___ U.S. ___, 96 S.Ct. 2392 (1976).
2. United States v. Agurs, 510 F.2d 1249 (D.C. Cir. 1975).
3. *Id.* at 1252-54.
4. 373 U.S. 83 (1963).
5. Calley v. Callaway, 519 F.2d 184, 220 (5th Cir. 1975).

son, the Supreme Court has made it clear that a prosecutor's duty of candor toward a defendant is an important ingredient of due process.[6] Thus, a prosecutor's suppression of materially favorable information may constitute denial of a defendant's due process right to a fair trial.[7]

As long ago as *Mooney v. Holohan*,[8] the Supreme Court said that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the "rudimentary demands of justice."[9] The *Mooney* principle was reaffirmed in *Napue v. Illinois*.[10] In that case the Court held that the defendant had been denied his constitutional right to a fair trial "when the state, although not soliciting false evidence, allows it to go uncorrected when it appears."[11]

In *Brady*,[12] the court expanded the *Mooney* doctrine. Defendant Brady had been convicted of first degree murder. The murder had been committed in the course of a robbery. Brady admitted at trial that he had participated in the robbery, but claimed that his codefendant had done the killing. Prior to trial Brady's counsel had requested that the prosecution allow examination of the codefendant's extrajudicial statements. Several such statements were disclosed, but the one in which Brady's codefendant confessed to the actual killing was suppressed by the prosecution and did not come to Brady's attention until after he had been tried, convicted, and sentenced. The Supreme Court held that suppression of the codefendant's confession violated the Due Process Clause of the Fourteenth Amendment: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[13]

Not every instance of prosecutional suppression of evidence results in a denial of the due process right to a fair trial, however. For a new trial to be required, the evidence that was suppressed must be of such nature that its use by the defense at trial would have had a significant impact on the outcome of the trial. As stated by the Court in Brady, the suppressed evidence must be "*material* either to guilt or to punishment."[14]

Before *Agurs* the Court had avoided defining the precise degree of materiality necessary to require a new trial,[15] and essentially two standards of materiality had arisen in the courts of appeals. The standard developed

6. United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972).
7. U.S. CONST. amends. V, XIV.
8. 294 U.S. 103 (1935).
9. *Id.* at 112.
10. 360 U.S. 264 (1959).
11. *Id.* at 269.
12. 373 U.S. at 83.
13. *Id.* at 87.
14. *Id.* (emphasis supplied).
15. Giles v. Maryland, 386 U.S. 66, 74 (1967).

by the District of Columbia Circuit[16] and adopted in the Ninth[17] and Tenth[18] Circuits sought to determine whether the undisclosed evidence, if brought to the attention of the jury, *might* have led the jury to entertain a reasonable doubt about the defendant's guilt. If so, a new trial would be required. This standard of materiality was applied by the court of appeals in *Agurs*.[19] However, other circuits have rejected that "might have" standard on the theory that it presented only a minimal barrier to a new trial.[20] Another standard of materiality is employed by the Second,[21] Fifth,[22] and Eighth[23] Circuits. These circuits have required a new trial when the defendant was able to show that there was a significant chance that had the added evidence been developed, as it undoubtedly would have been by skilled counsel, a reasonable doubt as to the defendant's guilt could have been induced in the minds of enough jurors to preclude a conviction.[24] The rule of the First Circuit apparently differed only slightly.[25]

The Supreme Court's decision in *Agurs* resolved the conflict among the circuits. The Court rejected both standards and established a new, two-tier test of materiality based upon whether a specific *Brady*-type request had been made. When, as in *Brady*, the defense specifically requests disclosure of a certain piece of evidence, the prosecution is put on notice that the defendant desires that particular piece of evidence.[26] Therefore, the

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

17. United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); Fields v. Alaska, 524 F.2d 259 (9th Cir. 1975).

18. United States v. Miller, 499 F.2d 736 (10th Cir. 1974).

19. 510 F.2d at 1253-54.

20. United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); Ross v. Texas, 474 F.2d 1150, 1153 (5th Cir. 1973).

21. United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); United States v. Kahn, 472 F.2d 272 (2d Cir. 1973); United States v. Morrell, 524 F.2d 550 (2d Cir. 1975). Although the Second Circuit had adopted the "significant chance" standard, it had added a slight variation. As prosecutorial culpability for suppressing favorable evidence increases, the level of materiality necessary to require a new trial decreases. As the culpability of the prosecutor increases from negligent nondisclosure to deliberate suppression, prophylactic considerations become more prevalent and eventually paramount. *See* United States v. Pfingst, 490 F.2d 262, 267 (2d Cir. 1973). This sliding scale of materiality had occasionally been cited with approval by other courts of appeals. Ross v. Texas, 474 F.2d 1150 (5th Cir. 1973); Clarke v. Burke, 440 F.2d 853 (7th Cir. 1971); Evans v. Janing, 489 F.2d 470 (8th Cir. 1973); Rhinehart v. Rhay, 440 F.2d 718 (9th Cir. 1971).

22. Shuler v. Wainwright, 491 F.2d 1213 (5th Cir. 1974). *See also* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975). There the court stated that "before the nondisclosure of evidence reaches a level of constitutional significance, the evidence must be 'crucial, critical, [and] highly significant.' " *Id.* at 221.

23. Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975).

24. *See, e.g.*, United States v. Morrell, 524 F.2d 550 (2d Cir. 1975).

25. In Woodcock v. Amaral, 511 F.2d 985, 991 (1st Cir. 1974), the First Circuit held that a new trial is not required unless it can be said that if the evidence had been disclosed its use at trial would have created a reasonable possibility of a different result.

26. ___ U.S. at ___, 96 S.Ct. at 2398-99.

first level of materiality applies if there is a specific request and places only a slight burden on a defendant to show that a prosecutor's suppression of favorable evidence denied him a fair trial. The *Agurs* Court determined that, when the defense request for disclosure is specific, disclosure by the government is required "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists."[27] When there is a specific request, the prosecutor's "failure to make any response is seldom, if ever, excusable."[28]

In *Agurs* the defense had not made a specific request for discovery of the victim's prior criminal record, and the prosecutor had not been put on notice of the possibility that his file contained evidence favorable to the defendant. Nevertheless, the Court held that this factor was not determinative in its consideration of Agurs' motion for a new trial. The Court said there may be cases where certain evidence "is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."[29] The Court felt, however, that the absence of a request was not irrelevant.[30] If the defendant makes only a general *Brady* request, or no request at all, the prosecutor is not put on notice that he may possess certain exculpatory evidence. The Court stated that in these situations, where the second level of materiality applies, the "constitutional standard of materiality must impose a higher burden upon the defendant."[31]

In establishing the second level of materiality, applicable when the defendant has failed to make a specific *Brady* request, the Court balanced the prosecutor's obligation to serve justice against the suggestion that the prosecutor must routinely deliver his entire file to defense counsel.[32] The Court felt that the fact that the evidence was in the hands of the prosecution at the time of trial but not made available to the defense distinguished it from evidence discovered from a neutral source after trial:

> For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal [the standard under Rule 33 of the Federal Rules of Criminal Procedure]. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice."[33]

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27. *Id.* at ___, 96 S.Ct. at 2399.
28. *Id.*
29. *Id.* at ___, 96 S.Ct. at 2401.
30. *Id. See also* United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968).
31. *Id.* at ___, 96 S.Ct. at 2401.
32. *Id.*
33. *Id.* (footnote omitted).

Nevertheless, the Court rejected the argument that the prosecution had a duty routinely to deliver his entire file to the defense.[34] Striking what it felt was the proper balance, the Court indicated that the proper standard of materiality should reflect the requirement that the jury find the defendant guilty beyond a reasonable doubt.[35] The Court held that a new trial is required only if "the omitted evidence creates a reasonable doubt that did not otherwise exist."[36] In explaining this standard the Court stated:

> This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.[37]

The Court indicated that the new, two-tier test of materiality was the same standard that other courts had applied "although the standard has been phrased in different language."[38] The cases cited in support of that belief do not substantiate the Court's assertion.[39] Evidently the Court has fashioned a completely new standard of *Brady* materiality.[40]

The two-level materiality test has no precedent in any reported cases from the courts of appeals. Since the first level of materiality is a rather low one, a probable effect of this case will be that prosecutors will feel more compelled to respond to specific discovery requests for *Brady* material. But defense attorneys are usually not aware of the existence of exculpatory evidence in the possession of the prosecution and consequently are not in a position to make a specific request for disclosure of that evidence. Therefore, the test that will be applied in almost every *Brady*-like case is the higher level of materiality, the second level "reasonable doubt" test. This standard presents a much higher barrier to a new trial than did any standard previously employed by the courts of appeals. In effect the standard requires that the suppressed evidence, if disclosed and used, would have

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at ____, 96 S.Ct. at 2402 (footnote omitted).
38. *Id.* at ____, 96 S.Ct. at 2402.
39. See Marshall's dissenting opinion. *Id.* at ____, 96 S.Ct. at 2404.
40. In reaching its decision, the Court rejected the Second Circuit's variable standard of materiality based upon prosecutorial culpability. The Court found that the duty to disclose would arise equally in situations where the prosecution had innocently overlooked highly exculpatory evidence as well as in situations where inept prosecutors incorrectly believed they were suppressing vital exculpatory evidence. The Court thought that Constitutional error results from the "character of the evidence, not the character of the prosecutor." The Court also rejected the argument that the standard of materiality should reflect the importance that the undisclosed evidence bore to the preparation of the defense. *Id.* at ____, 96 S.Ct. at 2400-01.

resulted in an acquittal.[41] The Court further encourages prosecutors' nondisclosure by eliminating all prophylactic considerations from the determination of materiality.[42] Finally, assuming that most prosecutors honestly attempt to serve the cause of justice, they will not normally have in their possession evidence that would result in the acquittal of the defendant. All these factors combine to make it clear that the prosecution will have little incentive to discover and disclose to the defense favorable evidence in its possession. Thus, the major impact of the *Agurs* case is that the prosecution will feel much more confortable in resolving questions of disclosure in favor of concealment.

JAMES K. KNIGHT, JR.

41. See Marshall's dissenting opinion. *Id.* at ____, 96 S.Ct. at 2404.
42. *Id.* at ____, 96 S.Ct. at 2400.