Fordham Law Review

Volume 53 | Issue 3 Article 2

1984

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ACCESS TO EXCULPATORY EVIDENCE: AVOIDING THE *AGURS* PROBLEMS OF PROSECUTORIAL DISCRETION AND RETROSPECTIVE REVIEW

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INTRODUCTION

IN the course of many criminal investigations, the state will uncover information that is favorable to the criminal defendant. The likelihood of defense counsel uncovering the same piece of information is usually slim.[1] This unequal access is caused by a number of factors ranging from a differential in resources to the timing of investigations.[2] The disparity in access to exculpatory evidence is even greater when the defendant is indigent.[3]

In *Brady v. Maryland*,[4] the Supreme Court attempted to lessen the disparity in access to exculpatory evidence before and during trial.

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1. *See* Rice, *Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse?*, 45 Miss. L.J. 887, 909-12 (1974). The defendant is generally at a distinct disadvantage because:

> [T]he state's investigative facilities . . . invariably have been at work gathering evidence long before defense counsel has entered the case. And in the process of investigation, the state, unlike the defendant, has the right, upon a showing of probable cause, to search private property for evidence. . . . It also has the power to compel witnesses to appear before a grand jury to give sworn statements which only the state can use in preparation for trial. The state can also gain access to evidence which would not otherwise be available by granting prospective witnesses immunity from prosecution.

Id. at 904 (footnotes omitted). *See generally* Fahringer, *Has Anyone Here Seen* Brady*?: Discovery in Criminal Cases*, 9 Crim. L. Bull. 325, 326 (1973) (discussing disparity in defendant's and prosecution's resources); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. Rev. 228, 249 (1964) (discussing respective advantages in discovery of prosecutors and defendants); Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond* Brady, 53 N.Y.U. L. Rev. 835, 862-68 (1978) (proposing sanctions on state for failure to investigate adequately all criminal cases) [hereinafter cited as *Adequate Investigation*]. Immunity from prosecution is more likely to be granted to prosecution witnesses than to defense witnesses. *See, e.g.*, United States v. Taylor, 728 F.2d 930, 935-36 (7th Cir. 1984); United States v. Thevis, 665 F.2d 616, 638-41 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

2. For instance, whereas the police can do fingerprint analysis and/or take blood samples at the scene of the crime, defense counsel is unlikely to have been retained at this point. The same would be true of finding and interviewing witnesses. See *supra* note 1.

3. *See, e.g.*, Matlock v. Rose, 731 F.2d 1236, 1243-44 (6th Cir. 1984) (burden on indigent defendant to show that psychiatric expert required for defense); Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974) (burden on indigent defendant to show that pre-trial investigative assistance required for defense), *cert. denied*, 420 U.S. 936 (1975); Caldwell v. State, 443 So. 2d 806, 812 (Miss. 1983) (burden on indigent defendant to show that ballistics expert required for defense), *cert. granted*, 105 S. Ct. 243 (1984).

4. 373 U.S. 83 (1963).

Brady and his companion, Boblit, were tried separately for felony murder and sentenced to death.[5] Brady's pretrial request to inspect Boblit's extrajudicial statements resulted in the prosecutor turning over some of the material but withholding a statement in which Boblit confessed to committing the homicide.[6] Brady testified and admitted his participation in the crime but contended that it was Boblit who actually committed the killing.[7] In his summation, Brady's attorney conceded that Brady was guilty of murder and asked the jury not to impose the death penalty.[8] The jury, which had not heard Boblit's exculpatory statement, sentenced Brady to death.[9] When defense counsel later discovered the existence of Boblit's statement, he moved for a new trial.[10]

The Supreme Court, obviously concerned that defense counsel was denied access to evidence in the prosecutor's control, focused on the impact of the nondisclosure on the defendant's ability to present his defense.[11] Accordingly, the Court held that the prosecutor's motivation in suppressing favorable evidence was irrelevant, given the overriding issue of adequate access to evidence and the Constitution's guarantee of a fair trial.[12] The Court stated 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 to punishment, irrespective of the good faith or bad faith of the prosecution."[13]

Brady was a major step forward in equalizing access to exculpatory evidence. Before *Brady*, the Supreme Court had imposed an almost absolute duty on the prosecutor to correct perjurious testimony.[14] In *Brady*, however, the Court recognized that disclosure of evidence showing perjury of government witnesses is not qualitatively different from

5. *Id.* at 84.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Brady moved for a new trial as to both guilt and punishment. The Maryland Court of Appeals had granted a new trial as to punishment, *see* Brady v. State, 226 Md. 422, 430-31, 174 A.2d 167, 171-72 (1961), *aff'd*, 373 U.S. 83 (1963), and the only issue in the Supreme Court was whether a new trial as to guilt should have been granted as well, *see* Brady v. Maryland, 373 U.S. 83, 85 (1963).

11. *See* Brady v. Maryland, 373 U.S. at 86-89.

12. *Id.* at 87. *See generally* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 713, 841, 847-48 (1976) (discussing constitutional aspects of defendant's lack of access to relevant evidence); Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 121-23 (1974) (*Brady* is part of guarantee of broad sixth amendment right to present effective defense).

13. Brady v. Maryland, 373 U.S. at 87. The Court's rejection of a prosecutorial misconduct analysis is made manifest by the fact that the prosecutor in *Brady* had arguably acted in bad faith. The prosecutor had disclosed other statements of Boblit, but suppressed a statement favorable to Brady: Boblit's admission of the actual homicide. See *supra* note 6 and accompanying text.

14. *See, e.g.*, Napue v. Illinois, 360 U.S. 264, 269 (1959); Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 106-07 (1935).

disclosure of exculpatory evidence in general.[15] Disclosure is required in both instances to ensure the defendant's access to favorable evidence.[16] Furthermore, in neither situation is the willfulness of the prosecutor at issue: The question is not prosecutorial misconduct, but rather the defendant's constitutional right of access to favorable evidence. The irrelevance of prosecutorial misconduct, even in perjury cases, was made clear in *Giglio v. United States.*[17] In *Giglio*, the prosecutor at trial did not know that a witness lied in testifying that he had not received a promise of leniency.[18] The Supreme Court unanimously rejected the claim that the prosecutor's good faith prevented reversal of the conviction.[19]

The Court in *Brady* did not, however, constitutionalize criminal discovery, nor did it intend to do so. For instance, *Brady* does not stand for the proposition that the prosecutor must open his file to the defendant.[20] Of course, complete access to the prosecutor's file would help defense counsel significantly.[21] Counsel would be able to plan a strategy that would enable it to dodge the prosecution's strong points and attack its weak points. More cynically, however, the defendant would be able to pressure witnesses before trial, or tailor his testimony in response to the prosecution's case.[22] A further danger is that the defendant's unimpeded access to the prosecutor's file may jeopardize continuing investigations.[23]

The crucial distinction between *Brady* and an open file rule is that *Brady* requires disclosure only of evidence favorable to the defendant.[24]

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15. *See* Brady v. Maryland, 373 U.S. at 86-87.

16. *See* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 Stan. L. Rev. 1133, 1151 n.70 (1982); Westen, *supra* note 12, at 122; *Adequate Investigation*, *supra* note 1, at 838-40.

17. 405 U.S. 150 (1972).

18. *See id.* at 151-53 (another prosecutor, at an earlier stage of the case, had promised the witness immunity).

19. *See id.* at 153-54.

20. This was made clear by the Court's statement in 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." The Court overreacted in *Moore*, in that defendant was not asking for an open file. Rather, defendant was merely asserting a *Brady* right to exculpatory evidence: the statement of an important government witness that he had heard somebody bragging about the crime of which Moore was accused. *See id.* at 805-06 (Marshall, J., dissenting).

21. Many commentators, including Justice Brennan, have argued for an open file policy. *See, e.g.*, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279, 284-88, 293-95; Fahringer, *supra* note 1, at 335; Rice, *supra* note 1, at 912-13; Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 136-40 (1972); Comment, *Implementing* Brady v. Maryland*: An Argument for a Pre-Trial Open File Policy*, 43 U. Cin. L. Rev. 889, 904-12 (1974).

22. *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). *But see* Brennan, *supra* note 21, at 291 & n.40 (perjury "bogey man" evidences distrust of defense counsel and is empirically unsupported).

23. *See* United States v. Cobb, 271 F. Supp. 159, 164 & n.4 (S.D.N.Y. 1967).

24. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (defendant has no constitutional right to disclosure of unfavorable evidence); United States *ex rel.* Knights v. Wolff, 713 F.2d 240, 244-46 (7th Cir.) (need not disclose information that is not exculpatory), *cert. denied*, 104 S. Ct. 504

Access to inculpatory evidence differs from access to exculpatory evidence in its effect on the truth-seeking function. Knowledge of inculpatory evidence would enable defense counsel to use strategic devices and possibly even unfair practices to get his client acquitted.[25] In contrast, defense counsel can use exculpatory evidence to present affirmative favorable proof, helping to ensure the reliability of the verdict. *Brady* thus enforces the right to a fair trial, not the right to an unfair advantage for defense counsel. Further, *Brady* comports with the Utopian model of a prosecutor's dual role: to be a zealous advocate but always to see that justice is done.[26]

Unfortunately, although the spirit of *Brady* was expansive as to equality of access to exculpatory evidence, the effectuation of such access has been problematic. The two major problems of implementing the *Brady* right are that: the prosecutor—an understandably biased party—is left to decide which information is in fact favorable to the defendant; and when a defendant is denied access to exculpatory evidence, he must rely on a speculative post-trial review to determine the effect such evidence would have had on his case.

The first problem arises because *Brady*, by imposing an affirmative duty on the prosecutor to disclose exculpatory evidence, apparently envisions that it is the prosecutor's duty to comb his files, perhaps spurred by a request from defense counsel,[27]and decide which evidence must be turned over to the defendant. But, even though the prosecutor does have a duty to see justice done[28]—from which a duty to turn over exculpatory evidence would seem a natural outgrowth—he is also a zealous advocate. Thus, if the prosecutor is to decide which evidence is favorable to the

(1983); People v. Perez, 100 A.D.2d 366, 374, 474 N.Y.S.2d 767, 771-72 (1984) (need not disclose evidence that does not suggest innocence). Of course defendants may have nonconstitutional rights to disclosure of certain unfavorable evidence pursuant to the Jencks Act, Pub. L. No. 85-269, § 3500, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (1982)) (statement of government witness available to defendant after witness has testified), and Rule 16 of the Federal Rules of Criminal Procedure, Fed. R. Crim. P. 16 (defendant's right to inspect his statements, criminal record and test results in possession of government).

25. *See, e.g.*, Brooks v. Tennessee, 406 U.S. 605, 611 (1972); United States v. Cadet, 727 F.2d 1453, 1468 (9th Cir. 1984); United States v. Cobb, 271 F. Supp. 159, 162 (S.D.N.Y. 1967).

26. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

27. *Brady* imposed on the prosecutor a duty of disclosure only upon defense counsel's request. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). After *Brady*, many courts and commentators downplayed the significance of a defense request. *See, e.g.*, Giles v. Maryland, 386 U.S. 66, 102 (1967) (Fortas, J., concurring) ("I see no reason to make the result turn on the adventitious circumstance of a request. If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event."); Traynor, *supra* note 1, at 230 ("How does Tantalus particularize that which is out of his sight as well as his reach?"). But the Court in United States v. Agurs, 427 U.S. 97, 106-09 (1976), elevated the necessity of defense counsel's particularized request to constitutional doctrine. See *infra* notes 40-43 and accompanying text.

28. See *supra* note 26 and accompanying text.

defense, it is only natural for him to err on the side of nondisclosure. Evidence that defense counsel may consider very favorable (or that can lead to even more favorable evidence) is apt to be downplayed or overlooked—and thus not disclosed—by an advocate on the other side.[29] Like the police officer in the fourth amendment context, the prosecutor is involved in a "competitive enterprise."[30] But whereas the fourth amendment's warrant requirement provides for an independent factfinder to protect the citizen's rights,[31] *Brady* seems to place the equally important right of access to exculpatory evidence[32] in the hands of a biased party.[33] *Brady* thus leaves the prosecutor with the nearly impossible task of determining objectively which evidence is favorable to the defendant.[34]

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29. For example, the following anecdote was related by Jon O. Newman, then United States Attorney for Connecticut (now a judge on the Second Circuit Court of Appeals), to the Judicial Conference of the Second Circuit:

> I recently had occasion to discuss [disclosure under *Brady*] at a PLI Conference in New York City before a large group of State prosecutors. . . . I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, "This is the man." In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, "That is *not* the man."
>
> The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said "that is not the man"? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. . . . Yet I was putting to them what I thought was the easiest case—the clearest case for disclosure of exculpatory information!

J. Newman, Remarks at the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), *reprinted in Discovery in Criminal Cases*, 44 F.R.D. 481, 500-01 (1968) (emphasis in original); *see also* Beatty, *The Ability to Suppress Exculpatory Evidence: Let's Cut Off the Prosecutor's Hands*, 17 Idaho L. Rev. 237, 243 (1981) (prosecutor incapable of making objective determination of favorability); Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U. L. Rev. 749, 765 (1964) (same).

30. Johnson v. United States, 333 U.S. 10, 14 (1948) ("[Fourth amendment's] protection consists in requiring that . . . inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

31. See *infra* notes 180-84 and accompanying text.

32. Both rights are fundamental constitutional rights. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (access to exculpatory evidence); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (protection against unreasonable search and seizure), *overruled on other grounds*, Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

33. This is not to speak of the abuse that can occur if the prosecutor acts in bad faith. Even an independent fact-finder or an open file rule cannot guarantee pre-trial access to exculpatory evidence if the prosecutor deliberately chooses to hide such evidence. This Article contends, however, that the suppression of evidence favorable to the defendant occurs largely due to good faith conclusions of nonfavorability by a zealous adversary. The prosecutor would turn over more evidence if he could look at his file the way an independent factfinder would. See *infra* notes 92-99 and accompanying text.

34. Similar problems can be seen in the Court's implementation of rights against compelled self-incrimination. In Miranda v. Arizona, 384 U.S. 436 (1966), as in *Brady*, the Court imposed on state officials a constitutional duty to protect the rights of an adversary party by adopting an objective point of view, a task which is by definition impossible. *See*

The second problem of implementing the *Brady* right arises once the prosecutor has overlooked or downplayed evidence objectively favorable to the defendant and the defendant has been tried without access to that evidence. Assuming that the evidence is discovered by the defendant at a later date,[35] the question is whether the prosecutor has violated the defendant's right to due process. The Court in *Brady* held that the defendant was entitled to a new trial on due process grounds if the prosecutor had suppressed "material" evidence,[36] thus implying that a new trial is not automatically required whenever the prosecutor suppresses exculpatory evidence. The Court did not define when suppressed exculpatory evidence would be deemed material, but the problem left by *Brady* is not merely the definition of materiality.[37] A more important problem is that, whatever the standard of materiality, it is applied after the trial is over. At that point it is difficult if not impossible to ascertain the true effect that the exculpatory evidence would have had on the defendant's case. Would it have changed the defense counsel's strategy? Could it have been easily deflected by the prosecution? If introduced as evidence, would it have been believed by the jury?

Such a speculative inquiry is made necessary because of the prosecutor's failure to turn over the evidence before or during trial. The flaw of *Brady* is not in requiring that suppressed information be material or in

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id. at 467 (police must adequately and effectively apprise accused of his rights and fully honor his exercise thereof). For an alternative to *Miranda*, comparable to the proposals in this Article as to the implementation of *Brady*, see Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1239-55 (1932).

35. This is a big assumption in many cases. Defense counsel rarely continues an investigation after trial. Undoubtedly, much evidence in the prosecutor's control is never discovered by defendant. *See* United States v. Starusko, 729 F.2d 256, 265 (3rd Cir. 1984) ("Only if the defendant is the beneficiary of fortuitous happenstance by discovering the materials through extrajudicial means . . . are his rights vindicated. The 'game' will go on, but justice will suffer."); United States v. Oxman, 740 F.2d 1298, 1310 (3rd Cir. 1984) ("[W]e are left with the nagging concern that [because of prosecutional bias in determining favorability of evidence] material to the defense may never emerge from secret government files."). For a bizarre case of discovery by defense counsel, see Chavis v. North Carolina, 637 F.2d 213, 221 (4th Cir. 1980) (defense counsel discovers favorable treatment of star prosecution witness, supposedly imprisoned, when witness waves to defense counsel from balcony of beach motel).

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

37. The circuit courts after *Brady* and before *Agurs* took various approaches to determining the materiality of suppressed evidence. *See, e.g.*, United States v. Miller, 499 F.2d 736, 744 (10th Cir. 1974) (even when suppressed evidence would be admissible only to attack witness' credibility, "prosecution's failure to produce must be inherently significant and favorable to the defense"); United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972) ("undisclosed evidence may be 'material' on the issue of an accused's guilt or innocence even though it goes only to credibility"); Levin v. Katzenbach, 363 F.2d 287, 290-91 (D.C. Cir. 1966) (defendant would be granted new trial if "government failed to disclose evidence which, in the context of this case, might have led jury to entertain a reasonable doubt about [defendant's] guilt"). For full a discussion of materiality standards adopted by the lower courts before United States v. Agurs, 427 U.S. 97 (1976), see Comment, *Materiality and Defense Requests: Aids in Defining The Prosecutor's Duty of Disclosure*, 59 Iowa L. Rev. 433 (1973) [hereinafter cited as *Defense Requests*].

leaving the explication of such a standard to another day. Rather, the flaw of *Brady* is in allowing the prosecutor to determine initially whether evidence should be turned over. By failing to provide for an objective determination of favorability before or during trial, the Court in *Brady* made necessary a speculative post-trial review. The question—"what would have happened?"—would not arise if the Court had invoked a more reliable device for ensuring disclosure in the first place.[38]

In the years since *Brady*, the problems of inadequate pre-trial review of exculpatory evidence and speculative post-trial review of the effect of nondisclosure have been exacerbated. In *United States v. Agurs*,[39] the Court tacitly recognized the difficult position of the prosecutor after *Brady*: Because of his role as an advocate, the prosecutor cannot determine the favorability of evidence in the way that an independent factfinder (not to speak of defense counsel) would.[40] However, the Court chose a strange solution for the prosecutor's dilemma: It shifted to defense counsel the burden of determining which evidence is exculpatory. In other words, under *Agurs* it is defense counsel's obligation to put the prosecutor on notice that certain evidence is or could be exculpatory.[41] Thus, directed by defense counsel, the prosecutor supposedly can act more objectively. The problem with this solution is that in many if not most cases, defense counsel is given the virtually impossible task of specifically identifying evidence that by definition he does not know exists.[42] Defense counsel must in effect rummage through the prosecutor's file without having access to the file.[43]

It is the contention of this Article that the spirit of *Brady*, based as it is on equality of access to exculpatory evidence before and during trial, cannot be effectuated by putting the pre-trial burden of determining favorability on the prosecutor. Nor can such access be guaranteed by foisting the burden of notice on defense counsel. A better way to ensure access to exculpatory evidence while it can still benefit defendant is to put the burden of determining the favorability of evidence on an independent, objective fact-finder: the trial court. This Article advocates a pre-trial in camera review by the court of all information in the prosecutor's

38. See *infra* notes 135-140 and accompanying text.

39. 427 U.S. 97 (1976)

40. *Id.* at 110-11.

41. *See id.* at 106-07.

42. See *supra* note 27.

43. Anyone who has played the game of Clue knows the frustration of such a search. The players in Clue must guess which cards are concealed in a pouch through a series of guesses and deductions by which the player eliminates alternatives. Unfortunately, the stakes for defense counsel in the "*Agurs* Game" are higher than those for the Clue player. It is ironic that the Court in *Agurs* ridiculed the "sporting theory of justice," United States v. Agurs, 427 U.S. 97, 108-09 & n.15 (1976), yet elevated guesswork by defense counsel to a constitutional standard, *see id.* at 114; *see also* Giles v. Maryland, 386 U.S. 66, 102 (1967) (Fortas, J., concurring) (requiring request from defense counsel turns trial into a sporting event); Babcock, *supra* note 16, at 1152 (using metaphor of officiated game to discuss *Agurs*).

custody. An in camera hearing requirement would remove from both the prosecutor and defense counsel the burden of determining favorability of evidence. It would avoid the dreaded "open file rule."[44] Most importantly, by providing for more reliable disclosure, an in camera hearing requirement could substantially relieve the courts of retrospective reviews of "what might have been," and the inevitable threat to the finality of judgments that such reviews entail.[45]

Part I of this Article examines the effectuation of the *Brady* right by *Agurs*, and lower court decisions after *Agurs*. It is apparent from a reading of these cases that the right of access to exculpatory evidence cannot be fully guaranteed by biased determinations of favorability. Such an approach leads to haphazard post-trial discovery and retrospective review under sliding standards of materiality. Part II of this Article discusses the current limited use of in camera hearings in the *Brady* context. Part II then outlines a proposal for an in camera hearing requirement in all criminal cases, and discusses both the benefits and problems that such a requirement would cause.

I. CURRENT IMPLEMENTATION OF THE RIGHT OF ACCESS TO EXCULPATORY EVIDENCE: *AGURS* AND ITS PROGENY

A. *Why Put the Burden of Notice on Defense Counsel?*

In *Agurs*, the defendant was charged with the stabbing death of James Sewell.[46] Agurs admitted the killing and pleaded self-defense.[47] Defense counsel presented no evidence;[48] the self-defense claim was presented solely through argument and through cross-examination of the prosecution's witnesses.[49] Defense counsel did not request that the prosecutor disclose Sewell's criminal record,[50] perhaps because he did not think it would be admissible to show the victim's character.[51] Agurs was found

44. *See* United States v. Agurs, 427 U.S. 97, 109 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972).

45. Retrospective review cannot be totally eliminated, however, even by an in camera hearing requirement. See *infra* notes 232-34 and accompanying text.

46. *See* United States v. Agurs, 427 U.S. 97, 98 (1976). Defendant Linda Agurs, a small woman, checked into a motel with James Sewell, who was wearing a Bowie knife and carrying another knife in his pocket. *Id.* at 99. About fifteen minutes later three motel employees heard Agurs screaming. *Id.* They found Sewell on top of Agurs as both struggled for a knife. *Id.* Sewell later died of multiple stab wounds resulting from this struggle; Agurs was unharmed. *Id.* at 99-100. Sewell was found with no money on his body, but his wife testified that he had $360 in his possession a few hours before the killing. *Id.* at 99.

47. *See id.* at 100.

48. *Id.*

49. *See id.*

50. *See id.* at 101.

51. Many courts have held that a defendant has a constitutional right of access only as to admissible evidence. *See* Comment, *The Prosecutor's Duty of Disclos[ure]: From* Brady *to* Agurs *and Beyond*, 69 J. Crim. Law & Criminology 197, 209-11 (1978) [hereinafter cited as *Duty of Disclosure*]. This is an anomalous result because *Brady* guarantees access to favorable evidence either before or during trial, see *infra* notes 278-87 and ac-

guilty.[52] After the trial, defense counsel came across a case that discussed the admissibility of a victim's prior criminal record when self-defense is claimed.[53] He went to the United States Attorney's office and found, near the front of the prosecutor's file, Sewell's criminal record showing prior convictions for violent crimes.[54]

Sewell's violent past, about which the jury did not know, would obviously have been helpful to Agurs' claim of self-defense.[55] Accordingly, defense counsel moved for a new trial, arguing that the prosecutor had denied the defendant her constitutional right, guaranteed by *Brady*, of access to favorable evidence.[56] The Court of Appeals for the District of Columbia Circuit granted a new trial, holding that the undisclosed evidence was material because it might have affected the jury's verdict.[57] The Supreme Court reversed on the ground that the Court of Appeals applied the wrong legal standard in determining whether the evidence was material and thus subject to disclosure under *Brady*.[58] The Supreme Court specifically stated that "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt."[59]

Although the Court's expressed concern in implementing *Brady* is with the factual guilt of the accused,[60] *Agurs* is a confusing case because

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companying text, when it is difficult if not impossible to tell whether evidence is admissible or not. At any rate, allowing the prosecutor to determine admissibility again indicates the central flaw of *Brady*: the lack of an objective determination of disclose ability at the time that disclosure should occur.

Furthermore, even if information could reliably be determined to be inadmissible, disclosure should not be absolutely precluded. Inadmissible information can often lead to favorable evidence that is admissible. *See* United States v. Bonanno, 430 F.2d 1060, 1062 (2d Cir. 1970) (prosecution required to disclose existence of outstanding indictment against principal prosecution witness because it gives lead to defense to investigate possible governmental promises to witness), *cert. denied*, 400 U.S. 964 (1970); United States v. Gleason, 265 F. Supp. 880, 884-86 (S.D.N.Y. 1967) (names of witnesses are not admissible evidence but disclosure may be required when such names could lead to favorable admissible evidence); *Duty of Disclosure*, *supra*, at 283-84 (prosecutor has duty "to disclose exculpatory material which might not be evidentiary itself but which might provide leads to other evidence") (quoting United States v. Ahmad, 53 F.R.D. 186, 193 (M.D. Pa. 1971)).

52. *See* United States v. Agurs, 427 U.S. at 98.

53. *See* United States v. Agurs, 510 F.2d 1249, 1251 (D.C. Cir. 1975), *rev'd on other grounds*, 427 U.S. 97 (1976). Defense counsel cited United States v. Burks, 470 F.2d 432, 434 (D.C. Cir. 1972).

54. United States v. Agurs, 510 F.2d at 1251; *see* Babcock, *supra* note 16, at 1172.

55. *See* Bowman & Bowman, *Defense of a Homicide Case*, in 3 Criminal Defense Techniques §§ 50.01[4], 50.03[2] (1984).

56. United States v. Agurs, 510 F.2d at 1251.

57. *See id.* at 1254.

58. *See* United States v. Agurs, 427 U.S. 97, 102, 112-14 (1976).

59. *Id.* at 112.

60. *See id.* at 112-13. The Burger Court's concern with an accurate factual determination of guilt, as opposed to the adequacy of legal process by which such a determination is made, has been noted by several commentators. *See, e.g.*, Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. Rev. 518, 519 (1977); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 Colum. L. Rev. 436, 437 (1980); *Ade-*

this expressed concern is different from the Court's actual concern and consequent result. If the Court were concerned solely with *Brady*'s impact on the correctness of the verdict, one would expect a suppressed piece of evidence to be evaluated by a single standard of materiality: Either the evidence would impeach the verdict or it would not. Yet *Agurs* established three different standards of materiality by which a court is to determine retrospectively the effect that an undisclosed piece of evidence might have had on the verdict. The actions of the prosecutor and the defense counsel determine which materiality standard is to be applied.

Under *Agurs*, if the undisclosed evidence shows that a prosecution witness committed perjury, then such evidence is considered material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[61] If the undisclosed evidence does not indicate perjury, the standard of materiality depends on whether the defense counsel makes a specific request for the information.[62] If the defense counsel makes such a request,[63] reversal is required if the undisclosed evidence "might have affected the outcome of the trial."[64] The Court apparently intended that this standard of materiality be rela-

quate Investigation, *supra* note 1, at 850-52. The result in *Agurs*, however, does not follow the model of factual guilt, because, as will be discussed, see *infra* notes 68-70 and accompanying text, the same undisclosed fact is treated differently depending on defense counsel's request.

61. United States v. Agurs, 427 U.S. 97, 103 (1976). The Court explained this "pro-defense" standard, *see* Babcock, *supra* note 16, at 1148 n.52, on the ground that perjury corrupts "the truth-seeking function of the trial process," *Agurs*, 427 U.S. at 104. Yet this explanation is inadequate, because undisclosed evidence showing perjury is not qualitatively different from undisclosed favorable evidence in general. *See id.* at 116 (Marshall, J., dissenting). Moreover, as will be discussed below, see *infra* notes 151-55, the line between "perjury" and "inconsistency" is quite nebulous, particularly with respect to its effect on the jury. Furthermore, the Court's special treatment of perjury ignores the Court's melding of undisclosed perjury and undisclosed favorable evidence in general in Giglio v. United States, 405 U.S. 150, 153-54 (1972), and Pyle v. Kansas, 317 U.S. 213, 216 (1942). See *supra* notes 14-15 and accompanying text.

62. This is not to say that the defense counsel's activity is irrelevant in a perjury situation. To the contrary: Whether a witness has committed perjury, instead of merely stating an "inconsistency," will depend on the thoroughness of the defense counsel's cross-examination. As with the obligation to make a specific request, defense counsel's obligation to pin down perjurious testimony requires defense counsel to stab in the dark. This can be an extremely perilous adventure on cross-examination. *See* Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984) (testimony of prosecution witness held to be "misleading," but not perjurious: "While Shields might have been more forthcoming in his testimony, neither can he be charged with defense counsel's failure to ask penetrating questions on cross examination.").

63. The Court in *Agurs* did not define when a request would be deemed specific. The Court merely stated that the request in *Brady* was a paradigmatic example of a specific request in that "[i]t gave the prosecutor notice of exactly what the defense desired." United States v. Agurs, 427 U.S. 97, 106 (1976). Lower courts after *Agurs* have had considerable difficulty in determining whether a defense request is specific or general. See *infra* notes 156-70 and accompanying text.

64. United States v. Agurs, 427 U.S. 97, 104 (1976). Most courts have held this standard to be equivalent to the "harmless error" standard. *See, e.g.*, United States v.

tively easy for defendant to meet.[65] Finally, where the defense counsel makes a general request or no request, the undisclosed evidence will be material under *Agurs* only when it "creates a reasonable doubt that did not otherwise exist."[66] This standard is "pro-prosecution,"[67] because it is much harder for a defendant to meet than the standard applied if a specific request has been made.

A cursory look at these various standards shows without doubt that the *Agurs* Court had other things on its mind than the avowed intent to guarantee reliable verdicts.[68] For instance, the same piece of undisclosed evidence, which would obviously have a single effect on a jury's verdict, will mandate different treatment under *Agurs* depending on the defense counsel's activity.[69] A perfect example is the undisclosed evidence in *Agurs*. Evidence of Sewell's violent past would undoubtedly have had some effect on the jury, as the Court of Appeals held, but reversal was not required because defense counsel did not specifically request the evidence.[70] The rule in *Agurs* is thus fundamentally inconsistent with a sole focus on a reliable verdict.

If the Court was not solely concerned with a reliable verdict, what could it have had in mind by such a complicated implementation of the *Brady* right? One motivation underlying *Agurs* must have been to allocate some of the burden in the disclosure process to defense counsel. Defense counsel's efforts after *Agurs* are a critical factor in determining the extent of defendant's right of access to exculpatory evidence. Why did the Court impose this burden on defense counsel? Professor Babcock contends that the *Agurs* Court sought to stem the broader implications of *Brady* that could have led to the abandonment of an adversarial system of justice.[71] She posits that because *Brady* requires the prosecutor to aid his adversary, the intent of *Agurs* is to require the adversary to earn such aid.[72]

This backlash toward a more adversarial system, however, does not

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Goldberg, 582 F.2d 483, 488 (9th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979); Babcock, *supra* note 16, at 1147.

65. The Court stated that nondisclosure in a specific request situation would be "seldom, if ever, excusable." United States v. Agurs, 427 U.S. 97, 106 (1976). This language, by focusing on excusing the prosecutor, again belies the Court's stated reliance on factual guilt.

66. *Id.* at 112.

67. Professor Babcock cogently suggests the terms "pro-prosecution" and "pro-defense" to characterize the differing standards of materiality delineated by *Agurs*. *See* Babcock, *supra* note 16, at 1148 n.52.

68. See *supra* notes 59-60 and accompanying text.

69. *See, e.g.*, Scurr v. Niccum, 620 F.2d 186, 189-91 (8th Cir. 1980) (evidence deemed material because specifically requested, but court implied that reversal would not have been required if general request had been made).

70. As Professor Babcock states: "[T]he dross of Sewell's conviction record would have been transformed by a specific request into reversal-worthy gold." Babcock, *supra* note 16, at 1149.

71. *See id.* at 1145-55.

72. *See id.* at 1152.

fully explain the standards set forth in *Agurs*. In certain situations after *Agurs*, for instance, even though defense counsel does not satisfy his adversarial burden, the prosecutor is nonetheless obligated to turn over exculpatory evidence.[73] Furthermore, the rules of the game in the adversary model are not so harsh and unfair as to penalize a litigant with a burden that will often prove impossible to fulfill.[74] Yet *Agurs* does exactly that by requiring defense counsel specifically to request information without knowledge of its existence.[75]

Finally, if *Agurs* is based on the Supreme Court's desire to restore the adversary system, one would expect the result of defense counsel's satisfying his adversarial burden to be congruent with the standard of prejudice for defense counsel's failure to satisfy such a burden. Yet this is not the case. If defense counsel makes a specific request and the prosecutor fails to disclose the requested evidence, the conviction is reversed only if the suppressed evidence "might have affected the outcome."[76] Yet when the same evidence goes unrequested due to ineffective assistance of defense counsel,[77] reversal is not required unless the outcome "would have"

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73. *See, e.g.*, Anderson v. South Carolina, 709 F.2d 887, 888 (4th Cir. 1983) (general request for exculpatory police reports held material under pro-prosecution standards of *Agurs*); Carman v. State, 604 P.2d 1076, 1080 (Alaska 1979) (failure to disclose exculpatory material that would have created reasonable doubt justifies new trial under *Agurs*; no specific request by defense counsel).

74. *See* Fuller, *The Adversary System*, in Talks on American Law 30, 42 (H. Berman ed. 1961).

75. Some post-*Agurs* courts have gone so far as to castigate defense counsel for failure to make the proper guesses on a specific request. For instance, in Ruiz v. Cady, 710 F.2d 1214 (7th Cir. 1983), the court stated:

> In the course of representing a defendant, it is incumbent upon defense counsel to make specific requests for specific, allegedly exculpatory evidence in the possession of the prosecution, and it is not the responsibility of the prosecutor or the judge to do the work of the defense counsel. All too often, as we are seeing in this case, the defense counsel makes a buckshot approach hoping a pellet will strike—this type of lack of preparation is not in the best interest of his client nor is it in the interest of justice.

Id. at 1218. It is submitted that such a "buckshot approach" does not always, or even often, stem from a "lack of preparation." Rather, defense counsel's broad discovery requests are caused by his impossible situation after *Agurs*: How can he ask for specific evidence without being able to look at the prosecutor's file? See *supra* notes 29, 30 and accompanying text. It is this unwarranted burden that *Agurs* imposes on defense counsel that the *Ruiz* court should have labeled as "not in the interest of [defendant] nor . . . in the interest of justice." *Ruiz*, 710 F.2d at 1218.

76. United States v. Agurs, 427 U.S. 97, 104 (1976).

77. Even though *Agurs* does leave defense counsel with an impossible task in many cases, there will of course be certain situations in which a reasonably competent defense counsel will be able to make a very specific request. Professor Babcock cites the factual situation in *Agurs* as a case of ineffective assistance, in that a professionally competent attorney would have requested Sewell's record of prior convictions. *See* Babcock, *supra* note 16, at 1172-73. In such a case, defense counsel's failure to comply with the *Agurs* burden would be grounds for a claim of ineffective assistance of counsel. *See* Strickland v. Washington, 104 S. Ct. 2052, 2066 (1984) (counsel has duty to make reasonable investigations).

been affected.[78] Thus it appears that the duty imposed by *Agurs* on defense counsel is higher than the duty imposed on the justice system to order a new trial when defense counsel fails to fufill his adversarial burden under *Agurs*. A true commitment to the adversary system would require reversal whenever defense counsel unreasonably failed to request specifically evidence that might have (as opposed to would have) affected the outcome.[79]

If the Court was not solely motivated by the adversary theory in *Agurs*, why did the Court impose on defense counsel the burden of making a specific request? The case, particularly the discussion of the prosecutor's role after *Brady*,[80] indicates that the Court was especially concerned with the difficult if not impossible task imposed on the prosecutor by *Brady*. The prosecutor, a zealous advocate by trade, could not easily be expected to comb through his files and determine with precision all evidence that will help his adversary's case in the slightest. Without any aid from those with a more objective viewpoint, the most that could be expected from a prosecutor is that he will view as favorable only those items of evidence that are obviously exculpatory to defendant, such as evidence that creates a reasonable doubt of the defendant's guilt.[81] The *Agurs* Court recognized, however, that the *Brady* right of access to exculpatory evidence could not be fully implemented if the defendant were entitled only to such obviously exculpatory evidence as would create a reasonable doubt.[82] *Brady* simply stated that defendants were entitled to favorable material evidence.[83] The Court in *Agurs* recognized that *Brady* did not require that evidence had to shake the courtroom (or jury room) walls in order to be material.[84] In *Brady* itself, the suppressed evidence held to be material to punishment[85] was of course favorable, but it hardly

78. Strickland v. Washington, 104 S. Ct. 2052, 2068 (1984).

79. As Professor Babcock suggests, the only way to form a proper connection between the specific request requirement and the effectiveness of counsel is through an especially pro-defendant standard of materiality for effective assistance: "Ideally, if the adversary model is to be fulfilled, *no* showing of prejudice should be required when the defense lawyer has been shown to be seriously ineffective." Babcock, *supra* note 16, at 1167 (emphasis in original).

80. *See* United States v. Agurs, 427 U.S. 97, 108-11 (1976).

81. *See id.* at 107. A reading of post-*Agurs* cases shows that even this mild assumption may have been too much. Prosecutors have on occasion overlooked the favorability of evidence that seems highly exculpatory. *See, e.g.*, Austin v. McKaskle, 724 F.2d 1153, 1156 (5th Cir. 1984) (police reports directly contradict damaging testimony that defendant was driver rather than passenger of car).

82. *See* United States v. Agurs, 427 U.S. 97, 107 (1976). Such a limited right would give little recognition to the artistry of defense counsel in exploiting evidence that is even remotely favorable. *See id.* at 119 (Marshall, J., dissenting) (materiality should be determined by impact of evidence on jury); United States v. Bonanno, 430 F.2d 1060, 1062 (2d Cir.) (even if indictment against star government witness is inadmissible, "this would not diminish its obvious value to the defense in preparing for trial"), *cert. denied*, 400 U.S. 964 (1970).

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

84. *See* United States v. Agurs, 427 U.S. 97, 112-13 (1976).

85. See *supra* notes 6-13 and accompanying text.

determined the issue. Boblit's confession exculpating Brady would, under the circumstances, be the subject of some skepticism by the jury.[86]

The question for the *Agurs* Court was how to guarantee disclosure of all evidence that is favorable but less than overwhelming—to which *Brady* guarantees defendant's access—when such evidence would often in good faith be overlooked by a prosecutor not prone to see the favorability of any evidence to his adversary. The Court solved its dilemma by putting on defense counsel the burden of making a specific request.[87] This was done not solely to guarantee that the defendant earn his *Brady* rights in the context of the adversary system, but rather because the Court apparently thought that defense counsel was the best party to direct the prosecutor toward favorable evidence.[88] Under *Agurs*, the function of a defense request is to "flag" evidence that is favorable but not overwhelming—evidence that a prosecutor in good faith would probably overlook.[89] The reward for guiding the prosecutor in this manner is disclosure, or reversal of a conviction when the prosecutor suppresses the evidence. The penalty for failing to guide the prosecutor toward evidence that is favorable but less than overwhelming is the inevitable suppression of such evidence without reversal. The prosecutor is not expected to determine the favorability of such evidence on his own. Accordingly, such less-than-overwhelming evidence that would not create a reasonable doubt but merely "might have affected the verdict," cannot, under *Agurs*, create a right to reversal unless the defense counsel flags it for the prosecutor.[90]

In sum, *Agurs* effectuates the *Brady* right of disclosure by trying to take much of the heat off the prosecutor. This is a salutory goal, even though incompletely realized, given the prosecutor's singular incapability of determining whether evidence is favorable to his adversary. However, *Agurs* in turn puts the heat on the defense counsel to effectuate *Brady* rights. This, as we will see, is not a salutory goal, and results in an ineffective remedy for the fundamental right of access guaranteed by *Brady*.

86. In Giglio v. United States, 405 U.S. 150 (1972), less-than-overwhelming evidence was also held to be material under *Brady* principles. *See id.* at 154. The suppressed evidence indicated that the main prosecution witness had made a deal with the government. This evidence was of course favorable to the defendant, but the defendant had already cross-examined the witness vigorously. *See id.* at 151-52. The Court reversed Giglio's conviction on the grounds that the jury was entitled to know of this evidence because it affected the witness' credibility. *Id.* at 154-55.

87. See *supra* notes 62-65 and accompanying text.

88. *See* United States v. Agurs, 427 U.S. 97, 106 (1976) ("In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired.").

89. *See* United States v. Keogh, 391 F.2d 138, 147-48 (2d Cir. 1968); *Defense Requests*, *supra* note 37, at 448-51.

90. *See* United States v. Turner, 725 F.2d 1154, 1159 (8th Cir. 1984) (favorable evidence might have affected verdict, but does not create reasonable doubt; no reversal in absence of specific request); Maddox v. Montgomery, 718 F.2d 1033, 1035-36 (11th Cir. 1983) (no specific request for evidence; therefore no reversal). See *supra* note 69 and accompanying text.

B. Agurs—*a Defective System for Guaranteeing Access to Exculpatory Evidence*

There are five basic problems with the method chosen by the Court in *Agurs* to determine the favorability of evidence to an accused. Part III of this Article proposes an in camera hearing requirement for all criminal cases, which would overcome the problems created by *Agurs*' implementation of the *Brady* right.

1. Prosecutor's Bias

The first problem arises because even if the evidence is extremely favorable and important to the defense as an objective matter, it is not uncommon for the zealous prosecutor to overlook its favorability in good faith. Thus, as with *Brady*,[91] *Agurs*' assumption that even the prosecutor can determine the favorability of obviously exculpatory evidence takes insufficient account of the prosecutor's dilemma. For example, in *Cannon v. Alabama*,[92] the issue of Cannon's identity as the perpetrator of a murder was in dispute.[93] The prosecution had one eyewitness to the crime who identified Cannon.[94] The prosecutor failed to disclose, however, that another person at the scene just before the murder occurred had stated that Cannon was not there.[95] As an advocate, it was certainly possible for the prosecutor to convince himself in good faith that the undisclosed evidence was not that important. The undisclosed witness did not say that another person had in fact committed the crime; she merely said that she hadn't seen Cannon at the scene that night.[96] This did not foreclose the possibility that Cannon arrived after she left. Therefore, even assuming that the prosecutor would evaluate in detail the import of evidence in his file not affirmatively favorable to his own case, it is understandable if he does not, as an objective matter, see that such evidence is favorable to the defendant's case.[97] The Fifth Circuit in *Cannon*, however, held that the witness' undisclosed statement to a police officer that she had not seen Cannon, was material under *Agurs* even though defense counsel had made no request for the evidence.[98] Thus, the court found that this evidence was so highly exculpatory that even the zealous advocate should have seen its favorability to the defense. Yet, the facts of *Cannon* itself show that the burden on prosecutors to cast an objective eye on their files is too great, even regarding highly

91. See *supra* notes 27-34 and accompanying text.
92. 558 F.2d 1211 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).
93. *See id.* at 1213.
94. *See id.*
95. *See id.*
96. *See id.*
97. It should be remembered that the prosecutor, who has already obtained an indictment, obviously feels that his case is strong—strong enough, perhaps, to withstand any evidence from which a defense counsel can wring a drop of favorability.
98. *See* Cannon v. Alabama, 558 F.2d at 1215-16.

exculpatory evidence.[99] This burden could be alleviated by requiring the prosecutor to submit his entire file to the trial court for in camera review.

2. Marginally Favorable Evidence

Because a prosecutor is prone to overlook highly exculpatory evidence, he will also overlook the favorability of less highly exculpatory evidence that is specifically requested by defense counsel. That is, the fact that the defense counsel, as required by *Agurs*, guides the prosecutor to favorable evidence does not necessarily mean that such evidence will be disclosed. The prosecutor still has an adversary mindset, and even when directed to evidence, he cannot be expected to look at it with defense-colored or even objective glasses. The *Agurs* system of guaranteeing disclosure of evidence that is less than overwhelmingly favorable in fact fails to guarantee such disclosure, because the ultimate question of favorability remains with the understandably biased prosecutor.

An example of the failure of the *Agurs* notice system is *Jones v. Jago*.[100] The defense counsel in *Jones* specifically directed the prosecutor toward all statements made by one Harvey.[101] The prosecutor reviewed Harvey's statements and unilaterally determined that none were favorable to defendant Jones.[102] In fact, Harvey, an eyewitness to the

99. The burden on the prosecutor is exacerbated by the fact that under the *Brady/Agurs* system of retrospective review, materiality of suppressed evidence is determined in light of all the evidence. *See* United States v. Agurs, 427 U.S. 97, 112 (1976). For instance, the suppressed statement in *Cannon* was considered material, partly due to the weakness of the government's case. Yet prospectively, from the prosecutor's point of view, it is all but impossible to expect him to recognize the weakness of his case, and then to gauge the favorability of evidence to the accused accordingly. There is thus an imperfect fit between the prosecutor's duty to disclose and the enforcement of that duty through retrospective application of materiality standards. This imperfect fit is recognized, but not resolved, by the Court in *Agurs*. *See* 427 U.S. at 107-08. The only way to guarantee disclosure of evidence under consistent standards of favorability is through contemporaneous review in an in camera hearing. See *infra* notes 180-88, 203-50 and accompanying text. The defendant will never be accorded fair access to favorable evidence under *Brady* when the right to such access is in the hands of a prosecutor looking forward or reviewed by an appellate court looking backward.

Cannon is not an isolated case of a court finding that suppressed evidence was so highly exculpatory that the prosecutor could be expected to (but failed to) determine its favorability without any help from defense counsel. *See, e.g.*, Austin v. McKaskle, 724 F.2d 1153, 1156 (5th Cir. 1984) (police records from night of appellant's arrest); Anderson v. South Carolina, 709 F.2d 887, 888 (4th Cir. 1983) (police reports contradicting government's theory).

100. 575 F.2d 1164 (6th Cir.), *cert. denied*, 439 U.S. 883 (1978).

101. *See id.* at 1166. Harvey was never called as a prosecution witness, so his statements were not otherwise available to defense counsel under the Jencks Act. *See* 18 U.S.C. § 3500 (1982).

102. *See* Jones v. Jago, 575 F.2d at 1166. It should be noted that this determination by the prosecutor had the collateral effect of keeping Harvey off the stand as a defense witness. Defense counsel reasonably assumed after nondisclosure by the prosecutor that Harvey had made prior statements harmful to Jones. Defense counsel concluded, therefore, that any value of Harvey's testimony would be outweighed by damaging impeachment evidence, which did not in fact exist. *See id.* at 1167.

murder with which Jones was charged, had made extensive statements that made no reference to Jones at all.[103] From the prosecutor's point of view, the evidence was at best neutral because Harvey did not expressly let Jones off the hook. *Jones* illustrates how, as in *Cannon*,[104] one with a prosecutorial mindset could in good faith look at the evidence in issue and determine that it was not exculpatory. Moreover, the fact that defense counsel, by specific request, "flagged" this statement for special review would not at all change the biased adversary's judgment with respect to its favorability. "Flagging" the issue for consideration does not change the nature of the person making the consideration. The court in *Jones* rightly held that Harvey's statement was material under the specific request standards of *Agurs*, "in light of all the attendant circumstances."[105] Yet *Jones* shows that the burden on the prosecutor to cast an objective eye on his files is too great, even when the defense counsel guides him through the files.[106] The prosecutor would not have to undertake such a burden if he were required to submit his entire file to the trial court for in camera review.

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103. *Id.* at 1166.

104. See *supra* notes 92-99 and accompanying text.

105. Jones v. Jago, 575 F.2d at 1166-67. As was seen for general requests in *Cannon*, see *supra* note 99, the burden on the prosecutor as to specific requests is exacerbated by the fact that his actions will be reviewed retrospectively in light of all the evidence. Thus, besides determining favorability, a prosecutor looking forward must plan for a court looking backward by assessing objectively the strength of his case. *Agurs* requires the prosecutor not only to be objective—a seeming impossibility—but also to master a crystal ball approach to favorability.

106. *Jones* is by no means an isolated case of a court reversing a conviction after finding that the prosecutor had overlooked the favorable nature of evidence, even though directed to it by his helpmate, the defense counsel. *See, e.g.*, Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983) (specific request for information respecting payment of government witnesses), *cert. granted*, 105 S. Ct. 427 (1984); Scurr v. Niccum, 620 F.2d 186, 190-91 (8th Cir. 1980) (police investigations of another suspect of crime); Sennett v. Sheriff of Fairfax County, 608 F.2d 537, 537 (4th Cir. 1979) (specific request for identity of two persons whose testimony might have discredited prosecution's identification witnesses; government's case "far from overwhelming"); People v. Kitt, 86 A.D.2d 465, 466, 450 N.Y.S.2d 319, 320 (1982) (exculpatory lab report suppressed despite specific request: "prosecution believed the evidence to be more inculpatory" than exculpatory).

A fundamental flaw in the *Agurs* system is that the prosecutor, in making his prospective determination of favorability, is apt to usurp the function of the jury. Often a prosecutor's conclusion that evidence is not exculpatory (even after investigating the evidence pursuant to a specific defense request) is really a conclusion that the evidence is entitled to little if any weight. Yet it is axiomatic that the weight of the evidence is a jury question. *See* Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1154 (5th Cir. 1981); Fed. R. Evid. 104. For an example of prosecutorial usurpation of the fact-finder's role, see Chaney v. Brown, 730 F.2d 1334 (10th Cir.), *cert. denied*, 105 S. Ct. 601 (1984). In *Chaney*, the prosecutor suppressed a statement, made to the FBI, that placed the murder victim over 100 miles from defendant on the day of the victim's death. *Id.* at 1348. The prosecutor determined that this statement was not exculpatory because the witness, at the time of defense counsel's specific request, was no longer certain of her identification of the victim. *Id.* Although this uncertainty may have detracted from the weight of the prior statement, the statement was certainly favorable to the defendant. The *Agurs* system thus allowed the prosecutor understandably, but impermissibly, to suppress the statement based on his own nonobjective conclusion that it was entitled to no weight.

3. Defense Counsel as Guide

Even assuming that a prosecutor can objectively determine the favorability of flagged evidence, the role of navigator through the prosecutor's file is an impossible task for defense counsel to fulfill. In effect *Agurs* requires the blind to lead the blind on a quest to discover evidence favorable to the accused. Even the court in *Agurs* recognized that "[i]n many cases . . . exculpatory information in the possession of the prosecutor may be unknown to defense counsel."[107] Given this recognized shroud over defense counsel, the Court would have been wise to question the advisability of designating defense counsel as the prosecutor's navigator. Instead of searching for another method of providing for disclosure of exculpatory evidence, however, the Court determined that any built-in deficiencies in defense counsel's ability to guide the prosecutor would simply excuse the prosecutor from a duty to disclose exculpatory, but not highly exculpatory, evidence.[108] The fact that defense counsel could not possibly have known that certain evidence existed created no sympathy for the defendant on the Court's part. Rather, the inherent limitations of defense counsel as navigator give rise under *Agurs* to sympathy for the prosecutor, who cannot be expected to uncover on his own, evidence that is less than highly exculpatory.[109] In sum, when defense counsel cannot possibly guide the prosecutor to favorable evidence because there is no way he can know of it, suppression of such evidence is not error under *Agurs* unless it is so obviously exculpatory as to create a reasonable doubt.[110] Defendant is thus denied access to less highly exculpatory evidence that might have merely "affected" the verdict.[111] Denial of access to such evidence is clearly contrary to *Brady*'s spirit of disclosure.[112] Access to all favorable evidence can best be ensured through an in camera hearing requirement, which does not rely on defense counsel as blind navigator.

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107. United States v. Agurs, 427 U.S. 97, 106 (1976). See *supra* note 27 and accompanying text.

108. *See* United States v. Agurs, 427 U.S. 97, 106-07 (1976).

109. A handful of courts have bent a little in recognizing the difficult situation facing defense counsel and defendant after *Agurs*. For instance, some courts have held a relatively general request to be specific when defense counsel could not be expected under the circumstances to do any better. *See, e.g.*, Chaney v. Brown, 730 F.2d 1334, 1344 (10th Cir.) ("Chaney's counsel could not limit his request to specific witnesses because the request was made prior to trial and . . . counsel did not then know the[ir] identit[ies] . . . ."), *cert. denied*, 105 S. Ct. 601 (1984). Other courts have held that if there is doubt whether a defense request is specific or general, the request should be deemed specific. *See, e.g.*, United States *ex rel.* Marzeno v. Gengler, 574 F.2d 730, 736 (3d Cir. 1978). In contrast, most courts are completely unsympathetic to defense counsel's inability specifically to request information to which he has never had access. *See, e.g.*, Ruiz v. Cady, 710 F.2d 1214, 1218 (7th Cir. 1983). See *infra* notes 161-64 and accompanying text.

110. *See* United States v. Agurs, 427 U.S. 97, 106-07 (1976).

111. See *supra* note 27.

112. See *supra* notes 82-86 and accompanying text.

4. Materiality Standard for Reversal

Even assuming that defense counsel can in some situations point the prosecutor toward favorable evidence, and even assuming that the prosecutor can overcome his bias and determine that such evidence is favorable to the defendant, disclosure does not automatically follow. Under *Agurs*, the prosecutor commits reversible error only by failing to disclose materially favorable evidence.[113] Thus, favorable evidence that is not, on retrospective review, deemed to be material can be freely suppressed by the prosecutor. As the *Agurs* court stated: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[114]

The meaning and promise of *Brady* is that a defendant is entitled to access to all evidence in his favor.[115] Yet this promise cannot be fully effectuated by the system of retrospective review adopted in *Brady* and perpetuated in *Agurs*. Of course, with the trial over and the verdict rendered, the systemic costs would be too high if the defendant could obtain a reversal whenever any objectively favorable evidence was suppressed. A materiality standard is the Court's assurance that generally fair verdicts are not unnecessarily overturned.[116] But although the Court's adherence to materiality standards is understandable in light of the interests at stake in post-trial reviews, the fact remains that defendants will often be denied access to objectively favorable evidence, without recourse.[117]

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113. See *supra* notes 57-58, 61-67 and accompanying text.

114. 427 U.S. at 109-10. The Court justified its holding that not all favorable evidence must be disclosed by contending that a rule requiring disclosure of all favorable evidence would lead to an open file rule: "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." *Id.* at 109.

Contrary to the Court's assertions, a rule requiring disclosure of all favorable evidence does not lead to the dreaded open file rule. For instance, the prosecutor would not have to disclose inculpatory evidence or neutral or irrelevant facts. Such information may be helpful to an accused, but it is not favorable in a *Brady* sense. If defendant had an absolute right to all favorable evidence, he would not be entitled to peruse the entire file, but he would have access to all evidence that could fairly be used to defend his innocence.

115. *See* Westen, *supra* note 12, at 121-23.

116. *See* United States v. Agurs, 427 U.S. 97, 117 (1976) (Marshall, J., dissenting).

117. It is thus possible that a prosecutor in custody of evidence that is objectively favorable but not overwhelmingly exculpatory may be willing to gamble with suppression. Assuming that the evidence is ever discovered by defense counsel (whose post-trial investigatory incentives are low), reversal is anything but automatic. *See, e.g.*, United States v. Farid, 733 F.2d 1318, 1320-21 (8th Cir. 1984) (specific request; impeachment evidence favorable but not material); King v. Ponte, 717 F.2d 635, 645 (1st Cir. 1983) (grand jury testimony favorable, but not material); United States v. Montoya, 716 F.2d 1340, 1346 (10th Cir. 1983) (specific request; impeachment evidence favorable but not material); *see also* United States v. Brown, 574 F.2d 1274, 1280 (5th Cir. 1978) (Rubin, J., concurring in part and dissenting in part) (materiality, not mere admissibility or relevance is *Agurs* test for reversal), *cert. denied*, 439 U.S. 1046 (1980).

After repeated frustration with prosecutors who gambled with suppression in reliance on the retrospective materiality standards of *Agurs*, the Third Circuit recently attempted to limit such gamesmanship in United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984). In

The only way to guarantee access to all favorable evidence and yet avoid the open file rule is to provide objective review of the prosecutor's file before the verdict is rendered—before the cost of a final judgment requires application of a materiality standard.

Furthermore, the Court's reliance in *Agurs* on materiality standards, although understandable, is fundamentally in conflict with the automatic right of reversal promulgated by the Supreme Court in *Davis v. Alaska*[118] and reaffirmed in *United States v. Cronic*.[119] In *Davis*, the Court held

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Oxman, the prosecutor suppressed a grant of immunity to a relatively important (though, in the eyes of the prosecutor, undoubtedly cumulative) prosecution witness. *See id.* at 1311. The defense had specifically requested such information. *Id.* at 1301. After conviction, the government argued that the suppressed information was not material under *Agurs*, because, viewed in the light of all the evidence presented, impeachment of the witness would not have affected the verdict. *Id.* at 1311. The court stated:

> It seems clear that [the *Agurs*] tests have a tendency to encourage unilateral decision-making by prosecutors with respect to disclosure. . . . [T]he root of the problem is the prosecutor's tendency to adopt a retrospective view of materiality. . . . Following their adversarial instincts, some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it neither to defense counsel nor to the court. . . . Our experience since *Agurs* suggests that [it] . . . pays too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants . . . .

Id. at 1310-11. In an attempt to control prosecutorial discretion in light of retrospective review, the *Oxman* court rejected the *Agurs* standard of materiality for specifically requested evidence, at least as framed in terms of whether it might have affected the verdict. The Third Circuit instead lifted a sentence from *Agurs* that materiality would be found whenever, viewed *prospectively*, "a substantial basis for claiming materiality exists." *Id.* at 1313 (quoting United States v. Agurs, 427 U.S. 97, 106 (1976)). Recognizing that this standard may require disclosure of favorable information that would not in fact have affected the verdict, the court adopted a second step to the analysis: Assuming the evidence should have been disclosed, and thus constitutional error occurred, was the error harmless beyond a reasonable doubt? *Oxman*, 740 F.2d at 1317.

Although the *Oxman* court is to be commended for its attempt to solve the *Agurs* problem of prospective application of retrospective standards of review, its effort is defective for several reasons. First, as the dissent points out, the court misreads *Agurs* when it attempts to provide a stricter standard of pre-trial disclosure than the standard applied to retrospective review. *Id.* at 1321 (Sloviter, J., dissenting). *Agurs* specifically states that no prosecutorial error has occurred unless the right to fair trial is denied. *See* 427 U.S. at 108. If evidence that, when viewed prospectively, appears possibly material is in fact not material when viewed retrospectively, the fair trial right has not been denied under *Agurs*.

Secondly, after much ado, the court of appeals nonetheless applies a harmless error standard on retrospective review. Because the harmless error standard has often been equated with the *Agurs* "might have affected the verdict" standard, see *supra* note 64 and accompanying text, it is apparent that the *Oxman* court has not solved the problem that it addresses. A gambling prosecutor will gamble on the retrospective harmless error standard in exactly the same way that he will gamble on the "might have affected the verdict" standard.

Finally, the *Oxman* court, in focusing on the gambling prosecutor, misses the central problem of *Agurs*: The prosecutor's adversarial instincts will prevent an objective determination of favorability, no matter how protective to the defendant the standard of pre-trial disclosure may be. Suppression will therefore occur even if the court were to adopt an "*arguable* basis for claiming materiality" standard for pre-trial disclosure.

118. 415 U.S. 308 (1974).

119. 104 S. Ct. 2039 (1984).

that denial of the right to effective cross-examination by a state rule of privilege that excluded evidence of bias was serious constitutional error that could not be cured by any showing of lack of prejudice.[120] In *Cronic*, the Court cited *Davis* approvingly as a situation in which the surrounding circumstances—denial of effective cross-examination—rendered it so unlikely that counsel could render meaningful assistance that automatic reversal was required.[121] In other words, the Court has twice stated flatly that denial of the right to effective cross-examination mandates reversal even if evidence of guilt was overwhelming, and even if full cross-examination would not have affected the conviction. In contrast, if a prosecutor suppresses evidence, leading to ineffective cross-examination of prosecution witnesses, application of *Agurs* would mean that reversal is far from automatic. Much would depend on whether the defendant's request for the information was specific or general.[122] Even if the request were specific, reversal would not be proper under *Agurs* if evidence of guilt was overwhelming.[123]

In sum, the Court has failed to integrate the *Agurs* line of cases with the *Davis* line. The defendant, for no reason whatsoever, is far better off under *Davis*, even though the prosecutor's suppression can create the same harm: denial of cross-examination. Not surprisingly, the conflict between *Davis* and *Agurs* has created confusion. In *Bagley v. Lumpkin*,[124] the Ninth Circuit applied the *Davis* rule of automatic reversal when the prosecutor suppressed impeachment evidence, and thus denied effective cross-examination of two prosecution witnesses.[125] This result is consistent with *Davis* but improper under *Agurs* because the district court judge had found beyond a reasonable doubt that even effective cross-examination would not have affected the verdict.[126] The Supreme Court has granted certiorari in *Bagley*[127] to resolve the obvious conflict between *Davis* and *Agurs*. For the purposes of this Article, it is enough to note that the anomaly addressed in *Bagley* would not arise in a system that guaranteed disclosure before the verdict is rendered.

5. Retrospective Review

Perhaps the major problem perpetuated by *Agurs* is that the *Brady* right of access to exculpatory evidence is enforced after trial by way of

120. *See* Davis v. Alaska, 415 U.S. 308, 318 (1974) (citing Smith v. Illinois, 390 U.S. 129, 131 (1968) (quoting Brookhart v. Janis, 384 U.S. 1, 3 (1966))).

121. *See* United States v. Cronic, 104 S. Ct. 2039, 2047 (1984).

122. See *supra* notes 62-67 and accompanying text.

123. See *supra* notes 112-14 and accompanying text.

124. 719 F.2d 1462 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 427 (1984).

125. *See id.* at 1464.

126. *See id.* The court of appeals did not challenge the district court's finding on this issue per se; rather, it held that the *Davis* rule of automatic reversal was based on the fundamentality of the right to effective cross-examination, the denial of which could never be harmless. *See id.* at 1464.

127. Bagley v. Lumpkin, 105 S. Ct. 427 (1984).

retrospective review. Because of the materiality standard imposed at that point,[128] a reviewing court cannot merely determine whether suppressed evidence is objectively favorable to defendant, but must also determine whether the evidence would or might have had some effect on the outcome of the trial. Yet such a determination is inherently speculative because one cannot tell with any certainty what effect the evidence would have had, precisely because the evidence was not introduced.[129] The appellate court's review of "what might have been" is extremely difficult in the context of an adversarial system. Evidence is not introduced in a vacuum; rather, it is built upon. The absence of certain evidence may thus affect the usefulness, and hence the use, of other evidence to which defense counsel does have access. Indeed, the absence of a piece of evidence may affect the entire trial strategy of defense counsel.[130] Retrospective review of suppressed evidence, even if made in light of all the evidence presented at trial, is likely if not certain to give insufficient consideration to the strategic uses to which the suppressed evidence could have been put.[131] In this respect, review of the likely effect of suppressed

128. See *supra* notes 114-17 and accompanying text.

129. *See* United States v. Oxman, 740 F.2d 1298, 1313 n.12 (3d Cir. 1984) (noting the "hazards of hypothesizing about the particular course of events that may have ensued at trial had the prosecutor disclosed exculpatory evidence"). A parallel problem of speculation is found in civil breach of contract actions, when plaintiff is required to prove lost profits: what he would have made but for defendant's breach. The general rule in this type of case is to resolve all doubts against the defendant, who was the cause of this uncertainty. *See, e.g.*, Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977); *In re* Rothko, 43 N.Y.2d 305, 323, 372 N.E.2d 291, 298, 401 N.Y.S.2d 449, 457 (1977). Interestingly, a parallel act of grace is not generally accorded to *Brady* defendants, even though the uncertainty as to the effect of the evidence was caused by the prosecutor's suppression and the trial court's lack of an in camera procedure. *See, e.g.*, United States v. Sperling, 726 F.2d 69, 73 (2d Cir.) (burden of materiality on defendant), *cert. denied*, 104 S. Ct. 3516 (1984); United States v. Montoya, 716 F.2d 1340, 1346 (10th Cir. 1983) (same).

130. *See* Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 145 (1964) (real focus of *Brady* must be on the effect suppression had on defense counsel's ability to prepare for trial) [hereinafter cited as *Prosecutor's Duty*].

131. For example, in Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983), Judge Kravitch argued in her concurrence that an exculpatory statement and witness were not material because they "would have contradicted the other theories on which [the] appellant had relied." *Id.* at 1546 (Kravitch, J., concurring). The real question, however, is whether Antone would have relied on those "other theories" if defense counsel had known the existence of the suppressed witness and statement. A more appropriate, though atypical, view was expressed by the Eighth Circuit in Scurr v. Niccum, 620 F.2d 186 (8th Cir. 1980). The court rejected the government's argument that suppressed evidence was not material because it was contrary to defendant's trial strategy:

> We reject this suggestion. For it amounts, in effect, to a claim that evidence wrongfully suppressed by the prosecution in advance of trial can be considered material only if it supports the particular defense strategy actually employed by the defendant, a strategy which, of necessity, would have been selected without the benefit of evidence the defendant was entitled to consider and use. . . . [W]e refuse to bind the defendant to a trial strategy selected in the partial vacuum created by the state's wrongful suppression of material evidence.

Id. at 191 n.3. The admirable analysis in *Niccum* is, however, arguably contrary to the

evidence is even more difficult and speculative than most other reviewing tasks undertaken by appellate courts.[132] In a typical case in which the government claims harmless error, for instance, the evidence has actually been introduced, and the trial has gone forth.[133] Even from a cold record, therefore, it is easier to ascertain the actual effect of introduced evidence than to determine "what might have been" if suppressed evidence had been disclosed to defense counsel.[134]

A further problem with retrospective review is that it allows the appellate court, on a cold record, to usurp the jury's role.[135] It is the jury's task to weigh the evidence.[136] The *Agurs* standards of materiality, however, require a finding by the judge that the evidence would have created a reasonable doubt (as to general requests) or that it might have affected the outcome (as to specifically requested evidence).[137] The supposedly objective materiality standards of *Agurs* do not require the judge to evaluate the suppressed information from the point of view of the reasonable juror who has been presented with the evidence by skilled counsel.[138]

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standards of materiality set forth in *Agurs*, which focus on the actual effect the suppressed evidence would have had on the jury, as opposed to the use to which the evidence could have been put by competent counsel. *See* United States v. Agurs, 427 U.S. 97, 112 n.20 (1976).

132. It could be argued that retrospective review is made easier by *Agurs*' refusal to focus on the use that defense counsel could have made of the evidence. This argument ignores the fact that *Brady* guarantees access to evidence before and during trial. Thus, an honest retrospective review would have to take account of the use that could have been made of the evidence, as well as its effect on the jury. *See* United States v. Agurs, 427 U.S. 97, 116-17 (1976) (Marshall, J., dissenting); *Prosecutor's Duty*, *supra* note 130, at 136, 149-50.

133. *See, e.g.*, Harrington v. California, 395 U.S. 250, 252 (1969) (unconstitutional introduction of co-defendants' confessions); Chapman v. California, 386 U.S. 18, 19 (1967) (prosecutorial comment on failure of accused to testify).

134. When defendant claims ineffective assistance of counsel, an appellate court will often be required, after *Strickland*, see *supra* note 78 and accompanying text, to determine what might have happened if defense counsel had acted competently. This is the same type of speculative analysis that the *Agurs* Court requires: to assume the existence of an occurrence that did not in fact occur. Far from giving validity to the *Agurs* system of review, however, the decision in *Strickland* shows another instance of the Supreme Court's failure to recognize the difficulty of appellate review in such a situation. *See* Strickland v. Washington, 104 S. Ct. 2052, 2075 (1984) (Marshall, J., dissenting); *see also* Larsen v. Maggio, 736 F.2d 215, 218 (5th Cir. 1984) (hypothetical "might have beens" held insufficient to show prejudice under *Strickland*).

135. *See* United States v. Agurs, 427 U.S. 97, 117-18 (1976) (Marshall, J., dissenting).

136. See *supra* note 106.

137. *See* United States v. Agurs, 427 U.S. 97, 112 (1976); *see also* Note, *The United States Court of Appeals: 1975-1976 Term Criminal Law and Procedure*, 65 Geo. L.J. 201, 322-29 (1976) (discussing contrast between *Brady* information and requirements imposed by Jencks Act).

138. See *supra* notes 41-43, 61-67 and accompanying text. In contrast, the Second Circuit standard of materiality before *Agurs* was whether the suppressed material, as developed and presented by skilled counsel, could have created a reasonable doubt in the minds of enough jurors to have affected the verdict. *See* United States v. Morell, 524 F.2d 550, 553 (2d Cir. 1975). See also the pre-*Agurs* cases collected by Justice Marshall, dissenting in United States v. Agurs, 427 U.S. 97, 119 n.5 (1976) (Marshall, J., dissenting).

Accordingly, numerous post-*Agurs* cases dismiss the materiality of suppressed evidence because the reviewing courts were not impressed with the value of the evidence in light of the entire record.[139] Yet this ignores the impact that the evidence might have had on an actual jury of laypersons.[140] In sum, the *Agurs* standard of retrospective review gives inadequate consideration to what would have actually happened at the trial if the prosecutor had met his constitutional duty of disclosure.

The final problem with retrospective review under *Brady* and *Agurs* is that it is an insufficient guarantee of finality of judgments. Of course, the major reason for a materiality standard (as opposed to the full effectuation of *Brady* rights that a mere favorability standard would provide) is to protect the finality of judgments.[141] Ironically, however, a reviewing court considering the materiality of suppressed evidence must make a complete review of the record, without the benefit of a "clearly erroneous" standard. A "clearly erroneous" standard cannot be applied in the majority of cases precisely because the trial court does not review the suppressed evidence before the judgment is rendered.[142] There is, therefore, no judicial ruling to which the clearly erroneous standard can be applied. If the trial court had reviewed the prosecutor's file pursuant to an in camera hearing before the judgment was rendered, a clearly errone-

139. See *infra* note 140.

140. For instance, a standard ruling of post-*Agurs* courts is that undisclosed impeachment evidence as to a prosecution witness is not material, even if specifically requested, when the witness was impeached on cross-examination anyway. *See, e.g.*, United States v. Tracey, 675 F.2d 433, 439 (1st Cir. 1982) (no request; witness' bias shown by other evidence), *cert. denied*, 53 U.S.L.W. 3473 (U.S. Jan. 8, 1985) (No. 84-784); United States v. Wilson, 671 F.2d 1138, 1139 (8th Cir.) (specific request; favorable treatment of prosecution witnesses not material because they had been impeached with prior crimes), *cert. denied*, 456 U.S. 994 (1982); United States v. Talavera, 668 F.2d 625, 631-32 (1st Cir.) (no request; prior statement of witness that he was prepared to give false alibi to police is not material because witness was already impeached as a paid informant), *cert. denied*, 456 U.S. 978 (1982); Skinner v. Cardwell, 564 F.2d 1381, 1386 (9th Cir. 1977) (evidence of deal with prosecution not material because witness was already impeached as inmate at state hospital, as LSD user, and with prior inconsistent statements), *cert. denied*, 435 U.S. 1009 (1978). Of course, it is possible for evidence favorable to the defense to be cumulative. *See* Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring). Under the materiality standards of *Agurs*, however, it is far too likely that a reviewing judge will determine evidence to be "cumulative," without considering its impact on a jury of laypersons. For example, in *Skinner*, the prosecution witness was impeached with evidence other than his deal with the government. *See* 564 F.2d at 1387. Yet these other grounds of impeachment may very well not have had the same impact as evidence that the witness had "sold his soul" to the government. Again it appears that the objective standard of materiality set forth in *Agurs* and applied in *Skinner* gives insufficient consideration to the impact that the suppressed evidence would have had on an actual jury. *See generally* Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 Harv. L. Rev. 887 (1981) (suggesting means to enforce needed disclosure).

141. See *supra* note 115-17 and accompanying text.

142. A "clearly erroneous" standard can only be applied to a judge's ruling. *See generally* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 664 (1971) (noting substantial deference given to trial judge's rulings based on facts and circumstances critical to record).

ous standard could legitimately be applied, thus providing greater protection of the final judgment.[143] The integrity of final judgments is obviously furthered if the lower court's ruling is made before the judgment is rendered. This is especially true if the court finds after pre-trial in camera review that the evidence must be disclosed under *Brady*. If the court orders disclosure after an in camera hearing, there will be no attack at all on the final judgment on *Brady* grounds.[144] Coupled with an abuse of discretion standard when the trial court refuses to order disclosure, an in camera procedure would be less disruptive to finality values than the system of retrospective review promulgated by *Agurs*.[145]

C. *Lower Court Problems in Administering the* Agurs *Materiality Standards*

After reading *Agurs*, one could not be called a doomsayer for predicting that the lower courts would have considerable difficulty in applying the standards set forth by the Court. Whether a court must reverse due to prosecutorial suppression of favorable evidence is governed under *Agurs* by a three-tiered standard of materiality (as opposed to a single standard of favorability).[146] The standard applied and therefore the result in a particular case will often depend on the pigeonhole into which the case can be placed, and those pigeonholes are regulated by nebulous terms: "perjury," "specific request," "general request."[147] Furthermore, a reviewing court must apply these varying standards retrospectively to a

143. *See, e.g.*, United States v. Reed, 726 F.2d 570, 577 (9th Cir.) (no abuse of discretion in trial court's refusal to order disclosure after in camera review), *cert. denied*, 105 S. Ct. 221 (1984); United States v. Wigoda, 521 F.2d 1221, 1227 (7th Cir. 1975) (clearly erroneous standard applies to in camera determination of Jencks Act material), *cert. denied*, 424 U.S. 949 (1976); United States v. Ross, 511 F.2d 757, 765 (5th Cir.) (in camera ruling by trial judge as to favorability of evidence given great deference by appellate court), *cert. denied*, 423 U.S. 836 (1975); *see also* United States v. Rosales, 680 F.2d 1304, 1305 (10th Cir. 1981) (abuse of discretion standard applied to trial court's pre-trial refusal to order disclosure of prosecution's witnesses). *But see* State v. Fleischman, 10 Or. App. 22, 31-32, 495 P.2d 277, 282 (1972) (appellate court reverses trial court's in camera ruling denying defendant access to police personnel file; no discussion of standard of review applied).

144. Of course, the government may refuse to comply with an in camera ruling of disclosure. This possibility is not, however, a threat to finality of judgments. Even in current practice the issue of prosecutorial refusal to disclose is resolved on appeal before trial. *See, e.g.*, United States v. Cadet, 727 F.2d 1453, 1464-65 (9th Cir. 1984) (government appeal of trial court's dismissal of indictment for failure to comply with discovery order); United States v. Cannone, 528 F.2d 296, 297-98, 300-01 (2d Cir. 1975) (government appeal of trial court's pre-trial order excluding testimony of witnesses whose names and addresses are not disclosed; abuse of discretion standard of review).

145. It should be noted that another expense of retrospective review is that if suppressed evidence *is* found to be material, it may be impossible to re-try the defendant. *See* Anderson v. South Carolina, 542 F. Supp. 725, 734 (D.S.C. 1982), *aff'd*, 709 F.2d 887 (4th Cir. 1983). This problem, of course, would not arise if disclosure was ordered either before trial or during trial, pursuant to an in camera determination.

146. See *supra* notes 61-67 and accompanying text.

147. See *supra* notes 61-67 and accompanying text.

situation in which the effect of suppression cannot by definition be determined with any certainty.[148] It is hardly surprising, therefore, that considerable judicial energy has been spent in plugging suppressed evidence into the overly complicated *Agurs* system. Through elaborate appellate review, concepts and labels that would not seem the least bit pertinent to the *Brady* right of access have in fact become determinative.[149] Moreover, uncertainty of application has usually resulted in rulings unfavorable to defendants, thus further diluting the *Brady* promise of access to favorable evidence.[150]

The lower courts applying *Agurs* have encountered several major problems in finding the correct materiality pigeonhole. Reading the pigeonholes from top to bottom, the first question encountered is: "what is perjury?" This issue will be intensely disputed by the advocates, with the prosecutor seeking to avoid this most pro-defense pigeonhole of materiality.[151] The most common type of case occurs when the prosecution's witness denies that he has agreed to a deal with the state. If a deal has in fact been agreed to in accordance with principles of contract law, testimony directly contradictory to the existence of the deal will usually be deemed to be perjury.[152] If the prosecutor has a mere "understanding" with the witness, however, or if the deal were discussed only generally and was not made definite until after the witness testifies, the lower courts have usually refused to apply the perjury standard of materiality under *Agurs*.[153] In effect, the rulings of lower courts have made it easier for a prosecutor to choreograph his actions so that he can make an informal deal with the witness and yet sidestep the pro-defense standard of

148. See *supra* notes 128-34 and accompanying text.

149. See *infra* notes 157-79 and accompanying text.

150. A parallel dilution occurred when the Supreme Court adopted a vague and speculative approach to the right of an indigent criminal defendant to counsel. *See* Betts v. Brady, 316 U.S. 455, 471-73 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335, 339 (1963). This problem was corrected, at least as to felony cases, in Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

151. The prosecutor's efforts will be especially important if the defendant had not made a specific request for the allegedly impeaching material. In this situation, a finding of perjury will be the difference between the application of the most pro-defendant and the most pro-prosecution standards of materiality.

152. *Compare* United States v. Iverson, 637 F.2d 799, 802-05 (D.C. Cir. 1980) (majority arguing that witness' testimony about her arrangements with government was perjurious), *modified*, 648 F.2d 737 (1981) *with id.* at 808-10 (Tamm, J., dissenting) (arguing that witness' testimony was simply confusing). *See also* United States v. Bigeleisen, 625 F.2d 203, 209 (8th Cir. 1980) (analyzing government's failure to correct perjurious testimony of prosecution witness).

153. *See, e.g.*, Smith v. Kemp, 715 F.2d 1459, 1464-65 (11th Cir.) (no perjury even though evidentiary hearing showed conflicting evidence on the issue), *cert. denied*, 104 S. Ct. 510 (1983); Wedra v. Thomas, 671 F.2d 713, 717 (2d Cir.) (no certain proof that deal existed at time witness testified), *cert. denied*, 458 U.S. 1109 (1982); United States v. Vargas-Martinez, 569 F.2d 1102, 1104-05 (9th Cir. 1978) (no showing of actual knowledge by witness of binding promise).

materiality when such a deal remains undisclosed.[154]

Similarly, with respect to substantive testimony, a court presented with a witness' suppressed prior statement contradicting in court testimony must decide whether the witness has committed perjury. After *Agurs*, lower courts presented with this question have generally held against defendants, on the ground that "mere" inconsistency, and not perjury, was shown.[155]

Agurs' second standard of materiality is for information that was suppressed by the prosecutor and specifically requested by defense counsel. The bone of contention here—assuming of course that the suppression is ever discovered—is whether the defense counsel specifically requested the information. Again, because of the pigeonholes established by *Agurs*, a determination of specificity will be of utmost importance to the parties, and thus heavily litigated and adjudicated. If defense counsel can show that his request was specific, chances of reversal increase significantly.[156]

The Court in *Agurs* gave the lower courts precious little guidance in the now-crucial determination of whether a defense request was specific or general. The Court merely categorized the obvious cases. First, a request for "anything exculpatory" or "all *Brady* material" would be deemed a general request.[157] Second, defense counsel's request in *Brady* itself for "Boblit's statements" was held to be specific because "[i]t gave the prosecutor notice of exactly what the defense desired."[158] Obviously, there is a large gray area between the examples considered by the *Agurs* court.

Left basically to their own devices, lower courts have taken different views regarding when a defense counsel's request can be deemed specific. The problem cases occur, of course, when defense counsel has no clue as

154. *See, e.g.*, United States v. Masri, 547 F.2d 932, 937 (5th Cir.) (witness compensated *after* testifying), *cert. denied*, 431 U.S. 932, *cert. denied*, 434 U.S. 907 (1977).

155. *E.g*, United States v. Daniels, 723 F.2d 31, 33 (8th Cir. 1983); United States v. Phillips, 664 F.2d 971, 1024-26 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, *cert. denied*, 459 U.S. 906 (1982); Lindhorst v. United States, 658 F.2d 598, 601 (8th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982). It should be noted that even if a finding of perjury is in fact made, reversal is hardly automatic after *Agurs*. *See, e.g.*, United States v. Meinster, 619 F.2d 1041, 1043-45 (4th Cir. 1980); United States v. Runge, 593 F.2d 66, 73-74 (8th Cir.), *cert. denied*, 444 U.S. 859 (1979). This is particularly true if the suppressed evidence is valuable for its impeachment effect only and is not admissible as substantive proof. Some courts have in fact held that a pro-prosecution standard of materiality should apply when evidence of perjury relates solely to impeachment. *See, e.g.*, United States v. Brown, 562 F.2d 1144, 1150 (9th Cir. 1977). Application of a pro-prosecution standard is undoubtedly contrary to the pro-defense standards set forth in Giglio v. United States, 405 U.S. 150, 154 (1972). See *supra* notes 17-19 and accompanying text. Moreover, the inconsistent application of multiple materiality standards again indicates a fatal flaw in the *Agurs* system. Such inconsistency would not occur with a single pre-trial standard of favorability governing the defendant's right to disclosure.

156. See *supra* notes 62-65 and accompanying text.

157. *See* United States v. Agurs, 427 U.S. 97, 106-07 (1976).

158. *Id.* at 106.

to what is in the prosecutor's files.[159] A few courts, presented with this anomaly left by *Agurs*, have been kind enough to evaluate the specificity of the defense request in light of how reasonably specific defense counsel could be expected to have been under the circumstances.[160] The vast majority of lower courts, however, ignores the plight of defense counsel, and looks solely at whether the prosecutor was adequately notified of specific evidence.[161] Indeed, this focus on the mind of the prosecutor is supported by *Agurs*, which basically responded to the problem of the shroud over defense counsel by applying the pro-prosecution standard of materiality for general requests.[162]

The emphasis on notice to the prosecutor, as opposed to the knowledge available to the defense counsel, has created several pitfalls for defendants and has accordingly diminished the promise of *Brady*. For instance, defense counsel must avoid the "overkill" that would occur with a broad, voluminous, all-encompassing request. Defense counsel in making a broad request may merely be trying to cover all the possibilities in light of his ignorance of what is actually in the prosecutor's file. Yet a reviewing court is likely to look at the volume of the request and hold that the request does not help the prosecutor to identify any particular piece of evidence as exculpatory.[163] On the other hand, by steering clear of the Scylla of overbreadth, defense counsel may encounter the Charybdis of overspecificity. Again by focusing on the mind of the prosecutor, lower courts have generally construed defense requests under the doc-

159. Of course, the existence of certain material can be predicted with reasonable accuracy, and as to such material, a specific request can be and usually is made by defense counsel. *See, e.g.*, Perkins v. Le Fevre, 691 F.2d 616, 618 (2d Cir. 1982) (felony murder charge; "rap" sheet of prosecution witness); United States v. Sternstein, 596 F.2d 528, 529 (2d Cir. 1979) (tax fraud charge; report by investigating Internal Revenue Service agents); United States v. Fontaine, 575 F.2d 970, 972 (1st Cir.) (extortion charge; request for evidence respecting voice exemplars), *cert. denied*, 439 U.S. 851 (1978); White v. Maggio, 556 F.2d 1352, 1358 (5th Cir. 1977) (murder charge; request for bullets tying defendant to crime).

160. See *supra* note 109.

161. *See, e.g.*, United States v. Cody, 722 F.2d 1052, 1062 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2678 (1984); United States v. Martorano, 663 F.2d 1113, 1114 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); *see also* Commonwealth v. Salemme, 11 Mass. App. Ct. 208, 222 & n.12, 416 N.E.2d 205, 214-15 & n.12 (1981) (defense request for "any and all information . . . of statements of promises, inducements or rewards . . . to any witnesses is a general request").

162. *See* Brown v. Chaney, 53 U.S.L.W. 3433, 3434 (U.S. Dec. 11, 1984) (No. 84-169) (Burger, C.J., dissenting from denial of certiorari); United States v. Agurs, 427 U.S. 97, 106-07 (1976). See *supra* notes 66-67 and accompanying text.

163. *See, e.g.*, Ruiz v. Cady, 710 F.2d 1214, 1218 (7th Cir. 1983) (defense counsel chided for "buckshot approach"); United States v. Martorano, 663 F.2d 1113, 1114 (1st Cir. 1981) (defense requests were "lengthy and comprehensive" but were "basically detailed boiler plate requests"), *cert. denied*, 460 U.S. 1011 (1983); United States v. Weiner, 578 F.2d 757, 767 (9th Cir.) (defense counsel's voluminous request labeled "shotgun approach" and equivalent to no request at all), *cert. denied*, 439 U.S. 981 (1978); United States v. Lasky, 548 F.2d 835, 839 (9th Cir. 1977) (voluminous request "places the government in no better position than if no request had been made"), *cert. denied*, 434 U.S. 821 (1977).

trine of expressio unius est exclusio alterius.[164] Given these pitfalls, it is apparent that defense counsel is left to blind luck in framing a request specific enough to cover evidence the existence of which he could not reasonably be expected to know.[165]

Another pitfall suffered by some defendants after *Agurs* occurs when the court finds that a specific request has indeed been made but fails properly to plug that finding into the appropriate materiality pigeonhole. In *United States v. Farid*,[166] for example, the court held that defense counsel "specifically requested" impeaching information about a particular prosecution witness.[167] The court then stated, however, that the suppressed statement was not material because it was not "sufficient to create a reasonable doubt."[168] The court failed to follow the overcomplicated materiality standards of *Agurs* by, in effect, applying the materiality standard for general requests to evidence that was in fact specifically requested by defense counsel.[169] This problem would not arise if a single standard of review—that the evidence is favorable—applied pursuant to a review of the prosecutor's file before or during trial.[170]

The final problem unnecessarily created by the *Agurs* three-tiered materiality standards occurs when the prosecution suppresses more than one piece of evidence. The first question, unanswered by *Agurs*, is whether the reviewing court should determine materiality in light of the cumulative effect of the suppressions. A cumulative analysis makes sense because it would be anomalous to reverse when the prosecution sup-

164. For a discussion of the doctrine of "expressio unius est exclusio alterius"—the expression of one thing is the exclusion of others—see 2A C. Sands, Sutherland's Statutes and Statutory Construction § 47.23, at 123 (4th ed. 1973). *See, e.g.*, United States v. DiCarlo, 575 F.2d 952, 958 (1st Cir. 1978) (carefully drawn request for information about "rewards" offered by prosecution technically does not include letters written by prosecution on behalf of witness), *cert. denied*, 439 U.S. 834 (1978); United States v. Oliver, 570 F.2d 397, 401 (1st Cir. 1978) (statement of eyewitness not covered by defense request because she was technically not prosecution witness, informant, co-defendant or active participant).

165. Of course, even if a defense request is deemed specific, reversal does not always, or even ordinarily, follow. *See, e.g.*, United States v. Sperling, 726 F.2d 69, 72-73 (2d Cir.) (tape as to witness' motivations not material because witness was impeached at trial), *cert. denied*, 104 S. Ct. 3516 (1984); King v. Ponte, 717 F.2d 635, 645-46 (1st Cir. 1983) (evidence cumulative); Wagster v. Overberg, 560 F.2d 735, 739-40 (6th Cir. 1977) (witness' statement specifically requested; nevertheless it would not further defendant's theory of the case).

166. 733 F.2d 1318 (8th Cir. 1984).

167. *Id.* at 1320.

168. *Id.* at 1321.

169. *Farid* is not the only case in which a court has misapplied *Agurs* by judging the materiality of specifically requested evidence under the reasonable doubt standard reserved for generally requested evidence. *See* Note, *The Prosecutor's Dilemma—A Duty to Disclose or a Duty Not to Commit Reversible Error*, 40 La. L. Rev. 513, 523 (1980) (suggesting Louisiana Supreme Court applied *Agurs* standard erroneously).

170. Even if an in camera review is not adopted, a single standard of post-trial review of materiality is at any rate preferable to the complications and collateral issues imposed by *Agurs*. For a suggested single standard of materiality, see United States v. Agurs, 427 U.S. 97, 121-22 (1976) (Marshall, J., dissenting).

presses one "big" piece of evidence, but not when it suppresses several "small" pieces of evidence having a "big" cumulative effect.[171] Nonetheless, it is possible for a court after *Agurs* to analyze each piece of suppressed evidence seriatim, and refuse to reverse because no single piece of evidence was material under *Agurs*. Such a result is certainly not prohibited by *Agurs*, and some lower courts have indeed failed to consider the cumulative effect of multiple suppressions.[172]

An even more perplexing question arises when a reviewing court is willing to do a cumulative analysis but is unable to fit all the suppressed pieces of evidence into the same *Agurs* pigeonhole. What standard of materiality is to be used if some but not all of the suppressed evidence were specifically requested? This situation may arise infrequently but certainly can occur, as the Third Circuit discovered in *United states ex rel. Marzeno v. Gengler*.[173] In *Marzeno*, the prosecutor suppressed a specifically requested police report and unrequested bits of evidence impeaching a government witness.[174] The court of appeals held that the evidence had to be considered cumulatively,[175] but it did not specify under which *Agurs* pigeonhole this analysis was to take place. The *Marzeno* court avoided this "more difficult question under the *Agurs* decision" by holding that the cumulative effect of the evidence was not material even if it were all treated as if it had been specifically requested.[176] A different though no less evasive approach was taken by the Fourth Circuit in *Anderson v. South Carolina*.[177] The court deftly sidestepped the problem of multiple suppressions of evidence—some of which was specifically requested and some generally requested—by stating that under the circumstances of the case a cumulative analysis was not even required because the generally requested evidence was itself material within its own *Agurs* pigeonhole.[178] It can be expected that courts confronted with this situation in the future will take similar steps to evade the problem left by *Agurs*' various standards of materiality.[179]

171. *See* United States *ex rel.* Marzeno v. Gengler, 574 F.2d 730, 736-37 (3d Cir. 1978); 3 C. Wright, Federal Practice & Procedure § 557.2, at 359 (2d ed. 1982).

172. *See, e.g.*, United States v. Jenrette, 744 F.2d 817, 824-26 (D.C. Cir. 1984) (four categories of suppressed evidence; no cumulative analysis); Maddox v. Montgomery, 718 F.2d 1033, 1035-36 (11th Cir. 1983) (prosecution suppressed photograph, police examination and witness statement; no cumulative analysis); Hicks v. Scurr, 671 F.2d 255, 261 (8th Cir.) (four pieces of evidence suppressed; no cumulative analysis), *cert. denied*, 459 U.S. 968 (1982).

173. 574 F.2d 730 (3d Cir. 1978).

174. *Id.* at 737.

175. *Id.*

176. *Id.* at 737-38.

177. 709 F.2d 887 (4th Cir. 1983) (per curiam).

178. *Id.* at 888. Interestingly, the lower court in *Anderson* had approached the problem differently, holding that the suppressed evidence, viewed cumulatively, would satisfy even the pro-prosecution standard of materiality for generally requested evidence. *See* Anderson v. South Carolina, 542 F. Supp. 725, 738 (D.S.C. 1982), *aff'd*, 709 F.2d 887 (4th Cir. 1983) (per curiam).

179. It should be noted that the already too difficult three-tiered standard of *Agurs* has

In sum, *Agurs* not only provides inadequate protection of the right of access to favorable evidence, but it also imposes substantial and unnecessary costs on appellate review. The time has come for a more reliable and efficient remedy for the *Brady* right.

II. THE IN CAMERA HEARING SOLUTION

A. *The Need for a Neutral and Detached Determination of Favorability of Evidence*

The Supreme Court has recognized the need for an independent and unbiased adjudicator to protect citizens' fundamental fourth amendment rights. A similarly objective fact-finder should be employed to protect an accused's fundamental right of access to exculpatory evidence.

In *Johnson v. United States*,[180] the Supreme Court rejected the government's argument that a police officer's search of a dwelling was constitutional because the officer had probable cause to search. The Court stated that the warrant requirement prohibits a warrantless search even though the police make an independent determination of probable cause, and even though such a determination could be found correct on retrospective review.[181] The Court reasoned that a warrant procedure is necessary to ensure that the determination of probable cause is in fact reliable.[182] The Court noted that reliability is guaranteed only when the determination is made by "a neutral and detached magistrate" rather than "by the officer engaged in the often competitive enterprise of ferreting out crime".[183] It is implicit in this rationale that a police officer, because of the nature of his role, may understandably resolve doubts in favor of a

been further complicated by the Court of Appeals for the Fifth Circuit. In that circuit, if the suppressed evidence relates only to impeachment of prosecution witnesses, it is not deemed material unless it would probably have resulted in acquittal had it been used at trial. *See* Garrison v. Maggio, 540 F.2d 1271, 1273-74 (5th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977). *See generally* Note, *Constitutional Law—Due Process—Defendant Not Entitled to New Trial Unless Evidence Suppressed by Prosecution Probably Would Have Resulted in Acquittal*, 48 Miss. L.J. 647 (1977) (discussing Fifth Circuit's move to stringent standard). The *Garrison* standard is the same as the standard of materiality for newly discovered evidence—a standard that was rejected by the Court in *Agurs* for cases in which prosecutorial suppression is involved. *See* United States v. Agurs, 427 U.S. 97, 111 (1976). In effect, the Fifth Circuit requires that suppressed impeachment evidence must have a greater (retrospective) effect on the jury than other types of suppressed evidence. *See Garrison*, 540 F.2d at 1276 (Wisdom, J., dissenting). The *Garrison* case not only adds a fourth tier of materiality to an already cumbersome three-tiered analysis; it also creates another pigeonhole problem: When is evidence useable solely for impeachment? *Id.* at 1277 (Wisdom, J., dissenting) (suppressed information could be used for purposes other than impeachment because it would have supported defendant's substantive alibi defense); *see also* Monroe v. Blackburn, 607 F.2d 148, 152 (5th Cir. 1979) (prior inconsistent statement goes to "substantive issue"; materiality standard for specifically requested evidence applied), *cert. denied*, 446 U.S. 957 (1980).

180. 333 U.S. 10 (1948).

181. *Id.* at 13-17.

182. *See id.* at 13-14.

183. *Id.* at 14.

finding of probable cause. Forcing the police officer to be an objective decisionmaker thus puts that person in a nearly impossible role, and citizens will suffer when the policeperson inevitably acts as an advocate in a competitive enterprise. The role of determining probable cause, therefore, must be given instead to an independent and unbiased adjudicator.[184]

The fifth and sixth amendment rights to a fair trial are as important in the constitutional hierarchy as the fourth amendment right to be secure against unreasonable searches and seizures.[185] Furthermore, the right of

184. Of course it is no secret that although the Supreme Court has adhered to the rationale of the warrant requirement, the application of the warrant requirement has become the exception, not the rule. *See, e.g.*, New York v. Belton, 453 U.S. 454, 460 (1981) (exception for search incident to arrest in automobile); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (inventory exception); United States v. Watson, 423 U.S. 411, 415 (1976) (no warrant required for public arrest); United States v. Robinson, 414 U.S. 218, 235 (1973) (no warrant necessary for search incident to custodial arrest); Chambers v. Maroney, 399 U.S. 42, 48-52 (1970) (automobile exception). In fact, it has been argued that the Court has basically abandoned the warrant clause of the fourth amendment in favor of the reasonableness clause. *See* United States v. Place, 103 S. Ct. 2637, 2652 (1983) (Blackmun, J., concurring) (noting "emerging tendency on the part of the Court to convert the [Terry v. Ohio, 392 U.S. 1 (1968)] decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable"). Nonetheless, the rationale for requiring a warrant procedure has never been rejected. *See* Illinois v. Gates, 103 S. Ct. 2317, 2328-32 (1983); *id.* at 2357 (Brennan, J., dissenting) (both majority and dissenting opinions stress the need to "preserve the role of magistrates as independent arbiters of probable cause").

A good faith exception to the exclusionary rule could be read to reject the implication from Johnson v. United States, 333 U.S. 10, 13-14 (1948), that good faith, understandable, but incorrect, determinations of probable cause are at the heart of what is prohibited by the fourth amendment. In its present state, however, the good faith exception as adopted by the Supreme Court does not allow the police to benefit from a good faith but mistaken determination of probable cause by an advocate-police officer. Rather, it allows the police to rely on determinations of probable cause by a neutral and detached magistrate. *See* United States v. Leon, 104 S. Ct. 3405, 3416-17 (1984). If anything, *Leon* reaffirms the central role of an objective adjudicator in the determination of probable cause. Good faith mistakes concerning whether a warrant itself is required, as well as whether probable cause exists when a warrant is not required, are still subject to the exclusionary rule. *See id.* at 3422.

It is debatable whether the magistrate's unbiased and independent role in determining probable cause is fully effectuated in practice. See authorities cited *id.* at 3418 n.14. To the extent that the magistrate is not an effective buffer between police and citizen, the solution lies not in rejection of the *Johnson* rationale, but in expenditure of resources to hire and train new magistrates, thereby relieving existing workload burdens. The magistrate would also be more effective if he could make a determination of probable cause based on complete factual data. *But see* Illinois v. Gates, 103 S. Ct. 2317, 2332-35 (1983) (overturning Court's prior efforts to prohibit magistrate's reliance on conclusions of police and informants).

185. In fact, the right to a fair trial has received far more favorable treatment from the Burger Court than has the fourth amendment right. *Compare* Herring v. New York, 422 U.S. 853, 856-57 & n.5 (1975) (failure to permit defense summation warrants retrial) *with* Stone v. Powell, 428 U.S. 465, 494-95 (1976) (no habeus corpus relief on basis of fourth amendment violation). The right referred to in the text—the right to a fair trial—is really an umbrella term including compulsory process, confrontation, effective counsel and the *Brady* right. All these rights coalesce into a right to an effective defense. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982); Westen, *supra* note 12, at 182.

access to exculpatory evidence in the prosecutor's custody is an inherent guarantee of the right to a fair trial.[186] Yet, unlike the fourth amendment guarantee, protection of the fundamental right of access to exculpatory evidence is in the hands of a naturally biased party—the prosecutor. Just as the police officer is naturally prone to resolve against the citizen all doubts about probable cause, so is the prosecutor, by the nature of his function prone to resolve against the defendant all doubt regarding the existence of favorable evidence.[187] Therefore, just as an independent adjudicator is required to protect against biased determinations of probable cause, so too is an independent adjudicator required to protect against a one-sided review of the prosecutor's file for evidence favorable to the defense.[188]

B. *The Right to an In Camera Hearing Today*

Under current practice, the trial court will conduct an in camera review for favorable evidence in the prosecutor's custody in two limited situations. First, if the prosecutor is in doubt as to whether certain evidence is "material" under *Brady*, or has other objections to pre-trial disclosure of admittedly favorable evidence, the prosecutor can submit the information to the trial court for in camera review.[189] Second, if defendant can make a preliminary showing that the prosecutor has materially favorable evidence in his custody, the trial court has discretion either to order disclosure of the evidence or, if the prosecutor objects, to undertake an in camera review of the specified material, but not of the entire file.[190] Many courts hold, however, that if the prosecutor, in response to the defendant's preliminary showing of materiality, nonetheless denies

186. *See* California v. Trombetta, 104 S. Ct. 2528, 2532 (1984); United States v. Agurs, 427 U.S. 97, 108 (1976).

187. See *supra* notes 27-34 and accompanying text.

188. Even though the policies behind the warrant requirement and a *Brady* in camera hearing requirement are analogous, there is no analogy in *Brady* for the many exceptions to the warrant requirement. These exceptions are based generally either on exigencies that make it impossible to obtain a warrant or on lesser expectations of privacy. *See, e.g.*, Cardwell v. Lewis, 417 U.S. 583, 588-96 (1974) (no practical difference between immediate warrantless search of car and immobilizing car until warrant obtained); United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring) (lawful arrest subordinates individual's privacy interest to legitimate government interest); Warden v. Hayden, 387 U.S. 294, 298 (1967) (pursuit of fleeing armed robber justified warrantless search of building into which he had fled). Neither exigency nor lesser expectation of rights would justify an exception to a criminal defendant's right to an unbiased review of the prosecutor's file to determine whether favorable evidence was contained therein.

189. *See* United States v. Agurs, 427 U.S. 97, 106 (1976); *see also* United States v. Higgs, 713 F.2d 39, 40, 44-45 (3d Cir. 1983) (government objects to pre-trial disclosure of identity of witness due to intimidation of that witness), *cert. denied*, 104 S. Ct. 725 (1984).

190. *See* United States v. Higgs, 713 F.2d 39, 45 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 725 (1984); United States v. Dinitz, 538 F.2d 1214, 1224-25 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); United States v. Gleason, 265 F. Supp. 880, 885-86 (S.D.N.Y. 1967); State v. Gillespie, 227 So. 2d 550, 557-59 (Fla. Dist. Ct. App. 1969); State *ex rel.* Dooley v. Connall, 257 Or. 94, 103-04, 475 P.2d 582, 586-87 (1970).

the existence of exculpatory evidence, the defendant has no right to an in camera hearing, because effectuation of *Brady* rights centrally depends on the integrity of the prosecutor.[191] The trial court's decision to conduct or to refuse to conduct an in camera hearing is reviewable only for abuse of discretion.[192]

The current limited use of in camera hearings is insufficient to effectuate the principles of *Brady*. The fundamental reliance on the good faith and integrity of the prosecution is misplaced, but not because prosecutors lack integrity or good faith. Rather, assuming that the prosecutor acts in good faith and with integrity, the fact is that he reviews his file from an advocate's point of view. Good faith and integrity do not and cannot guarantee an objective review of the file by the prosecutor. Thus, the fundamental *Brady* problem—that of forcing the prosecutor into a schizophrenic role—is not solved by a limited in camera right that ultimately can be triggered only by the prosecutor's action.[193] Even assuming, however, that we do not rely on totally the prosecutor, but instead require, as some courts do,[194] an in camera hearing on defendant's preliminary showing of materiality, such an in camera right is still too limited. Requiring defendant to show that certain evidence is material before defendant even has access to the evidence is merely another version of the *Agurs* anomaly: How do you specify evidence that you do not know is there? Proving materiality in the dark is no more viable than making a specific request in the dark.[195]

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191. *See, e.g.*, United States v. Eustace, 423 F.2d 569, 572-73 (2d Cir. 1970); United States v. Frazier, 394 F.2d 258, 262 (4th Cir.), *cert. denied*, 393 U.S. 984 (1968); United States v. Houston, 339 F. Supp. 762, 764-65 (N.D. Ga. 1972); United States v. Cobb, 271 F. Supp. 159, 163-64 (S.D.N.Y. 1967).

192. *See* United States v. Barshov, 733 F.2d 842, 850-51 (11th Cir. 1984); United States v. Cadet, 727 F.2d 1453, 1446-67, 1469 (9th Cir. 1984); United States v. Gaston, 608 F.2d 607, 613-14 (5th Cir. 1979).

193. It could be argued that even with an advocate's eye, a prosecutor in good faith will at least be in doubt about the favorability of some evidence, and thus will turn it over for in camera review, especially if the evidence is "flagged" by a specific request. The cases in which the prosecutor has not even entertained a doubt about clearly favorable evidence belie this argument. *See* Chaney v. Brown, 730 F.2d 1334, 1348, 1357 (10th Cir. 1984) (FBI reports implying that defendant may not have committed crime), *cert. denied*, 53 U.S.L.W. 3433 (U.S. Dec. 11, 1984) (No. 84-169); Scurr v. Niccum, 620 F.2d 186, 190-91 (8th Cir. 1980) (police reports focusing on another suspect); People v. Cwikla, 46 N.Y.2d 434, 441-42, 386 N.E.2d 1070, 1073-74, 414 N.Y.S.2d 102, 106 (1979) (understandings with prosecution witness); People v. Kitt, 86 A.D.2d 465, 466-67, 450 N.Y.S.2d 319, 320 (1982) (lab reports). See *supra* note 29 and accompanying text.

194. See *supra* notes 190-92 and accompanying text

195. In United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), the Court required defendant to prove that evidence (possible testimony of deported witnesses) was materially favorable, even though defendant did not have access to the evidence. *See id.* at 873. This is analogous to the quandary faced by defendant in obtaining an in camera hearing under *Brady*. It should be noted, however, that the burden on defendant is greater under *Brady* than under *Valenzuela-Bernal*. In *Valenzuela-Bernal*, defendant was required to show a material violation of compulsory process with respect to specific witnesses with whom defendant had been in contact. *See id.* at 871. Moreover, the government was exhorted to allow defendant to interview the witness if at all possible. *See id.* at 867. In

Even presuming that under current practice defendant earns a right to a limited in camera review of specified information, it does not necessarily follow that the court will allow disclosure of all favorable evidence. Many courts instead have used the *Agurs* standards of materiality for post-trial review to determine whether defendant is constitutionally entitled to evidence before or during trial.[196] If *Agurs* standards are used at the in camera hearing, only evidence that can be deemed material in futuro, not that which is merely favorable, must be disclosed. Obviously, a pre-trial or at-trial determination of whether evidence is material under *Agurs*—as opposed to "favorable" under common standards of relevance—is at best imprecise.[197]

There is authority in *Agurs* for the proposition that disclosure in camera should be governed by the *Agurs* post-trial standards of review. The Court did, after all, state: "[T]o reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[198] This passage certainly does not contemplate a constitutional entitlement to disclosure after in camera review of evidence that is merely favorable. The *Agurs* Court, however, was most concerned with, and was specifically addressing, post-trial review of the favorability of suppressed evidence.[199] A disclosure standard of mere favorability or relevance would not be justified after trial, given the countervailing interest in finality of judgments and the presumed uselessness

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contrast, a defendant required to make a preliminary showing of materiality under *Brady* does not, by definition, have any access to the information in the prosecutor's file. Defense counsel often cannot know what does and does not exist.

196. *See, e.g.*, United States v. Cuthbertson, 651 F.2d 189, 199 (3d Cir.) (Seitz, C.J., concurring) (*Agurs* materiality standard applies to trial court's decision to disclose information pursuant to in camera hearing), *cert. denied*, 454 U.S. 1056 (1981); United States v. Gardner, 611 F.2d 770, 774 (9th Cir. 1980) (appellate court applies *Agurs* reasonable doubt standard to trial court's in camera ruling).

197. *See* United States v. Oxman, 740 F.2d 1298, 1313 (3d Cir. 1984) (court incapable of speculating before trial whether information would be deemed material after trial under *Agurs* retrospective standards). Imprecision under current in camera practice is exacerbated because of the varying standards of materiality imposed by *Agurs*. Thus, if the prosecutor submits generally requested or unrequested information for in camera review, disclosure would not follow unless the information would create a reasonable doubt in futuro. United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980). See *supra* notes 66-67 and accompanying text. If the information were specifically requested, disclosure would follow only if the information might affect the outcome. See *supra* notes 62-65 and accompanying text. The overly complicated *Agurs* standards have created extreme difficulty for reviewing courts as a post-trial matter. See *supra* section II.C. and accompanying notes. Transplanting such standards to the pre-trial estimation of the effect of evidence on a jury that has not yet rendered a verdict necessarily creates even greater problems of judicial determination. *See* United States v. Cuthbertson, 651 F.2d 189, 200 (3d Cir.) (Seitz, C.J., concurring) ("I recognize that because one cannot predict how a trial may develop it is often difficult and somewhat impractical to determine before trial whether the failure to disclose certain material would meet the *Agurs* standard."), *cert. denied*, 454 U.S. 1056 (1981).

198. United States v. Agurs, 427 U.S. 97, 108 (1976).

199. *See id.* at 103.

of reversal when evidence is not in fact material.[200] These reasons do not apply to disclosure before or at trial. There is no final judgment that will be upset if evidence that is merely favorable or relevant to an accused is disclosed before a judgment is rendered. Moreover, it cannot be said at the point of the in camera hearing that disclosure of merely favorable evidence would be useless to the defendant. Indeed, favorable evidence is by definition useful to the accused if it is disclosed before or during trial. The spirit of *Brady* requires disclosure of all favorable evidence at the time it can be used.[201] Accordingly, the better view, even under current limited practice, is that the trial court after in camera review should disclose all information that can reasonably be deemed helpful or favorable to defendant.[202]

Even if the court under current in camera practice were to order disclosure of information merely favorable to defendant, the fact remains that the present use of in camera hearings is far too limited to solve the problems posed by *Brady* and *Agurs*. So long as the triggering of an in camera hearing is within the prosecutor's control, perhaps fortuitously helped along by defense counsel's guesswork, the right to an in camera hearing will remain a *Brady* right in *Agurs* clothing.

C. *The Absolute Right to an In Camera Hearing*

There are two possible ways to provide more effective access to exculpatory evidence as guaranteed by *Brady*: an open file rule or a blanket right to in camera inspection of the prosecutor's file. Both solutions avoid the *Agurs* problem of prosecutorial bias in determining favorability of evidence. Both avoid reliance on defense counsel's adventitious guesswork. Both avoid speculative post-trial review under complicated and varying standards of materiality. Both preserve the finality of judgments.

1. Advantages of In Camera Hearing over Open File Requirement

An in camera inspection requirement, however, would better fit the

200. See *supra* note 141 and accompanying text.

201. *See* United States v. Kaplan, 554 F.2d 577, 580-81 (3d Cir. 1977); United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); United States v. Eley, 335 F. Supp. 353, 357 (N.D. Ga. 1972); *Prosecutor's Duty*, *supra* note 130, at 145.

202. *See, e.g.*, United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir. 1984) (witnesses not to be called by prosecution may be "favorable" to defendant's case and their identities disclosable after in camera hearing); United States v. Gleason, 265 F. Supp. 880, 886 (S.D.N.Y. 1967) (transcript of co-defendant's testimony "could be deemed helpful"). Of course, even if evidence is deemed favorable, the time at which it must be disclosed to the defendant presents a separate question. For instance, if the prosecutor can show that witnesses may be threatened, it is certainly within the discretion of the trial court to defer disclosure of the witnesses' names and their criminal records, if any, until trial. *See* United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983) (defendant's "right to a fair trial will be fully protected if disclosure is made the day that the witness testifies"), *cert. denied*, 104 S. Ct. 725 (1984); United States v. Houston, 339 F. Supp. 762, 766 (N.D. Ga. 1972) (disclosure of criminal records of prosecution witnesses should be deferred until trial).

Brady right than would an overbroad open file requirement. *Brady* guarantees access only to favorable evidence.[203] An open file requirement would guarantee access to all evidence, favorable and unfavorable. According to the courts, intimidation of witnesses, perjury and interference with continuing investigations would follow inevitably from an open file requirement.[204] Moreover, those opposed to the open file rule seem to have an abiding resentment of the fact that defense counsel could sit back and allow the prosecutor to do his work for him, merely waiting for an entire file to be placed on his desk.[205]

Whatever the merits of such concerns about an open file rule,[206] a right to in camera inspection does not suffer from the same infirmities. The court, after an in camera review, can fully effectuate *Brady* by disclosing only favorable evidence. Granting defendant access to favorable evidence does nothing but further the quest for truth. Any dangers of abuse by defendant—such as pressuring favorable witnesses—can be controlled by delaying disclosure on a showing of proof by the prosecutor. Likewise, privileged information or information pertinent to continuing investigations can be screened and edited by the trial court in camera, again on a reasonable showing by the prosecutor. Furthermore, the court could deny disclosure if defense counsel had reasonable alternative access to the favorable information in the prosecutor's file, thus avoiding the defense counsel's unfair exploitation of the prosecutor's investigation, which might occur under an open file system.

The in camera procedure thus avoids the inherent dangers of an open file rule. More importantly, however, the in camera solution is more effective than *Agurs* in providing access to exculpatory evidence, because the defendant will receive evidence determined to be favorable by an unbiased, independent adjudicator, and such evidence will be disclosed at a time when it can actually be useful in presenting a meaningful defense.

2. A Proposal for In Camera Hearings

This proposal for a per se right to an in camera inspection proceeds as follows: At the time of pre-trial discovery, the prosecutor must submit his entire file on the case to the trial court or to a magistrate. The extent of information that must be included in the file would be governed by current standards as to whether information is within the custody of the prosecutor for *Brady* purposes.[207] Thus the prosecutor has the duty to

203. See *supra* note 24 and accompanying text.

204. See *supra* notes 22-23 and accompanying text.

205. *See* United States v. Agurs, 427 U.S. 97, 109-11 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972). *See generally* Babcock, *supra* note 16, at 1134 (considering feasibility of imposing constitutional duty on prosecutor to provide evidence to defendant).

206. *See* Brennan, *supra* note 21, at 288-90.

207. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154 (1972) (Information known by one prosecutor is attributed to another: "To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer

collect and include in his file all information held by the state.[208] When presented with the file, the independent adjudicator shall determine whether, and to what extent, the file contains information favorable to the defendant's preparation or presentation of his defense. The adjudicator can be aided in determining favorability through adversarial submissions by prosecutor and defense counsel. Such submissions would not, however, be disclosed to the opposing party.[209] Anything found by the court or magistrate to have a tendency to further the preparation or presentation of the defendant's case shall be presumed disclosable.[210] Once a preliminary determination of favorability is made, the adjudicator would notify the prosecutor of the information proposed for disclosure. At this point the prosecutor could object to disclosure in whole or part by a particularized showing of proof on any of four grounds.

The first basis on which the prosecutor may object to disclosure is that the information is privileged and that such privilege outweighs the defendant's constitutional right to prepare and present a defense.[211] Sec-

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who deals with it."); Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984) (Court warns that coordinated efforts by various law enforcement agencies may result in attribution of constructive knowledge of prosecutor of all information held by such agencies.); United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973) ("The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files."); Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure."); State v. Fleischman, 10 Or. App. 22, 32, 495 P.2d 277, 282 (1972) (Court held that evidence in hands of a different agency was within the prosecutor's constructive custody.).

208. See *supra* note 207.

209. The helpfulness of adversarial submissions, in light of the fact that the adjudicator is relatively unfamiliar with the case, is noted by the court in United States v. Gleason, 265 F. Supp. 880, 885 (S.D.N.Y. 1967).

210. As previously noted, a standard of mere favorability is logically and legitimately applied to pre-judgment disclosures, as opposed to the application of higher materiality standards when the judgment is final. See *supra* notes 128-34, 198-202 and accompanying text. Information could be deemed favorable, and thus subject to disclosure, even if it may not ultimately be admissible at trial. *Brady* is concerned with the defendant's ability to prepare a defense. Consequently, information that furthers the preparation of exculpatory material is as favorable as the exculpatory material itself. United States v. Gleason, 265 F. Supp. 880, 886 (S.D.N.Y. 1967). A clear example is the name of a witness not to be called by the prosecution. *See* United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir. 1984). *See generally Prosecutor's Duty, supra* note 130, at 146-47 (court must be concerned with any failure to reveal evidence before trial because suppression may adversely affect preparation).

211. Rulings respecting the conflict between privileges and defendant's right to a fair trial are routinely made by trial and appellate courts under current practice. Therefore, a ruling as to privilege by the trial court or magistrate as proposed in this Article would be in accordance with well established principles. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 705-06 (1974) (executive privilege); Davis v. Alaska, 415 U.S. 308, 319 (1974) (confidentiality of juvenile report); McCray v. Illinois, 386 U.S. 300, 312-14 (1967) (informer's privilege); United States v. Cuthbertson, 630 F.2d 139, 148-49 (3d Cir. 1980) (in camera hearing required to determine scope of newsperson's qualified privilege in light of defendant's conflicting right to exculpatory evidence), *cert. denied*, 449 U.S. 1126 (1981). For an interesting case in which a juvenile's right to confidentiality conflicted with his own

ond, objection may be made because disclosure of the information could reasonably lead to threats or danger to witnesses. If the adjudicator is satisfied with the prosecutor's showing on this point, disclosure of the information can be delayed until the trial.[212]

The prosecutor may also resist disclosure on the grounds that defense counsel has equivalent, alternative access to the information, or can be directed to such information. For instance, if the favorable information were in a public record, a copy of which was in the prosecutor's file, disclosure pursuant to in camera review would not be required if the prosecutor or the court informed defense counsel how to obtain his own copy of such a record.[213] Denial of disclosure in such a situation would be determined by prospective application of the familiar "equal access" exception to *Brady*, which is currently applied after trial.[214] The advantage of prospective application of the equal access principle is that defense counsel will, on notice from the court, obtain the information from another source.[215] As currently applied, the equal access exception simply punishes defendants for the failure of defense counsel to consider alternative access to favorable evidence.[216] Such a result is justifiable on

right to an effective defense, see *In re* Richard J., 122 Misc. 2d 839, 843, 472 N.Y.S.2d 264, 267 (N.Y. Fam. Ct. 1984) (exculpatory evidence as to juvenile in his own probation file protected by privilege; in camera hearing should be held to resolve conflict between juvenile's right to confidentiality and his right to effective defense).

212. *See, e.g.*, United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983) (*Brady* right to information that defendants could use on cross-examination would be fully protected if disclosure made on day witness testifies), *cert. denied*, 104 S. Ct. 725 (1984); United States v. Elmore, 423 F.2d 775, 779-80 (4th Cir.) (no prejudice in delaying until trial the disclosure of existence of exculpatory witness; pre-trial disclosure could have led to intimidation of (different) witness for the prosecution), *cert. denied*, 400 U.S. 825 (1970).

213. *See* Lewis v. United States, 393 A.2d 109, 116 (D.C. 1978).

214. The "equal access" exception provides that the prosecutor has no duty to disclose favorable evidence that can be easily obtained by defense counsel without resort to the prosecutor's file. *See, e.g.*, United States v. Jones, 712 F.2d 115, 122 (5th Cir. 1983) (defendants knew and dealt regularly with witnesses who were alleged to be exculpatory); United States v. Slocum, 708 F.2d 587, 599 (11th Cir. 1983) (witness' statements could have been discovered "with any reasonable diligence"); United States v. Bolden, 514 F.2d 1301, 1312 (D.C. Cir. 1975) (bullets were easily available to defense counsel).

215. It may be argued that requiring defense counsel to do "leg work" to get favorable information lacks utility when such information can be easily turned over by the court pursuant to an in camera hearing. However, the principle that the defense counsel should not be allowed unfairly to "sponge" off the prosecutor is deeply ingrained in our adversary system. *See generally* Babcock, *supra* note 16, at 1134-35 (discussing tension between adversarial system and prosecutor's duty to aid defense counsel). Notifying the defense counsel that exculpatory information exists and is accessible elsewhere is an appropriate balance of adversary policies and the right to an effective defense. Defense counsel is required to put in some effort, and defendant has access to favorable evidence. *See* United States v. Shelton, 588 F.2d 1242, 1250 & n.14 (9th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979). Of course it is possible that even when directed to an alternative source, defense counsel will not bother to retrieve exculpatory information. This is not a *Brady* problem, however, but rather a problem of ineffective assistance of counsel. *See generally*, Babcock, *supra* note 16, at 1163-74 (counsel ineffective when falls below acceptable "range of competence" in accumulating favorable evidence).

216. See *supra* notes 214-15.

retrospective review, but happily can be avoided by use of the in camera hearing.

The final objection that the prosecution should be allowed to make prior to disclosure, presuming a particularized showing of proof, is that the material proposed for disclosure is not in fact favorable to the presentation or preparation of the defense.[217] Such an objection performs a valuable service because at the time of in camera review the prosecutor is more familiar with the case than is the independent adjudicator. Evidence that appears favorable may be re-evaluated in light of the prosecutor's particularized explanation of the nuances of the case. The ultimate determination of favorability, however, must be made by the court.[218]

The court's determination after a pre-trial in camera hearing that information in the prosecutor's file is not favorable to the defense will not fully satisfy the defendant's right of access to exculpatory evidence.[219] The issue of favorability must remain open throughout the trial, because it may not be until the litigation unfolds that the favorability of a piece of information will become apparent to the court.[220] In order to be an effective guarantee of access to exculpatory evidence, a per se right to in camera inspection necessarily requires a continuing obligation on the part of the independent adjudicator throughout the trial to evaluate whether information held by the prosecutor is favorable to the defense.[221]

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217. See *supra* note 210 and accompanying text.

218. Because there are few if any countervailing interests not already accounted for by the prosecutor's other available objections, any doubt as to favorability after the prosecutor's showing should be resolved in favor of disclosure. Of course, defendant is not entitled to disclosure of evidence unless it is favorable. At the point of in camera hearing, however, there is little harm in allowing disclosure of even questionably favorable information. This is distinguished from the more stringent review required once a judgment is rendered, when re-trial would be a costly and useless act unless the undisclosed information is truly favorable. *See* United States v. Kaplan, 554 F.2d 577, 580 (3d Cir. 1977) ("In [the post-trial review] situation, there is no justification for granting a new trial so that a different jury might hear the same evidence.").

219. Under the in camera procedure outlined in this Article, the government must be allowed an immediate right to appeal the fact-finder's rejection of prosecutorial objections and consequent order of disclosure. Such an immediate appeal is provided for under the current, limited in camera practice. *See, e.g.*, United States v. Higgs, 713 F.2d 39, 40 (3d Cir. 1983) (appeal from district court order compelling disclosure), *cert. denied*, 104 S. Ct. 725 (1984).

220. *See* United States v. Cobb, 271 F. Supp. 159, 163-64 (S.D.N.Y. 1967); State v. Gillespie, 227 So. 2d 550, 558-59 (Fla. Dist. Ct. App. 1969); *Prosecutor's Duty, supra* note 130, at 147-48.

221. Any harm to defendant resulting from disclosure during trial of information then found to be favorable can be handled by continuance, within the discretion of the trial court, as is the case under current law. *See* United States v. Peters, 732 F.2d 1004, 1008 (1st Cir. 1984); United States v. Mourad, 729 F.2d 195, 199 (2d Cir.), *cert. denied*, 105 S. Ct. 180 (1984); United States v. Olson, 697 F.2d 273, 275 (8th Cir. 1983); *Duty of Disclosure, supra* note 51, at 218-19.

The proposal in text requires that the court have continuing access to the prosecutor's file throughout the trial. Also, if a magistrate has made the original in camera determination, the court would be obligated to obtain all pertinent information from the magistrate in order to perform its role of adjudicator of favorability throughout the trial.

3. Standard of Review

If a per se right to in camera review is implemented, an obvious ground of appeal for a convicted defendant is that the trial court erred in its in camera decision that certain evidence was not favorable to the defendant. In response to such a post-trial claim, the finality of the judgment may be protected by one of two review-restraining concepts.[222]

One possibility is that the appellate court apply the same standard of favorability that the trial court applied, but refuse to reverse unless the trial court's determination as to lack of favorability was clearly erroneous.[223] The "clearly erroneous" standard would give the trial court room for error on the often difficult and strategy-related question of favorability of evidence. The problem with appellate review using a standard of favorability, however, is that even if the lower court was clearly erroneous, nondisclosure of the favorable evidence could still be harmless beyond a reasonable doubt.[224] Reversal in such a situation, even given the fact that the lower court clearly should have disclosed the information, would effectuate *Brady* rights at an arguably unacceptable cost.[225] In this case, however, the cost might be acceptable given the fact that it would be the rare reversal in which evidence was so clearly favorable to defendant that the trial court erred, and yet denial of access to such evidence was harmless beyond a reasonable doubt. The finality of judgments would be substantially preserved.

A second possible standard for appellate review is that nondisclosure pursuant to an in camera hearing is reversible error unless the nondisclosure was harmless beyond a reasonable doubt. In other words, a constitutional violation would occur whenever the court failed to disclose favorable evidence, but the lower court's error would not be grounds for reversal if it did not have a material effect on the defendant's ability to prepare or to present a defense.[226]

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222. *See* Rosenberg, *supra* note 142, at 637.

223. This seems to be the approach of appellate courts reviewing in camera determinations under current practice. *See, e.g.*, United States v. Reed, 726 F.2d 570, 577 (9th Cir.), *cert. denied*, 105 S. Ct. 221 (1984); United States v. Gardner, 611 F.2d 770, 775 (9th Cir. 1980); United States v. Wigoda, 521 F.2d 1221, 1225-28 (7th Cir. 1975), *cert. denied*, 424 U.S. 949 (1976); United States v. Ross, 511 F.2d 757, 762 (5th Cir.), *cert. denied*, 423 U.S. 836 (1975).

224. An example would be impeachment evidence as to a collateral witness, when evidence of guilt was overwhelming. *See, e.g.*, United States v. Montoya, 716 F.2d 1340, 1345-46 (10th Cir. 1983).

225. Certainly the present Supreme Court assumes that reversal for harmless constitutional error imposes an unacceptable cost on the judicial system. *See* Strickland v. Washington, 104 S. Ct. 2052, 2067-68 (1984); United States v. Hasting, 461 U.S. 499, 509 (1983). *But see* Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & C. 421, 441 (1980) (should be no such thing as "harmless error" when it comes to constitutional rights).

226. If the reviewing court reverses only when the undisclosed information is material, the standard of review of the trial court's in camera ruling will not be in terms of whether such ruling was clearly erroneous. The in camera review would have been based on whether information is favorable, not whether it is material. Consequently, the reviewing

This materiality standard of review has certain disadvantages. First, the trial court's pre-trial standard—favorability—would differ from the appellate court's post-trial standard—materiality. This is not a major problem, however, in that the trial court would be constitutionally bound to turn over evidence that is favorable, even if such evidence is not sufficiently material to warrant reversal if withheld. There is no reason to think that the trial court would (as opposed to the prosecutor) err toward nondisclosure in reliance on the materiality standard of reversal. Applying different standards before and after trial is certainly preferable to the current state of affairs under *Agurs*, in which an adversarial prosecutor can refuse to disclose information that is favorable but not material, and is accordingly insulated from reversal.[227]

A second possible problem with the materiality standard of review is that it would resurrect the speculative "what might have been" analysis adopted by *Agurs*.[228] Yet there are three consolations present with a materiality standard of review of an in camera determination that do not exist under the *Agurs* review of a prosecutor's determination. First, unlike the *Agurs* situation, there has already been an independent judicial determination of favorability before trial. Second, unlike the *Agurs* situation, the reviewing court can apply a single standard of materiality because the nature of a defense request for evidence is not relevant to the court's duty to disclose favorable evidence pursuant to an in camera review.[229] Third, to the extent that more information is disclosed before and during trial by the objective court than by the advocate prosecutor,[230] the necessity to make such a speculative retrospective review of nondisclosures will arise less frequently than under *Agurs*. Accordingly, a materiality/harmless error standard of review for in camera errors as to favorability seems the most appropriate balance of the defendant's right

court must review the undisclosed information independently, under a totally different legal standard. Determining whether the trial court was clearly erroneous as to the favorable nature of the information would be a useless task for the appellate court. Clear error as to favorability would be irrelevant if the information is not material. Conversely, it is difficult to imagine a case in which the undisclosed information is material, but in which the trial court's determination that such information was not favorable to the defendant would not constitute clear error.

227. *See* United States v. Oxman, 740 F.2d 1298, 1309-11 (3d Cir. 1984). See *supra* notes 113-14, 117 and accompanying text.

228. See *supra* notes 128-34 and accompanying text.

229. This is not to say that defense counsel would have no role as to the in camera review. Defense counsel may be able in absentia to guide the court to favorable evidence in the file by submission of an adversarial explanation of the case. See *supra* note 209. In contrast to *Agurs*, however, this flagging function would not assume constitutional significance in an in camera review. Defendant would not be penalized for defense counsel's inability to guess at what may be in the prosecutor's file. Moreover, defense counsel's input is less crucial because the court as an unbiased adjudicator would not have the same bias problems that the prosecutor has in reviewing his file for evidence favorable to the defense.

230. Greater disclosure currently appears to occur when an in camera hearing is held. See *infra* note 297 and accompanying text.

of access to exculpatory evidence and the interest in preserving final judgments.[231]

4. Nondisclosure of Evidence

The final aspect of the per se right to an in camera review that must be addressed is the possibility of the prosecutor's failure to turn over information in his custody to the court for an in camera inspection. The in camera right guarantees an unbiased determination of favorability with respect to evidence reviewed by the court. Thus, if the prosecutor turns over a "thin" file, the in camera "solution" will be an ineffectual remedy for the *Brady* right. To the extent that a thin file would result from affirmative bad faith efforts of the prosecutor to obstruct in camera review, it must be stressed that the in camera solution is not designed to prevent prosecutorial misconduct. Rather, the in camera solution protects against the far more prevalent problem of prosecutorial misjudgment of the exculpatory nature of evidence contained in his file. As one commentator has noted: "[S]uppression of favorable evidence rarely occurs because of a defect in prosecutorial integrity. Rather, suppression usually results from the prosecutor's failure to appreciate the favorable aspects of certain evidence. Once he decides to indict, the prosecutor becomes an adversary whose perspective of the evidence is biased."[232] Thus, the in camera solution, like the *Agurs* system, rightfully relies on the integrity and good faith of the prosecutor.[233] The advantage of the in camera solution, however, is that it avoids unwarranted reliance on the prosecutor's ability to determine whether evidence is favorable to the accused.

If the assumption is correct that bad faith violations of *Brady* are extremely rare, the "thin" file problem will be commensurately rare. This is because the good faith decision whether to put information in the file is fundamentally different from the good faith decision whether information in the file is favorable to the defense. Whereas the former involves the prosecutor as administrator/organizer/bookkeeper, the latter involves the prosecutor as biased advocate. The mindset that results in good faith nondisclosure under *Agurs* would not affect the filekeeping decision. In fact, there would be no reason not to put all pertinent information, including exculpatory information, in the file because the prose-

231. It should be noted that a defendant cannot immediately appeal a trial court's in camera determination, because such an appeal can only be made from a final order. *See* 28 U.S.C. § 1291 (1982); *see also* Flanagan v. United States, 104 S. Ct. 1051, 1057 (1984) (district court's pre-trial disqualification of defense counsel was not final order); United States v. Hollywood Motor Car Co., 458 U.S. 263, 264 (1982) (district court's interlocutory order refusing to dismiss indictment was not final order).

232. Comment, *Implementing* Brady v. Maryland*: An Argument for a Pretrial Open File Policy*, 43 U. Cin. L. Rev. 889, 896 (1974) [hereinafter cited as *Open File*]. See *supra* notes 29-30 and accompanying text.

233. *See* United States v. Houston, 339 F. Supp. 762, 764-65 (N.D. Ga. 1972); United States v. Cobb, 271 F. Supp. 159, 164 n.4 (S.D.N.Y. 1967); State v. Gillespie, 227 So. 2d 550, 556 (Fla. Dist. Ct. App. 1969).

cutor as advocate is unlikely to consider much if any evidence in his file to be favorable to defendant's case at any rate.

It could be argued, however, that a per se right to an in camera hearing may result in a thin file not because the prosecutor fails to file the information, but because the prosecutor would have no incentive to investigate certain leads likely to result in discovery of exculpatory evidence. Again assuming the integrity of the prosecutor, however, the in camera solution presents little threat of substantial failures to investigate. In most cases the prosecutorial arm of the government does not try to discover exculpatory evidence; such evidence is uncovered in a search for inculpatory evidence and then filed by a prosecutor acting in good faith. It is fanciful to assume that investigations undertaken to inculpate a defendant will be deterred by the government's concern over the possibility that a court pursuant to in camera review will find that some of the information uncovered is favorable to defendant.

It is true, though, that some investigations that are very likely to lead to exculpatory evidence may not be undertaken and that certain evidence may not be preserved. For example, in a rape case with sufficient eyewitnesses, the government may not take a sperm sample when it could only hurt the prosecution's case, or the government may take such a sample but destroy it without testing it. These problems occur today, however, without the existence of the in camera threat: Cases have arisen in which defendant alleges either that the government failed in a duty to prepare information[234] or failed in a corresponding duty to preserve evidence.[235] In response to such cases, strong arguments have been made that a duty to investigate as well as to preserve all evidence that could be important to the defense is a logical extension of *Brady*, and is necessary to guarantee fully the constitutional right of access to exculpatory evidence.[236] Whatever the merits of this contention,[237] the fact remains that the good

234. *See, e.g.*, United States v. Warhop, 732 F.2d 775, 778 (10th Cir. 1984) (failure to prepare interview report).

235. *See, e.g.*, Johnston v. Pittman, 731 F.2d 1231, 1234 (5th Cir. 1984) (failure to preserve fluid samples of rape victim); Hilliard v. Spalding, 719 F.2d 1443, 1445 (9th Cir. 1983) (destruction of sperm sample in rape case); United States v. Bryant, 439 F.2d 642, 644-47 (D.C. Cir. 1971) (failure to produce tape recording of defendant's conversation with undercover agent) Mitchell v. State, 358 So. 2d 238, 240-41 (Fla. Dist. Ct. App. 1978) (failure to preserve tape recording of drug transaction), *rev'd on other grounds sub nom.* Corn v. Department of Legal Affairs, 368 So. 2d 591 (Fla. 1979).

236. *See generally* Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond* Brady, 53 N.Y.U. L. Rev. 835, 838 (1978) (must impose on state a duty to investigate adequately all criminal cases in accordance with sixth amendment rights and general notions of due process and fairness). See *supra* notes 234-35.

237. In California v. Trombetta, 104 S. Ct. 2528 (1984), the Supreme Court unanimously held that the constitutional right of "access to evidence" did not require the state to preserve breath samples for drunken driving prosecutions, *id.* at 2535. *Trombetta* does not, however, foreclose a prosecutorial duty of preservation or investigation. The Court in fact implied that if the unpreserved (or uninvestigated) evidence could have been of significant use to the defendant's case, the constitutional right of access to evidence would have been violated. *See id.* at 2534; *see also* United States v. Valenzuela-Bernal, 458 U.S.

faith of the government, as well as the inculpatory potential of most standard criminal investigations, will keep to a minimum the problem of uninvestigated leads and the risk that prosecutors will fail to preserve possibly favorable evidence. Adoption of an in camera solution will neither exacerbate nor minimize the problem.

Nonetheless, it is inevitable that some information that would be deemed favorable by the trial court in camera will not find its way into the prosecutor's file, and thus will not be disclosed to defendant either before or during trial. These situations will arise in one of three ways, all of which present fairly limited problems: (1) bad faith suppression by the prosecutor; (2) failure to investigate or to preserve evidence; or (3) failure to collect in the file all information that can legitimately be held to be within the prosecutor's custody, such as a federal Drug Enforcement Administration report favorable to a defendant being tried in state court.[238] Presuming that the nondisclosure is discovered after trial, what standard of reversal should apply?[239]

As is the case when the court errs in not disclosing favorable evidence after its in camera review,[240] the prosecutor's error in not including information in the file is reviewable under two possible standards: First, the court[241] can automatically reverse whenever it determines that the information not contained in the file would have been found favorable to the defense after an in camera review. Alternatively, and more restrictively, the court could reverse if the evidence is favorable to the defendant, unless the denial of access to such evidence was harmless beyond a reasonable doubt. Again, the advantage of a "mere" favorability standard is in its equation of pre-trial obligation with post-trial standard of review. But the disadvantage of the favorability standard is that reversal

858, 867 (1982) (when witness deported by government, defendant must show testimony would have been material and favorable). Defendant in *Trombetta* could not satisfy this materiality standard because the breath analysis test itself was reliable and there was no showing that the breath sample could have attacked the integrity of the breathalyzer test. *Compare* Hilliard v. Spalding, 719 F.2d 1443, 1446 (9th Cir. 1983) (sperm samples important to defense and must be preserved) *with* Johnston v. Pittman, 731 F.2d 1231, 1234-35 (5th Cir. 1984) (in context of case, fluid samples from victim would not have been reliable evidence).

238. As to the extent to which courts have held the prosecutor to be within constructive possession of information, see Morgan v. Salamack, 735 F.2d 354, 358 (2d Cir. 1984), and the cases cited therein. Generally, courts hold the prosecutor to a standard of due diligence. *See id.* at 359. This same standard would be applied under the in camera solution: All pertinent information that would be assembled by the duly diligent prosecutor should be contained in the file and produced for in camera inspection. See *supra* note 207 and accompanying text.

239. Of course the chances of such nondisclosure being discovered are as slim as under the *Agurs* system. See *supra* note 35 and accompanying text. Under the in camera solution, however, at least the number of nondisclosures will be minimal. As noted, the in camera solution remedies the main source of nondisclosure: the prosecutor's misjudgments as to the favorability of evidence. See *supra* notes 208-24 and accompanying text.

240. See *supra* notes 222-31 and accompanying text.

241. This will usually be an appellate court, but it could be a trial court if the evidence is discovered in time for defendant to make a motion for a new trial.

would be required in cases in which the re-trial would be basically duplicative. This is arguably too high a cost for enforcing the defendant's right of access to favorable evidence.[242] The materiality/harmless error standard, although not without problems in terms of speculative review and prosecutorial gamesmanship,[243] will arguably balance the interest in access to evidence with the interest in finality of judgments.[244]

Nonetheless, the case for automatic reversal whenever the prosecutor errs in failing to include favorable evidence in the file has further merit: It will encourage prosecutors to live up to their *Brady* duties. The in camera solution takes from the prosecutor's shoulders the onerous burden of determining favorability. The remaining administrative responsibility to include pertinent information in the file is far less burdensome and should arguably be strictly enforced. If the duty to maintain a complete file were not strictly enforced, prosecutors would have no incentive to cooperate with the court's in camera review. This is because inclusion of favorable evidence in the file does not help his case and exclusion of such evidence does not hurt his case unless the evidence is later discovered and is determined to be material, not just favorable.[245]

Assuming that such deviousness does not reflect the thoughts of the vast majority of prosecutors acting in good faith, the fact remains that the prosecutor acting in bad faith would have every opportunity to exploit the materiality standard, thereby vitiating the defendant's right of access to favorable evidence. Although bad faith suppressions exist in today's world of limited and happenstance disclosures under *Agurs*,[246] the same behavior would be rightly regarded as very glaring examples of prosecutorial misconduct when the determination of favorability is no longer the prosecutor's responsibility. Thus, even assuming that automatic reversal would present too great a cost if mandated for every case of a prosecutor's failure to include favorable information in the file, it may not be too great a cost if defendant can show that the prosecutor's failure was an act of bad faith.[247] Accordingly, an appropriate and effective standard of review for prosecutorial failure to submit information for

242. See *supra* notes 222-31 and accompanying text.

243. See *supra* notes 117, 222-31 and accompanying text.

244. See *supra* notes 222-31 and accompanying text.

245. This is a defect in the *Agurs* system with respect to the far broader problem of prosecutorial determination of the favorability of evidence. *Agurs*' materiality standards give prosecutors no incentive to comply with *Brady*. Beatty, *supra* note 29, at 238; Comment, *Prosecutor's Duty to Disclose Reconsidered*, 1976 Wash. U.L.Q. 480, 491-92 [hereinafter cited as *Duty Reconsidered*]; *see* United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) (court decries prosecutorial "gamesmanship").

246. *See* United States v. Agurs, 427 U.S. 97, 103-04 (1976); Note, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence in the Absence of a Focused Request From the Defendant*, 14 Am. Crim. L. Rev. 319, 330-34 (1976); *Duty Reconsidered*, *supra* note 245, at 492.

247. Pre-*Agurs* courts had required virtually automatic reversal if the prosecutor suppressed favorable evidence in bad faith. *See, e.g.*, United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968); Kyle v. United States, 297 F.2d 507, 513-14 (2d Cir. 1961); *see generally* Note, *The Prosecutor's Duty to Disclose After* United States v. Agurs, 1977 U.

in camera inspection is as follows: Reversal is required if the prosecutor's failure is in bad faith and the information would have been disclosed by the trial court as favorable to the preparation or presentation of the defense; if the prosecutor's error cannot be proven to be an act of bad faith, reversal is required if the information would have been disclosed by the trial court, unless the denial of access was harmless beyond a reasonable doubt to the preparation or presentation of the defense.

If automatic reversal for suppression of favorable but not material evidence is considered too high a cost for even bad faith prosecutorial errors,[248] the harmless error standard could be applied to all cases in which the prosecutor fails to include favorable evidence in the file. It would then be the duty of the courts to protect against any bad faith acts of the prosecutor—infrequent though they may be—by imposing sanctions other than reversal for such misconduct, such as publication of the prosecutor's name or referral for disciplinary action.[249]

Post-trial review of nondisclosures after in camera hearings, whether due to error by the prosecutor or the court, is undeniably difficult. The great solace, however, is that an in camera hearing will guarantee that such post-trial reviews will be far less frequent than under *Agurs*.[250] By eliminating the problem of prosecutorial incapability of determining whether evidence is favorable to the defendant, and by adopting a pretrial disclosure standard of favorability, not materiality, the in camera solution assures that defendants will have much less about which to complain on appeal.

D. *Objections to a Per Se Right to an In Camera Hearing*

A per se right to an in camera review of the prosecutor's file has never been adopted as a means to effectuate the defendant's constitutional right of access to exculpatory evidence.[251] Five arguments have generally been

Ill. L.F. 690, 700-04 (advocating standard of reversal if relevant information suppressed in bad faith) [hereinafter cited as *Disclosure*].

248. Courts have not been prone to adopt a rule of automatic reversal for bad faith errors by the prosecutor. *See, e.g.*, United States v. Modica, 663 F.2d 1173, 1181-82 (2d Cir. 1981) (substantial prejudice required for reversal when prosecutor made improper remarks in summation), *cert. denied*, 456 U.S. 989 (1982); People v. Galloway, 54 N.Y.2d 396, 401, 430 N.E.2d 885, 887-88, 446 N.Y.S.2d 9, 11-12 (1981) (defendant not substantially prejudiced by boisterous behavior of attorneys during trial). In rejecting a rule of automatic reversal, the court in *Modica* stated: "Reversal is an ill-suited remedy for prosecutorial misconduct; it does not affect the prosecutor directly, but rather imposes upon society the cost of retrying an individual who was fairly convicted." 663 F.2d at 1184. *See generally* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 644-47 (1972) (reviewing uses and limitations of appellate reversal).

249. *See* United States v. Modica, 663 F.2d 1173, 1185-86 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

250. See *infra* note 297 and accompanying text.

251. The Fifth Circuit in Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969), came close to adopting a per se in camera hearing requirement, noting that it would solve the problems of reliance on the benevolence of the prosecutor on the one hand, and the potential for abuse of an open file rule on the other.

advanced against an in camera solution to the problems of access posed by *Agurs*. Although some of the arguments are of substance, none really comes to grips with the significance of the rights guaranteed by *Brady* and the inadequacy of the *Agurs* system in effectuating those rights. The objections to the in camera solution can be adequately answered when viewed in that context.

1. The Trial Court is in No Position to Determine the Favorability of Evidence at an In Camera Hearing

In *United States v. Cobb*,[252] the court expressed a view representative of many authorities[253] that an in camera examination "offers no real solution" to the *Brady* problem "for the reason that the Court may be less knowledgeable than the parties, particularly in criminal proceedings presenting complicated issues."[254] There are several responses to this objection.

First, even a judge who knows only the general outlines of a case is likely to determine reliably and objectively whether information in the prosecutor's file is favorable or relevant to a logical defense to the charge. When compared to the *Agurs* system, in which the knowledgeable but biased prosecutor is expected to determine which evidence is favorable to the opponent, a substantial argument can be made that a less informed but more objective viewpoint would result in greater access by the de-

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See id. at 800-01. The Fifth Circuit subsequently retreated from the broad language in *Williams*. *See* United States v. Harris, 458 F.2d 670, 677 (5th Cir.) (*Williams* in camera procedure merely a "suggestion"), *cert. denied*, 409 U.S. 888 (1972). Under current Fifth Circuit practice, as well as elsewhere, defendant is entitled to an in camera hearing (other than by the grace of the prosecutor) only when he can make a preliminary showing of materiality, only as to specific evidence, not the entire file, and only if the prosecutor does not deny the existence of favorable evidence. See *supra* notes 189-92 and accompanying text.

Reviewing courts have occasionally chided lower courts for refusing to hold an in camera inspection, on the ground that such an inspection would have obviated the need for speculative post-trial review. *See, e.g.*, United States v. Gaston, 608 F.2d 607, 613-14 (5th Cir. 1979) (reversible error when trial court failed to conduct in camera review of documents specifically requested by defendant). Yet these suggestions from appellate courts clearly do not amount to a per se right to in camera inspection.

252. 271 F. Supp. 159 (S.D.N.Y. 1967).

253. *See, e.g.*, *Open File*, *supra* note 232, at 903-04 (discussing defects in judicial examination of evidence); *Disclosure*, *supra* note 247, at 711 (discussing who should decide if evidence is exculpatory); *Prosecutor's Duty*, *supra* note 130, at 148 (same).

254. United States v. Cobb, 271 F. Supp. 159, 163 (S.D.N.Y. 1967). The court relied on dictum from Dennis v. United States, 384 U.S. 855, 875 (1966), in which the Supreme Court stated that grand jury minutes could not be effectively reviewed by an in camera examination because "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." Ironically, however, this dictum, taken in context, appears to lean toward the dreaded open file rule, as opposed to prosecutorial discretion, for grand jury minutes. *See Dennis*, 384 U.S. at 875. The point of the in camera solution is that, although not without problems, it is more palatable than the open file rule, which courts believe will lead to abuses. See *supra* notes 22-23 and accompanying text.

fendant to exculpatory evidence.[255]

Secondly, a trial court is not without aid in determining favorability. Especially in complex cases, adversary submissions by the prosecutor and defense counsel can and will inform the court of the nature of the case and of the type of evidence that would be favorable to the defense.[256] Also, when the trial court calls its doubts in favor of the defendant, the prosecutor, on objection, can inform the court of circumstances it may have overlooked that indicate that the information about to be disclosed is not in fact favorable.[257]

Of course the relevance and favorability of information in the prosecutor's file may not become apparent to an objective decisionmaker, indeed to anyone, until the trial unfolds.[258] Prior convictions of a witness, for instance, do not become relevant unless the prosecution calls that witness or his statement is admitted under an exception to the hearsay rule.[259] Yet the in camera solution is not limited to a "one shot" pre-trial determination of favorability any more than the *Agurs* system allows the prosecutor to review his file only once.[260] As already noted,[261] the in camera solution, in order to be fully effective, requires a continuing duty to review information in the prosecutor's file and to disclose such information once its favorability becomes apparent.[262] Consequently, the argument that the trial court is ill-suited to determine favorability is unconvincing, especially when it is noted that as the trial proceeds, the court becomes familiar with the evidence.[263] Moreover, the court's effectiveness in de-

255. The same empirical proposition underlies the warrant requirement. Even though the police officer is obviously more familiar with the defendant's activity, the objective determination of the magistrate is considered more reliable and more protective of constitutional interests in privacy. *See* Illinois v. Gates, 103 S. Ct. 2317, 2332-33 (1983). See *supra* notes 180-84 and accompanying text.

256. See *supra* note 209 and accompanying text. The court in United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967) posited that the effectiveness of an in camera inspection would be increased substantially after adversary submissions. *See id.* at 885. This option is viable in light of the fact that such submissions need not be disclosed to the opposing party.

257. See *supra* notes 217-18 and accompanying text.

258. *See* United States v. Cobb, 271 F. Supp. 159, 163 (S.D.N.Y. 1967).

259. If a hearsay declarant has prior convictions, defendant may be able to impeach the veracity of that declarant under Federal Rule of Evidence 806. *See* Fed. R. Evid. 806.

260. *See, e.g.*, United States v. Campagnuolo, 592 F.2d 852, 859 (5th Cir. 1979) (prosecutor has continuing obligation under *Brady* to produce "at the appropriate time" exculpatory evidence requested).

261. See *supra* notes 219-21 and accompanying text.

262. Continuance or other devices may be required to assure that the information can still be used by the defendant. *See, e.g.*, United States v. Kopituk, 690 F.2d 1289, 1339 (11th Cir. 1982) (witness re-called to allow use of impeachment information), *cert. denied*, 103 S. Ct. 3542 (1983). See *supra* notes 219-21 and accompanying text.

263. It is possible that during the trial the trial judge may fail to remember that certain information, which now would be deemed favorable, is contained in the prosecutor's file. This problem can be alleviated somewhat by defense requests and by the trial court's discretion to order re-inspection of the file. Alternatively, the trial court could obtain a copy of the prosecutor's file, for reference purposes as the trial progresses. See *supra* notes 219-21.

termining favorability is particularly apparent when viewed in comparison with the problems that result when the issue of favorability is in the hands of the prosecutor or the defense counsel.

2. Access to the Prosecutor's File Will Prejudice the Trial Court Against the Defendant

The court in *State v. Gillespie*[264] states a representative view[265] of the alleged dangers of prejudice to the defendant that can arise with an in camera inspection:

> [I]t is not unreasonable to expect, indeed it is likely, that a prosecutor's files will contain information concerning an accused which is extremely prejudicial or inflammatory, yet probably inadmissible at trial; *e.g.*, the past criminal record of the accused, or his ill repute among law enforcement agencies. Knowledge of these matters on the part of the trial judge could seriously impair, however unintentionally, judicial impartiality.[266]

This argument not only underestimates the capacity and integrity of trial judges; it also ignores the fact that judges routinely consider evidence that is prejudicial to the defendant, and in fact exclude such evidence, without presumed impairment of their impartiality.[267] The fact that evidence in the prosecutor's file may be ruled inadmissible does not mean that the judge will never hear about it. It is the judge who will rule on admissibility when the vast majority of such evidence is inevitably proffered by the prosecution.[268] In fact, in ruling on the admissibility of evidence under Federal Rule of Evidence 403 in nonjury trials, prejudice is not an appropriate consideration, because it is presumed that the judge—unlike the jury—can keep prejudice from his mind in considering the evidence.[269]

Moreover, the prejudice shibboleth is already applicable to the more limited (in both extent and occurrence) in camera inspections that trial

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264. 227 So. 2d 550, 557-58 (Fla. Dist. Ct. App. 1969).

265. *See, e.g., Open File, supra* note 232, at 903; *Prosecutor's Duty, supra* note 130, at 148-49.

266. State v. Gillespie, 227 So. 2d 550, 557-58 (Fla. Dist. Ct. App. 1969). This argument will of course not apply if the task of conducting an in camera inspection is delegated to a magistrate.

267. *See* Fed. R. Evid. 104, 403, 404(b); 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 403[03], at 403-18 to -36 (1983); 2 J. Weinstein & M. Berger, *supra*, ¶ 404[18], at 404-99 to -113; 3 J. Weinstein & M. Berger, *supra*, ¶ 609[03], at 609-60 to -69.

268. The prosecutor would indeed be remiss as an advocate if he did not try to get damaging and even prejudicial evidence admitted. For example, defendant's prior criminal acts, while undoubtedly prejudicial, are more often than not probative to another issue in the case, such as motive or intent, and thus are at least arguably admissible under Rule 404(b) of the Federal Rules of Evidence. *See* Fed. R. Evid. 404(b); 2 J. Weinstein & M. Berger, *supra* note 267, ¶ 404[11]-[18], at 404-66 to -113. Because the argument as to admissibility will be before the trial judge, pre-trial in camera access to such information in the prosecutor's file creates no greater danger of trial court prejudice than that with which we live today.

269. *See* Gulf States Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981).

courts currently undertake under *Brady*. Yet courts have uniformly rejected the notion that access to prejudicial evidence during in camera review would impermissibly affect the trial judge.[270] This is a salutary result, because the harm from the judge's access to prejudicial information, if any, is far outweighed by the benefits reaped by defendant through the in camera device.[271]

3. Trial Court Access to the State's Evidence Will Create Chain of Custody Problems

In *State v. Gillespie*,[272] the court argued that a pitfall of the in camera hearing requirement is that "if the trial judge were to examine certain evidence he, himself, could become a link in the chain of possession thereof. The undoing of this circumstance, if it were to become necessary as well it might, could surely tax the bounds of discretionary procedural ingenuity."[273] Contrary to the assertion in *Gillespie*, however, chain of custody problems would be minimal, if not nonexistent, if the in camera solution were adopted.

The prosecution must establish a chain of custody for all real evidence that it seeks to admit as an exhibit at trial, in order to prevent an inference that such exhibits have been tampered with or changed in some regard.[274] Because the chain of custody requirement applies only to real evidence—as opposed to such evidence as witness' statements, lab and police reports and prior convictions of witnesses—a judge's review of the

270. *See* United States v. Johnson, 658 F.2d 1176, 1178-79 (7th Cir. 1981); *see also* United States v. Sonderup, 639 F.2d 294, 296-97 (5th Cir.) (judge not prejudiced by evidence from pre-trial motions and bond hearings), *cert. denied*, 452 U.S. 920 (1981).

271. In Gregg v. United States, 394 U.S. 489 (1969), the Court addressed the propriety of a trial judge's access to a pre-sentence report before a verdict had been rendered, *see id.* at 492. The Court noted that Federal Rule of Criminal Procedure 32 prohibited such access and held that "the rule must not be taken lightly" because "[t]o permit the *ex parte* introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from *premature* submission of the presentence report." *Id.* at 492 (emphasis added). *But see* United States v. Bunch, 730 F.2d 517, 519 (7th Cir. 1984) (judge need not recuse himself because of premature access to pre-sentence report). Pre-verdict access to a pre-sentence report differs from an in camera review of the prosecutor's file in one important respect: It serves no useful function, and does not benefit defendant in any way, for the judge to have access to a pre-sentence report before a verdict is rendered. The Supreme Court implicitly stated this in *Gregg* by referring to "premature" submission of the pre-sentence report. In contrast, when the judge reviews the prosecutor's file in camera, he performs an important, constitutionally-based function, which far outweighs any prejudice that may occur. The judge's in camera inspection is thus more akin to in limine rulings on evidence (an important function, albeit with access to prejudicial information) than it is to a premature access to a pre-sentence report. See *supra* notes 267-70.

272. 227 So. 2d 550 (Fla. Dist. Ct. App. 1969).

273. *Id.* at 558.

274. *See* United States v. Lampson, 627 F.2d 62, 65-66 (7th Cir. 1980); *see generally* Giannelli, *Chain of Custody and the Handling of Real Evidence*, 20 Am. Crim. L. Rev. 527, 535-45 (1983) (discussing appropriate circumstances and time periods for chain of custody).

prosecutor's file will not present a chain of custody problem with respect to the vast majority of information contained therein. Moreover, if the judge's in camera access to real evidence does present a chain of custody problem, it can easily be resolved by the prosecutor placing in the file a description of the real evidence he intends to use at trial.[275] A prosecutor's description of such evidence presents little risk of abuse of *Brady* principles, because if the prosecutor is going to admit it at trial, it is safe to assume that the evidence is not favorable to defendant. Although the prosecutor is too much of an advocate to know what information is favorable to defendant, he is sufficiently an advocate to know that evidence he will use at trial is not favorable to the defense.

Even assuming that the trial judge unavoidably becomes a link in the chain of custody during an in camera inspection, it is axiomatic that a gap in the chain of custody goes to the weight of the evidence, not to its admissibility.[276] It is inconceivable that the trial judge's possession of real evidence during in camera inspection would detract from the weight of such evidence.[277] Accordingly, objections to the in camera solution grounded in the trial court's custody of real evidence are weak at best.

4. *Brady* Applies Only When Exculpatory Evidence Is Suppressed by the Prosecutor and Discovered After Trial

In *United States v. Agurs*,[278] the Court described *Brady* as involving "discovery, after trial, of information which had been known to the prosecution but unknown to the defense."[279] Some Courts have accordingly viewed *Brady* as being simply irrelevant to discovery before or during the trial. In *United States v. Zive*,[280] for instance, the court stated flatly: "*Brady v. Maryland* did not deal in any way with pretrial discovery by a defendant nor with any duty of the court in that respect. On the contrary, the discussion was of the duty of the prosecutor, wholly apart from any order of the court."[281] Likewise, in *United States v. Moore*,[282] the

275. All other real evidence, if any, could be inspected by the judge in camera without a chain of custody problem, because the chain of custody requirement deals with actual use of real evidence at trial. *See* United States v. Lampson, 627 F.2d 62, 65 (7th Cir. 1980).

276. *See* United States v. Jefferson, 714 F.2d 689, 696 (7th Cir. 1983); United States v. Lampson, 627 F.2d 62, 65 (7th Cir. 1980); United States v. Henderson, 588 F.2d 157, 160 (5th Cir.), *cert. denied*, 440 U.S. 975 (1979); Giannelli, *supra* note 274, at 546.

277. It is important to note that when chain of custody objections have been sustained by courts, the gaps in the chain have occurred within the prosecutorial arm of the government. *See, e.g.*, United States v. Panczko, 353 F.2d 676, 679 (7th Cir. 1965), *cert. denied*, 383 U.S. 935 (1966), *overruled on other grounds*, United States v. Arciniega, 574 F.2d 931 (7th Cir.), *cert. denied*, 437 U.S. 908 (1978); Smith v. United States, 157 F.2d 705, 705-06 (D.C. Cir. 1946). The inference of tampering is obviously much greater when the custody questions arise within the prosecutorial arm of the government than when an unbiased judge has possession of the evidence.

278. 427 U.S. 97 (1976).

279. *Id.* at 103.

280. 299 F. Supp. 1273 (S.D.N.Y. 1969).

281. *Id.* at 1274.

court stated that "*Brady* did not deal with pretrial discovery. It concerned only prosecutorial *suppression* of evidence known to be crucial to the defense. . . . *Brady* was never intended to create pretrial remedies."[283]

If the above propositions are valid, a per se right of in camera review would receive no support from *Brady*, and may indeed be considered constitutionally impermissible. The in camera solution would amount to effectuating a right that has not even come into existence at the time of the in camera inspection, because the right would not exist until after the trial in which the prosecutor suppressed exculpatory evidence throughout the trial.[284]

The proposition that the *Brady* right arises only after trial reflects a misunderstanding of the case. *Brady* established the right of access to favorable evidence as part of the fundamental right to a fair trial.[285] *Brady*, and especially *Agurs*, established a method by which to effectuate that right of access: the remedy of post-trial reversal if it is found that defendant is denied access. Neither *Brady* nor *Agurs*, however, purports to promulgate an exclusive constitutional remedy for denial of the right of access to exculpatory evidence. Nor do *Brady* or *Agurs* purport to rule out alternative methods of effectuating the right, particularly if such methods will result in higher protection of the fundamental right of access to evidence.[286] Cases holding that *Brady* guarantees only a post-trial right are thus incorrect. Instead, *Brady* guarantees a right of access both before and at trial, by establishing a nonexclusive post-trial remedy.[287]

Of course, *Brady* and *Agurs* both focused on the prosecutor's duty to disclose, which does not especially suggest that a trial court would have a

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282. 439 F.2d 1107 (6th Cir. 1971).

283. *Id.* at 1108 (emphasis added); *see also* United States v. Conder, 423 F.2d 904, 911 (6th Cir.) ("*Brady* holds only that the suppression at trial of evidence favorable to an accused is a denial of due process."), *cert. denied*, 400 U.S. 958 (1970); United States v. Zirpolo, 288 F. Supp. 993, 1019 (D.N.J. 1968) ("[A]ppropriate remedial processes are available [under *Brady*] to correct possible abuse arising out of the suppression of exculpatory material."), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1970); United States v. Manhattan Brush Co., 38 F.R.D. 4, 7 (S.D.N.Y. 1965) (*Brady* did not intend to create pre-trial remedies.).

284. *See* State v. Gillespie, 227 So. 2d 550, 554 (Fla. Dist. Ct. App. 1969) (relying on *Brady* rights for pre-trial discovery "is akin, it may be said, to one yelling 'Ouch!', before he's hurt.").

285. See *supra* notes 12-13 and accompanying text.

286. To the contrary, the Court in *Agurs* recognized that in camera review would have at least some utility in effectuating defendant's right of access. *See* United States v. Agurs, 427 U.S. 97, 106 (1976).

287. Whether favorable information must be disclosed before or at trial under *Brady* (and under the in camera solution) will depend on the nature of the evidence and a balancing of prosecutorial interests. *See, e.g.*, United States v. Kaplan, 554 F.2d 577, 580 (3d Cir. 1977); United States v. Pollack, 534 F.2d 964, 973-74 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); United States v. Elmore, 423 F.2d 775, 779 (4th Cir.), *cert. denied*, 400 U.S. 825 (1970). Nonetheless, the *Brady* right is a right of access to evidence in time for it to be of use to the defense. See *supra* note 82.

pre-trial role in guaranteeing access to favorable evidence.[288] *Zive* and *Moore* specifically rely on *Brady*'s focus on the prosecutor's duty.[289] Again, however, this misses the point of *Brady*. It imposed a constitutional duty on the prosecutor, but neither it nor *Agurs* purported to adopt an exclusive method for effectuating that duty; neither decision prohibits adoption of an alternative, more effective method of allowing the prosecutor to satisfy his duty.[290] The in camera solution enforces the prosecutor's constitutional duty of disclosure established by *Brady*, and does so without imposing on the prosecutor the virtually impossible task of having to determine whether evidence is favorable to his adversary: The prosecutor discharges his *Brady* duty merely by keeping a complete file and turning it over to the court. Because the in camera solution is thus a more effective and less burdensome means of enforcing the prosecutor's *Brady* duty, it is hardly foreclosed by *Brady* or *Agurs*.

Courts that read *Brady* as requiring that the prosecutor's duty to disclose be discharged without interference by the court or anyone else are basically emphasizing prosecutorial prerogative, not prosecutorial duty. Yet *Brady* and *Agurs*, in providing one solution for enforcement of the duty to disclose, did not intend to grant to the prosecutor the privilege of sole dominion over exculpatory evidence. *Brady*, in imposing a duty on the prosecutor, did not thereby make him a despot. As the Third Circuit recently stated in *United States v. Starusko*: "We flatly reject the notion, espoused by the prosecution, that 'it is the government, not the district court, that in the first instance is to decide when to turn over *Brady* material.' . . . Today, we affirm this Court's long-standing policy and applaud the district court's effort to ensure prompt compliance with *Brady*."[291]

Accordingly, because neither *Agurs* nor *Brady* precludes more effective means of guaranteeing defendant's right of access to exculpatory evidence or more efficient means of enforcing the prosecutor's corresponding duty of disclosure, the in camera solution withstands a misreading of *Brady* as establishing a solely post-trial right.

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288. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* United States v. Agurs, 427 U.S. 97, 108 (1976) (prosecutor violated constitutional duty to disclose only when omission denies defendant a fair trial).

289. See *supra* notes 277-82 and accompanying text.

290. Again, the Court in *Agurs* envisioned at least limited use of an in camera inspection to aid the prosecutor in effectuating his duty of disclosure. *See* United States v. Agurs, 427 U.S. 97, 106 (1976).

291. 729 F.2d 256, 261 (3d Cir. 1984). Many courts have held that *Brady* rights are implicated before and during trial and that the trial court has the obligation both before and during the trial to enforce the prosecutor's duty of disclosure and defendant's corresponding right of access to favorable evidence. *See, e.g.*, United States v. Cadet, 727 F.2d 1453, 1470 (9th Cir. 1984); United States v. Brown, 574 F.2d 1274, 1278-79 (5th Cir.), *cert. denied*, 439 U.S. 1046 (1978); United States v. Eley, 335 F. Supp. 353, 358 (N.D. Ga. 1972); United States v. Gleason, 265 F. Supp. 880, 885 (S.D.N.Y. 1967); State *ex rel.* Dooley v. Connall, 257 Or. 94, 102, 475 P.2d 582, 586 (1970).

5. The In Camera Solution Will Impose an Intolerable Burden on the Trial Court

The strongest objection to the in camera solution has been saved for last. Undoubtedly, a per se right to an in camera review of the prosecutor's file would impose an extreme burden on the trial court, particularly in complex cases. A typical reaction to the task of in camera review is the response of the trial court judge in *United States v. Navarro*[292] to defendant's request for an in camera inspection under *Brady*: "Look, I am not going to conduct a trial within a trial here. . . . [The file] looks like it is about three inches thick, and I am not going to read it. I am going to accept the representation of Government counsel."[293] Dark predictions of the undue burdens that an in camera solution would impose have been voiced by courts[294] and commentators.[295] Even if the task of an in camera inspection could be delegated to magistrates, the burden on the criminal justice system would be substantial if every criminal defendant had an absolute right to demand in camera inspection before trial.

The response to the undue burdens objection is two-fold. First, the actual burdens of an in camera solution, when compared with the burdens imposed by the current *Agurs* system, may not be so great. In essence, *Agurs* results in expenditure of judicial resources at the appellate level, in the form of retrospective review under unnecessarily complicated materiality standards.[296] These appellate costs may not be as great under the in camera solution, given the fact that an objective pre-trial determination of favorability will result in greater disclosure to defendants.[297] Furthermore, trial courts are not free from burdens under the current *Agurs* system. If the suppression is not discovered until after trial and the suppressed evidence is held in retrospect to be material, substantial costs arise because of the necessity to re-try the case.[298] Another cost

292. 737 F.2d 625 (7th Cir.), *cert. denied*, 105 S. Ct. 438 (1984).

293. *Id.* at 629 n.5.

294. *See, e.g.*, United States v. Navarro, 737 F.2d 625, 631 (7th Cir.) ("undue burden on the district court"), *cert. denied*, 105 S. Ct. 438 (1984); United States v. Cobb, 271 F. Supp. 159, 163 (S.D.N.Y. 1967) ("pretrial fishing expedition"); State v. Gillespie, 227 So. 2d 550, 557 (Fla. Dist. Ct. App. 1969) ("ponderous, time-consuming task if utilized in every case merely on demand").

295. See *supra* note 253.

296. See *supra* notes 150-79 and accompanying text.

297. That the in camera solution will result in more disclosures is, of course, an empirical proposition. Evidence to support this proposition, however, can be found in the current, limited use of in camera hearings, in which the court orders disclosure and the prosecutor objects that the information is not *Brady* material. *See, e.g.*, United States v. Cadet, 727 F.2d 1453, 1470 (9th Cir. 1984); United States v. Higgs, 713 F.2d 39, 43 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 725 (1984). Such disclosure would clearly not occur if the prosecutor were the sole arbiter of favorablility. Moreover, even if the in camera solution does not totally prevent post-trial review, such review will at least be less complex than that required by *Agurs*. An appellate court could review the in camera ruling by a single standard, as opposed to the *Agurs* pigeonholes. See *supra* notes 163, 229 and accompanying text.

298. *See* Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983), *cert. granted*, 105 S.

occurs when the appellate court finds it necessary to remand to the trial court for an in camera hearing as to whether certain suppressed information in the prosecutor's file is in fact material, in which case reversal for such suppression would be required.[299] All this contretemps would be avoided if an in camera hearing were conducted before trial as a matter of course. A final cost of the *Agurs* system that cannot be ignored is that if the suppression of material evidence is not discovered until after trial, the passage of time may make re-trial impossible.[300]

All the above costs of the *Agurs* system occur because favorability of evidence is determined by the prosecutor, and thus exculpatory evidence is often not discovered until after trial, if at all. To the extent that an objective determination by the court or magistrate will result in more reliable findings of favorability, and thus increased disclosure before or at trial,[301] the in camera solution is in fact cost-effective in comparison to the *Agurs* system.

Nevertheless, the in camera solution does on balance raise a greater specter of substantial expenditure of resources than does the *Agurs* system.[302] More judges and magistrates would undoubtedly have to be hired. The question then becomes whether it is too expensive to provide more effective guarantees of the constitutional right of access to favorable evidence. It can be argued, of course, that if the right of access to exculpatory evidence is so fundamental as to be constitutionalized, no expense can be too great to ensure that the right is not merely an empty promise. Arguably, the drafters of the Bill of Rights have already factored in the cost of the right as well as the cost of an effective remedy, and have found

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Ct. 427 (1984); Sennett v. Sheriff of Fairfax County, 608 F.2d 537, 538 (4th Cir. 1979); People v. Cwikla, 46 N.Y.2d 434, 442, 386 N.E.2d 1070, 1074, 414 N.Y.S.2d 102, 106 (1979).

299. *See* United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983); United States v. Brown, 574 F.2d 1274, 1278-79 (5th Cir.), *cert. denied*, 439 U.S. 1046 (1978).

300. *See* Anderson v. South Carolina, 542 F. Supp. 725, 738 (D.S.C. 1982), *aff'd*, 709 F.2d 887 (4th Cir. 1983).

301. See *supra* note 297.

302. Note that as far as cost is concerned, the in camera solution would not necessarily be applicable to a defendant who pleads guilty. The constitutional issue for a defendant who pleads guilty is whether defendant has made a voluntary choice and gets that for which he bargained. Fambo v. Smith, 565 F.2d 233, 235 (2d Cir. 1977). Moreover, the right to prepare an effective defense, which is the heart of *Brady*, by definition does not apply to one who voluntarily chooses not to assert a defense. Accordingly, most courts have held that *Brady* does not apply to the decision to plead guilty. *See, e.g.*, Fambo v. Smith, 565 F.2d 233, 235 (2d Cir. 1977); United States v. Wolczik, 480 F. Supp. 1205, 1211 (W.D. Pa. 1979). Because the in camera solution is merely a more efficient method to protect the rights guaranteed by *Brady*, it follows that an in camera hearing would not be required if defendant pleads guilty well before trial. *But see Ex parte* Lewis, 587 S.W.2d 697, 700 (Tex. Crim. App. 1979) (prosecutor has *Brady* obligation to one who pleads guilty).

It should also be noted that the time taken in conducting an in camera hearing would be "excusable" delay, and thus would not give rise to speedy trial claims. *See* Barker v. Wingo, 407 U.S. 514, 530-33 (1972); 18 U.S.C. § 3161(h)(1) (1982); Amsterdam, *Speedy Criminal Trials: Rights and Remedies*, 27 Stan. L. Rev. 525, 530-31 (1975).

such costs to be worthwhile; it can be said that the drafters have done all the balancing of costs and benefits that is necessary.[303]

Reliance on the cost-benefit conclusions of the drafters, however, is not currently in vogue in the Burger Court. The Court has felt free to engage in its own cost-benefit analysis in determining whether a right and remedy must be enforced. Even if the right is a fundamental one, the Court has felt free to determine whether the suggested remedy for such a right is in fact cost-effective.[304] The propriety of the use of a cost-benefit analysis to determine the extent of enforcement of fundamental rights has often been debated, particularly as to the exclusionary rule, and need not be recapitulated here.[305] It suffices to note that if potentially greater expense is the only valid argument against an in camera solution, the discussion of the vitality of the proposal should not end there.

Even presuming that a cost-benefit analysis is warranted, two propositions seem unassailable: The constitutional right of access guaranteed by *Brady* is a fundamental right, which is and must be highly valued, and thus the benefits resulting from effective enforcement of the right are high, and the *Agurs* system provides inadequate and haphazard enforcement of the fundamental *Brady* right and results in significant costs to the justice system as well. Given this state of affairs, alternative methods of effectuating the constitutional right provided by *Brady* must at least be given some consideration.[306] This is particularly so if the alternative remedy relieves the justice system and the litigants of the unacceptable burdens imposed by *Agurs*: The prosecutor is freed from his impossible role of determining the favorability of evidence to his adversary, defense counsel is freed from his impossible role of guessing what might be in the prosecutor's file, and the reviewing court is freed from its impossible role

303. *See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 Creighton L. Rev. 565, 645-49 (1983).

304. Examples of the Court's current focus on costs to the justice system incurred by enforcing constitutional rights include: United States v. Leon, 104 S. Ct. 3405, 3413-16 (1984) (enforcement of fourth amendment rights through undifferentiated exclusionary rule not cost effective); Morris v. Slappy, 461 U.S. 1, 14 (1983) (cost of re-trial on witnesses, system and victims); Scott v. Illinois, 440 U.S. 367, 373 (1979) (Court focuses on costs in denying right to counsel when no imprisonment results); Stone v. Powell, 428 U.S. 465, 492-95 (1976) (societal costs of application of exclusionary rule).

305. See the opinions in United States v. Leon, 104 S. Ct. 3405 (1984), and the commentaries cited therein.

306. The Burger Court has been only too happy to consider alternative methods of enforcement of fourth amendment rights. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3422-23 (1984) (allowing reviewing courts to exercise informed discretion in ruling on fourth amendment questions); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 420-24 (1971) (Burger, C.J., dissenting) (discussing "the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement"). The in camera solution in fact derives some support from the Supreme Court's recent attacks on the exclusionary rule, which are based on the proposition that the rule is not only costly but ineffective in protecting fourth amendment rights. *See Leon*, 104 S. Ct. at 3413. Likewise, the *Agurs* system is open to legitimate attack on the grounds that it is quite costly and yet ineffective in protecting *Brady* rights.

of determining the effect of evidence that was not in fact used at trial. Also to be considered is the fact that the in camera device is already in limited use and results in greater disclosure to defendants.[307] Thus, given the inadequacy and costliness of the *Agurs* system and the logical and empirical basis of the in camera solution, even a Supreme Court concerned with costs must consider the possibility of a per se right to in camera inspection. At the very least, a pilot program should be instituted so that a more reasoned cost-benefit analysis can be undertaken. Undifferentiated fear of the cost of the in camera solution is an invalid basis of objection, especially in light of the inadequacies of *Agurs*.

CONCLUSION

The Supreme Court in *Brady* established a constitutional right of access to favorable evidence, but the Court has not provided an effective system for guaranteeing enjoyment of the right. Because the Court's current system results in unreliable and biased determinations of the central issue of favorability, *Brady* rights will generally depend on the luck of the defendant. Even if the defendant is fortunate enough to discover the existence of exculpatory evidence, this discovery may occur after trial, at which time the defendant's right of access must be evaluated speculatively and balanced against the interest in finality of judgments.

A per se right to an in camera hearing is a better and fairer method of guaranteeing enjoyment of *Brady* rights. The solution guarantees that information held by the prosecutor will be reliably reviewed, and that objectively favorable evidence will be disclosed to defendant, as required by *Brady*. The drawback of this solution is its cost. Yet more must be done to determine whether an in camera solution provides benefits that far outweigh the costs. The in camera solution deserves honest consideration; otherwise, we will remain unconscionably content with second-class enforcement of first-class rights.

307. See *supra* note 297.