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## Failure of the Prosecutor to Disclose Witness's Intention to File a Civil Suit Against a Criminal Defendant Is a Violation of the Fourteenth Amendment

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served at least two separate prison sentences prior to being sentenced for the most recent offense.<sup>139</sup> Instead, section 70.08 is cross referenced with section 70.04—which does not contain the requirement of separate sentences found in section 70.10—for purposes of determining whether a person has committed two or more violent felony offenses.<sup>140</sup> Therefore, it is suggested that the material change intended by the legislature was not given force by the court. Thus, it is submitted that the intent of the legislature to deal more harshly with repeat violent felony offenders coupled with the conspicuous absence of the requirement for separate sentences was sufficient to uphold the defendants' sentences as persistent violent felony offenders.

By enacting section 70.08 of the Penal Law, the legislature has attempted to deal with criminals who repeatedly commit violent felonies.<sup>141</sup> Whether the Court of Appeals correctly construed the legislative intent will ultimately rest with the legislature.<sup>142</sup> It is strongly urged that in dealing with the problem of violent, career felons, the legislature should be cognizant of the reality that the protection of society may very well require unbending severity.

*Charles McKenna*

*Failure of the prosecutor to disclose witness's intention to file a civil suit against a criminal defendant is a violation of the fourteenth amendment*

The duty of a prosecutor to divulge exculpatory evidence to a defendant is a well-established principle rooted in the due process clause of the fourteenth amendment.<sup>143</sup> Despite the continued vi-

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<sup>139</sup> See *supra* note 134.

<sup>140</sup> See *id.* It is suggested that by enacting § 70.08 without the sequentiality requirement, the legislature intended to impose enhanced sentences upon violent felony offenders regardless of when the predicate offenses were committed.

<sup>141</sup> See *supra* note 109 and accompanying text.

<sup>142</sup> While legislative action is the more conventional way to clarify this situation, judicial consideration is also possible. See *State v. Ellis*, 214 Neb. 172, 173, 333 N.W.2d 391, 393 (1983). In *Ellis*, the Supreme Court of Nebraska recently reversed itself on the requirement of sequentiality for determining a predicate conviction. *Id.* at 174, 333 N.W.2d at 393. The court held that convictions, not sentences imposed, are determinative for predicate offenses under the recidivist statute of that state. *Id.*

<sup>143</sup> See *United States v. Agurs*, 427 U.S. 97, 106 (1976); *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935). It was not until 1963 that the United States Supreme Court recognized the mere failure to disclose evidence favorable to the accused as a due process violation. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Prior to *Brady*, the Court had focused on prosecutorial misconduct and the use of false evidence as a violation of due process. See

tality of this doctrine, courts have been hampered by the lack of a clear standard for determining what evidence must be disclosed.<sup>144</sup> New York courts have applied a number of tests in an attempt to develop a clear standard and, consequently, have compelled the disclosure of several types of evidence.<sup>145</sup> Recently, in *People v.*

*Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942); see also Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 136-50 (1964) (tracing evolution of courts' focus in determining when the duty arises).

<sup>144</sup> See *Giles v. Maryland*, 386 U.S. 66, 68 (1967). In *Giles*, the Supreme Court demonstrated the division among the Justices on the appropriate standard for disclosure. See *id.* at 113 (Harlan, J., dissenting). The Court held that the failure of the prosecutor to reveal information on the reputation of a rape victim for unchastity was reversible error. See *id.* at 74-76. The four-Justice dissent stated that the conviction should stand since the evidence for conviction was compelling. *Id.* at 102-03 (Harlan, J., dissenting). See generally Comment, *Prosecutor's Constitutional Duty of Disclosure—Developing Standards Under Brady v. Maryland*, 33 U. PITT. L. REV. 785, 785 (1972) (lower and state courts left to decide scope of duty, whether reversal is warranted by nondisclosure in particular cases, timing of disclosure, and necessity of a request to trigger duty) [hereinafter cited as *Constitutional Duty of Disclosure*]. Thus, lower federal courts and state courts have been left with the responsibility of deciding what material is within the scope of *Brady*. *Id.* Consequently, contradicting standards have developed within the various jurisdictions. Compare *United States v. Rundle*, 410 F.2d 1300, 1304 (3d Cir. 1969) (en banc) (no duty to disclose in absence of defendant's request for material), *cert. denied*, 397 U.S. 993, (1970) with *Levin v. Clark*, 408 F.2d 1209, 1217 (D.C. Cir. 1967) (Burger, C.J., dissenting) (request not necessary for disclosure). For a comparison of differing standards, see Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 115-17 (1972) [hereinafter cited as *Prosecutor's Duty to Disclose*].

<sup>145</sup> See, e.g., *People v. Geaslen*, 54 N.Y.2d 510, 516, 430 N.E.2d 1280, 1282, 446 N.Y.S.2d 227, 229 (1981) (failure to disclose inconsistent police grand jury testimony violated defendant's due process rights); *People v. Cwilka*, 46 N.Y.2d 434, 441, 386 N.E.2d 1070, 1073, 414 N.Y.S.2d 102, 105-06 (1979) (failure to disclose possible agreement between key witnesses and prosecution violated *Brady* rule); *People v. Simmons*, 36 N.Y.2d 126, 131-32, 325 N.E.2d 139, 142-43, 365 N.Y.S.2d 812, 816 (1975) (negligent failure to disclose an erroneous identification deprived defendant of due process); see also *People v. Porter*, 93 App. Div. 2d 943, 943-44, 463 N.Y.S.2d 65, 66-67 (3d Dep't 1983) (dictum) (evidence that complainant had been hypnotized may be subject to *Brady* disclosure). But see *People v. Brown*, 56 N.Y.2d 242, 247-48, 436 N.E.2d 1295, 1297-98, 451 N.Y.S.2d 693, 695-96 (1982) (lack of full hearing on nature of withheld exculpatory evidence not necessarily a *Brady* violation); *People v. Jones*, 44 N.Y.2d 76, 78, 375 N.E.2d 41, 42, 404 N.Y.S.2d 85, 86 (failure to inform defendant of death of prosecutor's witness did not violate due process), *cert. denied*, 439 U.S. 846 (1978).

Prior to *Brady*, the New York courts had established a doctrine that provided for disclosure of exculpatory evidence. See *People v. Savvides*, 1 N.Y.2d 554, 556-57, 136 N.E.2d 853, 854, 154 N.Y.S.2d 885, 887 (1956). In *Savvides*, the Court of Appeals stated that the prosecution must divulge any promise of leniency made to a witness in exchange for his testimony against a defendant. *Id.* The Court further noted that such evidence must be divulged even if it bears only upon the witness' credibility rather than the defendant's guilt. *Id.* at 557, 136 N.E.2d at 854-55, 154 N.Y.S.2d at 887.

*Wallert*,<sup>146</sup> the Appellate Division, First Department, held that the failure of a prosecutor to inform the defendant that the complaining witness planned to file a post-trial civil suit for damages is a due process violation.<sup>147</sup>

In *Wallert*, the defendant was convicted of rape and other related offenses.<sup>148</sup> Prior to the trial, the prosecutor discovered that the complainant had consulted an attorney to pursue a civil action against the defendant and was awaiting the jury verdict before commencement.<sup>149</sup> Two days after his conviction, the defendant was served with process in an action seeking a recovery of eighteen million dollars.<sup>150</sup> Subsequently, the defendant moved to set aside the verdict on the ground that the prosecutor had violated his right to a fair trial by failing to reveal that he knew of the intended civil suit before conviction.<sup>151</sup> The motion was denied and the defendant appealed his conviction to the Appellate Division.<sup>152</sup>

A unanimous First Department panel reversed *Wallert's* conviction and ordered a new trial.<sup>153</sup> Justice Carro, writing for the court, relied on the landmark case of *Brady v. Maryland*<sup>154</sup> and found that the prosecutor's failure to notify the defendant of the

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<sup>146</sup> 98 App. Div. 2d 47, 469 N.Y.S.2d 722 (1st Dep't 1983).

<sup>147</sup> *Id.* at 48, 469 N.Y.S.2d at 723-24.

<sup>148</sup> *Id.* at 47, 469 N.Y.S.2d at 723.

<sup>149</sup> *Id.* at 48, 469 N.Y.S.2d at 723. The court did not state the manner in which the prosecutor gained knowledge of the suit. *Id.* The prosecutor knew only that the complainant had consulted an attorney and that no suit had actually been filed prior to the conviction. *Id.* The complainant was awaiting the result of the criminal trial because of its potential value in a civil suit. *See id.*; *see also* S. T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 305, 298 N.E.2d 105, 108, 344 N.Y.S.2d 938, 942 (1973) (criminal conviction is conclusive proof of underlying facts in subsequent civil action); RICHARDSON ON EVIDENCE § 348, at 315, 316 (10th ed. 1973) (*Grand* result operates whether convicted person is plaintiff or defendant in subsequent civil action).

<sup>150</sup> 98 App. Div. 2d at 47-48, 469 N.Y.S.2d at 723.

<sup>151</sup> *Id.* at 48, 469 N.Y.S.2d at 723. The motion to set aside the verdict was made under CPL § 330.30 (1983). 98 App. Div. 2d at 48, 469 N.Y.S.2d at 723.

<sup>152</sup> *Id.* As no opinion was issued on the motion to set aside the verdict, it is uncertain whether the denial of the motion was based upon the lack of due diligence on the part of the defense counsel in not raising the possibility of a civil suit at trial, or upon the belief that the new evidence would not have affected the outcome. Although there is no separate appeal from the denial of a CPL 330.30 motion, the decision is reviewable upon an appeal of the actual conviction. *See* *People v. Pollock*, 67 App. Div. 2d 608, 608, 412 N.Y.S.2d 12, 12-13 (1st Dep't 1979), *aff'd*, 50 N.Y.2d 547, 550, 407 N.E.2d 472, 474, 429 N.Y.S.2d 628, 630 (1980) (*per curiam*).

<sup>153</sup> 98 App. Div. 2d at 51, 469 N.Y.S.2d at 725. Justice Carro wrote the opinion of the court with Presiding Justice Murphy and Justices Ross, Asch, and Bloom concurring.

<sup>154</sup> 373 U.S. 83 (1963).

possibility of a civil suit constituted a due process violation.<sup>155</sup> The court noted that the complainant's credibility was crucial to the jury's determination and, therefore, the failure to divulge the complainant's intent to file a civil action constituted reversible error.<sup>156</sup> Furthermore, Justice Carro maintained that the prosecutor exacerbated the error by stating in his summation that the complainant lacked a motive to lie.<sup>157</sup> The court concluded that the failure to divulge the intention to file a civil suit was a clear violation of *Brady*, " 'as [such information] had the possibility of assisting the defendant and raising a reasonable doubt.' " <sup>158</sup>

It is suggested that the court erred by failing to follow properly the standards set out in cases decided subsequent to *Brady v.*

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<sup>155</sup> 98 App. Div. 2d at 49-50, 469 N.Y.S.2d at 724-25. The court quoted *Brady* in stating 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." *Id.* (quoting *Brady*, 373 U.S. at 87) (emphasis added). *Wallert* may be distinguished from *Brady*, however, in that there was no specific request made by the defendant for information concerning a potential suit. *See* 98 App. Div. at 48, 469 N.Y.S.2d at 723; *see also Constitutional Duty of Disclosure, supra* note 144, at 805-10.

<sup>156</sup> 98 App. Div. 2d at 50-51, 469 N.Y.S.2d at 725. The Appellate Division panel cited *Napue v. Illinois*, 360 U.S. 264, 269 (1959), to support the determination that the withholding of evidence concerning the witness' credibility was reversible error. *See* 98 App. Div. 2d at 50, 469 N.Y.S.2d at 725. Justice Carro appeared to give considerable weight to the issue of credibility because there was conflicting testimony on the events that took place on the night of the alleged rape. *See id.* at 48-49, 469 N.Y.S.2d at 724. He noted that "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.* at 50, 469 N.Y.S.2d at 725 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

<sup>157</sup> 98 App. Div. 2d at 50, 469 N.Y.S.2d at 725. Counsel for the defense also acknowledged that there was no motive to lie. *Id.* Furthermore, the fact that the trial court referred to the motive and interest of the witnesses in the jury charge added to the court's finding that the defendant was deprived of a fair trial. *Id.*

<sup>158</sup> *Id.* at 50, 469 N.Y.S.2d at 725 (quoting *People v. Kitt*, 86 App. Div. 2d 465, 467, 450 N.Y.S.2d 319, 321 (1st Dep't 1982)). The test applied by the First Department in determining whether the material should have been disclosed was enunciated in *People v. Kitt*, 86 App. Div. 2d 465, 467, 450 N.Y.S.2d 319, 320-21 (1st Dep't 1982). In *Kitt*, the First Department held that laboratory test results leading to a conviction must be disclosed due to the possibility that they could assist the defendant and raised a reasonable doubt. *Id.* This standard appears to be a hybrid of various tests previously enunciated by other courts. *Compare Giles v. Maryland*, 386 U.S. 66, 101-02 (1967) (Fortas, J., concurring) (government has a duty "voluntarily to disclose material in its exclusive possession which is exonerative or helpful to the defense") with *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968) (reversal of conviction required when undisclosed evidence creates a reasonable doubt of guilt). For a discussion of the various standards that have been used by the courts, see Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure*, 59 Iowa L. Rev. 433, 445 (1973).

*Maryland*.<sup>159</sup> In a recent decision on the duty to divulge exculpatory evidence, the United States Supreme Court employed a new analysis for reviewing convictions in which nondisclosed evidence is later revealed.<sup>160</sup> When no specific request for evidence is made, the standard applied is whether, on the basis of the entire record, the evidence would have created a reasonable doubt of guilt if it had been disclosed.<sup>161</sup> It is submitted that the First Department did not adequately consider all the evidence in making its decision, but instead focused only on the potential effect of the withheld

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<sup>159</sup> See, e.g., *United States v. Agurs*, 427 U.S. 97, 112 (1976). In *Agurs*, the defendant was convicted of second degree murder. *Id.* at 98. The prosecutor did not divulge the criminal record of the victim to defense counsel. *Id.* at 100-01. The defendant contended that the failure to disclose this evidence was a violation of the *Brady* doctrine. *See id.* The Supreme Court ruled that the prosecutor was not under a duty to divulge the deceased's record in the absence of a request. *See id.* at 114. The Court concluded that convictions should only be overturned if, after consideration of the entire record the "omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 112; see Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1148-50 (1982).

<sup>160</sup> See *United States v. Agurs*, 427 U.S. 97, 106-07 (1976). The Court established a three-tier analysis for review of convictions when exculpatory evidence was not divulged. *See id.* at 103-07. The test was originally formulated by Judge Friendly in *United States v. Keogh*, 391 F.2d 138, 146-48 (2d Cir. 1968). The first class of cases are those in which the prosecutor's suppression of evidence is deliberate. 427 U.S. at 146-47. In deliberate conduct cases, the evidence is clearly of such importance to the defendant that it "could not have escaped the prosecutor's attention." *Id.* at 147; see *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *People v. Savvides*, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854, 154 N.Y.S.2d 885, 887 (1956). This type of misconduct almost automatically requires an invalidation of the conviction. *Agurs*, 427 U.S. at 103. The second class of cases that involve nondisclosure are those in which the defendant makes a specific request for certain evidence. *Keogh*, 391 F.2d at 147. *Brady* is an illustration of this type of suppression. *See Agurs*, 427 U.S. at 104. Nondisclosure of specifically requested materials is also a certain ground for reversal. *Keogh*, 391 F.2d at 147. The third category of cases arises "where the suppression was not deliberate . . . and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use." *Id.* Judge Friendly noted that relief may still be granted in such cases, but "the standard of materiality must be considerably higher." *Id.*

<sup>161</sup> See *United States v. Agurs*, 427 U.S. 97, 112 (1976); *supra* note 160. The test used by the First Department was that evidence must be disclosed if it has "the possibility of assisting the defendant and raising a reasonable doubt." *Wallert*, 98 App. Div. 2d at 50, 469 N.Y.S.2d at 725 (quoting *People v. Kitt*, 86 App. Div. 2d 465, 467, 450 N.Y.S.2d 319, 321 (1st Dep't 1982)). This standard incorporates the test created by Justice Fortas in *Giles v. Maryland*, 386 U.S. 66, 101-02 (1967) (Fortas, J., concurring). The applicability of *Giles* is questionable after the Supreme Court's holding in *Agurs* repudiated the notion that any material that is helpful to the defense must be disclosed. *See Agurs*, 427 U.S. at 108 (rejection of "sporting theory of justice"). The *Agurs* Court clarified its holding by stating that "[t]he 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." *Id.* at 109-10.

evidence on the defendant's case.<sup>162</sup>

It is further submitted that the court's decision was improper because the disputed evidence was not sufficiently definite to require disclosure.<sup>163</sup> Typically, materials subject to mandatory disclosure are either tangible,<sup>164</sup> or the result of affirmative steps taken by the prosecution, such as a promise of leniency made to a witness.<sup>165</sup> In *Wallert*, the evidence in question, although possibly

<sup>162</sup> See 98 App. Div. 2d at 50, 469 N.Y.S.2d at 725. The court did not list any tangible evidence that may have existed, but instead concentrated solely on the credibility of the complainant. *Id.* The Third Department, by way of comparison, reviews the entire record to ascertain the possible effect of the withheld evidence on the fairness of the trial. See *People v. Porter*, 93 App. Div. 2d 943, 943-44, 463 N.Y.S.2d 65, 66-67 (3d Dep't 1983) (mem.).

Other jurisdictions have been faithful to the language in *United States v. Agurs*, 427 U.S. 97, 112 (1976), requiring the court to weigh all the relevant evidence before reversing a conviction. See, e.g., *United States v. LeRoy*, 687 F.2d 610, 619-20 (2d Cir.), cert. denied, 459 U.S. 1174 (1982). In *LeRoy*, grand jury testimony was not revealed to one of the defendants. 687 F.2d at 618. The Second Circuit held that the defendant had not met his burden of showing that the new evidence created a reasonable doubt because the evidence against him included items such as a tape recorded conversation discussing the alleged act. *Id.* at 619.

<sup>163</sup> See *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring). Although Justice Fortas devised one of the broadest tests for determining what material is subject to *Brady* disclosure, he did not compromise the requirement of definiteness. See *id.* Justice Fortas stated:

This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. *It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information.*

*Id.* (emphasis added).

It is submitted that the evidence in question in *Wallert* fits squarely within the class of material Justice Fortas deemed unworthy of disclosure. As the First Department noted, the prosecutor knew prior to the trial that the complainant had consulted an attorney regarding the possibility of a civil suit, but the suit had not been filed. 98 App. Div. 2d at 48, 469 N.Y.S.2d at 723. It is suggested that such knowledge is a prime example of preliminary, speculative material. In *United States v. Reed*, 439 F.2d 1 (2d Cir. 1971), the defendant appealed a bank robbery conviction. *Id.* at 2. The chief witness for the government was a co-conspirator. *Id.* Defense counsel contended that it was error for the trial court to refuse to allow cross-examination of the co-conspirator regarding his intention to publish a book on his career as a bank robber. *Id.* at 3-4. The Second Circuit held that while it is generally proper to question a witness about his financial interest in the outcome of a case, the witness' intention to act was too speculative to be relevant. *Id.* at 4.

<sup>164</sup> See *People v. Kitt*, 86 App. Div. 2d 465, 466-67, 450 N.Y.S. 2d 319, 321 (1st Dep't 1982). Physical evidence, such as laboratory test results, must be disclosed. *Id.*

<sup>165</sup> See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (failure to disclose an alleged promise not to prosecute witness is a due process violation); *People v. Consolazio*, 40 N.Y.2d 446, 453, 354 N.E.2d 801, 805, 387 N.Y.S.2d 62, 65 (1976) (prosecutor must divulge worksheets containing witness interrogatories), cert. denied, 423 U.S. 914 (1977); *People v. Gonzalez*, 74 App. Div. 2d 763, 764-65, 425 N.Y.S.2d 601, 603 (1st Dep't 1980) (mem.) (duty

relevant for impeachment purposes, had not previously been held to warrant disclosure.<sup>166</sup> Furthermore, requiring the prosecution to come forward with evidence that is merely "preliminary, challenged or speculative" places an intolerable burden on the state.<sup>167</sup>

In addition, the analysis employed by the First Department fails to make a distinction between exculpatory evidence and impeachment evidence.<sup>168</sup> Several federal courts have held that "a greater duty should be placed on a prosecutor to produce exculpatory evidence than to disclose evidence which could be used for impeachment purposes only."<sup>169</sup> Moreover, the courts have rea-

to disclose prosecutor's notes upon request); *see also* Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 890-91 (1981) (prosecution should be under duty to disclose deals made with its witnesses).

<sup>166</sup> *See Wheeler v. United States*, 351 F.2d 946, 947 (1st Cir. 1965). It is suggested that, although a financial interest in a particular outcome is relevant to the issue of credibility, *see id.* at 947, *Wheeler* may be distinguished from *Wallert* based on the fact that the witness in *Wheeler* volunteered certain information to the IRS with the probable intention of collecting a reward. *See id.* In *Wallert*, the witness did not voluntarily involve herself in a criminal proceeding; rather, she was placed in the position of testifying because she was the victim. *See* 98 App. Div. 2d at 48, 469 N.Y.S.2d at 724.

<sup>167</sup> *See People v. Brown*, 56 N.Y.2d 242, 247, 36 N.E.2d 1295, 1297, 451 N.Y.S.2d 693, 695 (1982). The New York Court of Appeals has noted that to "require a hearing to investigate every speculative and unsupported allegation of prosecutorial impropriety would unquestionably impose an undue burden upon both the District Attorney and the judiciary." *Id.* The United States Supreme Court has been sensitive to the heavy burden placed upon the prosecution as well. *See United States v. Agurs*, 427 U.S. 97, 111 (1976) (prosecutor is not under a "constitutional duty routinely to deliver his entire file to defense counsel"). Judge Friendly also dealt with the danger of placing insurmountable burdens on the state when he wrote:

Failure to appreciate the use to which the defense could place evidence in the prosecution's hands, or forgetfulness that it exists when a development in the trial has given it a new importance, are quite different . . . [T]he problems of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the defense would have altered the result.

*United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968). *But see Prosecutor's Duty to Disclose*, *supra* note 144, at 140 (prosecutor should be under duty to divulge his entire file to defense).

<sup>168</sup> *See Babcock*, *supra* note 159, at 1153-55. "[C]ourts have . . . developed a separate and even more pro-prosecution standard for the nondisclosure of impeachment evidence." *Id.* at 1153; *see also United States v. Imbruglia*, 617 F.2d 1, 6-7 (1st Cir. 1980) (courts are hesitant to grant retrials when newly discovered material is for purpose of impeachment).

<sup>169</sup> *United States v. Bracy*, 566 F.2d 649, 656 (9th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978); *see also United States v. Lasky*, 548 F.2d 835, 840 (9th Cir.) (presence of other testimony sufficient for conviction renders immaterial presence of non-disclosed evidence tending to impeach credibility), *cert. denied*, 434 U.S. 821 (1977).

The imposition upon prosecutors of a greater duty to disclose exculpatory evidence is consistent with the most recent discussion by the United States Supreme Court of the duty

soned that impeachment evidence alone may not be sufficiently material to require reversal of a conviction.<sup>170</sup> The materiality of the impeachment evidence must therefore be judged within the context of the entire record, with particular weight placed on the substantive evidence.<sup>171</sup> It is therefore urged that the New York courts more literally apply the materiality standard, in conformance with the current practice of the federal courts and the Third Department, by overturning convictions only if the nondisclosed exculpatory evidence creates a reasonable doubt of guilt that did not previously exist.<sup>172</sup> This approach would, it is submitted, sat-

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to disclose. See *United States v. Agurs*, 427 U.S. 97, 108 (1976). As there was no question of the credibility of the witness in *Agurs*, the Court did not specifically deal with the duty to divulge impeachment evidence absent a specific request. See *id.* at 104; cf. *United States v. McCrane*, 547 F.2d 204, 205-06 (3d Cir.), *vacated*, 427 U.S. 909 (1976) (*Agurs* test may not apply to evidence used for impeachment purposes). The Court has, however, previously held that impeachment evidence is subject to disclosure under the *Brady* doctrine. See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). One commentator has noted that in the context of *Brady* and *Agurs*, courts have minimized the effect of impeachment evidence on a jury's verdict. See *Babcock*, *supra* note 159, at 1156-57.

<sup>170</sup> See *Talamante v. Romero*, 620 F.2d 784, 787-89 (10th Cir.), *cert. denied*, 449 U.S. 877 (1980). In *Talamante*, the court noted that because of "the large array of evidence which can be considered favorable to the defense, courts have employed a sliding scale analysis in determining what level of materiality must be proven in order to establish a *Brady* violation." 620 F.2d at 787; see *Garrison v. Maggio*, 540 F.2d 1271, 1274 (5th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977); *Babcock*, *supra* note 159, at 1153-55 & n.76.

<sup>171</sup> See *supra* notes 162 & 170; see also *Garrison v. Maggio*, 540 F.2d 1271, 1274 (5th Cir. 1976) (distinction is to be made between evidence regarding merits of defense and purely impeachment evidence), *cert. denied*, 431 U.S. 940 (1977). One commentator has noted that the result of the judicially drawn distinction between the types of evidence has been a lack of reversals based on withheld impeachment evidence. See *Babcock*, *supra* note 159, at 1155.

<sup>172</sup> See *United States v. Agurs*, 427 U.S. 97, 112 (1976). The Appellate Division, Third Department applied the *Agurs* test in a recent case. See *People v. Porter*, 93 App Div. 2d 943, 944, 463 N.Y.S.2d 65, 67 (3rd Dep't 1983) (mem.). *Porter*, although not cited by the First Department in *Wallert*, dealt with a similar fact pattern. See *id.* at 943, 463 N.Y.S.2d at 66. *Porter* was convicted of rape in the first degree. *Id.* Subsequent to his conviction, *Porter* filed a motion to vacate the judgment on the ground that the "prosecution inadvertently neglected to disclose that the victim had been questioned by the State Police while under hypnosis." *Id.* Defense counsel contended that the subject of hypnosis would have been a relevant subject of inquiry. *Id.* at 943-44, 463 N.Y.S.2d at 66. The court acknowledged that the evidence could have been advantageous to the defendant, but held that there was no probability that the verdict would have been different if the information were disclosed. *Id.* at 944, 463 N.Y.S.2d at 67. The Third Department then cited *Agurs* and concluded that "constitutional error exists only if the omitted evidence creates a reasonable doubt concerning defendant's guilt." *Id.*

The New York Court of Appeals has also required that non-disclosed material be more than simply advantageous to the defense to require reversal. See *People v. Jones*, 44 N.Y.2d 76, 79-80, 375 N.E.2d 41, 43, 404 N.Y.S.2d 85, 87, *cert. denied*, 439 U.S. 846 (1978). The *Jones* Court held that the death of the prosecution's witness would have influenced the

isfy the requirement of a fair trial without sacrificing the interest of society in upholding valid convictions.

Vincent Toomey

*Torts—Recovery allowed for psychic injury resulting from observation of serious injury to family member if plaintiff in zone of danger*

Over 50 years ago, Chief Judge Benjamin Cardozo defined the limits of tortfeasor liability in New York by stating that the "risk reasonably to be perceived defines the duty to be obeyed."<sup>173</sup> This rule has been used to justify recoveries by plaintiffs who have suffered psychic injury as a result of being in physical peril themselves,<sup>174</sup> yet New York Courts have been reluctant to extend pro-

defendant's decision to plead, but that information was not subject to mandatory disclosure under *Brady* and *Agurs*. 44 N.Y.2d at 79-80, 375 N.E.2d at 43, 404 N.Y.S.2d at 87; see also *People v. Ausserau*, 77 App. Div. 2d 152, 156, 432 N.Y.S.2d 940, 943 (4th Dep't 1980) ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial") (quoting *Agurs*, 427 U.S. at 112-13).

<sup>173</sup> *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). In *Palsgraf*, a woman standing on a railroad platform was injured by a set of scales that was knocked over by the force of an explosion many feet away. *Id.* at 341, 162 N.E. at 99. The explosion occurred when a package of explosives was knocked from a passenger's arms as he jumped aboard a moving train. *Id.* at 340-41, 162 N.E. at 99. Chief Justice Cardozo reasoned that, since the plaintiff was in no foreseeable physical peril herself, there was no duty owed to her. *Id.* at 342, 162 N.E. at 101.

Dean Prosser has described *Palsgraf* as "something of a bombshell" in forsaking proximate cause and redefining the issue of foreseeability in terms of duty. W. PROSSER & W. KEETON, *HANDBOOK ON THE LAW OF TORTS* § 43, at 284 (5th ed. 1983). Indeed, the case has been written on extensively. See, e.g., Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 *YALE L.J.* 449, 449 (1930); James, *Scope of Duty in Negligence Cases*, 47 *NEV. U.L. REV.* 778, (1953); Prosser, *Palsgraf Revisited*, 52 *MICH. L. REV.* 1, (1953). The New York courts often return to the *Palsgraf* doctrine in discussing tort liability. See, e.g., *Robinson v. Reed-Prentice*, 49 N.Y.2d 471, 483, 403 N.E.2d 440, 445, 426 N.Y.S.2d 717, 723 (1980) (Fuchsberg, J., dissenting) (law of negligence phrased by Cardozo is "right on target"); *Havas v. Victory Paper Stock Co.*, 49 N.Y.2d 381, 385-86, 402 N.E.2d 1136, 1138, 426 N.Y.S.2d 233, 236 (1980) (answers to traditional negligence problems still found in principle formulated by Cardozo); *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976) (principle expressed in *Palsgraf* determines scope of duty).

<sup>174</sup> See, e.g., *Battalla v. State*, 10 N.Y.2d 237, 239-40, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35-36 (1961). Prior to *Battalla* New York required that there be some physical impact preceding recovery for psychic harm. See *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 109-10, 45 N.E. 354, 354-55 (1896). In *Battalla*, the infant plaintiff was placed in defendant's chair lift by an employee of the defendant who failed to secure the strap intended to protect the occupant. 10 N.Y.2d at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35. As a result of the employee's negligence, the infant became hysterical and suffered physical and mental injuries. *Id.* The *Battalla* Court, overruling *Mitchell*, held that a cause of action will lie for negligently caused "severe emotional and neurological disturbances with residual physical