The Prosecutor's Dilemma - A Duty to Disclose or a Duty Not to Commit Reversible Error

James P. Ryan
cases when the defendant's conduct was not intentionally deceptive.\footnote{Obviously, deterrence is relevant only to intentional offenders, and the common law class actions which the appellate court had cited as precedent for allowing class suits to be brought by the state for restitution all involved intentional violations by defendants. Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (1972); State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wash. 2d 298, 553 P.2d 423 (1976).} Other alternatives may satisfy the deterrent goal of consumer legislation with less strain on judicial resources. One such alternative is the imposition of a civil fine,\footnote{Section 1416 provides a maximum fine of $5000 per violation of any injunction issued under sections 1407 or 1408. The Louisiana fine is lower than those in most other jurisdictions, which generally are about $10,000. See Lovett, supra note 3, at 739 (discussion of civil penalties in a majority of states with a deceptive practice statute).} to be imposed not merely, as at present, for violation of an injunction, but upon a court's finding, after adversarial hearing, that a defendant knowingly engaged in a deceptive practice.

Adequate compensatory measures presently exist in the Unfair Trade Practices Law, and deterrence could be strengthened by legislative amendment. However, in the interest of discouraging deceptive conduct, the state supreme court, by allowing the Attorney General to bring class actions, has fashioned an additional consumer protection tool, albeit as yet a blunt one. It will be the task of the lower courts to hone the instrument for effective use in specific cases. Ultimately, the wisdom of the court's decision will depend upon the way it is applied in future actions. Careful attention to the facts of each case in light of the Stevens test will be essential if class actions are to effectuate the consumer protection General Motors seeks to promote.

\textit{Kelly Mangum}

\textbf{THE PROSECUTOR'S DILEMMA — A DUTY TO DISCLOSE OR A DUTY NOT TO COMMIT REVERSIBLE ERROR}

In a series of cases following the United States Supreme Court decision of \textit{United States v. Agurs}, the Louisiana Supreme Court has significantly altered its approach to the prosecutor's duty of

\footnote{1. 427 U.S. 97 (1976).}
disclosure of exculpatory\(^2\) material\(^3\) when faced with a specific request for that material.\(^4\) An analysis of the new direction taken by the Louisiana Supreme Court regarding the defendant's right to obtain specifically requested exculpatory evidence from the prosecution requires a thorough understanding of the landmark decision of \textit{Agurs}.

In \textit{Agurs}, the prosecutor had failed to disclose prior conviction records of the victim in the absence of a request. The Court held that the defendant's due process right to a fair trial does require a prosecutor to disclose exculpatory evidence to the defense in both a general request and a no request situation.\(^5\) In addition to recognizing

\begin{itemize}
\item Exculpatory evidence is commonly defined as that evidence which clears or tends to clear one from alleged fault or guilt. In \textit{Brady v. Maryland}, 373 U.S. 83 (1963), the Court used the term "favorable" instead of "exculpatory." 373 U.S. at 87. In \textit{Giglio v. United States}, 405 U.S. 150 (1972), the Court extended the definition to include evidence affecting credibility. Generally, the term has been defined broadly and has not been used to limit or define the prosecutor's duty to disclose. Rather, the requirement that the matter be "material" and the various tests of materiality set forth by the Court have been used to limit and define this duty.
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\item The prosecutor's constitutional duty of disclosure arises from the defendant's due process right to a fair trial. In \textit{Agurs}, the Court said:
\begin{quote}
We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense and if so, what standard of materiality gives rise to that duty. . . . We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution. Our construction of that Clause will apply equally to the comparable Clause in the Fourteenth Amendment applicable to trials in state courts.
\end{quote}
427 U.S. at 107.
\end{itemize}

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\item The United States Supreme Court had first recognized in \textit{Brady} that the prosecution's suppression of specifically requested evidence favorable to an accused, violates due process where the evidence is material either to guilt or punishment. In the subsequent decision of \textit{Moore v. Illinois}, 408 U.S. 786 (1972), the Court, discussing the \textit{Brady} decision and its meaning, stated:
\begin{quote}
The heart of the holding in \textit{Brady} is [that] the prosecution's suppression of evidence, in the face of a defense production request, [violates due process] where the evidence is favorable to the accused and is material either to guilt or punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.
\end{quote}
\textit{Id.} at 794-95.
\end{itemize}

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\item The Court in \textit{Agurs} stressed that the prosecutor's duty to disclose generally requested material will be the same as it is when there has been no request at all. In describing the effect of a general request, the Court said that "[s]uch a request really gives the prosecutor no better notice than if no request is made." 427 U.S. at 106-07. After some further discussion, the Court stated its conclusion as follows:
\begin{quote}
Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all.
\end{quote}
\textit{Id.} at 107.
\end{itemize}
ing the duty to disclose in both a general and no request situation and defining the standard of materiality\(^6\) by which that duty is to be judged,\(^7\) the Court in *Agurs* also reviewed the standard of materiality by which the prosecutor's duty to disclose specifically requested exculpatory evidence is to be judged\(^8\) and, in expounding on the nature of that duty, in dicta, seemingly expanded it.\(^9\) A closer examination of this apparent expansion of the prosecutor's duty to disclose specifically requested exculpatory material may ap-

6. Not every nondisclosure by the prosecutor will result in a violation of defendant's due process right to a fair trial. The nondisclosure will not result in constitutional error unless the evidence is "material" in a constitutional sense. As the Court said in *Agurs*:

On the other hand, since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we can not consistently treat every nondisclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. . . . Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

*Id.* at 111-12.

7. The standard is set forth as follows:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

*Id.* at 112-13.

8. The standard of materiality giving rise to the prosecutor's duty to disclose exculpatory material in the presence of a specific request was discussed by the *Agurs* Court as follows:

The second situation, illustrated by the *Brady* case itself, is characterized by a pre-trial request for specific evidence. . . . A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

*Id.* at 104.

9. The notice function of the specific request was addressed by the Court: Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

*Id.* at 106.
appropriately follow an in-depth analysis of the holding in *Agurs*, regarding the prosecutor's duty to disclose in both a general and no request situation.

The standard of materiality giving rise to the prosecutor's constitutional duty to volunteer exculpatory evidence to the defense in the general or no request situation is set forth in *Agurs*: "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record." 10

In setting forth this standard of materiality, applicable in a general or no request situation, the Court recognized that the problem of determining what, if anything, the prosecutor should voluntarily submit to defense counsel, arises in two principal contexts. First, before and during the trial the prosecutor must decide what must be voluntarily submitted to defense counsel. Secondly, after trial, a judge must decide whether a non-disclosure deprived the defendant of his due process right to a fair trial. The Court in *Agurs* stressed that the duty to disclose is to be judged by the same standard of materiality in both of these contexts. 11 The Court pointed out that the test of materiality as used before trial will be retrospective in nature, because it requires that the evidence be "evaluated in the context of the entire record" 12 and the record is obviously incomplete prior to trial. 13 The imposition of a retrospective pretrial

10. *Id.* at 112. See note 5, *supra.*
11. The Court stated:
   The problem arises in two principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel. Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.
427 U.S. at 107-108.
12. See text at note 10, *supra.*
13. The Court stated:
   Nevertheless, there is a significant and practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to 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 a defendant's right to a fair trial.
427 U.S. at 108 (emphasis added).
standard of materiality, which requires an evaluation of the material "in the context of the entire record," will hopefully force the prosecutor or trial judge to decide in favor of disclosure when in doubt, rather than risk reversal when the entire record is complete and the significance of the evidence can be properly evaluated. A realization that the Agurs "reasonable doubt" standard of materiality applies only in the general and no request situations and that the application of this standard is the same both before and after trial is essential to an understanding of the direction taken by the Louisiana Supreme Court. Although the Court in Agurs refers to "the significant and practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge," it is not intended that different standards of materiality be employed before and after trial. Rather, the variation arises solely because of the differing perspectives of the two parties: after trial the judge has the benefit of the whole record to assist in determining materiality, whereas at the pretrial stage the prosecutor has no record upon which to rely.

In addition to fashioning a "reasonable doubt" standard and determining how and when it is applied, the Agurs decision seemingly expands the prosecutor's duty to disclose specifically requested exculpatory material. Citing Brady v. Maryland for the proposition that a prosecutor must disclose exculpatory evidence when specifically requested, the Agurs Court reviewed the standard of materiality which gives rise to that duty as follows: "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." Therefore, under the Brady standard of materiality, a prosecutor faced with a specific request has a duty to disclose the requested material whenever suppression might affect the outcome of the trial.

After reviewing the Brady standard of materiality, the Court in Agurs arguably expanded the prosecutor's duty to disclose specifically requested exculpatory evidence by further stating: "[I]ndeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing

14. See note 13, supra.
15. As will be more fully developed, the Louisiana Supreme Court has erroneously applied the Agurs "reasonable doubt" standard as a post-trial standard of materiality to be used in evaluating the prosecutor's duty to disclose specifically requested exculpatory evidence. See text at note 30-37, infra.
16. 427 U.S. at 108.
18. See note 4, supra.
19. 427 U.S. at 104.
the information or by submitting the problem to the trial judge.\textsuperscript{20}
Given the \textit{Brady} standard of materiality applicable in a specific request situation and the statement in \textit{Agurs} that a prosecutor faced with a specific request must either disclose or submit the problem to the trial judge whenever "a substantial basis for claiming materiality exists," the Court in \textit{Agurs} arguably imposed on the prosecutor a duty to disclose the requested material to the defense or submit it to the court for an \textit{in camera} inspection whenever there is a substantial basis for claiming the suppressed material might affect the outcome of the trial.\textsuperscript{21}

Under the scheme set forth in \textit{Agurs}, there are clearly two separate standards of materiality which give rise to the prosecutor's duty to disclose exculpatory material to the defense. The applicability of a particular standard depends on the absence or presence of a specific request. In a general or no request situation, the prosecutor must volunteer exculpatory evidence to the defense whenever the omission, when viewed in context of the entire record, would create a reasonable doubt that did not otherwise exist.\textsuperscript{22} In a specific request situation, the prosecutor has a duty to disclose exculpatory material or submit the problem to the trial judge whenever a substantial basis for claiming materiality exists.\textsuperscript{23}

The first post-\textit{Agurs} Louisiana Supreme Court decision construing the prosecutor's duty to disclose specifically requested exculpatory evidence was \textit{State v. May}.\textsuperscript{24} In \textit{May}, the defense counsel specifically requested a letter allegedly authored by a co-indictee containing statements exculpating the defendant. In reply to this specific request, the state responded that it had no exculpatory evidence. The supreme court quoted the language from \textit{Agurs} requiring the prosecutor to respond either by furnishing the informa-

\begin{footnotes}
\item[20.] Id. at 106. The Court did not delineate the circumstances in which "a substantial basis for claiming materiality exists."
\item[21.] One question not yet resolved is what standard of materiality is to be used by the trial judge, either before or during trial, when the prosecutor submits the requested evidence for a determination of whether there is a duty to disclose. In \textit{Agurs}, the Court specifically instructed that the same standard be used both before and after trial, in a general or no request situation. See note 11, supra. The standard of materiality applicable in a specific request situation should likewise be the same both before and after trial. That standard of materiality as defined in \textit{Agurs} is satisfied whenever "a substantial basis for claiming materiality exists," or put another way, whenever there is a substantial basis for claiming the suppressed material might affect the outcome of the trial.
\item[22.] See text at note 10, supra.
\item[23.] See note 21, supra, and accompanying text.
\item[24.] 339 So. 2d 764 (La. 1976).
\end{footnotes}
tion or by submitting the problem to the trial judge whenever "a substantial basis for claiming materiality exists." Construing this Agurs standard, the court stated that if indeed there was such a letter as requested by the defendant and it contained statements of the nature he claimed, then at least, "a substantial basis for claiming materiality" existed. Deeming the prosecutor's general response that it had no exculpatory evidence insufficient in ascertaining whether a substantial basis for claiming materiality did indeed exist, the court held that the trial court erred in not requiring the prosecutor to respond to the specific request of the defendant by indicating whether the state had knowledge or possession of the letter. The court further indicated that if the state did have knowledge or possession of the requested letter, then there was at least a substantial basis for claiming materiality; thus, the trial court erred by not requiring the prosecutor to furnish the letter to the defendant or to submit it to the court for a determination as to whether it constituted material to which the defendant was entitled.

This part of the holding in May makes it clear that a prosecutor faced with a specific request must declare whether the state has knowledge or possession of the requested material; a general assertion that it has no exculpatory evidence will be insufficient. By imposing such a duty on the prosecutor, the Louisiana Supreme Court arguably has gone further than the Agurs decision requires. Under the Agurs standard, a prosecutor faced with a specific request must either turn the material over to the defendant or submit it to the court for a determination of whether it constitutes material to which defendant is entitled, only when there exists "a substantial basis for claiming materiality."25

Under Agurs the prosecutor has the discretion to evaluate the materiality of the requested matter and, upon a finding that a substantial basis for claiming materiality does not exist, the prosecutor may simply reply that he has no exculpatory evidence which he is bound to disclose. Because of the discretion given the prosecutor under the Agurs standard, a defendant denied disclosure of specifically requested material has a double burden on appeal: he must prove that the government actually had knowledge or possession of the requested material and that there exists "a substantial basis for claiming materiality." In May, the court imposed a duty on the prosecutor to respond to the specific request of the defendant

25. The court also mentioned admissibility as a factor to be considered in determining when a "substantial basis for claiming materiality exists." Id. at 770.
26. 427 U.S. at 106.
by stating whether the state has knowledge or possession of the requested material, regardless of whether "a substantial basis for claiming materiality exists." It is submitted that this holding in May is desirable, in that it gives both the trial and appellate courts a means of reviewing any determination by the prosecutor that a substantial basis for claiming materiality does not exist.\footnote{27}

The prosecutor in May was faced with a specific request for exculpatory evidence, so the court quite properly applied the "substantial basis for claiming materiality" standard. As discussed earlier,\footnote{28} this standard of materiality must be used both before trial by the prosecutor and the trial judge, and after trial by the reviewing judge. Before and during trial a prosecutor must disclose specifically requested exculpatory evidence whenever there is a substantial basis for claiming suppression might affect the outcome of the trial. After trial, a reviewing judge must find constitutional error whenever there is a substantial basis for claiming the suppressed evidence might have affected the outcome of the trial and the prosecutor has either failed to disclose the requested material or the trial court has erroneously failed to order disclosure. Thus, the due process analysis in a specific request situation is not intended to be different before and after trial.\footnote{29}

To be consistent with the above scheme, the court in May, on remand, should have instructed the trial court to grant a new trial upon a finding that the state had knowledge or possession of the requested material and that there was a substantial basis for claiming the requested letter might have affected the outcome of the trial. However, it did not do so. Instead, after applying the Agurs "substantial basis for claiming materiality" standard to the actions of the prosecutor and the trial judge before trial, the court stated that the error perhaps was not reversible. Quoting from that language in the Agurs decision which indicated that there is a "significant and practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge"\footnote{30} as to the prosecutor's duty to disclose in the general or no request situation, the court adopted the Agurs "reasonable doubt" standard, applicable in a general or no request situation\footnote{31} as the standard of reversibility or materiality to be applied post trial in a specific re-

\footnote{27} The same standard of materiality should be applied both pretrial and post-trial in a specific request situation, just as it is in a general or no request situation. See note 21, supra, and accompanying text.
\footnote{28} See note 21, supra, and accompanying text.
\footnote{29} See note 21, supra, and accompanying text.
\footnote{30} 427 U.S. at 108. For the proper meaning of this phrase, see note 13, supra.
\footnote{31} See text at note 10, supra.
quest situation. Thus, the court erroneously applied different standards of materiality, one pretrial and one post-trial, to determine when suppression of specifically requested exculpatory material violates due process.

Louisiana Supreme Court decisions subsequent to May have continued to apply the Agurs standard of materiality in a general or no request situation as a post-trial standard of materiality in a specific request situation. In State v. Falkins, unlike in May, the court had the benefit of a complete record before it and there was no need to remand for a determination as to whether the state had knowledge or possession of the requested material. The court found that the failure of the prosecutor to disclose that two of the state's eyewitnesses had earlier misidentified one of the suspects, when the defense had specifically requested of the prosecutor information as to all prior identifications made by the state's witnesses, was error in that a substantial basis for claiming materiality existed. However, instead of reversing immediately upon this finding, the court reversed only after applying the Agurs due process standard of materiality, which should be applied only in a general or no request situation.

32. In the subsequent decision of State v. Falkins, 356 So. 2d 415 (La. 1978), the court characterized the post-trial standard, applicable in a specific request, as follows:

   In Agurs, the United States Supreme Court summarized the constitutional test of reversibility because of non-disclosure in these terms, . . . “It necessarily follows that [in a post-trial hearing by the Court] if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.

   Id. at 418 (citation omitted), quoting United States v. Agurs, 427 U.S. at 112-13.

   The bracketed words, added to the Agurs quote by the Louisiana Supreme Court, illustrate the erroneous interpretation of the Agurs decision. The court has taken the Agurs standard of materiality, applicable in a general or no request situation, and applied it as a post-trial standard of reversibility in a specific request situation. Although the Louisiana Supreme Court referred to this post-trial standard as a test of reversibility, it must be construed as an application of a post-trial standard of materiality. The standard of materiality being defined is a test to judge the prosecutor's duty to disclose, which is a corollary to the defendant's due process right to a fair trial. If the prosecutor has violated his constitutional duty to disclose, then the defendant's due process right to a fair trial has been violated. If the defendant has been denied his due process right to a fair trial, then he must be granted a new trial and any discussion of reversibility or harmless error is inappropriate. Surely, it would be an exercise in contradiction for a court to say that a defendant has been denied his due process right to a fair trial and then to characterize the error as not reversible or harmless.

33. 356 So. 2d 415 (La. 1978).

34. In other words, the court applied the "reasonable doubt" standard. It stated:

   In summary, however, the record discloses weaknesses and uncertainties in the indentifications made by two of the state's five witnesses. Thus, the misidentification by two others on the day of the robbery, if brought to the
In the recent case of State v. Harvey, the Louisiana Supreme Court found error in the failure of the prosecutor to state whether he had knowledge or possession of the requested prior conviction records of prospective state witnesses. Accordingly, the case was remanded for a determination as to whether the Agurs-Brady standard of materiality had been violated. The supreme court instructed the trial judge to grant a new trial if this standard was violated, and then only if the material suppressed by the state would, upon its evaluation in the context of the entire record, create a reasonable doubt that did not otherwise exist. Consistent with May and Falkins, the court in Harvey applied the Agurs standard of materiality, which defines the prosecutor's duty to disclose in a general or no request situation, as a standard of reversibility in a specific request situation.

As discussed above, the Agurs decision does not contemplate the application of two different standards of materiality, one pretrial and one post-trial, in defining and reviewing the duty of a prosecutor to disclose specifically requested exculpatory evidence. Federal courts of appeals decisions subsequent to Agurs have consistently followed the constitutional scheme set forth in Agurs and have employed the different standards of materiality (depending upon whether there is a specific request situation or a general or no request situation) in delineating the scope of the prosecutor's constitutional duty of disclosure. By adopting the constitutional standard of materiality applicable in a general or no request situation as a standard of reversibility in a specific request situation, the Louisiana Supreme Court has placed an unconstitutionally harsh burden of proof on the defendant to prove the materiality of the suppressed evidence.

attention of the trial jury, was sufficiently material as to have raised reasonable doubt in the jury's mind, both as to the witness' own positive trial identification and also as to the strength of the state's case (i.e., since the identification of the accused by four out of five of the state's eyewitnesses is shown to be open to doubt).

Upon this showing, the constitutional test for reversibility has been met; for, as Agurs states, "the omitted evidence creates a reasonable doubt that did not otherwise exist."

Id. at 419, quoting United States v. Agurs, 427 U.S. at 112.
35. 358 So. 2d 1224 (La. 1978).
36. This standard is whether there is a substantial basis for claiming the suppressed evidence might affect the outcome of the trial. See note 21, supra, and accompanying text.
37. See text at notes 11-14, supra.
39. See text at notes 22-23, supra.
on a defendant seeking a new trial based on the failure of the prosecutor to disclose specifically requested exculpatory evidence. It is clearly more burdensome for a defendant to prove that the omitted evidence might create a reasonable doubt which did not otherwise exist than it is for him to prove that there was a substantial basis for belief that the suppressed evidence might have affected the outcome of the trial.40

It is submitted that the Louisiana Supreme Court has erroneously applied the Agurs standard of materiality in a general or no request situation to situations where a specific request has been made.

40. Neither can the use of the Agurs reasonable doubt standard as a standard of reversibility in a specific request situation be justified as an application of the federal harmless error rule. The federal harmless error rule has been summarized as follows: "The federal rule, then, allows a finding of harmless constitutional error only where the reviewing court, after examining the entire record, finds the untainted evidence of guilt so overwhelming . . . [that] the error complained of could not have affected the result." Comment, Harmless Constitutional Error—A Louisiana Dilemma?, 33 LA. L. REV. 82, 89 (1972). This standard focuses on both the sufficiency of the untainted evidence and the error's possible effect on the jury in determining whether violation of a federal constitutional right can ever be harmless error.

The standard of reversibility being employed by Louisiana courts focuses only on the sufficiency of the untainted evidence and does not consider the possible effect of the non-disclosure on the jury. See text at notes 28-30, supra. The Louisiana Constitution of 1974 limits the appellate jurisdiction of the supreme court in criminal matters to questions of law. LA. CONST. art. V, § 5(c). This clause has been interpreted as prohibiting the weighing of evidence by the supreme court. See, e.g., State v. Plummer, 281 So. 2d 716 (La. 1973); State v. Singleton, 252 La. 976, 215 So. 2d 512 (1968); State v. Page, 251 La. 810, 206 So. 2d 503 (1968). This prohibition prompted the rejection of any application of the federal harmless error rule in State v. Michelli, 301 So. 2d 577 (La. 1974), where the court said: "If we find a substantial violation of a constitutional or statutory right, and if we then attempted to determine whether the error were harmless, nothing could keep us from the prohibited task of evaluating the evidence." 307 So. 2d at 580 n.7.

The adoption in May, Falkins and Harvey of a standard of reversibility that would grant a new trial only when the failure to disclose the requested material which, "when viewed in the context of the entire record creates a reasonable doubt that did not otherwise exist," requires the supreme court to review the sufficiency of the evidence. The use of this standard of reversibility has the effect of usurping the function of the jury and is in violation of the Louisiana constitution. See LA. CONST. art. V, § 5(c). In State v. Moore, 305 So. 2d 532 (La. 1974), Justice Tate addressed the constitutional duty of an appellate court as follows:

Under our time-honored principles of judicial review, it is the province of the jury, not an appellate court, to determine guilt or innocence on the basis of properly admitted evidence. A court cannot deny a criminally accused his constitutional rights because it and the prosecutor determine that the accused is guilty of the crime of which—he is merely accused. An accused eventually convicted is as much entitled to the protection of the constitutional guarantees of a fair trial as is one eventually acquitted.

305 So. 2d at 536 (emphasis in original).
Under Agurs, the prosecutor should either disclose the requested material or submit it to the trial court whenever there is a "substantial basis for claiming the suppression of the evidence might affect the outcome of the trial." The trial judge should order disclosure of the specifically requested material, before or during trial, under the same circumstances. After trial the proper standard to evaluate whether a defendant's due process right to a fair trial has been violated by the failure of the prosecutor to disclose specifically requested exculpatory evidence is also whether there was a substantial basis for claiming that the suppressed material might have affected the outcome of the trial. If the reviewing court finds that there was a substantial basis for claiming the suppressed material might have affected the outcome of the trial, the defendant's due process right to a fair trial has been violated and a new trial should be ordered. It is urged that the Louisiana Supreme Court reject any further application of the Agurs standard of materiality in a general or no request situation to instances where the prosecutor is faced with the specific request. Otherwise, it must risk the possibility of reversal on collateral attack.

James P. Ryan

MAKING SENSE OF RANDOM VEHICLE STOPS AND THE FOURTH AMENDMENT: A HALTING ENIGMA

Defendant's automobile was subjected to a random driver's license and vehicle registration check, following a stop that was neither based on a traffic or equipment violation nor based on any criminal activity by the defendant or the other occupants of the vehicle. The patrolman effecting the stop arrested the defendant after having observed marijuana on the floor of the automobile. The Delaware state courts suppressed the marijuana as evidence on the ground that it had been obtained during an illegal detention. The United States Supreme Court affirmed and held that, absent artic-

41. See note 21, supra, and accompanying text.
42. See note 21, supra, and accompanying text.

1. An additional issue raised was the Court's lack of jurisdiction over the case, as the Delaware Supreme Court had based its decision on independent and adequate state grounds. The Court disposed of this issue by concluding that "the Delaware Supreme Court did not intend to rest its decision independently on the state constitution and that we have jurisdiction of this case." Delaware v. Prouse, 99 S. Ct. 1391, 1395 (1979). Compare Del. Const. art. I, § 6, with La. Const. art. I, § 5 (the right to privacy guarantee).