In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 75-491
	)	
LINDA AGURS,	)	
	)	
Respondent.	)	

Washington, D.C.
April 28, 1976

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioners, v. LINDA AGURS, Respondent.	No. 75-491

Washington, D. C.,

Wednesday, April 28, 1976

The above-entitled matter came on for argument at 2:15 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioners.

EDWIN J. BRADLEY, ESQ., Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D. C. 20001; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 75-491, United States against Agurs.

Mr. Frey, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW FREY, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on the government's petition for a writ of certiorari for the Court of Appeals for the District of Columbia Circuit which had ordered a new trial.

On the afternoon of September 24th, 1971, respondent and the decedent James Sewell checked into a Northwest Washington tourist home, registering as man and wife.

About 15 minutes later, three employees of the tourist home heard screams emanating from the room occupied by Sewell and respondent. Upon forcing open the door of the room, they discovered its two occupants on the bed, Sewell lying on top of respondent, and both holding on to a knife.

There was testimony showing that respondent's hand was on the handle of the knife and Sewell's on the blade.

After the two were separated, police and an ambulance were called. Sewell was taken to a nearby hospital where he died.

Respondent in the meanwhile had slipped out of the tourist home in the confusion and disappeared.

The evidence showed that Sewell had had some $345 in cash on his person about two hours before the fatal incident, which money was not found on his person or in the room after the stabbing.

An autopsy of Sewell revealed that he had been stabbed numerous times in the chest, abdomen, and back with a knife, including a stab wound of three and a half to four inches in depth into the heart, and another that entered just above the navel and penetrated about five and a half inches into the liver. There were also cuts on the palms of Sewell's hands of a kind, according to the medical examiner, that might be received by one trying to defend himself from a knife attack.

Respondent turned herself into the police the next day, at which time a physical examination of her disclosed no cuts, wounds or bruises on her person.

The prosecution's theory at trial was that Sewell had gone to the bathroom down the hall, and upon return to the room had found respondent rifling through his clothing. In the ensuing dispute, respondent took the knife and repeatedly stabbed Sewell, causing his death.

The defense contended that respondent, who did not testify as to what had transpired, may have acted in self-defense. Counsel based his argument to this effect on the fact

that it was respondent's screams that the motel employees had heard and the fact that when they broke into the room, Sewell was lying on top of the respondent.

The jury found respondent guilty of second degree murder.

In the course of preparing for trial, respondent's trial counsel had interviewed a witness who advised him that he believed that Sewell had been arrested a number of times, and possibly convicted, for assault with a knife. After consulting with another attorney, who was a former teacher of criminal law and an experienced practictioner, counsel concluded that any criminal record Sewell may have had would have been inadmissible in evidence in support of respondent's claim of self-defense because it was not known to respondent. He therefore made no further effort to discover or use information on this subject.

Now some three --

QUESTION: Presumably he had inquired of his client and found that she had no knowledge of --

MR. FREY: Yes, he so stated in his affidavit in this case.

Some three months after respondent was convicted, the Court of Appeals decided a case called United States against Burks, in which it stated in dictum that evidence of prior specific acts of violence by a deceased would be

admissible in a homicide case to support a claim of self-defense even if not known to the defendant.

When counsel learned of this decision, he checked the prosecutor's case file and found that it did contain Sewell's criminal record which consisted of two misdemeanor convictions in 1963, one for carrying a knife and one for simple assault with a knife -- this was eight years before the homicide -- and another misdemeanor conviction in 1971 for carrying a knife. He thereupon brought his motion for a new trial on the basis of newly discovered evidence, which has led us here today.

The District Court denied respondent's motion for a new trial on the basis of alleged prosecutorial suppression of the evidence of Sewell's criminal record, and subsequently also denied a second motion for a new trial based upon the alleged ineffectiveness of respondent's trial counsel in pursuing this matter.

The Court of Appeal reversed. While it expressly refused to find that the prosecutor had engaged in deliberate suppression, it concluded that the element of prosecutorial misconduct, in the absence of a defense request for the non-disclosed evidence in this case, were much less significant in assessing a new trial motion than the materiality of the undisclosed evidence.

QUESTION: Mr. Frey, was the case before the Court

of Appeals on direct appeal from the conviction?

MR. FREY: Yes, it was before the Court of Appeals on direct appeal. When this matter came out it was remanded to the Dictrict Court for a hearing. The motion for a new trial was denied. It was then -- the trial counsel then moved to have himself removed as counsel, and new counsel appointed, and it was remanded, I believe, to the District Court for a second hearing on the ineffective assistance of counsel point. But I believe it was on direct appeal rather than collateral attack. I don't think it would really make any difference, though, to the disposition of the case.

QUESTION: Well, then, nothing turns on the nature of the newly discovered evidence for purposes of granting or denying a motion for a new trial.

MR. FREY: I'm not sure I understand your question.

QUESTION: Well, I mean, was the case before the Court of Appeals in the posture of an attack on the judgement of conviction, or a claim that the trial judge erred in denying the motion for a new trial on the basis of newly discovered evidence?

MR. FREY: The latter.

QUESTION: The latter?

MR. FREY: Yes. Now, the Court of Appeals held that a new trial is required whenever, irrespective of the blameworthiness of the prosecutor's conduct, the undisclosed

evidence might have led the jury to entertain a reasonable doubt about a defendant's guilt. It concluded that this evidence came within that category, and thus a new trial was required.

In so ruling the court was essentially following the precedent established by the District of Columbia Circuit nearly ten years early in the decisions in Leven against Katzenbach and Leven against Clark, from which the Chief Justice, then a Circuit Judge, vigorously dissented. In the view of the majority in those cases, the absence of a defense request and the lack of defense diligence in discovering evidence subsequently claimed to justify a new trial, are factors to be given little or no weight in deciding the new trial motion. The mere fact that the prosecutors possessed evidence that might have been helpful to the defense was alone sufficient to require a new trial.

The dissent effectively expressed the contrary view, which is our view, that those factors are critical. That is: prosecutorial breach of duty, and defense diligence. And that their abandonment is difficult to justify either in logic or in terms of the impact of such a ruling upon the fabric of our adversarial system.

At the heart of this and like cases in our view is the need to choose between these two analytical models. The one propounded by Chief Judge Bazelon in Leven, the clear

tendency of which is to impel the government toward an open files policy in criminal cases. And the one upon which the Chief Justice's dissent was grounded, which seeks to define a duty of disclosure within the context of the adversarial system.

Now before turning to further discussion of these analytical models, let me stress the salient facts of this case, which in our view conclusively demonstrate the error of the Court of Appeals' decision.

First, the defense knew that Sewell probably had a criminal record, but it chose not to pin down the details of it. This was not evidence within the prosecutor's exclusive possession. It was equally available to the defense. They simply had to subpoena the police department to get it.

QUESTION: You don't submit the issue of ineffective assistance of counsel. But I notice that in this brief, the respondent's defense said that -- I gather, in defense, even if you're right on the first point, in defense of the judgement below. Are you going to address the ineffectiveness --

MR. FREY: Well, I will if the Court wishes at the conclusion of my argument.

QUESTION: Well, am I right that the respondent is relying on ineffectiveness of counsel to support an affirmance of the judgement?

MR. FREY: She relies on it. And in our reply

brief we have addressed it. We think that it is a proper issue before the court, that it is an alternative ground for affirmance, and we urge this court to decide it. And we've discussed why --

QUESTION: Was it decided below?

MR. FREY: It was not decided below.

QUESTION: Nor presented?

MR. FREY: It was presented below.

QUESTION: It was presented.

MR. FREY: It was presented but it was not decided.

QUESTION: And not decided.

MR. FREY: And the reason that we are urging this court to decide it is twofold. One is that this homicide occurred in 1971, and this case has been going a very long time without resolution. And secondly, it's really the other side of the coin of prosecutorial misconduct or non-disclosure, and I think that the two issues are sufficiently interrelated that it is appropriate for this court to consider both aspects in reaching its decision.

QUESTION: Mr. Frey, can defense counsel simply obtain by discovery the rap sheet on a decedent in this District?

MR. FREY: I'm advised that -- certainly at the time that this case was tried -- I mean there is a Privacy Act now although I don't know that it would apply to the

deceased. But at the time this case was tried, I believe all that was necessary was a subpoena to the police department. In this case all that was necessary, surely, was a request from the prosecutors for the information.

QUESTION: Well, but you're saying in effect, he could have gotten it by means other than going to the prosecutor.

MR. FREY: That's correct.

QUESTION: It wasn't within the exclusive province of the prosecutor.

MR. FREY: That's correct.

QUESTION: That's different than saying, he could have gone to the prosecutors.

MR. FREY: Well, I'm making both points, although I think they both have a telling effect in the same direction.

QUESTION: Well, when you say she could have gone to the prosecutor before the trial, that is under the Brady theory.

MR. FREY: Well, but I'm also, I'm making it -- although I realize there's no finding on this issue -- I'm simply making a pragmatic assessment. I mean, had they gone to the prosecutor and asked, thare's nothing in this record to suggest that it wouldn't have been given. Prosecutors frequently voluntarily disclose information that's requested of them.

QUESTION: Or if they could get it from the police department afterward, they could get it from the police department before trial.

MR. FREY: Well, they got it from the prosecutor afterward. They could have gotten it from either the prosecutor or the police department, I think, before trial.

Now the second point is that both the defense and the prosecution believed that the record was not admissible into evidence. Thus, even if the prosecutor had disclosed the record to the defense, it wouldn't have been used at the trial.

Now thirdly, this view of inadmissibility was quite reasonable at the time. It was only as the result of a dictum in a case decided three months later that it appeared likely that such evidence might have been held admissible. And indeed today, I think six judges of the Circuit Court of Appeals have indicated in their opinions on our petitions for re-hearing, that they would probably view this evidence as inadmissible. The District of Columbia Court of Appeals, the local court, has stated that such evidence would be inadmissible if not known to the defense.

QUESTION: That might give us some reason to wonder why they -- having that view -- they didn't resolve the matter in the Circuit.

MR. FREY: Well, we asked them to and I can't

answer. There were four votes for re-hearing en banc. But we needed five to secure it.

Now, finally, even if the defense had known of the evidence and of its admissibility, there were good tactical reasons not to use it, and these are addressed in the last section of our brief. And respondent has not really answered them. The evidence would have tended to show Sewell's familiarity with a knife, and therefore enhance the implausibility that respondent could have -- had he attacked her first -- succeeded in inflicting such grievous wounds upon him and escaping totally unscathed herself.

Now, if a new trial is going to be required on the basis of evidence such as this, we think there is very little left to any principle of finality of judgements in criminal cases.

Turning to the analytical framework, in our view cases like this can and should be approached analytically in much the same manner as any motion for a new trial based on newly discovered evidence. The first ingredient in every such case is the question whether the evidence is in fact properly characterized as newly discovered. It has uniformly been held that evidence known to the defendant, or discoverable in the exercise of due diligence, cannot supply the basis for a new trial. There's no reason to depart from that simply a Brady claim is involved. Indeed, it's highly inappropriate to do

so. Because the heart of the Brady claim relates to evidence in the exclusive possession of the government.

Now let's assume however that if the evidence of Sewell's criminal record can properly somehow be treated as newly discovered, or that the requirement of new discovery can be dispensed with.

Court must next consider, in any new trial motion on the basis of newly discovered evidence, what the proper standard is for assessing the sufficiency of a particular piece of evidence to warrant a new trial.

Now ordinarily when the evidence is simply uncovered, and it was unknown to anyone prior to the trial, the standard is whether the evidence would probably result in a different verdict on re-trial. This is an ancient and nearly uniformly followed standard. That standard fully accounts for the balance we have struck in our system between the undeniably important interest that convictions of innocent persons not be permitted to stand, and on the other hand, the interests in the finality of judgements arrived at after fair trials.

No one seriously suggests that respondent can meet that standard in this case. If she's to get a new trial, therefore, it's not because of concern that she may be innocent, but because of other policies.

Now to sharpen the focus, the question is: what

bearing does the fact that the prosecutor possessed the particular piece of evidence in question here have on the standard to be applied in determining whether the evidence supports a new trial?

The Court of Appeals plainly believed that that fact alone sufficed to justify a new trial on the most generous possible standard, that is, whether the evidence might have affected the jury's verdict.

We say that that fact standing alone has no effect. A further question must be asked, that is: did the prosecutor's failure to disclose constitute a breach of duty on his part? Only if that question can be answered affirmatively is there any justification to depart from the normal standards for awarding new trials on the basis of newly discovered evidence. Because only then can it be said that the trial that did take place was infected with unfairness. And only then can it be thought that the award of a new trial might serve a useful function in shaping future prosecutorial behavior.

Now, this analysis that I'm propounding, some of the commentators have suggested that it is inconsistent with certain language in this court's decision in Brady against Maryland. Specifically, what the court said in summarizing its holding was that the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or punishment, and here are the important words,

"...irrespective of the good faith or bad faith of the prosecution."

Now in Leven against Clark, the majority took the view that that language meant that the more generous standard of awarding a new trial was not to turn on prosecutorial misconduct but simply to turn on consideration of whether the evidence might have helped the defendant, had it been introduced at the original trial.

We think that's incorrect. First of all the language applies only when there is a defense request. The defense request in some sense may be viewed as taking the place of, or imposing an additional duty on the prosecutor and therefore relieving the court of the obligation to make a determination about his subjective state of mind.

In any event we think what that language means is that you judge the prosecutor's conduct not by having to find subjective bad faith, not by having to find willful misconduct, but by looking at the known facts and determining whether, objectively viewed, those facts show a departure from his duties. This is the same standard that is used in conventional negligence law. It still requires that he had a duty to disclose. If he had no duty to disclose that he breached, it's simply pointless to award new trials by virtue of what turns out then to be a wholly fortuitous fact that he had the piece of paper in his file that contained this evidence.

Now, if we have agreed thus far that the prosecutor must have breached the duty of disclosure, we next suggest that the presence or absence of a meaningfully specific defense request is of central importance in defining the prosecutor's duty of disclosure.

Now, let's be clear about what I'm contending here. If the prosecutor has willfully suppressed evidence, active with mens rea, a request would be unnecessary. Moreover, as Judge Friendly has indicated in the Keogh case -- and it has come to be generally accepted in the second circuit and a number of other courts, if the evidence is of such obvious exculpatory value that it couldn't have escaped the prosecutor's attention, even without a request, then there would be justification in those circumstances for awarding a new trial even in the absence of a request.

The cases cited by the Court of Appeals, from page 9a of the petition and footnote 10 are such cases. In the Hibler case, the prosecutor misrepresented the testimony that would be given in proposing a stipulation, although he knew that the person would not testify as he proposed in the stipulation. In Barbee, the prosecutor failed to disclose to the defendant ballistics evidence indicating -- and fingerprint evidence indicating -- strongly that the defendant was not guilty.

In Meers against Wilkins, which Mr. Justice Marshall wrote when he was on the Second Circuit, two eyewitnesses known to the prosecution and not known to the defense had failed to identify the defendant and the prosecutor had not disclosed that. In Poole -- it was a rape case -- there was evidence, medical evidence, that in fact the complainant had not had sexual intercourse.

When we're talking about that kind of evidence we don't doubt that the prosecutor has a duty of disclosure to the defense even in the absence of a request although if the defense already knew about the evidence, we do douht that a new trial would be required.

But most situations don't involve that. As Judge Friendly said in Keogh, that's the rare case when the prosecutor acts with that kind of gross negligence or callous disregard for fair play. The normal case is a case like this in which the prosecutor, who naturally is an adversary looking at the file from a certain perspective, who is not familiar -- he doesn't know what the defense knows, he doesn't know what the defense is going to be. He doesn't know what information is likely to be important to a defendant and what information is likely to be of no interest at all. In that situation it's awfully easy for him to make a mistake, for him to fail to appreciate the exculpatory utility of a piece of information in his file, unless he has had the

benefit of a focussed defense request which calls his attention to that kind of information, which therefore elevates his duty to examine that kind of information with care, too look at it from a perspetive of a defendant and to see whether, so viewed, he can perceive its utility to the defense.

QUESTION: When you say a focussed defense request, you mean something more, then, than just a request for Brady materials?

MR. FREY: Absolutely. Our firm position on this is that a request for all Brady material, all exculpatory material, is theequivalent of no request. All that does is say to a prosecutor, please obey your constitutional or other obligations. It doesn't perform the function that a request is to perform, which is to call the prosecutor's attention to certain kinds of evidence.

QUESTION: But the defendant probably doesn't any more -- probably knows less about what's in the prosecutor's file than the prosecutor does. And they both know what kinds of evidence would be relevant, don't they?

MR. FREY: Well, that's not necessarily true. First of all the question of whether the defendant knows it's in the file or not is not relevant. He can ask for it. If it's not in the file, the prosecutor won't produce. But I think in most cases, the defendant can anticipate. I know it's been suggested, how can the defendant know what's in the prosecution's

file? In our view, all you have to do is think about civil litigation and think about a lawyer of minimal competence preparing a series of written interrogatories for a witness and you'll see that it's quite easy. I mean, this case is a perfect example. If the defense wanted Sewell's criminal record, in order to show that he was the aggressor, it was a very simple thing for them to ask for.

QUESTION: When did the defense first come into possession of that information?

MR. FREY: Well, the trial was in July. The Burks decision was in October. Trial counsel read about the Burks decision in November of 1971 and it was in a few days thereafter. Went down to the U.S. Attorney's office and --

QUESTION: Why didn't the trial counsel consult someone about the admissibility of that evidence?

MR. FREY: -- two or three months before trial. He looked into it to the extent of determining -- I think probably correctly from this consultation -- that it would not be admissible. As it turned out, this particular panel had sat on a direct appeal of a refusal to admit the evidence, it might have reversed the conviction. But I don't think that even represents majority sentiment in the District of Columbia circuit. In any event I think it is an important point, not so much in this case, where there was no request, but in terms of understanding the general analysis, that to ask defendant

simply to request all the Brady material is a formality. I mean if that's all it amounts to, then I think we might as well forget about having a request requirement, because it would simply be unfair. It is inconceivable that there would be any reason for a defendant not to ask in that fashion. What the defendant has to do is to call to the attention of the prosecutor that he's interested in certain kinds of information.

QUESTION: Give me an example of a piece of paper or a piece of evidence that the prosecuotr wouldn't be obligated to turn over on his own but yet be obligated to turn over on a Brady request for that specific document? I don't suppose the prosecutor is required to turn over every piece of paper that the defendant asks for. In other words, which ones aren't?

MR. FREY: Well, it's clear, the requirement to turn over -- well, the constitutional standard which this Court has expressed is in terms of evidence that is requested by the defense that is favorable and that is material.

QUESTION: Could you know about that piece of paper and not have to turn it over on your own? Just the way you described it.

MR. FREY: Oh, yes. Well, this case is a perfect example that he knew about. He had in his file the criminal record of the decedent which is something that is a matter of routine trial preparation.

QUESTION: And it was favorable? You say it was favorable in the sense that --

MR. FREY: The Court of Appeals held that it was favorable because it would --

QUESTION: And you're not challenging that finding?

MR. FREY: Well, we do challenge that finding in part three of our brief. What we're not challenging is that is was admissible.

QUESTION: Well, as to two of these convictions, it didn't establish anything more than everyone already knew, namely, that this man carried a knife.

MR. FREY: That's right. Which was already in evidence, that he was carrying a knife on the particular occasion. But let me point to another example. In the Levin case the evidence that the prosecutor had was a statement from a witness equally available to the defense that he didn't remember something. The prosecutor wasn't claiming to use this witness to prove the point. Yet the court said, as it often does, that, well, had the defendant had this, which he could have gotten by simply going and asking the witness the same questions, had the defendant had this, why he might have changed his defense strategy, he might have been able to utilize this non-recollection of a particular event to --

QUESTION: And that would be something you wouldn't have to turn over on your own but which you would have to turn over on a Brady request?

MR. FREY: I think if there were a Brady request in

Levin, for instance, for any evidence in the prosecution's possession that a witness had not recollected certain transactions -- and it's not as difficult, I think if you think about it, it's not as difficult as you might suppose for a lawyer to come up with a focussed request. He knows what the issues are, he's talked to his client. His client has told him what's actually happened. That is what his client knows. Often his client has considerable involvement in the events, but not under the defense culpable involvement. I don't think it's insurmountable. Now, obviously, if the nature of the information is such that the prosecutor can appreciate that the defense couldn't possibly realize that it existed, that would go into the mix in determining whether the prosecutor had comported with his duties. It's not important so much how the duties are defined as that we clearly recognize at the outset the principle that there must be a breach of duty. However the court ultimately chooses to define that duty, whether it be more stringently than it has in Moore and in Brady. There must be a breach of duty before a new trial can be awarded on this ground.

I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Bradley.

ORAL ARGUMENT OF EDWIN J. BRADLEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BRADLEY: Mr. Chief Justice, and may it please

the Court:

May I first say that we are here on direct appeal. We were in the Court of Appeals on direct appeal. Notice of appeal was timely filed. And the last part of the Court of Appeals' opinion constitutes a grant of a new trial rendering unnecessary any consideration of the motions concerning the trial courts -- arguments concerning the trial courts, denial of a motion for a new trial and the alleged ineffectiveness of her trial counsel so we were --

QUESTION: -- the grant of a new trial that you get after a judgement and conviction is reversed, isn't it? The Court of Appeals says, on direct appeal, this case, the judgement is reversed and sent back for another trial.

MR. BRADLEY: Yes. Now, may it please the court, perhaps at the outset, because there seems to be such a striking difference -- I think it will emerge that there is such a striking difference between the perceptions of this case that I have and that my brother has that I should state our general view of the case and the general principles and propositions that we urge upon the court, but I will fully intend to very particularly get into the record.

QUESTION: Mr. Bradley, before you get too deeply into this case, I'm still a little troubled by the procedure. Because I didn't think your client -- I don't know whether began the counsel or not -- discovered this evidence until almost

four month after the trial was over. So how could it have been a direct appeal reversed on this ground?

MR. BRADLEY: As I understand it, counsel at that time had saved the appeal rights, and when substitute counsel did take over the appeal and made the Brady point a subject of the appeal. But that time, there was delay. The time began to run from the judgement of conviction. That was sometime after the trial, and by that time -- frankly, I'm surprised that there's a question about this because I simply assumed that we were all agreed that we were in the Court of Appeals on direct appeal on the Brady point and on the ineffectiveness point with regard to the motion after trial ended based on ineffectiveness of counsel. But the Brady point, as I understand it, was definitely before the Court of Appeals on direct appeal.

QUESTION: I assume you were not trial counsel in light of the claim of ineffective assistance of counsel.

MR. BRADLEY: No, we were not trial counsel.

Now, generally speaking, then, respondent's submission to the court today is, that the knowing possession, the conscious possession of evidence which, on the basis of perfectly clear precedent was admissible at that time, on the basis of the knowing possession of clearly admissible evidence readily recognizable as important to the issues, as relevant to the issues, readily recognizable as having significant

probative value, and as destructive of the prosecutor's case -- probative value for the defense -- that in such a case the defendant is presumptively entitled to that evidence, and that any non-disclosure of that evidence in the case of knowing possession -- as I say, I think the record will bear out --

QUESTION: I think the government agrees with you up to this point. You say, it shouldn't be kept from him?

MR. BRADLEY: Yes.

QUESTION: It wasn't kept from him, was it?

MR. BRADLEY: I'm sorry?

QUESTION: It wasn't kept from him.

MR. BRADLEY: Yes, there --

QUESTION: He never asked for it. It wasn't denied to him. How was it denied to him?

MR. BRADLEY: In this way. The defendant -- the defendant through counsel -- never asked the prosecutor specifically for this evidence. But the prosecutor was aware of the fact, through pre-trial investigation, was aware of the fact and had conscious possession of this evidence; made the deliberate choice, knowing of its relevance, knowing of the high degree of probative value, made the deliberate choice to withhold it.

QUESTION: Where did the prosecutor get this from? This information?

MR. BRADLEY: I don't know that as a matter of fact.

QUESTION: From the police department.

MR. BRADLEY: Yes.

QUESTION: And the defense counsel could have got it the same way.

MR. BRADLEY: Yes. Yes, your honor.

QUESTION: So how was the prosecutor preventing him from getting it?

MR. BRADLEY: The prosecutor did not prevent but the prosecutor withheld.

QUESTION: But let me just ask first, did he get it though?

MR. BRADLEY: No.

QUESTION: Well, where did the defense counsel get it?

MR. BRADLEY: Found it in the prosecutor's file while looking in that file himself for --

QUESTION: Then the prosecutor let him have it. Now what is there in evidence to show that if had asked for it earlier he wouldn't have gotten it?

MR. BRADLEY: Nor -- there is nothing in the record to indicate that this prosecutor behaving the way he had with respect to this evidence would have disclosed it. I see nothing in this record to justify conceding to this prosecutor a sufficient degree of good faith --

QUESTION: I don't know where you get "concealed"

from. This is a public document.

MR. BRADLEY: I don't believe I said that the prosecutor "concealed", the prosecutor, if it please your honor, did not disclose this evidence to the defense; made the conscious, deliberate choice not to disclose this evidence, which again I submit the record will show, and the nature of the case will show, he had to recognize it was palpably relevant, it would have been very helpful to the defense, and was hurtful to his case.

Now the question then really becomes whether the government in possession of exculpatory evidence should be excused because it's otherwise available or because there is no request.

QUESTION: Mr. Bradley?

MR. BRADLEY: Yes.

QUESTION: You've used a couple of times the expression "conscious possession" which suggests almost the presence of a physical document in the file. Is your view of the law that confined? What if the prosecutor may have heard from a witness something that is favorable to the defendant. He never made any notes of it, it's not in his file. Does he consciously possess -- in your use of that word -- that bit of evidence?

MR. BRADLEY: If it were highly material -- in any event, it's not this case -- but if it were highly material, if

it would provide the defense with a lead to probative evidence then, yes, I think the government then is in possession of exculpatory material and would be obliged to disclose it.

QUESTION: So it's not just open files but it's full divulgence of all conversations that the assistant U.S. Attorney may have had with witnesses.

MR. BRADLEY: I don't know how far your honor's question would take us.

QUESTION: I don't either.

MR. BRADLEY: I think in this case what in fact we have, and what I'm asking the Court to rule on, is something physical in the file of the prosecutor, that he was consciously possessed of. And the Court need only speak to that specific point.

QUESTION: Mr. Bradley, suppose it was a newspaper clipping that this man had been convicted of having a knife. That's all the prosecutor had. Would he be obliged to give that to the defense counsel?

MR. BRADLEY: Yes, your honor. And my question would be, why not? What is --

QUESTION: Then my final question is, is there any further you can go on that?

MR. BRADLEY: Well our submission is that the government is knowingly possessed of material which is helpful to the defense, there's an obligation to disclose

that information. This is not an adversarial point at this stage. If the government through its investigation, if the government through its preparation for trial, comes across something helpful to the defense, there is nothing to justify it. It doesn't hurt the government. It's administratively simple. There is nothing to justify the government withholding that from the citizen. The citizen is not an enemy. The citizen is not an adversary. With respect to the investigation of that crime. There may be problems with disclosing material adverse -- that is, the government's case against a defendant, which we deal with in a separate system of rules.

QUESTION: What about the defense counsel, with the aid of an apparently more experienced defense lawyer, coming to the conclusion that the general rule was that unless the defendant could show knowledge of the reputation, it was not admissible? That's the general rule in this country, is it not? Overwhelmingly, if not universally?

MR. BRADLEY: Well, the fact of the matter is, in this case, your honor, in this situation, there was extant a decision in the District of Columbia which flatly held --

QUESTION: A decision or --

MR. BRADLEY: Oh, no, a decision. The government mentioned the later case, but the earlier case, the earlier case is Evans, the later case is Burks. Burks simply applies

the 1960 case which states flatly, any evidence tending to show the kind of person a decedent might have been is admissible.

All of the arguments made against admissibility, I'm sure, were made to the court in that case. The court flatly rejected the position that either evidence of specific acts of violence or reputation obtained in evidence was admissible unless the defendant knew about it. It expressly rejected that position. It is a square holding, it could not be plainer. It rehearses all of the arguments. The objective occurrence in issue and not the subjective belief is the important thing.

QUESTION: Mr. Bradley?

MR. BRADLEY: Yes.

QUESTION: Is it not true that four judges, Court of Appeals, the District of Columbia, disagree with what you just said about the law in that circuit?

MR. BRADLEY: I don't really know because --

QUESTION: Have you read their opinion -- by the four judges who would have granted en banc consideration of the case ?

MR. BRADLEY: But not after having had the benefit of argument by both sides, of gaining a full appreciation for the problem.

QUESTION: Oh, you're saying they may have had a different view if they'd had the case argued?

MR. BRADLEY: If they'd had the case argued. And it was not argued to them.

But in any event, even if they now believe that, at the time this case was tried, this evidence was admissible.

QUESTION: But how can you say, in light of the doubt that certainly exists, as evidenced by the opinion of four of the judges, that the prosecutor deliberately withheld information which he and counsel forthe defendant both thought -- as the four judges did -- that the evidence was inadmissible.

MR. BRADLEY: Well, of course, our submission,is, as I said, that the negligence of the defense does not excuse the failure of the government to disclose. The prosecutor and the government should be charged with knowing that this evidence was admissible because there was a case on the books which quoted from an earlier case, the Griffin case, which, as I said, if they are read, they are flat holdings that this evidence is admissible. These cases touch upon this very nerve center, this question of whether or not a defendant must know about this evidence. It's a flat holding that specific acts of violence are admissible irrespective of the knowledge of the defendant. And at that time this evidence was clearly admissible. And the later case which the government mentioned --

QUESTION: Mr. Bradley, you say clearly admissible. Was this prior evidence evidence of acts of violence? Is evidence of possession of a knife evidence of an act of violence?

MR. BRADLEY: Your honor, there was a conviction for assault with a deadly weapon.

QUESTION: Oh, there was? I thought it was just possession of a knife.

MR. BRADLEY: And the 1971 conviction, as the court's file in this case will show, was for assault.

So our position would be, then, that if we go to the record of this case, the record will demonstrate that the prosecutor was knowingly possessed of evidence, that, as an experienced prosecutor, he must have realized, and I think the Court will conclude, he knew full well, was probative for the defense and hurtful of his case.

At the very beginning -- now the government suggests that maybe the prosecutor doesn't know a thing about the crux of the defense, or the theory of the defense. Six months before the trial at a bail hearing the defense attorney stood before the judge and said, we have a very real issue here of self-defense. There were screams. When these people were found, he was trying to kill her.

The government responded to that. The government knew six months before the trial that it was facing a fight on the question of self defense. The government tells us or the prosecutor tells us that there were several conferences both before and after the bail hearing with -- between prosecutor and defense attorney where they discussed the

issues in the case. And very specifically, they discussed the character of Sewell. The prosecutor offered the characterizeration, he was not a pillar of the community. Now I think that very clearly shows again that he knew he was in a fight on the question of the character of the victim in this death case.

QUESTION: When he said that to the defense counsel--

MR. BRADLEY: Yes.

QUESTION: -- couldn't the defense counsel have said, have you got any rap sheet on him?

MR. BRADLEY; Yes, he could have.

QUESTION: And he didn't. But he didn't.

MR. BRADLEY: No, he did not. But the prosecutor knew he had a rap sheet, and he did not tender it to the defense counsel. And it was a perfectly simple thing to do. And if he wasn't simply stonewalling, if he wasn't simply saying, I'll wait this out, hope he doesn't ask for it. I hope he never finds it. It may never be discovered in my file.

QUESTION: All I'm trying to do in my questions is to put an equal duty on the two. You know. The defense counsel should do a little something and the government should do a little something. But I'm trying to find out why you take the position that the government has to do everything and the defense counsel you excuse from doing anything. If you'd get in the middle there I could better understand your point.

MR. BRADLEY: Yes, because the question here is the fairness of the trial and whether or not the constitutional rights of this defendant are protected. And if it turns out that she's been whipsawed by suppression by the government and negligence by the defense, the result shouldn't be that they cancel out. This isn't a matter of last clear chance. I reject the notion that this is something like a negligence case. This is a question of the constitutional duty of the government to tender exculpatory material. And I simply fail to see any good reason why it shouldn't tender that favorable material.

QUESTION: When asked for.

MR. BRADLEY: Your honor, if the government, through its resources, has developed this evidence. It turns out that some of it is favorable to the accused in the case, what is it about that situation, I fail to see it, what is there about that situation that would require the government --

QUESTION: That in an adversary proceeding the defense counsel should make a little bit of investigation of his own case. Just a little bit.

MR. BRADLEY: I agree with that completely.

QUESTION: And in this case, he did know that this man was a dangerous man. He was told that. And he let it drop. Deliberately. Am I right?

MR. BRADLEY: Not in the sense that he felt that he

didn't want that evidence, nor in the sense that he was sandbagging, as the government suggests, that he'll wait until after the trial to raise it. He did it because he made a very serious error of judgement which constitutes ineffective assistance of counsel. He made the decision because he was told something that he believed to be true with respect to its admissibility, but he did not decide that he did not want that.

Now had he adequately investigated earlier, and had he perhaps mentioned something to the government, that might have provoked this prosecutor to disclose it, but the record doesn't even establish --

QUESTION: In some other similar case -- and I imagine you have a lot of stabbing cases in the District of Columbia -- if somebody finds it out now, I guess they could bring an action. If they were convicted at the same time this woman was?

MR. BRADLEY: And discover this same evidence? Under these same circumstances?

QUESTION: Yeah.

MR. BRADLEY: The prosecutor knowing that he had it yesterday?

QUESTION: Yeah.

MR. BRADLEY: Yes, your honor.

QUESTION: Okay. I just wanted to know how far you go.

QUESTION: Mr. Bradley, I want to be sure I'm clear on the admissibility point. I was under the impression that the record showed that he was arrested for assault but pleaded guilty to possession of a knife. Now if that is a correct understanding of the record, is it your position that the arrest information would also have been admissible?

MR. BRADLEY: May I speak first as to whether or not that is correct?

QUESTION: Yes, I'd like to hear it.

MR. BRADLEY: The government has put into the file -- and that file is available to the court, it's the file in this case -- a certificate of conviction, April, 1971, a guilty plea to assault. Now there was a charge -- assault with a dangerous weapon, carrying a prohibited weapon, knife, and a Uniform Narcotics Act violation. Now our position is that this entire record constitutes, on the one hand, actual evidence itself. Admissible evidence showing specific acts of violence under the Evans case. Secondly, it provides an excellent lead to the defense attorney with respect to opinion and reputation evidence. And thirdly, we would submit that it is admissible, as the Burks case shows. The Burks case, let me just quickly say, involved a conviction for cruelty to a child -- that was the only conviction. And the court ruled that the defense could show that the victim caused the death of a child. So here, the defendant could show not

merely the conviction, but also the circumstances leading up to this bargained plea. It would be open to the defense to show the actual circumstances of the assault with the brick, of the assault with the razor, of the carrying -- well, there was a conviction for assault with a razor -- but of the carrying of the brick and the prohibited weapon knife, presumably the same bowie knife.

Now the record furthermore -- as I said, this prosecutor knew, then, he was in a fight. He knew that he had a knife issue. He knew that he had a character issue. He came to possess a record with this rich promise for the defendant as far as exculpatory evidence was concerned, and he had to then decide, whether or not, under the Brady rule, he had to disclose that. He made the conscious decision -- and I would submit to the court it was one of callous indifference -- he made the conscious decision not to disclose that evidence.

QUESTION: Well, what do you know about the man's state of mind?

MR. BRADLEY: Well, we do know that he has admitted to having heard this fact that the defense in the case, the whole crux of the defense, was to be self defense. We know that he was thinking of a tough fight in a murder case. And we know then that he must have deliberately sought and obtained this criminal record. Now, was he simply somehow airily innocent about whether or not that might hurt his

case if it came before a jury? Didn't he have any conscious thought as to whether or not this was admissible into evidence? And if he did, did he do any research? And shouldn't the government be charged with knowing that this case held this was flatly admissible?

QUESTION: Well, why shouldn't the defense counsel be charged with precisely the same thing? He's a member of the bar.

MR. BRADLEY: He very definitely is, and having failed to do it in this case, there is ineffective assistance of counsel.

QUESTION: But why is that so, Mr. Bradley? In all walks of life, except apparently in your view of ineffective assistance of counsel, principals are charged with the acts of their agents. Now why shouldn't the defendant here be charged with the action of her agent, who was her counsel?

MR. BRADLEY: Well, that of course would destroy the whole notion of ineffective assistance of counsel.

QUESTION: Well, it would certainly water it down some from your rather wide-ranging view of things.

MR. BRADLEY: Well, I don't -- your honor, I would submit, it's not my view of ineffective assistance of counsel, it's the view of the American Bar Association in its promulgated standards, and it's the view of the now-leading

case in the District of Columbia that says "prompt investigation of factual and leading material..." --

QUESTION: Well, this Court has spoken on this subject and defined it, has it not, in McMann and Tolette.

MR. BRADLEY: Yes, your honor. And in McMann, as I understand it, it invited the various localities and jurisdictions to begin formulating specific principles, which is what has happened in DeCoster.

QUESTION: Well, I don't recall McMann saying anything about that at all.

QUESTION: Mr. Bradley?

MR. BRADLEY: Yes.

QUESTION: You place such emphasis on, as you characterize it, callous and deliberate withholding of this information. You're aware, I suppose, that the Court of Appeals in the judgement you're sustaining here today expressly said, after commenting on what the prosecutor did, that this is not to say that the prosecution engaged in deliberate suppression?

MR. BRADLEY: Yes, sir.

QUESTION: No denying that. So what you're really doing is making an argument based on semis. There's nothing in the record that supports it beyond your argument, is there?

MR. BRADLEY: Well, the record of the case, the transcript of the case --

QUESTION: The record shows that both counsels thought the evidence was inadmissible. Now does that suggest --

MR. BRADLEY: No, your honor, I must disagree with that. The record does not show that the prosecutor thought this evidence was inadmissible.

QUESTION: But the rule certainly was not settled across the country as it --

MR. BRADLEY: The law of the District of Columbia at this time, under the Evans case, and the Griffin case, was that this evidence was admissible. And that was immediately available to the prosecutor. And I simply cannot believe that a prosecutor trying a murder case was unaware of those cases.

QUESTION: So you charge him with callous, deliberate withholding of evidence relevant to the --

MR. BRADLEY: And I think the record bears that out.

QUESTION: I see.

MR. BRADLEY: And furthermore -- you see, what's happened in this case -- with the permission of the Court, there was a reference to the fact that, well, we all know that it was Sewell's knife. The jury knew nothing of the sort. Now as I said, the prosecutor knew he had a knife issue. And in the pre-trial he conceded to the defense attorney, well, it looks like you're right, it's Sewell's knife. You'll see that on page 48 of the appendix. The first witness that he called in the case was Sewell's wife, the victim. He asked her, did yo

husband carry a bowie knife? No, never. And he took pains to have her demonstrate for the jury the length of the knife that he did carry, indicating it was merely a pen knife, and it was a pen knife that was found in his pocket.

This prosecutor, having conceded prior to trial not only that he had a knife issue by apparently it was going the other way, then went into the trial, having concealed some very eloquent evidence as to knife carrying from the defense, went to the trial and then developed for the jury evidence from which they certainly must have concluded, taking the invitation of the prosecutor, that this knife was not taken into that room by Sewell.

He then asked the desk clerk, did you observe any weapon? And the desk clerk said no. Now these were the first two witnesses. Then later in the trial he brings in another person who was in the motel, Griffin , bring him from the lockup, asks him some very brief questions, one of which was whether or not you observed a weapon, and he said, yes he had. And then he also asked him another question with respect to the position of the knife and proceeded to discredit his testimony on that. The only evidence before the jury, in other words, that Sewell the victim carried the knife was from a witness discredited by the prosecutor.

So this was a prosecutor who overplayed his adversarial role. He knew he had evidence. As I've said, an

excellent characterization was that he simply stonewalled. Now that's what the result is going to be if you follow the suggestion of the government here today. If this Court doesn't take the opportunity to announce a rule, as a matter of firm policy, that any thing consciously in the possession of the prosecution which is readily recognizable as relevant to the defense and hurtful to the prosecution, that that must be turned over to the defense, what you're going to get is a prosecution then doing precisely what this United States Attorney did, waiting and hoping that the defense will miss the boat, and then arguing contributory negligence or arguing, shouldn't the defense have to help itself. And I submit, that's an excess of any adversary concept. And I would suggest to you that the rule -- I would submit to you that the rule that we ask you to follow today is, as I've said, administratively feasible. There's no hurt to the government in having to comply with this rule.

QUESTION: On the other hand, the defense counsel just sits around and waits four months later and then goes and gets the material out and he's in free.

MR. BRADLEY: Your honor, there are two answers to that. First of all, I think it's -- with deference -- an invalid behavioral assumption. I think prosecutors and defense attorneys will both try to win cases. I think the defense attorney, with a limitation of resources and time and astuteness,

will do its best to uncover evidence. And I think we can count on that. In any event, if you suspect that the defense attorney will sit back, waiting then until after trial to raise the Brady point, the answer is very simple. Have the prosecutor comb his file before trial, and if there's anything remotely helpful, disclose it. It solves the problem perfectly for the government. And there's no way, it seems to me, if we require that, that we'll impose any undue burden on the government. And in fairness it should be required. Why, again, should the government be allowed to withhold exculpatory material. So this was -- I think it's clear from the case law -- admissible. I think when you fully consider the issues in the case and what was going through -- had to be going through the mind of the prosecutor, he was talking about these issues with the defense, that he knowingly withheld admissible, helpful evidence, that he was callously indifferent, and if the defense had had this issue -- had had this evidence -- it would have changed fundamentally the whole character of this trial.

QUESTION: Mr. Bradley?

MR. BRADLEY: Yes.

QUESTION: I couldn't find any -- if any -- what sentence was imposed in this case?

MR. BRADLEY: Five to twenty years, your honor.

QUESTION: Five to twenty?

MR. BRADLEY: Yes. And at this point the defendant has credit for three years.

QUESTION: Was the defendant represented by the public defender's office, the legal aid unit?

MR. BRADLEY: It was an appointed counsel.

QUESTION: A private practitioner or legal aid?

MR. BRADLEY: Yes -- uh, no, a private practitioner.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey?

MR. FREY: Just one or two things, Mr. Chief Justice.

First of all, on the claim that this evidence was admissible. Evans case was completely distinguishable. What was held in Evans was the testimony that the deceased became violent when drunk, as he was at the time of his death, was admissible to show his character for violence. That's not in issue here. The question here is how do you show character for violence? Can you show character for violence by isolated, specific acts? I wonder if the defendant or indeed the Court of Appeals would be taking the same view if we were trying to show that the defendant was the aggressor by means of one -- or perhaps it's two, that's not what the opinions indicate -- simple assault convictions. In any event we've discussed that at pages 6 - 9 of our brief and I think it's plain that the

evidence was inadmissible in the District of Columbia at the time. Or certainly it was not plainly admissible.

Now what the prosecutor said in arguments to the District Court -- and there's no basis for assuming that he was lying -- explained to the District Court -- this is at page 148 of the appendix -- there was nothing in this case which indicated to the prosecution that the record of the decedent was in any way favorable or usable by the defense in this case. In fact I would say quite frankly to the Court that the government's position prior to Burks was that the prior record of a decedent was not admissible into evidence unless the defendant herself knew about it.

QUESTION: And when was Burks? That was a case and when was that decided chronologically?

MR. FREY: Four months after. It was decided three months after, in October of 1971.

QUESTION: After the conviction?

MR. FREY: After the trial and conviction in this case. And even in Burks it was dictum and I believe it was clearly --

QUESTION: And the Evans case somewhat antedated this trial?

MR. FREY: The Evans case was ten years earlier. But in Hays, which is the Tenth Circuit case which we cite, they approve Evans. Yet they say, if the defendant didn't

know about it, it's not admissible. If the defendant did know about it, it's admissible not because it tends to prove a propensity for violence on the part of the deceased --

QUESTION: -- but state of mind on the part of the defendant. That used to be the rule of evidence.

MR. FREY: I know the red light is on. There's one case that I feel obliged to call to the Court's attention. It wasn't discussed in our brief. And that's the decision of this Court in Griffin, which was in 3/36.

QUESTION: It was cited by your friends, though.

MR. FREY: I don't think it's been cited by either party. It was cited by the Court of Appeals in its opinion. Griffin was a capital case, and the last footnote in Justice Murphy's dissenting opinion will show why it's not apposite to this.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:14 o'clock, p.m., the case in the above-entitled matter was submitted.]