OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-48

TITLE UNITED STATES, Petitioner V. HUGHES ANDERSON BAGLEY

PLACE Washington, D. C.

DATE March 20, 1985

PAGES 1 - 61

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

V. : No. 84-48

HUGHES ANDERSON BAGLEY :

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Washington, D.C.

Wednesday, March 20, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 o'clock a.m.

APPEARANCES:

DAVID A. STRAUSS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

THOMAS W. HILLIER, II, ESQ., Seattle Washington; on behalf of the respondent, appointed by this Court.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in United States against Bagley.

Mr. Strauss, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. STRAUSS: Thank you, Mr. Chief Justice, and may it please the Court, in this case the Court of Appeals for the Ninth Circuit awarded respondent a new trial on the ground that the government had not disclosed to respondent certain documents in its files that respondent claims he could have used to impeach two government witnesses.

The issue concerns the standard of materiality that should be applied in determining whether such evidence is significant enough to require a new trial.

The respondent in this case was indicted in 1977 on multiple counts of violating federal narcotics and firearms statutes. Before trial, respondent served on the government eleven broadly worded discovery requests.

Among those requests was the one that has now become the focus of the case, a request for any deals,

promises, or inducements made to prospective government witnesses in exchange for their testimony.

In response to all the various discovery requests, the government gave the defense a large number of documents. Now, respondent elected to waive a jury trial, and he was tried by District Judge Vorhees of the Western District of Washington.

Among the witnesses against him were two state law enforcement officers named O'Connor and Mitchell, who had witnessed criminal transactions involving respondent while they were operating in an undercover capacity.

O'Connor and Mitchell were supervised during the investigation of respondent by the Federal Bureau of Alcohol, Tobacco, and Firearms, AFT. At trial, O'Connor and Mitchell testified primarily about the firearms charges.

Now, after the seven-day trial, Judge Vorhees found respondent not guilty on the firearms charges, but guilty on the narcotics charges. Some years later, respondent filed a Freedom of Information Act request, and he uncovered two form ATF contracts that had been signed by O'Connor and Mitchell before the trial, but that were not among the materials delivered by the government to the defense.

Respondent then brought this action for collateral relief under 28 USC 2255, alleging that if he had known of these form contracts at the time of the trial he could have used them to impeach O'Connor and Mitchell.

Respondent's 2255 motion came before Judge Vorhees. The prosecutor testified at a hearing that he had been unaware of the form contracts, which apparently were in ATF files, and that if he had been aware of them, he would have given them to respondent.

Judge Vorhees found that well after the trial O'Connor and Mitchell were each paid $300 by ATF, but that the ATF form contracts were blank when O'Connor and Mitchell signed them, that no AFT representative signed them until after the trial, and that no government agent at any time had promised O'Connor or Mitchell compensation for his services or his testimony or anything else.

QUESTION: Mr. Strauss, may I interrupt? You refer to these as form contracts. They do have some typed information in them that I gather is tailor-made for the particular -- for Mr. Bagley. Was that not true?

MR. STRAUSS: That is right, Justice Stevens. There was a finding, however, that at the time they were

signed by the witnesses, O'Connor and Mitchell, and in fact at the time of the trial the only thing typed into them was the unique identifier, a numerical code in the upper righthand corner.

QUESTION: Not even the name Mitchell?

MR. STRAUSS: There was no finding about the name Mitchell. I assume it was typed in at the time.

QUESTION: The language that he will provide information regarding T1 and other violations committed by Hughes A. Bagley and so forth, that was typed in after the trial?

MR. STRAUSS: That is the finding.

QUESTION: I see. And it is based on -- whose testimony was this?

MR. STRAUSS: I believe the testimony of the supervising AFT agent, named Prins.

QUESTION: And I notice it is signed by three officers of AFT, and they all signed after the trial, too?

MR. STRAUSS: Yes, that is right.

Judge Vorhees further found that O'Connor and Mitchell had at most a unilateral expectation that they might receive some compensation for their services, although not necessarily for their testimony.

Finally, Judge Vorhees ruled that since he

himself had found respondent guilty, he was uniquely positioned to determine the impact that the AFT form contracts would have had on the trial, and he stated that he was convinced beyond a reasonable doubt that the form contracts would have made no difference to his verdict.

Now, as I said at the outset, the Court of Appeals reversed and ordered that respondent be granted a new trial. This happened in 1983, six years after respondent was convicted. The Court of Appeals did not explain at any point in its opinion why Judge Vorhees was mistaken in concluding beyond a reasonable doubt that his own verdict would not have been affected by the form contracts.

Instead, the Court of Appeals stated, and I am reading the last sentence of its opinion, "We hold that the government's failure to provide requested Brady information to the respondent so that he could effectively cross examine two important government witnesses requires an automatic reversal."

QUESTION: Mr. Strauss, the government here doesn't challenge the application of the Brady doctrine to purely impeaching materials, I take it.

MR. STRAUSS: We do not dispute that there are some circumstances in which the prospecution has an

obligation to disclose purely impeaching material. That is right, Justice Rehnquist.

QUESTION: And this case is one of them?

MR. STRAUSS: No, this case, we would submit, is not one of them.

QUESTION: Can you imagine any way this case could have gone the other way and for the Judge to say I was wrong?

MR. STRAUSS: You mean for Judge Vorhees to say? Oh, I think very much so, Justice Marshall.

QUESTION: I mean, I think it is a horrible burden to put on somebody.

MR. STRAUSS: Well, I can understand, Justice Marshall, where a judge might in fact have an overreaction the opposite way and be insensed that this material was not brought to his attention.

QUESTION: When you were told to explain why you did something six years ago, your subconscious tells you to defend it.

MR. STRAUSS: Well, I think that is certainly right, Justice Marshall, and there are decisions of this Court predicated on that, but Judge

QUESTION: But was he --

MR. STRAUSS: I am sorry, Mr. Chief Justice. Judge Vorhees found respondent guilty on the basis of a

record which turned out according to respondent to be incomplete, and I think Judge Vorhees might very well have reacted the other way and said that if the government was going to conceal this information, he would teach it a lesson.

It is not obvious to me that the psychology cuts in favor of the government.

QUESTION: When the case was tried before the court without a jury, was any of this information before the court?

MR. STRAUSS: These form contracts were not before the court.

QUESTION: Yes, and that is the only issue in the case, isn't it?

MR. STRAUSS: That is right, is whether those had been --

QUESTION: So this was in effect something newly discovered.

MR. STRAUSS: That is exactly right.

QUESTION: In making the judgment he made, Judge Vorhees did not have to review any judgment or decision he had previously made on the issue involved here, did he?

MR. STRAUSS: That's right.

QUESTION: But, Mr. Strauss, wasn't there an

affidavit or something denying that anything like this occurred that Judge Vorhees had?

MR. STRAUSS: There were affidavits that Judge Vorhees had that the respondent but not the Court of Appeals has made quite an issue of. These were affidavits that were submitted to the respondent in response to a different discovery request.

QUESTION: I know, but did Judge Vorhees have those? Did he understand that there were no such contracts from those affidavits?

MR. STRAUSS: He could not have understood that there were no such contracts in those affidavits because the affidavits made no such representation.

QUESTION: What did the affidavits show?

MR. STRAUSS: The affidavits were long, detailed recountings of the undercover dealings between the witnesses and the defendant, and they concluded with a recital that said, I have made these statements free of threats or promises or promises of reward. Each of them concluded with that boilerplate recital.

QUESTION: And O'Connor and the other officer signed those affidavits?

MR. STRAUSS: They signed those affidavits.

QUESTION: And Judge Vorhees had those?

MR. STRAUSS: It is not clear. I could not

find any place where those affidavits were actually introduced into evidence by respondent. Respondent had the affidavits. They were Jencks Act material given to repondent.

QUESTION: But those statements were clearly false when they said they were free of promise of reward, because there is a promise of reward in these form contracts.

MR. STRAUSS: No, that is not right, Justice Stevens. The statements were not false. There was a finding of no promises. They are not false for several reasons. There is a finding that no promises were made to these witnesses, that at most they had a unilateral expectation that something would be given to them.

QUESTION: Yes, but might not the Judge have concluded that based on that statement that Justice Stevens referred to in those affidavits?

MR. STRAUSS: The judge who concluded that was the judge on habeas proceedings --

QUESTION: I see.

MR. STRAUSS: -- who had before him -- the entire record before him.

QUESTION: Not the trial judge?

MR. STRAUSS: Not the trial -- he was the trial judge, but he was the trial judge sitting in the

habeas proceeding. It was the same judge, but he concluded that at the time of the 2255 motion.

QUESTION: The form document says, the United States will pay to said vendor a sum commensurate with services and information rendered.

MR. STRAUSS: The testimony, Justice Stevens, that they gave was that while they were conducting this investigation, they were busy signing a lot of forms that were shown to them by the case agent, and they basically didn't know what the forms were for.

QUESTION: They gave that testimony before the magistrate, not before the judge.

MR. STRAUSS: That's right.

QUESTION: They never said that to the judge.

MR. STRAUSS: That's right, but the judge upheld the magistrate's finding.

QUESTION: When was that? Was that at the time of the original trial or at the habeas proceeding years later?

MR. STRAUSS: That was in the habeas proceeding in 1981.

QUESTION: This is five or six years later.

MR. STRAUSS: Yes.

QUESTION: So the judge's decision did not involve in any sense reviewing his own prior judgment.

MR. STRAUSS: That is right.

QUESTION: How can you say that? He made a finding of fact that his own prior judgment would not have been different based entirely on the prior judgment.

MR. STRAUSS: The prior judgment was based on different evidence from the evidence that was before him at the --

QUESTION: But it involved a complete review of the prior judgment, did it not? Is that not your whole argument?

MR. STRAUSS: I don't know whether that constitutes review of the prior judgment or not. It does not constitute review in the sense of any appellate review or of any second guessing of the judgment.

QUESTION: How could he have said he would have made the same decision without knowing what he decided in the first place?

MR. STRAUSS: Well, of course he knew what he decided in the first place, but the point is that the judge had no -- the factors that operate in cases like Santa Bella to cause judges to have a commitment to the decision they previously reached so that they will be unwilling to overturn that decision do not operate here, because there is new evidence.

And as I suggested in my colloquy with Justice Marshall, may even operate in the opposite direction, because the judge may be annoyed at the suppression -- at the alleged suppression of evidence by the government.

QUESTION: May I -- just one other question. In response to Justice White, I understood you to say that this was not Brady material that there was any obligation to produce. Is that your position?

MR. STRAUSS: I am not sure that the government would have had an obligation. Well, no, I am sure. The government would not have had an obligation to prcduce this material, I think, in the absence of a request.

QUESTION: Did this material relate to the narcotics charge or the firearms charge?

MR. STRAUSS: The witnesses testified on both, but their testimony was primarily on the firearms charges.

QUESTION: And they were acquitted on that charge?

MR. STRAUSS: They were acquitted on that charge. That is right.

QUESTION: Once again, why isn't it Jencks Act?

MR. STRAUSS: It is not Jencks Act, Justice Marshall, because it is not a statement. It is not Brady material in my view because this is simply not evidence that seriously draws into question the witnesses' credibility.

QUESTION: I thought you said that the government apologized for not knowing it was there.

MR. STRAUSS: The United States attorney said that if he had had these documents --

QUESTION: Well, why would he do that if he wasn't required to produce it?

MR. STRAUSS: I think it would have been very good practice for him to do it. I think he gave the right answer. It would make -- one of the features of the law in this area is that it really makes no sense for the United States attorney not to go overboard and to do far more than he is obligated to do, because if he doesn't, what is likely to happen is just what happened in this case. Six years down the road these documents will be uncovered and he will have to relitigate all of these issues.

QUESTION: Well, Mr. Strauss, it is your position that the request of the defense counsel when requesting prior criminal records of witnesses to be called by the government and any deals, promises, or

inducements made to the witnesses simply didn't cover the document that had been given to the witnesses to sign?

MR. STRAUSS: We think that is right, Justice O'Connor, although that is not the argument we are primarily relying on. The request was for deals, promises, or inducements made in return for the testimony. That is different from whether the government would compensate these people for their services.

I think it is one thing to compensate a person for specifically giving certain testimony in court and another to say that because he has performed certain undercover services he will receive compensation.

QUESTION: That is a pretty fine line you are trying to draw, isn't it?

MR. STRAUSS: I think there is a difference in the effect that would have on the credibility of the witness, but I would add that that is not -- our primary argument is not --

QUESTION: The fact finder would certainly regard as rather substantial evidence that a government witness was being paid, whether in return for a promise or anything else, wouldn't he?

MR. STRAUSS: I think --

QUESTION: Attorneys would love to have evidence like that, wouldn't they?

MR. STRAUSS: I think that is probably right, Justice --

QUESTION: And you suggest it is not good impeachment material?

MR. STRAUSS: I think a defense attorney probably would want to inquire into that. The defense attorney in this case --

QUESTION: Would want to? I would think he would be ineffective if he didn't.

MR. STRAUSS: Well, one of the findings that the District Judge made in this case was that the defense attorney's cross examination tactic was not to try to undermine the witness's credibility, but to try to enlist them on his side.

QUESTION: But he didn't know of the existence of these contracts when he was cross examining these witnesses.

MR. STRAUSS: He didn't know of the existence of these form contracts.

QUESTION: If he had, he would certainly have been after them, wouldn't he?

MR. STRAUSS: There is no finding to that effect, and there is no reason to think that.

QUESTION: Common sense would tell you that.

MR. STRAUSS: Well, I think --

QUESTION: He asked for them, didn't he?

MR. STRAUSS: He asked for deals, promises -- he made an omnibus request for deals, promises, or inducements in exchange for the testimony, not for anything specific like this.

One possible cross examination approach, Justice Brennan, would have been to pursue that line, without a doubt, but this defense attorney did not pursue that line. He never even asked --

QUESTION: Mr. Strauss, the judge on habeas certainly wouldn't have gotten to a harmless error analysis unless he thought there was error, and he couldn't have found that there was error unless he thought there had been concealment of material information.

MR. STRAUSS: I think, Justice White --

QUESTION: And you suggest that it wasn't even material.

MR. STRAUSS: I think, Justice White, that the judge on habeas found there was harmless error in order to avoid having to rule whether it was even material or within the request at all. He looked at the documents and said, these wouldn't have made any difference to me

and there is no point in pursuing this matter further.

QUESTION: Well, I know, but identifying material to show possible bias, I think that is enough of a finding of materiality.

MR. STRAUSS: These were blank -- the finding was, these were blank contracts with only the witnesses' signatures on it, that no promises of any kind were made to the witnesses, and that ultimately the witnesses were paid some money, well after the trial.

I think to suggest that the witnesses' credibility would have been substantially impaired at all by the fact that they signed one of these documents I think is incorrect.

QUESTION: Didn't the government furnish these documents? These weren't things that the witnesses made up on their own. Presumably the government investigator handed them to them and said, here, sign this, and at the appropriate time we will consider making a payment, or something of that sort. Isn't that what happened?

MR. STRAUSS: Essentially, that's right, Justice O'Connor.

QUESTION: How much did they get paid?

MR. STRAUSS: $300 apiece.

QUESTION: Plus expenses?

MR. STRAUSS: Plus expenses.

QUESTION: You don't seem to -- you just wouldn't be satisfied with winning this case on the basis that you won it before the habeas judge?

MR. STRAUSS: We would be more than satisfied to win this case on that basis.

QUESTION: Well, that is just on a harmless error basis. It isn't on a no materiality basis or on reviewing this on a lesser, less than a harmless error basis.

MR. STRAUSS: The question we presented concerned the harmless error issue, and we would be more than happy just to get rid of the Ninth Circuit's automatic reversal rule, which we think is completely unfounded.

QUESTION: Well, if we disagreed with that, wouldn't we remand to have them review the District Judge's determination of harmless error?

MR. STRAUSS: I think that is right, Justice White. If you disagreed with the automatic reversal rule, you would have to remand for that.

QUESTION: You certainly go much farther than that in the brief. In the brief you want to review this error, if there is one, on the basis of -- on a lower basis than the harmless error.

MR. STRAUSS: Well, than the constitutional

harmless error rule. That is right, Justice White, for just that reason, that if the Court should remand, little purpose would be served by having the Court simply remand to have the Ninth Circuit review it under a harmless error rule that we think is unnecessarily strict to us and not necessarily generous to --

QUESTION: Well, you think it is unnecessarily strict, but it certainly is indicated by our prior cases, isn't it?

MR. STRAUSS: I don't think that's right, Justice White. What the prior cases of the Court indicate is that this is the approach to be applied in cases where the government has knowingly introduced perjured testimony, and it is our submission that this sort of --

QUESTION: Constitutional error. If there is an error, it is a constitutional error.

MR. STRAUSS: It is the standard that applies to constitutional error.

QUESTION: But we shouldn't review that on the ordinary harmless error basis.

MR. STRAUSS: The failure to disclose these documents is not constitutional error. There is no provision in the Constitution that says the government has to disclose these documents. The question is what

standard of materiality.

QUESTION: Well, if there isn't any error -- what kind of an error is it if it isn't a constitutional error?

MR. STRAUSS: It is an error if it leads to the trial being unfair. The question is --

QUESTION: That isn't a constitutional error?

MR. STRAUSS: If the trial is unfair it is certainly a constitutional error. That's right. But the prior question is whether the non-disclosure of these relative, rather innocuous documents infected the trial with unfairness.

QUESTION: What case is it that requires the government to turn over statements that are merely impeaching as opposed to exculpatory?

MR. STRAUSS: The Court has never squarely held that the government has to turn over such material. I think that is right, Justice Rehnquist. But as we said, we don't dispute --

QUESTION: You want us to decide that they really do have an obligation under Brady to turn it over?

MR. STRAUSS: We, as I said, don't dispute that in some circumstances --

QUESTION: If we judge the case on that basis,

then, then we are assuming a constitutional error.

MR. STRAUSS: I don't follow that, Justice White. If the Court -- we would be happy if the Court were to assume that these documents were in some sense probative or relevant or useful, but to find that the automatic reversal rule applied by the Court of Appeals is not a correct one.

QUESTION: But then what? Assuming that, that this standard was the wrong -- that the Court of Appeals was wrong on saying there should be an automatic reversal, what then? If we assume that there was a constitutional error, what do we do?

MR. STRAUSS: I don't see why this -- the assumption is not that there was constitutional error, Justice White. The failure to disclose information like this is not constitutional error. All that the failure to disclose information like this does is raise a question whether the trial was fair.

And the issue is how material this evidence must be in order to cause us to question the basic fairness of the trial.

Our submission is that it is not necessary to find that the evidence would not have affected the outcome beyond a reasonable doubt in order to conclude that the trial was fair, that a much lower threshold is

appropriate.

The Court dealt with an issue quite similar to this, obviously, in United States against Agurs, where the Court specified a standard of materiality for cases in which the defense either does not request information from the government's files or makes a general request, and the Agurs standard is that the defendant must show that the undisclosed evidence raises a reasonable doubt about his guilt.

Now, it seems to us that that standard would be an appropriate standard to apply here rather than the harmless beyond a reasonable doubt test that the --

QUESTION: May I ask you a factual question, Mr. Strauss, on this question of whether it was a general request or a specific request? You mentioned the eleven different requests. Actually, I guess it is eleven paragraphs in one request for information.

And the eleventh paragraph said, "all information which would establish the reliability of the Milwaukee Railroad employees in this case whose testimony formed the basis for the search warrant."

Are they the same two employees?

MR. STRAUSS: I think they are, Justice Stevens.

QUESTION: And so wouldn't this have also been

responsive to that paragraph?

MR. STRAUSS: If it was responsive to Paragraph 6, which is the one we are disputing, then I think it would be responsive to that as well. We would dispute that this has --

QUESTION: The reason I raised it, it seems to me this may be relevant to the specificity of the request, whether it is covered by more than one paragraph.

MR. STRAUSS: The respondent has never relied on Paragraph Eleven as a basis for this.

QUESTION: I realize that, but I don't know why.

MR. STRAUSS: Well, I think probably, Justice Stevens, because it was understood that this had to do with collateral proceedings attacking the search warrant, and not with the trial in chief, but that is speculation.

QUESTION: I see.

MR. STRAUSS: As I said, the Agurs standard applies in cases where there has been a general request, and this really follows from Justice Stevens's last question. The request in this case was for deals, promises, or inducements. And in our view, it is not appropriate to regard that as a specific request in the

contemplation of Agurs.

If a prosecuting attorney receives a truly specific request, a request, for example, for the criminal record of the victim, or a request also from a defendant contemplating a defense of self-defense for any evidence in the government's possession that the victim committed acts of violence.

If a prosecuting attorney receives a request like that, we know with some clarity precisely what he is tc do. He is to go to his files and look for certain specific information, and he is to give instructions to the law enforcement officers working on the case that they are to come forward with certain specific documents or evidence if they have it.

It seems to us that when a prosecuting attorney receives a request like respondent's for deals, promises, or inducements, he is really in no better position than he would have been in if he had received no request at all. He has a duty under Brady and Agurs.

QUESTION: Well, suppose he had had a request for the names of any proposed witnesses who would be paid for their testimony. Would that be specific enough?

MR. STRAUSS: Who would be paid for their

testimony? Yes, certainly, Justice Marshall.

QUESTION: Really, that is what they wanted here, wasn't it?

MR. STRAUSS: No, Justice Marshall. There is no finding that they were paid for their testimony.

QUESTION: It is just that they testified and they were paid.

MR. STRAUSS: They performed undercover operations over a pericd of several months, and then were compensated for that.

I would like to save the balance of my time.

QUESTION: May I ask just one other factual question? You did mention a unique identifying number was on the contract when signed. I notice that the number is 490,803,000,000 and some more, which indicates there probably have been quite a few of these forms executed over the years.

(General laughter.)

QUESTION: Would this not be a standard thing that a prosecutor would inquire about if there are that many of them floating around?

MR. STRAUSS: I don't know, Justice Stevens. My offhand reaction would be that that proves too much, because there obviously weren't that many.

QUESTION: Well, I don't know how many people

you have at $300 apiece providing information. There could be a lot of them.

MR. STRAUSS: Contracts. I don't know the answer.

CHIEF JUSTICE BURGER: Mr. Hillier.

ORAL ARGUMENT OF THOMAS W. HILLIER, II, ESQ.,
ON BEHALF OF THE RESPONDENT, APPOINTED BY THIS COURT

MR. HILLIER: Thank you, Mr. Chief Justice. If it please the Court, the Ninth Circuit Court of Appeals found that the respondent's constitutional right to confront and cross examine his accusers was materially obstructed as a result of the government's failings in this case.

As a result, at issue here is whether the Court of Appeals correctly reasoned that the non-disclosure in this case resulted in constitutional error and whether it applied the appropriate standard in reaching that decision.

We obviously disagree with the petitioner's position that the Court of Appeals failed to consider the issue of materiality at all, and we take strenuous exception to its characterization of this sort of evidence that wasn't disclosed as non-constitutional, and its attempts to sort of trivialize its meaningfulness within the context of this case.

And I think in order to resolve the case and to really, truly determine what the character of that evidence was in relation to your decision, we have to look to the facts, because there are several facts, as you have already discussed in your questions of counsel for the petitioner, which are especially relevant to this case.

QUESTION: Were you trial counsel?

MR. HILLIER: I was not, Your Honor.

QUESTION: Were you counsel in the habeas?

MR. HILLIER: An assistant federal public defender in my office was, Your Honor.

QUESTION: I see.

MR. HILLIER: I have represented Mr. Bagley on prior occasions, but I was not counsel in this case.

The developments which occasioned this case occurred back in April and May of 1977, and during that time these two railroad employees were under the direct supervision of one single case agent in this case, a gentleman by the name of Mr. Norm Prins.

Between April 12th and May 4th of 1977, the two of them executed four separate affidavits each, a total of eight affidavits, detailing their contacts with Mr. Bagley within the context of their investigation, and at the end of each one of those affidavits, the

boilerplate paragraph indicated by counsel stated that they had received no rewards or promises of rewards in return for the statement that they had just made.

On May 3rd, 1977, the day before each of these individuals signed in the presence of Mr. Prins, they executed the contract which is at issue here today, a contract which is labeled For the Purchase of Information and Payment of Lump Sum Therefore.

On May 3rd they executed that contract, indicating an expectation, an objective expectation of return for their investigative efforts. On the following day, they executed again affidavits indicating that they had not. Mr. Prins supervised and observed both of these signings one day apart.

Pretrial, as indicated, Mr. Lundine, who was representing Mr. Bagley, filed a comprehensive Brady -- or a comprehensive discovery motion. It is important to note that this pretrial request came in November of 1977, a year after the Agurs decision, which required some sort of specificity if we are going to have the complaint that we do here today.

Within that pretrial discovery request, Mr. Lundine requested, as indicated, any promises or expectation -- promises or induecments made to witnesses in exchange for testimony, but that is not all, and we

don't rely upon that solely. As we indicated in our brief, the request was comprehensive. It goes on.

If I could, and it is in the record, of course, Mr. -- pursuant to Brady in a subsequent paragraph Mr. Lundine requested "notice and copies of all material in possession of the government which is exculpatory, which may be favorable to the defendants or would assist in the preparation of the defense, including promises or representations of any kind made to government witnesses."

And finally, he stated, "I would also request any information which goes to the reliability of the two government witnesses in this case that are the subject of this inquiry as it relates to the search warrant."

So, there were three separate recitals in that disccvery motion requesting information about any sorts of inducements or representations or promises which may have been made to the witnesses in this case which may in effect taint their testimony.

In that same month, on November 30th, the government responded to that request and indicated in their discovery response that all statements made by these two witnesses had been turned over to the defense, including the affidavits which are at issue here.

It is interesting to note that in that

response government counsel represented that these were the two principal government witnesses. Missing, of course, was the contract to purchase and pay for information provided in return for their services.

We submit that Agent Prins, who failed to disclose that document, however, didn't forget about it. Trial commenced in mid-December, from December 12th until December 23rd.

On December 21st, before the trial was even over, Agent Prins went to his supervisor with the contracts in question and requested payment to each of these individuals, $500, in return, as he stated in his documents, which are before the Court, for their investigative efforts and for their testimony at trial.

During trial Agent Prins did this, despite having turned over nothing with regard to those representations to counsel for the accused.

QUESTION: Mr. Hillier, it seems to me another fact you have got to contend with since you are stressing the facts is that we are not here just judging the conduct of some particular government witness.

We have a habeas proceeding in which Judge Vorhees after this bench trial that you are just describing had all the information that was apparently withheld and said it just wouldn't have made any

difference to him.

Now, the Ninth Circuit has said to Judge Vorhees, go ahead and try this case again. That just seems like a lot of beating around the mulberry bush. Judge Vorhees is going to come out the same way.

MR. HILLIER: Well, Judge Vorhees, when this case -- if this case is returned to Judge Vorhees, will probably preside over a jury trial, I would expect, Your Honor, so I don't think, and your cases suggest, Clancy, Goldberg, and the like, that we can't speculate as to what is going to happen again. We can't speculate what could have happened.

QUESTION: No, but we can speculate as to whether this error that you see would have had any effect on Judge Vorhees' deliberation in this case, and I would think he is a pretty good witness for that.

MR. HILLIER: Well, Judge Vorhees made a determination based upon what the Court of Appeals suggested was an improper constitutional analysis, and also his factual basis was undermined.

QUESTION: But he does say, this wouldn't have made any difference to me in trying the case. You can refine the constitutional arguments all the way you want, but that really has some import in this case. The Judge who tried it in a bench trial says, if I had known

all that you now tell me, I still would have come out the same way.

MR. HILLIER: Justice Rehnquist, you are correct, that is what he said, but why did he say that? Judge Vorhees --

QUESTION: Does it make any difference why he said it?

MR. HILLIER: Well, I believe it does, because it goes to the factual underpinnings for his decision, the facts which you must analyze now when you are independently reviewing the constitutional basis for his decision. Judge Vorhees indicated that, I make this finding because the testimony of these agents as it regarded the drug counts was largely exculpatory.

That simply wasn't the case. And in fact his verdict belies that. In reality, and contrary to what government counsel has indicated, what happened here, these two witnesses were key not only in the preparation of the entirety of the government's case, but they were the only witnesses produced by the government on the drug count. They were key --

QUESTION: Was there other evidence other than the testimony of these two witnesses that would have established

MR. HILLIER: The government -- excuse me.

QUESTION: -- the defendant's guilt on the drug counts?

MR. HILLIER: Excuse me, Your Honor. The government presented no other evidence except for these witnesses as relates to the drug counts. These witnesses -- and I think that it is important when reviewing your cases as to whether this information is material, Chief Justice --

QUESTION: I mean, there were no statements or confessions or admissions by the defendants themselves that were in evidence relating to the drug counts?

MR. HILLIER: As to the nine counts that were reduced down to simple possession, there was contradictory evidence to the agents in the record. As to the two delivery counts, there was testimony from the defendant himself at trial, but there was no other evidence which was produced by the government.

The defendant himself took the stand and acknowledged that he had made deliveries, but that they were not of the sort contemplated or charged by the government in its indictment.

QUESTION: Deliveries of what?

MR. HILLIER: Of controlled substances, prescribed, controlled substances, his own controlled, prescribed -- prescribed, controlled substances.

QUESTION: What was his testimony again?

MR. HILLIER: His testimony was that he did not make the deliveries as urged by the prosecution in the case, but he acknowledged that he had prescribed drugs himself that he had given to individuals in the past, including these two agents. But his testimony was in contradiction to the facts that they attempted to present to the court in --

QUESTION: Was that cumulative testimony or otherwise?

MR. HILLIER: The defendant's testimony?

QUESTION: No, the government's testimony. Was it cumulative?

MR. HILLIER: Well, the government's testimony, of course, came first, and our argument here is that the defendant was denied the opportunity to prepare a defense which contemplated effectively cross examining these individuals in anticipation of discrediting them.

The reason they didn't do that, of course, was because the government failed to disclose information that they had a right to.

QUESTION: Would his own admissions and his own testimony be sufficient to support Judge Vorhees' decision?

MR. HILLIER: Your Honor, I think that in order to answer that question, you have to presume that the error which occurred did not constitutionally impact the defendant's rights.

QUESTION: Wel, no, that is going around in a circle. I am asking you a very simple question. I will start over.

If the only testimony before the court was the testimony that the defendant himself gave, would it support a guilty decision?

MR. HILLIER: I think the simple answer to that is, I am not entirely certain. If the exact drugs which were charged in the indictment were the ones which he testified to delivering, I think that you are correct, but of course the defendant ought not to be put in that position of having to -- I think what the government is attempting to do is to put the cart before the horse here. What we are trying to argue --

QUESTION: He testified voluntarily, didn't he?

MR. HILLIER: Well, he did, but the strategy emplcyed there was, there was a need to confront the credibility of these witnesses. They had not any opportunity to do that pretrial or during trial, during cross examination because of the denial of the existence

of promises made to these witnesses.

QUESTION: Are you suggesting that if they had -- if the defense had been able to have this material so as to challenge the credibility of the two government witnesses, that then he might not have taken the stand and disclosed his guilt?

MR. HILLIER: That is entirely possible, Your Honor, and again, what your teachings have been, this Court's teachings are that we cannot speculate as to what might have happened. What we are required to do here is to look at the nature of the error, to analyze the character of the evidence to determine whether its non-disclosure may have impacted a constitutional right.

The constitutional right here is the right to cross examine on a material witness, a key witness, and that wasn't accomplished because the government in effect affirmatively said that there were no promises made to these people by handing over the affidavits which were presented, by Agent Prins's failure to disclose, and, we submit, wilfull withholding of those documents.

QUESTION: Let me go back to Justice Rehnquist's question. This is a hypothetical. The same type of trial as this, and they produced these two

contracts, and the judge, trying it without a jury, says, I have gone over the evidence, including these contracts, which I disregard, and find him guilty.

Would that stand up on appeal?

MR. HILLIER: Well, I --

QUESTION: On habeas? Anything else?

MR. HILLIER: Yes --

QUESTION: Would that stand up?

MR. HILLIER: Perhaps I am misunderstanding your hypothetical. Had the court actually received these documents in evidence at trial?

QUESTION: Yes, sir.

MR. HILLIER: And the court said, I appreciate the impeachment effort concerning these witnesses, I find their testimony compelling nonetheless.

QUESTION: Yes, sir.

MR. HILLIER: I think that we would have a hard time arguing that that case ought to be reversed, because we would be arguing that the factual basis for the court's decision was improper, and of course the court --

QUESTION: So you admit you could not reverse it?

MR. HILLIER: Well, if there were a factual basis. What I am admitting is that if there were facts

which supported a finding of guilt --

QUESTION: The exact same facts of this case. The only difference is, the two contracts were put in evidence.

MR. HILLIER: Yes.

QUESTION: And the judge said, despite these, I still find you guilty.

MR. HILLIER: Then we would be arguing to the Court of Appeals that the court was in error in reaching the decision it did, and we would have a difficult time doing that, Your Honor.

But that isn't the issue here, and that is why Judge Vorhees's analysis was incorrect. He did not perceive the constitutional significance of analyzing impeachment material pretrial to determine what strategy the case may take.

Judge Vorhees did not have the benefit of this Court's decisions in Strickland and Cronic, which came more recently outlining what effective counsel really is, and Justice O'Connor in her decision said, what we are looking to within the Sixth Amendment context is whether we can have justifiable reliance upon the outcome.

And what that means in Justice Stevens's opinion in Cronic was, a lawyer who is going to truly

test the adversarial process of the trial court proceeding, and the way that you do that is through cross-examination, of course, and Justice Stevens then alluded to the Davis decision, which indicates that this type of information, the ability to cross-examine a government witness with impeaching information, is of the most important kind of information when analyzing that effective cross examination question, and that failure to disclose it or to provide it or to limit is constitutional error of the first magnitude, and that is what we are dealing with here.

We never got to the point where we could involve ourselves in that very necessary constitutional right to effective cross examination of these witnesses. Entire trial strategies were affected, and as Justice O'Connor said in her opinion in Strickland, ineffectiveness, or the effectiveness of counsel includes the ability of counsel to make independent decisions about how to conduct a defense.

We had a jury waiver in this case. We had no cross examination of the key government witnesses. We don't know what would have happened, and Clancy and Goldberg and your other teachings suggest we should not speculate as to what might have happened, but rather we look at the character of the evidence which was

withheld, determined whether it was in fact of such magnitude that it impacted the constitutional rights of the defendants, and if it does, then you are going to reverse under the harmless error doctrine.

And if there is government interference in that process, actual government obstruction, then it is presumptive error, and we submit, and the Court of Appeals found in this case that the government's failure to disclose and their affirmations that these witnesses had had no promises concerning rewards, it was tantamount to government interference with the ability of counsel to conduct his defense.

QUESTION: Mr. Hillier, if we should agree with you, what about the holding that this required automatic reversal?

MR. HILLIER: Your Honor, as we indicated in our brief, that holding is effectively dicta, and I don't believe I am any happier with it than the Solicitor General is. I expect had it not been there, perhaps we wouldn't be here.

But the effect of that language, of course, has to be dealt with, but what you look to in the decision is whether in fact the Court of Appeals analyzed the materiality, and of course the Court of Appeals in reaching its decision alluded to Brady, to

Agurs, the standard set forth in Agurs, and to Davis, and the Court of Appeals then said, looking at Brady, the mandate of disclosure, and looking at Agurs, which says a failure will seldom, if ever, be excusable where there is a specific request, and this is a specific request case, and if it impacts a cross examination right, such as in Davis, then we are going to talk about reversal.

I think that the decision needs clarity, and that, of course, is the function of you at this point, is to add some clarity to the Court of Appeals' opinion.

QUESTION: Well, I know, but do we do it, or do we say they were wrong to require automatic reversal? Do we send it back?

MR. HILLIER: That is not necessary, Your Honor. I think what is necessary is to say that the language is improvident within the context of this decision, and that in looking at Giglio, there is a requirement of materiality in non-disclosure cases, but in this case there was materiality, so the result of the Court of Appeals was correct, but this does not mean that there is an automatic reversal rule that each case has to be analyzed on a case-by-case basis, and that instruction should be sent forward to the Courts of Appeals.

To summarize, the constitutional basis for our argument is, the government here did fail to disclose information as mandated by Brady. The failure was to a specific request, and under Agurs, those sorts of failures are seldom, if ever, excusable. When looking at the character of the evidence, as urged in the Agurs decision, we find that it involved impeaching information of critical importance.

To answer your question, Justice Rehnquist, it is our opinion that Giglio did decide that impeaching information fell within the purview of Brady, that is, that it is favorable information, that is information that must be presented to the accused within the mandate of Brady.

And of course Davis, Napue, Giglio, and Brady all talked about the importance of impeaching information. The character of that evidence is manifestly important to the accused. We look to the counsel's effective assistance through cross examination as mandated by Davis, Strickland, and Cronic, and we find that there was no cross examination.

In fact, the trial court found that there was no cross examination in this case, and that is apparent. We rely upon the statements of the government in this case.

And that brings us to the practicalities. We are dealing in the federal criminal discovery process, and as indicated in Agurs, it is not perfect. There is not full disclosure, and we are going to have problems like this from time to time.

Defense counsel in these situations is singularly reliant upon the forthrightness of the prosecutor in responding to government -- or to discovery requests. We have no capability to look into their file.

Here, where we ask for promises of reward or remuneration for any kinds of representations or inducements made to any witnesses, anything which might shed light on his reliability. Then I agree that the prosecutor was charged with going to his agent and saying, hey, have you promised this guy anything? Is there anything that we have got to let the defense counsel know which may impact the credibility of the witnesses in this case?

Well, the response to that in our case was to produce affidavits which clearly suggested to the contrary. As a result, cross examination was limited effectively and materially, and the constitutional rights of this defendant, we submit, were impermissibly infringed.

QUESTION: May I just ask one question, Mr. Hillier, there? It is true, however, is it not, that the affidavits that were made available to you made it clear that these two men were cooperating with the government in an undercover capacity, even though they didn't know they got specific payment for it?

MR. HILLIER: That's correct, Your Honor.

QUESTION: So there was some material that could have been used for cross examination purposes, even though they could not have made this particular --

MR. HILLIER: There was the ability to cross examine the agents as to the factual basis for their conclusions. There was no ability to cross examine as to their bias, their motive, their expectation of remuneration.

QUESTION: Why not?

MR. HILLIER: Because there was an affirmative representation by the government that they had had no promises for payment.

QUESTION: Yes, but if there hadn't been those representations, you normally would have asked them -- the trial counsel would normally have asked if they had been paid or if any promises had been made to them. Is that right?

MR. HILLIER: Your Honor, you are shooting in

the dark when you are doing that. If the government --

QUESTION: Well, so isn't a lot of cross examination shooting in the dark?

MR. HILLIER: I suspect you are correct, Chief Justice, but in this case we have had a representation from the government that nothing had been made. It certainly is not a failing on counsel's part to not have asked that question, and if they had asked that question, we don't know what the answer would have been, and again, Goldberg and Clancy suggest that we don't speculate. As Justice Brennan was discussing earlier --

QUESTION: I can tell you what the answer would be if they had been paid and it was known they had been paid. The first question the prosecution would ask, have you been paid?

MR. HILLIER: Well, that's correct.

QUESTION: Isn't that the way it is done?

MR. HILLIER: That is the way it is done. In this case --

QUESTION: And if it is not done that way, the defendant automatically asks, are you paid?

MR. HILLIER: Well, I think --

QUESTION: Isn't that true?

MR. HILLIER: -- in the federal court we rely upon the federal prosecutor, and when he said he wasn't

paid, we accepted that response, to our detriment, and as indicated in Barbie, we don't even know if the U.S. attorney knew.

QUESTION: Is that the adversary process?

MR. HILLIER: The adversary process does not require that an attorney ask every question if the question does not appear to be relevant or that a response will not be favorable to the accused. If I ask somebody if he is being paid expecting that he is going to say no, then I am asking the wrong question, and I am hurting my client because I am reinforcing the credibility of that agent.

And even more so, in this case can you imagine the possibilities with the cross examination. Here we have an affidavit executed on May 4 saying I'm not promising anything, and on May 3rd we have an affidavit, a contract for purchase of information. Why, if that had been turned over, the possibilities for effective cross examination are immense, and it is particularly immense because there was no monetary amount --

QUESTION: If the first one had been turned over, you wouldn't have gotten those affidavits.

MR. HILLIER: Well, the affidavits would have had to have been produced under Jencks, because they were statements of the accused, or of the witnesses, so

the possibilities for cross examination, as I have indicated, are tremendous, and they are even more tremendous because there was no actual amount set forth, so we are dealing with a person who is testifying and hopes to get the most amount he can possibly get.

QUESTION: Mr. Hillier, what do you think is the standard for judging the materiality of this failure to produce? Is it the Agurs standard?

MR. HILLIER: It is the Chapman standard.

QUESTION: Why Chapman?

MR. HILLIER: Well, because we are dealing with -- Agurs simply states that when you deal with constitutional error, then you analyze it on the basis of whether it was harmless beyond a reasonable doubt. Agurs states -- Agurs does not --

QUESTION: Well, I know, but beyond a reasonable doubt, that is a harmless error standard, isn't it?

MR. HILLIER: It is a constitutional harmless error standard.

QUESTION: I mean, it says there is an error, but under Agurs there is no constitutional error at all unless the omitted evidence creates a reasonable doubt that did not otherwise exist. If the omitted evidence creates such a reasonable doubt, there is constitutional

error, and you never reach a harmless error standard. You can't reach a harmless error standard.

MR. HILLIER: The Agurs standard which you have just --

QUESTION: Isn't that the Agurs standard?

MR. HILLIER: That is the non-constitutional Agurs standard which applies in general or unspecific, or general or no request situations. Agurs states --

QUESTION: Where do you get out of Agurs that there is a different standard for a specific request?

MR. HILLIER: Agurs states where there has been a specific request, then these kinds of situations will seldom if ever be excusable, and if there is a possibility that it might --

QUESTION: All that means to me is that seldom if ever would there not be a reasonabe doubt.

MR. HILLIER: Agurs went on to indicate that if it might have affected the jury's verdict, then it is reversible error under the strict disclosure standard. That is what Agur said.

QUESTION: That is the same -- is there any difference between that and just reasonable doubt?

MR. HILLIER: Absolutely, Your Honor. I think in constitutional error cases, first of all, the prosecutor bears the burden of indicating that it was

harmless. In the opposite, in the non-constitutional situation --

QUESTION: What do you think this standard, this reasonable doubt standard I just read to you is, a constitutional error standard? I thought it was. What kind of a -- is this a non-constitutional standard?

MR. HILLIER: Within the context -- ours is a constitutional error, Your Honor, because there was a failure to provide specifically requested evidence.

QUESTION: I am asking you now under the test in Agurs for a general request.

MR. HILLIER: Yes. I agree with the Solicitor General that the analysis of that kind of error is a non-constitutional analysis.

It becomes constitutional error if the defendant is able to meet his burden of persuasion in that case of showing that notwithstanding the non-constitutional nature of the disclosure in this case, the failure to disclose, and it is non-constitutional because there is no specific request, or the prosecutor wasn't put in a position where he had to respond, or the prosecutor responded dishonestly, then the defense bears the burden of showing that it interrupted the fair trial process of that particular case.

Then it elevates to the constitutional -- then it is constitutional error, but the analysis, the standard of review is different.

QUESTION: Well, Mr. Hillier, even in Strickland, which involved a Sixth Amendment right to counsel, the standard applied was the Agurs standard of establishing a reasonable probability that but for the error, the result would have been different, and I wonder if that isn't the appropriate standard here if you are correct that there was an error.

MR. HILLIER: No, Your Honor, it would not be, because Strickland was referring to the non-constitutional error aspect of the Agurs decision. It is our position -- and Agurs indicated that to determine whether it is constitutional or non-constitutional, you look to the character of the evidence.

QUESTION: Strickland was a state case. How could it be referring to some non-constitutional standard?

MR. HILLIER: Your Honor, in order to get here, of course, we have to urge that there is constitutional error, but in reaching the determination of whether there was constitutional error, there are various standards which apply.

When there is a head-on collision with a constitutional right, such as in Gideon where you say no lawyer at all, then that is presumed, and you have that collision. There are other types of error which result from a non-constitutional basis, such as the failure to disclose in the Agurs situation, which then require a different standard of review from the court to determine whether --

QUESTION: It would still have to be a constitutional issue to reach any state case, or a federal case either.

MR. HILLIER: Sure. Yes, Your Honor. That is true.

QUESTION: It sounds to me like you are putting the cart before the horse. After you meet the standard, then you know whether there has been a constitutional error or not. You don't get here assuming there is a constitutional error. You allege there is one, but you apply the standard in order to determine whether it is. Isn't that correct?

MR. HILLIER: Yes, Your Honor.

QUESTION: Let me see if I have your position clear. If in the prosecution the only evidence from whatever source was the same evidence that this man, the defendant, gave on the stand, testifying in his own

behalf, and a jury returned a verdict of guilty, would that verdict have been assailable?

MR. HILLIER: Your Honor, under that hypothetical, we would have difficulty, but that is -- that presumes that there was not the constitutional violation, the confrontation which existed --

QUESTION: It presumes nothing. I have put a simple hypothetical here. The only evidence is the evidence that he gave, whether from his mouth or from others, and the jury accepted that and found and returned a verdict of guilty. Do you think there would be anything really wrong with that verdict?

MR. HILLIER: Well, I guess --

QUESTION: In a legal sense. Would it be assailable?

MR. HILLIER: I think that again the counsel always has a difficult time assailing the verdict of a trier of fact. What we are alleging, however, is a constitutional impediment which affected that burden, and that is why --

QUESTION: That is not in my hypothetical.

MR. HILLIER: I understand that, Your Honor. And in response to your question, of course, absent constitutional error, if a jury returns a verdict based upon evidence presented, we are going to have a

difficult time arguing to a Court of Appeals.

QUESTION: Now take the same hypothetical, but not a jury, a judge makes that finding. He could not be reversed unless it were found to be clearly erroneous. Is that not so?

MR. HILLIER: Yes, Your Honor, in the absence of a constitutional error which affected that decision, then we would --

QUESTION: Well, in my hypothetical there is no constitutional question.

MR. HILLIER: I understand that, and in response to your hypothetical --

QUESTION: A pure factual question.

MR. HILLIER: Yes.

QUESTION: Thank you.

MR. HILLIER: Thank you.

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

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. STRAUSS: One or two brief points, Mr. Chief Justice.

We discussed the affidavits, which I think are a pure red herring in our reply brief, and I won't pursue them further. We also mention in our reply brief

that in addition to the testimony of the agents, there was a search of the defendant's residence that found some controlled substances.

I have two --

QUESTION: So the evidence supporting the drug charges other than the testimony of the two witnesses at issue here consisted of testimony of the defendant himself by way of some admissions, and physical evidence obtained in a search of his residence?

MR. STRAUSS: That is right. There was also that evidence in the case, Justice O'Connor.

QUESTION: Weren't there two groups of drug charges, and weren't their testimony important on the ones he went to jail on?

MR. STRAUSS: I don't think it is clear which ones he went to jail on. He received probation which was subsequently revoked on all counts. I don't want to suggest that their testimony was unimportant on any of them. But there was additional evidence. It is a mistake to say that their testimony was the only evidence in the case.

I want to make one point about what has happened generally in this area since Agurs, and then one point about this case in particular. In Agurs, the Court specified a standard that would apply to no

request or general request cases, and the Court said that a request for all Brady material or all helpful material would be a general request.

But the Court left open the possibility that a specific request would be judged by a different standard. Now, I think what the response to that has been, and this case is an excellent example of it, is that defense counsel have tried to take the general request for all Brady material and break it down into a dozen or so abstract categories, all deals, promises, and inducements, all information casting doubt on the reliability of the witnesses, all statements.

They have tried to rephrase the general request into requests that while not as all-encompassing, when taken together cover the waterfront, and as Mr. Hillier was arguing, that was essentially the way he presented his requests.

He said, we wanted to know everything they had. We wanted to know if there was anything that would cast doubt on the testimony of these agents.

And he suggested that when the prosecutor received these discovery requests, he should have gone to the agents and said, is there anything we should let the defendant know? That is our point exactly.

These were essentially general requests that

left the prosecutor no better off than he would have been if he had just gotten a request for all Brady information or no request at all. He would have had to go to the agents and say, is there anything we should let the defendant know?

QUESTION: So the Agurs-Strickland test or standard is the appropriate one in your view?

MR. STRAUSS: Yes.

QUESTION: The brief was a little vague that the government filed, and I didn't understand what the government thought.

MR. STRAUSS: We think there are some true specific request cases where you have a truly focused specific request where an argument can be made for a more exacting standard than Agurs.

QUESTION: Do you understand Agurs and Strickland to say that there is no constitutional violation at all unless what was done or not done would have created a reasonable doubt that otherwise would not have existed?

MR. STRAUSS: That is right.

QUESTION: And so if such a doubt exists, there is no occasion or reason to reach the harmless error.

MR. STRAUSS: That's right, because then you

know the trial was unfair, and you have to have a new trial.

QUESTION: Exactly.

MR. STRAUSS: I think that is exactly right, Justice White. In fact, I realize, Justice White, I should have answered your earlier question by quoting from Agurs at Page 108, where it says precisely that.

QUESTION: Well, now, tell me what -- I thought I understood your brief to say that Agurs and the government would -- well, you say Agurs did not establish a different standard for a specific request.

MR. STRAUSS: That is right. It did not -- It left the question open.

QUESTION: Well, and I thought your brief said that the same standard should apply to specific requests.

MR. STRAUSS: We left open the possibility, as Justice O'Connor noted, that there may be some true specific request cases in which a standard more exacting than Agurs would be appropriate, althought not a beyond a reasonable doubt standard, which we think should be reserved for truly egregious cases like the --

QUESTION: Well, what if it were perfectly true in this case that the government committed -- they just perjured themselves in these affidavits? What if

it were perfectly clear? You say it isn't clear, that it was just a lot of general things.

MR. STRAUSS: I think it is clear they did not perjure themselves.

QUESTION: Yes, but what if it was clear that they did?

MR. STRAUSS: If they perjured themselves in the trial, then Giglio and Napue --

QUESTION: No, no, in these affidavits.

MR. STRAUSS: I think that would probably not even be a Brady question. I think that would be a more general fairness problem. It would be as if the prosecutor lied to the defense counsel in a series of colloquies or in some other way took steps to mislead him. It would present a fairness problem, but not one that really lends itself to Brady and Agurs.

QUESTION: Would you approach it from the standpoint of a fair trial issue?

MR. STRAUSS: Yes. That's right.

QUESTION: You would, still would?

MR. STRAUSS: Yes.

QUESTION: Not just some supervisory way of censoring the prosecutor?

MR. STRAUSS: It might be appropriate to censor the prosecutor as well. I think there may be

cases in which prosecutorial misleading of the defense would reach a level to call the fairness of the trial into question.

I see my time is up. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:18 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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BY Paul A. Richardson

(REPORTER)