In *United States v. Agurs*,[1095] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. First, as noted, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[1096] Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it,[1097] the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[1098] Third (the new law created in *Agurs*), if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence. Under this third prong, if the prosecutor did not reveal the relevant information, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[1099]

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a *Brady* inquiry by requiring a reviewing court to establish the appropriate

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where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case). The beginning in *Brady* toward a general requirement of criminal discovery was not carried forward. *See* the division of opinion in Giles v. Maryland, 386 U.S. 66 (1967).

In Cone v. Bell, 556 U.S. ___, No. 07–1114, slip op. at 23, 27 (2009), the Court emphasized the distinction between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment, and concluded that, although the evidence that had been suppressed was not material to the defendant's conviction, the lower courts had erred in failing to assess its effect with respect to the defendant's capital sentence.

[1095] 427 U.S. 97 (1976).

[1096] 427 U.S. at 103–04. This situation is the Mooney v. Holohan-type of case.

[1097] A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283–84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

[1098] 427 U.S. at 104–06. This the *Brady* situation.

[1099] 427 U.S. at 106–14. This was the *Agurs* fact situation. Similarly, there is no obligation that law enforcement officials preserve breath samples that have been used in a breath-analysis test; to meet the *Agurs* materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant's due process rights absent bad faith on the part of the police); Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).