

# The Burger Court Opinion Writing Database

## *United States v. Bagley*

473 U.S. 667 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 21, 1985

Re: No. 84-48 - United States v. Bagley

Dear Harry:

I have deferred action waiting on the exchanges with Byron, et. al., but it is probable that I will join.

Regards,

A handwritten signature in cursive script, appearing to read "WB", is written below the typed word "Regards,".

Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 25, 1985

Re: No. 84-48 - United States v. Bagley

Dear Byron:

Please show me as joining you.

Regards,

A handwritten signature in black ink, appearing to read "W. E. B.", likely representing Warren E. Burger.

Justice White

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 1, 1985

No. 84-48

United States v. Bagley

Dear Thurgood,

You and I are in dissent in this.  
Will you take it on?

Sincerely,

Justice Marshall

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 18, 1985

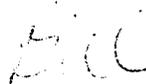
No. 84-48

United States v. Bagley

Dear Thurgood,

Please join me.

Sincerely,



Justice Marshall

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 12, 1985

84-48 - United States v. Bagley

Dear Harry,

I am awaiting the dissent in this case.

Sincerely yours,



Justice Blackmun  
Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 18, 1985

Re: 84-48, United States v. Bagley

Dear Harry,

I agree with what I take to be the central holding of your opinion in this case, namely:

"We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover all instances of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."  
Circulating draft, at 14.

I agree with you that this standard is in line with our precedents in this area and represents a reasonable accommodation of the interests at stake. To me, however, the discussion following the announcement of the standard on p. 14 undermines the clarity of the opinion. Instead of the single standard of materiality suggested on p. 14, the opinion at 15-17 (and particularly at 17) seems to adopt a sliding scale of materiality, depending in part on whether there was a "specific request," a "general request," or no request at all. I have two problems with this discussion. First, it strikes me as more confusing and difficult to apply in practice than the simple reasonable probability standard suggested on p. 14. Second, I think that when the issue is framed as one of materiality, the nature of the defendant's request is of dubious relevance: the focus should be primarily on the nature of the evidence itself, and evidence does not necessarily become more material simply by virtue of having been requested. The discussion on pp. 15-17, however, seems to suggest that there will always be some sort of a thumb on the scales in favor of the defendant when there has been something like a specific request. Although I can conceive of situations in which the denial of a specific request might have effects on defense strategy that would be more prejudicial to a defendant than simple nondisclosure absent a request, it does not seem to me that this would always be the case.

For these reasons, I would be more comfortable if the standard were simply announced as one of "reasonable likelihood" and the discussion of the relevance of the nature of the request were omitted. This simpler standard would, I think, be flexible enough to allow lower courts to take into account the particular circumstances of nondisclosure where it could be shown that the

- June 18, 1985 -

circumstances increased the likelihood of prejudice to the defendant. However, it would avoid what seems to me to be the implication of your current pp. 15-17: namely, that materiality should always be judged on the basis of a sliding scale under which a more specific request itself suffices to transform immaterial evidence into material matter that should have been produced.

Perhaps you cannot see your way clear to accommodating these concerns. If not, I shall circulate a brief opinion concurring in the judgment.

Sincerely yours,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R WHITE

June 24, 1985

84-48 - United States v. Bagley

Dear Harry,

I have sent the attached concurrence to  
the printer.

Sincerely yours,



Justice Blackmun

Copies to the Conference

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: 6/24/85

Recirculated: \_\_\_\_\_

No. 84-48 - UNITED STATES v. BAGLEY

JUSTICE WHITE, concurring in part and concurring in the judgment.

I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was "material," and I therefore join Parts I and II of the Court's opinion. I also agree that for purposes of this inquiry, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Ante, at 14. As the Court correctly observes, this standard is "sufficiently flexible" to cover all instances of prosecutorial failure to disclose evidence favorable

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 24, 1985

84-48 - United States v. Bagley

Dear Harry,

I can join the first 13-1/2 pages of your second draft, that is, down to the end of the first full paragraph on page 14. The remainder of the opinion gives me trouble. I would rather just state the standard as you do and remand for reconsideration under that standard. This would omit the specific request discussion and would not suggest to the Court of Appeals what the answer on reconsideration should be.

As it now stands, I shall file a brief opinion concurring in the judgment.

Sincerely yours,



Justice Blackmun

Copies to the Conference

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: 6/26/85

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.*  
HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1985]  
the CHIEF JUSTICE and

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins,  
concurring in part and concurring in the judgment.

I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was "material," and I therefore join Parts I and II of the Court's opinion. I also agree that for purposes of this inquiry, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ante*, at 14. As the Court correctly observes, this standard is "sufficiently flexible" to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. *Ibid*. Given the flexibility of the standard and the inherently fact-bound nature of the cases to which it will be applied, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case. I would hold simply that the proper standard is one of reasonable probability and that the Court of Appeals' failure to apply this standard necessitates reversal. I therefore concur in the judgment.

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: \_\_\_\_\_

Recirculated: JUN 27 1985

## SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.*  
HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[July 2, 1985]

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was "material," and I therefore join Parts I and II of the Court's opinion. I also agree with JUSTICE BLACKMUN that for purposes of this inquiry, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ante*, at 14. As the Justice correctly observes, this standard is "sufficiently flexible" to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. *Ibid.* Given the flexibility of the standard and the inherently fact-bound nature of the cases to which it will be applied, however, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case. I would hold simply that the proper standard is one of reasonable probability and that the Court of Appeals' failure to apply this standard necessitates reversal. I therefore concur in the judgment.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 28, 1985

Re: No. 84-48-U.S. v. Bagley

Dear Harry:

"In due course" I hope to circulate a dissent  
in this one.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: JUN 14 1985

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.* HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE MARSHALL, dissenting.

When the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose can not be deemed harmless error. Because that is precisely the nature of the undisclosed evidence in this case, I would affirm the judgment of the Court of Appeals and would not remand for further proceedings.

### I

The federal grand jury indicted the respondent, Hughes Anderson Bagley, on charges involving possession of firearms and controlled substances with intent to distribute. Following a bench trial, Bagley was found not guilty of the firearms charges, guilty of two counts of knowingly and intentionally distributing Valium, and guilty of several counts of a lesser included offense of possession of controlled substances. He was sentenced to six months' imprisonment and a special parole term of five years on the first count of distribution, and to three years of imprisonment, which were suspended, and five years' probation, on the second distribution count. He received a suspended sentence and five years' probation for the possession convictions.

The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Government's entire case hinged on the testimony of two private

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STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JUN 21 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.* HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

When the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose cannot be deemed harmless error. Because that is precisely the nature of the undisclosed evidence in this case, I would affirm the judgment of the Court of Appeals and would not remand for further proceedings.

I

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The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Gov-

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Pp. 6, 21, 24

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JUN 27 1985

SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.* HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 2, 1985]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

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The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Gov-

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Blackmun

Circulated: MAY 25 1985

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.*  
HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May —, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Brady v. Maryland*, 373 U. S. 83, 87 (1963), this Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.” The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

“The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, and any deals, promises or inducements made to witnesses in exchange for their testimony.” App. 18.<sup>1</sup>

<sup>1</sup> In addition, ¶ 10(b) of the motion requested “[p]romises or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity,

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 18, 1985

Re: No. 84-48, United States v. Bagley.

Dear Byron:

Thank you for your helpful letter of today. I feel confident that I can accommodate your concerns, and I would hope that in doing so I would not cause John and Sandra, who already have joined, to defect. I shall have something around to you within a couple of days.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

Grant

June 24, 1985

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 84-48, United States v. Bagley

Three cases are being held for Bagley.

3. No. 84-1279, Delaware v. Van Arsdall. Following a jury trial in the Superior Court, Kent County, Delaware, respondent was convicted of first degree murder and possession of a deadly weapon during the commission of a felony. On appeal, respondent argued that the trial court erred in ruling that he could not question a government witness, Robert Fleetwood, about Fleetwood's prior arrest and about a previous occasion on which Fleetwood had been questioned by a detective. Respondent contended that this ruling denied him the opportunity to expose Fleetwood's possible bias in testifying for the State and also deprived him of his right to confront the witnesses against him, in violation of the United States and Delaware Constitutions. The Supreme Court of Delaware reversed respondent's conviction, holding that "under the circumstances of this case, where the defendant was subjected to a blanket prohibition against exploring potential bias through cross-examination, the trial court committed a per se error. Consequently, the actual prejudicial impact of such an error is not examined and reversal is mandated." App. to Pet. for Cert. A-7.

The opinion in Bagley distinguishes the situation in which the prosecutor fails to disclose evidence that could be used to impeach a government witness from the situation in which the trial court directly restricts the scope of cross-examination of a government witness. The opinion rejects the use of an automatic reversal rule in the former situation. Delaware v. Van Arsdall involves the latter situation, and is not governed by Bagley. The Conference should decide whether to grant certiorari in Delaware v. Van Arsdall without regard to the fact that it was held for Bagley.

HAB.

Grant

This is a very important issue and there is a conflict.

- Dan

STYLISTIC CHANGES

pp. 14-16

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

Circulated: \_\_\_\_\_

Recirculated: JUN 24 1985

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.*  
HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Brady v. Maryland*, 373 U. S. 83, 87 (1963), this Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.” The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

### I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

“The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, and any deals, promises or inducements made to witnesses in exchange for their testimony.” App. 18.<sup>1</sup>

<sup>1</sup>In addition, ¶ 10(b) of the motion requested “[p]romises or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity,

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 25, 1985

Re: No. 84-48, United States v. Bagley

Dear Byron:

As I indicated this morning at conference, I shall stand on my second draft circulated June 24. Apparently, John now will withdraw his original joinder. Sandra continues her joinder. With your (and with Bill Rehnquist's) joins in Parts I and II, there is a Court for those parts of the opinion, however the Chief Justice votes on the side to reverse.

Sincerely,

Justice White

cc: The Conference

4.1

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

Circulated: \_\_\_\_\_

Recirculated: JUN 26 1985

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-48

UNITED STATES, PETITIONER *v.*  
HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

In *Brady v. Maryland*, 373 U. S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

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<sup>1</sup>In addition, ¶ 10(b) of the motion requested "[p]romises or representations made to any persons the government intends to call as witnesses at

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 28, 1985

Re: No. 84-48, United States v. Bagley

Dear John:

I shall not write in response to your dissent. Thus, the case apparently is ready to come down on Tuesday.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 18, 1985

Re: No. 84-48 United States v. Bagley

Dear Harry,

I have held off joining your circulating draft in this case for much the same reason expressed by Byron in his letter to you of June 18th. If you can accommodate his suggestion, I will be happy to join; if not, and he writes separately along the lines of his letter, I will probably join that.

Sincerely,



Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 24, 1985

Re: No. 84-48 United States v. Bagley

Dear Harry,

As presently advised I agree with Byron's letter of June 24th  
in this case.

Sincerely,



Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 24, 1985

Re: 84-48 - United States v. Bagley

Dear Byron:

Please join me in your separate concurrence in this case.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 28, 1985

Re: U.S. v. Bagley, 84-48

Dear Harry:

Please join me.

Respectfully,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 24, 1985

Re: 84-48 - United States v. Bagley

Dear Harry:

Although I joined your first draft, I find that I am unable to join the revision. Since Byron is writing separately in any event, perhaps you will decide to return to the original draft.

Respectfully,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 26, 1985

Re: 84-48 - United States v. Bagley

Dear Harry:

When you decided to adhere to your second draft and therefore gave me the opportunity, as well as the duty, to restudy the case in order to prepare a separate statement of my views, I found that I no longer will be able to concur in the judgment because I believe the standard you announce amounts to a partial rejection of the rule of Brady v. Maryland. The standard of reversal under Brady is precisely the same as that under the knowing use of perjury testimony cases. I have sketched out a rough draft of my views, which I will try and circulate within the next day or two.

Respectfully,



Justice Blackmun

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

1st DRAFT

Jun 28

SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.*  
HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE STEVENS, dissenting.

This case involves a straightforward application of the rule announced in *Brady v. Maryland*, 373 U. S. 83 (1963), a case involving nondisclosure of material evidence by the prosecution in response to a specific request from the defense. I agree that the Court of Appeals misdescribed that rule, see *ante*, at 6-10, but I respectfully dissent from the Court's unwarranted decision to rewrite the rule itself.

As the Court correctly notes at the outset of its opinion, *ante*, at 6, the holding in *Brady* was that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." 373 U. S., at 87. We noted in *United States v. Agurs*, 427 U. S. 97, 103 (1976), that the rule of *Brady* arguably might apply in three different situations involving the discovery, after trial, of evidence that had been known prior to trial to the prosecution but not the defense. Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third.

The two situations in which the rule applies are those demonstrating the prosecution's knowing use of perjured testimony, exemplified by *Mooney v. Holohan*, 294 U. S. 103 (1935), and the prosecution's suppression of favorable evidence specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's deliberate

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STYLISTIC CHANGES THROUGHOUT.  
6

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

Circulated: \_\_\_\_\_  
Recirculated: \_\_\_\_\_ JUL 1 1985

# SUPREME COURT OF THE UNITED STATES

No. 84-48

UNITED STATES, PETITIONER *v.*  
HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[July 2, 1985]

JUSTICE STEVENS, dissenting.

This case involves a straightforward application of the rule announced in *Brady v. Maryland*, 373 U. S. 83 (1963), a case involving nondisclosure of material evidence by the prosecution in response to a specific request from the defense. I agree that the Court of Appeals misdescribed that rule, see *ante*, at 6-10, but I respectfully dissent from the Court's unwarranted decision to rewrite the rule itself.

As the Court correctly notes at the outset of its opinion, *ante*, at 6, the holding in *Brady* was that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." 373 U. S., at 87. We noted in *United States v. Agurs*, 427 U. S. 97, 103 (1976), that the rule of *Brady* arguably might apply in three different situations involving the discovery, after trial, of evidence that had been known prior to trial to the prosecution but not to the defense. Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third.

The two situations in which the rule applies are those demonstrating the prosecution's knowing use of perjured testimony, exemplified by *Mooney v. Holohan*, 294 U. S. 103 (1935), and the prosecution's suppression of favorable evidence specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's deliberate



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

Supreme Court of the United States  
Washington, D. C. 20543

May 28, 1985

No. 84-48 U. S. v. Bagley

Dear Harry,

Please join me.

Sincerely,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 18, 1985

No. 84-48 United States v. Bagley

Dear Harry,

I find Byron's suggestions to be valid and I have no objection to any changes in the circulating opinion to incorporate them.

Sincerely,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 25, 1985

No. 84-48 United States v. Bagley

Dear Harry,

I prefer your second draft to the first, but I recognize the present lineup of the votes makes it difficult for you to garner a Court. I will continue to be a "join" under either version of your opinion.

Sincerely,



Justice Blackmun

Copies to the Conference