COURT OF APPEALS OF NEW YORK

People v. Fuentes[1]
(decided April 7, 2009)

Jose Fuentes was convicted of first degree rape and first degree sodomy.[2] The defense counsel moved to set aside the verdict arguing that a *Brady* violation occurred because the prosecutor suppressed a record of consultation of the victim. Pursuant to New York's Criminal Procedure Law ("CPL") section 33.30[1],[3], the defense counsel argued that a *Brady* violation required a reversal of the defendant's conviction and the granting of a new trial because the defendant's Due Process rights under the United States Constitution[3] and New York State Constitution[4] were violated.[5] The trial court denied the motion holding that "the outcome of the trial [would not have changed] as the [record of consultation] did not materially bear on [the] defendant's guilt or innocence."[6]

Furthermore, the trial court found that the defendant received the consultation note during the trial; therefore, the defendant could have utilized it as he saw fit.[7] Fuentes appealed to the Appellate Division, Second Department, which affirmed the trial court's decision and held that the defendant was "given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case."[8] Fuentes then requested leave to appeal from the New York Court of Appeals, which granted his request on the issue of whether the defendant suffered a *Brady* vi-

[1] People v. Fuentes *(Fuentes I)*, 907 N.E.2d 286 (N.Y. 2009).

[2] *Id.* at 289.

[3] U.S. CONST. amend. V, states, in pertinent part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

[4] N.Y. CONST. art. 1, § 6, states, in pertinent part: "[n]o person shall be deprived of life, liberty or property without due process of law."

[5] *Fuentes I*, 907 N.E.2d at 289.

[6] *Id.*

[7] *Id.*

[8] *Id.* (quoting People v. Fuentes (*Fuentes II*), 851 N.Y.S.2d 628, 628 (App. Div. 2d Dep't. 2008)).

olation when a record of consultation prepared by the hospital psychiatrist was not disclosed.[9]

The incident occurred on January 27, 2002, and there were two accounts as to what occurred in the hours leading to the crime in question.[10] The victim claims that the evening prior, she took a train home to Brooklyn with her friend and her friend's mother after visiting an arcade near Times Square.[11] While walking home, Fuentes followed the victim into her building and into the building's elevator.[12] Once the two were alone in the elevator, Fuentes placed a knife to the victim's neck and threatened to cut her if she did not cooperate.[13] Fuentes then led the victim to the roof where he raped and sodomized her.[14] Shortly thereafter, Fuentes forced the victim to walk with him to the subway where he talked with her, shut off her cell phone, wiped the exterior clean, and told her not to call anyone or report the incident to the police.[15] For several hours the victim did not tell anyone out of fear, but eventually she went to a friend's home, disclosed what occurred, and sought medical attention.[16] At the hospital, a rape kit was administered and psychiatric evaluation was conducted on the victim.[17] The police also interviewed the victim.[18]

Fuentes recounts a different version of the events on the evening in question. According to Fuentes, he and two other friends met the victim at an arcade in Times Square that evening.[19] As the night was winding down, the two proceeded to the subway where they both took a train to Brooklyn where the victim lived. [20] Shortly thereafter, the victim led Fuentes to the roof of her apartment where the victim proceeded to be "sexually aggressive," and eventually "had consensual sexual intercourse."[21] Fuentes maintains that the victim volunta-

[9] *Id.* at 287, 289.
[10] *Fuentes I*, 907 N.E.2d at 287.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Fuentes I*, 907 N.E.2d at 287.
[16] *Id.* at 287-88.
[17] *Id.* at 288.
[18] *Id.*
[19] *Id.*
[20] *Fuentes I*, 907 N.E.2d at 288.
[21] *Id.*

rily walked with him to the subway after having "consensual sexual intercourse," but became extremely upset when he said that he did not want to see her anymore.[22] The victim told Fuentes that he would regret not wanting to see her anymore.[23]

Prior to trial, the victim's medical records were disclosed to defense counsel as the prosecution has an "open file discovery agreement;"[24] however, this did not contain the record of consultation drafted by the hospital's psychiatrist.[25] At trial, a private investigator testified that the victim previously corroborated Fuentes' version of the events, but the investigator never made a record of the interview with the victim.[26] However, in 2004, two years later, the medical examiner issued a report concluding that the sample taken from the rape kit matched Fuentes' DNA.[27]

During trial, these records were admitted into evidence.[28] However, the one-page record of consultation drafted by the hospital's psychiatrist, which was *not* previously disclosed, was also admitted into evidence along with the disclosed documents.[29] Since the defense counsel had no knowledge of this report until summation, the defense counsel did not cross-examine any of the prosecution's witnesses regarding the psychiatrist's report.[30] However, upon discovery of the document at summation, the defense counsel demanded a mistrial.[31] The prosecution claims that it did not disclose the document because they thought that it was privileged.[32] The court did not grant the mistrial, but removed the undisclosed consultation note from the record so that the prosecution could not utilize it on closing, and therefore the jury would never see or hear of the document.[33]

The Due Process Clause in the Fourteenth Amendment of the

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Fuentes I*, 907 N.E.2d at 288.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Fuentes I*, 907 N.E.2d at 288.
[31] *Id.*
[32] *Id.* at 288-89.
[33] *Id.*

United States Constitution[34] guarantees "a criminal defendant the right to discover favorable evidence in the People's possession material to guilt or punishment."[35] The touchstone of the Due Process Clause is fairness, and it gives criminal defendants the right to obtain exculpatory evidence.[36] There are three elements to establish a *Brady* violation:[37] "(1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material."[38]

The first element will be satisfied depending upon the facts of the case. What is exculpatory or impeaching is likely to be a case-by-case determination.[39] The second element is satisfied even if the suppression is not willful or inadvertent because it is not the intent of the prosecution that determines a *Brady* violation, rather the character of the evidence.[40] The third element is analyzed under a "reasonable probability" standard, which holds that "undisclosed evidence is material only if there is a 'reasonable probability' that it 'would' have altered the outcome of the trial; a reasonable probability is 'a probability sufficient to undermine confidence in the outcome.' "[41]

Additionally, a *Brady* violation prevents a fair trial under the Sixth Amendment since the criminal defendant is entitled to any ex-

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[34] U.S. CONST. amend. V, states, in pertinent part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

[35] *Fuentes I*, 907 N.E.2d at 289.

[36] *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

> [I]f a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty . . . [s]uch a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Id.

[37] *Fuentes I*, 907 N.E.2d at 289.

[38] *Id.*

[39] *Cf.* People v. Irizarry, No. 6676-2006, 2009 WL 1758769, at *3 (N.Y. Sup. Ct. June 15, 2009) (finding that the ballistics' evidence found upon Irizarry did not exculpate Trujillo and Castillo since the prosecution's theory was that they were acting in concert).

[40] Strickler v. Greene, 527 U.S. 263, 281-82 (1999); United States v. Agurs, 427 U.S. 97, 110 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

[41] People v. Vilardi, 555 N.E.2d 915, 918 (N.Y. 1990) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

culpatory or impeachment evidence.[42] Most *Brady* violations are never discovered; therefore, there are no remedial measures.[43] Thus, the criminal justice system is harmed as a whole because the lack of a fair trial inhibits the ability to discern the innocent from the guilty.[44] *Brady* violations are serious in nature because if certain material is not produced, it represents to the defense that the evidence does not exist, and, as a result, the defense might change its tactics, strategies, and decisions based upon the non existence of a piece of evidence.[45]

In *Brady v. Maryland*, John Brady and Donald Boblit were both convicted of first degree murder and sentenced to the death penalty.[46] Brady's argument was that although he participated in the crime, he did not do the actual killing and should not receive the death penalty.[47] Prior to trial, Brady's counsel requested all extrajudicial statements made by Boblit.[48] Brady appealed his conviction, but the Maryland Court of Appeals affirmed his conviction.[49] It was not until after the Maryland Court of Appeals affirmed Brady's conviction that Brady discovered a statement given by Boblit on July 9, 1958, where Boblit admitted to doing the actual killing.[50] This statement was never disclosed to Brady or his counsel.[51] As a result, Brady's counsel petitioned the trial court for post-conviction relief.[52] The trial court dismissed the petition; however, Brady's counsel appealed, and the Maryland Court of Appeals held that the "suppression of the evidence by the prosecution denied [Brady] due process of law."[53] Consequently, the Maryland Court of Appeals remanded to case for retrial on the issue of sentencing alone.[54] Brady appealed to the United States Supreme Court arguing that the remand should be

[42] Elizabeth Napier Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1452 (2006).
[43] *Id.*
[44] *Id.*
[45] *Bagley*, 473 U.S. at 682.
[46] *Brady*, 373 U.S. at 84.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 84-85.
[50] *Id.* at 84.
[51] *Brady*, 373 U.S. at 84.
[52] *Id.* at 84-85.
[53] *Id.* at 85.
[54] *Id.*

regarding the conviction as well as the sentencing.[55]

The Court explained in *Brady* that when "[the] prosecution . . . withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty . . . that does not comport with standards of justice."[56] However, the fact that the confession would not have reduced the offense to anything below first degree murder illustrates the lack of prejudice suffered by Brady when the confession was withheld in a trial of his guilt.[57] The confession clearly implicated Brady, even though it illustrates that Boblit did the killing.[58] The Supreme Court noted the severity of such suppression by stating that such "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[59] The Court held that it was proper for Brady to receive a new hearing regarding sentencing and not on the issue of guilt because the failure to disclose the confession only prejudiced the sentencing hearing.[60]

Nearly forty years later, the Supreme Court revisited *Brady* in *Strickler v. Greene*.[61] In Strickler, the defendant, Tommy Strickler was found guilty of abduction, robbery, and capital murder.[62] On January 5, 1990, Leanne Whitlock was abducted from a local shopping center and murdered.[63] Anne Stoltzfus was a main witness and provided extensive testimony, based on her observations on January 5, 1990.[64] On the day of the crime, Stoltzfus claims to have seen Strickler, Henderson, and a blond Caucasian woman in the local shopping mall in addition to seeing the abduction in the parking lot of the shopping mall.[65] After a conflict in the parking lot between Strickler, Henderson, and Whitlock, Stoltzfus claims to have had her

[55] *See id.*

[56] *Brady*, 373 U.S. at 87-88.

[57] *Id.* at 88.

[58] *See id.* at 84, 88.

[59] *Id.* at 87.

[60] *Id.* at 88.

[61] Strickler v. Greene, 527 U.S. 263 (1999).

[62] *Id.* at 277. Mr. Ronald Henderson, a co-defendant, was also convicted of murder, but he did not receive the death penalty. *Id.* at 266.

[63] *Id.*

[64] *Id.*

[65] *Strickler*, 527 U.S. at 270.

daughter write down the license plate number of the car.[66] Throughout the trial, Stoltzfus asserts that she has an "exceptionally good memory."[67]

After being convicted of capital murder, Strickler filed a writ of habeas corpus to vacate the capital murder conviction arguing that he did not receive a fair trial since the prosecution withheld *Brady* material.[68] Strickler argues that letters Stoltzfus wrote to Detective Claytor along with Claytor's notes of his interviews with Stoltzfus should have been disclosed because they are *Brady* material.[69] Strickler contends that the use of these documents would have allowed Strickler to impeach significant parts of Stoltzfus' testimony, and the inability to do so has prejudiced the jury's finding of Strickler's guilt.[70] The United States District Court explained that Strickler "had no independent access to this material and the Commonwealth repeatedly withheld it throughout [Strickler's] state habeas proceedings."[71] Since the failure to disclose these documents was "sufficiently prejudicial to undermine the confidence in the jury's verdict," the district court found a *Brady* violation and vacated the capital murder conviction.[72] However, the United States Court of Appeals for the Fourth Circuit reversed because Strickler never argued a *Brady* violation at his trial or at a state collateral proceeding.[73] The court of appeals considered this argument to be available to Strickler during the state proceedings because he "should have known of such claims through the exercise of reasonable diligence."[74] Additionally, the court of appeals found Strickler's allegation of a *Brady* violation to be without any merit since the requirement of prejudice could not be satisfied; Strickler appealed to the United States Supreme Court.[75]

The subject of Strickler's claim for a *Brady* violation are eight

[66] *Id.* at 272.
[67] *Id.* at 273.
[68] *Id.* at 265.
[69] *See id* at 266, 273.
[70] *Strickler*, 527 U.S. at 266.
[71] *Id.* at 278.
[72] *Id.* at 279.
[73] *Id.*
[74] *Id.*
[75] *Strickler*, 527 U.S. at 280.

exhibits, which were undisclosed.[76] Exhibit one is a note by Detective Claytor, dated January 19, 1990, and explains that Stoltzfus could only identify the Caucasian female.[77] Exhibit two is a summary by Detective Claytor of his interview with Stoltzfus on January 19, 1990 and January 20, 1990.[78] During this interview, Stoltzfus explains that she is unsure if she could identify the Caucasian males that she saw on January 5, 1990 at the shopping mall.[79] Exhibit three is a summary of the abduction.[80] Exhibit four is a letter from Stoltzfus to Detective Claytor where Stoltzfus claims to have clarified some of her confusions by conversing with her daughter, but that she is still having problems remembering.[81] Exhibit five is a letter from Stoltzfus to Detective Claytor where she describes the Whitlock's car, but does not give the license plate number that her daughter allegedly wrote on a piece of paper.[82] Exhibit six is a letter from Stoltzfus to Detective Claytor, dated January 25, 1990, where she explains that after spending time with Whitlock's boyfriend, she is able to clearly identify Whitlock as the victim.[83] Exhibit seven is a letter from Stoltzfus to Detective Claytor, dated January 16, 1990, where she thanks him for being patient in handling her "muddled memories" and that she "never would have made any of the associations that [Detective Claytor] helped [her] make."[84] Finally, exhibit eight was undated, but it summarized the events that Stoltzfus testified to and explained that she did not think anything of throwing out the card, which contained the license plate number of the car that Strickler, Henderson, and Whitlock got into.[85]

These exhibits are significant as they demonstrate the progression Stolzfus made from the time of investigation until she testified against Strickler at trial. Looking at these exhibits together illustrates that Stolzfus started off extremely uncertain about the identity

[76] *Id.* at 273.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Strickler*, 527 U.S. at 274.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Strickler*, 527 U.S. at 275.

of the Caucasian female and the alleged perpetrators. However, as time progresses, it is evident that Stolzfus remembered additional information at the suggestion of her daughter, Whitlock's boyfriend, and Detective Claytor. This information would have been beneficial to the defense in attacking the credibility of Stolzfus on cross-examination as it seems she was unduly influenced

The Supreme Court explained that the duty to disclose evidence to the criminal defendant pertains to exculpatory and impeachment evidence.[86] This duty applies even though the criminal defendant has made no request for the evidence.[87] As a result, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf."[88] This includes evidence known only by the police and/or investigators.[89] The prosecution represents the government and is under a duty to seek justice not convictions.[90]

In this case, the Supreme Court found that the undisclosed material could have been used to impeach Stoltzfus because there is an extreme conflict "between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial perception of the event 'as a trial episode of college kids carrying on' that her daughter did not even notice."[91] Thus, the first element of a *Brady* violation, which requires favorable exculpatory or impeaching evidence, was satisfied.[92] The second element of suppression by the prosecution is satisfied as well, since the prosecution knew of a few of the documents, and should have used due diligence to discover the remaining documents from the detective on the case and disclose them to the defendant.[93] By using open file discovery and not seeking out these files, the prosecution represented to Strickler that this type of evidence did not exist.[94] For documents as significant as these, this is likely to have altered Strickler's approach, strategies,

[86] *Id.* at 280.
[87] *Id.*
[88] *Id.* at 281.
[89] *Id.* at 280-81.
[90] *Strickler*, 527 U.S. at 281.
[91] *Id.* at 282.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 285.

and tactics at trial.

Regarding the third element of prejudice, the Supreme Court held that the court of appeals was incorrect in finding that without the undisclosed evidence, the remaining evidence was sufficient to warrant a conviction by the jury.[95] In deciding the prejudice component of a *Brady* violation, the Court asks whether Strickler received a fair trial that resulted in a "verdict worthy of confidence" without the evidence.[96] In order to do so, a court may not look to the disclosed evidence in a vacuum, but must determine whether the undisclosed evidence would put the case in a different light.[97] If this new light would undermine confidence in the verdict, then there must be a reversal so that this undisclosed evidence may be considered to ensure a fair trial.[98] Thus, the Court found that the non-disclosure of these documents was not prejudicial because there was only a "reasonable possibility" and not a "reasonable probability" that this evidence would have affected the outcome of the trial.[99] The fact that Strickler was the one seen driving the car, he kept the car, and he threatened Henderson with a knife the same evening would allow the jury to conclude that he was leader of the crime.[100] Alternatively, Strickler could still be guilty of capital murder even without proof that he was the dominant partner.[101] Finally, the forensic evidence linking Strickler to the crime and the need for two people to hold down Whitlock and lift the rock demonstrates that there was a joint partnership in murdering Whitlock.[102] Since the third element for a *Brady* violation could not be satisfied, the Supreme Court held that Strickler's conviction and sentencing remained valid.[103]

The New York State Constitution also guarantees "a criminal defendant the right to discover favorable evidence in the People's

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[95] *Strickler*, 527 U.S. at 290.

[96] *Id.* at 289-90.

[97] *Id.* at 290 ([T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' ").

[98] *Id.*

[99] *Id.* at 291.

[100] *Strickler*, 527 U.S. at 292.

[101] *Id.*

[102] *Id.* at 293.

[103] *Id.* at 296.

possession material to guilt or punishment."[104] This guarantee gives criminal defendants the right to discover exculpatory evidence under the Due Process Clause of the New York State Constitution.[105] In New York, the requirement for a *Brady* violation is substantially similar to the federal court's requirements, except for the third element regarding materiality. The New York Court of Appeals treats *Brady* violations differently than in the federal context.[106] The federal system uses the "reasonable probability" standard in analyzing the materiality of *Brady* material that has been suppressed.[107] In *United States v. Agurs*, the Supreme Court of the United States announced a two-tiered materiality standard when analyzing *Brady* violations.[108] The first tier dealt with evidence that the defendant specifically requested.[109] If suppressed, this evidence is material resulting in a deprivation of due process of law if it "might have affected the outcome of the trial."[110] For the second tier, general requests or no requests, the prosecution's duty to disclose is based upon the nature of the evidence, and the evidence must be disclosed if it would create "a reasonable doubt that did not otherwise exist."[111] However, in *United States v. Bagley*, the Supreme Court leaves the two-tiered materiality standard set forth in *United States v. Agurs* and adopts the "reasonable probability" standard for *Brady* violations.[112] In *People v. Vilar-*

[104] *Fuentes I*, 907 N.E.2d at 289.

[105] See *id*; N.Y. CONST. art. 1, § 6, states, in pertinent part: "[n]o person shall be deprived of life, liberty or property without due process of law."

[106] Michele Kligman, *New York State Constitutional Decisions: 2006 Compilation Due Process Supreme Court of New York Appellate Division, Third Department*, People v. Rivette, 22 TOURO L. REV. 61, 65 (2006) (discussing New York's refusal to adopt the "reasonable probability" standard for analyzing *Brady* violations).

[107] *Vilardi*, 555 N.E.2d at 920.

[108] Kligman, *supra* note 106, at 64.

[109] *Vilardi*, 555 N.E.2d at 917-18.

[110] *Id.* (quoting *Agurs*, 427 U.S. at 104).

[111] *Id.* at 918 (quoting *Agurs*, 427 U.S. at 112).

[112] *See* United States v. Bagley, 473 U.S. 667, 681-82 (1985).

> [T]he *Strickland* . . . test for materiality [is] sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose [*Brady* material]: 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.

Id.

di, the New York Court of Appeals refused to adopt the "reasonably probability" standard.[113] The court altered the two tiered standard set out in *United States v. Agurs* and held that undisclosed "evidence is material if there is a 'reasonable possibility' that the failure to disclose the exculpatory [evidence] contributed to the verdict."[114]

In *People v. Hunter*,[115] Burton Hunter was convicted of first degree sodomy.[116] As in most criminal trials, *Hunter* had two different versions of the events. According to the victim, on December 9, 2001, she met Hunter and went to his home to watch a movie.[117] When she was at his home, the victim claims that he performed sexual intercourse and oral sex on her without her consent.[118] Hunter claims that only oral sex took place and that when the victim said no he stopped.[119] After he stopped, Hunter claims that she put on her cloths and ran out of the house.[120] He followed her to see what was wrong, and she told him that he raped her.[121] It is undisputed that immediately thereafter the victim told her friend and her mother that Hunter had raped her.[122]

After Hunter's trial, he discovered that another man, Parker, had been indicted for raping the victim as well.[123] The alleged rape of the victim by Parker took place ten months after the alleged rape of the victim by Hunter, and one month before Hunter's trial.[124] On May 27, 2003, Parker plead guilty to raping the victim.[125]

As a result of this discovery, Hunter moved pursuant to CPL section 440.10 to set aside his conviction, arguing that the prosecution's failure to disclose that the victim claimed another man had raped her was a *Brady* violation.[126] The prosecutor conceded that he

[113] Kligman, *supra* note 106 at 65.
[114] People v. Burnette, 612 N.Y.S.2d 774, 778 (Sup. Ct. N.Y. County 1994).
[115] People v. Hunter, 892 N.E.2d 365 (N.Y. 2008).
[116] *Id.* at 367.
[117] *Id.* at 366.
[118] *Id.*
[119] *Id.*
[120] *Hunter*, 892 N.E.2d at 366.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 367.
[124] *Id.*
[125] *Hunter*, 892 N.E.2d at 367.
[126] *Id.*

learned of the accusation prior to Hunter's trial.[127] The county court set aside Hunter's conviction holding that there was a *Brady* violation; however, the appellate division reversed.[128] The appellate division held that the evidence of Parker's alleged rape of the victim would not be admissible at trial because Hunter did not show that "the accusation was false or that it was similar enough to the [victim's] accusation of [Hunter] to suggest 'a pattern of false complaints;' " Hunter appealed to the New York Court of Appeals.[129]

The New York Court of Appeals primarily considers the third element of a *Brady* violation because it is clear that this evidence is impeachment evidence and that the prosecution knew, but did not disclose the evidence to Hunter.[130] Unlike the appellate division, the court determined that the *Parker* evidence would be admissible because the trial court has discretion to permit impeachment evidence to be admitted.[131] In analyzing the prejudice element of a *Brady* violation, the court refers to the "reasonable probability" standard set out in the federal courts; however, in application, the court uses the New York standard for no requests.[132] The New York standard for evidence not requested is that it is material if it would create "a reasonable doubt that did not otherwise exist."[133] The court explains that the failure to disclose the fact that the victim also accused Parker of rape is material because Parker's "evidence would have added a little more doubt to the jury's view of the [victim's] allegations.[134] "We find it reasonably probable that a little more doubt would have been enough."[135] Thus, the prosecution did commit a *Brady* violation, and Hunter is entitled to a new and fair trial.

This opinion seems to combine the "reasonable probability" standard set out in *Bagley* with the original New York standard of creating "a reasonable doubt that did not otherwise exist." The court is giving the criminal defendant less protection by using the "reason-

[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Hunter*, 892 N.E.2d at 367.
[131] *Id.* at 368.
[132] *Id.* at 368.
[133] *Vilardi*, 555 N.E.2d at 918 (quoting *Agurs*, 427 U.S. at 112).
[134] *Hunter*, 892 N.E.2d at 368.
[135] *Id.*

able probability" standard instead of the "reasonable possibility" standard articulated by the New York Court of Appeals in *Vilardi*.[136]

In *Fuentes*, the court seems to utilize its own construction of the materiality standard in this opinion. According to the court, if the defendant makes a specific request for the material, then the failure to disclose is material if "there exists a 'reasonable possibility' that it would have changed the result of the proceeding."[137] However, if there is no request or a general request, then the court stated that the failure to disclose is material if there is a " 'reasonably probability' that it would have changed the outcome of the proceedings."[138] The court seems to be mixing the different standards articulated for analyzing *Brady* violations. Additionally, by utilizing the reasonable probability standard when there has not been a specific request, the court is making it more difficult for the defendant to prove a *Brady* violation. With this opinion, the New York Court of Appeals has made it more difficult to determine which standard to utilize when confronted with a *Brady* violation under the New York State Constitution.

As expected, the New York Court of Appeals found there to be no *Brady* violation. The court refuses to articulate which standard it is using, but finds that the undisclosed record of consultation "would not have altered the outcome of the case."[139] There is no discussion if this was determined on a "reasonable probability" basis or "reasonable possibility" basis.

Nonetheless, the court discounts the undisclosed document by explaining that it would not have altered the outcome of the case.[140] The court mentions the following reasons for the materiality standard to not be satisfied: the interview notes corroborate the victim's testimony that she walked home alone, it is unclear as to whether the suicidal thoughts occurred due to the alleged rape or a situation prior to the alleged rape, there was no evidence of mental illness that affected perception, and the victim's use of marijuana was only twice

[136] Kligman, *supra* note 106 at 67 (discussing New York's refusal to adopt the "reasonable probability" standard for analyzing *Brady* violations).

[137] *Fuentes I*, 907 N.E.2d at 289.

[138] *Id.*

[139] *Id*. at 289.

[140] *Id.* at 289.

and did not affect perception.[141] Finally, the court condones the actions of the prosecution by explaining that the prosecution should have requested an in camera inspection of the documents to determine if they were privileged or *Brady* material.[142]

Pamela Cullington

[141] *Id.* at 289-90.

[142] *Fuentes I*, 907 N.E.2d at 290 (explaining that defense counsel should be able to rely on the file obtained pursuant to open file discovery and be able to assume that it is complete).