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# People v. Buie

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## **DUE PROCESS**

*United States Constitution Amendment V:*

*No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .*

*United States Constitution Amendment XIV:*

*[Nor] shall any State deprive any person of life, liberty, or property, without due process of law . . . .*

*New York Constitution Article I, Section 6:*

*No person shall be deprived of life, liberty, or property without due process of law.*

## **SUPREME COURT, APPELLATE DIVISION**

### **FIRST DEPARTMENT**

People v. Buie<sup>1</sup>  
(decided December 20, 2001)

Kevin Buie was convicted of three counts of murder in the second degree, attempted murder in the second degree, and robbery in the first degree.<sup>2</sup> Buie appealed his conviction arguing that the prosecution's delay in revealing the names of two exculpatory witnesses violated the spirit of *Brady v. Maryland*<sup>3</sup> by

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<sup>1</sup> 289 A.D.2d 140, 735 N.Y.S.2d 45 (1st Dep't 2001).

<sup>2</sup> *Id.*

<sup>3</sup> 373 U.S. 83 (1963) (holding that suppression of evidence by the prosecution that is favorable to an accused who has requested it violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution).

denying him due process guarantees inherent under both the Federal<sup>4</sup> and New York State<sup>5</sup> Constitutions.<sup>6</sup> He further argued that the “verdict was not based on legally sufficient evidence and was against the weight of the evidence.”<sup>7</sup> The Appellate Division, First Department affirmed the lower court’s ruling, holding that the verdict was based on legally sufficient evidence, was not against the weight of the evidence, and the prosecution’s delay in disclosing the identity of the witnesses to Buie did not violate the due process protections of either the Federal or New York State Constitutions.<sup>8</sup>

Buie’s appeal alleged that the delay in receiving the names and addresses of two exculpatory witnesses violated *Brady*.<sup>9</sup> More specifically, Buie claimed the police reports that had been disclosed to him contained witness information that provided the police with descriptions of other suspects, whose descriptions were at odds with his physical characteristics.<sup>10</sup> Although the names and addresses of the two witnesses who supplied these descriptions were not initially disclosed, that information was provided to Buie two months before trial.<sup>11</sup> The court, however, found that Buie did not even establish that either of the two witnesses’ testimony would have been exculpatory, and further noted these persons did not even claim to witness the shootings.<sup>12</sup> The court stated that one witness’ testimony was “vague and confusing,” and found the other witness, who claimed he had seen a man carrying a gun leaving the building at the time the crime occurred, had an “extremely poor vantage point.”<sup>13</sup> As a result, the court held that there was “no reasonable possibility that the outcome of the trial

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<sup>4</sup> U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: “[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .”

<sup>5</sup> N.Y. CONST. art. I § 6, states in pertinent part: “No person shall be deprived of life, liberty or property, without due process of law.”

<sup>6</sup> *Buie*, 289 A.D.2d at 140, 723 N.Y.S.2d at 46.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Buie*, 289 A.D.2d at 140, 723 N.Y.S.2d at 46.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

would have been different” if the defendant found the witnesses, or alternatively, if their hearsay statements were used at trial.<sup>14</sup>

The seminal case dealing with the prosecution’s failure to disclose exculpatory evidence to the defendant is *Brady v. Maryland*.<sup>15</sup> In *Brady*, the defendant and a companion were tried separately, both found guilty of murder, and sentenced to death.<sup>16</sup> Although Brady testified at his trial that he participated in the crime, he claimed that Boblit, his companion, committed the actual killing.<sup>17</sup> Prior to his trial, Brady’s attorney requested that the prosecution provide him an opportunity to examine the extrajudicial statements of Boblit. The prosecution seemingly complied with the request by allowing defense counsel to view several of Boblit’s statements. However, subsequent to Brady’s conviction and sentence, it was discovered that one statement, in which Boblit admitted committing the homicide, was withheld.<sup>18</sup> Based on the suppression of the exculpatory statement by the prosecution, Brady appealed his conviction.<sup>19</sup>

The United States Supreme Court found that Brady’s conviction was based on the deliberate suppression of the statement.<sup>20</sup> The Court held that the prosecution’s failure to disclose exculpatory evidence in its possession, that is both favorable and material to the defendant’s guilt or punishment, violates due process.<sup>21</sup> The Court further noted that this standard is applicable regardless of the good or bad faith of the prosecutor.<sup>22</sup>

More than twenty years later, the United States Supreme Court in *United States v. Bagley*,<sup>23</sup> articulated the standard for determining when undisclosed evidence is material.<sup>24</sup> Bagley was indicted on fifteen charges of violating federal narcotics and

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<sup>14</sup> *Id.*

<sup>15</sup> 373 U.S. at 83.

<sup>16</sup> *Id.* at 84.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Brady*, 373 U.S. at 87.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 473 U.S. 667 (1985).

<sup>24</sup> *Id.*

firearms statutes.<sup>25</sup> Six days before trial, the defense filed a discovery motion requesting the prosecution provide “the names and addresses of the witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, any deals, promises or inducements made to witnesses in exchange for their testimony.”<sup>26</sup> The prosecution did not disclose to the defense any “deals, promises or inducements” that were made to two witnesses.<sup>27</sup> After a bench trial, the defendant was convicted of the narcotics charges and found not guilty with respect to the firearms charges.<sup>28</sup> Subsequent to his conviction, Bagley discovered the undisclosed contracts of two government witnesses that demonstrated that the witnesses were paid for providing the government with information.<sup>29</sup> The defendant appealed his conviction, alleging the prosecution’s failure to disclose the contracts of the two witnesses violated due process under *Brady*.<sup>30</sup>

In deciding the standard of materiality to be applied to *Brady* violations, the United States Supreme Court in *Bagley* discussed that due process affords the defendant a fair trial, and as such, the prosecution must disclose to the defendant evidence favorable to him.<sup>31</sup> The contracts that were withheld contained evidence that would have been used to impeach the witnesses by demonstrating bias or interest, and the Court refused to draw a distinction between exculpatory evidence and impeachment evidence.<sup>32</sup> Accordingly, the Court held that this evidence is protected under the rule of *Brady*.<sup>33</sup> However, before overturning a conviction, there must be a finding of “materiality.”<sup>34</sup> In order for the undisclosed evidence to be material, there must be a finding that the undisclosed evidence would have changed the judgment or

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<sup>25</sup> *Id.* at 669.

<sup>26</sup> *Id.* at 669–70.

<sup>27</sup> *Id.* at 670.

<sup>28</sup> *Bagley*, 473 U.S. at 671.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 672.

<sup>31</sup> *Id.* at 675.

<sup>32</sup> *Id.* at 676.

<sup>33</sup> *Bagley*, 473 U.S. at 677.

<sup>34</sup> *Id.*

verdict.<sup>35</sup> The Court held that evidence is material if there is a “reasonable probability that it would have altered the outcome of the trial.”<sup>36</sup> The Court further held that this standard of materiality applies regardless of whether the defendant makes a specific or general request for the favorable evidence, or whether the defendant requests the evidence at all.<sup>37</sup>

In *People v. Vilardi*,<sup>38</sup> the New York Court of Appeals addressed the standard that is applicable in New York when determining whether exculpatory evidence is material.<sup>39</sup> In that case, the defendant was convicted of arson in the first degree, attempted arson in the first degree and conspiracy, resulting from the planned explosion of a pizzeria and laundromat.<sup>40</sup> Defense counsel made a pretrial motion for all reports dealing with the laundromat explosion.<sup>41</sup> The prosecution seemingly complied with the request and sent all reports, with the exception of one. It was not until after the defendant was convicted that defense counsel realized there was an undisclosed report.<sup>42</sup> Based on the prosecution’s failure to disclose the exculpatory material, the defendant appealed.<sup>43</sup> On appeal, the Appellate Division, Second Department, vacated the defendant’s conviction based on the prosecution’s failure to disclose the report.<sup>44</sup> Specifically, the Appellate Division found there “was a reasonable possibility that the undisclosed material contributed to the defendant’s conviction” and granted the defendant a new trial.<sup>45</sup>

On appeal to the New York Court of Appeals, the prosecution in *Vilardi* argued that New York courts should follow the “*reasonable probability*” standard set forth by the United States Supreme Court in *Bagley*.<sup>46</sup> In deciding whether New York

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 682.

<sup>37</sup> *Id.*

<sup>38</sup> 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 69–70, 555 N.E.2d at 915, 556 N.Y.S.2d at 518.

<sup>41</sup> *Id.* at 70, 555 N.E.2d at 916, 556 N.Y.S.2d at 519.

<sup>42</sup> *Id.*

<sup>43</sup> *Vilardi*, 76 N.Y.2d at 71, 555 N.E.2d at 916, 556 N.Y.S.2d at 519.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (emphasis added).

should follow the standard set forth by the federal system, which is less favorable to the defendant, the New York Court of Appeals noted that even before the *Brady* decision, New York had recognized a due process right in this area.<sup>47</sup> That right was based on fairness to the defendant and the ethical and professional obligation of the prosecutor.<sup>48</sup> Based on those principles, the New York Court of Appeals declined to adopt the federal standard of “reasonable probability” of materiality and continued to follow the standard more favorable to the defendant.<sup>49</sup> This requires a showing of “reasonable possibility” that failure to disclose the exculpatory evidence contributed to the result.<sup>50</sup>

The Appellate Division, First Department, in *People v. Perry*,<sup>51</sup> addressed the issue of when exculpatory material must be turned over to the defendant.<sup>52</sup> In *Perry*, the defendant argued on appeal that untimely disclosure by the prosecution of a potential witness violated *Brady*.<sup>53</sup> During jury selection, the prosecution disclosed to the defendant information of a possible exculpatory witness, and at that juncture the defendant was unable to locate the potential witness.<sup>54</sup> The Appellate Division, First Department held that the defendant did not successfully persuade the court that

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<sup>47</sup> *Id.* at 76, 555 N.E.2d at 919, 556 N.Y.S.2d at 522.

<sup>48</sup> *Vilardi*, 76 N.Y.2d at 76, 555 N.E.2d at 919, 556 N.Y.S.2d at 522 (citing *People v. Novoa*, 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504 (1987); *People v. Cwikla*, 46 N.Y.2d 434, 386 N.E.2d 1070, 414 N.Y.S.2d 102 (1979); *People v. Simmons*, 36 N.Y.2d 126, 325 N.E.2d 139, 365 N.Y.S.2d 812 (1975); *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956); *People v. Creasy*, 236 N.Y. 205, 140 N.E. 563, 236 N.Y.S. 205 (1923).

<sup>49</sup> *Vilardi*, 76 N.Y.2d at 76, 555 N.E.2d at 919, 556 N.Y.S.2d at 522.

<sup>50</sup> *Id.* at 77, 555 N.E.2d at 920, 556 N.Y.S.2d at 522 (citing *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984); *People v. Porter*, 128 A.D.2d 248, 516 N.Y.S.2d 201 (1st Dep’t 1987); *People v. Valez*, 118 A.D.2d 116, 504 N.Y.S.2d 404 (1st Dep’t 1986); *People v. Pugh*, 107 A.D.2d 521, 487 N.Y.S.2d 415 (4th Dep’t 1985); *People v. Kitt*, 86 A.D.2d 465, 450 N.Y.S.2d 319 (1st Dep’t 1982); *People v. Ramos*, 146 Misc.2d 168, 550 N.Y.S.2d 784 (Sup. Ct. Bronx County 1990) (predicting New York will continue to adhere to the “reasonable possibility” standard, which is consistent with the “right sense of justice” standard New York courts have relied upon)).

<sup>51</sup> 266 A.D.2d 151, 700 N.Y.S.2d 107 (1st Dep’t 1999).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

earlier disclosure would have resulted in locating the witness, and further held that the defendant did not make a showing that the witness' testimony would have been exculpatory.<sup>55</sup> As such, his conviction was affirmed.<sup>56</sup>

Similarly, in *People v. Cortijo*,<sup>57</sup> the defendant argued the prosecution's disclosure of "*Brady* material" was untimely.<sup>58</sup> The defendant was convicted of attempted murder and criminal possession of a weapon.<sup>59</sup> He appealed his conviction alleging that the prosecution did not disclose all exculpatory evidence prior to trial, and thus violated *Brady*.<sup>60</sup> During trial, the defendant had discovered that the prosecution was aware of two eyewitnesses.<sup>61</sup> The defendant was afforded an opportunity to interview one of the witnesses, and declined to call him as a defense witness.<sup>62</sup> The Appellate Division, First Department and the New York Court of Appeals affirmed the defendant's conviction.<sup>63</sup> The New York Court of Appeals held that the defendant's due process rights were not violated because he was "given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the prosecution's witness or as evidence during his case."<sup>64</sup>

Additionally, in *People v. McKee*,<sup>65</sup> the defendant was convicted of murder in the second degree.<sup>66</sup> He subsequently appealed his conviction arguing the prosecution's delayed disclosure of "*Brady* material" entitled him to introduce a hearsay statement as a sanction for the delay.<sup>67</sup> The "*Brady* material" at issue was a summary of a purported witness interview with police, which gave a description of an assailant that was inconsistent with

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<sup>55</sup> *Id.*

<sup>56</sup> 266 A.D.2d at 151, 700 N.Y.S.2d at 107.

<sup>57</sup> 70 N.Y.2d 868, 517 N.E.2d 1349, 523 N.Y.S.2d 463 (1987).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Cortijo*, 70 N.Y.2d at 868, 517 N.E.2d at 1349, 523 N.Y.S.2d at 463.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 269 A.D.2d 225, 703 N.Y.S.2d 447 (1st Dep't 2000).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*



the defendant's physical characteristics.<sup>68</sup> However, the material had been provided to the defendant three weeks prior to trial.<sup>69</sup> Defense counsel had an opportunity to interview the individual, who subsequently denied witnessing the crime and even making the statement.<sup>70</sup> Accordingly, the defense did not call him as a witness.<sup>71</sup> The appellate court affirmed the conviction, holding that the defendant had ample time to make "effective use of the information."<sup>72</sup>

The United States Supreme Court has not addressed the issue of when exculpatory evidence, "*Brady* material," must be disclosed to the defendant, and therefore cannot provide lower courts with guidance on that issue. However, the United States Supreme Court in *Bagley* addressed the appropriate standard for determining when undisclosed exculpatory evidence constituting a "*Brady* violation" is "material" and requires reversal of defendant's conviction.<sup>73</sup> Rather than follow the federal system, which provides that undisclosed exculpatory evidence is "material" when there is a "reasonable probability" the undisclosed evidence would have changed the judgment or the verdict, the New York Court of Appeals relied on its strong pre-*Brady* policy of affording greater protection in this area than the federal system.<sup>74</sup> Accordingly, New York has declined to follow the "reasonable probability" standard of materiality set forth by the federal system, and continues to afford greater due process protection for the defendant, holding that undisclosed exculpatory evidence is "material" when there is a "reasonable possibility" that the undisclosed evidence contributed to the result.<sup>75</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *McKee*, 269 A.D.2d at 225, 703 N.Y.S.2d at 447.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Bagley*, 473 U.S. at 677.

<sup>74</sup> *Vilardi*, 76 N.Y.2d at 76, 555 N.E.2d at 919, 556 N.Y.S.2d at 521.

<sup>75</sup> *Id.* at 77, 555 N.E.2d at 920, 556 N.Y.S.2d at 522.