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**SUPREME COURT OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT**

People v. Rivette¹
(decided July 7, 2005)

Jacques Rivette was indicted and charged with four counts of murder in the second degree, robbery in the first degree, and burglary in the second degree involving the robbery and murder of a shop manager.² For the first two counts of murder, Rivette was charged individually; the remaining counts involved him and his accomplice, Timothy Thorsen.³ Rivette was convicted of two of the second-degree murder counts as well as the robbery count, thus receiving an aggregate prison sentence of thirty-seven years to life.⁴ The county court denied Rivette's motions to vacate the judgment⁵ pursuant to Criminal Procedure Law, section 440.10.⁶

On appeal of these denials, Rivette asserted four main arguments: (1) that there was insufficient proof to support his conviction;⁷ (2) that fatal *Brady* errors were committed at trial,⁸ subsequently violating the Due Process Clauses of both federal and

¹ 798 N.Y.S.2d 188 (App. Div. 3d Dep't 2005).

² *Id.* at 190.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ N.Y. CRIM. PROC. LAW § 440.10 (2005).

⁷ *Rivette*, 798 N.Y.S.2d at 190.

⁸ *Id.* at 191.

state constitutions;⁹ (3) that the county court exceeded its power by appointing a district attorney based on a conflict of interest;¹⁰ and finally (4) that there was error in assigning consecutive sentences for his convictions.¹¹ The Appellate Division ultimately upheld the conviction,¹² most relevantly concluding that there was no violation of Rivette's constitutional rights.¹³

Jacques Rivette was found guilty of robbing and murdering a manager of a Stewart's shop located in the City of Troy, Rensselaer County, in October of 1987.¹⁴ At trial, the People produced evidence from Stewart employees stating that roughly five thousand dollars "and possibly some cigarettes" were missing from the store after the murder took place.¹⁵ Friends of Rivette stated that he went into the store earlier to purchase drugs but was denied since he had no funds and was already in debt to the shop.¹⁶ To further corroborate this circumstantial evidence, friends also testified that Rivette and his accomplice admitted to robbing the store, taking the victim to the back room so as to open the safe, laying him down, and shooting him in the back of the head.¹⁷ Rivette also bragged about these details

⁹ U.S. CONST. amend. XIV stating in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law" N.Y. CONST. art. I, § 6 stating in pertinent part: "No person shall be deprived of life, liberty or property without due process of law."

¹⁰ *Rivette*, 798 N.Y.S.2d at 192.

¹¹ *Id.*

¹² *Id.* at 193.

¹³ *Id.* at 191.

¹⁴ *Id.* at 190.

¹⁵ *Rivette*, 798 N.Y.S.2d at 191.

¹⁶ *Id.*

¹⁷ *Id.*

while in jail.¹⁸ Additionally, the People produced evidence that a .22 caliber revolver left a bullet in the victim's skull, and that Rivette's accomplice once owned one of these guns which was unintentionally destroyed by the police.¹⁹

The Appellate Division reasoned that failure to produce fingernail scrapings would not have been exculpatory, concluding that no error was committed.²⁰ Furthermore, the court held that the failure to disclose a plea deal with a material witness was not error because defense counsel was already on notice.²¹ Finally, the failure to produce the murder weapon was not considered error because the defendant was permitted to expose the limitations of the destroyed gun at trial.²² The court then concluded that there was no "reasonable possibility" that failure to produce the gun would have been error.²³

The issue of constitutional due process, with regard to Rivette's argument on appeal, stemmed from *Brady v. Maryland*.²⁴ In that case, the Supreme Court plainly 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 to punishment, irrespective of the good faith or bad faith of the prosecution."²⁵ The Court reasoned that our society is deprived, and

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Rivette*, 798 N.Y.S.2d at 192.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 373 U.S. 83 (1963).

²⁵ *Id.* at 87.

the justice system suffers, when a defendant is treated unfairly, to wit, the prosecution withholding evidence that would necessarily exculpate any accused.²⁶

In *United States v. Agurs*,²⁷ a framework was established in order to determine whether or not a new trial is necessary. Evidence that is specifically requested by defense is material if it “might have affected the outcome of the trial.”²⁸ When a general request or even when no request has been made by defense with respect to exculpatory evidence, the definition of materiality shifts to whether it “create[d] a reasonable doubt that did not otherwise exist.”²⁹

Less than ten years later, the Supreme Court in *United States v. Bagley*³⁰ addressed the issue of what standard of materiality should be used to determine whether or not a conviction should be reversed on the basis of *Brady* errors.³¹ The Court held that “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.”³² This standard applies whether or not the defense gives notice to the prosecution with regard to disclosure of evidence.³³ Thus, cases where the defense gives “no request,” a “general request,” or a

²⁶ *Id.*

²⁷ 427 U.S. 97 (1976).

²⁸ *Id.* at 104.

²⁹ *Id.* at 112.

³⁰ 473 U.S. 667 (1985).

³¹ *Id.* at 669.

³² *Id.* at 682.

³³ *Id.*

“specific request” are included in the determination³⁴ and will ultimately reflect on the reviewing court’s decision based on the “totality of the circumstances.”³⁵

In *People v. Vilardi*,³⁶ the New York Court of Appeals made a clear distinction among the aforementioned Supreme Court rulings as to which standard it adopted with respect to *Brady* errors.³⁷ The court held that a *Brady* claim is properly raised, and a defendant’s constitutional rights are violated, when the People have not informed the former of certain exculpatory information that would indicate a “reasonable possibility” that this undisclosed material aided in his/her conviction.³⁸ The court reasoned that state sentiment of due process in this realm is based on an “elemental fairness” for the defendant and professional obligations of the prosecution.³⁹

Additionally, *People v. Scott*⁴⁰ also applied the “reasonable possibility” standard in its decision. The court in *Scott* examined the existence of a potential *Brady* error by first determining whether or not a defendant’s request to vacate the judgment was specific,⁴¹ as to give notice of “[the defense’s] interest in particular material.”⁴² Once the prosecution is placed on notice that the defendant considered the

³⁴ *Id.*

³⁵ *Bagley*, 473 U.S. at 683. Though the court agreed that the adversarial process will be impaired more greatly depending on the gradation of request for evidence made by defense counsel, the court argued that “this possibility of impairment does not necessitate a different standard of materiality.” *Id.* at 682-83.

³⁶ 555 N.E.2d 915 (N.Y. 1990).

³⁷ *Id.* at 919-20 (explaining that the court adopted *Agurs* as opposed to the “lesser protections” of *Bagley*).

³⁸ *Id.* at 916.

³⁹ *Id.* at 919.

⁴⁰ 667 N.E.2d 923 (N.Y. 1996).

⁴¹ *Id.*

proposed evidence to be pertinent to his/her case, the evidence is “governed by a ‘reasonable possibility’ standard of prejudice—i.e., a reasonable possibility that the outcome of the trial would have differed had the evidence been produced.”⁴³ The *Scott* court held that a polygrapher’s opinion regarding a “witness’s veracity” on a polygraph test, which the defendant considered to be relevant *Brady* material,⁴⁴ was nevertheless considered inadmissible evidence.⁴⁵ Furthermore, corroborating testimony revealed that the witness’ polygraph test was truthful and that the witness was not withholding pertinent information. This supported the defendant’s conviction.⁴⁶

In conclusion, *Brady* errors are treated differently under the New York State Due Process Clause than they are in the federal context. The Federal Constitution standard is a general one: when a prosecutor suppresses evidence that is favorable to the defendant, the defendant’s due process rights are violated if the evidence is deemed material to the defendant’s innocence. The burden on the prosecution is the same regardless of whether or not notice is given, or if such notice is general or specific. The standard is always one of “reasonable *probability*.” Hence, a reversal is only warranted when the suppression is sufficient to undermine the outcome of the trial.

Conversely, the state constitution makes a clear distinction

⁴² *Id.* at 924.

⁴³ *Id.* (citing *Vilardi*, 555 N.E.2d at 920).

⁴⁴ *Id.* (arguing that the polygraph exam sheet indicated that the People’s witness was “withholding pertinent information” regarding who he viewed at the time of the alleged manslaughter, which defendant considered to be material to his conviction).

⁴⁵ *Scott*, 667 N.E.2d at 924.

⁴⁶ *Id.* (reasoning that there was “no reasonable possibility that the outcome of the trial would have differed had the document been produced.”).

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between itself and the Federal Constitution.⁴⁷ This standard requires reversal when there is a “reasonable *possibility*” that the prosecution’s suppression of evidence might have contributed to a defendant’s conviction. The state affords more protection to a defendant, especially when the defendant gives the prosecution a specific request for the suppressed information, calling for heightened prosecutorial care. If, however, no notice is given, the appropriate standard is whether disclosure of the suppressed evidence could have created reasonable doubt in a juror’s mind.

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⁴⁷ See Vilardi, 555 N.E.2d at 919 (“Our own view of important State concerns in this matter has differed significantly from the Supreme Court’s newest interpretation of the dictates of the Federal due process standard.”).

