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Due Process

fails to subsidize [the] abortion."[37] The program still provides an eligible woman with services after the abortion;[38] terminating the pregnancy does not terminate the eligibility for service and care.[39]

In addition to rejecting the plaintiffs' due process and equal protection claims, the court briefly and concisely rejected the plaintiffs assertions that the statute violated the Aid to the Needy and Public Health Clauses of the New York State Constitution because it failed to provide for medically necessary abortions without regard to the woman's financial or medical needs.[40] The court of appeals reiterated that PCAP recipients are not indigent, nor in need of medical assistance[41] and that the statute's purpose is to combat infant mortality.[42] Rejecting these claims, the court reversed the order of the appellate division.

The court of appeals concluded that the PCAP statute is constitutional under both New York and Federal Constitutions because it is rationally related to the Legislature's objective of preventing infant mortality by providing prenatal and post pregnancy care for low income women.[43]

People v. Baxley[44]
(decided June 30, 1994)

Defendant claimed that his criminal convictions were obtained in violation of his statutory rights under New York Criminal Procedure Law [hereinafter CPL] section 440.10[45] and his

37. *Id.*
38. *See* N.Y. PUB. HEALTH LAW § 2521.
39. *Hope*, 83 N.Y.2d at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.
40. *Id.* at 577-78, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.
41. *Id.* at 578, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.
42. *Id.*
43. *Id.*
44. 84 N.Y.2d 208, 639 N.E.2d 746, 616 N.Y.S.2d 7 (1994).
45. N.Y. CRIM. PROC. LAW. § 440.10 (McKinney 1994). This provision reads in pertinent part:

federal[46] constitutional right to due process. Under section 440.10, the defendant implicitly asserted a violation of his due process rights under the New York State Constitution as well.[47] The defendant claimed that his motion to vacate the judgment should be granted because the prosecution failed to disclose exculpatory evidence, thereby depriving him of a fair trial.[48] The New York Court of Appeals held that both the supreme court and appellate division abused their discretion, as a matter of law, in denying defendant's motion without a hearing.[49] The court of appeals held that the record contained insufficient facts to determine if a violation had occurred; thus, it remanded the case to the supreme court for an evidentiary hearing on the defendant's CPL section 440.10 motion.[50]

The defendant was arrested for the murder and robbery of an employee at a food concession stand. The basis for this arrest was

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1. At any time and after entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

. . .

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, . . . and which is of such character as to created a possibility that had such evidence been received at the trial the verdict would have been more favorable to the defendant;

. . .

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

Id.

46. U.S. CONST. amend XIV, § 1. This provision states in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

47. N.Y. CONST. art. I, § 6. This provision states in relevant part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

48. *Baxley*, 84 N.Y.2d 208, 639 N.E.2d 746, 616 N.Y.S.2d 7.

49. In reviewing this case, the court of appeals outlined its authority to hear this issue on appeal. The court of appeals noted that, historically, this claim was normally pursued through post judgment review via a writ of error *coram nobis*. *Id.* at 212-13, 639 N.E.2d at 749, 616 N.Y.S.2d at 10 (citing People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957)).

50. *Id.*

the written statements of four informants, Washington, Youmans, McKinney, and Alston. Each of these informants averred that the defendant made oral admissions to them concerning his participation in the crime.[51] Washington and McKinney both testified at trial; their testimony was the primary evidence of the defendant's guilt.[52]

Three years and two months after the defendant was convicted and sentenced, he filed a motion pursuant to CPL section 440.10 to vacate his conviction.[53] Two of the grounds asserted in the motion were: (1) newly discovered evidence;[54] and (2) the judgment was obtained in violation of the defendant's state or federal constitutional rights.[55]

The basis for the newly discovered evidence claim was the recanting of trial testimony by two witnesses, Washington and McKinney.[56] The court of appeals found that they had no

51. *Id.* at 210, 639 N.E.2d at 747-48, 616 N.Y.S.2d at 9-10.

52. *Id.* at 211, 639 N.E.2d at 748, 616 N.Y.S.2d at 10.

53. *Id.*

54. *See* N.Y. CRIM. PROC. LAW. § 440.10(1)(g) (McKinney 1994).

55. *See* N.Y. CRIM. PROC. LAW. § 440.10(1)(h) (McKinney 1994).

56. McKinney's statement consisted of one sentence in which she denied hearing the defendant make any statements about the murder. *Baxley*, 84 N.Y.2d at 211, 639 N.E.2d at 748, 616 N.Y.S.2d at 9. However, McKinney did not recant her testimony that she saw defendant with a shotgun six months after the murder. *Id.* Washington denied that defendant confessed to him and averred that his trial testimony was fabricated because he was in police custody at the time, on an unrelated offense, and "believed it was in my best interest to cooperate with the District Attorney's office." *Id.*

authority to disturb the ruling of the trial court on this issue[57] and upheld the denial of defendant's motion without a hearing.[58]

The basis for the second ground in Baxley's motion was an affidavit by Youmans which stated that Washington and he were induced to perjure themselves in return for leniency on their pending charges.[59] Youmans stated that he notified the prosecutor about the police coercion before he was scheduled to testify.[60] Further, Youmans also swore that "[defendant] never told me or to my knowledge, Michael Washingon, that he killed Regina Carter."[61] The prosecutor did not disclose this statement to the defense because he believed that the statement was fabricated.[62] The prosecution decided not to call Youmans to testify at trial.[63]

The supreme court denied the motion without a hearing,[64] and the appellate division affirmed the judgment and denial of

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57. The court of appeals cannot review the denial of a motion to vacate a judgment on the grounds of newly discovered evidence unless the court has statutory authority. *See* N.Y. CRIM. PROC. LAW § 440.10. In People v. Brown, the court of appeals held that the power to vacate a conviction based on newly discovered evidence rests within the discretion of the court. 56 N.Y.2d 242, 246, 436 N.E.2d 1295, 1297, 451 N.Y.S.2d 693, 695 (1972). This discretion is "unlimited in the lower courts and thus this court has no power . . . to review their exercise of discretion." *Id.* These recantations did not imply that their prior testimony were caused by police or prosecutorial misconduct. *Baxley*, 84 N.Y.2d at 212, 639 N.E.2d at 748-49, 616 N.Y.S.2d at 9-10.

58. *Id.* at 212, 639 N.E.2d at 748, 616 N.Y.S.2d at 9. *See* N.Y. CONST. art. VI, § 3(a) (stating court's jurisdiction is limited to "questions of law, except when the judgment is of death."); N.Y. CRIM. PROC. LAW § 470.35 (McKinney 1994) (outlining scope of review of order from intermediate appellate courts); People v. Crimmins, 38 N.Y.2d 407, 409, 343 N.E.2d 719, 720, 381 N.Y.S.2d 1, 3 (1975) (emphasizing that the court of appeals had no power to review the discretionary denial of a motion to vacate a conviction based on newly discovered evidence).

59. *Baxley*, 84 N.Y.2d at 211, 639 N.E.2d at 748, 616 N.Y.S.2d at 9.

60. *Id.*

61. *Id.* at 211-12, 639 N.E.2d at 748, 616 N.Y.S.2d at 9.

62. *Id.* at 212, 639 N.E.2d at 748, 616 N.Y.S.2d at 9.

63. *Id.*

64. *Id.*

defendant's motion.[65] Under CPL section 440.30,[66] a motion to vacate a judgment made under section 440.10 may be denied without a hearing only for specific reasons.[67] The court of appeals, finding that none of these reasons existed,[68] held that the lower courts abused their discretion as a matter of law in denying defendant's motion without a hearing.[69] The court felt that there was a genuine issue of fact as to whether the defendant's due process rights were violated.[70]

The New York Court of Appeals has stated that the "concept of fairness" contained in the State and Federal Due Process Clauses imposes a duty on the prosecution to disclose evidence favorable

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65. 194 A.D.2d 681, 599 N.Y.S.2d 105 (2d Dep't 1993).

66. N.Y. CRIM. PROC. LAW § 440.30 (McKinney 1994). Section 440.30 states in relevant part:

> (4) Upon considering the merits of the motion, the court may deny it without conducting a hearing if:
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> (a) The moving papers do not allege any ground constituting legal basis for the motion; or
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> (b) The motion is based upon the existence of occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or
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> (c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or
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> (d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is on reasonable possibility that such allegation is true.

Id. Section 440.30 also sets forth the procedure by which to make a motion pursuant to § 440.10 (motion to vacate judgment) and § 440.20 (motion to set aside sentence).

67. N.Y. CRIM. PROC. LAW § 440.30.

68. *Baxley*, 84 N.Y.2d at 212, 639 N.E.2d at 749, 616 N.Y.S.2d at 9. The court analyzed each provision of § 440.30(4) and found that none of the situations applied to the instant case. *Id.* at 214, 639 N.E.2d at 749-50, 616 N.Y.S.2d at 10-11.

69. *Id.* at 213, 639 N.E.2d at 749, 616 N.Y.S.2d at 9.

70. *Id.*

to the accused.[71] The court also stated that evidence which is relevant to the credibility of witnesses falls within this duty.[72]

In *People v. Vilardi*,[73] the court of appeals emphasized that the current standard governing New York courts stems from the United States Supreme Court's decision in *United States v. Agurs*.[74] In *Agurs*, the defendant, charged with second degree murder,[75] claimed self defense.[76] After her conviction, defense counsel moved for a new trial on the ground that the prosecutor did not disclose the victim's criminal record to defense counsel.[77] Defendant argued that this evidence would have helped her prove a self-defense claim by showing that the victim was a "violent-prone person."[78] The government argued that, in the absence of

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71. People v. Novoa, 70 N.Y.2d 490, 496, 517 N.E.2d 219, 222-23, 522 N.Y.S.2d 504, 507-08 (1987) (reasoning that this duty must exist in order to "give substance" to a defendant's right to due process).

72. *Id.* at 496, 517 N.E.2d at 223, 522 N.Y.S.2d at 508.

73. 76 N.Y.2d 67, 555 N.E.2d, 915, 556 N.Y.S.2d 518 (1990). The defendant was arrested and charged with first degree arson, first degree attempted arson and conspiracy to set off two pipe bombs. *Id.* at 69-70, 555 N.E.2d at 915, 556 N.Y.S.2d at 518. Before trial, defense counsel requested "all reports 'by ballistics, firearm and explosive experts' concerning the Laundromat explosion." *Id.* at 70, 555 N.E.2d at 916, 556 N.Y.S.2d at 519. (citation omitted). The defendant was convicted on all counts; on appeal, defense counsel discovered the existence of a report, used in a coconspirator's trial, not disclosed by the prosecution. *Id.*

74. 427 U.S. 97 (1976). The New York courts rely on federal precedent for rules concerning *Brady* material. *Vilardi*, 76 N.Y.2d at 85, 555 N.E.2d at 925, 556 N.Y.S.2d at 528 (Simons, J., concurring).

75. The defendant and Sewell checked into a motel. *Agurs*, 427 U.S. at 99. Sewell was wearing a bowie knife and carrying another knife in his pocket. *Id.* Fifteen minutes later, motel employees heard the defendant screaming for help. *Id.* Forcing their way into the room, the employees saw Sewell on top of the defendant, fighting for control of the bowie knife. *Id.* Sewell died from stab wounds to his chest and abdomen. *Id.* at 100. He also had several cuts on his arms and hands which were thought to be "defensive wounds." *Id.* Defendant had "no cuts or bruises of any kind." *Id.*

76. *Id.*

77. Sewell had previously pled guilty to assault and carrying a deadly weapon, in 1963, and to a charge of carrying a deadly weapon, in 1971. *Id.* at 100-01. In both cases, the deadly weapon was a knife. *Id.*

78. *Id.* at 100.

an appropriate request for such information, the prosecution had no duty to disclose the victim's prior record.[79]

The United States Supreme Court held that, in the absence of a specific request for the victim's criminal record, the jury verdict could be reversed only if the new evidence created a "reasonable doubt" as to the outcome of the trial.[80] If the new evidence could not create such a reasonable doubt, a new trial would not change the outcome.[81]

In general, the court of appeals is of the opinion that the standard set forth in *Agurs* was more appropriate to deal with both types of situations: those in which prosecutorial bad faith or negligence is present and those in which such bad faith is not present.[82] This standard can also deal with a situation where the defense makes either a general or specific request for evidence.[83] When the defense makes a specific request for evidence, the failure to make any response is "seldom, if ever, excusable."[84] In cases where defense counsel makes a general request or no request for *Brady* material,[85] the prosecutor's failure to disclose exculpatory evidence violates due process "only if the omitted evidence creates a reasonable doubt which did not otherwise exist."[86]

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79. *Id.*

80. *Id.* at 112.

81. *Id.* at 113.

82. People v. Smith, 63 N.Y.2d 41, 67, 468 N.E.2d 879, 891, 479 N.Y.S.2d 706, 718 (1984) (recognizing that it would be "inappropriate" to apply the same standard of review when a prosecutor suppresses evidence, and when a prosecutor fails to disclose information due to a generalized request from defense counsel).

83. People v. Vilardi, 76 N.Y.2d 67, 74, 555 N.E.2d 915, 918, 556 N.Y.S.2d 518, 521 (1990).

84. United States v. Agurs, 427 U.S. 97, 106 (1976).

85. *Brady* material is "evidence both favorable to the accused and material to the issue of guilt or punishment." United States v. Endicott, 803 F.2d 506 (9th Cir. 1986), *cert. denied*, 498 U.S. 989 (1990), *cert. denied*, 114 S. Ct. 456 (1993).

86. *Smith*, 63 N.Y.S.2d at 67, 468 N.E.2d at 891, 479 N.Y.S.2d at 718. Had the request been made specifically for such information, the court would have granted a new trial if there was a "reasonable possibility" that the

In analyzing the defendant's contentions, the court found that Youman's statements were not insufficient as a matter of law to constitute exculpatory material under *Brady*.[87] Youman's affidavit, if true, would have constituted exculpatory evidence because it impeached Washington, one of the prosecution's main witnesses. However, because Baxley's defense attorney only made a general request for *Brady* material, the standard of review on remand is whether the withheld evidence creates a "reasonable doubt" which did not previously exist.[88]

The federal standard for determining a prosecutor's duty to disclose exculpatory evidence was set forth in *Brady v. Maryland*.[89] In *Brady*, the United States Supreme Court held that a prosecutor's failure to disclose evidence favorable to the accused, where such evidence is "material either to guilt or to punishment," violates a person's right to due process.[90]

In *Brady*, the Court found that the defendant's due process rights were violated when the prosecution failed to disclose a statement made by an accomplice, tried separately, in which the

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defendant would not have been convicted. *Vilardi*, 76 N.Y.2d at 77, 555 N.E.2d at 920, 556 N.Y.S.2d at 523.

87. N.Y. CRIM. PROC. LAW § 440.30(4)(a)&(b) (McKinney 1994). The court also found that these allegations did not fall under sections (4)(c)&(d)(i)-(d)(ii). Therefore, the supreme court had no authority under § 440.30 to deny defendant's motion without a hearing. *Baxley*, 84 N.Y.2d at 214, 639 N.E.2d at 750, 616 N.Y.S.2d at 11.

88. In remitting the case to the supreme court of New York for a hearing on defendant's motion, the hearing court must determine whether Youmans in fact communicated *Brady* material to the prosecutor which was not disclosed to the defense. *Baxley*, 84 N.Y.2d at 214, 639 N.E.2d at 750, 616 N.Y.S.2d at 11. If the court finds that *Brady* material was communicated to the prosecutor, and the evidence "creates a reasonable doubt that did not otherwise exist," the judgment of conviction must be vacated and the defendant ordered a new trial. *Id.* (following *Agurs* standard for review in absence of specific request by defense).

89. 373 U.S. 83 (1963). Defendant was tried, found guilty of first degree murder, and sentenced to death. *Id.* at 84. In preparing for trial, defendant's counsel requested to examine his coconspirator's extrajudicial statements. *Id.* One of these statements, in which the coconspirator admitted to committing the homicide, was withheld from defense counsel until after his conviction and his sentence were affirmed. *Id.*

90. *Id.* at 87.

accomplice admitted to doing the actual killing.[91] The defense made a specific request for all such statements made by the accomplice.[92]

In modifying *Brady*, the Supreme Court stated in *United States v. Bagley*,[93] that the purpose of a rule requiring prosecutors to disclose exculpatory information is not to make the defense attorney's job easier, but "to ensure that a miscarriage of justice does not occur."[94]

In *Bagley*, the prosecution did not disclose that two witnesses who worked for the Bureau of Alcohol, Tobacco and Firearms signed contracts which gave them three hundred dollars in exchange for their work in obtaining evidence and testifying against the defendant.[95] Defense counsel argued in his motion to vacate the judgment that the prosecution's failure to disclose these contracts, in response to the defense's specific request for such documents,[96] violated the defendant's due process rights under *Brady*.[97] The Supreme Court held that evidence not disclosed to the defense is material "only if 'there is a reasonable

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91. *Id.* at 84. The determination of whether a defendant's due process rights have been violated is not affected by a finding of good faith or bad faith on the part of the prosecutor. *Id.* at 87. "The principle . . . is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.*

92. *Id.* at 84. Although the Supreme Court found that Brady's right to due process had been violated; the Court remanded the case for retrial solely on the issue of punishment. *Id.* at 88. Brady's counsel conceded that his client was guilty of murder in the first degree. *Id.* at 84. Counsel was asking the jury not to give his client the death penalty. *Id.* The Supreme Court decided that even if the confession was admitted, it could not have reduced Brady's crime below that of murder in the first degree. *Id.* Therefore, Brady was not prejudiced by a retrial solely on punishment. *Id.* at 88.

93. 473 U.S. 667 (1985).

94. *Id.* at 675 (replacing standard formulated in *United States v. Agurs*).

95. *Id.* at 671.

96. Defense counsel requested, *inter alia*, "[t]he prior criminal records of witnesses, and any deals, promises or inducements made to witnesses in exchange for their testimony." *Id.* at 669-70.

97. *See supra* note 89.

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[98]

At the present time, the New York Court of Appeals has not adopted the standard set forth in *Bagley*. Although they have had ample opportunity to do so, the court continues to adhere to the standard set forth in *Agurs*. In evaluating New York's perspective on due process, the court of appeals places a stronger emphasis on having the evidence presented to the jury at trial, whereas the federal system relies more on post-trial appellate proceedings. New York courts believe that in this situation, the jury has made a less-informed determination of the defendant's guilt or innocence.[99] This standard also provides less incentive for the prosecutor to disclose potentially exculpatory evidence to the defense. The stricter New York rule places a greater significance on a prosecutor's decision to disclose or withhold evidence. By raising the stakes, most prosecutors will err on the side of caution in disclosing borderline information.[100] The court also takes into account the ambiguity of the standard as evidenced by the lack of a clear rationale behind the *Bagley* rule.[101]

Both the New York State and Federal Constitutions recognize a defendant's right to a fair trial as being incorporated into the right

98. 473 U.S. at 682 (quoting Strickland v. Washington, 466 U.S. 668, 682 (1984) (emphasis added)). The witness' testimony was given primarily on the firearms charges. The defendants were acquitted of these charges at trial. *Id.* at 673. The Court found that the use of the contracts to impeach the witnesses "would not have been helpful." *Id.* In its opinion, the Court recognized that this standard treats evidence suppressed in bad faith the same as when there is no bad faith; however, the Court reasoned that this can be factored into the totality of the circumstances analysis. *Id.* at 683.

99. People v. Vilardi, 76 N.Y.2d 67, 77-78, 555 N.E.2d, 915, 920, 556 N.Y.S.2d 518, 523 (1990) (explaining New York's reliance on *United States v. Agurs*).

100. *Id.* at 77, 555 N.E.2d at 920, 556 N.Y.S.2d at 523.

101. The court looked at the fact that it was a plurality opinion in which no more than three justices agreed on the reasoning behind the court's holding and five justices felt that there should be a distinction between general and specific requests. *Vilardi*, 76 N.Y.2d at 74 n.4, 555 N.E.2d at 918 n.4, 556 N.Y.S.2d at 521 n.4.

of due process.[102] Both courts have the same goal of discouraging prosecutors from withholding exculpatory evidence and ensuring that criminal defendants have a fair trial. However, New York courts have implemented a higher burden for prosecutors to meet in analyzing the failure to disclose exculpatory evidence. As a result, defendants will have a relatively easier burden of proof by pursuing a violation of a state constitutional right to due process in a motion to vacate a criminal conviction. The federal rule focuses more on the materiality of the evidence and less on the actions of the prosecutor.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

People v. Douglas[103]
(decided October 27, 1994)

Defendant appealed his conviction of criminal possession of a controlled substance in the fifth degree, in violation of New York Penal Law section 220.06 (5).[104] Defendant made a motion for the court to review his conviction and retroactively apply the scienter requirement to the weight element, as enunciated in the subsequent decision of *People v. Ryan*.[105] Defendant claimed that the state's evidence was insufficient.[106] He asserted that the jury should have been precluded from finding him guilty since the

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102. People v. Cwikla, 46 N.Y.2d 434, 441, 386 N.E.2d 1070, 1073, 414 N.Y.S.2d 102, 105 (1979) (recognizing prosecutor's obligation to disclose exculpatory evidence as "fundamental") (citing Brady v. Maryland, 373 U.S. 83 (1963)).

103. 205 A.D.2d 280, 617 N.Y.S.2d 733 (1st Dep't 1994).

104. N.Y. PENAL LAW § 220.06 (McKinney 1989).

105. 82 N.Y.2d 497, 626 N.E.2d 51, 605 N.Y.S.2d 235 (1993). The defendant was tried more than a year before *Ryan* was decided. *Douglas*, 205 A.D.2d at 282, 617 N.Y.S.2d at 734.

106. *Douglas*, 205 A.D.2d at 283, 617 N.Y.S.2d at 734.