Touro Law Review

Volume 8 | Number 1 Article 20

1991

Due Process

DUE PROCESS

N.Y. CONST. art. I, § 6:

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

U. S. CONST. amend. V:

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

U.S. CONST. amend. XIV, § 1:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

COURT OF APPEALS

Fosmire v. Nicoleau[199]
(decided January 18, 1990)

See the case analysis under FREE EXERCISE OF RELIGION.[200] The court agreed that plaintiff's due process rights were violated because she was not given notice and an opportunity to be heard when a hospital obtained a court order to administer life sustaining blood transfusions against her wishes.[201]

Forti v. New York State Ethics Commission[202]
(decided April 5, 1990)

See the case analysis under EQUAL PROTECTION.[203] The

199. 75 N.Y.2d 218, 551 N.E.2d 77, 551 N.Y.S.2d 876 (1990).

200. For a discussion of this case see *supra* notes 658-96 and accompanying text.

201. *Fosmire*, 75 N.Y.2d at 224, 551 N.E.2d at 80, 551 N.Y.S.2d at 879.

202. 75 N.Y.2d 596, 554 N.E.2d 876, 555 N.Y.S.2d 235 (1990).

203. For a discussion of this case see *supra* notes 411-43 and accompanying text.

court rejected plaintiffs' claim that section 78(8) of the Ethics in Government Act violated their state and federal constitutional due process right to practice law. The court held that a hindrance in marketability does not interfere with the ability to practice law.[204]

People v. Vilardi[205]
(decided May 10, 1990)

A defendant convicted of first degree arson claimed, on appeal, that his right to due process of law under the state[206] and federal[207] constitutions had been violated by the prosecution's failure to disclose specifically requested exculpatory *Brady* material.[208]

The court of appeals held that the failure to disclose the exculpatory evidence was reversible error and that defendant was entitled to a new trial. More importantly, the court, in a close decision, held that the applicable New York standard "to measure materiality, where the prosecutor was made aware by a specific discovery request that defendant considered the material important to the defense,"[209] remains that there be "a showing of a 'reasonable possibility' that the failure to disclose the exculpatory report contributed to the verdict."[210] This New York formulation expresses a departure from the federal standard announced in *United States v. Bagley*,[211] which requires a showing that the undisclosed evidence is material only if "there is a reasonable

204. *Forti*, 75 N.Y.2d at 614, 554 N.E.2d at 884, 555 N.Y.S.2d at 243.

205. 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

206. N.Y. CONST. art. I, § 6.

207. U.S. CONST. amend. XIV, § 1.

208. *See* Brady v. Maryland, 373 U.S. 83 (1963). *Brady* material is exculpatory evidence which meets three criteria: 1) it must be evidence favorable to the defendant; 2) defense counsel must have made a demand to review that material; and 3) the prosecution must have knowledge of the material prior to the trial. *See Vilardi*, 76 N.Y.2d at 73, 555 N.E.2d at 917, 556 N.Y.S.2d at 520.

209. *Vilardi*, 76 N.Y.2d at 77, 555 N.E.2d at 920, 556 N.Y.S.2d at 523.

210. *Id.*

211. 473 U.S. 667 (1985).

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[212] The New York standard is based on independent state constitutional grounds and is a continuation of the existing New York rule.[213] Prior to *Bagley*, the federal rule and the New York rule were the same.

The defendant in *Vilardi* was convicted of first degree arson, first degree attempted arson, and conspiracy in having planted and set off pipe bombs in both a pizzeria and a laundromat in Brooklyn.[214] The prosecution's bomb squad witness was Officer Daniel Kiely, who had inspected the basement of the laundromat the day after the explosions. The bomb in the pizzeria had never exploded. Because first degree arson requires a showing of damages that were caused by the explosion, the laundromat findings were crucial to the defendant's case.[215]

Defendant's co-conspirators had been tried first in a separate proceeding. At their trial, although Kiely testified that he ultimately concluded that the laundromat bomb had exploded (based on his reinspection of the premises one year after the incident), upon cross-examination it was revealed that his initial report (made one day after the incident) had concluded that he had not uncovered any evidence of an explosion in the laundromat.[216] Thus, the defendant's co-conspirators were acquitted of first degree arson charges.

Upon preparing for defendant's trial, counsel had requested from the prosecution all reports made by "ballistic, firearm and explosive experts."[217] The prosecutor sent twelve reports to counsel, but failed to send a copy of Officer Kiely's initial

212. *Vilardi*, 76 N.Y.2d at 84, 555 N.E.2d at 925, 556 N.Y.S.2d at 528.

213. A majority of the court of appeals adopted the New York standard on separate state grounds. Judges Simons, Wachtler and Bellacosa, although concurring in the judgment, would have found reversible error under the *Bagley* standard which they would have adopted as the New York rule. *Id.* at 77, 555 N.E.2d at 920, 556 N.Y.S.2d at 523.

214. *Id.* at 69-70, 555 N.E.2d at 915, 556 N.Y.S.2d at 518.

215. *Id.* at 70, 555 N.E.2d at 915, 556 N.Y.S.2d at 518.

216. *Id.* at 70, 555 N.E.2d at 916, 516 N.Y.S.2d at 519.

217. *Id.*

report, which was made the day after the incident. Defendant was convicted of all charges, including the first degree arson charge. On appeal, he contended that the absence of this report violated his due process rights.[218]

The appellate division reasoned, and a majority of the judges of the court of appeals agreed, that the specific request made by the defendant placed a higher burden on the prosecutor to disclose the requested material than would have existed if no request had been made. When a defendant specifically requests material and does not receive it, he is led to believe that the material does not exist. The defendant may then alter his trial strategy based on this erroneous belief. This type of error is "seldom, if ever, excusable" and verges on prosecutorial misconduct.[219] The *Bagley* standard of materiality abandons any distinction between cases where requests for exculpatory evidence are specifically made and those where no requests at all are made.[220] The *Vilardi* court declined to accept a standard that offers less protection to the individual defendant than was currently offered under the state

218. *Id.* at 71, 55 N.E.2d at 916, 556 N.Y.S.2d at 519. In *Brady*, the Court explained the theory for the interrelationship between the failure to disclose exculpatory evidence and the due process requirements of the fourteenth amendment:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if 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 through deliberate deception of court and jury . . . .

Brady, 373 U.S. 83, 86 (1963) (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

219. *Vilardi*, 76 N.Y.2d at 74, 555 N.E.2d at 918, 556 N.Y.S.2d at 521. The court cited People v. Brown, 67 N.Y.2d 555, 496 N.E.2d 663, 505 N.Y.S.2d 574 (1986), *cert denied*, 479 U.S. 1093 (1987) and People v. Cwikla, 46 N.Y.2d 434, 386 N.E.2d 1079, 414 N.Y.S.2d 102 (1979). This reasoning mirrors the Supreme Court reasoning in United States v. Agurs, 427 U.S. 97 (1976), which created a two tier approach which imposed a lesser burden on defendant in a "specific request" case where the prosecution is put on notice "that there is particular evidence the defense does not have and believes to be important." *Vilardi*, 76 N.Y.2d at 73-74, 555 N.E.2d at 918, 556 N.Y.S.2d at 521.

220. *Vilardi*, 76 N.Y.2d at 75, 555 N.E.2d at 919, 556 N.Y.S.2d at 522. In essence, the court of appeals is choosing to remain with the *Agurs* formulation.

constitution.

Judge Simons, joined by Chief Judge Wachtler and Judge Bellacosa in a concurring opinion, affirmed the reversal and concluded that the defendant was entitled to the undisclosed evidence. However, the concurring judges would not have departed from the federal standard. According to the concurrence, the court is disregarding the "Supreme Court's decision merely because it disagrees with them or dislikes the result reached."[221] Recognizing that the state court is empowered to reach its own rulings on matters of state constitutional law, Judge Simons reasoned that New York has in actuality no "constitutional rules on *Brady* material independent of Federal precedents."[222] Because of this, Judge Simons concluded that the court cannot find an independent state ground for departure from the federal rule.

The concurring opinion offers "noninterpretative considerations" necessary for determining when the state court under its own constitution may depart from a federal constituional decision.[223] This is relevant to the decision in this case because the federal due process clause and the New York State due process clause do not vary significantly in either language or intent.[224] Other state decisions that depart from Supreme Court holdings have fallen into three categories: "1) we chose to adhere to our own established law . . . , 2) to establish a more protective State right by constitutionalizing a prior fully developed common law right or 3) because we found a separate state rule justified by

221. *Id.* at 80, 555 N.E.2d at 922, 556 N.Y.S.2d at 525 (Simons, J., concurring).

222. *Id.* at 85, 555 N.E.2d at 925, 556 N.Y.S.2d at 528 (Simons, J., concurring). The majority's independent state ground was not based on *Brady* material specifically, but on prior cases dealing with prosecutorial use of false and misleading testimony.

223. *Id.* at 80, 555 N.E.2d at 922, 556 N.Y.S.2d at 525 (Simons, J., concurring).

224. *Id.* The court cited People v. Alvarez, 70 N.Y.2d 375, 515 N.E.2d 898, 521 N.Y.S.2d 212 (1987) as holding that the federal and state due process clauses do not materially differ and hence are not subject to inconsistent analysis. *Vilardi*, 76 N.Y.2d at 80, 555 N.E.2d at 922, 556 N.Y.S.2d at 525.

concerns peculiar to New York State residents."[225] Thus, the concurrence found no analytical basis for departures from the federal rule since exculpatory evidence does not fit into any of the above three categories and the New York due process clause does not materially vary from the federal clause. Accordingly, the concurring Judges concluded that departing from the federal rule is invalid and likely to create "instability and uncertainty in our law."[226]

Prior to *Bagley* and the "reasonable probability" standard, federal constitutional law was based on the Supreme Court's decision in *Brady v. Maryland*.[227] *Brady* established "that the prosecution's failure to disclose to the defense evidence in its possession both favorable and material to the defense entitles the defendant to a new trial."[228] *Brady* involved "evidence that had been specifically requested by the defense."[229] It was uncertain, however, if the "specific request for the exculpatory evidence" was an "*indispensable* element of a Brady claim."[230]

Later, in *United States v. Agurs*,[231] the Supreme Court "created a two-tiered framework for determining whether favorable evidence was 'material,'"[232] such that non-disclosure of it would require a new trial. Under this framework, specifically requested evidence "was material if it 'might have affected the outcome of the trial.'"[233]

"[I]n cases where there had been no request or, only a general request for exculpatory material, . . . undisclosed exculpatory evidence was material only if it 'create[d] a reasonable doubt that

225. *Vilardi*, 76 N.Y.2d at 83, 555 N.E.2d at 924, 556 N.Y.S.2d at 527 (Simons, J., concurring) (citations omitted); *see People v. P.J. Video*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986).

226. *Id.* at 86, 555 N.E.2d at 926, 556 N.Y.S.2d at 529 (Simons, J., concurring).

227. 373 U.S. 83 (1963).

228. *Vilardi*, 76 N.Y.2d at 73, 555 N.E.2d at 919, 556 N.Y.S.2d at 520.

229. *Id.*

230. *Id.* (emphasis in original).

231. 427 U.S. 97 (1976).

232. *Vilardi*, 76 N.Y.2d at 73, 555 N.E.2d at 917, 556 N.Y.S.2d at 520.

233. *Id.* at 73, 555 N.E.2d at 918, 556 N.Y.S.2d at 521. (quoting *Agurs*, 427 U.S. at 104).

did not otherwise exist.'"[234] The *Agurs* court found a failure to respond to a specific and relevant request "seldom, if ever, excusable."[235] In *Bagley* the Supreme Court reconsidered the *Agurs* approach and replaced it with a single test for all cases – "undisclosed evidence is material only if there is a 'reasonable probability that it 'would' have altered the outcome of the trial."[236]

The court of appeals rejected the new federal *Bagley* standard, basing its decision on its own state jurisprudence, and concluding that the state constitution has its own requirements for a fair trial. The court cited New York cases pre-dating the federal *Brady* case[237] that dealt with similar questions "of knowing prosecutorial use of false and misleading testimony, . . . [which] were decided entirely without reference to Federal law, based on [its] own view . . ."[238] of what a fair trial requires. "We have long emphasized that our view of due process in this area is, in large measure, predicated both upon 'elemental fairness' to the defendant, and upon concern that the prosecutor's office discharge its ethical and professional obligations."[239] Following these "long-standing State concerns,"[240] the court of appeals stated that its standard has long been "premised on *Agurs*, and . . . has been understood and cited again and again as the governing standard throughout the State."[241] Therefore, the court declined to abandon it in favor of *Bagley*. The court mentioned that the new federal *Bagley* standard is "hardly clear" and has created considerable confusion in its application.[242] By contrast, the

234. *Id.* (quoting *Agurs*, 427 U.S. at 112).

235. *Id.* at 74, 555 N.E.2d at 918, 556 N.Y.S.2d at 521 (citing *Agurs*, 427 U.S. at 106).

236. *Vilardi*, 76 N.Y.2d at 74, 555 N.E.2d at 918, 556 N.Y.S.2d at 521 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

237. *Brady* was based on prior federal cases similar to the New York cases the court relies on here.

238. *Vilardi*, 76 N.Y.2d at 75, 555 N.E.2d at 919, 556 N.Y.S.2d at 522 (citations omitted).

239. *Id.* at 76, 555 N.E.2d at 919, 556 N.Y.S.2d at 522.

240. *Id.*

241. *Id.*

242. *Van Pelt*, 76 N.Y.2d. at 78, 555 N.E.2d at 920, 556 N.Y.S.2d at 523.

court of appeals has determined that the New York standard encourages heightened "prosecutorial care"[243] in responding to discovery requests and establishes a clear standard.

People v. Van Pelt[244]
(decided June 5, 1990)

A criminal defendant contended that his due process rights under the federal[245] and state[246] constitutions were violated when he, upon retrial before a new trial judge, received a harsher sentence than originally imposed by the first trial judge.[247] The court held that the defendant's procedural due process rights were violated.[248]

A jury convicted defendant of first and second degree armed robbery, and the trial judge sentenced defendant to concurrent terms of five to ten years and four to eight years. The appellate division reversed and remanded for a new trial because the trial judge failed to instruct the jury that the prosecution had to disprove the defendant's alibi beyond a reasonable doubt.[249] Upon retrial, before a new trial judge, defendant was again convicted of first and second degree armed robbery. However, this judge imposed increased concurrent terms of seven and one half to fifteen years and six to twelve years. The trial judge imposed a harsher sentence because he believed that the defendant coerced his sister and brother-in-law into establishing an unbelievable alibi, and because a complaining witness was forced to come back to court to testify, thereby reliving the trauma of the incident.[250]

In a unanimous decision, the court of appeals held that the imposition of a harsher sentence by a trial judge creates a presump-

243. *Id.*
244. 76 N.Y.2d 156, 556 N.E.2d 423, 556 N.Y.S.2d 984 (1990).
245. U.S. CONST. amends. V, XIV, § 1.
246. N.Y. CONST. art. I, § 6.
247. *Van Pelt,* 76 N.Y.2d at 161, 556 N.E.2d at 425, 556 N.Y.S.2d at 986.
248. *Id.* at 158, 556 N.E.2d at 424, 556 N.Y.S.2d at 985.
249. *Id.* at 158-59, 556 N.E.2d at 424, 556 N.Y.S.2d at 985.
250. *Id.* at 159, 556 N.E.2d at 424, 556 N.Y.S.2d at 985.