State of New York

Court of Appeals

The People of the State of New York

Respondent,

v.

Danny Colon and Anthony Ortiz,

Defendants-Appellants.

BRIEF FOR THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
AMICUS CURIAE

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September 4, 2009

COURT OF APPEALS
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK, :
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Respondent, :
:
-against- :
:
DANNY COLON and ANTHONY ORTIZ, :
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Defendants-Appellants. :

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *AMICUS CURIAE*

STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 12,800 direct members – and 94 state, local, and international affiliate organizations with another 35,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The New York State Association of Criminal Defense Lawyers (NYSACDL) – an affiliate of NACDL – is a non-profit membership organization of more than 850

criminal defense attorneys who practice in the State of New York and is the largest private criminal bar association in the State. Its purpose is to provide assistance to the criminal defense bar to enable its members to better serve the interests of their clients and to enhance their professional standing. NYSACDL is dedicated to assuring the protection of individual rights and liberties for all.

NACDL and NYSACDL file this *amicus* brief in support of appellants, Danny Colon and Anthony Ortiz, because they believe that robust disclosure of exculpatory information helps ensure the fairness and accuracy of criminal trials, and is vital to the integrity, reliability and proper functioning of the criminal justice system – policies undermined by the Appellate Division's decision in this case.

PRELIMINARY STATEMENT

Must a defendant establish the admissibility of suppressed exculpatory information to satisfy the materiality standard of *Brady v. Maryland*, 373 U.S. 83 (1963), and *People v. Vilardi*, 76 N.Y.2d 67 (1990)? That question – reserved in *People v. Hunter*, 11 N.Y.3d 1, 5 (2008) – is among those raised on this appeal, involving a prosecutor's systematic neglect of her disclosure obligations despite specific request for the suppressed information. *See People v. Colon*, 55 A.D.3d 444, 445 (1st Dept. 2008). And it is the question *amici* principally address in this brief.

Amid a broader pattern of misconduct, the prosecutor in this case failed to disclose witness interview notes suggesting that individuals other than appellants were

involved in the double murder for which they were convicted at trial. *Id.* The Appellate Division concluded that the prosecutor "improperly" withheld this "potentially exculpatory information." *Id.* But the Court found no "reasonable possibility" the information might have changed the verdict, asserting that (1) the documents constituted inadmissible hearsay, and (2) appellants could not show they "might have led to admissible exculpatory evidence." *Id.* (citing *Vilardi*, 76 N.Y.2d at 77). No consideration was given to whether, and to what extent, counsel could have investigated the information and made use of resulting leads in preparing for trial. On this scant analysis, the Court held the information immaterial and rejected appellants' *Brady* claim.

The Appellate Division's decision contravenes settled *Brady* law, misconstrues the rule's doctrinal rationale and must be reversed. Due process requires prosecutors to disclose favorable *information* – not just evidence – in time for defense counsel to investigate and use it at *trial*. *See, e.g., Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974). When the prosecutor withholds the information, she prevents counsel from exercising those opportunities. And requiring a defendant to establish the information's admissibility for the first time years after conviction – when witnesses have disappeared or died, memories have faded and other leads available before trial have vanished – is an often impossible task. *Cf., e.g., Reyes v. Greiner*, 340 F. Supp. 2d 245, 277-78 (E.D.N.Y. 2004) (collecting federal and New York state cases noting futility of reconstruction hearings after long passage of time), *aff'd*, 150 Fed. App'x 77 (2d Cir. 2005).

In this paradoxical way, the Appellate Division's approach rewards the wrongdoer and penalizes the victim, saddling defendants with an all but insurmountable burden. It thereby creates a perverse incentive for prosecutors to withhold disclosure and train later *Brady* arguments on the strength of the People's case – a case tainted by their own suppression of its potential antidote. *Contra Hunter*, 11 N.Y.3d at 5 (due process entitles defendant to favorable information known to People "*at the time of trial*," and right "[can]not be nullified by post-trial events") (emphasis supplied); *Vilardi*, 76 N.Y.2d at 78 (defendant entitled to materiality review on record "unimpaired by failure to disclose important evidence").

Proper *Brady* analysis hinges not on whether suppressed exculpatory information is in admissible form, but on whether its timely disclosure, with an adequate opportunity for defense counsel to investigate and use it, might have affected the outcome. *Cf. Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) (due process trumps mechanical application of evidentiary rules to ensure fundamental fairness). In cases like this one – when the information emerges long after trial – courts should assume its accuracy and that timely disclosure would have led to admissible or otherwise helpful evidence, and then apply the *Vilardi* materiality test. *See, e.g., United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (suppressed information may be material if it could lead to admissible evidence); *cf. People v. Ennis*, 11 N.Y.3d 403, 414 (2008) (implying that inadmissible

information may be material if its "content" might have opened new "line of investigation").

In other words, courts should presume the information has been exploited to its full exculpatory potential – that timely investigation by competent counsel would have confirmed its veracity and developed it into evidentiary or otherwise useful form – and *then* ask whether it has a reasonable possibility of influencing the verdict. *See, e.g., Strickland v. Washington,* 466 U.S. 668 (1984) (defense counsel presumed competent and has duty to investigate); *Kyles v. Whitley,* 514 U.S. 419, 441 (1995) (disclosure to "competent counsel" would have made a difference); *People v. Fuentes,* 12 N.Y.3d 259, 266 (2009) (Jones, J., dissenting) (counsel obliged to conduct "follow-up investigation" upon timely disclosure). Any other approach undermines *Brady*'s disclosure mandate and encourages widespread suppression of exculpatory information, spawning unfair trials and false convictions.

Application of this analysis requires reversal of appellants' convictions. Assuming its accuracy, admissibility or other utility, there is at least a reasonable possibility that information attributing the charged murders to third parties might have led to a different result. *See People v. Primo*, 96 N.Y.2d 351 (2001); *Holmes v. South Carolina*, 547 U.S. 319 (2006) (both recognizing power of alternative perpetrator/third-party culpability evidence). At a minimum, the case should be remanded for further proceedings and proper materiality analysis, by the standard *amici* propose, in the first instance.

DISCUSSION

A. The Requirement of Disclosure: History

A proper understanding of the *Brady* rule begins with the decision itself. In *Brady*, the Supreme Court announced that "the suppression by the prosecution of evidence favorable to the 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." 373 U.S. at 87. Accordingly, a conviction must be reversed when the defendant can demonstrate "(1) evidence is favorable, either because it is exculpatory or impeaching; (2) that the prosecution suppressed such evidence; and (3) that prejudice [ensued] because the suppressed evidence was material." *Fuentes,* 12 N.Y.3d at 263 (citing *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999)).

Following *Brady*, considerable debate arose as to whether a specific request for exculpatory evidence was an essential element of a successful claim. *See* Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 115-17 (1972). *United States v. Agurs* settled the controversy, establishing a two-tiered framework for determining whether suppressed evidence was "material" so as to require reversal. 427 U.S. 97 (1976). Evidence specifically requested by the defense was material if it "might have affected the [trial's] outcome." *Id.* at 104. But where there had been no request, or only a general one, the prosecution's duty to disclose emanated solely from the nature of the evidence itself, ostensibly justifying a heavier burden. In those

instances, evidence was material only if it "create[d] a reasonable doubt that did not otherwise exist." *Id.* at 112.

A deeply divided Court revisited *Agurs* in *United States v. Bagley*, a case involving undisclosed impeachment evidence, and replaced the two-tiered approach with a uniform standard applicable across-the-board. 473 U.S. 667 (1985). Borrowing its newly announced *Strickland* test for ineffective assistance of counsel claims, the Court in *Bagley* held that undisclosed evidence is material only upon a "reasonable probability" that it "would" have altered the verdict, i.e., "a probability sufficient to undermine confidence in the outcome." *Id.* at 682. Writing for the majority, Justice Blackmun deemed this standard "sufficiently flexible" to cover both impeaching and exculpatory information, in "specific request" and "no request/general request" cases alike. *Id.* Justice Blackmun acknowledged that a prosecutor's failure to respond to a specific request not only deprives the defense of the information sought, but may lull counsel into thinking that it does not exist, and so to abandon investigative and trial efforts in that direction. Nonetheless, he decided that this risk was adequately reflected in the "totality of the circumstances," making a separate standard unnecessary. *Id.* at 682-83.

In *Vilardi*, this Court rejected *Bagley* and adopted a stricter materiality test for specific request cases, relying on the due process clause of the State constitution. Stressing its long held view "in this area" – predicated on "elemental fairness to the defendant" and "concern that the prosecutor's office discharge its ethical and

professional obligations" – the Court analogized suppressing requested information to withholding statements of prosecution witnesses, a statutory and decisional violation warranting automatic reversal. 76 N.Y.2d at 76-77 (citations and internal quotes omitted).[1] On that basis and others, the Court concluded that suppressing requested *Brady* information offends due process, and compels a new trial, upon a "reasonable possibility" that the nondisclosure contributed to the verdict. *Id.* at 77.

Amplifying its reasoning, the Court explained that a "backward-looking outcome-oriented standard" of materiality – one that gives "dispositive weight to the strength of the people's case" – dissuades prosecutors from thoroughly searching for and fully disclosing exculpatory information. To avoid these pitfalls and create a bright line incentive for disclosure, the Court warned that withholding exculpatory information upon request is "seldom if ever excusable." *Id.*

Finally, the Court reaffirmed *Vilardi*'s thrust last year in *Hunter*, underscoring that the People's disclosure duty turns on their knowledge "at the time of trial" and cannot be "nullified" by subsequent events. 11 N.Y.3d at 6.

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[1] While reversal for *Rosario* violations (*see People v. Rosario*, 9 N.Y.2d 286 (1961)) is no longer automatic, *e.g.,* CPL 240.75; *People v. Sorbello,* 285 A.D.2d 88 (1st Dept.), *lv. denied,* 97 N.Y.2d 658 (2001), the analogy remains instructive. *See infra* 15.

B. The Policies Motivating *Brady* and *Vilardi* Mandate Broad Disclosure of Exculpatory Information Regardless of Form

1. Keying *Brady* Materiality to Exculpatory Potential, Rather than Post Hoc Admissibility, Promotes the Accuracy and Fairness of Trials

At its core, the State's duty to disclose derives from society's interest in fair and accurate criminal trials. *See, e.g., People v. Novoa*, 70 N.Y.2d 490, 496 (1987) (disclosure duty rooted in due process "concept of fairness"); *United States v. Rodriguez*, 496 F.3d 221, 226 n.4 (2d Cir. 2007) (disclosure serves twin "objectives" of fairness to defendant and convicting guilty rather than innocent). As the Supreme Court reiterated in *Strickler*, prosecutors play a

> special role . . . in the search for truth. . . . [A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal [trial] is not that it shall win a case, but that justice shall be done.

527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (quotation marks omitted); *see generally Vilardi*, 76 N.Y.2d at 76 (New York *Brady* law premised on "elemental fairness to the defendant") (citations and internal quotes omitted).

A corollary of the duty to disclose is that prosecutors must divulge favorable *information* – not just *evidence* – in time for the defendant to adequately investigate and develop it for effective use at trial. *See, e.g., Gil*, 297 F.3d at 104-05; *Leka v. Portuondo*, 257

F.3d 89, 101 (2d Cir. 2001). The U.S. Attorney's Manual thus recognizes that timely disclosure of information favorable to the defense is critical to ensure a fair trial. U.S.A.M. § 9.5001. Similarly, New York's new Rules of Professional Conduct require prosecutors to produce "evidence or *information* ... that tends to negate the guilt of the accused ... except when relieved of this responsibility by a protective order of a tribunal." R 3.8(b)(2009) (emphasis supplied).

It follows that the admissibility of suppressed exculpatory information – i.e., whether or not it is in evidentiary form when it belatedly surfaces – does not and cannot dictate its materiality for *Brady* purposes. Instead, courts rightly focus on whether, if timely disclosed and developed by skilled counsel, the information's *fruits* might have instilled enough reasonable doubt to avoid conviction. *See, e.g., Grant*, 498 F.2d 376; *Gil*, 297 F.3d at 104 (*Brady* information material if it could lead to admissible evidence or aid cross-examination). In other words, the relevant prejudice is prejudice to the defendant's trial preparation, which necessarily impacts the trial's fairness and reliability, and thereby implicates the verdict's accuracy and integrity. *See United States v. Polisi,* 416 F.2d 573, 577 (2d Cir. 1969). Indeed, this Court suggested as much in *Ennis*, intimating that inadmissible information may be material if its content might have opened a new line of investigation. 11 N.Y.3d at 414.

Grant illustrates the point. There, as here, a prosecutor suppressed requested *Brady* information inculpating someone other than the defendant in the charged crime, a bank

robbery. Reversing the defendant's conviction, the Second Circuit held that timely disclosure of the information, "allow[ing] for [its] full exploration and exploitation" at trial, could have led counsel to "uncover additional exculpatory evidence" that "might have induced ... reasonable doubt" among the jury. 498 F.2d at 379, 382; *accord, e.g., DeSimone v. Phillips*, 461 F.3d 181, 195-97 (2d Cir. 2006) (suppressed hearsay statement implicating third party in charged murder material because defense entitled to pursue resulting leads); *Gil*, 297 F.3d at 104 (exculpatory hearsay memorandum material even if inadmissible because it could have led to admissible evidence).

More recently, the Second Circuit squarely rejected the approach employed by the Appellate Division here, broadly declaring that the State's *Brady* obligations "do[] *not* depend on whether the information to be disclosed is admissible as evidence in its present form." *Rodriguez*, 496 F.3d at 226 n.4 (emphasis supplied). Writing for the Court, Judge Leval concretely showed how linking materiality to admissibility degrades *Brady*'s fair trial guarantee:

> Assum[e], for example, that the prosecution's investigations revealed a reliable informant's inadmissible hearsay statement to the effect that the defendant was innocent and had been framed by a rival gang, and that the true perpetrator was in fact X, who had thrown the murder weapon into the abandoned mine shaft outside of town. [On that scenario], it would *seriously undermine the reliability of the judgment and the fairness of the proceeding to negate the defense's*

> *entitlement to be informed of this on the ground that the hearsay statement was inadmissible.*

Id. (emphasis supplied). Applying this logic, the Court held that *Brady* reaches impeaching witness statements in government interviews even if not written down, never mind reduced to admissible form. *Id.* at 225-27.

For similar reasons, most federal appeals courts eschew admissibility-based materiality analysis and require timely disclosure of exculpatory information for full exploration and exploitation at trial. *See*, *e.g., United States v. Price*, 566 F.3d 900, 912 (9th Cir. 2009) (suppressed information material if it can be used on cross-examination); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 162-63 (2d Cir. 2008) (same if information could lead to admissible evidence or be useful on cross examination); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (same if information could lead to admissible exculpatory evidence); *Hutchinson v. Bell*, 303 F.3d 720, 743 (6th Cir. 2002) (same if information would lead to admissible evidence); *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999) (inadmissible evidence may be material under *Brady*); *United States v. Asher*, 178 F.3d 486, 496 (7th Cir. 1999) (same); *United States v. Bowie,* 198 F.3d 905, 909 (D.C. Cir. 1999) (material if useful on cross-examination); *White v. Helling,* 194 F.3d 937, 946 (8th Cir. 1999) (material if leads to further investigation or useful for impeachment); *Wright v. Hopper,* 169 F.3d 695, 703 (11th Cir. 1999) (inadmissible evidence may be

material if it would have led to admissible evidence); *Banks v. Reynolds,* 54 F.3d 1508, 1521 n.34 (10th Cir. 1995) (material if leads to admissible evidence).

To vindicate *Brady*'s due process and fair trial concerns, New York should formally join these courts in rejecting admissibility as materiality's touchstone. *Cf. Chambers,* 410 U.S. at 302 (evidence rules "may not be applied mechanistically to defeat the ends of justice").

2. Pegging *Brady* Materiality to Post Hoc Admissibility Encourages Pervasive Suppression of Exculpatory Information

Conversely, a test that equates materiality with admissibility frustrates *Brady* by chilling disclosure of favorable information. Centered on the weight of the trial evidence, such a standard invites prosecutors to avoid looking for exculpatory information and erring on the side of disclosure while falling back later on the apparent strength of the People's case – precisely what *Vilardi* and *Hunter* condemn. *See* 76 N.Y.2d at 77; 11 N.Y.3d at 5.

Animating *Brady* is the premise that it is chiefly for defense counsel, not the prosecutor, to decide what information is exculpatory and determine how to use it in the first instance. *See, e.g., DeSimone*, 461 F.3d at 195 (contrary view "appoint[s] the fox as henhouse guard"). Indeed, that is one reason disclosure must occur in time for adequate investigation and evidentiary development by the defense at trial. Suppression, as noted, prevents counsel from exercising those opportunities. And again, compelling the

defendant to establish admissibility for the first time years after conviction is a largely impossible task. *See supra* 3 and cases cited; *cf. People v. Yavru-Sakuk*, 98 N.Y.2d 56, 60-62 (2002) (reconstruction hearing may be "futile" after long "lapse of time") (citation and internal quotes omitted).

To say that information is immaterial because it is inadmissible therefore begs the question, as it is inadmissible precisely *because* the prosecutor failed to timely disclose it. The Appellate Division's approach thus punishes the *defendant* for an admissibility problem created by the *People's* nondisclosure, tagging him with a nearly insurmountable burden. *Contra, e.g., United States v. Mastrangelo*, 693 F.2d 269, 272-73 (2d Cir. 1982) ("Neither in criminal nor civil cases will the law allow a person to take advantage of his own wrong."). It thereby encourages prosecutors to conceal exculpatory information without fear of reversal, significantly diluting *Brady*'s protection. *Contra Hunter*, 11 N.Y.3d at 5 (disclosure duty coincides with People's knowledge at time of trial regardless of future developments). Put more vividly, it empowers prosecutors to use suppression as both a sword, to help secure victory at trial, and a shield to deflect later *Brady* claims on inadmissibility grounds. And, concomitantly, it leaves the defendant in a pernicious double bind, never receiving the information for trial yet without subsequent recourse under *Brady*.

Where, as here, suppressed exculpatory information comes to light long after trial, it follows that courts should assume its accuracy and that timely disclosure would have

led to admissible or otherwise helpful evidence, and then apply *Vilardi* to assess the information's materiality. In other words, courts should apply a rebuttable presumption that the information has been exploited to its full exculpatory potential – that timely investigation by diligent counsel would have confirmed its validity and developed it into evidentiary or otherwise useful form – and *then* ask whether it has a reasonable possibility of changing the verdict. *See supra* 4-5 and cases cited. And in close cases, an adverse inference should be drawn where the People fail to seek in camera review before trial, *see* CPL 240.90(3), of items whose "exculpatory value" seems "debatable" or uncertain, *Vilardi*, 76 N.Y.2d at 77. *See, e.g., Fuentes,* 12 N.Y.3d at 265 (criticizing prosecutor's failure to request in camera inspection of undisclosed document); N.Y. Rules of Prof'l Conduct R. 3.8(b); *cf., e.g., People v. Yavru-Sakuk,* 4 N.Y.3d 814 (2005) (error not to submit undisclosed diary entries for in camera inspection) (*Rosario* case); *People v. Banch*, 80 N.Y.2d 610, 616 (1992) (adverse inference charge for undisclosed *Rosario* material).

By requiring the People to prove that timely disclosure and investigation would *not* have yielded admissible or otherwise helpful evidence,[2] this approach puts the onus of suppression where it belongs: on the party responsible for the admissibility problem

[2] Unlike a post hoc admissibility burden on the defense, this rebuttal hurdle is not particularly hard for the People to clear. For example, inadmissible impeachment information that is merely cumulative probably would not merit relief. *Cf., e.g., Ennis,* 11 N.Y.3d at 413-14 (proposed presumption effectively rebutted; "this is *not* a case where [suppressed exculpatory] information might have opened a line of investigation for the defense that was not otherwise available") (emphasis supplied); *People v. Scott*, 88 N.Y.2d 888, 891 (1996) (polygrapher disavowed conclusion, attributed to him in suppressed document written by prosecutor, regarding witness's veracity).

in the first place. *Cf.* Final Report of the New York State Bar Assn's Task Force on Wrongful Convictions at 28 (Apr. 4, 2009) (recommending that *Vilardi* be "revised to require that the State show there was no possibility of prejudice to the convicted person"). It roughly restores the parties' pre-suppression positions, with an appropriate tax against the People to deter future violations, and to offset the increased difficulty defendants face in investigating stale information years after trial.

Equally beneficial, *amici*'s position furthers *Vilardi*'s goal of encouraging greater disclosure in borderline situations, leaving the ultimate determination of what is exculpatory, and how to use it, to the player best suited to make it: defense counsel. *See Kyles*, 514 U.S. at 14 (prosecutor "anxious about tacking too close to the wind" will opt for disclosure). And it counters the favorable inferences the People would otherwise derive from a trial record unfairly "[]impaired by failure to disclose important evidence." *Vilardi*, 76 N.Y.2d at 78.

By all these means, a disclosure rule emphasizing information's content rather than form gives *Brady* force and effect, promoting fuller compliance, fairer trials and more accurate verdicts. *See, e.g., Ennis*, 11 N.Y.3d at 414 (suppressed exculpatory statement potentially material, even if inadmissible, if its "content" opens new line of investigation); *Rodriguez*, 496 F.3d at 225-27 (prosecutors must disclose substance of witness lies even if not written down); *Vilardi*, 76 N.Y.2d at 77 (withholding specifically requested information "seldom if ever excusable"). In contrast, an admissibility-oriented

materiality approach does just the opposite, rewarding prosecutors for suppressing exculpatory information in the hope that the means to exploit it will dry up before it ever surfaces. *Contra Hunter*, 11 N.Y.3d at 5 (disclosure duty measured by prosecutors' knowledge at time of trial). And, in turn, suppression breeds unreliable trials and wrongful convictions, disserving justice, discrediting our system and defeating *Brady*'s purpose.

3. Suppression of Exculpatory Information Spurs Unfair Trials and False Convictions

The travesty of false conviction needs little elaboration. The innocent lose their liberty and are lost to their loved ones, while the guilty go free and continue to threaten society. *Contra Texas v. Cobb*, 532 U.S. 162, 172 (2001) (noting society's "compelling interest in finding, convicting, and punishing those who violate the law") (citations and internal quotes omitted); 4 W. Blackstone, *Commentaries on the Laws of England* 352 (1768) (better that 10 guilty escape than one innocent suffer). And when false convictions are exposed, citizens doubt the justice system's efficacy and question the rule of law. *Cf. People v. Savvides,* 1 N.Y.2d 554, 556 (1956) ("The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach."). Yet the surge of exonerations in rape and capital cases suggests that many false convictions go undetected.[3]

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[3] The prevalence of DNA exonerations in rape cases suggests that "false convictions that (continued...)

To cite just one example, Ernest Sonnier was recently released after spending 23 years in a Texas prison for a rape he did not commit. *Man Held for 23 Years is Set Free by DNA Tests,* N.Y. Times, August 8, 2009, at A11. Prosecutors charged Sonnier in 1984 based on a victim identification, in the face of primitive blood tests pointing strongly to his innocence. *Id.* At trial, an analyst in the scandal-plagued Houston crime lab testified that Sonnier could have been the perpetrator – despite the scientific evidence to the contrary. Innocence Project, *Houston Man Freed After 23 Years,* http://www.innocenceproject.org/Content/2108.php (last visited Aug. 12, 2009).

The risk of false conviction is markedly enhanced by policies, like an admissibility-oriented materiality approach, that inhibit robust disclosure. The Innocence Project reports that exculpatory information was suppressed in at least 34% of false conviction cases eventually upended by DNA evidence. Innocence Project, Government Misconduct, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited Aug. 10, 2009). And a string of exonerations in North Carolina – including 10 in death penalty cases from 1998 to 2008 – drove the legislature to institute an open file discovery regime, which scuttled the Duke Lacrosse case and

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[3](...continued)
come to light are the tip of [an] iceberg" in *all* cases where DNA is unavailable. Samuel R. Gross, *et al., Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 531 (2005). A similar inference can be drawn from the disproportionate exoneration rate in capital murder cases, which are better investigated and reviewed, compared to the overall exoneration rate for murders. *Id.* at 531-33.

disbarred the prosecutor. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and The Road to Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 Geo. Mason L. Rev. 257, 260 (2008).

In the *Brady* context, rules favoring disclosure are the best deterrent against false convictions. *See Kyles,* 514 U.S. at 456 (Scalia, J., dissenting) ("In a sensible system of criminal justice, wrongful conviction is avoided by establishing ... lines of procedural legality that leave ample margins of safety."). With the rise in false convictions fueled by suppression of discoverable evidence, it is clearer than ever – and certainly clearer than it was when this Court decided *Vilardi* – that tying materiality to admissibility is just bad policy. It deprives juries of information relevant and potentially crucial to making a reliable judgment of guilt or innocence, bucking the "modern trend," *United States v. Scheffer*, 523 U.S. 303, 323 (1998) (Stevens, J., dissenting), of admitting "all the evidence which [tends to] expose[] the truth." *Kyles*, 514 U.S. at 440 (citation and internal quotes omitted).[4]

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[4] The Appellate Division also erred in holding that undisclosed benefits conferred on a prosecution witness, a jailhouse informant, were immaterial. *Colon*, 55 A.D.3d at 445; *see Kyles*, 514 U.S. at 436 (materiality of suppressed evidence considered "collectively, not item by item") (footnote omitted). Though jailhouse informants are notoriously unreliable, *e.g.*, Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 Case W. Res. L. Rev. 593, 599 (2007), the Supreme Court recently ruled that their credibility is for the jury like that of any other witness. *Kansas v. Ventris*, 129 S. Ct. 1841, 1847 n.* (2009). To properly judge the credibility of a jailhouse informant, the jury needs to know all his incentives for testifying – especially given the current "tendency" to "enlarge" the "matters" submitted to juries in the witness credibility "domain." *United States v. Banks*, 556 F.3d 967, 982-83 (9th Cir. 2009) (Alarcon, J., concurring and dissenting) (citation and internal quotes omitted); *see, e.g., United States v. James*, 609 F.2d 36, 46 (2d Cir. 1979) (witness's bias and motive always material, never collateral and provable by (continued...)

C. Appellants' Convictions Must Be Reversed

As the Appellate Division found, the People "improperly" suppressed a welter of "potentially exculpatory information" in this case, including statements by two witnesses naming four individuals other than appellants as participants in the charged homicides. *Colon*, 55 A.D.3d at 445. But the Court applied an errant materiality test, focusing on the admissibility of the statements rather than the content of the underlying information, and ignoring whether fruit of its timely disclosure and investigation might have changed the outcome.

Under the correct standard – one assuming the information's accuracy; presuming that timely disclosure and investigation would have rendered it admissible, evidentiary or otherwise useful; and drawing an adverse inference against the People for shunning in camera review – appellants' convictions must be reversed. It is at least reasonably possible that properly developed evidence pinning the murders on third parties might have led the jury to acquit. *See, e.g., Primo*, 96 N.Y.2d 351; *Holmes*, 547 U.S. 319. In addition, defense counsel could have used the information to attack the "thoroughness and good faith of the [People's] investigation," *Kyles*, 514 U.S. at 445, arguing that the police ignored other suspects, perilously rushed to judgment or even framed appellants.

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[4](...continued)
extrinsic evidence). Indeed, such incentives bear not only on the informant's state of mind, but on the prosecution's bias and motive in offering them, i.e., how far it will go to convict the defendant. *See Kyles*, 514 U.S. at 445-46 (*Brady* material may be used to attack investigation's integrity).

See id. at 446 (defense lawyers commonly seek to "discredit the caliber of the investigation or the decision to charge the defendant," and courts may consider this potential use in "assessing [] possible *Brady* violation") (citation and internal quotes omitted). And these uses together certainly could have swayed the verdict.

At a minimum, the case must be remanded for further proceedings and application of the correct materiality standard in the first instance. This is especially so because (1) the People continued to withhold the witnesses' contact information even during the CPL 440 proceedings – perpetuating and compounding their *Brady* violations – and (2) the hearing court refused to order the information's disclosure, barring appellants from approaching or interviewing the witnesses to build the record. App. Br. 31.

CONCLUSION

The judgment of the Appellate Division should be vacated.

September 4, 2009 Respectfully submitted,

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