

are often insufficient to determine disability, particularly in mental health cases (*Javery v. Lucent Techs. Inc.*, 741 F.3d 686 (6th Cir. 2014), and *Smith v. Bayer Corp.*, 275 F App'x 495 (6th Cir. 2008)). The lack of an interview with Ms. Okuno raised “questions about the thoroughness and accuracy of the benefits determination” (*Okuno*, p 610, citing *Shaw v. AT&T Umbrella Ben. Plan No. 1*, 795 F.3d 538, 550 (6th Cir. 2015)). Further, Reliance failed to consult with medical professionals with expertise in mental health. The court pointed out that the language of ERISA § 2560-503-1 (h)(3)(iii) (2001) states that when any adverse determination is based on a medical judgment, the fiduciary shall “consult with a health care professional who has appropriate training and experience in the field of medicine involved in the medical judgment.” The *Okuno* case emphasizes the importance of using consultants with the relevant expertise.

Anxiety and depression are frequent components of physical ailments, particularly those resulting in disability. If the mere presence of these psychiatric symptoms obviated the disability claim, as a practical matter, virtually all disability claims based on physical ailments would be denied. For evaluators, the ruling reinforces the importance of a thorough examination and at times, an in-person examination and consultation with the claimant's treatment providers.

Ms. Okuno's case was remanded to the district court. The district court directed Reliance to undertake another review of Ms. Okuno's claim that, apart from her psychiatric diagnoses, she was disabled as a result of her physical ailments.

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## Psychiatric Record Discoverable as Brady Material

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## Psychiatric Records in the Possession of the Prosecution are not Privileged, but Discoverable as Brady Material

In *Fuentes v. Griffin*, 829 F.3d 233 (2d Cir. 2016), the U.S. Court of Appeals for the Second Circuit reversed the U.S. District Court for the Eastern District of New York's decision that denied state inmate Jose Fuentes' petition for *habeas corpus* after his conviction for first-degree rape was affirmed on direct appeal. The defense contended that the prosecution withheld a psychiatric record that was needed to discredit the alleged victim and potentially exonerate Mr. Fuentes, and the nondisclosure of this record denied Mr. Fuentes a fair trial. In particular, the victim's psychiatric consultation met the *Brady* standard for evidence and should have been made available to the defense (from *Brady v. Maryland*, 373 U.S. 83 (1963)), in which the U.S. Supreme Court ruled that suppression of evidence favorable to a defendant by the prosecution violates due process). The U.S. Court of Appeals agreed that Mr. Fuentes' petition should have been granted based on his *Brady* claim. The court ordered that a new judgment be entered and Mr. Fuentes be released unless afforded a new trial within 90 days.

### Facts of the Case

The defendant/petitioner, Jose Alex Fuentes had oral and vaginal intercourse with G. C. on the roof of her apartment building in January 2002. At issue is whether these acts were consensual or rape. Because only Ms. C. and Mr. Fuentes were present, this case relies heavily on the credibility of Ms. C.'s report.

Ms. C. testified that she had gone to an arcade shortly after midnight with her friend Tammy and three others. They all left to go home from the arcade at 3:00 a.m. by subway. Ms. C. switched trains from the others and exited the subway station alone near her building when a stranger, later identified as Mr. Fuentes, followed her home, threatened her with a knife, and raped her. Later that day, Ms. C. went to Tammy's home and told her friend she had been raped and then went to Woodhull Hospital where a rape kit was prepared and police were informed.

While at Woodhull Hospital, following collection of the rape kit, Ms. C. received a psychiatric consultation. According to the record of the psychiatric consultation, Ms. C. had a two-year history of depression, suicidal thoughts, relationship problems with her mother, and crying spells. She also reported

feeling angry for putting herself at risk the night of the alleged rape. She was described as fully oriented and not appearing delusional or psychotic. She received a diagnosis of dysthymic disorder and the suggestion for a referral to a psychiatric clinic at discharge.

In contrast, Mr. Fuentes testified that he met Ms. C. in an arcade bar. He stated that they left the arcade together and went to the roof of Ms. C.'s apartment building to have sex. Afterward, Mr. Fuentes testified, Ms. C. suggested they see each other again, but Mr. Fuentes balked and stated that it was a "one-night stand." Ms. C., once jilted, became angry and self-deprecating and stated that Mr. Fuentes was "going to be sorry." Ms. C. reportedly accompanied Mr. Fuentes back to the subway station. Once there, Mr. Fuentes described her behavior as "unstable" and "erratic," enough so that a subway employee took notice.

#### *Ruling and Reasoning*

Before trial, the prosecution removed the record of the psychiatric consultation from the file disclosed to the defense. During closing arguments, Mr. Fuentes' attorney, leafing through trial exhibits, noticed the record of Ms. C.'s psychiatric consultation shortly after the alleged rape and realized it had not been turned over. Mr. Fuentes' attorney moved for a mistrial on the grounds that the nondisclosure of the psychiatric consultation constituted a *Brady* due process violation. *Brady* requires the prosecution to turn over all information that may be helpful to the defense.

The prosecution admitted to intentionally withholding the record of the psychiatric consultation from *Brady* disclosure out of concern for psychiatrist-patient privilege. The court found that, in fact, the prosecution acted inappropriately by withholding the psychiatric consultation and not allowing the court to rule on discoverability. The court found that the consultation did not contain information favorable to the defense and was not subject to *Brady* disclosure. Mr. Fuentes' attorney argued that the undisclosed psychiatric consultation could have been used to cross-examine and impeach Ms. C.'s credibility and therefore was subject to *Brady* disclosure.

Mr. Fuentes appealed to the New York State Court of Appeals. The appeal failed. The court found that, although the psychiatric consultation should have been disclosed, the nondisclosure would not

have changed the outcome of the trial and was a harmless error.

Failing in state court, Mr. Fuentes petitioned the U.S. District Court for the Eastern District of New York, for federal *habeas corpus* relief. The district court denied *habeas*, saying that the U.S. Supreme Court had not established that psychiatric consultation information was considered material for *Brady* disclosure.

Mr. Fuentes then turned to the U.S. Court of Appeals for the Second Circuit. He argued that when the New York Court of Appeals rejected his *Brady* claim, it incorrectly applied the materiality standard of *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Kyles*, the U.S. Supreme Court further defined the contours of *Brady* claims by introducing a materiality standard. This standard requires disclosure of information that would have a "reasonable probability" of a different trial outcome. The Second Circuit agreed. The court noted that the trial may have resulted in a different outcome, had the defense been able to explore the accuser's history. Cross examination of Ms. C. may have "potentially corroborated Fuentes's account of her behavior as 'unstable' and 'erratic' when he declined to see her again, to wit, being angry and volubly upset at being rejected" (*Fuentes*, p 249).

#### *Discussion*

In *Fuentes*, the prosecution was in possession of a psychiatric consultation, among other emergency room medical records of the victim. The prosecution chose to withhold the record of psychiatric consultation from the defense out of concern for psychiatrist-patient privilege.

Privilege is a legal right belonging to the patient to prevent the disclosure of confidential information in a court of law. In addition, all 50 states have laws regarding privilege, but it was not until *Jaffee v. Redmond*, 518 U.S. 1 (1996), that the privilege was recognized under the Federal Rules of Evidence.

John Henry Wigmore (1863–1943) an expert on the rules of evidence, suggested that when judges rule on whether information is privileged, they should consider four questions (Wigmore JH, Tillers P, Chadbourn JT (1961). Evidence in trials at common law. Boston: Little Brown). Did the communication originate in a confidence that it would not be disclosed? Was confidentiality necessary to maintain the relationship? Was the relationship one that the community wished to foster? Was the injury of disclosure greater than the benefit gained by correct disposal of the litigation?

At first blush, psychiatrists might consider a patient's psychiatric history in the court of law to be covered by doctor–patient privilege. In most circumstances, Ms. C's record of psychiatric consultation would be privileged. The common exceptions to privilege include reporting of child abuse, court-ordered examinations and, when the individual puts her mental condition at issue in litigation. In *Fuentes*, we have a completely different circumstance. The medical record, including the psychiatric consultation, was in the possession of the prosecution. The question became, not whether the record was privileged, but whether it should be turned over to the defense under the *Brady/Kyles* materiality standard.

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## Necessary Services Must Be Proven Futile Before Parental Rights Termination

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### The State Must Provide all Necessary and Reasonable Services to Correct Parental Deficiencies Before Declaring Parental Unfitness and Terminating Rights

In the *Matter of the Parental Rights of B. P.*, 376 P.3d 350 (Wash. 2016), the Supreme Court of Washington reversed an order of parental termination on the grounds of insufficient evidence demonstrating the futility of provision of attachment services to assist mother–child bonding. The court found that the state failed to meet the evidentiary standard of clear, cogent, and convincing evidence in arranging for all necessary services for correcting parental deficiencies before termination.

#### Facts of the Case

In 2011, B. P. was born addicted to methamphetamine and placed into foster care. The child's mother, Ms. O., entered an order of dependency, requiring mental health, parenting, addiction, and

family services. She completed a residential treatment program where B. P. was placed into her care. Ms. O. relapsed, and B. P. was again placed into foster care. Then two years old, B. P. exhibited signs of aggression, disorganized behavior, and distress during multiple placements, particularly when confronted with changes in routine.

Ms. O. then gave birth to another child, A., and again entered residential substance abuse treatment. Visits with B. P. were reinstated, supervised by family therapist Lori Eastep, to determine whether the parent–child relationship could be repaired. With a pending termination hearing, Ms. O. completed her program and moved to transitional housing. She sought a continuance of the termination hearing to acquire more stable housing. She also alleged that the foster family was receiving family preservation services, which she and B. P. were not.

By the final dependency hearing, Ms. O. had completed all ordered services with only a minor rule violation. Therapist Eastep testified that she had provided “therapeutic visits” (distinguished from formal family therapy) for B. P. and Ms. O.

The state's case at the termination trial was that Ms. O. was unfit to parent B. P. because of B. P.'s emotional needs, though the adequacy of Ms. O.'s care for A. was not in question. Experts testified about negative consequences of multiple changes in caregiver relationships. Fact witnesses stated that Ms. O. needed time to work through past trauma and attain emotional stability and that B. P. had a disorganized attachment to Ms. O. (despite a secure attachment to the foster parents). A therapist testified that B. P. was at risk for attachment disorder and needed stability during this early developmental period. Others testified to Ms. O.'s need for external structure to provide consistent parenting and the requirement for continued intensive treatment in this early stage of addiction recovery. On the other hand, some testimony identified Ms. O.'s favorable prospects for continued sobriety.

Ms. O. testified that she was farther in her recovery than during the previous relapse and was receiving better treatment. She stated that she understood the harm she had caused B. P., but felt that she could provide optimal future care.

The trial court terminated parental rights noting that “all necessary services, reasonably available, capable of correcting parental deficiencies within the foreseeable future have been offered . . .” (*B. P.*, p