

SUCCESSFUL BRADY/NAPUE CASES
(Updated Sept. 27, 2009)
*** capital case**

I. UNITED STATES SUPREME COURT

***Banks v. Dretke,**
540 U.S. 668 (2004)

Texas death row inmate was entitled to habeas relief from his death sentence due to the prosecution's suppression of evidence of a trial witness's informant status where that witness's testimony was key to the prosecution's claim of future dangerousness and the witness was not otherwise effectively impeached. Petitioner established cause for his failure to present the evidence establishing the *Brady* violation to the state court in that petitioner reasonably relied on the government's pre-trial promise to disclose all *Brady* material, and the state had continued to deny that the witness was informant at state post-conviction proceedings.

***Kyles v. Whitley,**
514 U.S. 419 (1995)

Reversing denial of habeas relief as to capital conviction and death sentence where state withheld eyewitness and informant statements, and a list of license numbers. Withheld evidence is to be evaluated collectively, not item-by-item, and the standard is a "reasonable probability" of a different result. The Court also made clear that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. at 437.

Giglio v. United States,
405 U.S. 150 (1972)

Government failed to disclose impeachment evidence of a promise of immunity in exchange for testimony. Prosecutor's knowing creation of a false impression requires new trial "if there is any reasonable likelihood that the false testimony could have affected the verdict."

***Miller v. Pate,**
386 U.S. 1 (1967)

Illinois death row inmate entitled to habeas relief where prosecution knowingly misrepresented paint-stained shorts as blood-stained, and failed to disclose the true nature of the stains.

***Brady v. Maryland,**
373 U.S. 83 (1963)

Suppression 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 of the prosecution. (Here, the state court had concluded that Brady was entitled to resentencing because of the prosecution's failure to disclose an extrajudicial statement by the co-defendant where he admitted to being the actual killer. The Supreme Court affirmed the state court's ruling that Brady was not entitled to a new guilt-innocence trial.)

Napue v. Illinois,
360 U.S. 264 (1959)

"When reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of immunity deal with witness violates Due Process. In addition, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." See *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. State of Kansas*, 317 U.S. 213. And "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." See *Alcorta v. State of Texas*, 355 U.S. 28.

II. UNITED STATES COURTS OF APPEALS

***Simmons v. Beard,**
___ F.3d ___, 2009 WL 2902251 (3rd Cir. Sept. 11, 2009)

Under AEDPA, habeas granted due to state's failure to disclose impeachment evidence related to the two primary witnesses tying the defendant to the crimes. The victim was an elderly woman killed in her home. Three neighbors identified the defendant as the person last seen with the victim asking to use her phone. These witnesses were all connected as they lived in the same house. They only came forward identifying the defendant after his arrest and pictures had been publicized. Another witness testified that she had been robbed and sexually assaulted by a man described similarly shortly after the murder but before the body was found and her attacker referenced the murder. While she reported the assault on the day it occurred, she made no reference to the statement referencing the murder and she only identified the defendant in a photo array after the murder and his picture had been publicized. She identified him a second time in a lineup requested by defense counsel. The defendant's girlfriend, who had initially made statements to police that would have provided the defendant with an alibi defense, contradicted the asserted alibi in her trial testimony. The state had failed to disclose four items from the defense. First, the defendant's girlfriend was a suspect and was threatened with arrest if she did not cooperate with police. She cooperated and all of her in-person or phone conversations with the defendant were recorded. Second, the other assault victim had attempted to buy a pistol soon after the assault and lied on the forms to avoid disclosing her 1951 felony conviction for burglary,

which made her ineligible to purchase a weapon. The lie made her subject to prosecution for perjury. She was charged with the weapons charge, but the prosecutor and detective in this case dismissed the charges against her and did not forward the information as they did in other cases where persons were suspected of perjury. Third, lab reports of evidence collected following her assault report showed no blood or seminal fluid and hairs consistent with the assault victim but not the defendant. Finally, at some point prior to trial, the assault victim was shown a mug book containing the defendant's picture but did not identify him. A police officer testified in the preliminary hearing, however, that she had not been shown a mug book. This failed identification was the only *Brady* issue the state court reviewed on the merits. The Third Circuit's review under AEDPA was complicated because there was a four-way split in the state court decision with no ground receiving a majority support. Because the state court found procedural bars for three of the claims, there was no adjudication on the merits. The state court's decision on the failed mug book identification was "an unreasonable construction of the factual evidence" presented in state court because the court failed to consider the undisputed fact that the defense would not have requested a lineup if this information had been disclosed. Likewise, because the state court had reviewed the merits of only the mug book identification claim, "the court did not reach the issue of the collective effect of multiple violations." Conducting this collective analysis, the court found the suppressed evidence to be material as "it calls into question the credibility of the two witnesses at the heart of the case." The prosecutor also recognized that the other assault victim was a "critical witness," beginning his opening statement describing her testimony and even calling her "critical" witness. "Overall the picture of what [the] trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened."

United States v. Torres,
569 F.3d 1277 (10th Cir. 2009)

Distribution conviction reversed on direct appeal. The defendant was convicted for distribution to a confidential informant during a controlled buy. Prior to trial, the government disclosed that the informant was paid \$100, cooperated with the government for approximately eight months, had previously been a drug user but had not used in 15 months, and she had two prior felony convictions. The defense was prohibited from cross-examining the informant with criminal complaints for drug possession and forgery that had been dismissed in the year prior to the defendant's arrest. Following trial, the defense discovered evidence related to the informant that had not been disclosed and filed a motion for new trial. The District Court improperly applied the newly discovered evidence test and denied relief. Reversal required because the government failed to disclose that (1) the informant had been retained by the DEA on two prior occasions and had been de-activated following the forgery charge, which was later dismissed; and (2) she had misidentified the defendant as his cousin.

United States v. Price,
566 F.3d 900 (9th Cir. 2009)

Felon in possession of firearm conviction vacated due to government's failure to disclose key

witness' criminal record. The pistol was found under the driver's seat of a car that was pulled with the defendant riding in the rear. While circumstantial evidence pointed to the defendant, the key government evidence was the testimony of a witness that testified she had seen the defendant with the pistol 15 minutes before the car had been stopped. Unknown to the defendant, except for one prior theft conviction, was that this witness had a lengthy history of theft and fraudulently using false registration tag convictions and arrests for shoplifting. The undisclosed evidence was material as the prosecutor relied heavily on the witness' testimony in closing and the defendant was acquitted of the drug trafficking charges tried at the same time. The District Court erred in finding no *Brady* violation simply because the prosecutor did not personally have knowledge of the witness' history, although the record was clear that, at minimum, the prosecutor had requested a detective to obtain this information.

Shortt v. Roe,
2009 WL 2487046 (9th Cir. 2009) (unpublished)

Habeas relief granted in murder and robbery case because the state failed to disclose that a state witness had been given sentencing consideration in exchange for his testimony against the defendant and failed to correct the witness' false testimony denying consideration. Under AEDPA, the state court's decision was an objectively unreasonable application of both *Brady* and *Napue*.

***Douglas v. Workman,**
560 F.3d 1156 (10th Cir. 2009)

Under AEDPA, habeas relief granted to two petitioners due to state's failure to disclose deal the Oklahoma prosecution made in exchange for shooting victim/key witness' testimony. The witness, a member of the Crips, and a teenage girl who died were shot in a drive-by shooting. The witness initially made contradictory statements to police, but ultimately identified Powell and Douglas as the shooters. Both were charged with capital murder. The witness had cocaine trafficking charges pending at the time of the shooting. He was not charged due to the weapon and drugs on him at the time of the shooting. Prior to the preliminary hearing, he was also charged with throwing a rock at a police car. By the time of Douglas' trial, he pled to a lesser offense of possession with intent to distribute and received a 10 year sentence. The other charge was dismissed. After serving four months of his sentence he was released on pre-parole. That status was revoked when he was arrested for receiving stolen property. He had a pre-parole interview for a second consideration and was notified that release would not be recommended just three days before he initially met with the capital prosecutor. During his testimony in Douglas' trial, he denied any deals or help from the prosecutor in exchange for his testimony. The prosecutor even elicited his testimony that he had never asked the prosecutor for help. His testimony was the "linchpin" in the state's case, which culminated with the state's closing argument emphasizing his trustworthiness. Just one day after Douglas' trial, the prosecutor sent a detailed letter to the parole board in support of the witness' parole application and referencing the witness' testimony in the upcoming Powell trial. The witness was granted pre-parole status again

but again violated and was reincarcerated. The witness contacted his mother, who contacted the prosecutor, who contacted the sentence administration auditor just a week before Powell's trial. Without disclosure of any of this information, the witness again served as the key witness for the state. He again denied any deals or assistance and the state again elicited his testimony that he had not even asked for help. A month after Powell's trial, the prosecutor contacted the prison warden who approved the restoration of 400 days' credit to the witness, effectively discharging his sentence and getting him released from prison. While Powell and Douglas sat on death row, the prosecutor's assistance to the witness continued. Assault with a deadly weapon charges for shooting someone were dismissed due to "insufficient evidence of identification." Drive-by shooting charges were dismissed "due to lack of cooperation from the victims." He had an assault and battery charge for beating his girlfriend with a baseball bat and trafficking in cocaine charges. Even though the capital prosecutor was no longer in the district attorney's office, he contacted the prosecutor on the witness' behalf. The witness was also arrested for murder charges in Texas. The witness was sentenced to 15 years on the assault case and was then allowed to plead to the trafficking charge for a five year ("unusually lenient") concurrent sentence. The witness was allowed to plead to a reduced aggravated robbery charge in Texas and received a twelve and a half year sentence concurrent with his Oklahoma sentences. While Powell and Douglas were pending in federal habeas, the witness disclosed that he had been unable to identify any of the shooters. He said that he would not testify against either defendant unless the state assisted him with his then-pending trafficking case. Thereafter, the prosecutor continued to assist him because he threatened to reveal his perjury in the trials. The district court granted relief to Powell but denied relief to Douglas. The Tenth Circuit granted relief to both. For Douglas, who had been pending in the Tenth Circuit when the witness disclosed the deal, there were some complicated procedural holdings resolving statute of limitations and possibly second petition/successor issues in Douglas' favor prior to reaching the merits. *De novo* review was applied because the state court never addressed the *Brady* claims on the merits. The court found that the witness' identification of the defendants was "indispensable" as the "only direct evidence linking [the defendants] to the murder." If the juries had discounted his testimony as not credible, they almost certainly would have acquitted the defendants. While defense counsel attempted to impeach the witness on the issue of his motive to testify, they were "stonewalled" by the witness' repeated denials and "stymied from rebutting those denials" by the state's failure to disclose the relevant impeaching evidence. While there was less evidence of a deal prior to Douglas' trial, the evidence still supported a finding that the state was offering assistance to the witness in exchange for his testimony. Two witnesses testified in the trial that the witness told them he had made a deal with the prosecutor in exchange for his testimony. The witness was charged with drug or weapons offenses, even though he admitted possession at the time of the shooting. And, the prosecutor sent a letter to the parole board just one day after trial. In light of the continued assistance to the witness long after the trials were over and even after the prosecutor left the district attorney's office, "the reasonable inference [of a deal prior to trial] becomes inescapable." Even if the deal was tacit, disclosure was required. "A deal is a deal—explicit or tacit. There is no logic that supports distinguishing between the two." *Id.* at 1186.

Harris v. Lafler,

553 F.3d 1028 (6th Cir. 2009)

Under AEDPA, habeas relief granted in second-degree murder case due to the state's failure to disclose three statements made by police officers to the state's primary witness. The witness and the defendant were in a bar fight. Later that night, a vehicle followed the car in which their opponent rode and shots were fired into that vehicle killing two passengers. The witness and the defendant were arrested a month later. The witness testified at the preliminary hearing that he drove the vehicle and the defendant fired into the other vehicle. Defense counsel asked him six times whether any promises or deals had been made in exchange for his testimony. The witness said no. This testimony was read into the trial evidence, after the witness invoked his Fifth Amendment rights. The state failed to disclose to the defense that police officers had told the witness: (1) his girlfriend would be released if they were satisfied with his statement; (2) he would be released if he testified at the preliminary hearing consistent with his statement; and (3) he should tell no one that police had promised him anything in return for his statements or testimony. These statements were material because they could have been used to cast doubt on the witness' credibility. The state had also "featured" the witness' "eyewitness account" in closing arguments. The court rejected the state's request for remand for an evidentiary hearing because the state had never before challenged the factual accuracy of the witness' post-conviction statements. "The time to submit evidence or seek an evidentiary hearing is before factual allegations become the basis for a decision against the State, not after."

Drake v. Portuondo,
553 F.3d 230 (2nd Cir. 2009)

Under AEDPA, habeas relief granted in murder case on *Napue* claim because the prosecution presented false expert testimony. Two high school students were killed while making out in a car parked near a junkyard. The defendant, another high school student, had dressed in military fatigues and fired into the car. According to his statement, he was out looking for abandoned cars to shoot at the junkyard and was not aware the car was occupied when he opened fire on it. The state, in order to compensate for evidence of lack of motive, presented "expert" testimony "regarding a fictional syndrome of sexual dysfunction, dubbed 'picquerism,' which is 'medically speaking, nonsense,' but appeared to account for the particular, gruesome circumstances of the shooting." The only other possible evidence of a sexual motive was that the female victim had a bruised rectum. She also had bite-marks on her breasts, which, according to the forensic odontologist, are often present in sexual crimes. The forensic odontologist recommended the prosecutor consult a "prison psychologist" in Michigan. The prosecutor did so two weeks before trial. After an hour long call, the "expert" said he needed to think about the case before he could give an opinion. He later informed the prosecutor it was "picquerism," which the prosecutor had never heard of. The prosecutor waited until the day before the "expert" testified to notify the defense of the intent to call him. This late notice prohibited defense counsel from finding a competing expert and preparing for cross-examination. In his testimony, the "expert" gave a long list of impressive credentials. He then testified the he had been provided with information only the day before and immediately formed his opinions about the case, which was a clear case of

picquerism. The defense requested a two-week continuance to allow time to find a rebuttal expert, but this request was denied. The testimony given by the “expert” was false in a number of ways. His credentials were almost non-existent except that he was a “prison psychologist” with no doctorate degree and a limited license to practice only in prison services or under the supervision of a fully-licensed psychologist. The record also supported the inference that the prosecutor knowingly elicited the false testimony because the prosecutor delayed notice to the defense until the last minute and then resisted a continuance. Likewise, the prosecutor’s notes revealed that he knew the “expert” had not “published” any papers so he asked the “expert” if he had “written” any papers, whereas he asked other experts about writing and publication. Likewise, the testimony that the “expert” had just been provided information the day before and immediately formed his opinion was clearly false, as he had “two weeks to conjure up his quackery.” The “supposed brevity” of the “expert” review of the case “was perhaps the strongest reason” for the jury to find it credible. The prosecutor knew this testimony was false because the falsehood related directly to conversations with the prosecutor. This false testimony went directly to the only issue in the case, which was intent, and the Court could not conclude that there was no reasonable likelihood the false testimony could have affected the judgment of the jury.

U.S. v. Banks,
546 F.3d 507 (7th Cir. 2008)

In cocaine possession case, government’s withholding of evidence impeaching government chemist’s expert testimony with evidence she misused her government credit card warranted granting defendant’s new trial motion. Although presence of cocaine not at issue given that another chemist “allegedly tested” substance and concluded it was cocaine and there was “great deal of evidence” presented against defendant that included police surveillance, the accusations of expert’s misappropriation of funds and pending disciplinary proceedings against her were relevant to bias. While “acquittal may have been less likely than conviction” even if impeachment evidence had been disclosed, district court did not abuse discretion in finding evidence about government witness material.

United States v. Triumph Capital Group, Inc.,
544 F.3d 149 (2nd Cir. 2008)

In racketeering, racketeering conspiracy, bribery, wire fraud and obstruction of justice case, district court abused its discretion by denying motion for new trial where prosecution failed to disclose notes taken by FBI special agent during attorney proffer and the notes supported an alternative version of an important conversation that was entirely at odds with the government's theory of the case at trial. Defendant could have used the proffer notes not merely to support his version of the conversation with the witness, but also to impeach the witness's credibility.

Toliver v. McCautry,
539 F.3d 766 (7th Cir. 2008)

Where petitioner was convicted of first degree intentional murder based on brother's murder of roommate, *Brady* was violated when state failed to disclose letter received before trial that "tended to show" petitioner's brother acted alone when shooting victim and petitioner attempted to stop his brother from killing roommate. Letter's author, Smith, offered to testify at petitioner's trial about contents of letter if prosecutor would ask Smith's prosecutor about favorable treatment on Smith's pending charges. Smith would have testified that two witnesses to the murder told him petitioner tried to stop his brother's actions, and when he asked why petitioner was being charged, a witness said prosecutor wanted to prosecute both brothers, and told witnesses if they did not cooperate, they would be charged with murder. Smith said prosecutor replied to letter, stating he could not help Smith because Smith's pending prosecution was in another county, and Smith's information "did not shed any new light" on case. State court denial of relief unreasonable application of clearly established law because undisputed evidence "would have bolstered...defense" and "enhanced significantly ... chances of jury's accepting" petitioner's account of facts, and might have created reasonable doubt on whether petitioner "intentionally aided and abetted in murder" or "attempted to prevent it."

***Jells v. Mitchell,**
538 F.3d 478 (6th Cir. 2008)

Denial of habeas relief on *Brady* claim reversed in case where petitioner convicted of felony murder and sentenced to death on theory that petitioner randomly kidnapped victim and her child, and later killed victim. Although case was under AEDPA, *Brady* claim reviewed de novo because state court failed to address merits of four items of evidence the suppression of which petitioner had properly raised in state court. (Other items were not raised in state court and were not considered by the federal court.) The withheld evidence involved: (1) victim visited long-time friend on night of her murder, victim had a drink and was tipsy, friend walked victim to van, saw victim's son in the van but could not see person driving, (2) victim's sister stated victim would not take ride from stranger, and victim drinking when sister last saw her on night murdered, (3) victim's boyfriend who indicated victim arrived at bar around 11:00 p.m. to retrieve key to apartment, and appeared to have been drinking and "was high," and (4) police report from anonymous person later identified who called twice within 30-minutes, stating she and father saw man grabbing female and young boy about 11:00 p.m. Withheld documents refuted prosecution's theory of random kidnapping and duress, and impeached credibility of witness who believed altercation with victim was abduction, but admitted in telephone call she couldn't see man well. Impeachment of that witness together with information that victim voluntarily accompanied petitioner bolstered credibility of another witness who testified witnessed incident but did not call police because he believed victim and man knew each other. Evidence victim intoxicated undercut aggravating factor three-judge panel found supporting death: that petitioner deprived victim of freedom in methodical manner. Petitioner entitled to habeas relief as to his death sentence.

Mahler v. Kaylo,
537 F.3d. 494 (5th Cir. 2008)

In manslaughter case, reversing denial of habeas relief because prosecution violated *Brady* when it failed to provide defense with pretrial witness statements that supported defense and could have been used to impeach several witnesses' trial testimony about fight between two groups of people. State post-conviction court unreasonably applied clearly established federal law when it found statements not material. Although state court applied right standard, it "focused solely and unreasonably" on whether trial testimony provided jury "sense that 'a struggle' or 'a series of struggles'" occurred at some time between two groups. But "heart of" defense was whether struggle was ongoing or had ended and victim had turned away from petitioner when shooting occurred. State's case against petitioner "depended on reliability of the very witnesses whose pretrial statements were suppressed," and those statements directly undermined the prosecution witnesses' testimony that struggle had ended, and victim turned away when petitioner shot him.

United States v. Aviles-Colon,
536 F.3d 1 (1st Cir. 2008)

Reversing denial of new trial motion in drug conspiracy case where prosecution withheld DEA reports that could have been important for impeachment purposes at trial by helping defendant advance his defense that he was not part of a certain drug conspiracy but rather a member of a rival conspiracy.

United States v. Chapman,
524 F.3d 1073 (9th Cir. 2008)

In securities-related case, district court did not abuse its discretion by dismissing indictment following flagrant prosecutorial misconduct, i.e., reckless discovery violations and misrepresentations to the court.

White v. McKinley,
519 F.3d 806 (6th Cir. 2008)

In §1983 action initiated against former wife and investigating police officer following plaintiff's prosecution, conviction, and later acquittal of allegedly molesting his daughter, plaintiff had right under *Brady* to disclosure by police officer of his romantic relationship with plaintiff's wife and to preservation of potentially exculpatory evidence contained in plaintiff's daughter's diary. "[N]o reasonable police officer" under these circumstances "could have believed he could deliberately misrepresent the nature and length of his relationship with [plaintiff's wife], or that he could deliberately fail to preserve a child victim's diary containing potentially exculpatory information."

***Tassin v. Cain,**
517 F.3d 770 (5th Cir. 2008)

Petitioner who was sentenced to death for capital murder committed during armed robbery was entitled to habeas relief based upon prosecution's failure to disclose prosecution witness's plea

bargain. Petitioner denied plan to rob two men who, along with a third person, were looking for drugs. Petitioner's wife, indicted on same charges, pleaded guilty and received 10-year sentence. At petitioner's trial, wife testified petitioner planned robbery. Defense requested disclosure of deals for lenient treatment in exchange for wife's testimony, but State denied any deal, wife testified no promises were made in exchange for her testimony, and State argued wife had no reason to lie because she faced potential 99-year sentence. Petitioner learned of deal post-conviction when inmate forwarded him letter wife wrote to another inmate discussing possible sentencing deal. Wife's attorney later averred judge "indicated" would sentence wife to 15 years, and possibly only 10, if she waived marital privilege. Wife testified in post-conviction proceedings she believed she would receive 10-year sentence. Relief denied by state court because trial judge, defendant's wife and the wife's attorney denied a final agreement existed. Federal court found that state court ruling requiring petitioner prove judge "promised" wife lenient sentence was contrary to clearly established Supreme Court law because "suppressed bargain need not have been [] firm promise" in order to mislead jury about wife's credibility, and State never disclosed bargain. State had duty to disclose witness's expected financial treatment even absent a "firm promise," and "nondisclosure of the understandings" violated *Brady*.

***Jackson v. Brown,**
513 F.3d 1057 (9th Cir. 2008)

Affirming grant of habeas relief as to special circumstance (death eligibility) finding and death sentence where prosecutor violated *Napue* by failing to correct false testimony by jailhouse informants about expected benefits from testifying against petitioner. The "materiality" element of *Napue* was satisfied with respect to the jury's special circumstances finding given importance of informant's testimony on question of whether petitioner acted with the requisite "intent to cause death."

United States v. Garner,
507 F.3d 399 (6th Cir. 2007)

In carjacking case, prosecution violated *Brady* by failing to timely turn over records from the victim's cell phone which was used to make and receive calls by the hijacker or hijackers. The records supported defendant's theory that he had been framed by the codefendant, the codefendant's friend, and the codefendant's ex-girlfriend. Because of the late disclosure, defense counsel did not have time to investigate records to determine their value.

U.S. v. Jernigan,
492 F.3d 1050 (9th Cir. 2007) (en banc)

Reversing denial of motion for new trial in case where defendant was convicted of robbing three banks and prosecution had failed to reveal that while defendant was awaiting trial, two more banks in area were robbed by a woman bearing an "uncanny physical resemblance" to defendant. The defense had been misidentification and the reliability of a surveillance video was contested.

(The appeals court agreed that the video failed to identify defendant as the robber.) The suppressed evidence was material because it “substantially erode[d] the already questionable value of eyewitness identifications,” there was a “similar modus operandi in all” robberies, and the suppressed evidence magnified the “significance of gaps and inconsistencies” in the prosecution’s case, which lacked any physical evidence tying defendant to the crimes. “[C]onsidered collectively” the withheld evidence was material and defendant was denied fair trial.

***Graves v. Dretke,
442 F.3d 334 (5th Cir.), cert. denied, 549 U.S. 943 (2006)**

Prosecution violated *Brady* by failing to disclose statements by its critical witness, the alleged co-perpetrator, one of which also implicated the witness’s wife in the murders, and the other of which exonerated Graves. (The only statement disclosed to Graves was one implicating both the witness and Graves. Graves had also been informed that the witness was found to have lied during a polygraph exam when he denied that his wife was involved in the crime.) The statement by the witness claiming to have committed the offense by himself would have undercut the prosecution’s explanation for the witness’s failure to implicate Graves before the grand jury – that Graves had threatened the witness. Even more egregious than the suppression was the fact that the prosecutor knowingly elicited false and misleading testimony from the witness and a police investigator that the witness had always implicated Graves except in his grand jury testimony where he’d denied either men had been involved in the crimes. That Graves was aware of the polygraph results did not establish that he failed to exercise due diligence in seeking out the statement implicating the witness’s wife in the murder since Graves had no reason to believe such a statement had been made. Further, the prosecutor’s questioning of the witness at trial, as well as the prosecution’s discovery responses, reinforced defense counsel’s view that if the wife was involved at all, it was only after the fact. The statement about the wife’s involvement was exculpatory because it fit with the defense theory that two people committed the offense, not three as the prosecution theorized. It also provided a basis for arguing that the witness was blaming Graves in order to save his wife. The statements were material because they would have allowed defense counsel to argue persuasively that (1) the murders were committed by the witness alone or with his wife and (2) the witness’s plan from the beginning was to exonerate his wife but since a story that he acted alone was not believable, he falsely implicated Graves. That the statements did not fit completely with the defense that was presented at trial did not render them immaterial because counsel may have acted differently had the statements not been suppressed.

***Silva v. Brown,
416 F.3d 980 (9th Cir. 2005)**

In pre-AEDPA capital case, prosecution violated *Brady* where although it disclosed that murder charges had been dropped against the co-defendant in exchange for his testimony against Silva, it did not reveal that part of the deal was that the co-defendant, who had previously been in a motorcycle accident and sustained severe brain damage, would forgo a psychiatric evaluation. The primary evidence against Silva was the testimony of the co-defendant. Although the co-

defendant's story was corroborated in some respects, it was his testimony alone that provided proof that Silva was the triggerman. The suppressed evidence was material given that the co-defendant's testimony was crucial, and the fact that the prosecutor was concerned about the jury finding out about the witness's mental state was evidence of the weakness of the remainder of the case. The suppressed evidence was not cumulative to other impeachment evidence. While evidence of dropped charges offered an incentive to testify falsely, it did not offer a possible explanation for the co-defendant's confused account of events. The suppressed evidence would have diminished the credibility of the witness, and the prosecution's desire to hide the evidence would have diminished the overall credibility of its case. Finally, the fact that the jury acquitted Silva of one of the two charged murders did not indicate that impeachment of the co-defendant had been effective.

Conley v. United States,
415 F.3d 183 (1st Cir. 2005)

Prosecution violated *Brady* by failing to disclose evidence that the primary witness had expressed a desire to have his memory hypnotically enhanced, which went to his ability to recall the events. The petitioner was a police officer who was charged with perjury for his testimony about the circumstances surrounding the brutal beating of an undercover officer who had been mistaken for a fleeing suspect. The witness at issue, another police officer, had originally told internal affairs that he had seen the undercover officer chasing the actual suspect, as well as an unidentified police officer behind the undercover agent. (This contradicted the petitioner's account whereby he claimed to have chased and captured the suspect without ever seeing the undercover agent or his beating.) Later, the witness recanted his statement that he had seen a police officer behind the undercover agent. In his grand jury testimony, which was disclosed to the defense, he explained that he had made the earlier statement about seeing someone behind the undercover agent because he felt guilty about not having seen everything and felt like he should have. What was not disclosed was a statement to the FBI where the witness said that he knew and liked the undercover agent, felt badly that he could not say what had happened, and so he convinced himself he'd seen something. He then expressed a desire to have his memory hypnotically refreshed in order to "truly recall" the events preceding the beating. This evidence was material and not cumulative of the witness's retraction to the grand jury because the grand jury statement impeached his motive, not his ability to recall. Counsel's choice not to impeach the witness with his grand jury testimony was supported by an independent strategy and was not proof counsel would not have relied on the hypnosis statement. Finally, the other evidence at trial was weak – the government admitted the victim's testimony was likely impaired by the head trauma he sustained in the beating, and the actual fleeing suspect's testimony was impeached with his felony convictions.

***Hayes v. Brown,**
399 F.3d 972 (9th Cir. 2005) (en banc)

The prosecution's knowing presentation of false evidence and failure to correct the record

violated Hayes's due process rights. *Napue* applies to false evidence, not just perjured testimony. The constitutional prohibition against presenting false, rather than perjured, evidence was not a new rule under *Teague*. The false evidence regarding whether a deal had been made with the key prosecution witness was material because there was a reasonable likelihood the false testimony affected the jury's verdicts as to first degree murder and the death sentence. Once materiality is established, there is no need to apply *Brecht*.

Slutzker v. Johnson,
393 F.3d 373 (3rd Cir. 2004)

Brady violation found where prosecution suppressed a police report recounting a statement by the neighbor of the victim that she saw someone other than petitioner speaking with the victim's wife outside the victim's home after the murder. At trial, she testified that it was petitioner, who had been having an affair with the victim's wife, who she saw after the murder. The trial prosecutor's testimony that it was her normal practice to turn over all documents was insufficient to overcome the testimonial and circumstantial evidence indicating that the defense was not provided with the report. The evidence was exculpatory and material because the neighbor was the most credible of the witnesses against petitioner. Although the claim had been procedurally defaulted because it was never presented to the state court, cause was found to overcome the default because there was no procedurally viable way for the petitioner to exhaust the claim once the suppressed material was discovered during federal habeas proceedings. (The ability to have federal proceedings stayed while new claims were exhausted was uncertain at the relevant time and, therefore, petitioner risked losing his right to adjudication of his exhausted federal claims if his federal petition was dismissed without prejudice while he returned to state court to exhaust the *Brady* claim.)

United States v. Sipe,
388 F.3d 471 (5th Cir. 2004)

In case involving border control agent's conviction for use of excessive force and infliction of bodily injury during arrest, district court did not err in granting new trial based on *Brady* violations. The cumulative impact of the suppressed evidence satisfied the materiality prong of *Brady*. The suppressed evidence involved: (1) a statement by the government's star witness indicating a personal dislike for the defendant, which was somewhat inconsistent with the witness's subsequent testimony; (2) benefits provided to testifying aliens that were more substantial than the benefits the defense was told about; and (3) a prior charge against a witness of filing a false police report which the witness was acquitted of.

United States v. Rivas,
377 F.3d 195 (2nd Cir. 2004)

A *Brady* violation occurred in this narcotics smuggling case where the prosecution failed to disclose until after the guilty verdict that its chief witness, the defendant's fellow seaman who

testified that defendant concealed drugs in defendant's cabin, had told the government that he, not defendant, had brought the package of drugs on board the vessel, purportedly believing that it contained alcohol meant for defendant. Although this revelation was arguably consistent with the witness's trial testimony that the drugs belonged to defendant, it could have led the jury to question the witness's credibility and bolstered the defendant's theory that the witness rather than defendant was engaged in smuggling.

Mathis v. Berghuis,
90 Fed.Appx. 101, 2004 WL 187552 (6th Cir. 2004) (unpublished)

Grant of habeas relief affirmed in rape case where state failed to disclose that complainant had twice made false reports to the police claiming to have been the victim of violent crimes, including rape and armed robbery. The state court's requirement that petitioner show that the prosecutor was aware of the undisclosed police reports was "clearly contrary to Supreme Court precedent."

Norton v. Spencer,
351 F.3d 1 (1st Cir. 2003)

In Massachusetts child sexual assault case where the alleged victim, Fuentes, was the sole witness, the appeals court affirms the grant of relief on petitioner's *Brady* claim. After trial, petitioner discovered evidence that the prosecution had likely been off by several months in its contention about when the assaults allegedly occurred, and petitioner had not been at the house at the relevant time. Petitioner also learned that another alleged victim, Noel, who had been found incompetent to testify, admitted to having fabricated the charges against petitioner at the insistence of Fuentes. Noel further stated that Fuentes had made up his allegations and that the prosecutor repeatedly told Noel and Fuentes how to testify even after being informed by Noel that none of the claims were true. The state court's denial of relief involved both an unreasonable determination of the facts and an unreasonable application of clearly established federal law.

Castleberry v. Brigano,
349 F.3d 286 (6th Cir. 2003)

Prosecution committed *Brady* violation during petitioner's robbery-murder trial by withholding: (1) a description of the assailant by the victim which differed from petitioner's appearance; (2) a statement by a witness claiming to have heard the prosecution's key witness plotting the robbery of the victim; and (3) witness accounts of suspicious persons in the vicinity of the killing, including descriptions of "thin" individuals. (Petitioner was 5'9", 221 pounds at the time of the crime.) Although the suppressed evidence would not have contradicted all of the testimony received at trial, it was enough to create a reasonable probability of a different outcome at trial had the *Brady* information been available. The state court decision denying relief was contrary to Supreme Court precedent in that the state court analyzed the suppressed evidence for materiality item by item rather than cumulatively.

Hall v. Washington,
343 F.3d 976 (9th Cir. 2003)

In California murder case, false and material evidence was admitted in violation of petitioner's due process rights. The false evidence took the form of a series of handwritten questions and answers allegedly exchanged between petitioner and a jailhouse informant. These notes were admitted at trial as adoptive admissions, without the testimony of the informant. In post-trial proceedings, petitioner presented evidence – including an admission from the informant and testimony from document experts – that the informant fabricated the jailhouse notes by changing the questions after petitioner had written his answers.

Goldstein v. Harris,
82 Fed. Appx. 592, 2003 WL 22883652 (9th Cir. 2003) (unpublished)

Appeals court affirms grant of habeas relief in murder case where the prosecution suppressed evidence related to the credibility of its two key witnesses. First, it failed to disclose a deal with the jailhouse informant. Second, it did not reveal that police investigators were impermissibly suggestive during the eyewitness's identification of petitioner in a photo lineup, or that it advised the eyewitness that he need not retake the stand to clarify his testimony after he realized that he may have recognized petitioner because he had met him prior to the murder. Further, the prosecution violated *Napue v. Illinois* by failing to correct the informant's false testimony about not having received benefits for his assistance in this and other cases.

Bailey v. Rae,
339 F.3d 1107 (9th Cir. 2003)

In case involving convictions for sexual abuse and sexual penetration, the prosecution violated *Brady* by failing to disclose therapy reports concerning the victim's mental capacity. The reports were "exculpatory" because the crimes for which petitioner was charged required that the victim be incapable of consent due to a mental defect and the reports indicated that the victim understood both what type of physical contact was not okay and that she could say "no." Unhelpful passages in the reports did not negate their exculpatory nature since, taken as a whole, they were favorable to the defense. The state post-conviction court's finding that the reports were not exculpatory was an unreasonable application of Supreme Court precedent. The suppressed evidence was material despite the fact that the victim's trial testimony was consistent with the findings in the report. "Cumulative evidence is one thing. Unique and relevant evidence offered by a disinterested expert is quite another. By summarily dismissing the Ford reports as cumulative, the state court fundamentally mischaracterized their nature and significance. Setting aside for a moment the substance of the reports, it is implausible that one could equate a statement made by a teenage complainant whom the State has labeled intellectually deficient with a clinical assessment provided by a disinterested professional therapist who had been treating the victim over a period of years." The state court's denial of the *Brady* claim on materiality grounds was both "contrary to" and an "unreasonable application of" clearly established Supreme Court precedent. It was

contrary to Supreme Court precedent because it required that the suppressed evidence "be such as will probably change the result if a new trial is granted." The state court's denial of the *Brady* claim was also objectively "unreasonable" in that "the state court's analysis of prejudice amounted to little more than a blanket assumption that, because [the] reports were cumulative, they would have had little impact on the trial's outcome." The appeals court "conclude[s] that the Supreme Court's *Brady* jurisprudence requires more than simply labeling the evidence as cumulative without placing it in context."

Monroe v. Angelone,
323 F.3d 286 (4th Cir. 2003)

In evaluating a *Brady* claim in a post-AEDPA case, deference to the state court's rejection of the claim is only required as to the suppressed evidence that the state court considered. *Brady* material that was discovered for the first time in federal court is subject to de novo analysis. And because materiality is assessed collectively, rather than on an item-by-item basis, the federal court "must make an independent assessment of whether the suppression of exculpatory evidence--including the evidence previously presented to the state courts--materially affected Monroe's first-degree murder conviction." Given the thin, circumstantial case against defendant, the prosecution committed reversible error under *Brady* when it failed to disclose information that could have been used to impeach its key witness, as well as other witnesses, and information that could have supported the defense theory that someone else killed the victim. (The district court found, among other things, that the prosecution suppressed evidence that its key witness was offered assistance in obtaining a sentence reduction in an unrelated case and that this witness had previously supplied information to the police.) As for respondent's contention that there was no duty to disclose the material because the "substantive equivalent" was heard by the jury, the court states: "the prosecution has a duty to disclose material even if it may seem redundant. Redundancy may be factored into the materiality analysis, but it does not excuse disclosure obligations."

Scott v. Mullin,
303 F.3d 1222 (10th Cir. 2002)

State's suppression of evidence of a third party's confession to the capital murder provided cause to overcome the default of petitioner's *Brady* claim by the state court, and petitioner was entitled to relief on the claim. The first two prongs of *Brady* were satisfied because the suppressed evidence was known by police investigators prior to trial and it was clearly favorable to petitioner. The third prong - a reasonable likelihood of a more favorable result - was also satisfied even if, as the government contended, the confession could only have been used to impeach the third party. Had the third party's credibility been called into question by the confession, doubt about the testimony of other prosecution witnesses who claimed to be with the third party at the time of the killing could have been raised.

Mendez v. Artuz,

303 F.3d 411 (2nd Cir. 2002), cert. denied, 123 S.Ct. 1353 (2003)

Petitioner who was convicted of, among other things, the attempted murder of Johnny Rodriguez, was entitled to habeas relief based on the prosecution's failure to disclose evidence that another individual had placed a contract on the life of Johnny Rodriguez prior to the shooting. The evidence was "favorable" because it directly contradicted the motive theory testified to by the prosecution witnesses. That the evidence did not suggest an alternative shooter did not mean it was not favorable, given the absence of evidence connecting petitioner to the individual who allegedly took out the contract. And although Johnny Rodriguez identified petitioner as the shooter, trial evidence raised questions about the identification. Materiality is further established by the fact that the suppressed information could have been used by petitioner "to challenge the thoroughness and adequacy of the police investigation."

**Sawyer v. Hofbauer,
299 F.3d 605 (6th Cir. 2002).**

In sexual assault case, the state court unreasonably applied *Brady* by failing to correctly identify the evidence that was suppressed. Petitioner was entitled to relief on his *Brady* claim given the State's failure to reveal test results establishing that petitioner was not the source of a semen stain on the victim's underwear. This was material given evidence in the record suggesting that the perpetrator could have cleaned himself with the victim's underwear following oral sex.

**United States v. Gil,
297 F.3d 93 (2nd Cir. 2002)**

In mail fraud case, conviction vacated under *Brady* where the government withheld a memorandum indicating that the defendant was authorized to obtain payment for his extra-contractual work by submitting inflated subcontractor invoices, thus showing that he did not deceive or defraud municipal entity.

**Jamison v. Collins,
291 F.3d 380 (6th Cir. 2002)**

Brady violation occurred both in the suppression of exculpatory evidence by the prosecution, and in the failure of the prosecutor to weigh the evidence for purposes of *Brady* disclosure which was the result of an Ohio police policy to withhold potentially exculpatory information from the prosecutor. The following suppressed items are found, collectively, to be material to petitioner's defense requiring the grant of habeas relief as to the capital conviction: (1) a positive identification of different suspects by an eyewitness to the crime; (2) prior statements by the accomplice (who was also the key prosecution witness) that omitted dramatic details provided during the accomplice's trial testimony; (3) an eyewitness account that could have impeached the accomplice's testimony; (4) descriptions of the suspects that undermined the accomplice's claim that he and petitioner committed the crime together and supported petitioner's argument that

other suspects were overlooked; (5) evidence pointing to another suspect's involvement in the crime; and (6) an offense report indicating that the victim of a similar robbery had been unable to identify her attacker at the time of the offense.

Benn v. Lambert,
283 F.3d 1040 (9th Cir.), cert. denied, 123 S.Ct. 341 (2002)

In case under AEDPA, the panel unanimously affirms the grant of habeas relief to Washington death row inmate based on *Brady* violations. The prosecution failed to disclose numerous pieces of impeachment information that could have undermined the credibility of the jailhouse informant who was the key prosecution witness as to premeditation, the aggravating circumstance of common scheme or plan, and motive. The withheld evidence related to: (1) the witness's history of misconduct while acting as an informant; (2) the witness made a false allegation implicating petitioner in a notorious unsolved murder; (3) the witness's exposure to prosecution in other cases; and (4) the witness's history as an informant. An independent basis for habeas relief is the prosecution's failure to disclose evidence that a fire at petitioner's trailer was accidental. This was material because the prosecution's theory was that the trailer fire was arson, and that the capital murders were related to insurance fraud connected to the arson.

Killian v. Poole,
282 F.3d 1204 (9th Cir. 2002), cert. denied, 123 S.Ct. 992 (2003)

State court unreasonably applied the law to the facts in determining that petitioner was not prejudiced by the suppression of evidence, some of which came into existence post-trial, where the evidence exposed the motivation of the key prosecution witness to lie and tended to show that he did in fact lie at petitioner's trial.

DiLosa v. Cain,
279 F.3d. 259 (5th Cir. 2002)

State court applied a rule of law contrary to Supreme Court precedent when it assessed the materiality of suppressed evidence by weighing the existing evidence against the excluded evidence, rather than asking whether the excluded evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Further, the state court's ultimate legal conclusion cannot be reconciled with *Kyles* and *Brady*. Given that the defense to the murder charge was that unknown intruders killed petitioner's wife, and the prosecutor highlighted the absence of evidence corroborating petitioner's account, the State's failure to reveal evidence potentially pointing to intruders in the house and statements indicating potential intruders in the neighborhood undermines confidence in the verdict.

Boss v. Pierce,
263 F.3d 734 (7th Cir. 2001)

State appellate court's apparent assumption that suppressed evidence must be exculpatory to

satisfy the requirements of *Brady*, rather than merely impeaching, was contrary to clearly established Supreme Court precedent. State court unreasonably applied *Brady* in finding that defense counsel would have discovered the suppressed information by exercising due diligence given that the source was a defense witness, where nothing about the witness's role in the case (an alibi witness) suggested that she had knowledge about statements made by the key prosecution witness around the neighborhood. "Holding that reasonable diligence requires defense counsel to ask witnesses about matters of which counsel could not have reasonably expected a witness to have knowledge is inconsistent with the aim of *Brady* and its progeny." State court unreasonably applied *Brady* in finding that evidence uncovered after disclosure of the witness's statement was simply cumulative, where: (1) the new witnesses were neutral and disinterested, in contrast to the defense witnesses at trial; and (2) the new witnesses recounted confessions by the key prosecution witness, which was significantly different than the eyewitness testimony of trial witnesses.

Mitchell v. Gibson,
262 F.3d 1036 (10th Cir. 2001)

In case where the government did not dispute the district court's finding that petitioner's rape and sodomy convictions were constitutionally infirm due to the prosecution's failure to disclose exculpatory test results, and its presentation of false testimony by Oklahoma City police chemist, Joyce Gilchrist, the Tenth Circuit concluded that petitioner was also entitled to habeas relief as to his death sentence. The district court erred in using standard of *Romano v. Oklahoma* in assessing whether the *Brady* violation required vacated of death sentence. (The appeals court noted, however, that because the *Brady* violation in this case deprived petitioner of his right to cross-examination and to present mitigating evidence, petitioner would still be entitled to relief under *Romano* without having to demonstrate that the entire sentencing was rendered fundamentally unfair.) Applying *Kyles*, the appeals court found that petitioner was entitled to relief even though there may have been sufficient evidence to justify the jury's death verdict, given that the rape and sodomy convictions "impacted all three of the aggravating circumstances found by the jury: that the murder was heinous, atrocious and cruel; that it was committed to avoid arrest for the rape and sodomy; and that Mr. Mitchell posed a continuing threat to society." Further, the defense presented considerable mitigating evidence.

Leka v. Portuondo,
257 F.3d 89 (2nd Cir. 2001)

In this non-capital New York murder case, the Second Circuit granted relief, finding that the prosecution's failure to disclose the name of a crucial eyewitness with information favorable to the defense "until three business days before trial," and failure to disclose the substance of the witness' knowledge at all, violated *Brady*. Petitioner was convicted strictly on the questionable testimony of two eyewitnesses, each of whom gave post-trial statements recanting, to varying degrees, their identifications of petitioner. The suppressed evidence consisted of the eyewitness account of an off-duty police officer, who saw the shooting from above, and gave an account which differed in

important respects from that of the witnesses who testified at trial. In finding the suppressed evidence "material," the Second Circuit observed that "[i]t is likely that [the witness'] testimony at trial would have had seismic impact." And in concluding that the prosecution suppressed the information notwithstanding the fact that it disclosed the witness' name three days before trial, the court explained that "the prosecution failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use."

Boyette v. LeFevre,
246 F.3d 76, 93 (2nd Cir. 2001)

The Second Circuit reversed the district court's denial of relief in this New York robbery, arson and attempted murder case, finding that the prosecution violated *Brady* in failing to disclose several documents. The prosecution's case rested solely on the victim's identification of petitioner, the credibility of which was bolstered at trial by the victim's claim that she recognized her attacker immediately. The undisclosed documents revealed that the victim had not, in fact, identified the perpetrator immediately, and tended to undermine the credibility of her memory by contradicting her claim that her attacker had smeared some type of fire accelerant on her face. Petitioner's first trial ended when the jury hung 9-3 in favor of acquittal, and his defense at both trials centered on a relatively strong alibi supported by the testimony of multiple witnesses who placed petitioner out-of-state at the time of the crime. The court summed up its conclusion that petitioner was entitled to relief as follows: "Because this very close case depended solely on [the victim's] credibility, the [state appellate court] applied *Kyles* in an objectively unreasonable way when it concluded - without any analysis - that [petitioner] was not prejudiced."

Finley v. Johnson,
243 F.3d 215 (5th Cir. 2001)

In this Texas kidnapping case, petitioner made a sufficient showing of actual innocence to permit him to overcome procedural default of his *Brady* claim by showing that the *Brady* material in his case - evidence that a restraining order was issued against his kidnapping victim two days after the kidnapping - was highly probative of petitioner's defense of "necessity," because it supported his claim that his actions were immediately necessary to protect others from being harmed by the kidnapping victim, and if accepted by the jury, would have resulted in petitioner's acquittal.

Paradis v. Arave,
240 F.3d 1169 (9th Cir. 2001)

The Ninth Circuit affirmed the district court's grant of relief in this former Idaho capital case (death sentence commuted to life) on petitioner's claim that the state violated *Brady v. Maryland* by failing to disclose a prosecutor's notes taken at a meeting with law enforcement and the medical examiner. The notes contained, among other things, information regarding the condition of the victim, time of death, and the medical examiner's opinions based on that information, all of which would have been useful to petitioner in impeaching the medical examiner's testimony

indicating that the victim died in Idaho, rather than in Washington. If successful, this would have negated Idaho's jurisdiction to prosecute petitioner for murder.

***Nuckols v. Gibson,**
233 F.3d 1261 (10th Cir. 2000)

The Tenth Circuit granted relief in this Oklahoma capital case, finding that the state failed to disclose material evidence impeaching a key prosecution witness. The undisclosed evidence indicated that the witness - a deputy sheriff whose testimony provided the only support for the admissibility of petitioner's confession, which itself was the only piece of evidence linking petitioner to the crime - had been strongly suspected of stealing from the sheriff's office, and had been tangentially involved in a second murder, for which petitioner was also under arrest at the time of his confession. The evidence was impeaching and material because it would have allowed petitioner to raise questions about the witness' motivation for testifying that petitioner reinitiated questioning which led to his confession, thereby turning what had been a close credibility contest between petitioner and the witness in petitioner's favor, and securing the suppression of petitioner's confession.

White v. Helling,
194 F.3d 937 (8th Cir. 1999)

The Eighth Circuit granted relief in this 27 year old robbery/murder case due to the state's nondisclosure of several documents strongly suggesting that a witness whose testimony severely undermined petitioner's defense of coercion had initially identified someone other than petitioner as the person who took his wallet during the crime, and that the witness had been coached to such an extent that, had the evidence been revealed earlier, the trial might have excluded the witness' testimony altogether.

Spicer v. Roxbury,
194 F.3d 547 (4th Cir. 1999)

A majority of the Fourth Circuit panel affirmed the district court's grant of habeas relief in this post-AEDPA, non-capital habeas case from Maryland. The majority agreed with the district court's conclusion that the prosecutor violated *Brady v. Maryland* by failing to appreciate and disclose to the defense a serious discrepancy between the descriptions of a key witness' knowledge as told to the prosecutor by the witness himself, and as told to the prosecutor by the witness' lawyer, who had contacted the prosecutor about the witness' knowledge in hopes of working out a plea deal. While the witness told his lawyer several times that he had not seen petitioner on the day petitioner allegedly attacked a bar owner, and the lawyer communicated this information to the prosecutor, the witness himself subsequently told the prosecutor, and later petitioner's jury, that he had seen petitioner on the day of the attack, and that petitioner was running away from the crime scene while being chased by an employee of the victim's restaurant.

Love v. Freeman,
1999 WL 671939 (4th Cir. Aug. 30, 1999) (unpublished)

The Fourth Circuit granted federal habeas corpus relief in this North Carolina child sexual assault case, finding that the state violated *Brady* by failing to disclose: evidence that the alleged victim twice denied she had been sexually abused; numerous inconsistencies in the alleged victim's account of the sexual assault; evidence of the alleged victim's "perhaps pathological lying history" and self-destructive and attention-seeking behavior; a tape recording and transcript of a social worker's interview of the alleged victim, during which the social worker utilized suggestive interviewing techniques and supplied the alleged victim with information that subsequently became part of her story; complete records of the alleged victim's hymenal examination; information suggesting the alleged victim's mother ceased supporting petitioner's claim of innocence as a result of coercion by the department of social services; and information indicating that the alleged victim had previously been raped by two boys.

Crivens v. Roth,
172 F.3d 991 (7th Cir. 1999)

The Seventh Circuit granted relief in this non-capital murder case on the ground that the state violated *Brady* by failing to disclose the entire criminal record of its key witness. In so holding, the court rejected the state's contention that no *Brady* violation occurred because the nondisclosure was not deliberate, but was instead a result of the witness having used aliases, thereby making parts of his criminal record more difficult to locate. The court reasoned: "Criminals often use aliases, but the police are able to link the various names to a single individual through a variety of means. If the state indeed asked for the criminal history records . . . , we find it difficult to accept that the Chicago Police Department had not or could not have discovered [that the witness had been arrested under more than one name]." The court further concluded that, in light of the witness' demonstrated propensity to lie, the fact that petitioner had been afforded an opportunity to question him concerning his criminal record was not enough to render the state's nondisclosure immaterial. Finally, the court characterized the state's failure to disclose the witness' record in the face of a direct request and a court order "inexcusable," and concluded that "[t]he atmosphere created by such tactics is one in which we highly doubt a defendant whose life or liberty is at stake can receive a fair trial."

Schledwitz v. United States,
169 F.3d 1003 (6th Cir. 1999)

The government violated *Brady* by failing to disclose that its key witness, who was portrayed as a neutral and disinterested expert during petitioner's fraud prosecution, had for years actually been actively involved in investigating petitioner and interviewing witnesses against him. In granting relief, the court noted that, although "[t]aken individually, none of the [undisclosed evidence, which included items other than the nature of the expert's involvement] would appear to raise a 'reasonable probability' that [petitioner] was denied a fair trial," this evidence, viewed collectively,

entitled petitioner to relief.

United States v. Scheer,
168 F.3d 445 (11th Cir. 1999)

The court granted relief in this bank fraud case on the ground that the government violated *Brady* by failing to disclose that the lead prosecutor in the case had made a statement to a key prosecution witness, who was himself on probation as a result of a conviction arising out of the same set of facts, "that reasonably could be construed as an implicit -- if not explicit -- threat regarding the nature of [the witness'] upcoming testimony . . ." 168 F.3d at 452. In granting relief, the court made clear that, to succeed, the appellant was not required to prove that the witness actually changed his testimony as a result of the prosecutor's threat, nor was he required to establish that, had evidence of the threat been disclosed, the remaining untainted evidence would have been insufficient to support his conviction.

Seiber v. Coyle,
1998 WL 465899 (6th Cir. July 27, 1998) (unpublished)

The court granted relief on petitioner's claim that the state violated *Brady* in two instances. The first violation resulted from the state's failure to disclose that a member of the prosecution team had promised one of two key witnesses that his probation would be transferred to another jurisdiction after his testimony against petitioner. The second violation arose out of the state's nondisclosure of a preliminary crime scene report indicating that the perpetrator of the burglary for which petitioner was later convicted was approximately half petitioner's age, and that no other information identifying the perpetrator was known. The contents of this report sharply contradicted the testimony of the prosecution's only other key witness, a police officer who described the perpetrator in minute detail at trial, and identified petitioner as fitting the description.

United States v. Service Deli, Inc.,
151 F.3d 938 (9th Cir. 1998)

The court reversed the defendant government contractor's conviction for filing a false statement with the United States Defense Commissary Agency because the government failed to disclose notes taken by one of its attorneys during an interview with the state's most important witness. The notes contained "three key pieces of information" useful in impeaching the witness: (1) the witness' story had changed; (2) the change may have been brought on by the threat of imprisonment; and (3) that the witness explained his inconsistent stories by claiming that he had suffered "a stroke which affected his memory." This information was material, the court explained, because "the government's entire case rested on [the] testimony" of the witness who was the subject of the undisclosed notes, and that witness' credibility "essentially was the only issue that mattered." Finally, the court rejected the government's contention that the undisclosed impeachment evidence was merely cumulative because the defendant had gone into the same areas

on cross examination of the witness. The court explained: "It makes little sense to argue that because [defendant] tried to impeach [the witness] and failed, any further impeachment evidence would be useless. It is more likely that [defendant] may have failed to impeach [the witness] because the most damning impeachment evidence in fact was withheld by the government."

Singh v. Prunty,
142 F.3d 1157 (9th Cir.), cert. denied, 525 U.S. 956 (1998)

The court granted habeas relief in this murder for hire case on the ground that the prosecution violated *Brady* by failing to disclose an agreement with its star witness, pursuant to which the witness avoided prosecution on several charges, and received significantly reduced sentences on other charges. The undisclosed information was material, in the court's view, because "[i]t is likely the jury had to believe [the witness'] testimony in order to believe the prosecution's theory. For these reasons, [the witness] was the key witness who linked [petitioner] to the murder-for-hire scheme," and his "credibility was vital to the prosecution's case."

***Clemmons v. Delo,**
124 F.3d 944 (8th Cir. 1997), cert. denied, 523 U.S. 1088 (1998)

Petitioner was convicted of murder and sentenced to death for the killing of a fellow prison inmate. Habeas relief granted as to conviction based on prosecution's failure to disclose an internal prison memo generated the day of the incident which indicated that someone saw a second inmate commit the murder. While petitioner did present other inmates to testify at trial that this second inmate committed the murder, the prosecution argued that these witnesses were not believable because the person they were implicating was "conveniently dead," thus the outcome of the proceeding was sufficiently undermined.

***East v. Johnson,**
123 F.3d 235 (5th Cir. 1997)

Habeas relief granted as to death sentence where prosecution failed to disclose the criminal record of key witness used to establish future dangerousness with testimony that petitioner had raped and robbed her. If this witness' prior record had been disclosed, defense would have discovered a mental competency evaluation which reflected that the witness suffered from bizarre sexual hallucinations. District court erred in applying a sufficiency of the evidence test rather than considering whether impeachment of the witness would have undermined the jury's sentencing recommendation.

United States v. Vozzella,
124 F.3d 389 (2nd Cir. 1997)

Conviction for conspiring to extend extortionate loans reversed where prosecution presented false evidence and elicited misleading testimony concerning that evidence which was vital to prove a

conspiracy.

***Carriger v. Stewart,**
132 F.3d 463 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1133

Habeas relief granted as to conviction and death sentence where prosecution withheld from defense the Department of Correction file of the state's star witness. Because the witness had a long criminal history, the prosecution had the duty to turn over all information bearing on his credibility. The DOC file contained not only information that the witness had a long history of burglaries (the crime the witness was now blaming on the defendant), but also that he had a long history of lying to the police and blaming others to cover up his own guilt.

United States v. Fisher,
106 F.3d 622 (5th Cir. 1997), abrogated on other grounds by Ohler v. United States, 529 U.S. 753 (2000)

New trial ordered where government failed to disclose FBI report directly contradicting testimony of a key government witness on bank fraud charge. Because the witness' credibility was crucial to the government's case, there was a reasonable probability that the result would have been different if the report had been disclosed.

Duran v. Thurman,
106 F.3d 407 (9th Cir. 1997) (unpublished)

Habeas corpus relief granted where state prosecutor told murder defendant's counsel that charges against state's key witness had been dismissed, when witness actually had a pending misdemeanor charge. The court rejected the state's contention that defense counsel should have known about the pending charge, stating counsel was entitled to believe the prosecution's representations to be truthful. The undisclosed charge was material because the witness provided the only testimony contradicting petitioner's theory of self-defense, and his credibility would have been lessened had the jury known that charges were pending against him.

United States v. Pelullo,
105 F.3d 117 (3rd Cir. 1997)

Denial of § 2255 motion reversed where government failed to disclose surveillance tapes and raw notes of FBI and IRS agents. The notes contained information supporting defendant's version of events and impeaching the testimony of the government agents, who provided the key testimony at defendant's trial for wire fraud and other charges.

United States v. Steinberg,
99 F.3d 1486 (9th Cir. 1996), disapproved on other grounds, 165 F.3d 689 (9th Cir. 1999) (en banc)

New trial ordered where prosecution failed to disclose information indicating that its key witness, an informant, was involved in two different illegal transactions around the time he was working as a CI, and that the informant owed the defendant money, thus giving him incentive to send the defendant to prison. Although the prosecutor did not know about the exculpatory information until months after the trial, nondisclosure to the defense of this material evidence required a new trial.

Guerra v. Johnson,
90 F.3d 1075 (5th Cir. 1996)

Grant of habeas relief affirmed where district court made detailed, legally relevant factual findings indicating that police had intimidated key witnesses to murder of police officer and failed to disclose material information regarding who was seen carrying the murder weapon moments after the shooting.

United States v. Cuffie,
80 F.3d 514 (D.C. Cir. 1996)

Undisclosed evidence that prosecution witness, who testified that defendant paid him to keep drugs in his apartment, had previously lied under oath in proceeding involving same conspiracy was material where witness was impeached on basis that he was a cocaine addict and snitch, but not on basis of perjury, and where his testimony provided only connection between defendant and drugs found in witness' apartment.

United States v. Smith,
77 F.3d 511 (D.C.Cir. 1996)

Dismissal of state court charges against prosecution witness, as part of plea agreement in federal court, was material and should have been disclosed under due process clause, even though prosecutor disclosed other dismissed charges and other impeachment evidence was thus available, and whether or not witness was intentionally concealing agreement. Armed with full disclosure, defense could have pursued devastating cross-exam, challenging witness' assertion that he was testifying only to "get a fresh start" and suggesting that witness might have concealed other favors from government.

United States v. Lloyd,
71 F.3d 408 (D.C.Cir. 1995)

Defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to new trial where prosecution: (1) withheld, without wrongdoing, tax return of defendant's client for year which defendant did not prepare returns; and (2) failed to disclose prior tax returns for four of defendant's clients. The first item would probably have changed the result of the trial, and the second group of items were exculpatory material evidence.

United States v. David,
70 F.3d 1280 (9th Cir. 1995) (unpublished)

New trial ordered where defendant had been convicted of operating a continuing criminal enterprise solely on the strength of testimony of two prisoners serving life sentences in the Philippines. Subsequent to the conviction, these two prisoners were released, and defendant discovered previously undisclosed evidence of a deal between the government and the two prisoners.

United States v. O'Connor,
64 F.3d 355 (8th Cir. 1995), cert. denied, 116 S.Ct. 1581 (1996)

Brady violation occurring when government failed to inform defendant of threats by one government witness against another and attempts to influence second government witness' testimony was reversible error with respect to convictions on those substantive drug counts and conspiracy counts where testimony of those government witnesses provided only evidence; evidence of threats, combined with undisclosed statements from interview reports, could have caused jury to disbelieve government witnesses.

United States v. Boyd,
55 F.3d 239 (7th Cir. 1995)

Trial court did not abuse discretion by granting new trial based on government's failure to reveal to defense either drug use and dealing by prisoner witnesses during trial or "continuous stream of unlawful" favors prosecution gave those witnesses.

***Banks v. Reynolds,**
54 F.3d 1508 (10th Cir. 1995)

Habeas relief granted to capital murder petitioner where failure of prosecution to disclose to defendant that another individual had been arrested for the same crime violated defendant's right to a fair trial. Relief is granted on the *Brady* claim despite possible knowledge by defense counsel of withheld material because "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge."

Smith v. Secretary of New Mexico Dept. of Corrections,
50 F.3d 801 (10th Cir.), cert. denied, 116 S.Ct. 272 (1995)

Habeas granted where material evidence relating to a third person/suspect was not disclosed, prosecutor's lack of actual knowledge was irrelevant because police knew, and prosecution's "open file" was not sufficient to discharge its duty under *Brady*.

United States v. Alzate,

47 F.3d 1103 (11th Cir. 1995)

Failure of prosecutor to correct representations he made to the jury which were damaging to defendant's duress defense, despite having learned of their falsehood during the course of the trial, was *Brady* violation and required granting of new trial motion.

United States v. Robinson,
39 F.3d 1115 (10th Cir. 1994)

District court did not abuse discretion in ordering new trial where, in violation of *Brady*, government failed to disclose evidence tending to identify former codefendant as drug courier; conviction was based largely on testimony of codefendants and defendant had strong alibi evidence.

United States v. Kelly,
35 F.3d 929 (4th Cir. 1994)

Kidnapping conviction reversed where government failed to furnish an affidavit in support of an application for a warrant to search key witness's house just before trial, and failed to disclose a letter written by same witness which would have seriously undermined her credibility.

United States v. Young,
17 F.3d 1201 (9th Cir. 1994)

New trial granted where detective's testimony regarding location of incriminating notebooks was false, regardless of whether government presented the evidence unwittingly. Reasonable probability existed that result would have been different absent the false testimony, which was highly prejudicial in light of government's otherwise weak case.

Demjanjuk v. Petrovsky,
10 F.3d 338 (6th Cir.), cert. denied, 115 S.Ct. 295 (1994)

Prosecutorial misconduct where government attorneys failed to disclose to petitioner and court exculpatory materials during denaturalization and extradition proceedings of alleged "Ivan the Terrible." They acted with "reckless disregard."

United State v. Udechukwu,
11 F.3d 1101 (1st Cir. 1993)

New trial granted to remedy prosecutorial misconduct of failing to disclose salient information concerning defendant's theory that she had been coerced into being a drug courier. Prosecutor argued during closing that there was no evidence to support defendant's claim when in fact he knew that source defendant named existed and was a prominent drug trafficker.

United States v. Kalfayan,
8 F.3d 1315 (9th Cir. 1993)

Where defense counsel had made *Brady* request about whether key witness had signed cooperation agreement, and later request for missing witness instruction foundered because defense counsel did not know of the deal, *Brady* required government to disclose its existence.

Ballinger v. Kerby,
3 F.3d 1371 (10th Cir. 1993)

Failure to produce exculpatory photograph, which would have undermined co-defendant's already flimsy credibility, violated Due Process.

United States v. Brumel-Alvarez,
991 F.2d 1452 (9th Cir. 1993)

Brady violation where government failed to disclose memo indicating that informant lied to DEA, had undue influence over DEA agents, and thwarted investigation of evidence crucial to his credibility.

United States v. Kojayan,
8 F.3d 1315 (9th Cir. 1992)

Where government failed to disclose agreement with potential witness and later request for missing witness instruction was denied because counsel was unaware of the agreement, *Brady* required disclosure.

United States v. Gregory,
983 F.2d 1069 (6th Cir. 1992) (unpublished)

Government suppressed audio from a videotape of marijuana plants being destroyed. The information in the audio would have significantly reduced defendant's sentence. This was a *Brady* violation.

Hudson v. Whitley,
979 F.2d 1058 (5th Cir. 1992)

Habeas petitioner, in fourth petition, claimed that state suppressed crucial evidence that its only eyewitness had originally identified a third party, and that third party had been arrested. Petitioner demonstrated "good cause" because state failed to disclose the info despite repeated requests.

Thomas v. Goldsmith,
979 F.2d 746 (9th Cir. 1992)

State obliged to turn over to petitioner any exculpatory semen evidence for use in federal habeas proceeding in which petitioner sought to overcome state procedural default through miscarriage of justice exception, for colorable showing of actual innocence, and duty was not extinguished by petitioner's failure to argue existence of such obligation in district court; due to obvious exculpatory nature of semen evidence in sexual assault case, neither specific request nor claim of right by petitioner was required to trigger duty of disclosure.

United States v. Brooks,
966 F.2d 1500 (D.C. Cir. 1992)

Prosecution's *Brady* obligation extends to search of files in possession of police department and internal affairs division.

United States v. Minsky,
963 F.2d 870 (6th Cir. 1992)

Government improperly refused to disclose statements of witness that he did not make at trial. Disclosure could have resulted in loss of credibility with jury based on false statements to FBI.

United States v. Spagnuolo,
960 F.2d 990 (11th Cir. 1992)

New trial ordered on basis of *Brady* violation where prosecution failed to disclose results of a pre-trial psychiatric evaluation of defendant which would have fundamentally altered strategy and raised serious competency issue.

Jacobs v. Singletary,
952 F.2d 1282 (11th Cir. 1992)

Brady violated where state failed to disclose statements of witness to polygraph examiner which contradicted her trial testimony.

Brown v. Borg,
951 F.2d 1011 (9th Cir. 1991)

Brady violated where prosecutor knew her theory of the case was wrong but misled the jury to think the opposite was true through her presentation of testimony.

Jean v. Rice,
945 F.2d 82 (4th Cir. 1991)

Audio tapes and reports relating to hypnosis of rape victim and investigating officer were material under *Brady*, and should have been disclosed to defense where they had strong impeachment

potential and could have altered case.

Ouimette v. Moran,
942 F.2d 1 (1st Cir. 1991)

Due process violated by state's failure to disclose long criminal record of, and deals with, state's chief witness where evidence against petitioner came almost entirely from this witness.

Campbell v. Henman,
931 F.2d 1212 (7th Cir. 1991)

Inmates do not forfeit right to exculpatory material before disciplinary proceeding simply because they forego option of assistance of staff representative who would have access to such material.

United States v. Tinch,
907 F.2d 600 (6th Cir. 1990)

Prosecutor's response to Jencks Act and *Brady* request was deliberate misrepresentation in light of knowledge of testimony of government agent before grand jury. Reversal was required since misconduct precluded review of the agent's testimony by the district court.

United States v. Wayne,
903 F.2d 1188 (8th Cir. 1990)

Government's failure to disclose *Brady* material required new trial where drug transaction records would have aided cross-exam of key witness.

United States v. Tinch,
907 F.2d 600 (6th Cir. 1989)

"Deliberate misrepresentation" where prosecutor withheld grand jury testimony of cop, after defense requested any Jencks Act or *Brady* material and prosecutor responded that none existed. Convictions reversed.

Reutter v. Solem,
888 F.2d 578 (8th Cir. 1989)

Prosecution's failure to inform defense that key witness had applied for commutation and been scheduled to appear before parole board a few days after his testimony required habeas relief. Violation was compounded by prosecution's statement to the jury that the witness had no possible reason to lie.

United States v. Weintraub,

871 F.2d 1257 (5th Cir. 1989)

Impeachment evidence which was withheld would have allowed defendant to challenge evidence presented as to amount of narcotics sold, was material to sentencing and required remand for new sentencing hearing.

McDowell v. Dixon,
858 F.2d 945 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989)

Black petitioner's due process rights violated where state suppressed key witness's initial statement that attacker was white and prosecutor added to the deception at trial by allowing witness to testify that she "had always described her attacker as a black man."

Jones v. City of Chicago,
856 F.2d 985 (7th Cir. 1988) [Civil case]

In successful § 1983 action against police officers by plaintiff who had been charged with murder, court notes that while *Brady* does not require police to keep written records of all their investigatory activities, attempts to circumvent the rule by keeping records in clandestine files deliberately concealed from prosecutors and defense, which contain exculpatory evidence, cannot be tolerated.

United States v. Strifler,
851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989)

Information in government witness' probation file was relevant to witness' credibility and should have been released as *Brady* material. Criminal record of witness could not be made unavailable by being part of probation file. District court's failure to release these materials required reversal.

Miller v. Angliker,
848 F.2d 1312 (2nd Cir.), cert. denied, 488 U.S. 890 (1988)

Habeas granted where state withheld evidence which indicated that another person had committed the crimes with which petitioner was charged. Same standard for *Brady* claim evaluation applies for defendant who pled not guilty by reason of insanity as for defendant who pled guilty.

Carter v. Rafferty,
826 F.2d 1299 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988)

Lie detector reports of test given to important prosecution witness were material where witness' testimony was the only direct evidence placing petitioner at scene of crime. Fact that other contradictory statements of the witness had been disclosed did not remove the "materiality" of the lie detector results.

***Bowen v. Maynard,**
799 F.2d 593 (10th Cir.), cert. denied, 479 U.S. 962 (1986)

Violation where prosecution failed to disclose that they considered Crowe a suspect when Crowe better fit the description of eyewitnesses, was suspected by law enforcement in another state of being a hit man, and carried the same weapon and unusual ammunition used in the murders. This met even the strictest standard under *Agurs*.

United States v. Severdija,
790 F.2d 1556 (11th Cir. 1986)

Written statement defendant made to coast guard boarding party should have been disclosed under *Brady*, and failure to disclose warranted new trial. The statement tended to negate the defendant's intent, which was the critical issue before the jury.

Brown v. Wainwright,
785 F.2d 1457 (11th Cir. 1986)

Habeas granted under *Giglio* where prosecution allowed its key witness to testify falsely, failed to correct the testimony, and exploited it in closing argument. Standard is whether false testimony could in any reasonable likelihood have affected the judgment of the jury.

Lindsey v. King,
769 F.2d 1034 (5th Cir. 1985)

Brady violated where prosecution, after a specific request, suppressed initial statement of eyewitness to police in which he said he could not make an ID because he never saw the murderer's face. His story changed after he found out there was a reward.

United States v. Fairman,
769 F.2d 386 (7th Cir. 1985)

Prosecutor's ignorance of existence of ballistic's worksheet indicating gun defendant was accused of firing was inoperable does not excuse failure to disclose.

Walter v. Lockhart,
763 F.2d 942 (8th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986)

State held, for over twenty years, a transcript of a conversation tending to exculpate petitioner insofar as it supported his claim that the cop shot at him first.

United States v. Alexander,

748 F.2d 185 (4th Cir. 1984), cert. denied, 472 U.S. 1027 (1985)

Government's equivocation in making critical factual representations to defense counsel and to district court regarding its possession of *Brady* materials requested in connection with new trial motion fatally compromised integrity of proceedings on the motion so that district court's denial of the motion could not stand.

***Chaney v. Brown,
730 F.2d 1334 (10th Cir.), cert. denied, 469 U.S. 1090 (1984)**

Conviction affirmed but death sentence reversed where evidence, admissible under *Eddings*, which contradicted prosecution's theory of the murder and placed petitioner 110 miles from the scene, was withheld by prosecution.

**United States v. Holmes,
722 F.2d 37 (3rd Cir. 1983)**

District court abused its discretion by denying defendant's request for adjournment to permit counsel to complete examination of Jencks Act material, which was a stack of paper at least eight inches thick provided on the morning of the day before trial.

**Anderson v. State of South Carolina,
709 F.2d 887 (4th Cir. 1983)**

Habeas relief granted where prosecution withheld police reports despite general and specific requests from defense counsel, and failed to furnish autopsy reports upon counsel's request. There is no general "public records" exception to the *Brady* rule.

**United States v. Muse,
708 F.2d 513 (10th Cir. 1983)**

Prosecutor must produce *Brady* material in personnel files of government agents even if they are in possession of another agency.

**Chavis v. North Carolina,
637 F.2d 213 (4th Cir. 1980)**

Habeas relief granted where prosecution suppressed an amended statement by a key witness, information concerning the witness's favorable treatment by authorities, and records of the witness's mental deficiencies.

**United States v. Auten,
632 F.2d 478 (5th Cir. 1980)**

Prosecutor's lack of knowledge of witness's criminal record was no excuse for *Brady* violation.

Martinez v. Wainwright,
621 F.2d 184 (5th Cir. 1980)

In homicide prosecution, deceased's rap sheet, which prosecution failed to provide to defense pursuant to defense request, was "material" within meaning of *Brady* to the extent it served to corroborate petitioner's testimony with respect to shooting incident. That the rap sheet was in possession of the medical examiner, not the prosecutor, did not defeat the claim.

DuBose v. Lefevre,
619 F.2d 973 (2nd Cir. 1980)

Habeas relief granted where state encouraged witness to believe that favorable testimony would result in leniency toward the witness. Failure to disclose was not justified by fact that promise of state had not taken a specific form. Questions about a deal arose during examination of the witness, but nothing about the deal was disclosed.

United States v. Gaston,
608 F.2d 607 (5th Cir. 1979)

Reversed where trial court failed to conduct an in camera review of *Brady* material despite defendant's request for specific documents relating to interviews of two named witnesses, no evidentiary hearing was conducted, nor were the documents produced. The reports were sought not only for impeachment, but for substantive exculpatory use.

Monroe v. Blackburn,
607 F.2d 148 (5th Cir. 1979)

Habeas relief granted in armed robbery case where, despite specific request by petitioner, prosecutor withheld a statement given by the victim to police which could have been useful in attacking victim's testimony at trial. Because the request was specific, the standard of review was "no reasonable likelihood that evidence would have affected judgment of the jury."

United States v. Antone,
603 F.2d 566 (5th Cir. 1979), cert. denied, 446 U.S. 957 (1980)

For *Brady* analysis, no distinction is drawn between different agencies under the same government --- all are part of the "prosecution team."

Campbell v. Reed,
594 F.2d 4 (4th Cir. 1979)

Where co-defendant denied existence of agreement with prosecution during testimony, prosecution had a duty to correct. Jury was entitled to know about it and prosecution's deliberate deception was fundamentally unjust.

United States v. Herberman,
583 F.2d 222 (5th Cir. 1978)

Testimony presented to grand jury contradicting testimony of government witnesses was *Brady* material subject to disclosure to the defense.

United States v. Beasley,
576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979)

Conviction reversed due to failure of government to timely produce statement of key prosecution witness where not only was the witness critical to the conviction, but defense and prosecution argued his credibility at length, and the statement at issue differed from witness' trial testimony in many significant ways.

Jones v. Jago,
575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978)

Habeas granted under *Brady* and *Agurs* where state withheld, despite defense request, a statement from coindictor who, prior to trial, had been declared material witness for prosecution, and against whom all charges were then dropped. State's claim that witness' statement made no express reference to petitioner and was therefore neutral was unsuccessful.

United States v. Butler,
567 F.2d 885 (9th Cir. 1978)

New trial required where government failed to disclose whether the witness had been promised a dismissal of the charges against him, and the witness testified falsely in this regard. The standard is whether the false testimony could in any reasonable likelihood have affected the judgment of the jury.

Annunziato v. Manson,
566 F.2d 410 (2nd Cir. 1977)

Habeas granted where one of two key prosecution witnesses testified falsely that he received no promise of leniency when in fact he had made a deal to avoid prison on pending charges, and prosecutor knew or should have known of this fact.

United States v. Sutton,
542 F.2d 1239 (4th Cir. 1976)

Reversed where prosecutor concealed evidence that key prosecution witness was coerced into testifying against defendant, and then went on to falsely assure the jury that no one had threatened the witness.

Boone v. Paderick,
541 F.2d 447 (4th Cir. 1976), cert. denied, 430 U.S. 959 (1977)

Petitioner prejudiced where prosecutor failed to disclose deal with accomplice/witness for leniency. Prosecutor knew or should have known that false evidence was being presented where witness denied deal at trial.

Norris v. Slayton,
540 F.2d 1241 (4th Cir. 1976)

Habeas granted where state failed to furnish to rape defendant's counsel copy of lab report showing no hair or fiber evidence in petitioner's undershorts or in victim's bed.

United States v. Pope,
529 F.2d 112 (9th Cir. 1976)

Conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for testimony and compounded the violation by arguing to the jury that the witness had no reason to lie.

Washington v. Vincent,
525 F.2d 262 (2nd Cir. 1975), cert. denied, 424 U.S. 934 (1976)

Habeas relief granted where key prosecution witness lied about his deal with the state, and prosecutor took no action to correct what he knew was false testimony. Petitioner was entitled to relief despite the fact that there was evidence that petitioner and his counsel knew of the perjury as it happened but took no steps to object.

United States v. Gerard,
491 F.2d 1300 (9th Cir. 1974)

Convictions reversed where defendants were deprived of all evidence of promise of leniency by prosecutor, and prosecutor failed to disclose that witness was in other trouble, thereby giving him even greater incentive to lie.

United States v. Deutsch,
475 F.2d 55 (5th Cir. 1973), overruled on other grounds, United States v. Henry, 749 F.2d 203 (5th Cir. 1984)

Prosecution found to be in possession of information which was in the files of the Postal Service. Availability of information is not measured by how difficult it is to get, but simply whether it is in possession of some arm of the state.

United States ex. rel. Raymond v. Illinois,
455 F.2d 62 (7th Cir.), cert. denied, 409 U.S. 885 (1972)

Defendant entitled to new trial even though exculpatory evidence had been revealed to defendant himself, but not to defense counsel.

Jackson v. Wainwright,
390 F.2d 288 (5th Cir. 1968)

In racial misidentification case, failure of prosecutor to reveal misidentification requires habeas relief even though defense counsel had name and address of the witness.

***United States ex rel. Thompson v. Dye,**
221 F.2d 763 (3rd Cir.), cert. denied, 350 U.S. 815 (1955)

Habeas relief granted where state failed to inform defense counsel that arresting officer smelled alcohol on petitioner at the time of arrest. Absent state's deceit, jury may have believed defendant's physical and mental state evidence.

Barbee v. Warden,
331 F.2d 842 (4th Cir. 1964)

In A.W.I.K. and unauthorized use of automobile case, wherein defendant's gun was offered for ID purposes only and several witnesses made partial ID of gun as being used in shooting, reports of ballistics and fingerprint tests made by police, which tended to show that different gun was used and to exculpate defendant, were relevant and prosecution should have disclosed their existence.

III. UNITED STATES DISTRICT COURTS

United States v. McDuffie,
2009 WL 2512194 (E.D. Wash. 2009) (unpublished)

District Court granted motion for new trial in drug case due to the Government's failure to disclose, prior to a fingerprint expert's testimony during trial, the presence of a detective's fingerprints on an electronic scale recovered from the defendant's apartment at the time of his arrest. The defense had asserted the scale was new and the presence of cocaine on the scale was because the evidence had been tampered with by the detective in order to pressure the defendant into providing favorable testimony in an unrelated murder case. The fingerprint evidence was material because it would have supported the defense, especially because the detective in

question, who was arguably the prosecution's key witness, was not present in the defendant's apartment at the time of the arrest or search. Because it was not disclosed until during the trial itself, the defense was limited to unprepared cross of the expert and unsupported and speculative arguments. If the evidence had been disclosed prior to trial, the defense could have presented "affirmative evidence regarding standard police procedures that might have supported the tampering theory."

Cardoso v. United States,
___ F. Supp. 2d ___, 2009 WL 2252339 (S.D.N.Y. July 29, 2009)

New sentencing ordered in 2255 proceeding due to government's failure to disclose impeachment evidence relevant to a cooperating witness in drug conspiracy case. The court relied on this witness' testimony in sentencing by finding the defendant was "a supervisor" and adjusting her advisory offence level upwards by 3. The court also relied on this testimony in rejecting the defense argument that she was a minor participant and was eligible for a point reduction. Because of the "supervisor" finding, which disqualified her for consideration for the statutory "safety valve," the court did not hear argument on the request to sentence the defendant below the statutory minimum. Prior to sentencing, the government discovered, but did not disclose, that the cooperating witness was actively involved in drug trafficking and actively lying to law enforcement at the time of events in this case. Because the court had relied on this witness' testimony in making findings in sentence, new sentencing was ordered, even though the defendant had been sentenced well below the guidelines range the first time.

United States v. Jiles,
2009 WL 2212152 (W.D. Va. July 24, 2009) (unpublished)

Motion for new trial granted in assaulting federal officer case due to the government's failure to disclose six disciplinary actions against one of the four officer witnesses. The disciplinary actions, included misuse of a government credit card and making false statements and directly concerned the officer's credibility. The defendant asserted his actions were justified and taken in self-defense. The evidence was material, especially in light of the government's prior disclosure of evidence affecting the credibility of one of the other three officers.

United States v. Gaitan-Ayala,
2009 WL 901522 (D. Hawaii April 2, 2009) (unpublished)

A portion of the convictions for conspiracy and distribution reversed following government's post-trial disclosure of evidence that a cooperating witness had purchased large quantities of methamphetamine and cocaine during the period he was a cooperating witness in this case. The defendant's motion for new trial on some count granted where the witness' testimony was material because the witness, while freely admitting his long history of using and dealing drugs prior to his cooperation, denied continued use and dealing during his cooperation.

United States v. Friedlander,
2009 WL 320861 (M.D. Fla. Feb. 6, 2009 (unpublished))

Enticing a child to engage in sexual acts conviction vacated on motion for new trial due to *Napue* violation. The defendant presented a psychiatrist specializing in sexual disorders. He testified based on the DSM IV TR published in 2000. The prosecutor cross-examined him extensively in an attempt to establish that he was relying on an outdated version of the DSM when, in fact, the prosecutor was relying on a version published in 1994. Following the trial, the prosecutor gave notice that she had been mistaken and the defendant filed a motion for new trial. Although this was not a case involving the knowing use of false or perjured testimony, the prosecutor's cross still put false and material evidence before the jury and this evidence effectively destroyed the credibility of the defense expert. Despite "compelling and overwhelming" evidence of guilt, the court granted the motion for new trial because of the court's observation of "the jury's reaction to the embarrassing and humiliating cross" of the defense expert, which made it impossible for the court "to say without any confidence, that beyond a reasonable doubt" the error "did not contribute" to the conviction.

United States v. Fitzgerald,
615 F. Supp. 2d 1156 (S.D. Cal. 2009)

District court dismissed indictment with prejudice following grant of motion for new trial due to *Brady* violation. The defendant, a CPA, was convicted of aiding and abetting a doctor in filing false income tax returns over a two year period. The doctor was the primary witness against the defendant. The jury acquitted the defendant on one charge and convicted on the other. The court granted a motion for new trial because the government failed to disclose the transcripts or taped conversations of the doctor talking to his tax attorney, which were made after the doctor became a cooperating witness. *United States v. Fitzgerald*, 2007 WL 1704943 (S.D. Cal. 2007), *aff'd*, 279 Fed. Appx. 444 (9th Cir. 2008) (unpublished). These tapes revealed that the tax attorney believed the returns were valid, which was also part of the defendant's defense. By the time these tapes were disclosed to the defense, the doctor had died. The court found that the government, at minimum, recklessly disregarded its discovery obligations. Thus, the court found the proper remedy for the *Brady* violation was dismissal of the indictment with prejudice.

U.S. v. Stanford,
2008 WL 4790782 (D.S.D. Oct. 31, 2008)

New trial granted to three defendants in drug case where prosecution did not disclose that a key prosecution witness provided law enforcement with inaccurate information about another drug transaction, and that the witness was involved in controlled buys in order to "work" off potential charges against her. Witness's "seriously misleading" testimony was material, and although other incriminating evidence against defendants existed, there was "a reasonable probability that the suppressed impeachment evidence would have put the case in a different light." Although witness did not testify about one of the defendants, her "misleading testimony bolstered the integrity of

the entire conspiracy investigation,” creating “a spillover effect” prejudicing that defendant.

***Breakiron v. Horn,
2008 WL 4412057 (W.D. Pa. Sept. 24, 2008)**

Habeas relief granted to death row inmate where prosecution withheld favorable evidence that could have been used to impeach testimony of jailhouse snitch. Although claim was procedurally defaulted, the suppression of the evidence by the State provided cause to overcome the default. And because the claim was never raised in state court, review was de novo. At trial, jury was charged on 1st, 2nd and 3rd degree murder and voluntary manslaughter, and defense “effectively conceded” guilt of 3rd degree murder when it presented defense that petitioner was too intoxicated to form specific intent to kill. Jailhouse snitch testified petitioner admitted murder and described incriminating details that contradicted petitioner’s testimony about his impaired recollection of the killing. Inmate admitted prior assault conviction, but denied that the crime was really attempted murder and denied receiving any benefits for testimony. Prosecutor relied on inmate’s testimony, arguing inmate credible and received no bargain, deal or money for testimony. In fact, inmate wrote prosecutor requesting benefits in exchange for his testimony against petitioner, i.e., relief from pending convictions not yet final. At the time of the letters, the inmate was also a suspect in another case. State’s contention it had no duty to disclose letters because it made no “deal” with inmate erroneous. Inmate received requested relief when state did not appeal decision granting inmate post-trial relief from the conviction. In addition, no charges were filed in the other case. The inmate’s letters “had impeachment value,” and, importantly, the trial prosecutor acknowledged that the letters would have been disclosed had they been in the file when he took over the case. The prosecution also violated *Brady* by failing to disclose that the inmate’s prior conviction was for assault with intent to rob while armed, not simply assault. Even if the prosecution was unaware of the actual nature of inmate’s conviction, it had a duty to learn the information. (The state court’s default of this allegation as untimely was not adequate to bar federal review.) By “failing to disclose impeachment evidence,” petitioner’s first degree murder conviction was rendered “unworthy of confidence” given that inmate’s testimony about petitioner’s premeditation and planning “undeniably added strength” to first degree murder case and suppressed evidence was relevant to: (1) inmate’s veracity when he testified had nothing to gain; and (2) prosecution’s assertion that inmate had no reason to be biased in favor of prosecution.

**U.S. v. Hector,
2008 WL 2025069 (C.D. Cal. May 8, 2008)**

New trial granted where government’s failure to investigate and disclose impeachment material “constituted flagrant misconduct.” Despite defendant’s “numerous specific requests seeking information,” and judge’s “abundantly clear” concerns that Government had “not sufficiently complied with its *Brady* obligations,” including telling Government it had “an obligation to affirmatively find out information” relating “to [its] informant that you can reasonable acquire,” government “failed to make even basic inquiries about the credibility of its primary witnesses.”

Although knowing informant had lengthy criminal record, government did not speak to officers involved in another case where informant was involved, and did not investigate informant's "history of informing" for over 20 years, attempts to "manipulate officials" and willingness "to lie to help himself." Because government's conduct was "egregious," defendant needed only show "flagrant conduct had 'at least some impact on the verdict.'" If jury heard other law enforcement officials considered informant "manipulative and willing to lie," "it would have been less likely to believe him." Court "seriously considered dismissing indictment," but instead granted new trial where Government will conduct "more thorough investigation...." Given its "compromised" "credibility," Government must "independently research this (and any other) informant."

***Montgomery v. Bagley**

482 F.Supp.2d 919 (N.D. Ohio 2007), aff'd, ___ F.3d ___, 2009 WL 3075609 (6th Cir. Sep 29, 2009)

In double murder case, habeas relief granted where prosecution withheld a police report indicating that a witness, who knew victim Ogle, saw her alive four days after the prosecution theorized she was murdered. The evidence was material because it directly contradicted the testimony of the co-defendant who had a motive to lie to exculpate himself due to circumstantial evidence pointing to both him and Montgomery. That Ogle was seen four days after victim Tincher was found dead also undermined the prosecution's theory that Montgomery's motive to kill Tincher was to eliminate the only person who saw Montgomery with Ogle the day the prosecution contended she was killed.

***Tassin v Cain,**

482 F.Supp.2d 764 (E.D. La. 2007), aff'd, 517 F.3d 770 (5th Cir. 2008)

Habeas relief granted as to capital conviction and death sentence where critical prosecution witness provided misleading and uncorrected testimony about the sentence she was to receive as part of her plea agreement. She testified that she could be sentenced up to 99 years, that she did not know whether her testimony would affect her sentencing, and that she had been made no promises concerning her testimony. In fact, as established in state post-conviction proceedings, the witness had been informed by her attorney that the judge had told him the witness should expect a 10 year sentence if she testified, based on the consistency of her testimony. The state court had denied relief because Tassin had failed to establish that an actual promise had been made to the witness. This decision was contrary to *Brady* by applying "a more stringent standard than the one established by Supreme Court precedent." Materiality is found because the witness's testimony was crucial to the State's case in that it provided the only evidence of a plan to commit armed robbery.

Perez v. United States,

502 F.Supp.2d 301 (N.D.N.Y 2006)

In case involving prosecution for illegal reentry into the U.S., the prosecution violated *Brady*

because it had constructive knowledge that the defendant was a U.S. citizen at the time he was originally deported and at the time of reentry but failed to disclose it. (The defendant had been unaware that he automatically had become a naturalized U.S. citizen derivatively through his mother's successful naturalization.)

***Wilson v. Beard,**
2006 WL 2346277 (E.D. Pa. Aug. 9 2006) (unpublished)

In barroom shooting case where the prosecution's evidence centered on two eyewitnesses and one long-time police informant, the prosecution violated *Brady* by withholding impeachment evidence. It failed to disclose evidence that one eyewitness had a lengthy criminal history, including impersonating a police officer, and an extensive psychiatric history as a result of several head injuries. The prosecution further withheld evidence that the other eyewitness had an extensive psychiatric history, including medication with antipsychotic drugs. Also not disclosed to petitioner was that during his trial, this witness was transported by a detective from the prosecutor's office for emergency psychiatric care whereupon he was diagnosed with schizophrenia. Regarding the informant witness, petitioner was not told that the officer who took his statement had been giving the witness interest free loans for some time. This same officer at trial had denied providing anything to the informant. (The claim was considered de novo by the federal court because the state court had refused to reach the merits on waiver grounds but the waiver rule was not adequate to preclude federal rule.)

***Powell v. Mullin,**
2006 WL 249632 (W.D. Okla. Jan. 31, 2006), aff'd, 560 F.3d 1156 (10th Cir. 2009)

Prosecution violated petitioner's constitutional rights by suppressing evidence concerning benefits provided to the sole identification witness and leaving uncorrected false testimony about the absence of benefits. During habeas proceedings, petitioner offered evidence that the prosecutor had written a letter to the parole board requesting leniency following the witness's testimony in petitioner's co-defendant's case, produced a letter from the witness to his mother regarding deal negotiations, and introduced testimony regarding a phone call between the witness's mother and a member of the prosecution team about benefits to the witness. The prosecutor's testimony that he sought benefits for the witness without being asked and without alerting the witness he had done so was rejected. (Note that co-defendant, whose trial preceded the letter to the parole board, was denied relief. *Douglas v. Mullin*, 2006 WL 249663 (W.D. Okla., Jan. 31, 2006). Although this was a post-AEDPA case, de novo review of the claim was conducted because the state court rejected the claim based on a procedural bar that the federal court determined was not adequate to preclude federal review.)

***United States v. Hammer,**
404 F.Supp.2d 676 (M.D. Pa. 2005), *appeals dismissed*, 564 F.3d 628 (3rd Cir. 2009)

Petitioner was entitled to sentencing phase relief under § 2255 based on prosecution's suppression

of evidence supporting petitioner's version of how the murder of his cellmate occurred. The cellmate was tied to his bed with braided sheets and strangled. Prosecution theorized that the cellmate agreed to be tied up as part of a hostage ruse that would get him transferred to a different prison. Petitioner pled guilty, but specifically denied the hostage ruse scenario and that he had braided the sheets for this purpose. Prosecution failed to disclose third party statements indicating that petitioner regularly engaged in sexual activity with other inmates involving tying inmates down with braided sheets. Guilt-phase relief was denied because petitioner specifically denied the sheets/hostage ruse elements of the prosecution's case at his plea, and yet pled guilty anyway. Penalty phase relief was appropriate because the prosecution had relied primarily on the fact of the braided sheet tie-down scenario to prove the substantial planning and premeditation aggravator, one of only two found by the jury, among many mitigating circumstances.

Ramsey v. Belleque,
2005 WL 1502875 (D. Or. June 10, 2005) (unpublished)

In robbery and assault case, prosecution violated *Brady* by suppressing evidence of unrelated drug sales by Ramsey's alleged victim to a confidential informant which would have impeached the victim's testimony at Ramsey's trial. The victim had claimed that he and Ramsey were former drug dealing partners and that after their partnership ended, Ramsey robbed him and shot him in the leg. The victim claimed he was no longer dealing drugs at the time of the incident. The suppressed evidence, which was discovered shortly after Ramsey's conviction when drug dealing charges were brought against the victim, could have supported Ramsey's defense that the victim had fronted drugs to Ramsey and that the victim was accidentally shot after pulling a gun on Ramsey during a dispute about payment for the drugs. Notably, the prosecutor had argued to the jurors that to find for Ramsey, they would have to believe that the victim was still dealing drugs. By refusing to grant Ramsey a new trial, the state court unreasonably applied clearly established federal law.

***Bell v. Haley,**
437 F.Supp.2d 1278 (M.D. Ala. 2005)

Habeas relief granted as to death sentence in robbery-murder case based on suppression of evidence that could have impeached the key witnesses against Bell. The victim's body was never found, nor was a weapon or any forensic evidence recovered. The case against Bell was largely based on the testimony of two witnesses, one who claimed to have been present at the murder scene but not a participant, and another who said that Bell came to his house following the murder and showed him the robbery proceeds. This witness also corroborated some elements of the first witness's story. The district court found three *Brady* violations. First, the State suppressed a prior statement of the second witness that was inconsistent with his trial testimony. Second, the State failed to disclose that the prosecutor threatened the second witness with a habitual offender prosecution if he did not testify. Third, the State suppressed a tacit agreement with the first witness not to prosecute him for his involvement in the case. The court found that while evidence in the case was sufficient to show that Bell was involved in some way in the crime,

the *Brady* evidence was enough to establish a reasonable probability of a different outcome at sentencing.

Eastridge v. United States,
372 F.Supp.2d 26 (D.D.C. 2005)

In case involving numerous gang members charged with killing a man, the prosecution violated *Brady* by failing to disclose a grand jury transcript where two unindicted gang members falsely denied being present at the club where the altercation began on the night of the killing. A witness at trial had testified that he and the petitioner were not among the group that chased and killed the victim, which was consistent with the petitioners's account. This witness's version of events included the presence of the two unindicted gang members. Had the false denials by the unindicted gang members been revealed, the testimony of the supporting witness would have been more credible.

***Simmons v. Beard,**
356 F.Supp.2d 548 (W.D. Pa. 2005), aff'd, ___ F.3d ___, 2009 WL 2902251 (3rd Cir. 2009)

There was a reasonable probability of a more favorable result at Simmons's capital trial had the prosecution not suppressed evidence that would have further impeached the two main prosecution witnesses. Simmons was charged with raping and killing an elderly woman. The primary evidence against him came from another elderly woman who alleged that Simmons attacked her and said, "if you don't shut your [expletive] mouth, you'll get the same thing [victim] got," and Simmons's girlfriend who testified about Simmons's behavior around the time of the crime. The prosecution suppressed evidence that (1) the girlfriend had been threatened with charges if she did not cooperate in wiretapping Simmons; (2) the elderly woman had purchased a gun following her assault, in violation of felon in possession of gun law, and charges were dismissed by investigators in Simmons's case; (3) the elderly woman perjured herself on the gun application forms; (4) lab reports found no blood or semen on the elderly woman's clothes, and found hair consistent only with the victim and inconsistent with Simmons; and (5) the elderly woman had failed to identify Simmons in a mug book. (The State had affirmatively denied that a mug book procedure had taken place.) Evidence regarding intimidation of the girlfriend, and disposition of gun charges against the elderly woman provided a motive for their having lied, which was missing in the impeachment at trial. Lab reports further undermined the elderly woman's story, even though they did not point to another suspect. And had the defense known about the elderly woman's inability to identify Simmons in a mug book, it would not have pursued a strategy of in-person identification. Cumulatively, this led to a reasonable probability of a different outcome. The state court's conclusion that no single piece of evidence would have changed the outcome was an unreasonable application of *Kyles*.

United States v. Lyons,
352 F.Supp.2d 1231 (M.D. Fla. 2004)

Brady and *Giglio* violations admitted to by the government which related to a drug conspiracy count also materially tainted the remaining counts because impeachable testimony as to the drug conspiracy counts affected the jury's ability to assess the character and credibility of the defendant's testimony about the other counts. Dismissal with prejudice of remaining counts in the indictment was appropriate where the defendant was prejudiced by the government's numerous and flagrant *Brady* and *Giglio* violations, and its later denials and delay.

United States v. Hernandez,
347 F.Supp.2d 375 (S.D. Tex. 2004)

Defendant's motion to dismiss an indictment charging him with assaulting, interfering with, and resisting a border control agent was granted where the government acted in bad faith by allowing the defendant's niece to plead to a superseding indictment without notice to the defendant and then deporting her while knowing that she was the only witness who would support the defendant's claim of self defense. The Government's action violated due process and compulsory process by impeding the defense's access to exculpatory and material evidence.

United States v. Koubriti,
336 F.Supp.2d 676 (E.D.Mich. 2004)

Court grants government's motion to dismiss terrorism-related charges and grants defendants' motion for a new trial on document fraud charges where the government post-trial confessed that *Brady* violations had occurred and an independent review of the suppressed documents by the court confirmed that defendants' constitutional rights were violated.

Conley v. United States,
332 F.Supp.2d 302 (D.Mass. 2004), aff'd, 415 F.3d 183 (1st Cir. 2005)

Petitioner was entitled to habeas relief based on the prosecution's failure to disclose an FBI memorandum which contained significant data bearing on a key prosecution witness's inability to recall crucial events. The court rejects the government's argument that the memorandum wasn't material because defense counsel at trial embraced aspects of the witness's testimony.

Turner v. Schriver,
327 F.Supp.2d 174 (E.D.N.Y. 2004)

In robbery case where the alleged victim was the sole witness, the prosecutor's representation that the victim had no criminal record, both to defense counsel and to the jury, when in fact he did, violated petitioner's due process rights under *Brady v. Maryland*. In addition, there was also a violation of due process based upon the admission of perjured testimony which the prosecutor should have known was false.

United States v. Park,

319 F.Supp.2d 1177 (D. Guam 2004)

In case where the government conceded that information obtained from an interview was material to guilt, the prosecutor could not satisfy its *Brady* obligation by providing a summary of the interview. "[W]here a prosecutor obtains exculpatory information from an interview with a government witness and where the prosecutor takes notes during the interview, the government is obligated under *Brady* to produce such notes."

Government of Virgin Islands v. Fahie,
304 F.Supp.2d 669 (D.V.I. 2004)

In case involving a charge of possession of an unlicensed firearm, the prosecution violated *Brady* by failing to reveal prior to trial a gun trace report that showed the weapon belonged to someone else. The prosecution's case was one of constructive possession in that the gun was found in a car that defendant had been driving. The gun trace report was consistent with defendant's claim that the gun was not his. Had the prosecution timely revealed the report, defense counsel may have been able to link the true owner of the gun to one of the passengers that had been in the vehicle before the gun was found by police. Because information about the report only came out during cross-examination of a witness, defendant "had no meaningful opportunity to utilize the evidence that someone else owned the weapon to his advantage." The trial court abused its discretion, however, in dismissing the case with prejudice as a sanction for the constitutional violation.

***Willis v. Cockrell,**
2004 WL 1812698 (W.D.Tex. Aug. 2004)

Brady violation found in Texas capital case where prosecution failed to disclose that its mental health expert had evaluated petitioner regarding future dangerousness and had written a report with two hypothetical scenarios, one of which was favorable, one of which was not, and the favorable scenario fit with petitioner's absence of a history of violence. State appellate court's finding that no *Brady* error occurred by the prosecution's failure to disclose the report was contrary to and involved an unreasonable application of clearly established federal law because the state court applied a sufficiency of the evidence test for materiality, erroneously stated that the brief nature of the evidence presented at the penalty phase undermined, rather than supported, a finding of materiality, and failed to consider that disclosure of the report would have led to the favorable testimony of the expert.

St. Germain v. United States,
2004 WL 1171403 (S.D.N.Y. 2004)

Defendant was entitled to a new trial where the government failed, whether deliberately or inadvertently, to disclose material exculpatory evidence in sufficient time for the defense to make use of it. In finding that the evidence was "suppressed," the court notes, among other things, that the evidence was not disclosed until the eve of trial and it was in the misleading guise of Jencks

Act material. The court rejects the government's argument that the suppressed evidence was not material because defendant could be found guilty under an alternative theory that was consistent with the new evidence. Materiality is evaluated based on the prosecution theory that was actually presented at trial.

United States v. Rodriguez,
2003 WL 22290957 (E.D.Pa. 2003)

In federal drug case, the prosecution violated *Brady* by failing to disclose numerous statements made by the co-defendant at two proffer sessions that were favorable to the defense. First, while the government's theory was that the defendant, who was the co-defendant's uncle, was involved in a conspiracy with the co-defendant in which the defendant was the source of the heroin and brought the co-defendant and the drugs to some of the transactions, the information from the proffer sessions called that theory into question. Notably, the co-defendant had provided detailed information about a drug distribution network that did not involve the defendant. Second, contrary to the prosecution's representation at trial, the co-defendant had implicated other family members while denying that defendant was involved in drug dealing. Because the prosecution had falsely claimed that the co-defendant protected all family members in his statements, the defense had declined to admit into evidence the co-defendant's statement that defendant was not involved. (This statement from the proffer session had been disclosed to defendant.) Finally, had defense counsel been given the complete information from the proffer sessions, he would have been able to conduct a further investigation about the sources of the co-defendant's drugs that may have resulted in additional exculpatory evidence.

United States v. Washington,
263 F.Supp.2d 413 (D. Conn. 2003), on reconsideration, new trial again granted based on
***Brady* violation, 294 F.Supp.2d 246 (D. Conn. 2003)**

In case involving a charge that defendant was a felon in possession of a gun where the key evidence was a taped 911 call by a person who was deceased by the time of trial, the prosecution violated *Brady* by its belated disclosure of the caller's prior conviction for falsely reporting a crime to law enforcement. Although the conviction was revealed at the close of evidence on the first day of the short trial, the late disclosure denied the defense the opportunity to weave the conviction into its overall trial strategy.

Norton v. Spencer,
253 F.Supp.2d 65 (D. Mass. 2003), aff'd, 351 F.3d 1 (1st Cir. 2003)

In sexual assault and battery case, petitioner is to be granted habeas relief on his allegations of *Brady* error unless respondent requests an evidentiary hearing. (Relief is ultimately ordered in 256 F.Supp.2d 120 (D. Mass. 2003), after respondent failed to request an evidentiary hearing.) Because the state court failed to address the federal claim, de novo review is applied irrespective of *Early v. Packer*, 123 S.Ct. 362 (2002). The court also finds that petitioner is entitled to relief

even if AEDPA is applied. Assuming the truth of petitioner's affidavits, the prosecutor violated *Brady* by failing to reveal that the alleged victim's cousin informed the prosecutor that he made up allegations against petitioner at the insistence of the alleged victim, and that the alleged victim had admitted to his cousin that his accusations against petitioner were fabricated. (The cousin had refused to answer some questions at a pretrial hearing, resulting in the dismissal of charges against petitioner related to the alleged sexual assault on the cousin.)

United States v. Gurrola,
2002 WL 31941469 (D. Kansas Dec. 16, 2002)

New trial granted based on *Brady* violation where FBI agent testified that the defendant's daughter had informed him that defendant was distributing methamphetamine, which defendant's daughter denied, and the prosecution failed to disclose the agent's reports of his interviews with the defendant's daughter which contained no mention of defendant. Fact that prosecution had revealed to defense counsel prior to trial that it was not producing unrelated reports that pertained to persons other than defendant did not "adequately put defense counsel on notice that the government possessed reports favorable to the defendant." The suppressed evidence was material given that a key issue at trial was whether the defendant "knowingly" possessed the methamphetamine found in her home.

Mathis v. Berghuis,
202 F.Supp.2d 715 (E.D. Mich. 2002), aff'd, 90 Fed.Appx. 101, 2004 WL 187552 (6th Cir. 2004) (unpublished)

State's failure to disclose prior police reports suggesting rape complainant had made false accusations of rape and armed robbery in the past mandated habeas relief. In denying relief, state court unreasonably applied clearly established federal law.

Beintema v. Everett,
2001 WL 630512 (D.Wyo. April 23, 2001)

The district court granted habeas corpus relief in this "delivering marijuana" case on the ground that the prosecution's failure to disclose that a police officer had threatened the state's primary witness that his family would be prosecuted if he refused to cooperate violated *Brady*. Disagreeing with the Wyoming Supreme Court's conclusion that the evidence was not "material," the district court observed that petitioner's "trial was dependent almost entirely upon the testimony of a single witness, . . . and as such, impeachment evidence [petitioner's] counsel could have used to attempt to discredit that witness or question the veracity of that witness would be material." In concluding that 28 U.S.C. §2254(d)(1) did not bar relief on petitioner's claim, the district court explained that "[t]he Wyoming Supreme Court's opinion includes repeated references stating that certain evidence was not material. This suggests that 'cumulative materiality' was not the touchstone of the [state] court's opinion and that it was rather a series of independent materiality evaluations, contrary to the requirements of *Bagley*. This is . . . and

unreasonable application of clearly established law . . ."

Faulkner v. Cain,
133 F.Supp.2d 449 (E.D.La. 2001)

The district court granted habeas corpus relief in this murder case on the ground that the prosecution violated *Brady* by suppressing the names of police officers who were first on the murder scene, and evidence that homosexual pornography and rubber gloves were found at the scene. This information was favorable and material because petitioner's defense was that his codefendant became belligerent and struck the victim in response to an unwanted homosexual sexual advance, not pursuant to a plan with which petitioner had been involved. The victim's sexual orientation and the codefendant's claim of self defense were key issues at trial with regard to, inter alia, petitioner's mens rea with respect to first degree murder as a principal. The state court's finding that the suppressed evidence was not material because petitioner and the codefendant could have fled after the alleged unwarranted sexual advance was unreasonable in that petitioner's failure to run for assistance did not negate the defense that he did not harbor the requisite intent to commit murder. (The habeas petition in this case was a successor petition that had been authorized by the Fifth Circuit.)

Bragg v. Norris,
128 F.Supp.2d 587 (E.D.Ark. 2000)

The district court granted relief and ordered petitioner's immediate release in this "delivery of a controlled substance" case, in which petitioner established "actual innocence" to permit merits review of his *Napue* and *Brady* claims, and further established his entitlement to relief on the merits of those claims. Both claims arose out of "highly reliable" evidence that a police drug agent falsified notes and back-dated reports in order to build an otherwise nonexistent case against petitioner for selling crack. The officer's identification of petitioner as the person who sold him crack was the only evidence supporting the conviction. Petitioner proved, however, that: the officer's claim that he identified petitioner by running his license plate through a state records check could not be true, because the plate number in question was not issued to petitioner by the state until several weeks after the officer claimed to have run his check; the officer's claim that he confirmed his identification by viewing a police photograph of petitioner could not have been true because the police had no photographs of him until months after the identification allegedly occurred; and, although the officer testified at petitioner's trial that he had excluded another suspect who shared a first name with petitioner by looking at photographs of that suspect, an undisclosed set of notes written by the officer indicate the officer's belief that the other suspect and petitioner were, in fact, the same person.

In granting relief on petitioner's *Napue* claim, the court acknowledged that the prosecuting attorneys may not have intentionally elicited false testimony from the officer, but found that knowledge of the contents of the officer's notes should be imputed to the prosecutor, thereby establishing a violation of *Napue*. Additionally, citing the testimony of two other prosecutors that

"the case would have been over" if the defense had been given access to the information about the officer's activities, the court concluded that this evidence was "material" for purposes of petitioner's *Brady* claim, such that relief was required. Finally, the court ordered petitioner's immediate release, and allowed petitioner to be accompanied back to the jail by his counsel "to ensure he is out-processed as rapidly as possible" in order to satisfy the court's desire that he "be released from custody . . . this day."

United States v. Peterson,
116 F.Supp.2d 366 (N.D.N.Y. 2000)

The district court granted a new trial in this federal prosecution, finding that the prosecution violated the Jencks Act by inadvertently suppressing investigators' notes which, if disclosed, would have revealed discrepancies with the government's trial testimony relating to petitioner's statement. These discrepancies created a significant possibility that the jury would have had a reasonable doubt as to defendant's guilt.

***Benn v. Wood,**
2000 WL 1031361 (W.D. Wash. 2000), aff'd 283 F.3d 1040 (9th Cir.), cert. denied 123 S.Ct. 341 (2002)

The district court granted relief from petitioner's conviction and death sentence, finding that although the state had been ordered to search for and disclose evidence of its confidential informant's prior dealings with law enforcement, it failed to conduct the search, and therefore failed to locate and disclose a wealth of impeaching material. The undisclosed information included: evidence that the informant had been a police snitch for fifteen years; "significant evidence of unreliability and dishonesty in [the snitch's] dealings with police; perjury by the snitch in another case; protection by the prosecution from charges for other crimes; use and sale of drugs by the snitch while staying in a hotel at government expense during petitioner's trial. The undisclosed information was material because the snitch, who claimed petitioner had confided in him in jail, provided the only evidence to support the prosecution's theory that petitioner's killing of the victims was premeditated, and was the result of an insurance fraud scheme gone bad. With regard to the insurance fraud scheme, the prosecution also withheld evidence of an official determination that a fire in petitioner's trailer, which the prosecution alleged to be a component of the insurance scheme, had actually started accidentally.

***Jamison v. Collins,**
100 F.Supp.2d 647 (S.D.Ohio 2000), aff'd 291 F.3d 380 (6th Cir. 2002)

In pre-AEDPA case, The court held that the cumulative effect of undisclosed exculpatory evidence in this Ohio capital case raised a reasonable probability that, had it been revealed, petitioner would not have been convicted of capital murder or sentenced to death. The evidence included: statements by a cooperating codefendant that were significantly inconsistent with his testimony at petitioner's trial; statements of eyewitnesses suggesting the perpetrator did not match

petitioner's description; and statements of eyewitnesses to robberies admitted as other acts evidence against petitioner. This evidence was material in that it could have been used to direct suspicion to others, including the codefendant, to impeach the codefendant's testimony, and to discredit eyewitness identifications of petitioner in connection with robberies admitted as other bad acts. Although petitioner's *Brady* claims were procedurally defaulted, the court found the fact that the state continued to withhold the evidence during petitioner's state court proceedings constituted "cause," and concluded further that the materiality of the undisclosed evidence under *Brady* and its progeny constituted "prejudice" sufficient to overcome the default.

Watkins v. Miller,
92 F.Supp.2d 824 (S.D.Ind. 2000)

After finding that petitioner's DNA evidence conclusively refuting the prosecution's theory that he alone raped and murdered the victim established a miscarriage of justice sufficient to entitle him to merits review of his procedurally barred *Brady* claims, the court granted relief on those claims. The court found that the state failed to disclose exculpatory evidence indicating that a witness saw the victim being abducted at a time for which petitioner had a firm alibi, and that another potential suspect had taken and failed a polygraph examination about the victim's murder.

United States v. McLaughlin,
89 F.Supp.2d 617 (E.D.Pa. 2000)

The court granted defendant's motion for a new trial in this federal tax evasion case, finding that the government's nondisclosure of a witness' grand jury testimony contradicting the trial testimony of defendant's accountant on the critical point of whether the accountant had knowledge of defendant's bank account, and nondisclosure of documents supporting defendant's claim that certain income was legitimately entitled to tax deferred status, violated *Brady*.

Reasonover v. Washington,
60 F.Supp.2d 937 (E.D.Mo. 1999)

After finding that petitioner had satisfied the "miscarriage of justice" standard and permitting her to pass through the *Schlup* actual-innocence gateway in order to obtain merits review of her procedurally defaulted claims, the court granted relief in this Missouri murder case in which the state sought, but did not obtain, the death penalty, on the ground that the prosecution committed numerous *Brady* violations, including: failure to disclose two audiotapes, one containing petitioner's conversation with an ex-boyfriend in which she credibly asserted her innocence, and another containing petitioner's conversation with a snitch which is consistent with petitioner's claims of innocence and inconsistent with the snitch's subsequent trial testimony; failure to disclose the existence of an extremely favorable deal between the prosecution and its main snitch, whose testimony was the "linchpin" of the state's case; and failure to disclose a prior deal between

the state and its secondary snitch, who testified falsely that she had never before made a deal with the state.

United States v. Locke,
1999 WL 558130 (N.D.Ill. July 27, 1999)

The government violated *Brady* in connection with defendant's federal trial for conspiracy to import heroin by suppressing a statement made by a co-defendant at his change-of-plea hearing, in which the co-defendant indicated that neither he nor defendant had knowledge that their travel abroad with another co-defendant was for the purpose of importing heroin. Noting the weakness of the government's case against defendant at trial, the court found this statement material and granted defendant's motion for new trial. In reaching this conclusion, the court rejected the government's contention that it did not "suppress" the statement since defendant's attorney was free to have attended the co-defendant's change-of-plea hearing, at which he would have heard the statement first hand. The court reasoned that a defendant's counsel had not failed to act with reasonable diligence in not attending the hearing, since such hearings do not ordinarily produce exculpatory evidence for co-defendants.

Cheung v. Maddock,
32 F.Supp.2d 1150, 1159 (N.D.Cal. 1998)

The state violated *Brady* in this attempted manslaughter case by failing to disclose medical records indicating that the victim of the shooting of which petitioner was convicted had a blood alcohol content substantially higher than the victim's testimony acknowledged. This blood alcohol evidence was favorable to petitioner in several ways: it drew into question the victim's identification of petitioner, rather than one of petitioner's two companions, as the shooter; it undermined the victim's credibility, since his claim that he only consumed one drink on the night of the shooting could not possibly have been true in light of his blood alcohol content; and it undermined the credibility of the victim's companions, who testified in corroboration of his claim that he only consumed one drink on the night of the shooting.

Spicer v. Warden, Roxbury Correctional Institute,
31 F.Supp.2d 509, 522 (D.Md. 1998), rev'd in part on other grounds, 194 F.3d 547 (4th Cir. 1999)

The prosecution violated *Brady* by failing to reveal that counsel for one of three eyewitnesses upon whom its case rested had told the prosecutor that the witness would say he had seen petitioner in the days before and after the crime, but not on the actual day of the crime. At trial, however, this witness testified that he had actually seen petitioner running from the scene of the crime. The district court concluded that this development in the incriminating quality of the witness' testimony was sufficiently inconsistent with how his counsel had previously described what he knew as to render nondisclosure of counsel's description to the prosecutor a violation of *Brady*.

United States v. Dollar,
25 F.Supp.2d 1320, 1332 (N.D.Ala. 1998)

The district court dismissed charges of conspiracy and concealing the identity of firearms purchasers as a result of the government's repeated, egregious violations of its disclosure obligations under *Brady*. These violations centered on nondisclosure of materially inconsistent pre-trial statements of several of the government's key witnesses. The court explained that, "[f]rom the outset of this case, defense counsel have been unrelenting in their effort to obtain *Brady* materials. The United States' general response has been to disclose as little as possible, and as late as possible--even to the point of a post-trial *Brady* disclosure. * * * [A]fter having assured the court that it had produced all *Brady* materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses."

United States v. Colima-Monge,
978 F.Supp. 941 (1997)

Defendant's due process rights would be violated if the INS withheld information concerning the co-defendant which may be relevant to defendant's motion to dismiss. Motion for protective order denied.

United States v. Patrick,
985 F.Supp. 543 (E.D.Pa. 1997), aff'd 156 F.3d 1226 (3rd Cir. 1998)

Motion for a new trial granted when government failed to disclose evidence which would have impeached one of its main witnesses. This evidence could not have been obtained by the defendant through the exercise of due diligence as the government never identified the information that was contained in the withheld documents. Thus, the defendant could not have known of the essential facts that would have permitted him to make use of the evidence.

Ely v. Matesanz,
983 F.Supp. 21 (1997)

After an evidentiary hearing, the district court found that a plea agreement between the state and its witness had not been disclosed to the defense. Additionally, the state failed to correct false testimony presented by the witness that no deal existed. Writ of habeas corpus conditionally granted.

Chamberlain v. Mantello,
954 F. Supp. 499 (N.D.N.Y. 1997)

Relief granted where police officers gave perjured testimony, even though the prosecuter was unaware of the misconduct.

United States v. Fenech,
943 F.Supp. 480 (E.D.Pa. 1996)

New trial ordered where government's undisclosed file on informant indicated that his motivation for cooperating was monetary, yet prosecution elicited testimony from him at trial that he did not cooperate for the money, but rather because he felt that he was "doing something real good for the world."

Banks v. United States,
920 F.Supp. 688 (E.D.Va. 1996)

Guilty plea successfully challenged where government failed to disclose information regarding conjugal visits government allowed informant to receive; information was useful to attack credibility of informant and government agents and would probably have convinced defendant to proceed to trial since defendant's actions were only criminal when viewed in context supplied by the agents and the informant.

United States v. Ramming,
915 F.Supp. 854 (S.D.Tex. 1996)

Motion to Dismiss for, *inter alia*, prosecutorial misconduct granted where, in multi-count bank fraud indictment, government failed to disclose, despite court order to the contrary, numerous items of evidence tending to support defendants' claims of innocence and refute government's theory of the case.

***Williamson v. Reynolds,**
904 F.Supp. 1529 (E.D. Okla. 1995), aff'd on other grounds, 110 F.3d 1508 (10th Cir. 1997),
and abrogated on other grounds, Nguyen v. Reynolds, 131 F.3d 1340 (10th Cir. 1997)

The prosecution's withholding of a videotaped interview of petitioner following a polygraph examination, in which petitioner denied involvement in the murder, tainted his conviction and death sentence. The crux of the prosecution case was alleged admissions by petitioner. "If the 1983 videotape had been accessible during trial, defense counsel could have countered the prosecution's testimony regarding alleged oral admissions with the powerful tool of visual evidence of Petitioner's denials." Further, the videotape would have allowed defense counsel to conduct a more thorough cross-examination of a police witness who failed to tape some of the alleged admissions. Statements on the tape, which were consistent with petitioner's trial testimony, also would have assisted the case in mitigation, including by allowing defense counsel to suggest that the codefendant played the primary role in the capital murder.

***Rickman v. Dutton,**
864 F.Supp. 686 (M.D.Tenn. 1994), aff'd on other grounds, 131 F.3d 1150 (6th Cir. 1997),
cert. denied, 523 U.S. 1133 (1998)

Habeas granted where prosecution permitted witness to falsely testify that he had not been promised favorable treatment including immunity for incriminating statements and preferential treatment during his incarceration.

Xiao v. Reno,
837 F.Supp. 1506 (N.D.Cal. 1993), aff'd 81 F.3d 808 (9th Cir. 1996)

Due process was denied to alien when United States official had alien paroled into United States to be used as witness in heroin conspiracy trial, even though official was aware that prosecutors in Hong Kong declined to prosecute him because he may have been mistreated during interrogations; failure to produce memorandum concerning Hong Kong officials' concerns was flagrant *Brady* violation. District court permanently enjoined government from returning him to foreign country.

United States v. Burnside,
824 F.Supp. 1215 (N.D. Ill. 1993)

Brady requires disclosure of impeachment information of which government personnel, but not prosecutors personally, are aware. Knowledge of warden and others at facility housing witnesses could be imputed to prosecution.

Bragan v. Morgan,
791 F.Supp. 704 (M.D.Tenn. 1992)

Nondisclosure of plea agreement between prosecution and witness, whether or not it was quid pro quo, required new trial for defendant where witness's testimony that he faced life in prison, and prosecutor's claim in closing argument that witness faced habitual criminal count were false, regardless of a quid pro quo arrangement and the witness was the key prosecution witness.

Ouimette v. Moran,
762 F.Supp. 468 (D.R.I. 1991), aff'd, 942 F.2d 1 (1st Cir. 1991)

Habeas relief granted where failure of prosecutor to disclose to defendant that state's chief witness had 24 more criminal convictions than the four disclosed by the state, or to disclose the inducements, promises, and rewards offered to the witness for his testimony, violated defendant's due process rights.

Hughes v. Bowers,
711 F.Supp. 1574 (N.D.Ga. 1989), aff'd, 896 F.2d 558 (11th Cir. 1990)

Habeas granted where evidence was suppressed that the state's sole eyewitness to the murder stood to benefit from the life insurance policy of the victim if the defendant were shown to be the aggressor. Court evaluated this under the standard for knowing use of perjured testimony, i.e.

whether there is any reasonable likelihood that the false testimony could have affected the jury's verdict.

Orndorff v. Lockhart,

707 F.Supp. 1062 (E.D.Ark. 1988), aff'd in part, vacated in part, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 499 U.S. 931 (1991).

Due process and right to confrontation violated where prosecution failed to disclose that witness's memory was hypnotically refreshed during pretrial investigation. Violation was compounded by prosecutor's statement during opening that the jury would be "amazed at the recollections" of the witness.

Silk-Nauni v. Fields,

676 F.Supp. 1076 (W.D.Okla. 1987)

Exculpatory evidence was unconstitutionally withheld when state failed to disclose a statement which would have revealed inconsistencies as to sequence of events leading up to shootings, and directly related to insanity defense by showing that defendant held and acted upon certain beliefs which lacked a foundation in reality.

Troedel v. Wainwright,

667 F.Supp. 1456 (S.D.Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987).

Bagley and *Napue* violated when prosecution pushed expert to say that, in his expert opinion, Troedel fired the gun, despite the fact that his reports and his habeas testimony indicated that he could not tell who really fired it. Prosecutor was found to have misled the jury in his questioning of the expert, and the evidence was material because it was the only thing linking Troedel to the crime.

Carter v. Rafferty,

621 F.Supp. 533 (D.N.J. 1985), aff'd, 826 F.2d 1299 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988)

Habeas relief granted where prosecution failed to comply with a specific request for a polygraph report which substantially undermined witness's testimony which was the "cracked and shaky pillar" supporting the state's case.

Scott v. Foltz,

612 F.Supp. 50 (E.D.Mich. 1985)

Habeas granted where a witness testified falsely that she had not entered into a plea bargain with the prosecution before testifying, and that witness' credibility was a key issue in the case.

United States v. Stifel,
594 F.Supp. 1525 (N.D.Ohio 1984)

Conviction for willfully and knowingly mailing infernal machine with intent to kill another vacated where prosecution failed to disclose evidence implicating another suspect, statement by defendant's girlfriend attesting to his innocence in contradiction to her trial testimony, and results of investigation tending to show that defendant did not buy the switch used in the bomb.

***Kennedy v. Thigpen,**
NO CITE AVAILABLE (N.D.Ala. 1994)

Conviction and death sentence reversed where prosecution withheld statement of a co-defendant which could have been useful to negate defendant's intent to kill and suggest that co-defendant was really the killer.

Jackson v. Calderon,
1994 WL 661061 (N.D.Cal. 1994)

Habeas granted where defendant was denied the opportunity to elicit exculpatory testimony from an anonymous informant whose identity the government failed, in violation of *Brady*, to disclose. Defendant demonstrated a "reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in [his] exoneration."

Raines v. Smith,
1983 WL 3310 (N.D.Ala. 1983)

Habeas granted where the police failed to tell prosecution that, while three witnesses identified one suspect, only one---an elderly man whose ability to accurately identify was highly suspect---identified defendant. There was no other evidence linking defendant to the crime.

Sims v. Wyrick,
552 F.Supp. 748 (W.D.Miss. 1982)

Where promises were made to key prosecution witnesses in habeas petitioner's firebombing case, and those promises were unlawfully concealed from petitioner and his counsel, so that petitioner suffered obvious prejudice of being deprived of his right to cross-examine those witnesses, petitioner was deprived of due process and fair trial.

Anderson v. State of South Carolina,
542 F.Supp. 725 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983)

Habeas granted where right to fair trial was denied by prosecution's failure to make autopsy report and investigative notes available to trial counsel, because the withheld materials might well

have created reasonable doubt in minds of jurors, who deliberated 32 hours before returning a guilty verdict.

United States v. Tariq,
521 F.Supp. 773 (D.Md. 1981)

Government violates defendant's Fifth Amendment right to due process and Sixth Amendment right to compulsory process when it acts unilaterally in a manner which interferes with defendant's ability to discover, to prepare, or to offer exculpatory or relevant evidence, by deporting a witness who is an illegal alien, if the Government knows or has reason to know that the witness' testimony could conceivably benefit defendant and if deportation occurs before defense counsel has had notice and a reasonable opportunity to interview and/or depose the illegal alien.

Blanton v. Blackburn,
494 F.Supp. 895 (M.D.La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981)

New trial ordered where state failed to fully disclose all of agreements and understandings it had with key government witnesses and failed to correct testimony which it knew or should have known was false, even though witnesses' answers to questions concerning agreements were technically direct, and even though no formal plea agreements had been entered into.

Cagle v. Davis,
520 F.Supp. 297 (E.D.Tenn. 1980), aff'd, 663 F.2d 1070 (6th Cir. 1981)

Habeas granted where, despite lack of request by petitioner for exculpatory material, fundamental fairness required prosecutor to disclose the availability of a witness, who was "planted" in petitioner's jail cell soon after his arrest to interview him in violation of his constitutional rights and who could have testified that, prior to petitioner's alleged confession to witness, petitioner had continually denied his involvement in victim's murder.

United States ex rel. Merritt v. Hicks,
492 F.Supp. 99 (D.N.J. 1980)

Habeas granted where failure, despite specific request, to disclose police report which cast substantial doubt on credibility of witness whom New York state court twice characterized as being "in many respects unreliable," and upon whom the state's entire case rested, deprived defendant of due process and fair trial.

United States v. Turner,
490 F.Supp. 583 (E.D.Mich. 1979), aff'd, 633 F.2d 219 (6th Cir. 1980), cert. denied, 450 U.S. 912 (1981)

New trial granted where DEA agent, who had entered into a leniency agreement with the defense

counsel for a prosecution witness, not only failed to correct the witness' testimony disclaiming any such arrangement but took the stand and buttressed the witness' false testimony through an affirmative material misrepresentation that no agreement existed, and such conduct was an affront to the court's dignity and honor and to the nation.

Jones v. Jago,
428 F.Supp. 405 (N.D.Ohio 1977), aff'd, 575 F.2d 1164 (6th Cir. 1978), cert. denied, 493 U.S. 883 (1978)

Habeas granted where state, despite a specific request from defense counsel, suppressed statement of co-indictee which, though somewhat ambiguous, appeared on its face to be favorable to the defense and was sufficiently material to compel disclosure.

United States ex rel. Annunziato v. Manson,
425 F.Supp. 1272 (D.Conn. 1977)

Habeas granted where trial court's refusal to permit cross-examination of key prosecution witness as to pending criminal charges to show bias and motive violated right of confrontation, particularly in light of prosecution's nondisclosure of impeachment information concerning extensive immunity and aid offers to the witness.

Kircheis v. Williams,
425 F.Supp. 505 (S.D.Ala. 1976), aff'd, 564 F.2d 414 (5th Cir. 1977)

Habeas granted where state, despite a court order, failed to produce motel records tending to exonerate defendant, and failed to inform the defense of an oral agreement with a key prosecution witness which could have affected the witness' credibility.

Moynahan v. Manson,
419 F.Supp. 1139 (D.Conn. 1976), aff'd, 559 F.2d 1204 (2nd Cir. 1977), cert. denied, 434 U.S. 939 (1977)

Habeas granted where prosecution's failure to disclose that its key witness was a target of police investigation for the same criminal scheme for which defendant stood accused, was threatened with prosecution, but was never charged, deprived defendant of due process because it raised reasonable doubt as to guilt.

Emmett v. Ricketts,
397 F.Supp. 1025 (N.D.Ga. 1975)

No privilege existed between chief prosecution witness and psychologist in connection with "age regression" sessions, and since psychologist was an investigative arm of the prosecution, both he and the DA were required to produce files for in camera inspection. Habeas granted for failure to

disclose.

Ray v. Rose,
371 F.Supp. 277 (E.D.Tenn. 1974)

Conviction set aside due to failure of prosecution to reveal that it had made a standing plea bargain with codefendant, who pleaded guilty only after he gave testimony during trial which implicated defendant, which resulted in defendant's being deprived of due process of law.

Hawkins v. Robinson,
367 F.Supp. 1025 (D.Conn. 1973)

Where government informant was the only witness who was not a law enforcement officer, and his testimony would have been highly relevant to identification and alibi defense, defendant was deprived of a fair trial when the trial court refused at his request to require the government to identify informant and furnish information as to his location.

Simos v. Gray,
356 F.Supp. 265 (E.D.Wisc. 1973)

Where witnesses identified defendant from police photos six weeks after offense and never wavered from their identifications, the state had a duty to disclose police reports which indicated that, of the night of the offense, witnesses declined to view photos because they were sure they could not identify the couple they saw, that five days later a witness made a mistaken identification, and the witnesses gave inaccurate physical descriptions.

Simms v. Cupp,
354 F.Supp. 698 (D.Ore. 1972)

Conviction vacated where state suppressed original description of witness' assailant, which differed substantially with her trial testimony, in order to corroborate inculpatory story of children who had been riding with defendant.

Bowen v. Eyman,
324 F.Supp. 339 (D.Ariz. 1970)

Habeas granted where trial court's refusal to appoint expert to test seminal fluid removed from vaginal tract of rape victim and to test petitioner's blood type, which could have negated guilt, denied petitioner fundamental fairness and was tantamount to a suppression of evidence in violation of *Brady*.

Clements v. Coiner,
299 F.Supp. 752 (S.D.W.Va. 1969)

Police polygraph report and psychiatrist's letter to prosecutor raising possibility of petitioner's defective mental condition were material to issue of limitation of criminal responsibility and failure of prosecutor to produce documents, even though not requested, rendered conviction on guilty plea violative of constitutional due process.

Imbler v. Craven,

298 F.Supp. 795 (C.D.Cal. 1969), aff'd, 424 F.2d 631 (9th Cir. 1970), cert. denied, 400 U.S. 865 (1970)

Petitioner was denied due process where prosecution permitted witness to give material testimony which prosecution knew or should have known was false, suppressed an exculpatory fingerprint, and failed to disclose negative evidence indicating that coat, which prosecution claimed was worn by petitioner, was not petitioner's.

Hernandez v. Nelson,

298 F.Supp. 682 (N.D.Cal. 1968), aff'd, 411 F.2d 619 (9th Cir. 1969)

Habeas granted where petitioner denied culpability in illegal sale of heroin, informer was material witness on issue of petitioner's guilt, and prosecution knowingly engaged in conduct which permitted informer to be unavailable at time of trial.

IV. STATE COURTS

State v. Piety,

2009 WL 3011107 (Tenn. Crim. App. 2009) (unpublished)

Aggravated rape conviction vacated due to state's failure to disclose photographs taken of the alleged victim's "private parts" during her physical examination. The alleged victim was engaged to the defendant and lived with him. During a fight, the defendant conceded that he beat her and choked her. That night and the next morning, the defendant testified they had consensual vaginal and anal sex. The alleged victim, however, testified that she was raped. Police were called after her mother and sister arrived and saw the victim's injuries. While there was plenty of evidence and the aggravated assault conviction was affirmed, the rape conviction was supported only by the alleged victim and a nurse, who testified that she had injuries to her buttocks and vaginal area. The state failed to disclose the pictures of the alleged victim's buttocks and vaginal area, however, because they did not reflect the injuries described by the nurse in her testimony.

Deren v. State,

15 So. 3d 723 (Fla. App. 2009)

Battery and disorderly conduct charges vacated due to the State's failure to disclose workers' compensation records detailing payments of \$24,000 to the alleged victim. The charges arose out of a disturbance between the defendant and his friend and the victim, a bar bouncer. The evidence was material to show the victim's financial motive to paint the defendant and his friend as the

aggressors in the initial fight.

Harris v. State,
966 A.2d 925 (Md. 2009)

Murder, conspiracy, and solicitation to commit murder convictions vacated in post-conviction proceedings. The state's theory was that the defendant had solicited and conspired with a co-defendant to kill the defendant's fiancée. The co-defendant went along with the plan and made numerous statements to others as events unfolded. Ultimately, the fiancée was killed and the defendant was shot in the leg. The codefendant, who had pled guilty to murder in exchange for a 50-year sentence, testified that while he had pled guilty to the murder that he had changed his mind at the last minute and that the defendant took the gun and killed the victim and then ordered the codefendant to shoot him in the leg. The codefendant also testified that his initial confessions to police and his younger brother were false. The defendant denied guilt. A jailhouse snitch testified that, while in confinement, the codefendant admitted involvement but denied being the shooter to him and that the defendant had twice offered to pay him to testify that the defendant admitted guilt. The jailhouse snitch had also been facing first degree murder charges, but pled guilty prior to the defendant's trial to second degree murder in exchange for a 30-year sentence. Both the codefendant and the snitch acknowledged during testimony that they could seek a sentence reduction but denied any promises from the state in that regard. Reversal was required because the state had, in fact, promised not to oppose their motions for reduction if the state was satisfied with their testimony. The codefendant's sentence was reduced to 30 years and the snitch's sentence was reduced to 25 years. This evidence was material as both of these witnesses had prior criminal records and credibility issues while the defendant had no prior record and no apparent motive to have his fiancée killed since he was not even the beneficiary on her life insurance policy.

State v. Soriano-Clemente,
2009 WL 2432052 (Minn. App. 2009) (unpublished).

Aggravated robbery case vacated due to state's failure to disclose the victim's prior convictions. The victim testified that she and her mother were robbed at gunpoint by two men in her sister's store. When the robbers left, the victim ran out and saw a Jeep drive away. Sometime later, the Jeep with the license plate number provided by the victim was stopped and defendant, who had been a passenger before running when the vehicle stopped, was arrested. The victim identified the Mexican defendant as an assailant at trial (even though she initially described the assailant as Asian) but her mother could not identify the assailants. The defendant testified that he had been in the Jeep with three other men only for the purpose of buying drugs. He waited in the Jeep while two others went inside the store. Following conviction but prior to sentencing, defense counsel discovered that the victim had a significant conviction history including drug possession, perjury, use of different names and addresses during prior arrests, and multiple crimes of dishonesty, including financial transaction fraud. While there was no evidence the prosecutor on defendant's case knew about this prior record, some of the victim's prior convictions were prosecuted by the

same state office.

Sarber v. State,
2009 WL 2366097 (Minn. App. 2009) (unpublished)

Drug possession conviction vacated in post-conviction. The defendant was a passenger in the car driven by the state's primary witness. When police stopped the car, drugs were found either in the console between the seats or under the driver's seat. The defendant was the only one charged. While the evidence of non-disclosure was not clear, it was clear that the witness had been arrested only weeks before on a drug charge in which he attempted to shift blame to his companion. In addition, the witness had met with a detective on numerous occasions to discuss working as an informant in order to gain assistance with his pending charges. While defense counsel was aware of the prior arrest and incident report, the state did not challenge the findings that the discussions with the detective were never disclosed. Likewise, it was not disclosed that the detective did approach the prosecutor and speak on the witness' behalf. While there was no formal agreement, the witness still had incentive to testify against the defendant. Because the record was unclear, the court found alternatively that if the evidence was disclosed by the state, counsel was ineffective in failing to impeach the witness with this information.

People v. Ball,
2009 WL 1942427 (Cal. App. 2009) (unpublished)

Infliction of corporal injury on a spouse or cohabitant conviction reversed on direct appeal due to state's failure to disclose exculpatory witness. In addition to the charge of which he was convicted, the defendant had also been charged with attempted kidnapping, assault with a deadly weapon, and making a criminal threat arising from the same incident and a separate charge of infliction or corporal injury on a spouse or cohabitant from an earlier incident. The defendant's girlfriend had been at a friend's house, along with two other persons, when someone came to the door asking for her and that person assaulted her. The victim testified it was the defendant. The owner of the home testified it was not the defendant, but was impeached with allegations that she may later have dated the defendant. Another witness present, who had called 911, was never asked whether the defendant was the assailant. The fourth witness, who had been present at the time of the assault, was subpoenaed by the state and informed the prosecutor during the trial that the defendant was not the assailant. The state excused the witness without informing defense counsel but the defense learned of this information after resting and sought, without objection by the state, to reopen its case. The trial court's denial of the motion was error. The undisclosed evidence was material, especially in light of the jury's rejection of the majority of the testimony of the victim.

Ex parte Johnson,
2009 WL 1396807 (Tex. Crim. App. 2009) (unpublished)

Relief granted in post-conviction proceedings due to *Brady* violation in aggravated sexual assault

of a child case. The per curiam opinion does not discuss the facts but the concurrence does. The day before the scheduled trial, the prosecutor interviewed the alleged victim who denied any sexual abuse. Also, shortly before trial, the prosecutor's investigator had been informed by school officials that the alleged victim was a "great liar." On the day of trial, the alleged victim did not appear to testify. None of this was disclosed prior to the defendant entering a guilty plea and later being adjudicated and sentenced to life. The complainant's recantation was directly exculpatory and the non-disclosure required a grant of relief.

State v. Smith,
2008 WL 5272480 (Tenn. Crim. App. 2008) (unpublished)

Rape of child convictions reversed due to state's failure to disclose the alleged victim's juvenile adjudications for car theft and joyriding and her prior allegations of physical abuse by her grandfather that were not substantiated by social service workers.

Ex parte Toney,
2008 WL 5245324 (Tex. Crim. App. 2008) (unpublished)

Relief granted in post-conviction proceeding due to "Agreed Findings of Fact & Conclusions of Law" of *Brady* violation. The per curiam opinion does not discuss the facts.

***Taylor v. State,**
262 S.W.3d 231 (Mo. 2008)

In prison killing case, denial of post-conviction relief as to death sentence reversed in part due to prosecution's failure to disclose: (1) letters sent by the state's jailhouse witness to the lead investigator for the prosecutor that the investigator then destroyed; (2) a memorandum the investigator composed memorializing one of his conversations with the jailhouse witness in which the latter referenced the likelihood of his testimony being needed against petitioner and contained false allegations of corruption on the part of two police officers; and (3) the state's intention to ask prosecutors to extend favorable treatment to the jailhouse witness on his pending charges if he gave helpful testimony against petitioner.

People v. Hunter,
892 N.E.2d 365 (N.Y.App. 2008)

In case where defendant was charged with multiple sexual offenses against the alleged victim and was convicted of sodomy despite his defense that what occurred was consensual, petitioner's due process rights were violated by the suppression of evidence that the complainant had later (but before defendant's trial) accused another of rape under similar circumstances, i.e., in both cases, the alleged assaults took place in the accused man's home. The other alleged assailant also contended that the encounter was consensual but sometime after defendant's trial pleaded guilty to attempted rape. That plea, however, did not cure the due process violation that occurred from

the prosecution's failure to reveal the accusation – "If the information known to the People when this case was tried was 'favorable to [the] accused' and 'material' within the meaning of *Brady*, defendant had a due process right to obtain it, and that right could not be nullified by post-trial events." And although the trial court did have the discretion to preclude the defendant from impeaching the complainant with the second accusation, it also had the discretion to allow the impeachment. In finding that the suppressed information was material, it was noted that the prosecutor at defendant's trial highlighted the implausibility of defendant's account and that evidence of a similar accusation may have left the jury more skeptical of the complainant. Also, that the jury did learn of the complainant's earlier threat to falsely accuse her own father of rape did not render the withheld evidence cumulative.

***In re Miranda,**
182 P.3d 513 (Cal. 2008)

In capital case, habeas relief granted as to death sentence where prosecution suppressed inmate letter tending to rebut its "star penalty phase witness" and contradicting prosecution's suggestion in argument that evidence that another person killed the second victim "didn't exist." State's argument that letter not material under *Brady* because it was inadmissible hearsay was erroneous as inadmissible evidence may be material under *Brady*. The trial judge, not prosecutor, is arbiter of admissibility, and prosecutor's disclosure obligations do not turn on prosecutor's view of whether or how defense might use particular evidentiary items. Prosecutor's disclosure obligation depends on collective effect of all suppressed evidence favorable to defense, not effect of evidence considered item by item.

People v. Beaman,
890 N.E.2d 500 (Ill. 2008)

In first degree murder case where evidence against petitioner was not particularly strong, prosecution violated *Brady* by failing to disclose information about an alternative suspect, "John Doe." Doe was known to defense counsel as having been involved in a relationship with the victim but counsel had no evidence pointing to him as the killer. The undisclosed evidence about Doe consisted of the following: (1) Doe failed to complete a polygraph examination; (2) Doe was charged with domestic battery and possession of marijuana with intent to deliver prior to petitioner's trial; (3) Doe had physically abused his girlfriend on numerous prior occasions; and (4) Doe's use of steroids had caused him to act erratically. That some of the undisclosed evidence may have been inadmissible at trial did not mean it was not "favorable" given that it could have assisted in gaining admission of critical alternative suspect evidence. First, the undisclosed polygraph evidence would have bolstered a claim by petitioner that Doe was a viable suspect because the circumstances of his avoidance of the exam could be viewed as evasive, and also because the polygraph examiner indicated that Doe was specifically identified as a suspect. The evidence that Doe was charged with domestic battery and had physically abused his girlfriend on many prior occasions could also have been used by petitioner at a pretrial hearing to establish Doe as a viable suspect given that Doe was in the process of renewing his romantic relationship with

the victim prior to her death. And the undisclosed evidence of Doe's steroid abuse may have explained his violent outbursts toward his girlfriend and supported an inference of a tendency to act violently toward others. Finally, the undisclosed evidence that Doe had been charged with possession of marijuana with intent to deliver could have been used by petitioner as part of Doe's motive to commit the murder in light of evidence that the victim owed Doe money for drugs.

People v. Williams,
854 N.Y.S.2d 586 (N.Y.A.D. 2008)

In robbery case, defendant “substantially prejudiced” by untimely disclosure of *Brady* materials. Although victim could not identify robber, defendant was convicted based on testimony of possible accomplice and another witness who defendant and accomplice visited later that day. During cross-examination of police officer, defense counsel discovered defendant and accomplice made statements that had not been disclosed, and prosecution file contained other “potentially exculpatory material.” Motion to dismiss charges based on *Brady* violations denied but trial judge instructed jury it could infer that had additional cross-examination been conducted on one witness, witness would have been “further impeached.” This instruction failed to ameliorate prejudice defendant suffered because jury not informed how witness’s testimony would have been impeached or how it was different than before.

State v. Williams,
660 S.E.2d 189 (N.C.App. 2008), aff’d, 669 S.E.2d 628 (N.C. 2008)

Affirming dismissal of charges in assault on government employee case where government officials destroyed booking photographs taken of defendant in different county before and after the alleged assault and also destroyed a poster that had been made by prosecutors using those same photographs. (After defendant was booked in Stanly County on unrelated charges, he filed a lawsuit against a Stanley County Assistant District Attorney, as well as other Stanly County officials. Defendant was then transferred to Union County, where the alleged assault on an officer occurred. Defendant contended that he had in fact been the victim of assault by Union County officers. Defendant was transferred back to Stanly County where a second booking photo was taken. The photos, according to the captions created by the prosecutors for the poster, showed defendant “before and after” defendant filed his Stanly County lawsuit. The “before” picture showed defendant at the initial booking in Stanly County. The “after” photo showed injuries sustained by defendant during the assault incident in Union County. At the time this all occurred, Union and Stanly Counties were in the same prosecutorial district.) The poster was material because it would have been admissible as impeachment evidence. It was also relevant to any defense that could have been offered, including self-defense. Noting that a judge refused to admit testimony about the contents of the destroyed poster in the unrelated Stanly County trial, the court found defendant was irreparably prejudiced by destruction of the poster and photographs as to the Union County charge.

People v. Uribe,

76 Cal.Rptr.3d 829 (Cal.App. 2008)

In case where defendant was charged with various sexual crimes against his granddaughter, the prosecution violated *Brady* by failing to disclose a videotape of a medical examination of the alleged victim. In the motion for new trial, the defense expert explained how the videotape provided further support for his trial testimony that there was no evidence of penetration, and contradicted the opinions offered by the prosecution experts. Knowledge of the videotape, which was taken during an examination at a local medical center, was imputed to the prosecution given that the medical center conducted such examination at the initiation of a police officer who was investigating possible criminal conduct. This meant that the medical center was acting on the government's behalf and was part of the prosecution team for *Brady* purposes. The prosecution also had greater access to records generated from the examination given that the examiner, in accordance with law, forwarded the final report to law enforcement.

***State v. Brown,
873 N.E.2d 858 (Ohio 2007)**

Where evidence established defendant was involved in deaths of two victims and the defense theory was that defendant lacked the level of intent needed to establish "prior calculation and design," the prosecution breached its duty to provide all material evidence when it withheld police reports containing statements implicating other persons in the murders, including statements that someone other than Brown claimed responsibility for the murders. Even though statements were "hearsay and might not be admissible," they were material because they suggested someone other than Brown "pull[]ed the trigger" which could have impacted the sentencing decision. In addition, trial counsel's decision not to contest Brown's involvement in the murders was based upon the evidence that had been disclosed. Had counsel known that someone else had claimed to have fired the gun that killed the two victims, a different defense strategy may have been employed. Undisclosed police reports "put the reliability of the verdict in question," and required new trial.

**State v. Farris,
656 S.E.2d 121 (W.Va. 2007)**

Prosecution's failure to disclose to defendant, who was charged with sexually abusing children in his care, evidence obtained by forensic psychologist during interview with defendant's cousin, that alleged victims' mother had attempted to convince her to falsely accuse defendant of sexual abuse, and that one of the alleged victims had inserted a toothbrush into her own vagina, constituted a *Brady* violation. The undisclosed evidence provided impeachment evidence, supported defendant's claim that alleged victims' mother convinced her children to lie, and provided alternate explanation for physical evidence of vaginal penetration. The knowledge obtained by the psychologist during the forensic examination, conducted at the request of the West Virginia prosecution team investigating sexual abuse allegations against defendant, would be imputed to West Virginia prosecuting authorities.

Ex Parte Elliff,
2007 WL 1346358 (Tex. Crim. App. 2007) (unpublished)

Summarily affirming grant of habeas relief in murder case where prosecution failed to disclose the existence of a witness who possessed information indicating that someone else committed the offense.

State v. Youngblood,
650 S.E.2d 119 (W.Va. 2007)

Following remand from the Supreme Court for full consideration of defendant's *Brady* claim, defendant's convictions for numerous sexual and weapons offenses are reversed and a new trial ordered based on the suppression of a note that corroborated the defendant's claim that the sexual encounters were consensual and might have impeached the testimony of the alleged victim's friends who denied knowing about sexual activity between the defendant and the alleged victim. Suppression is found given testimony that a police officer read the note and then urged the person who discovered it to destroy it. Although the prosecutor was unaware of the note, a police officer's knowledge of it is imputed to the prosecutor.

Walker v. Johnson,
646 S.E.2d 44 (Ga. 2007)

In case involving various charges, including kidnaping and robbery, the prosecution violated *Brady* by suppressing taped statements by a witness who explained in detail why she believed the victim had actually set up the crime to recover insurance monies, by the victim, and by the defendant. Although the State did provide a one paragraph reference to the witness's 48-page statement, this did not comply with *Brady* given that these notes "omitted much of the potentially exculpatory material contained in the complete transcript" and incorrectly reported that the witness had offered no justification for her belief that no crimes occurred. "Rather than informing the defense of the substantive nature of [the witness's] statement, there is a significant likelihood that the State's incomplete and inaccurate response to Johnson's discovery and *Brady* motions induced defense counsel to believe either that the taped statements were not in existence or that they contained no information beneficial to the defense." Inconsistencies in the victim's statement would have assisted the defense during cross-examination. Finally, the defendant's statement would have been useful at trial because in it the defendant clearly told the interrogating officer where he was at the time of the crime and who could corroborate this, which would have contradicted the officer's trial testimony that the defendant never provided him with the names of any alibi witnesses. Suppression of the defendant's statement permitted the prosecutor to argue that the alibi defense was recently fabricated.

Ex Parte Masonheimer,
220 S.W.3d 494 (Tex. Crim. App. 2007)

Double jeopardy under the state and federal constitutions barred a third trial of defendant charged with murder where his prior mistrial motions were necessitated primarily by prosecution's intentional failure to disclose exculpatory *Brady* evidence with the specific intent to avoid the possibility of an acquittal. The defendant contended that he killed the victim, who was his daughter's boyfriend, in self defense. According to the defense, the victim had grown increasingly aggressive toward the daughter due to his use of anabolic steroids. Suppressed by the prosecution, among other things, was evidence that the victim had a hidden supply of steroids.

Stewart v. Commonwealth,
2007 WL 89476 (Va. App. Jan. 16, 2007) (unpublished)

Brady violation found where prosecution belatedly revealed information about a third party who could have been responsible for the check forgery that the defendant was charged with. Although the information came out during the trial, defense counsel had cross-examined several witnesses and the defendant had already testified in his own defense, "thus potentially compromising whatever alternative trial strategy the evidence might have suggested."

In re Sodersten,
53 Cal.Rptr.3d 572 (Cal.App. 2007)

In murder case where no physical evidence directly implicated petitioner, habeas relief was granted based on the prosecution's failure to disclose "tape-recorded statements of the two key trial witnesses that contained inconsistent statements, as well as admissions of lying and coercive interrogation of one of the witnesses." The evidence was material even though other witnesses placed petitioner at or around the victim's residence before and after her body was discovered, contrary to his alibi, given that the key prosecution witnesses were the only ones who identified petitioner as the victim's attacker/killer. And the fact that one of the suppressed tapes, which was made surreptitiously when petitioner and one of the key witnesses were in custody, included statements by petitioner that conflicted with his trial alibi did not defeat materiality because petitioner offered an explanation for the conflict at the habeas hearing and he could have altered his defense at trial had the tape been disclosed. That petitioner passed away before the court of appeal ruled did not render the proceeding moot given that petitioner spent 20 years in prison for a crime he may not have committed, and the integrity of the judicial system was undermined by the prosecution's actions.

Workman v. Commonwealth,
636 S.E.2d 368 (Va. 2006)

In homicide case where defendant's claim that victim was shot in self-defense depended on the jury believing defendant's assertion that victim's friend had a gun, which the friend denied, *Brady* violation occurred where prosecution failed to reveal that a witness in another case had brought up this case during a police interview and reported having been told that the victim's friend had

tried to pass the victim a gun during the altercation and then fled the scene with the weapon. (The police never informed the prosecutor about this statement.) Because the police failed to follow up on this witness's statement, it was material because it would have been a powerful tool to support the defense's contention that the police investigation was inadequate. In addition, once the defense team learned of the statement, the witness was interviewed and he revealed personal knowledge about two recent "shoot outs" involving the victim's friend. The witness also led the defense to someone else who recounted a separate recent shooting by the victim's friend. Thus, even if the first statement was not admissible, it was material because its disclosure would have led to exculpatory admissible evidence. There was no lack of diligence in failing to discover the first statement even though defense counsel happened to interview one of the officers who conducted the witness interview and that officer testified at trial. Under *Strickler*, defendant could not be faulted for relying on the Commonwealth's "open file" response to defendant's discovery motion. Finally, given how recent the new shooting incidents were, the evidence could not be deemed cumulative of evidence at trial about the victim's friend pointing a weapon at a Deputy Sheriff four years earlier.

People v. Harris,
825 N.Y.S.2d 876 (N.Y. A.D. 2006)

Summary reversal of attempted murder and robbery convictions where prosecution failed to disclose exculpatory material obtained by an investigator for the Monroe County District Attorney and the subject material was *Brady* material because it affected the credibility of a key prosecution witness. "Reversal of defendant's judgment of conviction is required, moreover, because defendant made a specific request for such material and 'there is a "reasonable possibility" that, had that material been disclosed, the result would have been different'"

***Riddle v. Ozmint,**
631 S.E.2d 70 (S.C. 2006)

In case where the capital conviction rested almost entirely on the testimony of petitioner's mentally retarded younger brother, the prosecution violated *Brady* by failing to disclose a statement made by the brother close to a year after his original statement which contained major inconsistencies and the fact that three days before trial, the officers took the brother to the scene for a re-enactment. Evidence about the trip would have underscored the defense position that the brother was unreliable and needed to be coached. The lower court's finding that the defense could have found the statement by interviewing the officer who took it is rejected as "unrealistic" and not what *Brady* requires. The lower court also erred in finding that the defense could have discovered the information through the prosecution's "open-file" policy, given that the prosecution routinely removed work product and other information on a "case-by-case" basis. In addition, because the trip occurred only three days before trial, this further hindered any attempt, even if required, to discover it. Finally, the brother testified that he had made no statements or had any contact with officers after his first statement, and the prosecutor let this testimony go uncorrected. The lower court was wrong to accept the State's assertion that the brother simply

must not have understood the question or not recalled the events.

State v. Williams,
896 A.2d 973 (Md. 2006)

In murder case where key prosecution witness was a jailhouse snitch, a *Brady* violation occurred by the suppression of evidence that the snitch was a paid informant and that he was seeking leniency in another case based on his testimony in petitioner's case, contrary to his claim on the stand that he was testifying against petitioner solely because it was the right thing to do. Although the particular Assistant State's Attorney prosecuting petitioner was unaware of this information, *Brady* mandated "that, under the circumstances of this case, the State's duty and obligation to disclose exculpatory and mitigating material and information extend beyond the individual prosecutor and encompass information known to any prosecutor in the office." Defense counsel could not be blamed for failing to discover the impeachment evidence given that the snitch's status as a paid informant could only have been revealed by the prosecution or the police. That defense counsel had conducted a "superb" cross-examination of the snitch failed to render the suppressed impeachment evidence immaterial.

Sykes v. United States,
897 A.2d 769 (D.C. 2006)

Defendant convicted of robbery-murder and other charges was entitled to a new trial based on the prosecution's failure to timely provide grand jury testimony of two witnesses, who were unavailable at the time of trial, which directly contradicted the confidential informant's testimony with respect to defendant's alleged express and adoptive admissions. That the defendant was permitted to introduce portions of the grand jury testimony did not cure the error because the prosecutor was able to suggest that the witnesses had not been truthful before the grand jury and the jury was not able to observe the witnesses's demeanor and make a credibility determination.

State v. Anderson
2006 WL 825270 (Ohio App. Mar. 31, 2006) (unpublished)

DUI charges properly dismissed where defendant requested that videotapes taken of him and his interaction with police be preserved and the State destroyed them. Due to the specificity of defendant's request, State is found to bear the burden of demonstrating that the evidence would have been wholly inculpatory, which it could not. In addition, the destroyed videotapes would have resolved several matters in dispute and provided the only possible impeachment of the officers.

***Simpson v. Moore,**
627 S.E.2d 701 (S.C. 2006)

In case involving charges of robbery-murder at a convenience store, the prosecution's failure to

disclose that a bag of money was found behind the counter violated *Brady*. One victim/witness testified that after some shots were fired, petitioner took money from the cash register. Petitioner claimed that he “chickened out” of the robbery, only shot the owner after the owner accosted petitioner, and did not take any money from the store. The bag of money at the crime scene was determined to be critical evidence regarding the robbery charge/aggravator. A new trial was ordered on the robbery charge, with a resentencing to follow based on the outcome of that retrial.

State v. Larkins,
2006 WL 60778 (Ohio App. Jan. 12, 2006) (unpublished)

Indictment on robbery charges is dismissed where defendant’s initial conviction was overturned based on the State’s failure to disclose a wealth of *Brady* material and the defendant now would be unable to use the information that had been suppressed because 8 defense witnesses were now deceased and 10 had no known address.

State v. Scheidel,
844 N.E.2d 1248 (Ohio 2006)

In prosecution for kidnaping, rape and attempted rape, the prosecution violated *Brady* by suppressing notes from an interview with the child victim before trial, in which the child stated that defendant did not penetrate her vagina. Materiality is found even though the notes did not constitute a “statement” by the victim and despite a clear description by the child of the rape to a nurse, evidence of vaginal scarring, and testimony by a friend of the defendant who claimed on one occasion to have walked into the child’s room and discovered the defendant with his pants down standing over the bed of the naked, crying child.

Commonwealth v. Lykus,
2005 WL 3804726 (Mass. Super. Dec. 30, 2005)

In kidnaping and murder case where evidence against defendant included dye from ransom money that was found in his car and on his belongings, same kind of bags that ransom money was in were found in his truck, bullets in victim were consistent with those fired from his gun, and several witnesses identified his voice on tapes demanding ransom money, a *Brady* violation is found from the Commonwealth’s failure to disclose FBI lab reports indicating that defendant’s voice could not be conclusively established to be the voice on the tapes. Although the prosecutor had requested production of this evidence, supervisors at the FBI specifically directed agents not to produce it. The suppression of the lab reports is nonetheless imputed to the Commonwealth because the FBI had been “intimately involved” in the investigation of the case. Even if the suppression could not be imputed to the Commonwealth, the lab reports would then be considered newly discovered and still provide grounds for a new trial given that the voice identification was a “major component” of the case against defendant.

***Schofield v. Palmer,**

621 S.E.2d 726 (Ga. 2005)

Despite the existence of “considerable” evidence implicating petitioner in the murders of his estranged wife and step-daughter, habeas relief was required based on the prosecution’s suppression of evidence that the Georgia Bureau of Investigation had paid a witness \$500 for providing information implicating petitioner. Petitioner’s nephew testified that he went to the victims’s home with petitioner, cut the phone lines at petitioner’s request, and petitioner then kicked in the door and shot the victims. The defense theory was that the nephew alone was responsible for the crime. The witness at issue testified to seeing petitioner’s car parked in the location described by the nephew. Evidence of the payment was material because it provided a basis for impeaching the witness. Suppression of the evidence provided cause to overcome the procedural default of the claim.

People v. Proventud,
802 N.Y.S.2d 605 (N.Y. Sup. 2005)

In attempted murder case, prosecution violated *Brady* by failing to disclose that the victim identified defendant’s brother in a photo array and wrote down “looks like him.” Notably, the conduct of the jury during trial indicated that identification was a major issue. Relief was required despite the fact that the identification was tentative and that defendant’s brother was incarcerated at the time of the crime.

People v. Blackman,
836 N.E.2d 101 (Ill. App. 2005)

State violated *Brady* when it failed to disclose the payment of \$20,000 in relocation expenses to a witness where the witness in question was one of only two to put defendant at the scene and the only one who was not chemically impaired at the time. Nondisclosure of information prevented defendant from the impeaching witness and making a knowing choice of jury trial over bench trial. Court’s offer of continuance following disclosure of information insufficient to cure error.

Robinson v. Commonwealth,
181 S.W.3d 30 (Ky. 2005)

Napue violation occurred at the sentencing proceedings following defendant’s conviction for various drug offenses when the parole officer erroneously testified that good time credits would be factored into the parole eligibility date and the prosecutor not only failed to correct this incorrect information in his argument to the jury, but relied heavily on the parole officer’s testimony in arguing that the jury should impose the maximum penalty.

People v. Garcia,

2005 WL 2387474 (Cal. App. Sept. 29, 2005) (unpublished)

In attempted murder case, the prosecution's failure to disclose a letter requesting leniency for a witness for his participation in the case and requesting his placement in a witness protection program, when considered in combination with misconduct by the prosecutor during argument, justifies a new trial. At trial, the witness had claimed that he was testifying because he received a deal that released him from juvenile hall. The lead investigator testified that the State had requested leniency for the witness in a separate case. With regard to another witness, the investigator testified that she was absolutely sure of her photo identification while the witness said she had equivocated. It is found that the suppressed information would have assisted in the impeachment of one witness and also have damaged the credibility of the investigator with regard to the disputed circumstances of the other witness' photo identification.

**Bowlds v. State,
834 N.E.2d 669 (Ind. App. 2005)**

In case of criminal recklessness resulting in serious bodily injury, the prosecution's suppression of three police reports violated *Brady*. The reports included information about the arrest of another suspect matching the description of the assailant, incriminating statements by another person present at the scene, hearsay statements regarding culpability of a third possible suspect, and prior-conviction impeachment material concerning two witnesses who identified petitioner in a lineup.

***McCarty v. State,
114 P.3d 1089 (Okla. Crim. App. 2005), cert. denied, 126 S.Ct. 660 (2005)**

Post-conviction relief granted in rape-murder case because of the conduct of forensic analyst Joyce Gilchrist, who withheld evidence, most likely destroyed exculpatory evidence, provided flawed analysis and documentation, testified in a manner that exceeded the limits of forensic science, and altered lab reports to avoid detection.

***Tillman v. State,
128 P.3d 1123 (Utah 2005)**

Petitioner was entitled to relief from his death sentence where, following conclusion of federal habeas proceeding and while execution date was active, petitioner discovered partial transcripts of pre-trial interviews conducted with state's star witness. Because the State had affirmatively represented that no recordings of interviews had been made, petitioner was not under an obligation during the first round of post-conviction proceedings to have found them and petitioner demonstrated good cause under state common law to overcome the procedural default of his *Brady* claim. The key witness, who was present at the crime scene, was granted complete immunity and presented the only evidence against petitioner. The transcript contained indications that the witness was not as certain about the sequence of events as she was at trial; evidence that

an officer was attempting to coach her testimony; inappropriate laughter when recounting details of the gruesome murder; and evidence that petitioner was suicidal prior to the incident. The evidence was material as to the sentence because discrepancies, coaching, and laughter tended to decrease the witness's credibility and therefore could have increased the jury's perception of her moral culpability. If the witness was more culpable than she indicated, the State's attempt to portray her as an innocent victim under the sway of petitioner would have been undermined. An increase in her moral culpability could also have underscored to the jury the disparate treatment of granting the witness full immunity while sentencing petitioner to death. Evidence of petitioner's suicidal ideation was found to be mitigating.

***Floyd v. State,**
902 So.2d 775 (Fla. 2005)

In robbery-murder case with an African-American defendant, prosecution violated *Brady* by suppressing statements of a neighbor who saw two white men park their truck in the victim's driveway and enter the victim's house, heard "scrambling" noises while the men were inside, and saw the men leave hurriedly, all within the time period the medical examiner had estimated as the time of death. This was *Brady* evidence particularly when combined with other evidence in police reports that was inconsistent with the State's presentation at trial, including inconsistencies in reports of pry marks on interior window frames, and arguments regarding the presence of Negroid hair on the victim's sheet despite the fact that the bed was made at the time of the crime. Also suppressed were letters written by a jailhouse snitch seeking a bonus for his help. The court found that the *Brady* evidence warranted relief, despite the fact that it did not amount to "irrefutable evidence" or "smoking gun" for innocence. (The evidence against the defendant included his ownership of a coat which contained a sock with the victim's blood on it and his having cashed a check belonging to the victim.)

Prewitt v. State,
819 N.E.2d 393 (Ind. App. 2004)

In murder case involving the death of the defendant's husband, who the defendant claimed she found dead in the bathroom with a gunshot wound in the head after she awoke from a blackout, the prosecution violated *Brady* by suppressing evidence that could have supported a third party guilt defense. Without the evidence, the only available defense had been suicide. A State detective had indicated that there was no exculpatory evidence, but withheld the following information: (1) the known presence of defendant's son at the crime scene during a key time period coupled with statements that he went by a witness's house and said that he would be going to California if something happened that night and then left a blood trail from there back to the bar where he was later seen; (2) a witness's statement that the son and a friend moved the victim's body, which was consistent with crime scene evidence; and (3) witness statement that the son had hired him to beat up the victim. The defendant was not guilty of lack of due diligence in obtaining this information because the State had misrepresented the status and results of its investigation. Although the body moving evidence was not independently material, it was found to fall under *Brady* as a part of a

cumulative analysis.

***Mordenti v. State,
894 So.2d 161 (Fla. 2004)**

In murder-for-hire case where the prosecution's case turned almost completely on the testimony of petitioner's former wife, the prosecution violated *Brady* by failing to turn over the ex-wife's date book which contradicted part of her testimony and affected the credibility of other parts of her testimony. In addition, an entry on the date of the murder implicated the ex-wife's then boy friend in the killing. The prosecution also violated *Brady* by failing to turn over the results of an interview with the lawyer who had represented the victim's husband who had been charged with hiring petitioner to commit the murder. (The victim's husband had committed suicide prior to trial and the trial court, unbeknownst to defense counsel, issued an ex parte order finding that the attorney-client privilege no longer applied and ordering the attorney to submit to an interview with the State.) The attorney revealed in the interview that petitioner's ex-wife and the victim's husband had had an affair and the victim's husband believed that the ex-wife had orchestrated the murder. The victim's husband had also claimed that a phone call to petitioner on the day of the murder was related to business and had been set up by the ex-wife. This was consistent with petitioner's explanation about the call. Even if the attorney's testimony was inadmissible hearsay, it was nevertheless material because it would have led defense counsel to discover evidence for impeaching the ex-wife. Further, the testimony may have been admissible for impeachment purposes. "Cumulatively, the total picture in this case-the State's *Brady* violations in failing to disclose [the ex-wife's] date book and the undisclosed information obtained from [the attorney's] interview with the State, in addition to other *Brady* violations where the State failed to disclose information obtained from interviews with key witnesses coupled with misrepresentations by the prosecutor-compels us to grant Mordenti relief in the instant case."

**Herndon v. Commonwealth,
2004 WL 2634420 (Ky. App. Nov. 19, 2004) (unpublished)**

In sexual abuse case, investigating detective is found to have lied in order to mislead the jury.

**Commonwealth v. Vettrano,
2004 WL 2320319 (Ky. App. Oct. 15, 2004) (unpublished)**

Grant of post-conviction relief upheld where detective remained silent when prosecution argued that petitioner's defense – that he only shot the two victims after the surviving victim raised his arm revealing a silver gun – was unbelievable because no such gun was found at the crime scene. In fact, the detective had discovered a silver gun in the male victim's night stand. By smelling and examining it, the detective concluded it hadn't been fired. He also found it to be irrelevant because he saw no blood trail leading from the kitchen, where the shooting occurred, to the night stand. The evidence was material because defense counsel would have tested for blood between the kitchen and night stand.

State v. Johnson,
599 S.E.2d 599 (N.C. App. 2004)

Trial court erred in violation of defendant's rights under *Brady v. Maryland* in this sexual offenses case when it failed to order that defendant be provided with Department of Social Service records concerning the minor victim which indicated: (1) the victim's brother had a history of physical violence; (2) the victim and her brother suffered yeast infections at the same time; (3) the victim and her brother were sometimes left in the house alone together; (4) the victim admitted lying to a social worker on one occasion about injuries; and (5) the victim's mother believed that she could have caused at least one of the victim's injuries.

State v. Martinez,
86 P.3d 1210 (Wash. App. 2004)

Prosecution violated *Brady* by withholding an exculpatory police report until shortly before it rested its case. "The State prosecutor's withholding of exculpatory evidence until the middle of a criminal jury trial is . . . so repugnant to principles of fundamental fairness that it constitutes a violation of due process." Defendant had been charged with being an accomplice to numerous crimes. The actual perpetrators claimed that defendant had been the mastermind and had provided them with the two guns used in the offense – one black, one silver. A co-worker of defendant was shown a line-up of guns and picked out the guns recovered by the perpetrators as the guns shown to her by defendant in December 1999 which he had offered to sell to her. What the prosecution failed to reveal until well into the trial was a police report establishing that the silver gun had been owned by a third party who had not reported it stolen until October 2000. Thus, the silver gun earlier possessed by defendant, which he had reported stolen in the summer of 2000, could not have been the gun recovered by one of the perpetrators. On this record, where the jury hung 10-2 in favor of acquittal, the appeals court concludes that the trial court did not abuse its discretion in dismissing the refiled charges as a sanction for the prosecution's misconduct.

State v. Hill,
597 S.E.2d 822 (S.C. App. 2004)

Trial court erred as a matter of law in holding that *Brady* and the state discovery statute did not apply in probation revocation proceedings. The Probation Department was required to disclose exculpatory documents in the possession of investigating agencies, even though it was a separate entity from those agencies. The suppressed evidence was found to be material even though it had been considered during a motion for reconsideration that was denied. The court reasoned: "Having already found Hill violated his probation and having imposed a sentence, we believe it would have been difficult for the court to be completely objective during the subsequent proceeding." Further, Hill was denied the opportunity to thoroughly cross-examine the witnesses when armed with full information.

State v. Bright,

875 So.2d 37 (La. 2004)

Second degree murder conviction reversed where prosecution suppressed evidence of its key witness's criminal history, including the fact that he was on parole at the time of his identification of petitioner, and could have been subject to parole revocation due to his drinking at the time of the offense. In concluding that the suppressed evidence was material the court noted that no physical evidence or other witnesses implicated petitioner, and the defense alibi witnesses had been impeached by their prior criminal convictions.

State v. White,
680 N.W.2d 362 (Wisc. App. 2004)

In armed robbery case, petitioner was entitled to post-conviction relief based on the prosecution's failure to disclose the probationary status of the alleged victim/key prosecution witness. While the alleged victim, who was a store clerk, claimed that petitioner robbed him at gunpoint, petitioner testified that the alleged victim had willingly given him money from the cash register to compensate petitioner for a shortfall in a prior marijuana purchase. Although the jury did learn that the witness had a prior conviction, there was a reasonable probability of a more favorable verdict had the jury been given evidence showing a possible motive for the witness to shape his testimony, i.e., to avoid having his probation revoked.

People v. Richardson,
2004 WL 1879506 (Cal.App. 2004) (unpublished)

In case where defendant was charged with, among other things, resisting arrest and battery on peace officers, the prosecution violated *Brady* by failing to disclose a complaint against one of the arresting officers alleging that the officer used excessive force in arresting the complainant. This was material because it supported defendant's contention that the same officer used force on him, without provocation, and then falsely claimed that the force was justified by defendant's conduct. That the complainant recanted his story when ultimately interviewed by the defense did not defeat the *Brady* claim.

People v. Stein,
2004 WL 1770418 (N.Y.A.D. 2004)

Defendant who had been convicted of numerous sexual offenses, as well as endangering the welfare of a child, was entitled to a new trial based on the prosecution's failure to disclose that two of the complainants had filed notices of civil claims against defendant's employer, a school district, attempting to hold it responsible for defendant's alleged criminal conduct. Evidence of the civil claims was highly relevant to the issue of the complainants' credibility. The failure to disclose this evidence was aggravated by the prosecutor's argument during summation that there was no evidence that the complainants were bringing civil lawsuits.

Commonwealth v. Adams,
2004 WL 1588108 (Mass. Super. 2004)

Petitioner who had been convicted of murder and robbery was entitled to a new trial based on the prosecution's suppression of evidence including the prior criminal records of Commonwealth witnesses, and police notes and reports showing prior inconsistent statements of a key Commonwealth witness.

Toro v. State,
2004 WL 1541917 (R.I.Super. 2004) (unpublished)

Under Rhode Island's "variable standard for applying *Brady*," a new trial is granted automatically where there was a deliberate failure to disclose by the state regardless of the degree of harm. Here, defendant was entitled to a new trial based on an investigating officer's failure to disclose to the defense that an uninterested witness claimed that a key prosecution witness had admitted to him that he had not actually seen defendant commit the murder. That the prosecutor was ignorant about this new witness was irrelevant, as was the alleged "good faith" of the officer who claimed to have withheld the information because he concluded it was not credible.

Babich v. State,
2004 WL 1327986 (Minn. App. 2004) (unpublished)

In drug sale and possession case, prosecution violated *Brady* by failing to disclose the full statement of the key witness which contradicted trial testimony by the witness and a police officer claiming that the witness had not mentioned petitioner's drug activities during an initial interview. The full statement was also exculpatory in that it contained a basis for suggesting that someone other than petitioner could have had exclusive control over the methamphetamine petitioner was charged with possessing and selling.

Williams v. State,
831 A.2d 501 (Md. App. 2003)

Brady violation is found in homicide case where the prosecution failed to disclose that jailhouse snitch was a paid police informant for a drug unit, that he received benefits in criminal cases because of his assistance to the drug unit, and that he had requested leniency from the judge in a pending criminal case based in part on his testimony against petitioner. Although neither the trial prosecutor nor the homicide investigators were aware of this information, under the circumstances of this case – which included the fact that a judge had notified the prosecutor's office of the informant's requests for leniency – the appeals court finds that "it is not unreasonable to charge the prosecution with knowledge of impeachment information about [the informant] that, in violation of *Brady v. Maryland*, it failed to divulge to appellant's counsel." The court explained: "When, as here, there is an obvious basis to suspect the motives and credibility of a proposed witness for the State, it may be incumbent upon the State's Attorney, in an office with many

Assistant State's Attorneys, to establish a procedure to facilitate compliance with the obligation under *Brady* to disclose to defense material that includes information 'casting a shadow on a government witness's credibility[.]' Moreover, the police officers who are part of the prosecution team should be required to make some investigation into the background of the jailhouse snitch." (Footnote and citation omitted.) In finding that the undisclosed information was material, the court pointed out that the snitch provided direct evidence against petitioner and that the only other direct evidence was from a witness whose testimony was confused and contradictory.

People v. Stokes,
2003 WL 22707339 (Cal. App. 2003) (unpublished)

Defendant was denied a fair trial in case involving charges of sexual offenses where the prosecution failed to disclose a lengthy police report until nearly a year after the alleged victim's conditional examination and the report contradicted some of the testimony given by the alleged victim during the examination. Because the victim died prior to trial, the conditional examination was offered into evidence and defendant was unable to cross-examine the witness about the police report.

State v. Larkins,
2003 WL 22510579 (Ohio App. 2003) (unpublished)

In robbery-murder case where no physical evidence linked defendant to the crime, the trial court properly found a *Brady* violation by the prosecution's failure to disclose, inter alia, that: (1) a witness's description of the assailant who was allegedly defendant, i.e., "Road Dog," did not match defendant; (2) this same witness claimed "Road Dog" and the codefendants were at his home at a time when a trial witness stated she was with defendant; (3) another witness provided a statement which contradicted some trial testimony, implicated a third party as being "Road Dog," and provided a possible alibi for defendant; (4) all the eyewitness descriptions obtained from people present at the crime scene differed from defendant's appearance; and (5) the testifying co-defendant lied when asked if the prosecution had promised her anything in exchange for her testimony and about her past criminal convictions.

Ex Parte Molano,
2003 WL 22349039 (Tex.Crim.App. 2003)

In case involving conviction for bodily injury to a child, record supported trial court's grant of relief on *Brady* claim. Although there was no intentional suppression by the trial prosecutors, police agencies and other prosecutors in the same office were aware of written statements by witnesses that would have impeached two of the trial witnesses and supported the defense.

People v. Lee,
2003 WL 22100843 (Cal.App. 2003) (unpublished)

The prosecution violated *Brady* by failing to disclose a dispatch tape containing a description of the suspect that did not match defendant. Although defendant was aware of the description because it was mentioned in a police report, and the names of officers from various jurisdictions were included in that report, defense counsel had been unable to find the source of the description and so was without admissible evidence on this issue. Once he received the dispatch tape, after defendant had been convicted, defense counsel was able to identify the officer and obtain favorable testimony. The court rejects the State's argument that it met its *Brady* obligations by giving defendant notice of the description and names of possible sources. "Respondent's position here would support a prosecutor's disclosure of exculpatory statements, and a list of names of possible witnesses, accompanied by a deliberate refusal to divulge which, if any, of the listed witnesses made the exculpatory statements. This turns the important constitutional mandate of *Brady* into a childish game of hide-and-seek. Reasonably diligent defense counsel should be able to operate under the assumption that the prosecutor has complied with *Brady* at least to the extent of disclosing evidence of exculpatory statements made by police officers that were part of the investigative team in the case being prosecuted."

***Head v. Stripling,**
590 S.E.2d 122 (Ga. 2003)

In Georgia capital case, the prosecution violated *Brady* by failing to disclose petitioner's confidential parole records for his prior convictions, where the records revealed that State officials and petitioner's mother had characterized him as mentally retarded, that a State official characterized an above-average IQ test result as "questionable," and that petitioner had sub-70 IQ score on another IQ test taken when he was 16 years old. Such evidence was material given the prosecution's assertion at trial that petitioner had recently concocted his mental retardation claim, and the prosecution relied on the above-average IQ test score as direct evidence of his actual intelligence. That the State had an alleged good motive in keeping the records from petitioner – the statutorily-imposed confidentiality of parole files – was irrelevant to the *Brady* claim. A state statute regarding parole file confidentiality cannot trump a capital defendant's constitutional rights.

State v. Bennett,
81 P.3d 1 (Nev. 2003)

The prosecution committed a *Brady* violation where it failed to disclose a statement by a jailhouse informant that the co-defendant had admitted that he planned the murder of the victims during the robbery and had convinced petitioner to do the killing. Although the statement was obtained after the jury returned a death verdict against petitioner, it was before formal sentencing and its revelation to petitioner when it was obtained would have entitled petitioner to a new penalty hearing. The statement was favorable at the sentencing stage in that: (1) it was relevant to refute the aggravating circumstance that the murder was random and without apparent motive; and (2) it provided mitigating evidence by characterizing petitioner as a follower who was convinced by the co-defendant to participate. In finding a reasonable probability of a more favorable result had the information been disclosed, the court notes that the statement corroborated petitioner's

contention that he had fallen under the influence of the co-defendant who had planned the crime, and that the prosecution also failed to disclose the prior criminal history contained in the co-defendant's juvenile records from Colorado, and the fact that a prosecution witness had been a paid informant in Utah.

State v. Greco,
862 So.2d 1152 (La. App. 2003)

In non-capital robbery-murder case where the defendant had claimed self-defense, the trial court did not abuse its discretion in finding that the defendant was entitled to relief based upon the recantations of two prosecution witnesses and their claims that law enforcement officers and the prosecutor's investigator suborned perjury. The witnesses testified in post-conviction proceedings that the prosecution's key witness was the one who stated he planned to "roll" the victim, and that they had falsely attributed the remark to defendant at trial because of threats by authorities. The credibility of trial testimony by the officers regarding the circumstances of taking defendant's confession, in which a detective admitted paraphrasing certain statements and omitting others, was sufficiently undermined and called into doubt the validity of other statements and the confession, thus entitling defendant to a new trial.

Brownlow v. Schofield,
587 S.E.2d 647 (Ga. 2003)

Prosecutor violated *Brady* in child molestation case by failing to reveal that during an interview 10 days before trial the alleged victim shook his head negatively when asked by the prosecutor whether the defendant had committed oral sodomy on him. The trial court erred in denying relief on the ground that the prosecution had disclosed to the defense similar and more weighty exculpatory evidence, i.e., a videotape of an earlier interview with the alleged victim in which he denied that any improper touching occurred. Given that the only evidence of defendant's guilt was the alleged victim's trial testimony claiming oral sodomy had occurred, there was a reasonable probability of a more favorable verdict on that count had the prosecutor disclosed the second denial.

People v. Kazakevicius,
2003 WL 21190612 (Mich.App. May 20, 2003)(unpublished)

In case involving charges of criminal sexual conduct, a *Brady* violation occurred when the prosecution effectively suppressed the alleged victim's counseling records that "could be read to indicate that the victim had suppressed her memories of the alleged sexual abuse for several years; that it was through counseling that these memories resurfaced; that the victim still did not have a complete memory of what allegedly happened; and that the victim's memories may have been triggered by a form of hypnosis during counseling." (The records were in the possession of the prosecution and the trial court denied defendant's request for in camera review of the records.) The counseling records were material given that the victim's testimony was the principal evidence

against defendant, and the counseling records "would have allowed defendant to explore possible alternative explanations for the origin of the allegations of sexual abuse, including whether they were the product of outside influences affecting both the reliability of the allegations and the credibility of the victim."

State v. VanWinkle,
2003 WL 1798945 (Neb.App. April 8, 2003)(unpublished)

In case involving charges of burglary and criminal mischief, the prosecution violated *Brady v. Maryland* when it suppressed a letter written by its key prosecution witness – who was the alleged accomplice– which stated that defendant was innocent of the crimes. The fact that the information was not sought by Van Winkle through a discovery request was irrelevant. And the letter was not cumulative to other evidence which also impeached the alleged accomplice. "The fact [the alleged accomplice] was impeached to a degree by evidence that he had lied when he accused VanWinkle of another similar crime in Palmer, that he was an unwilling witness testifying under the threat of prosecution for additional crimes, and that he had told [another person] that VanWinkle was not there is not the same as a written statement to the prosecutor that [the alleged accomplice] was lying when he accused VanWinkle of the crime."

Keeter v. State,
105 S.W.3d 137 (Tex. App. 2003)

In case involving charges that defendant sexual abused his stepdaughter, his claim of *Brady* error was properly preserved through his amended motion for new trial which was accompanied by an affidavit from the victim's stepmother stating that the victim had changed her story so many times that she was not believed by the stepmother, and that the prosecutor told the stepmother that she would not be called as a witness in light of her disbelief of the victim. Based on the evidence presented at the hearing on the motion for new trial, it is found that the prosecution suppressed favorable evidence that neither the victim's father nor her stepmother believed the victim, that they thought she was a constant liar, and that the victim had made contradictory statements to them about defendant. This evidence was material given that the case against defendant rested on the testimony of the victim, and the suppressed evidence could have raised doubts about the victim's credibility. The court squarely rejects the argument that the evidence did not have to be disclosed because it could have been discovered by defense counsel acting with due diligence. "The cases do not hold that the prosecution is relieved of its duty under *Brady* to disclose exculpatory evidence when defense counsel (a) knows or should know a witness exists, and (b) might discover the exculpatory evidence if defense counsel asks the right questions of the witness. Implementation of such a rule could effectively undermine *Brady* because it would almost always relieve the prosecutor of disclosing *Brady* information."

State v. Lindsey,
844 So.2d 961 (La.App. 2003)

In homicide case where the defense at trial centered on petitioner's intoxication, the prosecution violated *Brady* by failing to reveal that two witnesses who testified to petitioner's sobriety at trial had previously stated that he was intoxicated at the time of the shooting. Although petitioner's trial counsel could not be found, and so there was no definitive proof that the prior statements had not been disclosed to him, the appellate court rejected the trial court's conclusion that petitioner had failed to meet his burden of establishing suppression. The trial prosecutor, who had not been on the case throughout the proceedings, testified that she would have turned over the statements had she been aware of them. Given that defense counsel presented an intoxication defense but did not impeach the witnesses with the prior statements, the prosecutor presumed that defense counsel did not receive the statements. Further, the prosecution's file indicated that the State's answer to discovery was that the defense was not entitled to the witnesses' statements. Finally, the suppressed statements were material under *Brady*, contrary to the finding of the trial court.

Hutchison v. State,
118 S.W.3d 720 (Tenn. Crim. App. 2003)

In burglary and assault case, the trial court did not err in considering a claim of *Brady* error that was raised after the statute of limitations had run in light of its finding that petitioner Harper had raised the claim within one year of learning about the existence of an exculpatory FBI report indicating that petitioner Hutchinson's tools had not been used in the burglary. The trial court also properly permitted the petitioners to amend their petitions, despite a limited remand from the appellate court, given the discovery of additional exculpatory evidence. Evidence supported the trial court's finding that the state, acting in good faith, unintentionally failed to disclose exculpatory material, i.e., the FBI report and a statement by a witness which would have lent some support to the defense theory that the assault was committed by the victim's cousin and was unrelated to any burglary. The grant of post-conviction relief on the claim of *Brady* violations is affirmed.

Harrington v. State,
659 N.W.2d 509 (Iowa 2003)

Approximately twenty-five years after his murder conviction, petitioner was granted postconviction relief based on the suppression of police reports that provided "abundant material for defense counsel to argue that [a third party] had the opportunity and motive to commit the crime." Although trial counsel had some information about a suspicious third party, he was denied "the 'essential facts' of the police reports so as to allow the defense to wholly take advantage of this evidence." In order to show materiality petitioner was not required to establish that the police reports would have "led to evidence that someone else committed [the] crime." If the evidence would create a reasonable doubt about the petitioner's guilt, "it is material even if it would not convince the jury beyond a reasonable doubt that [the third party] was the killer."

People v. Martinez,
103 Cal.App.4th 1071 (Cal.App. 2002)

Habeas relief granted where prosecution failed to investigate and confirm allegations that critical prosecution witness had prior felony convictions that had been expunged and also failed to reveal that charges were pending against the witness at the time of trial.

Ramirez v. State,
96 S.W.3d 386 (Tex.App. 2002)

In "official oppression" prosecution, State's knowing use of false and misleading testimony by key witness against defendant entitled him to a new trial. The State violated the *Mooney-Pyle-Napue* line of cases by permitting the witness to testify that her contact with an attorney was not about seeking money, even though the prosecution was aware that a civil suit had been or soon would be filed by that attorney against the city. That the witness did not know that the lawsuit had actually been filed at the time she testified was irrelevant since the State knew that the testimony was false or misleading.

***Ex parte Richardson,**
70 S.W.3d 865 (Tex. Crim.App. 2002)

Capital conviction and death sentence reversed based on prosecution's suppression of a diary kept by one of the police officers who was guarding the State's sole eyewitness to the crime. The diary revealed the officer's belief that the witness was not a truthful person, and also identified five other members of the protective team who harbored the same opinion. In finding the suppressed evidence material, the appeals court notes that the eyewitness's credibility was the key issue, and when her credibility was successfully challenged at the separate trials of the two co-defendants, both were acquitted. Although petitioner did challenge the witness's credibility at the time of his own trial, "nothing that [petitioner's] attorney presented . . . could compare with a parade of six law enforcement officers testifying that, in their opinion, [the purported eyewitness] was not a credible witness and not worthy of belief under oath."

Nickerson v. State,
69 S.W.3d 661 (Tex.App. - Waco 2002)

Murder conviction is reversed due to prosecution's untimely disclosure of a videotape showing defendant's bizarre behavior in jail prior to trial. (The tape was revealed for the first time during the punishment phase of the proceedings.) It was clearly favorable to an insanity defense, which defendant had considered raising, and it was undisputed that the tape was in the possession of agents acting on behalf of the State. In light of the uncertainty regarding defendant's sanity, his personal "knowledge" of the taped event had no bearing on what his attorney should have known. The tape was deemed "material" given that two mental health experts expressed strong reservations about their initial sanity diagnoses after their review of the videotape, and despite the fact that two experts presented by the prosecution did not believe that the tape established defendant's insanity at the time of the crime.

***Conyers v. State,**
790 A.2d 15 (Md. 2002)

Postconviction relief granted regarding capital conviction and death sentence where the State suppressed evidence that the jailhouse snitch requested a benefit when he first approached the police and that he refused to sign his written statement absent such a commitment. That the jury was aware that the informant later received a plea agreement in return for his testimony against defendant did not vitiate the State's error in withholding the other evidence. The suppressed evidence is found to be material for a number of reasons, including: (1) the snitch was a key witness as to defendant's principalship in the murder and principalship directly governed eligibility for the death penalty; and (2) the prosecution emphasized the snitch's credibility in argument.

Hensley v. State,
48 P.3d 1099 (Wy. 2002)

Where the state suppressed evidence which could have been used to impeach a confidential informant, the Court held that such evidence was material and warranted a reversal of the defendant's conviction. The evidence at issue was an audio recording of the informant allegedly using methamphetamine, which was inconsistent with her testimony that she was addressing her addiction and only used methamphetamine once during the two years that she worked for the government.

***Martin v. State,**
839 So.2d 665 (Ala. Crim. App. 2001)

Postconviction relief granted to Alabama death row inmate in light of prosecution's suppression of several pieces of material evidence. The undisclosed evidence included: (1) the fact that the sole eyewitness to defendant's presence near the crime scene had undergone hypnosis; (2) a statement made by the sole eyewitness while under hypnosis; (3) a description of the perpetrator (which did not match defendant) and an identification of someone other than defendant at a pretrial lineup by a witness who testified at trial she was unable to identify the perpetrator because she had been focused on the gun; (4) the presence of unidentified fingerprints on evidence related to the murder; and (5) a suggestive photo array regarding defendant's car.

Hoffman v. State,
800 So.2d 174 (Fla. 2001)

Where the state failed to disclose results of scientific hair analysis which excluded petitioner, codefendant and male victim as the sources of hairs found in the female victim's hands, petitioner was prejudiced. In addition, under circumstances where another person also confessed to the crime, the state's failure to disclose information regarding the existence of other suspects prejudiced petitioner.

State v. Barber,
554 S.E.2d 413 (N.C. 2001)

Due process violation found where prosecution failed to disclose telephone records that were not merely corroborative, but rather lent crucial factual support to a defense witness whose credibility was questioned by the prosecution. Evidence proffered by the petitioner to establish materiality included affidavits from two jurors confirming that, had the phone records been introduced at trial, it "would have" and "could have" affected the verdict.

Atkinson v. State,
778 A.2d 1058 (Del. 2001)

Defendant's conviction of attempted unlawful sexual intercourse second degree and related charges was reversed due to the state's failure to disclose notes of witness interviews done by an investigating prosecutor until that prosecutor testified as the state's final witness. The notes revealed that the complainant, who was the state's main witness, had not initially described the sexual component of the alleged assault to three of the state's witnesses; if the notes had been made available to defense counsel before trial, cross-examination of those witnesses may have changed outcome of defendant's trial.

State v. Kemp,
828 So.2d 540 (La. 2002)

Second degree murder conviction reversed where the prosecution failed to timely reveal a taped statement of an eyewitness which mentioned a comment by the victim that lent support to petitioner's self defense contention. Although the statement came out towards the end of the trial, reversal was still required. "[T]he details provided by [the witness] in her taped statement which had [the victim] offering an option to 'shoot it out' possess such potential to give the evidence at trial an entirely different cast that undermines confidence in this jury's rejection of [Kemp's] self-defense claim. To this extent, the state's failure to provide timely disclosure impacted the fundamental fairness of the proceedings leading to [Kemp's] conviction."

***Hoffman v. State,**
800 So.2d 174 (Fla. 2001)

The court reversed the denial of post-conviction relief in this Florida capital case, and remanded for the grant of a new trial. The state violated *Brady* by failing to disclose the results of analysis performed on strands of hair found in one victim's hands; those results excluded defendant, his co-defendant, and both victims as possible sources of the hairs, prejudiced the defense and entitled defendant to new trial, where only other evidence linking defendant to murders was a single fingerprint found on pack of cigarettes in victims' motel room, and defendant's confessions, and where another suspect had also confessed; defendant challenged both of his confessions at trial, and saliva samples taken from cigarette butts found at murder scene did not match defendant's

blood type.

***State v. Huggins,**
788 So.2d 238 (Fla. 2001)

The state violated *Brady* in this Florida capital case by failing to disclose the statement of a witness indicating that he saw the defendant's wife driving a vehicle similar to the victim's vehicle. The substance of this statement contradicted the testimony of the defendant's wife, who was a key prosecution witness. The court found that the state suppressed the information even though it had provided the defense with a "lead sheet" naming the witness, because that sheet inaccurately reflected that the witness had seen a male driving the victim's vehicle, thereby making the witness' account seem unfavorable to the defense.

Spray v. State,
2001 WL 522004 (Tex.App. May 17, 2001)

The court reversed the defendant's conviction for aggravated sexual assault of a child under fourteen, finding that the state violated *Brady* by failing to disclose a Child Protective Services report reflecting that the alleged victim's sister, who corroborated the abuse allegations at trial, had denied any sexual abuse when questioned by investigators. On appeal, the court concluded that "[c]learly the CPS report was favorable and material in that [alleged victim's sister], the only other witness who can corroborate the sexual assault allegations, made statements contained therein that directly contradict her testimony at trial."

State v. Gonzalez,
624 N.W.2d 836 (S.D. 2001)

The South Dakota Supreme Court reversed defendant's conviction of attempted statutory rape, finding that the state failed to disclose - in direct violation of the trial court's order - the alleged victim's counseling records. Those records were favorable and material because they contained a version of the alleged sexual encounters that differed from that offered by the complainant - who was the state's only witness on this issue - with respect to the number of encounters, and the events which took place during those encounters.

Garrett v. State,
2001 WL 280145 (Tenn.Crim.App. March 22, 2001)

The prosecution violated *Brady* in this arson/felony murder case by failing to disclose an investigative report containing a statement by the first fireman to reach the victim, who was found in a utility room in a burning house. At trial, the state contended that the utility room door had been locked from the outside, raising the implication that the defendant locked the victim in the room prior to setting the house on fire. The report, however, indicated that the first person to reach the utility room found the door unlocked. The court found this information favorable and

material even though the state presented additional evidence in post-conviction proceedings suggesting that the person who made the report had misquoted the fireman, who had actually stated that the door was locked at the time he arrived.

Wilson v. State,
768 A.2d 675 (Md.App. 2001)

The court upheld the grant of post-conviction relief in this case involving robbery and related charges on the ground that the state violated *Brady* by failing to disclose written plea agreements between the state and two key codefendant witnesses. Although defense counsel was able to elicit some information about the witnesses' deals during their testimony, that testimony was not completely accurate, and the inaccuracy was compounded by the state's characterization of those deals, and of the witnesses' lack of motivation to lie, during closing arguments.

***Rogers v. State,**
782 So.2d 373 (Fla. 2001)

The court granted post-conviction relief in this Florida capital case, finding that the state violated *Brady* by failing to disclose: (1) a second confession by defendant's alleged co-perpetrator, who also testified for the prosecution, which could have been used to show that although defendant participated in other robberies with co-perpetrator, he had not participated in the one for which he was being tried; and (2) an audiotape of a witness preparation session on which the prosecution can be heard attempting to influence the testimony of its chief witness.

State v. McKinnon,
2001 WL 69214 (Ohio.App. Jan. 29, 2001)

Defendant's rape conviction was reversed due to the prosecution's nondisclosure of an investigative report quoting a security guard from the apartment complex where the alleged victim claimed to have been raped as having been told by the alleged victim that her attacker made her take off all her clothes and do it on the floor. At trial, on the other hand, the alleged victim testified that her attacker "tore off" her clothes. The court found the undisclosed report favorable and material because it could have been used to undermine the alleged victim's credibility, and rebut the prosecution's argument that she had been consistent in her account of the attack every time she spoke about it - both crucial points given that the alleged victim's testimony was the only evidence tying defendant to the attack.

***Johnson v. State,**
38 S.W.3d 52 (Tenn. 2001)

In this Tennessee capital case, the court granted sentencing phase post-conviction relief on the ground that the state violated *Brady* by withholding a police report containing favorable information material to the issue of the applicability of an aggravating sentencing factor. The

withheld police report showed that petitioner could not have fired the bullet that grazed a customer during a grocery store robbery. The state relied on the theory that petitioner fired that bullet to support the aggravating circumstance that he knowingly created great risk of death to two or more persons, other than the murder victim, during the act of murder. The court found the information in the police report material because, had it been disclosed, there was a reasonable probability that the aggravating circumstance would not have been applied to petitioner; absent evidence that petitioner fired the bullet in question, the state failed to prove that he placed any other people at great risk of death.

Lay v. State,
14 P.3d 1256 (Nev. 2000)

The court granted post-conviction relief from petitioner's murder conviction after concluding that the state violated *Brady* by withholding evidence that a paramedic, who testified that the victim identified petitioner as the shooter, had stated in several pretrial interviews that the victim did not tell her anything while she was treating him. This information was favorable and material because, apart from evidence of petitioner's fingerprints on the stolen car from which shots were fired, the paramedic was the only neutral witness to provide evidence that petitioner either fired shots or drove the car.

Commonwealth v. Hill,
739 N.E.2d 670 (Mass. 2000)

The court affirmed the grant of a new trial in this Massachusetts murder case, concluding that the state violated *Brady* by deliberately failing to disclose a leniency agreement with a key prosecution witness, despite requests for such information. The state's nondisclosure deprived defendant of his right to cross-examine the witness effectively, and the harm resulting from this nondisclosure was exacerbated by the conduct of the prosecutor, who allowed the witness to mislead the jury about his own sentencing expectations and his motive for testifying for the state, and suggested in closing argument that the jury should assess credibility by considering whether the witness had "something to lose," and that defendant was the only witness with anything to lose.

***Commonwealth v. Strong,**
761 A.2d 1167 (Penn. 2000)

The Pennsylvania Supreme Court reversed the denial of post-conviction relief in this capital case, finding that the state violated *Brady* by failing to reveal the existence of an understanding between the state and petitioner's co-perpetrator, pursuant to which the co-perpetrator was offered a sentence of two years on charges of murder and kidnapping in exchange for his testimony, and eventually received a sentence of 40 months after pleading guilty. The court found it irrelevant that the trial prosecutor had been unaware that his superior had been negotiating the co-perpetrator's deal with his counsel, and found the evidence of that deal "material" because

there were obvious discrepancies between petitioner's and the co-perpetrator's testimony, and because the co-perpetrator was the key witness who put the gun in petitioner's hand at the time of the murder.

Byrd v. Owen,
536 S.E.2d 736 (Ga. 2000)

The Georgia Supreme Court affirmed the grant of habeas relief in this drug-related murder case on the ground that the state deprived petitioner of due process by withholding evidence that it had reached an immunity agreement with its key witness, and by failing to correct the witness' misleading testimony about the existence of such an agreement. The court further found that the state's nondisclosure deprived petitioner of his right to effective assistance of counsel at trial and on direct appeal. Counsel testified in habeas proceedings that he would not have advised petitioner to waive trial by jury if he had known of the state's deal with the witness; with regard to direct appeal, the state's suppression of evidence of its agreement with the witness deprived counsel of the ability to raise all meritorious issues. The state's misconduct in this case was made more egregious by the fact that petitioner's direct appeal focused on the suppression of information about deals with two other witnesses, which the appellate court held should have been turned over pursuant to *Brady* before concluding that petitioner had not demonstrated materiality.

State v. Harris,
2000 WL 1376459 (Ohio App. Sept. 26, 2000)

The Ohio court of appeals reversed defendant's attempted murder and felonious assault convictions due to the prosecution's suppression of the victim's grand jury testimony, in which the victim denied having a gun prior to the fight which led to his stabbing. At trial, the victim acknowledged having had a gun prior to the fight. Although the version provided by the victim at trial was more favorable to defendant than the version he gave to the grand jury, the court of appeals concluded that the suppression of the grand jury testimony prejudiced defendant by depriving him of information which would have been useful for impeaching the victim's trial testimony. In reaching this conclusion, the court noted that "the prosecution placed emphasis on the veracity of [victim]'s account of losing possession of the handgun [before being stabbed] . . . [and] challenged the jurors to contrast [victim]'s testimony against the testimony of 'defendant and his friends who have already lied to both the police and on the stand.'"

People v. Ellis,
735 N.E.2d 736 (Ill.App. 2000)

The appellate court reversed the denial of post-conviction relief in this murder case, finding that the prosecutor violated *Brady* by failing to inform defense counsel and the jury about benefits, of which prosecutor knew or should have known, which were orally promised to prosecution witnesses in exchange for their testimony. In so holding, the court imputed a detective's

knowledge of these promises to the prosecutor.

State v. Hunt,
615 N.W.2d 294 (Minn. 2000)

The prosecution violated *Brady* by failing to disclose that a psychological examination of its key witness against defendant revealed that the witness was incompetent to stand trial.

Buck v. State,
70 S.W.3d 440 (Mo.App.E.D. 2000)

The state's failure to inform defendant about five of a prosecution witness' six convictions prejudiced defendant at his trial for tampering with a witness; although the prosecutor told defendant about one of the convictions, the witness was central to the prosecution's case in that he provided the only evidence that defendant tampered with a witness, and the other convictions would have been useful for impeachment.

State v. Henderson,
2000 WL 731472 (Ohio App. 1 Dist. June 9, 2000)

The state violated *Brady* in prosecution arising out of a drive by shooting by failing to disclose the taped statement of another individual who claimed to have been driving the car in which defendant was riding. This statement was significant because it contradicted the prosecution's two witnesses, both of whom testified that defendant was both the driver and the shooter.

State v. Larimore,
17 S.W.3d 87 (Ark. 2000)

The state's suppression of evidence of a state medical examiner's change of opinion concerning time of death following his conversation with police about his initial time of death determination providing defendant with an "iron-clad alibi" violated *Brady*.

State v. Nelson,
749 A.2d 380 (N.J.App.Div. 2000)

The state's failure to reveal that one of its witnesses in this drug case had a prior sexual assault conviction violated *Brady*; the witness was important to the state's case, the trial involved a credibility contest, the defendant was impeached with his own prior conviction, and the jury deliberated for over two days, reaching a verdict only after hearing a read-back of witness' testimony.

Harridge v. State,
534 S.E.2d 113 (Ga.App. 2000)

In this vehicular homicide case, the state violated *Brady* by failing to reveal the existence of lab results generated by the Georgia Bureau of Investigation indicating that cocaine and marijuana had been detected in the decedent's urine. In reaching this conclusion, the court noted that, "[f]or purposes of *Brady*, we decide whether someone is on the prosecution team on a case-by-case basis by reviewing the interaction, cooperation and dependence of the agents working on the case. . . . Here, the GBI laboratory was fully involved in the investigation of this case in that it was responsible for testing not only [the decedent's] blood and urine, but also [defendant's] blood. Moreover, both the medical examiner and the prosecutor were completely dependent on the crime lab for determining the amount of drugs and alcohol present in [the decedent's and defendant's] bodies. Because the GBI laboratory was part of the prosecution team and based on [the GBI doctor's] affidavit, we find that the state had possession of the test results showing drugs in Smith's urine."

***Mazzan v. Warden,
993 P.2d 25 (Nev. 2000)**

The court granted relief in this 1979 capital murder case, finding the prosecution violated *Brady* by failing to disclose numerous documents indicating that an alternate suspect with a motive had been in the area with an associate on the night of the murder. Had this information been disclosed, it would have supported petitioner's claim that he heard two people running from the murder scene. The withheld information revealed suspicion among law enforcement that the decedent had been killed as a result of his involvement in a major drug dealing organization, and the alternate suspect was believed by law enforcement to have been a key figure in that organization.

**State v. Sturgeon,
605 N.W.2d 589 (Wis.App. 1999)**

Defendant established his right to withdraw a guilty plea to burglary due to the state's failure to disclose an interview transcript and an officer's personal recollection indicating that he twice denied any knowing involvement in the crime; the evidence was within the exclusive control of the prosecution, and defendant established that the *Brady* violation caused him to plead guilty.

**Robles v. State,
1999 WL 812295 (Tex.App. Oct. 7, 1999)**

The court reversed defendant's convictions for sexual assault and indecency with a child on the ground that the prosecution acted in bad faith in misleading the trial court as to the existence of a tape recording of the alleged victim, who recanted at trial, being interviewed, and possibly coerced and threatened, by the prosecutor and a child protective services worker. Assuming that the tape no longer exists, the court remanded for a development of evidence of the tape's contents to be followed by a determination whether, in light of the tape's destruction, defendant can be afforded a fair trial.

***Mooney v. State,**
990 P.2d 875 (Okla. Crim. App. 1999)

Although not expressly relying on *Brady*, the appeals court vacates the death sentence due to the prosecutor's failure to timely disclose letters from the State's star witness on the continuing threat aggravator, where investigation into the contents of the letters would have provided substantial evidence to effectively confront and impeach the witness concerning his motive for testifying. He claimed in one letter, and while testifying, that his reason for coming forward was because his grandfather had been murdered under circumstances similar to the capital offense. In fact, his grandfather had not been killed and his true motive for testifying was to obtain relocation within the prison system.

State v. Castor,
599 N.W.2d 201 (Neb. 1999)

The state's failure, despite a *Brady* request by the defense, to disclose statements of two witnesses, one of which directly contradicted the state's theory that the victim was shot in his home, and one of which supported defendant's theory that the victim disappeared after getting into a brown pickup truck parked in front of the victim's house, violated *Brady*, and warranted grant of defendant's motion for new trial.

Johnson v. State,
1999 WL 608861 (Tenn.Crim.App. Aug. 12, 1999), aff'd, 38 S.W.3d 52 (Tenn. 2001)

The state violated in connection with the sentencing phase of petitioner's capital trial by withholding a crime scene report indicating that a bullet which grazed a bystander could not have been fired from the location the state contended petitioner was in at the time of the offense. This evidence was material because the state argued to the jury that petitioner had fired that shot in support of the aggravating circumstance of creating a great risk of death to others, which the jury ultimately found.

***Young v. State,**
739 So.2d 553 (Fla. 1999)

The Florida Supreme Court vacated petitioner's death sentence and remanded for resentencing due to the prosecution's failure to disclose attorney notes indicating that one of its key witnesses who testified to the sequence and type of gunshots he claimed to have heard during petitioner's altercation with the decedent had initially indicated that he was not even sure whether he had heard gunshots or firecrackers. In addition, the prosecution withheld statements from other people which, if disclosed, would have provided corroboration for petitioner's theory that the decedent had fired first and petitioner returned fire in self defense. In the course of granting relief, the court rejected the state's contention that the exculpatory notes were attorney work product and therefore exempt from disclosure. The court explained that "the [disclosure] obligation exists

even if such a document is work product or exempt from the public records law."

People v. Torres,
712 N.E.2d 835 (Ill. App. 1999)

The court reversed petitioner's convictions for murder and two counts of attempted murder where the prosecution failed to disclose that two of its witnesses were promised release from probation in exchange for their testimony, and failed to correct one witness' false testimony that he had not been promised leniency in exchange for his testimony. This evidence was material because, aside from these witnesses, only two others identified petitioner as a shooter, and all of the prosecution's witnesses were members of a gang that was at odds with petitioner's gang.

Little v. State,
736 So.2d 486 (Miss. App. 1999)

The court reversed defendant's embezzlement conviction on the ground that the prosecution violated *Brady* by failing to disclose the existence and contents of a "cash receipts journal" which documented that "the bulk" of the \$96,000 he was accused of embezzling had in fact been deposited into the company account.

State v. DelReal,
593 N.W.2d 461 (Wis. App. 1999)

Defendant's conviction for second degree recklessly endangering safety while armed was reversed due to the prosecution's failure to reveal that his hands had been swabbed for gunshot residue, but that the swabs were not analyzed prior to trial. This evidence was material both because the results of the post-trial tests requested by defendant were negative, and because the fact that the swabs had been taken directly contradicted the testimony of the self-proclaimed lead investigator, who testified unequivocally that no swabs had been taken. In the context of this case, which involved questionable eyewitness identifications of defendant and inconsistent testimony as to the location of the perpetrator relative to others at the scene, there was a reasonable probability of a different result had the residue evidence been revealed.

In re Pratt,
82 Cal.Rptr.2d 260 (Cal. App. 1999)

The court affirmed the trial court's grant of state habeas relief on the ground that the state violated *Brady* by failing to disclose a substantial amount of evidence indicating that the only prosecution witness to claim that petitioner had confessed to the murder for which he was convicted had been a long-time informant for state and federal law enforcement agents, and had received favorable treatment in return for his cooperation with authorities. In the course of its decision, the appellate court provided a useful discussion of how *Brady* claims should be analyzed on state habeas in California.

Gibson v. State,
514 S.E.2d 320 (S.C. 1999)

The court affirmed the grant of state post-conviction from petitioner's guilty plea to voluntary manslaughter on the ground that the prosecution violated *Brady* by failing to disclose that a state witness could not have seen the crime in the manner she claimed because the view from the position she described was obstructed. When confronted with this fact by state authorities with whom she visited the crime scene, the witness changed her story. If disclosed, this evidence would have been favorable to petitioner as additional proof of the witness' propensity to lie. The evidence was material because, had it been disclosed, there was a reasonable probability that petitioner would have chosen to go to trial instead of pleading guilty.

Rowe v. State,
704 N.E.2d 1104, 1109 (Ind. App. 1999)

The court granted post-conviction relief from petitioner's convictions for murder and attempted murder. At trial, petitioner's "intoxication and insanity defenses were completely hamstrung by" the testimony of his roommate/lover that petitioner had not ingested any drugs prior to shooting several members of his own family. The state violated *Brady*, however, by failing to reveal that this witness had been convicted of burglary and theft and was on probation at the time of his testimony. This information would have been useful to petitioner in order to establish that the witness had strong motivation to deny taking part with petitioner in the consumption of illegal drugs -- namely, admitting taking drugs would have strengthened the state's case at the witness' probation revocation proceeding scheduled to take place a few months after petitioner's trial.

State v. Allen,
1999 WL 5173 (Tenn. Crim. App. Jan 8, 1999)

Defendants' attempted rape convictions were reversed on the ground that the state breached its *Brady* obligation by failing to comply with a court order to review the alleged rape victim's psychiatric treatment records for exculpatory information. Citing concerns for the alleged victim's privacy, the prosecutor never undertook the order examination, and therefore failed to uncover and disclose evidence indicating that the alleged victim had a documented history of, among other things, psychotic behavior. Because the outcome of defendants' trial "primarily turned on the credibility of the victim," the appellate court concluded that they were entitled to relief. Commenting on the prosecutorial inaction which led to the *Brady* violation in this case, the court stated that "[a] 'hear no evil, see no evil' attitude is inconsistent with prosecutorial responsibilities."

***In re Brown,**
952 P.2d 715 (Cal. 1998)

Writ of habeas corpus granted in capital case where crime lab neglected to provide the defense a

copy of the worksheet attached to defendant's toxicology report, even though the prosecution was unaware of the error. The prosecution was obligated to review the lab files for exculpatory evidence and provide any such evidence to the defense. The worksheet reflected that PCP was present in the defendant's system at the time of the incident, which would have supported his claim of diminished capacity.

State v. Copeland,
949 P.2d 458 (1998)

Conviction of second-degree rape reversed where prosecution failed to disclose that the victim/witness had a prior felony conviction. Such information could have been used by the defense to impeach this key witness, and there is a substantial likelihood that the failure to disclose the prior record affected the jury's verdict.

***State v. Parker,**
721 So.2d 1147 (Fla. 1998)

The court granted sentencing phase relief in this Florida capital case as a result of the state's suppression of evidence from a jailhouse informant indicating that a co-defendant, not petitioner, actually shot and killed the victim. In concluding that this evidence was material, the court noted that petitioner had been sentenced to death by a vote of eight to four, and that the only evidence suggesting petitioner had been the shooter was the testimony of another co-defendant's girlfriend, who claimed petitioner admitted the shooting while the girlfriend was visiting his co-defendant in jail. That co-defendant received a life sentence.

State v. Calloway,
718 So.2d 559 (La. App. 1998)

Defendant's convictions for two counts of first-degree murder were reversed due to nondisclosure by the prosecution and the trial court (which reviewed the information in camera) of statements made by two of the prosecution's primary eyewitnesses. These statements, which were taken shortly after the murders occurred, contradicted the eyewitnesses' trial testimony in several important respects, including the height, weight, age and attire of the assailant. The court explained that the failure to make these statements available to the defense "not only . . . deprived [defense counsel] of the opportunity to cross examine the witnesses about these inconsistencies, but . . . also deprived [defendant] of the opportunity to show the weakness in the [witnesses'] identifications. Further, it might have bolstered the defense theory that the witnesses colluded to cover up what really happened on the night in question."

***State v. Nelson,**
715 A.2d 281, 285-288 (N.J. 1998)

Defendant's death sentence was vacated on the ground that the prosecution violated *Brady* by

failing to reveal that an officer wounded during defendant's shootout with police had served notice of, and later filed, a lawsuit against local authorities alleging that they had failed to provide training and instruction necessary to ensure the safety of police officers in situations such as the one that occurred in this case. The court reasoned as follows concerning the materiality of the officer's allegations to the sentencing phase of defendant's trial: "Had the jury been aware that this crucial witness, the brother of one of the dead police officers, agreed with defendant that inadequate police training had sparked defendant's violent reaction, it is at least reasonably probable that an additional juror or jurors would have found the existence of one or more of defendant's mitigating factors."

State ex rel. Yeager v. Trent,
510 S.E.2d 790 (W.Va. 1998)

Petitioner was entitled to a new trial on murder charge where substantial evidence developed post-trial indicated that a critical prosecution witness had an undisclosed plea agreement.

Little v. State,
971 S.W.2d 729 (Tex. App. 1998)

Defendant's DWI conviction was reversed due to the prosecution's failure to reveal to defense counsel that its expert on blood alcohol content had lost the graphical information necessary to assess the accuracy of the state's blood alcohol analysis. Although this information was not directly exculpatory, it was impeaching in the sense that "the graphical results are necessary to analyze the reliability . . . of the results of the blood test." In concluding that relief was warranted under *Brady*, the court reasoned: "[H]ad the State disclosed the loss of the evidence as soon as it became aware of the fact, defense counsel would have had the option of employing a different trial strategy--one that may have resulted in exclusion of the testimony altogether. * * * The testimony was the only quantitative evidence of appellant's intoxication. * * * Thus, we conclude the State's failure to inform the defense of the lost evidence is a failure to disclose material information which undermines confidence in the outcome of the trial."

People v. Diaz,
696 N.E.2d 819 (Ill. App. 1998)

Defendant, a county jail correctional officer, was convicted of three charges arising out of his alleged involvement in drug dealing within the jail. The court reversed the convictions on the ground that the prosecution violated *Brady* and *Napue* by failing to disclose that an important inmate witness had been given a deal resulting in an illegal concurrent sentence, and by failing to correct that witness' false testimony that he had not received favorable treatment in exchange for his testimony. Rejecting the state's contention that the witness had not been given a deal, the court noted a clear indication in the State's Attorney's undisclosed file that the witness' "illegal sentence was 'OK'd' by a supervisor in the State's Attorney's office because [the witness] had worked as an informant for the State's Attorney's public integrity unit," and explained that "this court does not

have to ignore common sense." "An agreement between the State and its witness," the court continued, "does not have to be so specific that it satisfies the traditional requirements for an enforceable contract." Here, the "circumstances, taken as a whole, indicate that a deal was made between [the witness] and the State" Turning to the prosecution's failure to correct the witness' false denial that a deal existed, the court stated: "We consider the State's conduct to have been outrageous and we will not tolerate it. . . . That [conduct] raises questions about the State's integrity and goes to the heart of the judicial system--confidence in the factfinding process."

State v. Harris,
713 N.E.2d 528 (Ohio App. 1998)

The court of appeals affirmed the trial court's dismissal of felony possession of marijuana charges against defendants following disclosure by a prosecution investigator during trial that he had long possessed an airport log indicating that defendants had not been given baggage claim tickets when they boarded the flight on which the prosecution contended the defendants were smuggling marijuana. This evidence was consistent with defendants', which was that a third party who purchased defendants' tickets and encouraged them to fly to Ohio to look for work had actually placed the marijuana in their luggage without their knowledge. The court of appeals found that the trial court did not abuse its discretion in dismissing the charges rather than imposing a lesser sanction in light of the fact that the information had been purposely withheld, and continuing the case would result in undue prejudice to the defendants.

People v. Johnson,
666 N.Y.S.2d 160 (N.Y.A.D. 1997)

In prosecution for sale of a controlled substance, prosecution erred in not disclosing lab analysis that contained alterations testified to by a police officer. New trial ordered.

People v. Kasim,
66 Cal. Rptr.2d 494 (Cal. App. 1997)

Reversal required where prosecution withheld impeachment evidence that key witnesses had received deals for lenient treatment in their own criminal cases in exchange for their testimony against defendant. Such evidence was material as the result of the trial depended in large part on the credibility of the witnesses.

State v. Blanco,
953 S.W.2d 799 (Tex. App. 1997)

Trial court did not abuse discretion in granting a motion for a new trial due to state's failure to disclose in the prosecution of an aggravated assault case that the defendant's brother had confessed to the crime.

People v. LaSalle,
243 A.D.2d 490 (N.Y.A.D. 1997)

First degree sodomy conviction reversed due to prosecution's failure to disclose that complainant indicated at a prior hearing that she was unfamiliar with her attacker's full name.

Ware v. State,
702 A.2d 699 (Md. 1997)

Reversal required where prosecution failed to disclose that its key witnesses had a motion to reconsider sentence pending which was being held in abeyance until the conclusion of defendant's trial. The Maryland Court of Appeals held that this was an implied deal which should have been revealed.

State v. Kula,
562 N.W.2d 717 (Neb. 1997)

Murder conviction reversed and new trial ordered where prosecution failed to disclose material evidence regarding investigation of other suspects before the first day of trial and trial court abused its discretion and committed plain error by refusing to grant a continuance following disclosure of the evidence to allow counsel to investigate other suspects and prepare a defense.

***State v. Phillips,**
940 S.W.2d 512 (Mo. 1997)

New penalty phase ordered where state withheld audiotape containing hearsay statement indicating that defendant's son claimed sole responsibility for dismembering murder victim. The statement was material because the prosecution specifically argued that defendant deserved the death penalty because she had cut up the victim's body herself, and the sole aggravating circumstance found by the jury was depravity of mind, which was based upon the dismemberment of the victim's body.

People v. Ariosa,
660 N.Y.S.2d 255 (N.Y.Co.Ct. 1997)

Indictment for three counts of forcible rape dismissed where prosecution waited until jury deliberations had begun to turn over an envelope it had possessed for several months containing numerous items directly contradicting the victim's assertions at trial, some of which were written in the victim's own hand. While the court expressed its belief that the prosecution's nondisclosure was not motivated by malice, it nevertheless decided to send a message to the state that its review of discoverable materials must be "a pro-active, vigorous attempt to respond to the requests made by defense counsel or to seek protective orders in circumstances they feel are inappropriate for discovery."

Ohio v. Aldridge,
1997 WL 111741 (Ohio App. 2 Dist. March 14, 1997) (unpublished)

Order granting relief from multiple convictions for forcible rape of a child and gross sexual imposition of a child affirmed where prosecution failed to disclose full length report detailing: numerous instances of highly suggestive questioning techniques employed with child accusers; medical evidence indicating absence of sexual abuse; inability of alleged child victim to identify picture of defendant; and numerous threats made by police investigator against child witnesses in the face of their denials that sexual abuse occurred. Rather than full report, defense counsel were furnished with a redacted version which made no mention of the exculpatory and impeaching information contained in the full length version.

Flores v. State,
940 S.W.2d 189 (Tex. App. 1996)

Murder conviction reversed where prosecution failed to disclose written and verbal statements made by disinterested witness corroborating defendant's contention that victim, who was defendant's roommate, shot herself during an argument with defendant. Because there were no eyewitnesses to the shooting other than defendant her credibility was crucial, and undisclosed statements fully supported defendant's version of events such that, had they been disclosed, the result of the trial would likely have been different.

Ex parte Mowbray,
943 S.W.2d 461 (Tex.Crim.App. 1996)

Murder conviction reversed where prosecution waited until two weeks before trial to disclose blood spatter expert's report tending to support defendant's contention that victim shot himself in bed next to her despite having received the report seven months earlier; prosecution purposely delayed disclosure and caused defense counsel to erroneously believe that the expert who had written the exculpatory report would be a witness for the state and be available for cross-examination.

***State v. Cook,**
940 S.W.2d 623 (Tex.Crim.App. 1996)

Defendant's conviction and death sentence for a 1977 murder reversed where testimony of a key prosecution witness from defendant's first trial was introduced against defendant at his third trial after the witness had died. The introduction of the testimony at the third trial undermined the reliability of defendant's conviction because the prosecution's earlier failure to disclose the witness' prior inconsistent statements to police and to the grand jury had precluded the defense from effectively investigating the witness' testimony and impeaching him with his prior statements.

State v. Oliver,

682 So.2d 301 (La. App. 1996)

New trial ordered where conviction hinged on credibility of two alleged victims who were key prosecution witnesses and prosecution failed to disclose statements made by each near time of offense differed significantly from their trial testimony.

State v. Ponce,
1996 WL 589267 (Ohio App. Oct. 10, 1996)

Rape conviction reversed where prosecution failed to turn over a police report and records from the county children's services authority. The police report contained a description of the alleged rape which was significantly inconsistent with the alleged victim's trial testimony, and the children's services records revealed information supportive of the defendant's theory at trial that the alleged victim's story had been fabricated. The court found that, "[c]ollectively, the prosecution's refusal to disclose the [materials] serve to undermine confidence in the outcome of defendant's trial."

***Craig v. State,**
685 So.2d 1224 (Fla. 1996)

Death sentence reversed and new sentencing hearing ordered where prosecutor elicited false and misleading testimony from codefendant indicating that he was serving two life sentences for his role in the crime and argued severity of codefendant's punishment to the jury when prosecutor knew that codefendant was already in a work release program and would soon be paroled; this information was material because it affected codefendant's credibility and prevented jury from considering actual disparity between sentences of each defendant.

Carroll v. State,
474 S.E.2d 737 (Ga. App. 1996)

Defendant who pleaded guilty to homicide by vehicle and serious injury by vehicle allowed to withdraw plea due to state's failure to disclose that sole state expert had indicated, shortly before defendant entered plea, that calculation of speed at which defendant was driving when she lost control of vehicle was incorrect and that it was not possible to calculate her speed based on data provided by investigating officer, and opined that road conditions contributed to accident.

State v. Womack,
679 A.2d 606 (N.J.), cert. denied, 519 U.S. 1011 (1996)

For purposes of defendant's prosecution for practicing medicine without a license, evidence that defendant told investigator his professional status as doctor of naturopathy and not medical doctor was not probative on state's theory regarding practice of medicine without a license, but was probative on state's alternative theory of holding oneself out as a medical doctor; failure to

disclose such exculpatory evidence to grand jury required dismissal of portion of indictment asserting alternative theory.

Frierson v. State,
677 So.2d 381 (Fla. App. 1996)

Prosecution's failure to disclose police report and deposition of officer regarding incident strikingly similar to shooting incident for which defendant was convicted and which indicated that date of event was day after that indicated by witnesses required new trial; fact that witnesses who testified were alcohol and substance affected and could have mistaken date of incident, along with officer's description and other undisclosed discrepancies in eyewitness testimony, undermined confidence in jury's verdict.

State v. Knight,
678 A.2d 642 (N.J. 1996)

Murder conviction reversed on cumulative impact of suppressed exculpatory evidence which included: state's alleged eyewitness got no prison time on unrelated offense carrying potential 364-day confinement period, despite prosecution's claim that she had no incentive to lie; woman eyewitness who claimed to have spoken to witness just prior to crime had made statement that she was not near crime site at critical time; and FBI agent had testified that he lacked certain information regarding case at time he interrogated defendant when teletype records showed he had received information.

Farmer v. State,
923 S.W.2d 876 (Ark. App. 1996)

New trial ordered where prosecution failed to disclose impeachment evidence that officer upon whose testimony state's case was built was not a police officer at time of trial because he had resigned shortly before after wrecking his police car and filing a false police report to cover up his violation of police rules; prosecutor admitted that decision had been made not to ask witness at trial where he was employed.

People v. May,
644 N.Y.S.2d 525 (N.Y.A.D. 1996)

Convictions for second degree murder, second degree attempted murder and first degree assault reversed where prosecution failed to disclose arrangement with witness who was promised favorable sentence on unrelated charges in exchange for testimony against defendant, and failed to correct witness' false statement to effect that he had not been promised any consideration in return for testimony; nondisclosure was not harmless in light of significance of witness' testimony that he witnessed actions alleged in indictment.

People v. Lantigua,
643 N.Y.S.2d 963 (N.Y.A.D. 1996)

Sole eyewitness' recantation of identification testimony was not incredible or collateral to defendant's guilt or innocence in second-degree murder prosecution; credibility of eyewitness' testimony at trial, not of her recantation, was relevant issue, and there were questions as to conflicting testimony by eyewitness and her brother, and where eyewitness was at time of murder, and People's failure to disclose existence of another witness deprived defense of opportunity to investigate what that witness might have observed and of ability to conduct knowledgeable cross-examination of eyewitness as to her whereabouts, her view of events, distractions caused by presence of another person, and her general credibility.

***Jiminez v. State,**
918 P.2d 687 (Nev. 1996)

Postconviction relief granted in capital case where prosecution failed to disclose evidence of other possible suspects which was relevant to informant's impeachment and to challenge methods and reliability of police investigation, and failed to disclose evidence that informant had assisted police in other cases in exchange for dismissal of charges while police witness and informant both testified informant had no relationship with police in other cases; information could have altered outcome where evidence against defendant was circumstantial, informants' testimony that he overheard defendant's telephone conversation with his father in which he admitted to killing was impeachable, and police did only slight investigation of other possible suspects.

Smith v. State,
471 S.E.2d 227 (Ga. App. 1996)

Conviction for selling crack cocaine reversed where special agent and probation officer had agreement that as part of informant's undercover work, officer would not serve outstanding warrant on informant and informant had crucial role in drug transaction, but state failed to fully disclose relationship with informant upon defendant's request and special agent testified that informant "didn't have any charges pending or anything."

Dinning v. State,
470 S.E.2d 431 (Ga. 1996)

New trial ordered on *Giglio* violation where prosecution failed to disclose evidence of immunity agreements with material prosecution witnesses where evidence against murder defendant was circumstantial and witnesses' testimony was critical to state's case; withheld evidence included videotape of one witness' interview with police which contained protracted discussion of immunity in exchange for testimony.

Shields v. State,

680 So.2d 969 (Ala.Crim.App. 1996)

Murder conviction reversed where state withheld evidence of victim's prior conviction for assault and other information tending to show victim was aggressive and prone to violent acts. This information was material to defendant's claim of self-defense.

Cotton v. Commonwealth,
1996 WL 12683 (Va.App. Jan. 16, 1996)

Statutory burglary and arson convictions reversed where state failed to timely disclose its relationship with a key witness who was incarcerated with defendant prior to trial. In exchange for testimony, prosecutor had agreed to make efforts on the witness' behalf with the parole board, and witness had been furnished with a copy of defendant's statement to police, which he was seen reading prior to defendant's trial.

Brummett v. Commonwealth,
1996 WL 10209 (Va.App. Jan. 11, 1996)

Convictions on five counts of sexual crimes reversed where trial court erroneously failed to order disclosure, after in camera review, of statements of victim and forensic evidence indicating semen found was not that of defendant.

***Hamilton v. State,**
677 So.2d 1254 (Ala.Crim.App. 1995)

Conviction and death sentence reversed where key witness perjured himself with regard to statements he claimed were made by defendant regarding lack of remorse and pride resulting from the murder, and falsely denied the existence of a deal for his testimony. Police had led witness to believe he would be freed from jail in exchange for his testimony, and their actions were taken as part of the prosecution team, despite fact that prosecutor had no knowledge of the deal.

***Padgett v. State,**
668 So.2d 78 (Ala.Crim.App.), cert. denied, 668 So.2d 88 (Ala. 1995)

Capital murder conviction is reversed due to the prosecution's delayed disclosure of test results calling into question whether the blood sample allegedly provided by defendant, which was tied to the victim, had in fact come from defendant. Defendant's opportunity to cross examine the serologist the afternoon he found out about the second test result was inadequate to cure the violation.

People v. Jackson,
637 N.Y.S.2d 158 (N.Y.A.D. 1995)

State violated *Brady* in second-degree murder prosecution by failing for three years to disclose statements by learning-disabled witness who, by time of disclosure, had no substantive memory of many details of events at issue; statements' exculpatory value was evident on their face, as witness stated numerous times that defendant was outside apartment when shots were fired, and witness gave leads as to other possible perpetrators of crime.

***Kills On Top v. State,**
901 P.2d 1368 (Mont. 1995)

Confidence in the death sentence was undermined by the prosecution's failure to disclose evidence related to a key guilt-phase witness that could have been used by the defense to challenge her credibility or argue bias. The undisclosed evidence concerned the witness's criminal history and her allegation that she had been raped by a jailer.

Jackson v. Commonwealth,
1995 WL 710112 (Va.App. 1995)

Conviction for abduction with intent to defile reversed where trial court erroneously failed to order state to disclose victim's statements to police. These statements contained information inconsistent with victim's testimony on several points. Because victim's credibility was the crucial issue in the case, nondisclosure of the statements deprived defendant of the opportunity to explore and expose victim's inconsistencies.

People v. Wright,
658 N.E.2d 1009 (N.Y. 1995)

Alleged assault victim's status as police informant was material and favorable to defendant, and prosecution's failure, despite *Brady* requests, to reveal that alleged victim was informant denied defendant due process. If information had been revealed, defendant, could have presented it as motive for police to corroborate alleged victim's testimony and to disbelieve defendant's claim that she stabbed alleged victim because she believed he was going to rape her. Information also would have refuted state's explanation that victim did not want to go to hospital after stabbing because police would have thought he "did something" due to of his criminal record.

People v. Curry,
627 N.Y.S.2d 214 (N.Y.A.D. 1995)

Motion to withdraw guilty plea granted where state failed to disclose information about investigation into police corruption in violation of due process. Case would hinge on credibility contest of defendant and cop, who allegedly stole defendant's money during arrest, and DA had serious information about the cop's criminal activities.

State v. Laurie,

653 A.2d 549 (N.H. 1995)

New Hampshire constitutional right to present all favorable evidence affords greater protection to criminal defendant than federal *Brady* standard; it requires state to prove beyond a reasonable doubt that favorable evidence knowingly withheld would not have affected verdict.

State v. Gardner,
885 P.2d 1144 (Idaho App. 1994)

Defendant entitled to withdraw guilty plea where prosecutor violated *Brady* by failing to disclose eyewitness statement tending to show that collision and resulting death were caused by tire blowout, not by defendant's fatigue or drug use.

People v. Rutter,
616 N.Y.S.2d 598 (N.Y.App.Div. 1994), opinion adhered to on reargument, 623 N.Y.S.2d 97 (N.Y.App.Div. 1995)

Appellate counsel held ineffective for failing to raise and argue: (1) People's disclosure, on morning after key witness was excused, of transcript of polygraph in which this witness denied knowledge of the homicide as *Rosario* and *Brady* violation; and (2) failure of trial court to allow the witness to be recalled and cross-examined with the transcript.

Bowman v. Commonwealth,
445 S.E.2d 110 (Va. 1994)

Prosecution's failure to earlier disclose police officer's report violated *Brady*; had defendant been aware of discrepancies in police officer's report and officer's failure to mention defendant's facial scars, he could have strengthened his defense of mistaken identity. Trial court abused its discretion in refusing to review in camera police officer's report as requested by defendant.

Jefferson v. State,
645 So.2d 313 (Ala.Crim.App. 1994)

Writ of error coram nobis granted where prosecution failed to disclose prior inconsistent statements of two witnesses who testified to seeing defendant fleeing the scene. Earlier statements identified the fleeing suspect as someone else.

***State v. Gilbert,**
640 A.2d 61 (Conn. 1994)

Capital murder conviction reversed where state failed to disclose, after specific defense request, reports from victims' family and friends in which they said that two other individuals had been in the store earlier the same day---carrying guns and threatening to kill someone.

State v. Perry,
879 S.W.2d 609 (Mo.App. 1994)

State's failure to disclose defendant's girlfriend's pretrial statement violated *Brady* where statement was directly contrary to girlfriend's trial testimony, supported claim that he was "framed" and confessed solely in response to police beating, he specifically requested statement, and defense did not know statement existed until after trial.

State v. Munson,
886 P.2d 999 (Okla.Crim.App. 1994)

New trial granted where state failed to disclose hypnosis of key prosecution witness, withheld over 165 exculpatory photographs and wilfully suppressed hundreds of pages of exculpatory reports.

***Commonwealth v. Green,**
640 A.2d 1242 (Pa. 1994)

Conviction and death sentence reversed where state failed to disclose two out of court statements by co-conspirator in which she claimed she shot and killed a cop.

State v. White,
640 A.2d 572 (Conn. 1994)

State's failure to disclose exculpatory *Brady* material prior to probable cause hearing mandated reversal of convictions and new probable cause hearing even though material was disclosed to defense during jury selection; although defendants made use of evidence, witnesses whose statements were initially not revealed were unavailable at time of trial.

Commonwealth v. Galloway,
640 A.2d 454 (Pa. Super. 1994)

Commonwealth's *Brady* violation in failing to disclose that its key witness' recollection was hypnotically refreshed prior to trial entitled defendant to new trial on one murder where witness was only one to testify that she saw him possess and shoot a gun, and one of two witnesses to testify that she heard defendant confess.

State v. Landano,
637 A.2d 1270 (N.J. Super. App. Div. 1994)

Brady violated where cop's handwritten notes indicating that witness rejected defendant's photo were suppressed, and only an official report saying witness failed to make an ID was disclosed.

State v. Florez,
636 A.2d 1040 (N.J. 1994)

Conviction reversed where state failed to disclose fact that informant had been involved in reverse sting drug transaction, even though defendants knew he was involved in crime, but did not know he was an informer. This was material because the informer played a central role in setting up the drug deal.

People v. White,
606 N.Y.S.2d 172 (N.Y.App.Div. 1994)

Convictions vacated under *Brady* and *Rosario* where undisclosed statement indicated that prosecution witness said he could not identify person who shot victim, while at trial he testified to knowing defendant vaguely and seeing him chase victim and fire weapon at him, and link of defendant to second murder was in significant part through ballistics evidence that same gun was used in both murders.

West v. State,
444 S.E.2d 398 (Ga.App. 1994)

Conviction reversed where State's failure to disclose tape recording of alleged drug deal involving defendant prior to trial violated due process; tape was exculpatory in that it might have shown that informant gave perjured testimony.

Jefferson v. State,
645 So.2d 313 (Ala.Crim.App. 1994)

Brady violated where undisclosed exculpatory evidence was material to murder prosecution because it would have tended to show that someone other than defendant committed crime and would have been relevant to impeach credibility of two witnesses who testified for prosecution.

Ex parte Williams,
642 So.2d 391 (Ala. 1993)

Brady violated where state failed to produce lineup photographs from which victim had identified a person other than defendant, hat which had led police to that person, and statement in which victim had failed to mention supposedly identifying raincoat found in defendant's home.

Burrows v. State,
438 S.E.2d 300 (Va.App. 1993)

Commonwealth's failure, in response to murder defendant's *Brady* request for exculpatory material, to provide defendant with information respecting Commonwealth witness' criminal past

and apparent long-standing relationship with Commonwealth's attorneys, warranted new trial.

People v. Gaines,
604 N.Y.S.2d 272 (N.Y.App.Div. 1993)

Brady violation, which required reversal of convictions, occurred where prosecutor did not disclose cooperation agreement reached between trial assistant's superior and attorney for principal prosecution witness under which witness would not be required to go to prison on pending felony charges if he testified against defendant.

People v. Steadman,
623 N.E.2d 509 (N.Y. 1993)

Convictions reversed under *Brady* where trial assistants, as representatives of DA's office, were chargeable with knowledge of promises made by assistant DA to prosecution witness' attorney for purposes of duty to disclose *Brady* material, and assistants were obligated to clarify record after witness falsely testified that no promises were made.

State v. Avelar,
859 P.2d 353 (Idaho App. 1993)

Prosecution's failure to disclose that party to whom cocaine was delivered could not identify defendant as one who delivered cocaine violated due process and required that conviction be set aside; disclosure would likely have altered defendant's trial strategy significantly.

People v. Garcia,
17 Cal.App.4th 1169 (Cal.App. 1993)

Habeas granted where state failed to disclose evidence that tended to impeach reliability of state's accident reconstruction expert, by showing that expert had used faulty methodology and made errors in other cases.

Swartz v. State,
506 N.W.2d 792 (Iowa App. 1993)

PCR granted where state failed, in violation of *Brady*, to disclose evidence of alleged coperpetrator's threatening and overbearing nature, and where rebuttal witness, who was the only witness available to directly contradict defendant's compulsion testimony, falsely denied existence of a deal for his testimony.

***Garcia v. State,**
622 So.2d 1325 (Fla. 1993)

Conviction and death sentence reversed where prosecution failed to disclose statement to police given by a key prosecution witness which corroborated defendant's assertion that someone else committed the murder. Violation was compounded because prosecution denied the existence of the person defendant identified, despite the fact that police had arrested him and knew he was going by the name defendant gave them.

State v. Lindsey,
621 So.2d 618 (La.App. 1993)

Conviction reversed where state failed to disclose a promise to give accomplice favorable consideration if she testified credibly, and exacerbated the *Brady* violation by failing to correct the witness' assertion at trial that she was not expecting consideration.

State v. Spurlock,
874 S.W.2d 602 (Tenn.Crim.App. 1993)

Murder conviction reversed where prosecution failed to disclose: (1) statements, which had been taken by the sheriff's department, which stated or implied that someone else did the murder; and (2) audio and video recordings of key prosecution witness giving statement incriminating defendant after being promised he would be released from jail.

Jones v. State of Texas,
850 S.W.2d 223 (Tex.App.-Fort Worth 1993)

Conviction and sentence reversed where prosecution failed to timely disclose exculpatory, material information in a victim impact statement which tended to negate the only evidence of defendant's intent to shoot the victim.

Funk v. Commonwealth,
842 S.W.2d 476 (Ky. 1993)

Life sentence (state did seek death penalty) reversed where state failed to turn over various pieces of exculpatory hair and fiber evidence.

Averhart v. State,
614 N.E.2d 924 (Ind. 1993)

Negative results from gunshot residue tests that were withheld by the prosecution during trial were material at sentencing phase, even though they were not at the guilt phase. Although the test results did not establish that petitioner had not failed the fatal shot, "[t]he absence of gunshot residue . . . form[ed] part of a chain of circumstantial evidence pointing away from [petitioner] as the triggerman. Confidence in the manner in which the jury evaluated the aggravating circumstances with respect to [petitioner] cannot be maintained in this atmosphere."

People v. Davis,
614 N.E.2d 719 (N.Y. 1993)

Brady violated by failure to disclose, despite specific request, hospital records of third party whom complainant identified as one of his attackers, indicating that third party was admitted to hospital shortly before the attack.

McMillian v. State,
616 So.2d 933 (Ala.Crim.App. 1993)

Brady violated where prosecution failed to disclose: (1) earlier statements by its key witness claiming to know nothing about the crime and then argued to jury that witness had told same story from the beginning; (2) statement of fellow inmate who overheard key witness discussing plan to frame defendant.

State v. Bryant,
415 S.E.2d 806 (S.C. 1992)

Once defendant has established basis for his claim that undisclosed evidence contains exculpatory material or impeachment evidence, State must produce undisclosed evidence for trial judge's inspection; trial judge should then rule on materiality of evidence to determine whether State must produce it for defendant's use.

***Gorham v. State,**
597 So.2d 782 (Fla. 1992)

Conviction and death sentence vacated where state failed to disclose that key witness had been a paid CI in defendant's case and in others. The fact that the witness had received substantial payments in other cases made the evidence material for challenging his credibility.

People v. Holmes,
606 N.E.2d 439 (Ill.App.1 Dist. 1992), appeal denied, 612 N.E.2d 518 (Ill. 1993)

Conviction reversed where prosecution told jury that chief witness was just an innocent bystander when in fact he participated in the crime, and violated *Napue* by lying about the benefits witness was to receive for his testimony.

People v. Clausell,
182 A.D.2d 132 (N.Y.App.Div. 1992)

Due process violated where prosecution failed to disclose a buy report in a drug prosecution until after conviction since defense specifically requested the report twice, officer's testimony was essential, and report contained useful impeachment material.

People v. Jackson,
154 Misc.2d 718 (N.Y.Sup.Ct. 1992), aff'd, 603 N.Y.S.2d 410 (N.Y.Sup. 1992), appeal denied, 633 N.E.2d 487 (N.Y. 1994)

Convictions for second degree arson and six counts of felony murder reversed where detective and fire department, despite their independent duty to disclose under *Brady*, failed to reveal that it was the expert opinion of the detective that the fire was an accidental electrical fire.

Savage v. State,
600 So.2d 405 (Ala.Crim.App.), cert. denied, 600 So.2d 409 (Ala. 1992)

Manslaughter conviction reversed where prosecutor failed, in violation of *Brady*, to disclose statements of two witnesses who said defendant acted in self-defense; statements were arguably exculpatory and could have been used to impeach the testimony of the witnesses at trial.

Commonwealth v. Moose,
602 A.2d 1265 (Pa. 1992)

Murder conviction reversed where state failed to disclose deal with jailhouse snitch despite a general request by the defense. Defendant's failure to seek criminal records of state witnesses was directly traceable to state's failure to identify the prisoner.

People v. Janota,
181 A.D.2d 932 (N.Y.App.Div. 1992)

Rape conviction reversed due to prosecution's delay in turning over notes of complainant's initial version of the incident which would have brought her credibility into serious question. Counsel found out about the notes after he had cross-examined her for a day and a half, and did not recall her for fear such a move would be seen as harassment.

State v. Knapper,
579 So.2d 956 (La. 1991)

Reversed where prosecution failed to disclose a police report in which eyewitness gave description of murderer's clothes which was opposite that of chief state witness. The report also mentioned another group of men who were committing crimes that night, one of whom was found in possession of the murder weapon.

People v. Godina,
584 N.E.2d 523 (Ill.App. 1991), appeal denied, 591 N.E.2d 26 (Ill. 1992)

Second-degree murder conviction reversed where pending burglary prosecution of state's witness was material and thus subject to disclosure under *Brady* where the witness' testimony assisted

state in convicting defendant.

Commonwealth v. Santiago,
591 A.2d 1095 (Pa.Super. 1991), appeal denied, 600 A.2d 953 (Pa. 1991)

Because the point of the disclosure requirement is to ensure a fair trial, the trial judge had an obligation to disclose to the defense prior inconsistent statements made in camera by prosecution witness.

State v. Davis,
823 S.W.2d 217 (Tenn.Crim.App. 1991)

Drunk driving conviction reversed where state failed to disclose police department memoranda revealing knowledge of incorrect readings, malfunctions, and tampering with intoxilizer machine; although evidence also included police observations of defendant, the intoxilizer was central to the state's case.

Perdomo v. State,
565 So.2d 1375 (Fla.App. 1990)

Trial court should have held *Richardson* hearing on potential *Brady* violation and its potential to prejudice defendant where potentially exculpatory evidence might still be in state custody, even though state did not disclose evidence because it believed it had been stolen.

***Bevill v. State,**
556 So.2d 699 (Miss. 1990)

Conviction and death sentence reversed where defense was not allowed to adduce at trial whether prosecution helped its key witness to have one of his prior convictions expunged in exchange for his testimony.

Ex parte Adams,
768 S.W.2d 281 (Tex.Crim.App. 1989)

Conviction reversed where prosecution suppressed prior inconsistent statements of its key witnesses. These statements seriously eroded the credibility of both witnesses.

Ex parte Brown,
548 So.2d 993 (Ala. 1989)

Conviction reversed where state failed to disclose, until introduction at trial, physical evidence which contradicted victim's statement despite the granting of defense's motion requiring disclosure of tangible evidence expected to be introduced at trial.

Ham v. State,
760 S.W.2d 55 (Tex. App. 1988)

Conviction reversed where state failed to turn over evidence, following *Brady* request, of chief medical examiner's testimony which tended to confirm defense expert's position and draw into question the state's evidence of defendant's guilt.

***State v. Johnston,**
529 N.E.2d 898 (Ohio 1988)

Conviction and death sentence reversed where prosecution failed to disclose evidence which undermined its theory of where the murder occurred and who did it.

Ex parte Womack,
541 So.2d 47 (Ala. 1988)

Conviction reversed where prosecution failed to disclose: (1) transcript of a meeting with a witness who recanted his grand jury testimony and attempted to implicate himself in the crime, only to be dissuaded by his counsel and the district attorney; (2) plea arrangements with two witnesses; (3) police reports and memos which included prior inconsistent statements and jailhouse confessions.

State v. Smith,
504 So.2d 1070 (La.App. 1987)

Defendant should have been permitted in camera inspection of alleged prior statement of victim for material inconsistencies or *Brady* information, in light of defendant's specific requests for such statements, which were based on differences between opening statement and victim's testimony.

State v. Osborne,
345 S.E.2d 256 (S.C.App. 1986), aff'd as modified, 353 S.E.2d 276 (S.C. 1987)

Nondisclosure, despite timely *Brady* motions prior to trial, of two recorded statements by State's primary witness, who was a heavy alcohol and drug user, had long criminal record, and had changed his story to an eyewitness account in exchange for near immunity, denied defendants due process, where verdict was questionable, and defense counsels' cross-exam might well have shifted weight of evidence to establish reasonable doubt had State complied with motion.

State v. Wyche,
518 A.2d 907 (R.I. 1986)

Prosecutor's failure to disclose existence of blood test, which indicated that sexual assault victim's blood-alcohol concentration was .208, was deliberate, violated due process and *Brady*, and

required new trial, where prosecutor knew of test results on evening before testimony of physician, who knew about test, and where prosecutor made no disclosure of test until guilty verdict.

Bloodworth v. State,
512 A.2d 1056 (Md. 1986)

Under *Bagley*, exculpatory material does not have to be in the prosecutor's possession. Here, fact that prosecutors were not in physical possession of detective's report of another possible suspect with respect to three offenses was immaterial to whether failure to disclose report to defendant was *Brady* violation.

Cipollina v. State,
501 So.2d 2 (Fla.App. 1986), review denied, 509 So.2d 1119 (Fla. 1987)

State committed *Brady* violation by failing to inform defense counsel of name and address of witness who obtained alibi information for defendant from codefendant in prison, even though State had informed defense that same witness had inculpated codefendant.

People v. Buckley,
501 N.Y.S.2d 554 (N.Y.Sup. 1986)

Updated rap sheet on prosecution witness, showing disposition of a charge not appearing on sheet given to defense was material which prosecution was obligated to disclose to defense.

Knight v. State,
478 So.2d 332 (Ala.Crim.App. 1985)

Evidence that both defendant and rape victim were A and H secretors (substances in saliva), and that person who smoked cigarettes found ground out on victim's card table was an H secretor, was clearly favorable to defendant's claim of innocence, and State's failure to disclose such evidence was a due process violation.

***Binsz v. State,**
675 P.2d 448 (Okl.Crim.App. 1984)

Convictions and death sentence overturned where prosecution tried to avoid telling the jury of key witness's leniency deal by keeping the witness ignorant of the bargain struck with her counsel.

Commonwealth v. Wallace,
455 A.2d 1187 (Pa. 1983)

Prosecution failed to correct false statements by its key witness and suppressed parts of his

criminal record. Defense made numerous requests for full disclosure of the witness's criminal record and the prosecution repeatedly failed to deliver.

Granger v. State,

653 S.W.2d 868 (Tex.App. 1983), aff'd, 683 S.W.2d 387 (Tex. 1984), cert. denied, 472 U.S. 1012 (1985)

Life sentence reversed where prosecutor, judge, and witness's counsel all failed to disclose existence of a deal that changed witness's sentence from death to life. Also, because prosecution failed to correct the witness's testimony regarding the deal, her testimony from the first trial was not admissible at the second, after she refused to testify, because defendant's right to cross-examine her had been violated.

State v. Perkins,

423 So.2d 1103 (La. 1982)

Reversed under *Brady* where State failed to disclose statement of eyewitness, which substantially corroborated defendant's version of shooting, despite defendant's request of a copy of any statements of any person interviewed by agent of State in connection with subject matter of case. Statement might have affected outcome as to either guilt or punishment.

People v. Angelini,

649 P.2d 341 (Colo.App. 1982)

Where defendant requested tapes of prosecution's interviews with key prosecution witness, prosecution's failure to disclose that witness had been hypnotized on morning witness testified required new trial.

State v. Goodson,

277 S.E.2d 602 (S.C. 1981)

In prosecution for housebreaking, grand larceny and safecracking, state's failure to disclose existence of roll of film showing a person other defendant on premises where crime occurred deprived defendant of a fair trial, in that film could possibly cast serious doubt on credibility of state's only witness implicating the defendant.

State v. Fullwood,

262 S.E.2d 10 (S.C. 1979)

Where defendant pled self-defense when victim attacked him with a knife and cut him, where investigating officer, who was asked for disclosure, falsely told counsel that he had no information beneficial to defendant, and where prosecutor argued several times that victim had no knife although prosecutor had knife in his possession during the trial, concealment of the knife deprived

defendant of fundamental fairness in his trial.

Deatrick v. State,
392 N.E.2d 498 (Ind.App. 1979)

New trial ordered where, in response to defendant's request, prosecutor and codefendant denied existence of a "deal" for codefendant's testimony, and on direct exam prosecutor elicited denial from codefendant that any promises for his testimony were made. Prior to trial prosecutor made promises and wrote a letter to parole board. This could have affected verdict, especially considering eyewitnesses' were inability to identify faces of perpetrators and prosecutor's repeated emphasis of codefendant's sincerity.

Dozier v. Commonwealth,
253 S.E.2d 655 (Va. 1979)

Conviction reversed where prosecutrix had made written statement which did not refer to alleged rape and did not refer to defendant by name. Statement was constitutionally material to charges, in that it affected credibility of the witness, even though the written account of the abduction was substantially consistent with the prosecutrix's testimony at trial. Failure of Commonwealth to disclose pursuant to defendant's request required new trial.

V. MILITARY CASES

United States v. Winningham,
2006 WL 2266827 (A.F. Crim. App. July 26, 2006) (unpublished)

Brady violation found in rape case where prosecution failed to disclose identity of and statement by a witness who was told by defendant, sometime after the alleged offense, that the sexual encounter had been consensual and that the victim had been awake, contrary to her allegations.

United States v. Stewart,
62 M.J. 668 (A.F. Crim. App. 2006)

Prosecution violated *Brady* in rape case by belatedly disclosing the alleged victim's medical records which indicated a wide variety of medical conditions and drugs which could have provided an alternative explanation for the symptoms she displayed after drinking a beverage provided by defendant. The prosecution theory was that defendant intentionally drugged the victim and then raped her after she was unconscious. Although there was a suggestion of a type of "date rape" drug found in the victim's urine sample, it was too small to be considered a "positive" result. The defense did not receive the medical records until after the prosecution's case in chief had concluded. The remedy offered – a new opening argument, re-cross of the victim, and stipulated testimony by the prosecution toxicologist – was inadequate to cure the harm in light of the defense's explanation about the ways its strategy would have been different had it possessed

the records earlier.

United States v. Mahoney,
58 M.J. 346 (C.A.A.F. 2003)

In court-martial proceedings for use of cocaine, the government violated *Brady* by failing to provide the defendant with a letter that had been written by a command staff judge advocate criticizing the prosecution's expert witness for his testimony in prior court-martials and questioning whether his employment should be continued. In particular, the letter complained about the expert's lack of enthusiasm for the military's drug testing program and his criticism of studies that other forensic toxicologists rely upon. In finding that disclosure of this letter was required, the appeals court rejected the government's defense that the trial prosecutor did not know of the letter. The court concluded that "it would have become known to him by the exercise of reasonable diligence," and that appropriate inquiry would have led to discovery of the letter. Because the letter arguably created a significant motive for the expert to testify positively about lab procedures and underlying scientific studies, cross-examination about the letter could have enhanced the defense case which centered on attacking the procedural regularity and reliability of urinalysis.

United States v. Sebring,
44 M.J. 805 (N.M.Crim.App. 1996)

Under *Kyles*, prosecutor's obligation to search for favorable evidence known to others acting on the government's behalf extends to information concerning levels of quality control at government's controlled substances testing laboratory. Failure of prosecuting officer to discover and disclose report indicating that laboratory had experienced significant quality control problems required reversal of defendant's conviction.