CASES REMANDED OR HEARING GRANTED BASED ON BRADY/NAPUE CLAIMS
(Updated Sept. 27, 2009)
*** capital case**

I. UNITED STATES SUPREME COURT

***Cone v. Bell,**
___ U.S. ___, 129 S. Ct. 1769 (2009)

Capital habeas case remanded for determination of materiality in sentencing of evidence suppressed by the state of the defendant's drug addiction and impairments at the time of the offenses. The defendant, a Vietnam veteran, robbed a jewelry store. After a high-speed chase, he fled on foot shooting a police officer and a bystander. The next day, he beat an elderly couple to death in their home. During his trial, he presented an insanity defense supported by two experts, who testified the defendant suffered from acute amphetamine psychosis as a result of his drug addiction. The state established in cross that both experts were relying solely on the defendant's self-reports. In rebuttal, the state presented the testimony of the defendant's live-in girlfriend, who testified she had never seen him use drugs. In arguments, the state asserted that the defendant was not a drug addict and was merely a "drug seller." Following conviction, the defense presented no evidence in sentencing but argued the defendant's drug addiction was mitigating and should be considered. The state had failed to disclose statements from witnesses who had seen the defendant several days before the murders, who described the defendant as being "drunk or high," "wild eyed," and the like. In addition, multiple police bulletins describing the defendant as a "heavy drug user" were included in the undisclosed documents. A number of these were sent by a police officer that testified at trial that the defendant had no needle marks on him at the time of arrest. Also undisclosed were notes of a police interview of the state's rebuttal witness conducted several days after the crimes, which revealed "discrepancies between her initial statement and her trial testimony."

> In sum, both the quantity and quality of the suppressed evidence lends support to Cone's position at trial that he habitually used excessive amounts of drugs, that his addiction affected his behavior during his crime spree, and that the State's arguments to the contrary were false and misleading.

Id. at 1784. The Court agreed with the Sixth Circuit that the evidence was immaterial to the jury's finding of guilt. With respect to sentencing, however, the Court noted:

> There is a critical difference between the high standard Cone was required to satisfy to establish insanity as a matter of Tennessee law and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case. . . . It is possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone's drug

> use played a mitigating, though not exculpating, role in the crimes he committed. The evidence might also have rebutted the State's suggestion that Cone had manipulated his expert witnesses into falsely believing he was a drug addict when in fact he did not struggle with substance abuse.

Id. at 1785-86. The lower courts had not "fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone's drug addiction–especially if attributed to honorable service of his country in Vietnam–was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death." *Id.* at 1786. Remanded to the District Court.

Youngblood v. West Virginia,
547 U.S. 867 (2006)(per curiam)

Defendant convicted of sexual assault, brandishing firearm and indecent exposure on testimony of three women. Defendant moved to set aside verdict based on evidence investigator uncovered in "graphically explicit note" "squarely" contradicting State's evidence and "directly" supporting] defense that sexual activity consensual. Note apparently shown to state investigator, but after "alleged[ly]" reading it, investigator returned it and told person "to destroy it." Without discussing *Brady*, trial court denied new trial because "note provided only impeachment," not exculpatory evidence, state investigator did not find it important because he did not provide it to prosecutor, and State not at fault for not disclosing it. State supreme court affirmed, but two justices dissented, concluding note material and suppressed. Because defendant presented "federal constitutional *Brady* claim" to state appellate and trial courts, certiorari granted, judgment vacated and matter remanded so Court would "have the benefit of the views" of full state appellate court.

II. UNITED STATES COURTS OF APPEALS

United States v. Salem,
578 F.3d 682 (7th Cir. 2009)

Witness intimidation case remanded to trial court due to inadequate record on *Brady* claim. Just prior to sentencing, the government disclosed a plea agreement from another case that indicated the alleged victim had been involved in a murder (along with the defendant entering that plea agreement) for which he had never been charged, even though it was potentially a capital case. From the plea agreement, it appeared that the alleged victim had made a detailed statement about that murder that had never been disclosed. Case remanded to ensure that all evidence disclosed and to reevaluate the claim.

***Smith v. Secretary, Dept. of Corrections,**
572 F.3d 1327 (11th Cir. 2009)

Under AEDPA, capital case remanded for cumulative materiality consideration of six *Brady* claims. Defendant was convicted, in 1983 and again on retrial in 1990, of robbery and murder of a cab driver. The defendant's fingerprints were on the phone used to call the cab. A witness testified that when the cab arrived the defendant got in the backseat while his codefendant got in the frontseat. The defendant's uncle testified that a pistol was missing from his house and witnesses testified the defendant had a pistol in the hours before the robbery. An eyewitness, who lived near the crime scene, testified that he saw the defendant get out of the backseat with a gun and saw him shoot the cabdriver, who was running away. Other witnesses testified the defendant made incriminating statements afterwards. Expert testimony established the presence of lead residue consistent with bullets in the defendant's pocket. During the 1990 trial, the eyewitness admitted that he had received leniency on seventeen unrelated felony charges he had pending in exchange for his 1983 testimony. The codefendant had pleaded guilty to second degree murder and testified for the state that the defendant was the shooter. The only defense witness testified that the codefendant told him, while in confinement, that the defendant was not the shooter. The Eleventh Circuit held that six undisclosed items must be considered in a cumulative materiality analysis: (1) Evidence that the eyewitness sought assistance with pending probation violations and a grand theft charge in exchange for his 1990 testimony. The state court never addressed this evidence. (2) Evidence that the eyewitness was concerned in 1990 that he might be charged with sexually abusing a minor and sought the prosecutor's assistance with this charge. Because this evidence provided a "motivation to testify," the state court's determination that it was not impeachment material was unreasonable. (3) Police reports that the eyewitness was initially listed as a suspect. While this evidence was not material in itself, the state court did not consider it cumulatively. (4) Evidence from prosecutor notes and police reports that the witness who described seeing the defendant get in the backseat of the cab provided a physical description of a man 30-75 pounds lighter than the defendant and remained "not positive" of his identification even after identifying the defendant from a photograph. While this evidence was not material in itself, the state court did not consider it cumulatively. (5) Evidence that the eyewitness approached the codefendant in a holding cell prior to trial, showed hip a map of the crime scene, and offered to help him with the case. While this evidence was not material in itself, the state court did not consider it cumulatively. (6) Evidence that the statement of one of the witnesses testifying that the defendant came to her house and made incriminating statements after the shooting was inconsistent with statements of other witnesses about the defendant's whereabouts at the time. The Court held that, in considering materiality:

> [I]t is essential that the process not end after each undisclosed piece of evidence has been sized up. The process must continue because *Brady* materiality is a totality-of-the-evidence macro consideration, not an item-by-item micro one. . . .
>
> Cumulative analysis of the force and effect of the undisclosed evidence matters because the sum of the parts almost invariably will be greater than any individual part.

Id. at 1346-47. Here, the state court failed to conduct a cumulative analysis. Even assuming it had, the state court did not consider the evidence that the eyewitness assistance with the possible

sexual abuse charges in 1990 in that analysis. Remanded for the cumulative analysis.

Starns v. Andrews,
524 F.3d 612 (5th Cir. 2008)

In manslaughter case where petitioner argued self-defense, petitioner was entitled to merits review of *Brady* claim that was based on the suppression of witness's grand jury testimony describing the victim's very disturbed mental state shortly before her death. (The witness was called before a grand jury that did not indict petitioner and was not called by the prosecution at trial.) Although defense counsel had been told that the witness reported that the victim had "acted strangely," the prosecutor downplayed any potential mental health issues in the case. On this record, the lower court erred in finding that the federal petition was untimely on the ground that petitioner should have investigated the potential *Brady* violation earlier.

Jeffries v. Morgan,
522 F.3d 640 (6th Cir. 2008)

In attempted rape and murder case, district court was required to review the entire record in assessing petitioner's *Brady* and insufficiency of the evidence claims. (The *Brady* claim involved the failure of the prosecution to disclose information about an initial suspect that the authorities "cleared." Although nothing withheld was itself material exculpatory evidence, petitioner argued that disclosure was nevertheless required because further investigation would have led to inculpatory admissions by the suspect that the prosecution failed to discover.)

United States v. Rodriguez,
496 F.3d 221 (2nd Cir. 2007)

In prosecution for conspiracy to possess and distribute cocaine, a remand to the district court was necessary for a determination of the substance of a government witness's lies during her initial interview with law enforcement authorities, in order to determine whether the prosecution's failure to disclose the substance of the lies prior to trial violated *Brady*. Although the prosecutor elicited during the witness's testimony that she had initially lied about everything, this would not be sufficient to comply with *Brady* if it was incomplete or if defense counsel was denied the opportunity to effectively use the impeaching or exculpatory information.

Spencer v. Klauser,
70 F.3d 1280 (9th Cir. 1995) (unpublished)

Habeas case attacking guilty plea to child molestation charges remanded for evidentiary hearing where substantial evidence tended to show that medical reports indicating no signs of sexual abuse existed at time of plea but were not disclosed by the state. This nondisclosure, coupled with defendant's questionable mental competency created the danger of a guilty plea by an innocent man, and further inquiry was required.

Walker v. City of New York,
974 F.2d 293 (2nd Cir. 1992), cert. denied, 113 S.Ct. 1387 (1993)

In a §1983 action, plaintiff's complaint alleging failure of the municipality to train its assistant DA's on fulfilling *Brady* obligations, with result that the DA's suppressed impeachment evidence and failed to reveal lineup misidentification, was sufficient to state a claim against the municipality.

United States v. Bryan,
868 F.2d 1032 (9th Cir.), cert. denied, 493 U.S. 858 (1989)

In mail fraud case, vacating conviction and remanding to the district court for a determination whether defendant was denied access to documents to which he was entitled under Rule 16(a)(1)(C) or *Brady*. On remand, the district court is to determine whether the prosecutor had knowledge of and access to documents in the possession of closely related federal investigatory agencies that were either material to Bryan's defense or belonged to him within the meaning of Rule 16(a)(1)(C). In addition, the district court should determine whether such documents, if they exist, were *Brady* evidence, and, if so, whether they were material within the test announced in *Bagley*.

***Moore v. Kemp,**
809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054 (1987)

Whether a key prosecution witness was incarcerated at the time of his testimony against a capital defendant, or had been promised immunity for his testimony, would be material if not disclosed. Because review of the prosecution witness's probation file, in the context of the entire record, convinced the court of appeals that it contained information highly relevant to petitioner's *Brady*/*Giglio* claim, the state habeas court, in denying petitioner's counsel access to that information, denied petitioner the opportunity to prove his claim. It therefore followed that the state habeas hearing was not full, fair, and adequate and so the findings produced by that hearing regarding the *Brady*/*Giglio* claim were not entitled to deference. The case was remanded for an evidentiary hearing on the claim.

Levin v. Katzenbach,
363 F.2d 287 (D.C. Cir. 1966)

Claim for relief based on breach of prosecutor's duty to disclose is not dependent on whether a more able, diligent or fortunate counsel might possibly have discovered the evidence on his own. Remand for evidentiary hearing on claim that prosecution failed to disclose evidence that called into question the testimony of prosecution witnesses.

III. U.S. DISTRICT COURTS

***Williams v. Schriro,**
423 F.Supp.2d 994 (D. Ariz. 2006)

In highly circumstantial capital murder case, petitioner was entitled to an evidentiary hearing on his claim that the prosecution violated *Brady* by withholding evidence regarding the existence of an alternate suspect. The state court procedural bar on untimeliness grounds was not consistently applied, and petitioner had diligently presented his claim to state court. **Note:** The petition was ultimately denied. See *Williams v. Schriro*, 2007 WL 552230 (D.Ariz. Feb 21, 2007).

Steward v. Grace,
362 F.Supp.2d 608 (E.D. Pa. 2005)

Petitioner convicted of murder was entitled to evidentiary hearing on his *Brady* claim involving an allegation that the prosecution suppressed evidence that the coat allegedly belonging to the killer contained hair that did not match petitioner. It needed to be resolved whether a search warrant indicated the purpose for which petitioner's hair was taken. If it did, petitioner would have been on notice of the testing and not entitled to relief. A request for DNA testing of the hair was denied, because it would not prove actual innocence or provide the basis for relief on any claim. **Note:** The petition was ultimately denied. See *Steward v. Grace*, 2007 WL 2571448 (E.D. Pa. Aug. 30, 2007).

Lopez v. Massachusetts,
349 F.Supp.2d 109 (D. Mass 2004)

In kidnapping-murder case, petitioner was entitled to an evidentiary hearing, and was authorized to seek discovery, on his *Brady* claim which involved suppression of evidence about an alternative suspect. **Note:** The petition was ultimately denied. See *Lopez v. Massachusetts*, 480 F.3d 591 (1st Cir. 2007).

United States v. Anderson,
2003 WL 21544241 (D. Kan. July 2, 2003) (unpublished)

In federal criminal case involving Medicare kickbacks and conspiracy, petitioner was entitled to an evidentiary hearing on his claim that the prosecution suppressed evidence that one of its witnesses had a prior relationship with federal law enforcement officials. **Note:** The § 2255 petition was ultimately denied. *See United States v. Anderson*, 2004 WL 624966 (D. Kan. 2004).

Reid v. Vaughn,
2003 WL 924080 (E.D. Pa. March 4, 2003) (unpublished)

In post-AEDPA case, petitioner was entitled to an evidentiary hearing on his claim of *Brady* error premised on the failure of the prosecutor to reveal that a key prosecution witness had given an inconsistent description of the crime shortly before his testimony and then reverted to the original

version after receiving stern warnings from the prosecutor. (The *Brady* claim was discovered when post-conviction counsel read of the incident in a non-fiction book.) The petitioner did not fail to develop the facts in state court given that he presented a statement written by a defense investigator who had interviewed the prosecution witness and received confirmation from him about the allegation, and petitioner had requested, but was denied, an evidentiary hearing. Petitioner was not guilty of lack of diligence simply because he did not present the state court with affidavits from the prosecutor or the prosecution witness. The state court's ruling that petitioner was not entitled to an evidentiary hearing because he failed to present sufficient evidence to support his allegations was not imposition of an adequate state procedural rule given that the rule was not consistently applied. **Note:** The habeas petition was ultimately denied. See *Reid v. Vaughn*, 279 F.Supp.2d 636 (E.D. Pa. 2003).

Lavallee v. Coplan,
239 F.Supp.2d 140 (D. N.H. 2003)

In case involving charges of sexual abuse of a minor, the state court's finding that the prosecution had no duty to produce records in the possession of the New Hampshire Department of Health and Human Services, Division of Children, Youth and Families ("DCYF") contradicted the broad language used by the Supreme Court in *Kyles v. Whitley*, and was "contrary to" *Pennsylvania v. Ritchie*, where the Supreme Court made no distinction between the prosecution and a state protective service agency that possessed exculpatory evidence sought by the defense. Although neither *Pennsylvania v. Ritchie* nor *Kyles v. Whitley* requires prosecutors to survey every state agency to determine whether the agencies possess potentially exculpatory evidence, where, as in this case, "the state has a statute pertaining to the disclosure of confidential state records, and the trial court has ordered the prosecutor to produce those records to the defense, the disclosure obligations of *Brady v. Maryland*, and its progeny, apply." The suppression of the relevant records until jury deliberations were in progress denied Lavallee of the opportunity to effectively utilize the materials; it is "unreasonable to suggest that Lavallee should have asked the trial court to re-open the evidence at that point for additional cross-examination." Lavellee's motion to dismiss the indictment following revelation of the records was adequate to preserve the *Brady* claim. Materiality will be determined by review of the records and consideration of the entire record. Relief will be precluded, however, if the state trial court's finding that the records were cumulative, and therefore not material, was not contrary to Supreme Court precedent or involving an unreasonable application of such precedent. **Note:** The district court ultimately denied relief. See *Lavallee v. Coplan*, 374 F.3d 41 (1st Cir. 2004).

Herbert v. Government of Virgin Islands,
2001 WL 1691546 (D. Virgin Islands Dec. 10, 2001) (unpublished)

Defendant was entitled to an evidentiary hearing on his claim that the prosecution suppressed a tape recording or transcript in which the identity of the real robber-killer was revealed. The trial court erred in denying the Brady claim on the grounds that defendant had not requested the information and that the prosecution had not been actually aware of it. The case is remanded in

order to give defendant "the opportunity to establish the location of the tape or transcript, whether the Government had possession of it, whether the prosecutor knew or should have known of it and otherwise attempt to establish his Brady claim."

***Bell v. Haley,**
2001 WL 1772140 (M.D. Ala. Dec. 5, 2001) (unpublished)

In Alabama death penalty case, petitioner was entitled to an evidentiary hearing on his claim that the prosecution suppressed evidence that witness Austin, who testified that petitioner confessed to committing the murder alone, had made a prior statement indicating that petitioner had claimed that prosecution witness Hubbard had fired the initial shot. Petitioner was also entitled to a hearing on his allegation that the prosecution failed to disclose a deal made with Austin in exchange for his testimony against petitioner, and on whether the state failed to correct false testimony by Hubbard and Austin. "One obvious purpose of the rule announced in [Brady and its progeny] is to prevent the prosecution from doing what it may have done here: presenting to the jury a theory of the case that it may have known was incomplete or misleading and suppressing the evidence that would enable the jury to undertake informed and meaningful deliberations." Materiality regarding the above evidence is measured by whether or not there is a reasonable probability of a more favorable sentence. Given new evidence proffered by petitioner, he is also entitled to an evidentiary hearing on his claim that the prosecution suppressed evidence of a deal with prosecution witness Hubbard. Although the claim was procedurally defaulted, cause and prejudice were established.

IV. STATE COURTS

LaPointe v. Commissioner of Correction,
966 A.2d 780 (Conn. App. 2009)

Murder, arson, and sexual assault case remanded (in second state habeas proceedings) following trial court's erroneous grant of the respondent's motion for a judgment of dismissal concluding that the defendant failed to establish a prima facie case. The state's failure to disclose detective notes about the burn time of the fire in light of other evidence concerning the defendant's whereabouts at the time established a prima facie showing requiring additional proceedings.

People v. Frantz,
868 N.Y.S.2d 757 (N.Y.A.D. 2008)

Hearing ordered on *Brady* claim in post-conviction review of second degree murder and robbery case. An accomplice, who plead guilty to robbery and a reduced sentence, testified that he saw the defendant handling a gun and saw both the defendant and his codefendant shoot the victim. A hearing was warranted because the accomplice had made pretrial statements that he did not see the defendant with a gun, that the alley where the shooting took place was dark, and that he saw only the codefendant shoot the victim. Hearing to address questions of fact regarding whether

this prior statement was disclosed to the defense and materiality.

Stanley v. State,
995 So.2d 599 (Fla. App. 2008)

Based on petitioner's allegations that State withheld evidence of agreement it made with its witness in exchange for witness's testimony against petitioner, trial court erred in its summary denial of claim, and matter remanded for evidentiary hearing or other relief.

Garcia v. State,
291 S.W.3d 1 (Tex.App. 2008)

In case involving, inter alia, charges of aggravated assault with a deadly weapon, the trial court abused its discretion in denying defendant's motion for a new trial without an evidentiary hearing on defendant's *Brady* claim. The claim was supported by an affidavit from an investigator who claimed that the investigator used by the prosecutor revealed post-trial that the victim awoke from his coma with no memory of who shot him, that the prosecution team worked with the victim to reconstruct his memory, and that the victim was informed that he faced criminal charges if his memory did not become more clear. An affidavit from defendant's attorney explaining that the prosecutor's investigator refused to sign an affidavit and denied making the statements attributed to him in the other affidavit did not defeat the need for a hearing.

Edwards v. State,
985 So.2d 698 (Fla. App. 2008)

Lower court erred in summarily denying *Brady* claim that alleged the prosecution failed to disclose: (1) a note to the trial judge requesting leniency for petitioner's co-defendant; (2) co-defendant's pretrial statement that the gun used during the robbery was a "cap gun"; (3) video surveillance from the crime scene; and (4) a forensic report noting that a positive identification of petitioner's footprint could not be made.

Ward v. State,
984 So.2d 650 (Fla. App. 2008)

In case involving a no contest plea to careless or negligent operation of a vehicle causing death or serious injury while license was revoked, the lower court erred in summarily denying petitioner's *Brady* claim which alleged that the prosecutor withheld a report by the medical examiner indicating that a highway patrol officer had stated that the other car had been driving on the wrong side of the road at the time of the accident. It was improper for the lower court to reject the claim on the ground that records from a related civil suit established that petitioner could have obtained the report at issue had he exercised due diligence given that the civil records were never made part of the record in this case. (Nor did the lower court observe the procedures required for taking judicial notice of court documents.) That the medical examiner had been listed by the

prosecutor as a witness in a discovery exhibit also did not defeat the claim.

***Commonwealth v. Dennis,**
950 A.2d 946 (Pa. 2008)

Remanding for consideration of several claims, including claim that the Commonwealth violated *Brady* by failing to disclose activity sheets addressing police interviews with the victim's aunt and uncle that indicated that eyewitness Howard told them that two other previously unmentioned individuals witnessed the crime and that Howard knew the assailants as classmates from a high school that petitioner had not attended. According to petitioner, disclosure of this evidence would have permitted further impeachment of Howard, an important witness at trial.

***Sanders v. State,**
285 S.W.3d 630 (Ark. 2008)

Granting permission for lower court to entertain coram nobis petition alleging *Brady* claim where prosecution witness allegedly admitted at post-conviction hearing that he had lied when he claimed at trial not to have made a deal with the prosecutor in exchange for his testimony against petitioner and the trial prosecutor corroborated the witness's admission. Given the significance of this witness's testimony at trial, good cause was shown to allow petitioner to proceed with the claim.

***Rivera v. State,**
995 So.2d 191 (Fla. 2008)

Lower court erred in summarily rejecting *Brady*/*Giglio* claim raised in successive petition alleging that jailhouse informant falsely testified that he received no deal for his testimony. In support of the claim, petitioner pointed to a recently discovered plea agreement as well as jail receipts, a law enforcement synopsis of a conversation with the informant, and a law enforcement memorandum of an interview with informant corroborating the information in the plea offer. Petitioner further contended that the new information established that the inmate was working as a confidential informant for law enforcement at the time he gave evidence against petitioner. Because the State did not sufficiently refute the allegations, petitioner was entitled to an evidentiary hearing on his *Brady*/*Giglio* claims.

Hempstead v. State,
980 So.2d 1254 (Fla. App. 2008)

In burglary case, petitioner was entitled to further review of *Brady* claim based on suppression of wife's arrest statement. The lower court erred in concluding that petitioner could not establish prejudice on the ground that the wife's trial testimony was cumulative to testimony by the chief prosecution witness. In fact, the wife's prior statement not only could have been used to impeach her trial testimony, but it also could have been used to cast doubt on the chief prosecution

witness's testimony.

Boyd v. United States,
908 A.2d 39 (D.C. 2006)

In kidnaping-murder case where prosecution theory was that defendant was one of four assailants, and defense theory was that three men not including the defendant committed the crime, case is remanded to trial court for it to order prosecution to disclose statements by eyewitnesses to the kidnaping who saw less than four assailants. If the defendant believes the statements are material, he is to file a motion to vacate the conviction under *Brady*. The prosecution had withheld the statements on the ground that the witnesses may not have been in a position to see all four men. The trial court had agreed that disclosure was not required and denied a defense request to review the statements *in camera*, noting that the prosecution's theory was not that the four men were standing together for anyone to see. At trial, however, one of the prosecution witnesses claimed to have seen four assailants outside the car. "In arguable cases, the prosecutor should provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for *in camera* inspection. Further, when the issue appears to be a close one, the trial court should insist upon reviewing such material, and should direct disclosure to the defense if, considering (to the extent possible) the anticipated course of the trial, there is a reasonable probability that disclosure may affect the outcome."

Ex Parte Ramirez,
2006 WL 3735390 (Tex. Crim. App. Dec. 20, 2006) (unpublished)

In burglary case, remand to trial court to consider *Brady* claim where prosecutor had not yet responded to petitioner's allegation that the State suppressed evidence that a witness could not identify him as the perpetrator of the offense, and then falsely represented to the defense, and the trial court, that the witness was medically unavailable to testify.

Missouri v. Parker,
198 S.W.3d 178 (Mo. App. 2006)

Petitioner convicted of being an accessory in a drive-by shooting was entitled to an evidentiary hearing on his claim that the prosecution violated *Brady* when it suppressed statement from a witness identifying the car from which shots were fired as a car other than one petitioner was in, and statements from witnesses in the home who testified that the victims were outside and ran inside after shooting. Such evidence would have supported his claim that he was in a car that drove by the house at issue, but that shots were not fired from the car he was in and that the house was dark with nobody outside when he drove by.

Armstrong v. State,
2006 WL 1626726 (Tenn. Crim. App. Jun. 8, 2006) (unpublished)

Writ of *coram nobis* is proper vehicle for litigating *Brady* claim if State suppressed evidence. Remanding for determination of whether State suppressed evidence, whether claim could have been discovered with due diligence, and whether Petitioner was "without fault" in delay of bringing claim. Underlying claim involves two medical records indicating that because victim's eyes were taped shut she never saw her attackers.

State v. Seabrookes,
2006 WL 1060502 (N.J. Super. April 24, 2006) (unpublished)

Remand for further proceedings where it appeared that the prosecution was aware during defendant's trial of information undercutting its theory of the case – that defendant and his indicted co-defendant committed two murders together. Shortly after defendant's conviction, the prosecution moved to dismiss the indictment in the co-defendant's case based on new information indicating he was not involved. This evidence may have been material, among other reasons, because a key eyewitness had identified without hesitation both defendant and the co-defendant as the perpetrators in one of the shootings.

State ex re. Walker v. State,
920 So.2d 213 (La. 2006)

Petitioner's discovery of allegedly suppressed evidence allows untimely filing. Remand to determine if State has been prejudiced by events beyond its control. If not, *Brady* claim should be reached on merits.

Commonwealth v. Daniels,
837 N.E.2d 683 (Mass. 2005)

In homicide case, petitioner was entitled to post-conviction discovery in connection with his motion for new trial which was premised on newly discovered information implicating another person in the murder and providing a motive for this new person and another to harm the victim. The Commonwealth had a continuing duty to disclose exculpatory information, despite the trial court's denial of defendant's pretrial discovery motions, especially where counsel made very specific requests for information that were related to the new information. Given the specificity of the request a lower standard for determining the appropriateness of a new trial should be used and the defendant "need only demonstrate a substantial basis exists for prejudice from the nondisclosure"

People v. Forster,
2005 WL 2234760 (Cal. App. Sept. 15, 2005) (unpublished)

Where defendant was convicted of pointing a gun at a police officer based on the testimony of the officer, and defendant admitted he had a gun but claimed he was running away and that the officer falsely accused him to cover up his improper shots at defendant, the trial court failed to conduct

the proper *Brady* analysis when it determined that an incident in which the officer shot at a suspect allegedly attempting to rob him was undiscoverable because the incident was eleven years old and had not been recorded in the officer's file (although the court noted the age of the incident should be considered in materiality analysis).

Johnson v. State,
617 S.E.2d 252 (Ga. App. 2005), rev'd on other grnds., State v. Johnson, 630 S.E.2d 377 (Ga. 2006)

In drug possession case where defense was that the drug was planted in defendant's car and witnesses described suspicious actions of a man, Cedric Bridges, in and around defendant's car, lower court needed to determine whether the confidential informant was Bridges, rather than simply a tipster. If it was Bridges, this fact would be crucial to the defense, and that it should be disclosed in the event of a retrial.

Polk v. State,
906 So.2d 1212 (Fla. 2005)

In sexual abuse case, remand for consideration of petitioner's claims, including *Brady* claim, where petitioner post-conviction obtained DNA results excluding him as source of semen found at the crime scene. Defendant had no duty to exercise due diligence in reviewing the DNA test results before the time the state actually furnished them.

Freshwater v. State,
160 S.W.3d 548 (Tenn. Crim. App. 2004)

In robbery-murder case where victim was shot with two different guns and the defense was that the accomplice was solely responsible for the crime which the defendant was unaware in advance would even occur, remand for evidentiary hearing on allegations that the prosecution suppressed evidence that the accomplice admitted sole responsibility to a snitch.

State v. French,
85 P.3d 196 (Hawai'i 2004)

Trial court abused its discretion in refusing to conduct an *in camera* review of the complainant's probation records and then releasing to defendant relevant information pertaining to the complainant's truthfulness and honesty. Although the records are confidential under state law, any statutory privilege must bow to the defendant's constitutional rights.

Manning v. State,
884 So.2d 717 (Miss. 2004)

Evidentiary hearing was warranted on numerous claims, including claims that the prosecution

knowingly presented false testimony, coerced a witness into providing false testimony, and suppressed exculpatory evidence. The false testimony/coercion allegation concerned a prosecution witness who testified that he lived across the street from the victims and observed petitioner force his way into the victims' apartment on the day of the capital murders. Newly discovered evidence, including suppressed police reports, indicated that the witness did not live across the street from the victims' apartment until after the murders. The witness explained in an affidavit that he was pressured by the police to implicate petitioner. Other suppressed evidence included a finding that a shoe print found in blood at the victims' apartment was a size 8, which was too small to have been made by petitioner, and information implicating a third party in the offense.

People v. Ledbetter,
794 N.E.2d 1067 (Ill. App. 2003)

Lower court erred by summarily dismissing post-conviction relief petition which alleged that the prosecution violated *Brady* by failing to disclose that the police officer who testified that petitioner had confessed to him was under investigation for corruption at the time of his testimony.

Abatti v. Superior Court,
4 Cal.Rptr.3d 767(Cal. App. 2003)

Trial court erred in failing to perform *in camera* review of former police officer's personnel records where the former officer was a key prosecution witness and defense counsel had obtained information that the witness had left the police department due to accusations of acts of moral turpitude rather than because of a disability as he'd claimed in an interview with the defense investigator. Defense counsel further averred that counseling records in the personnel file would document prior acts of dishonesty. The information sought by defendant was thus material under *Brady* because it could impeach the former police officer, who was to testify that defendant made admissions to him that would corroborate the victim's story.

Bustillo v. Johnson,
63 Va. Cir. 125, 2003 WL 22518501 (Va. Cir. Ct. 2003)

In a murder case where the defense at trial was that another party was the actual assailant, police reports that provided some corroboration to the defense theory were exculpatory and should have been disclosed. The case is remanded for a limited hearing on the question of materiality.

Guzman v. State,
868 So.2d 498 (Fla. 2003)

In capital murder case where prosecution witnesses lied about the benefits received by a witness, remand for further consideration of petitioner's *Giglio* claim is required because the lower court erroneously applied the less-defense friendly materiality standard of *Brady*. Where false testimony

has been presented, the proper question "is whether there is any reasonable likelihood that the false testimony could have affected the court's judgment as the factfinder in this case. If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required. The State bears the burden of proving that the presentation of the false testimony was harmless beyond a reasonable doubt."

Moss v. State,
860 So.2d 1007 (Fla. App. 2003)

Circuit court erred by summarily denying a motion for post-conviction relief in murder case where agents from the FBI crime laboratory were important prosecution witnesses and the motion alleged that the prosecution failed to disclose reports finding that the FBI crime laboratory used shoddy practices, that some its agents testified falsely, that errors in testing had occurred, and that flawed scientific reports had been issued. The circuit court erroneously looked only to testimony favorable to the state and then concluded that ample evidence supported petitioner's convictions exclusive of the testimony of the FBI agents. On remand, the circuit court is to hold an evidentiary hearing or evaluate the weight of the newly discovered evidence and all the evidence presented at trial.

Taylor v. State,
848 So.2d 410 (Fla. App. 2003)

Petitioner who pleaded guilty to driving under the influence manslaughter was entitled to a remand on her *Brady* claim where the lower court summarily denied the claim even though there was nothing in the record (at least as provided to the appellate court) to conclusively refute the petitioner's allegations. Petitioner set forth a viable *Brady* claim by alleging that the state failed to reveal the results of the blood test from the other driver involved in the accident which would have shown that the driver had alcohol and drugs in her system, as well as statements by a witness that indicated the driver of the other car was intoxicated, driving erratically, and talking on a cell phone at the time of the offense. Petitioner further alleged that she would not have entered the guilty plea but for the state's suppression of the favorable evidence.

Patel v. State,
108 S.W.3d 82 (Mo. App. 2003)

Petitioner who was convicted of various counts of assault and armed criminal action was entitled to an evidentiary hearing on his claim that the prosecution failed to disclose the full extent of its bargain with the key prosecution witness (who was the man petitioner allegedly hired to kill two people). A parole revocation transcript did not conclusively refute petitioner's allegation that the witness received a concurrent sentence in an unrelated case as part of his agreement to testify against petitioner. (The witness received a 20-year sentence for his role in the crimes for which petitioner was charged, a fact known to petitioner's jury. The witness was also sentenced to 7 years in separate parole revocation proceedings with that sentence to run concurrent to the

20-year sentence.) Given the importance of the witness's credibility in the prosecution's case against petitioner, the court finds a reasonable probability of a more favorable verdict had "the jury had been informed that, as alleged, the state recommended a seven-year sentence from an unrelated case be served concurrently with the twenty-year sentence."

Bergren v. State,
2003 WL 446813 (Minn.App. Feb. 25, 2003) (unpublished)

Petitioner was entitled to an evidentiary hearing on his claim that the prosecution violated Brady by failing to disclose a quid pro quo plea agreement with his accomplice where: although the victim's identification of petitioner as the shooter was equivocal, the accomplice's testimony on this point was absolute; the accomplice denied at trial that his plea agreement required his testimony against petitioner; and at a post-trial proceeding the accomplice's attorney asserted that the guilty plea had indeed been "negotiated around" the state's desire to obtain the accomplice's testimony against petitioner.

***State v. Reynolds,**
2002 WL 46988 (Ohio App. 7 Dist Jan. 8, 2002) (unpublished)

Ohio death row inmate was entitled to an evidentiary hearing on his allegation that the state withheld information relating to bias of two witnesses at petitioner's trial. Petitioner submitted evidence supporting his allegation that the two key prosecution witnesses had, contrary to their trial testimony, agreed to testify only after being promised money by the state. Assuming the suppressed deals can be established, there is a reasonable probability of a more favorable outcome given that the evidence against petitioner was circumstantial, and the state's case rested primarily on the "colorful and incriminating" testimony of the two witnesses. Further, the alleged deals cast doubt on the testimony of other prosecution witnesses. The trial court erred by evaluating the *Brady* claim under a sufficiency of the evidence test.

***Floyd v. State,**
808 So.2d 175 (Fla. 2002)

Florida death row inmate Floyd was entitled to an evidentiary hearing on claims that the government withheld exculpatory evidence where the record did not conclusively refute Floyd's factual allegations. (Floyd alleged that the State withheld the following information: (1) a witness's statement that she saw several white men force their way into the victim's house around the time the State estimated the victim had died; (2) evidence that the man who accompanied Floyd when he was arrested provided deceptive responses on his polygraph; and (3) evidence which would have been used to impeach one of Floyd's former cellmates who testified that Floyd confessed to the crime.)

Gorman v. State,
619 N.W.2d 802 (Minn. 2000)

Post-conviction relief petitioner was entitled to an evidentiary hearing on his claim that, he was prejudiced in his murder trial, at which he claimed self-defense, by the state's nondisclosure of evidence that the victim had another name and a prior criminal history under that name; the evidence that the victim was boasting that he had just been released from prison would have been admissible to bolster petitioner's credibility, and the evidence might have changed petitioner's decision to testify.

State v. Lindsey,
715 So.2d 544 (La. App. 1998)

Petitioner, who had been convicted of second degree murder, was entitled to an evidentiary hearing on his *Brady* claim where apparently undisclosed police statements by prosecution witnesses supported petitioner's defense of intoxication and conflicted with the witnesses' trial testimony.

Dalbosco v. State,
960 S.W.2d 901 (Tex. App. 1997)

Trial court erred in failing to include for appeal the personnel file of a police officer who testified against appellant. Appellant alleges the file contains information indicating the officer was dismissed for lying and thus may have been material impeachment evidence. Case abated to trial court to include file.

Roberts v. State,
881 P.2d 1 (Nev. 1994)

Trial judge's failure to review confidential informant file before ruling on defendant's Brady claim, that the file contained material information relevant to entrapment defense and state should have disclosed file, required remand for in camera review of file.

Duncan v. State,
575 So.2d 1198 (Ala.Crim.App. 1990), cert. denied, 575 So.2d 1208 (Ala. 1991).

State's failure to disclose, despite specific request, legal pad on which police department employees recorded information about the case violated due process to the extent that the pad contained exculpatory information. Remanded for determination.

State v. Pollitt,
508 A.2d 1 (Conn. 1986)

Fact that claimed *Brady* material was disclosed during, and not after, trial did not preclude the application of *Brady* obligation to disclose, which declared the right to material and favorable evidence was part of the fundamental right to a fair trial. Remanded for hearing on *Brady* issue.

***Smith v. Zant,**
301 S.E.2d 32 (Ga. 1983)

Petitioner entitled to hearing on his claim that *Napue* and *Giglio* were violated where prosecution told jury that witness was not promised anything for his testimony when in fact he was threatened with death penalty if he failed to testify, and given life sentence in exchange for his testimony.