

## SUCCESSFUL BRADY/NAPUE CASES

(Updated September 6, 2017)

\* capital case

### I. UNITED STATES SUPREME COURT

#### **\*Wearry v. Cain**

**136 S.Ct. 1002 (2016) (per curiam)**

United States Supreme Court summarily reverses Louisiana court's denial of postconviction relief on *Brady* claim, holding that state prejudicially failed to disclose material evidence including inmates' statements casting doubt on the credibility of the testimony of the state's key witnesses. Wearry was convicted by a jury of capital murder and sentenced to death, largely on the basis of testimony of two inmates, Scott and Brown, both of whose testimony was significantly different from the various statements they had provided to law enforcement prior to trial. There was no physical evidence linking Wearry to the crime and Wearry presented an alibi defense at trial. After Wearry's conviction became final, he obtained information that the prosecution had withheld (1) police reports that indicated that one inmate had reported that Scott "wanted to make sure [Wearry] gets the needle cause he jacked over me" and another inmate lied to investigators at Scott's urging, stating that he had witnessed the murder; (2) information that Brown had twice sought a deal to reduce his sentence in exchange for testifying against Wearry, and that the police had told him they would talk to the DA; and (3) medical records on Hutchinson, an individual whom Scott had reported ran into the street to flag down the victim on the night of the murder, pulled the victim out of the car, and shoved him into the cargo space and got into the cargo space himself. The medical records indicated that nine days before the murder Hutchinson had undergone knee surgery and would not have been able to run, bend, or lift substantial weight. The new evidence is sufficient to undermine confidence in the guilty verdict. "The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi." 136 S.Ct. at 1006. "Scott's credibility, already impugned by his many inconsistent stories, would have been further diminished had the jury learned that Hutchinson may have been physically incapable of performing the role Scott ascribed to him, that Scott had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated Wearry to settle a personal score. Moreover, any juror who found Scott more credible in light of Brown's testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister's relationship with the victim's sister—as the prosecution had insisted in its closing argument—but by the possibility of a reduced sentence on an existing conviction." *Id.* at 1006-07. The Louisiana court improperly evaluated the materiality of each piece of withheld evidence rather than all of them cumulatively.

#### **\*Smith v. Cain,**

**565 U.S. 73 (2012)**

In Louisiana death penalty case, reversing denial of post-conviction relief where the prosecution failed to disclose statements by the only eyewitness to the five murders that he was unable to

describe or identify any of the three assailants. The suppressed evidence was material given that the eyewitness provided the only evidence linking the defendant to the murders and the undisclosed statements directly contradicted the eyewitness' emphatic identification of the defendant at trial as the first gunman to enter the room where the killings occurred. That the eyewitness made inconsistent statements on the night of the murder suggesting that he could identify the first gunman did not render the undisclosed statements immaterial. Nor did the State's speculation that the undisclosed statements could have been made because of the eyewitness' fear of retaliation. (Dissent by Thomas.)

**\*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 an 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**

**United States v. Cessa,**  
**861 F.3d 121 (5th Cir. 2017)**

In conspiracy to launder drug proceeds case, appeals court vacates judgment of district court on *Brady* claim and remands for further consideration of the claim. Defendant was indicted and charged with counts of conspiring to launder drug proceeds with the Zetas, a Mexican gang, by buying, training, and racing quarter horses in the U.S. and Mexico. He was convicted and sentenced to 200 months in prison and forfeiture of his personal property and a \$60 million money judgment. Prior to trial, he moved that the government provide all interview memoranda, and the district court granted the motion. The court reviewed the interview memoranda and denied defendant access to those relating to a particular witness, stating that nothing in them was helpful to the defense. The Court of Appeals holds that the district court did not consider all three prongs of *Brady* when determining not to disclose the memos; it is clear both from the court's language and its timing that it considered only whether the interview memos were favorable, not whether they were material. Materiality of impeachment evidence may become clear only during or after a witness's testimony and materiality of exculpatory evidence may become clear only upon a full review of trial evidence. Furthermore, the district court clearly erred in finding that the interview memos were not favorable to the defense. Some of the witness's statements were exculpatory: they supported defendant's theory that he did not buy the horses using Zeta money and instead bought the horses with his own money and gave them to the Zetas as gifts because he feared the Zetas, and that he did not join the conspiracy at all. Some of the witness's statements in the memos were

inconsistent with his trial testimony that the Zetas delivered money to defendant and that defendant was “friends” with one of the Zetas rather than afraid of him. Instead of addressing the second and third prongs of *Brady* (suppression and materiality), the Court of Appeals remands for full assessment of the memos and the interview notes associated with them (which the government contends not to have thoroughly reviewed).

**\*Thomas v. Westbrooks,**

**849 F.3d 659 (6th Cir. 2017) (cert. pet. filed Aug. 17, 2017)**

Court of Appeals reverses district court’s denial of Thomas’s habeas corpus petition filed under 28 U.S.C. § 2254 challenging his Tennessee conviction and death sentence. Thomas was convicted of felony murder arising from the shooting of an armored truck driver in the course of a robbery. Prior to his trial on this case, he was tried and convicted in federal court of interfering with interstate commerce, carrying a firearm in relation to a crime of violence, and being a felon in possession of a firearm, all stemming from the same event. Thomas’s girlfriend testified at both trials, indicating that Thomas was present at the scene of the shooting and connecting him to other circumstantial evidence in the case. After the federal case, but before the state case, the FBI paid Thomas’s girlfriend \$750, and this information was contained in the file the FBI provided to the state prosecutors, but it was not provided to the defense. Thomas’s girlfriend testified at trial that she did not receive any reward money, and the prosecutor emphasized to the jury that she testified simply because it was the right thing to do. On appeal, the state conceded that the prosecution suppressed the information about the \$750 payment and that the information was favorable to Thomas, but argued that it was not material evidence and so the suppression was not prejudicial. The Sixth Circuit holds that the district court’s conclusion that the evidence was not material because there was substantial evidence linking Thomas to the crime is a mischaracterization of *Brady* requirements – the question is whether the guilty verdict is worthy of confidence in the absence of the suppressed evidence, and the court concludes that it is not. Thomas’s girlfriend’s testimony was vital to the prosecution’s case because she provided the only information linking Thomas to the scene, to his codefendant, and to transactions cited as circumstantial evidence of his involvement in the shooting. Without the evidence of the \$750 payment, Thomas had no basis upon which to impeach her on the basis of her financial interest. “[I]f the jury had been presented with evidence of an unusual payment to an individual who can be fairly characterized as an accessory after the fact, it might well have chosen to disregard her testimony against Thomas as untrustworthy and unreliable.” 849 F.3d at 665.

**\*Dennis v. Sec’y, Pa. Dep’t of Corr.,**

**834 F.3d 263 (3d Cir. 2016) (en banc)**

In post-AEDPA capital murder case, Third Circuit affirms grant of habeas corpus relief by district court on *Brady* claim. Third Circuit holds that Pennsylvania state court unreasonably disregarded the impeachment value of a receipt that discredited a government’s key witness’ testimony concerning when she saw Dennis, unreasonably applied *Brady* in concluding that the documents suggesting that a third party committed the murder were immaterial, and acted contrary to clearly established federal law in adding an admissibility requirement to *Brady* where none exists. Dennis

was convicted of killing a high school student, based largely on eyewitness testimony. Dennis presented an alibi defense, along with evidence of mistaken identity and good character. He and others testified that he was on a bus and at singing practice at and around the time of the murder. The prosecution withheld (1) a time-stamped receipt concerning when a witness picked up her welfare benefits, which corroborated the time which the defense theorized the witness saw Dennis on a bus; (2) a police activity sheet that indicated that one of the eyewitnesses who testified against Dennis had provided information inconsistent with her testimony; and (3) documents regarding a tip from an inmate that stated that a third party had identified himself as the killer. The Pennsylvania Supreme Court's decisions denying the *Brady* claims rested on unreasonable conclusions of fact and unreasonable applications of clearly established law, or were contrary to Supreme Court precedent for the following reasons:

- (1) With regard to the receipt, the state court's findings that the receipt was cumulative of other testimony and also had no bearing on the alibi were unreasonable determinations of fact and an unreasonable application of *Brady*. The state court failed to recognize the impeachment value of the receipt, which provided documentary evidence that the witness's trial testimony about the time she saw Dennis was false. It would have corroborated Dennis's testimony that he saw the witness when he got off the bus – the witness's correct testimony “would have strengthened Dennis's and his father's testimony that Dennis had been with his father that afternoon and was on the bus at the time of the murder.” 834 F.3d at 287. This was sufficient to demonstrate the receipt's favorability under *Brady*, particularly because this was the only disinterested witness who otherwise corroborated the testimony of Dennis and his family and friends. The receipt was material – “Transforming . . . a disinterested individual with documentary support, into a defense witness, meets the requirements of *Brady* materiality because it would have necessarily bolstered Dennis's alibi defense narrative and ‘put the whole case in . . . a different light.’” 834 F.3d at 295. The police had the receipt and therefore so did the prosecution; the defense had no affirmative due diligence obligation under *Brady* to obtain the receipt independently when the prosecution team had it: “the concept of ‘due diligence’ plays no role in *Brady* analysis.” 834 F.3d 291.
- (2) With regard to the police activity sheet, one of the eyewitnesses made a statement to her aunt and uncle that she recognized the perpetrators from high school, and this statement was not disclosed to the defense at trial. The state court's denial of the *Brady* claim articulated the correct standard for materiality but applied the standard inconsistently with Supreme Court precedent. The statement could have been used as impeachment to undercut the eyewitness's credibility in a manner not duplicated by other challenges the defense was able to level at trial and the prosecution argued that the eyewitness's testimony was “enough to convict” Dennis. 834 F.3d at 299. “Armed with the activity sheet, defense counsel could have impeached [the witness] in a manner that very well may have led her to admit she recognized the perpetrators from her high school,” 834 F.3d at 301, as well as to challenge the adequacy of the police investigation and to mount an “other suspect” defense at trial.
- (3) With regard to the documents relating to an inmate's statement that a third person had confessed to the killing, the state court's conclusion that the documents were not material

was an unreasonable application of *Brady*, and its conclusion that the documents were inadmissible was contrary to clearly established law, which does not have an admissibility requirement for disclosure purposes. The statement that someone else committed the crime was exculpatory. The statement “was not fruitless [as found by the state court], it was simply not rigorously pursued.” 834 F.3d at 307.

The cumulative materiality of the withheld documents “commands” relief. 834 F.3d at 311-12.

**NOTE:** This case also interprets *Richter*’s “gap-filling” of theories upon which the state court denied relief as “reserved for those cases in which the federal court cannot be sure of the precise basis for the state court’s ruling. . . . It does not permit a federal habeas court, when faced with a reasoned determination of the state court, to fill a non-existent ‘gap’ by coming up with its own theory or argument, let alone one, as here, never raised to the state court.” 834 F.3d at 282 (citing *Premo v. Moore*, 562 U.S. 115 (2011)). “[W]hen the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that ‘could have supported’ the state court’s decision.” 834 F.3d at 283.

**Fuentes v. Griffin,**  
**829 F.3d 233 (2d Cir. 2016)**

Second Circuit reverses denial of habeas corpus relief by district court in non-capital case charging rape and sodomy of the first degree, which had held that the New York state court’s denial of Fuentes’ *Brady* claim was neither contrary to nor unreasonable application of clearly established federal law. Second Circuit holds that Fuentes’ *Brady* claim should have been granted on the ground that the state court’s rejection of the *Brady* claim was an unreasonable application (under 28 U.S.C. §2254(d)(1)) of the materiality standard established by *Kyles v. Whitley*, 514 U.S. 419 (1995). The prosecution suppressed a record of a psychiatric evaluation of the complainant that impeached her testimony and supported the defendant’s version of events. The record was relevant because the issue was not whether an alleged rapist was the defendant, but rather whether the event was a consensual sexual encounter rather than a sexual assault. It was material because the complainant provided the only evidence that what occurred was a crime and the withheld document was the only evidence by which the defense could have impeached the complainant’s credibility as to her mental state. The suppressed psychiatric record indicated that the complainant reported depression, suicidal thoughts, frequent crying spells, and family problems dating back two years and cannabis abuse for a year before the alleged assault. That record could have confirmed Fuentes’ testimony that the complainant was acting erratically on the night of their encounter and also explained the complainant’s crying during her testimony. “Based on clearly established fundamental rights and principles, we think it indisputable that if the prosecution has a witness’s psychiatric records that are favorable to the accused because they provide material for impeachment, those records fall with *Brady* principles, and that the Supreme Court has so recognized.” 829 F.3d at 247 (citing, *e.g.*, *United States v. Abel*, 469 U.S. 45, 52 (1984); *Williams (Michael) v. Taylor*, 529 U.S. 420, 427 (2000)). The trial court’s determination that the record did not contain anything exculpatory, and the state appellate court’s conclusion that the report supported the prosecution’s case because it corroborated the complainant’s testimony that she was upset that she had put herself in danger by walking home alone, were unreasonable because they

relied upon a misreading of the withheld report, which indicated that the complainant's symptoms were long-standing and not caused by immediate events, and that they may have provided an explanation for the complainant's reporting the incident as a crime that corroborated the defense theory that the complainant was angry and upset about being rejected. The state's conclusion that the suppression of the report was not prejudicial because the evidence against the defense was overwhelming was also unreasonable because the evidence against the defendant was not overwhelming, as there was no physical or medical evidence that the complainant had been subjected to force, and the complainant's testimony was contrary to that of others in several respects.

**Carrillo v. City of Los Angeles,**  
**798 F.3d 1210 (9th Cir. 2015), cert. denied, 136 S.Ct. 1671 (2016)**

Ninth Circuit affirms district court's denial of officer-defendants' motion to dismiss plaintiff-exonerees' § 1983 lawsuit on qualified immunity grounds where "first, the law at the time of the investigations clearly established that police officers had to disclose material, exculpatory evidence under *Brady*, and second, that any reasonable officer would have understood that *Brady* required the disclosure of the specific evidence allegedly withheld." 798 F.3d at 1213. The evidence withheld included both impeachment and exculpatory evidence. The impeachment evidence included statements to police officers by a testifying eyewitness that the eyewitness saw the shooter only in profile, asked to be hypnotized because he could not remember what the shooter looked like, and recalled the shooter did not have a mustache unlike every person in the photo lineup; statements to police officers by another testifying eyewitness that he selected the defendant in the lineup because of his face, but the hair of the perpetrator was curlier; statements by another eyewitness that he selected several other photographs from a "gang book" before selecting defendant's, and that the officer had told him the others could not be the perpetrator but defendant was. The exculpatory evidence included evidence of a previous attempt on the victim's life by another perpetrator.

**Comstock v. Humphries,**  
**786 F.3d 701 (9th Cir. 2015)**

In post-AEDPA case involving conviction for possession of stolen property, Comstock was entitled to habeas relief due to the prosecution's failure to disclose a material and exculpatory statements made by the alleged victim, Street. The state's theory was that Comstock or another person stole Street's wrestling championship ring and Comstock pawned it; the defense at trial was that Comstock found the ring outside Street's apartment. Comstock was sentenced to 10-15 years under Nevada's habitual offender statute. Street testified at trial that he never loaned the ring, it never fell off accidentally, and although he had misplaced it in his apartment, he did not recall losing it outside, and that Comstock was a maintenance worker and had been inside his apartment. In a presentencing statement, Street wrote that he had told the prosecutor and investigating detective prior to trial that he was not sure the ring had been stolen at all; he remembered having taken the ring off outside his apartment and putting it on the ground or air conditioner, and that he didn't remember putting it back on. The prosecution had not disclosed this fact to the defense, and

argued in the opposition brief to the defense motion for new trial that Street had told the prosecution only that it was “possible” he could have taken the ring off, but that in fact that did not happen. The trial court denied the motion for new trial. The Court of Appeals held that Street’s statements were favorable to Comstock: they impeached Street’s credibility about how he handled his ring and cast serious doubt as to whether there was a crime at all (the Nevada Supreme Court did not make a clear determination about this). The statements were suppressed—there is no evidence to the contrary, only the prosecution’s arguments in the opposition to the motion for new trial (the Nevada Supreme Court did not make a factual finding regarding what the state knew prior to trial). The statements were material, both as impeachment of Street’s testimony and as exculpatory, particularly in light of the prosecution’s closing argument. Defense counsel attempted to cross-examine Street about the possibility he had dropped the ring, but the cross-examination fell flat, and the disclosure of Street’s pretrial statements would have transformed this cross. The prosecution argued that Street never would have lost the ring because it was too important to him, and that therefore there must have been a crime; but Street’s pretrial statements called that into question as well, and would have made the prosecution’s case significantly weaker. The Nevada Supreme Court’s findings to the contrary were an unreasonable application of *Brady*.

**Armstrong v. Daily,**  
**786 F.3d 529 (7th Cir. 2015)**

Seventh Circuit affirms district court’s denial of officer-defendants’ motion to dismiss plaintiff-exoneree’s § 1983 lawsuit on qualified immunity grounds where the officers intentionally destroyed evidence:

Though *Brady* did not announce a duty to preserve evidence, a duty to refrain from bad-faith destruction flows necessarily, and obviously, from its familiar holding that suppression of material exculpatory evidence violates due process. [Citing *Brady*.] *Brady* would mean nothing if, as [the officer] argues, a prosecutor could comply with its command by deliberately destroying exculpatory evidence and then disclosing the fact of destruction to the defense. [¶] Under [the officer’s] argument, a reasonable police investigator could have believed in 1980 that if he possessed exculpatory evidence, he had an obligation to disclose it to the defense unless he deliberately destroyed it first. No reasonable police officer or prosecutor could have believed that in 1980. That is not a reasonable interpretation of *Brady*, and neither [the officer] nor the partial dissenting opinion has directed us to any courts that have adopted it. Under the law in 1980, including at least *Killian* and *Brady*, prosecutors had a clearly established legal duty not to act in bad faith to destroy evidence, which if suppressed or destroyed, “creates a reasonable doubt that did not otherwise exist.” See *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

**Bies v. Sheldon,**  
**775 F.3d 386 (6th Cir. 2014)**

As in *Gumm v. Mitchell*, 775 F.3d 345 (6th Cir. 2014), the Sixth Circuit affirmed the grant of relief in this formerly capital case from Ohio, finding that the prosecution violated *Brady* by failing to



disclose favorable, material information which undermined confidence in petitioner's convictions for the murder and attempted sexual assault of a ten year old boy in an abandoned building. Lacking any physical evidence to connect him to the crime, "[t]he State's case against Bies rested almost entirely upon an unrecorded statement that Bies allegedly made to the police following a prolonged and highly suggestive custodial interrogation." 775 F.3d at 388. Discovery conducted during petitioner's federal habeas proceedings yielded "hundreds of pages of evidence," including "a substantial collection of tips, leads, and witness statements relating to other individuals who had been investigated for the murder – two of whom had apparently confessed to the crime [including one suspect named Roger Cordray], and neither of whom was ever ruled out as the perpetrator." 775 F.3d at 394-95. After Bies was granted abeyance to present the new *Brady* claim to the state court, the state court declined to adjudicate the claim on the merits, resulting in *de novo* review in federal court. After noting that the first two elements of the *Brady* analysis – suppression and favorability – were not disputed, the Sixth Circuit quickly determined that the previously undisclosed information had also been "material" under *Brady*. The facts regarding Cordray alone, had they been disclosed, would have provided a compelling counter-narrative to the State's theory of the case and could have created a reasonable doubt as to Bies' guilt in the minds of the jurors. "Considering the evidence collectively," the court concluded, "it is painfully clear that the result of the trial would likely have been different had the suppressed evidence been disclosed to the defense." *Id.* at 403.

**Gumm v. Mitchell,**  
**775 F.3d 345 (6th Cir. 2014)**

The Sixth Circuit affirmed the grant of relief in this formerly capital case from Ohio, finding that the prosecution violated *Brady* by failing to disclose favorable, material information, and that the prosecutor committed additional misconduct by eliciting and emphasizing unreliable evidence of petitioner's propensity to engage in violent and distasteful acts. Petitioner and his co-defendant, Michael Bies (see *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014)), were convicted and sentenced to death (both men's death sentences were later set aside pursuant to *Atkins v. Virginia*) in connection with the 1992 murder and attempted sexual assault of a ten year old boy in an abandoned building in Cincinnati. Because there was no physical evidence linking petitioner to the crime, the prosecution's case was built upon witness testimony placing him near the scene around the time of the crime and a confession provided after extensive interrogation. Examining petitioner's claim *de novo* because it had been disposed of in state court on the basis of lack of subject matter jurisdiction, the Sixth Circuit began by describing a vast array of undisclosed evidence related to other individuals who had been investigated for the murder, including evidence that Roger Cordray had confessed to the crime. Although some of this evidence would have been inadmissible at trial, much of it, including Cordray's confession and law enforcement's apparent failure to pursue a wide array of leads, would have been admitted. With regard to materiality, the Sixth Circuit found that, "[c]onsidering the quality and quantity of the evidence that the state failed to disclose, the potential for that evidence to have affected the outcome of Petitioner's trial is inescapable." 775 F.3d at 370. The prosecutor also committed misconduct by eliciting specific language from two lay witnesses in an "intentional and deliberate manner," including claims that petitioner had "fucked a horse" and had been "so hard up he'd do it to anyone," – and by using that language

to build an unreliable and improper propensity argument. The court concluded that “the case against petitioner was so weak and the prosecutor’s misconduct so ‘pronounced and persistent’ that it ... had a ‘probably cumulative effect upon the jury which cannot be disregarded as inconsequential.’” *Id.* at 385 (quoting *Berger v. United States*, 295 U.S. 78, 89 (1935)).

**Amado v. Gonzalez,**  
**758 F.3d 1119 (9<sup>th</sup> Cir. 2014)**

In gang-related homicide case where petitioner was convicted under an aiding and abetting theory, he was entitled to habeas relief due to the prosecution’s failure to disclose that the key eyewitness against petitioner was on felony probation for a robbery and had been a member of a gang affiliated with the targeted victims. The state appellate court’s finding that the evidence about the witness was not newly discovered was an unreasonable determination of the facts in light of the evidence before it. In addition, the state appellate court’s ruling that petitioner was required to show that he could not have discovered the evidence through the exercise of due diligence was contrary to clearly established Supreme Court precedent. “Especially in a period of strained public budgets, a prosecutor should not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations. No *Brady* case discusses such a requirement, and none should be imposed.” Because the witness had been prosecuted by the same district attorney’s office that prosecuted petitioner, the witness’s criminal history was deemed available to the prosecution. That the witness had been impeached at trial by cross-examination about his weak vision did not defeat a finding of materiality as to the undisclosed evidence. Importantly, the eyewitness provided the only evidence that petitioner brought a gun to the crime scene. Without this testimony, it was unlikely that the jury could have found the requisite mental state.

**\*Lambert v. Beard,**  
**537 Fed.Appx. 78 (3<sup>rd</sup> Cir. 2013) (unpublished), cert. denied, 134 S.Ct. 1938 (2014)**

On remand from the Supreme Court for further consideration of *Brady* claim under §2254(d), adhering to prior judgment, and finding that alternative grounds for state court decision identified in Supreme Court’s opinion (*Wetzel v. Lambert*, 132 S.Ct. 1195 (2012)) were unreasonable under § 2254(d)(1) and (d)(2). Lambert was convicted and sentenced to death for his alleged participation in a 1982 robbery and double murder with another man, Reese. Lambert and Reese came to the attention of law enforcement through the claims of one Bernard Jackson, who fingered them after receiving word that an eyewitness had identified him as one of the robbers, and Jackson’s statements and trial testimony were a central component of the state’s case. *See* 633 F.3d at 131 (“It is undisputed that without Jackson’s statements to the police, the Commonwealth could not have indicted Lambert on these charges.”). At the joint trial of Lambert and Reese, Jackson’s credibility “was savaged” with numerous inconsistent statements and his ready admission that he was testifying to benefit himself. *Id.* Despite the devastating impeachment, Jackson “somewhat proudly” concluded his testimony by emphasizing that he had

always been consistent in identifying Lambert and Reese as the two robbers. *Id.* However a “Police Activity Sheet” discovered during state post-conviction proceedings established that this claim was also inconsistent with a prior statement by Jackson. When presented with Lambert’s *Brady* claim based on the prosecution’s suppression of the Police Activity Sheet, the state post-conviction courts denied relief on the ground that any additional impeachment value it may have provided was merely cumulative, and that the suppressed information was therefore immaterial. In subsequent federal habeas proceedings, the district court “did not mention the Police Activity Sheet ....” 633 F.3d at 132. After describing its role under § 2254(d), the Third Circuit examined and rejected the Pennsylvania Supreme Court’s conclusion that the suppressed evidence was immaterial. Relying on “the logic of” *Napue v. Illinois*, 360 U.S. 264 (1959), as “extended to the *Brady* context” in *Banks v. Dretke*, 540 U.S. 668 (2004), the Third Circuit observed that “it is patently unreasonable to presume – without explanation – that whenever a witness is impeached in one manner, any other impeachment becomes immaterial.” 633 F.3d at 134. The Third Circuit went on to explain as follows:

What is critical here is that the undisclosed statement by Jackson that there was another participant – a “co-defendant,” to use his word – was not just one more piece of impeachment material to be placed in a “so what” category because Jackson had already been so thoroughly impeached. Rather, the undisclosed Police Activity Sheet would have opened an entirely new line of impeachment, and would have done far more than simply allow the defense to point out – as it did – that Jackson was inconsistent and often changed his story. The way we know that ... is that by not disclosing it, the prosecution was able to rely on Jackson’s consistency in naming Reese and Lambert as the perpetrators, the only point on which he was consistent at trial. The Supreme Court has instructed that we may take the Commonwealth at its word that this was important. ... Here, the prosecution’s closing argument emphasized Jackson’s consistency in naming Lambert and Reese as the perpetrators. No more, in our view, need be said to make clear that finding that Lambert had not met the requirements of *Brady* was an unreasonable application of clearly established Supreme Court precedent.

633 F.3d at 135.

**Dow v. Virga,**  
**729 F.3d 1041 (9<sup>th</sup> Cir. 2013)**

In robbery case, habeas relief is granted under *Napue* where prosecutor elicited and then failed to correct false testimony by a detective who stated that petitioner (rather than his attorney) had asked that each of the participants in a lineup wear a bandage under his right eye at the location at which petitioner had a small scar under his. The prosecutor then capitalized on the false testimony during argument by telling the jury that petitioner had demonstrated consciousness of guilt by trying to hide his scar in order to prevent the sole eyewitness from identifying him. In finding the misconduct harmless, the state court applied a standard that was “contrary to” the harmless standard required by *Napue*. (The state court asked whether it was reasonably probable that a result more favorable to petitioner would have occurred absent the misconduct,

rather than whether there was a reasonable likelihood that the false testimony could have affected the judgment.) But even presuming the correct standard had been applied, the state court's application of that standard would have constituted an "unreasonable application" of clearly established Supreme Court law. The evidence of guilt was weak and had resulted in a hung jury at the first trial. The eyewitness's identification of petitioner was inconsistent but was bolstered at the retrial by the detective's false testimony and the arguments made in reliance on it.

**Aguilar v. Woodford,**  
**725 F.3d 970 (9th Cir. 2013), cert. denied, 134 S.Ct. 1869 (2014)**

In murder case where eyewitness identification testimony was subject to challenge and the defense presented evidence that a third party was the actual shooter, the prosecution violated *Brady v. Maryland* by failing to disclose information demonstrating the unreliability of the "scent dog" it relied upon to connect petitioner to the shooting. The California Court of Appeal unreasonably applied *Brady* in concluding that the information was not material. In support of this claim, petitioner attached the transcript from another case in which the trial court excluded scent identification evidence after the prosecution stipulated to mistakes made by the dog, and a letter, dated sixth months prior to trial, in which LA County Public Defender informed the DA of the problems with the dog's work and specifically identified that information as material subject to disclosure under *Brady*. The knowledge conveyed from the Public Defender to the DA was "imputed" to the prosecutor who tried petitioner's case. Even if the DA's office had been ignorant, the knowledge possessed by the Sheriff's Department about the mistakes would also have been sufficient to constitute suppression. The suppressed information could have had supported a powerful argument for excluding the scent identification testimony and at the very least it provided powerful impeachment material.

**\*Browning v. Trammell,**  
**717 F.3d 1092 (10<sup>th</sup> Cir. 2013)**

The Tenth Circuit affirmed the grant of guilt-or-innocence phase relief on petitioner's *Brady v. Maryland* claim in this Oklahoma capital case. Petitioner was convicted and sentenced to death for killing the adoptive parents of his former girlfriend, Tackett, who was also wounded in the alleged attack and served as the prosecution's central witness at trial. The defense theory was that Tackett and petitioner's co-defendant, Pethel, had conspired to frame petitioner so that Tackett could inherit the deceased victims' property. Prior to trial, Tackett's own attorney provided the prosecution with Tackett's mental health records, but later insisted the records were privileged, had been disclosed by mistake, and should not be made available to the defense. The trial court reviewed the records in camera pursuant to *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and found that they were covered by state law privilege, and that their content was neither favorable nor material. The court therefore refused to disclose them to the defense, and the Oklahoma Court of Criminal Appeals (OCCA) later upheld that ruling. Petitioner then raised his *Brady* claim again in federal habeas proceedings. The district court conducted its own in camera review

of Tackett's mental health records, disagreed with the state court's assessment of their content, ordered them disclosed to habeas counsel, and later granted relief. After determining that "a Brady claim resolved through the process established in Ritchie has been 'adjudicated on the merits' for purposes of § 2254(d)," 717 F.3d at 1103, the Tenth Circuit observed that "neither the state trial court nor the OCCA gave any reasoned explanation" for concluding that Tackett's mental health records contained nothing favorable or material, *id.* at 1104, and then found those conclusions unreasonable. The court noted that the "State does not contest the favorability" of the records, then found as follows:

On the exculpatory side, [Tackett's] records describe her as hostile, assaultive, combative, and even potentially homicidal. Such evidence tends to show that a person with a motive to kill might even have a disposition to kill. ¶ On the impeaching side, Tackett's psychiatric evaluations evinced, among other things, memory deficits, magical thinking, blurring of reality and fantasy, and projection of blame onto others. This is classic impeachment evidence. ... ¶ Accordingly, we agree with the district court's disposition of the favorability question: "There is no reasonable argument or theory that could support the [Oklahoma courts'] conclusion that the sealed material contained nothing favorable to Browning's defense."

717 F.3d at 1105.

With regard to materiality, the Tenth Circuit observed that, "[b]y rejecting Browning's materiality argument, the Oklahoma courts necessarily concluded that Tackett's mental health records – had they been available for use at trial – could not have put the trial in a 'different light' and 'undermine[d] confidence in the verdict.'" 717 F.3d at 1106 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). After framing the "question for ... review [a]s whether the Oklahoma courts reached that conclusion unreasonably," *id.* the Tenth Circuit concluded that they did:

Tackett was the prosecution's indispensable witness, and all sides knew that Browning's fate turned on her credibility. In case that was not obvious to the jury, the prosecution made it abundantly clear at closing argument[.] \* \* \* If, as the prosecution told the jury at the time, Browning's only defense was to discredit Tackett – and this was really the only possible defense in light of her powerful eyewitness testimony – then it is difficult to see how the Oklahoma courts could reasonably conclude there was nothing material about a recent diagnosis of a severe mental disorder that made her hostile, assaultive, combative, and even potentially homicidal, or that Tackett was known to blur reality and fantasy and project blame onto others.

717 F.3d at 1106. The court went on to consider the state's argument that the impact of the mental health records would have been offset by other evidence corroborating Tackett's trial testimony, but found it insufficient. "In any event," the Tenth Circuit concluded, "whether the jury necessarily would have reached an alternate conclusion is not the appropriate inquiry. We only inquire whether the Oklahoma courts could have reasonably decided that the mental health evidence would not have mattered. The answer is no. This evidence would have mattered, even in light of the State's corroborating evidence." *Id.* at 1107.

**\*Milke v. Ryan,**  
**711 F.3d 998 (9<sup>th</sup> Cir. 2013)**

The Ninth Circuit granted relief in this Arizona capital case, finding that the prosecution violated *Brady v. Maryland* by failing to disclose a substantial body of information undermining the credibility of Phoenix police detective Armando Saldate, whose uncorroborated claim that petitioner had confessed constituted the only evidence against her. Petitioner was convicted and sentenced to death for her alleged participation in a conspiracy to kidnap and murder her own four year old son. The murder was actually carried out by two men, Styers and Scott, but neither implicated petitioner or testified against her, and no physical evidence connected her to the crime scene. The prosecution's case therefore rested on Det. Saldate's testimony that, during a thirty minute, unrecorded interrogation, petitioner had given him a full confession to participation in the conspiracy. Petitioner consistently denied confessing to Saldate, contended that he had ignored her request for counsel and his own superior's directive to record the interrogation, and pointed out that Saldate failed to even secure her signature on a Miranda waiver. Recognizing the importance of challenging Saldate's account, petitioner's trial counsel attempted to subpoena his "entire personnel file," but the prosecution successfully moved to quash that request, and the defense acquired nothing with impeachment value. After her convictions and sentence were affirmed on direct appeal, petitioner sought state postconviction relief alleging, among other things, that the prosecution had violated *Brady* by failing to disclose documents establishing that Saldate had a history of misconduct and dishonesty. In support of her claims, petitioner supplied the state post-conviction judge (who had also presided over her trial) with hundreds of pages of records from other cases in which Saldate had committed various forms of misconduct, including lying under oath, violating suspects' rights during interrogations, and abusing his authority with female suspects. "[D]espite this trove of undisclosed impeachment evidence, the post-conviction court rejected Milke's claim that she'd been denied access to impeachment material." 711 F.3d at 1005. The Arizona Supreme Court subsequently denied a petition for review. Petitioner then sought federal habeas relief. After ordering the state to disclose Saldate's personnel files – which yielded only two years' worth of files from a twenty-one year career – the district court denied relief. After determining that the state post-conviction court's denial of relief was both contrary to federal law, and based on an unreasonable determination of the facts in light of the state court record, the Ninth Circuit proceeded to the merits of petitioner's *Brady* claim. The court first reviewed the wealth of "favorable" evidence documenting Saldate's misconduct and dishonesty to his superiors and to courts. *See* 711 F.3d at 1012-16. With regard to "suppression," the court explained that Saldate's involvement in petitioner's case coincided with a number of other controversies involving his misconduct in other cases – all of which were handled by the Maricopa County Attorney's Office – such that "it must have occurred to ... someone in the prosecutor's office or the police department (or both) that Saldate was also the key witness [in this case]. Yet no one saw fit to disclose ... Saldate's misconduct to Milke's lawyer." *Id.* at 1017. The court also noted that although the "court documents showing Saldate's misconduct were available in the public record," the state remained obligated to disclose them because defense counsel lacked the information to find them independently. *Id.* The court explained that Milke was able to discover the court documents detailing Saldate's misconduct only after a team

of approximately ten researchers in post-conviction proceedings spent nearly 7000 hours sifting through court records. ... The team worked eight hours a day for three and a half months, turning up 100 cases involving Saldate. Another researcher then spent a month reading motions and transcripts from those cases to find examples of Saldate's misconduct. A reasonably diligent lawyer couldn't possibly have found these records in time to use them at Milke's trial. 711 F.3d at 1018. With regard to "prejudice," the Ninth Circuit summed up the impact of the suppressed information as follows:

Milke's alleged confession, as reported by Saldate, was the only direct evidence linking Milke to the crime. But the confession was only as good as Saldate's word, as he's the only one who claims to have heard Milke confess and there's no recording, written statement or any other evidence that Milke confessed. Saldate's credibility was crucial to the state's case against Milke. It's hard to imagine anything more relevant to the jury's – or the judge's – determination whether to believe Saldate than evidence that Saldate lied under oath and trampled the constitutional rights of suspects in discharging his official duties. If even a single juror had found Saldate untrustworthy based on the documentation that he habitually lied under oath or that he took advantage of women he had in his power, there would have been at least a hung jury. Likewise, if this evidence had been disclosed, it may well have led the judge to order a new trial, enter judgment notwithstanding the verdict or, at least, impose a sentence less than death. The prosecution did its best to impugn Milke's credibility. It wasn't entitled, at the same time, to hide the evidence that undermined Saldate's credibility. ¶ Also at issue was Saldate's claim – again, unsupported by evidence – that Milke waived her *Miranda* rights and didn't ask for a lawyer. Beyond its effect on Saldate's credibility, evidence of Saldate's falsifications and his disregard of *Miranda*, would have been highly relevant to the determination of whether Milke's alleged confession had been lawfully obtained. The suppression of evidence of Saldate's lies and misconduct thus qualifies as prejudicial for purposes of *Brady* and *Giglio*.

711 F.3d at 1018-19.

The Ninth Circuit went on to remand the case with instructions that the district court not only to issue the writ, but also require the state to disclose all of Saldate's personnel records, and then "provide a statement under oath from a relevant police official certifying that all of the records have been disclosed and none has been omitted, lost or destroyed." 711 F.3d at 1019. The court further directed that, in the event such a certification is not produced, the district court "shall hold an evidentiary hearing to determine whether any records have not been produced, and, if so, why." *Id.* Finally, the court directed that the "clerk of our court shall send copies of this opinion to the United States Attorney for the District of Arizona and to the Assistant United States Attorney General of the Civil Rights Division, for possible investigation into whether Saldate's conduct, and that of his supervisors and other state and local officials, amounts to a pattern of violating the federally protected rights of Arizona residents." *Id.* Chief Judge Kozinski (who also wrote the opinion for the court) added a separate concurring opinion expressing further skepticism of Saldate's testimony, criticizing Arizona officials for "having given free rein to a lawless cop to misbehave again and again," 711 F.3d at 1024, and noting that he would have also

reversed the district court's determination that petitioner had knowingly waived her *Miranda* rights, *see id.* at 1025.

**Munchinski v. Wilson,**  
**694 F.3d 308 (3rd Cir. 2012)**

The Third Circuit affirmed the district court's grant of the previously authorized second habeas petition in this Pennsylvania double murder case known as the "Bear Rock Murders," noting the state's concession on the merits of petitioner's *Brady v. Maryland* claims and rejecting its contentions that the claims were barred as untimely, defaulted, and not sufficiently supported to warrant consideration in a second federal petition. After one jury hung, the prosecution's theory at the second trial was that petitioner, a co-defendant, and one Bowen – who became the key witness after contacting law enforcement from prison and offering his assistance – went to see the victims about a drug transaction, and that petitioner and the co-defendant raped the victims, then shot them. Aside from Bowen's testimony, the prosecution presented testimony from three acquaintances and a jailhouse informant who claimed that petitioner had made inculpatory remarks to them. Through years of investigation and court-ordered discovery, three state post-conviction proceedings, and two federal habeas proceedings, petitioner amassed an array of material, previously suppressed information, including doctored investigative reports, inconsistent statements, witness-coaching, and wilful non-compliance with post-conviction orders for evidence production. Among other things, the new information established that "the murders could not have happened as the Commonwealth proposed at trial" because "the Commonwealth's timeline is inconsistent with the physical evidence," and "Bowen, the only witness who could provide any details supporting the Commonwealth's theory of the case, was not even in Pennsylvania the night of the murders ...." 694 F.3d at 335-36; *see also id.* at 336 (noting that the witnesses who claimed to have heard petitioner confess had a clear "motivation to fabricate"). After rejecting the state's various procedural defenses, the Third Circuit noted that the state had "expressly and rightly conceded" that the state court's denial of relief involved an unreasonable application of *Brady*. The court then concluded with the following observation: "It seems that the Commonwealth's decision to appeal the District Court's judgment may have been motivated by considerations external to this particular case, because it is difficult to discern any significant justification on this record for continuing to defend what is now acknowledged by all to be a badly tainted and highly suspect conviction." *Id.* at 339.

**\*Wolfe v. Clarke,**  
**691 F.3d 410 (4th Cir. 2012)**

The Fourth Circuit affirmed the grant of relief in this Virginia murder-for-hire capital case, finding that the prosecution violated *Brady v. Maryland* by suppressing a police report impeaching its key witness, and that petitioner had shown cause and prejudice to overcome the default of the *Brady* claim resulting from his failure to present it to the state courts. Petitioner's convictions arose out of the murder of a drug dealer. While it was undisputed that the murder



was actually committed by one Barber, the theory underlying the prosecution of petitioner was that he had hired his friend, Barber, to carry out the killing. Barber testified to that effect – in exchange for a sixty year sentence – at petitioner’s trial, and petitioner was convicted of capital murder, conspiring to distribute marijuana, and a related firearms count. After petitioner’s state post-conviction proceedings were complete and his federal habeas petition had been filed, Barber signed an affidavit recanting his testimony against petitioner. Acting on that development, petitioner immediately amended his federal petition to include a *Brady* claim, and an argument that the claim should be reviewed on its merits via the *Schlup v. Delo*, 513 U.S. 298 (1995), actual innocence gateway; he later added requests for discovery and an evidentiary hearing. The district court denied relief without a hearing, but the Fourth Circuit remanded for further consideration of petitioner’s entitlement to a hearing, discovery and merits review. On remand, the district court held that petitioner had satisfied *Schlup*, then granted discovery and a hearing. During the “contentious” discovery proceedings that followed, the prosecution grudgingly disgorged the “Newsome report” (among many other favorable documents) which showed that Detective Newsome had suggested the murder-for-hire theory involving petitioner to Barber as a way for Barber to improve his own bargaining position. After an evidentiary hearing at which Barber recanted his testimony against petitioner under oath, the district court found a series of *Brady* violations and granted relief from all of petitioner’s convictions. On appeal, the Fourth Circuit found it unnecessary to look beyond the suppressed Newsome report, which it described as “[t]he single, plainly momentous item of suppressed Barber impeachment evidence ....” 691 F.3d at 417. After rejecting several procedural arguments asserted by the state, the court observed that the absence of an adjudication on the merits by the state court rendered § 2254(d) inapplicable, then held that petitioner had satisfied all three components of the *Brady* test. The Newsome report was “favorable” because it was “indubitably impeaching, in that it establishes a motive not only for Barber to implicate someone else, but to point the finger specifically at Wolfe.” *Id.* at 423. After noting that “[t]he Commonwealth did not contest the suppression issue,” and that the “willfulness or inadvertence” of the prosecution’s nondisclosure is irrelevant under *Brady*, the Fourth Circuit made clear that, in this case, “the Commonwealth’s suppression ... was entirely intentional.” *Id.*; see also *id.* at 424 (quoting district court’s criticism of prosecutor’s description of his disclosure policy, and adding that, “We sincerely hope that the Commonwealth’s Attorney and his assistants have finally taken heed of those rebukes”). The Fourth Circuit also had no difficulty finding materiality, explaining that, “[i]n these circumstances, where ‘the jury had to believe that Barber was credible and that his version of events was in fact truthful and accurate in order to support [Wolfe’s] conviction,’ the materiality of the Newsome report is manifest.” *Id.* at 424 (quoting district court order). Finally, a majority of the Fourth Circuit panel upheld the district court’s determination that the *Brady* violation resulting from suppression of the Newsome report warranted a grant of relief from petitioner’s drug conspiracy and firearms convictions as well as his capital murder conviction. While the majority acknowledged that the conspiracy and firearm convictions were supported by admissions made during petitioner’s own testimony, it also accepted his contention that those admissions had been made necessary only because of the circumstances created by the *Brady* violation. The majority explained:

Because the Commonwealth concedes that Wolfe’s trial testimony was central to

his drug conspiracy conviction and sentence, and because the Commonwealth cannot prove that Wolfe would have testified if the Newsome report had not been suppressed, we agree with the district court that Wolfe is entitled to vacatur of all three of his state convictions.

691 F.3d at 426.

**\*Guzman v. Secretary, Dept. of Corrections,**  
**663 F.3d 1336 (11<sup>th</sup> Cir. 2011)**

The Eleventh Circuit affirmed the grant of guilt-or-innocence phase relief in this Florida capital case, finding that the state violated *Giglio v. United States* when its key witness (Cronin) and its lead investigator (Sylvester) testified falsely about the existence of a deal between the state and Cronin, and did not disclose that Sylvester had paid Cronin a \$500 reward shortly before she testified to the grand jury that indicted petitioner. Although Sylvester testified at petitioner's state post-conviction relief hearing that she never informed the prosecutor of the payment (and the prosecutor corroborated that assertion), the Eleventh Circuit agreed with the Florida Supreme Court that, pursuant to *Kyles v. Whitley*, 514 U.S. 419 (1995), "Sylvester's knowledge of this evidence was imputed to the prosecutor." 663 F.3d at 1349. The Eleventh Circuit began its assessment of the state courts' denial of relief on petitioner's Giglio claim by agreeing with their conclusion that, given the extent to which Cronin was actually impeached at trial, "[t]he addition of the truthful testimony about the \$500 reward would not have made a material difference in Cronin's credibility to the finder of fact." 663 F.3d at 1350. Despite this finding, however, the Eleventh Circuit went on to determine that the Florida Supreme Court's failure to account for the impact of the \$500 payment on the motivation of Cronin – a prostitute and crack addict to whom \$500 was a lot of money – to lie rendered its decision defective. The Eleventh Circuit then identified "several reasons" why the Florida Supreme Court's decision did not prevent a grant of federal habeas relief: (1) while the state court emphasized that another informant had also implicated petitioner, and that the victim's wounds were consistent with a knife possessed by petitioner, the other informant had recanted before petitioner's trial, and the knife wound evidence was not particularly strong; (2) the state court also discounted the extent to which the trial was a credibility contest between petitioner and Cronin, and the possibility that, had the \$500 payment – and the timing of that payment – been disclosed, petitioner's own (not implausible) account would have prevailed; (3) the state court "either did not consider or unreasonably discounted the import of the fact that both Cronin and Sylvester testified falsely," which deprived petitioner's defense counsel of the opportunity not only to mount a stronger challenge to Cronin, but also to impugn the credibility of the state's lead investigator. 663 F.3d at 1351-52. The court further noted that the evidence against petitioner at trial "was circumstantial and far from overwhelming":

There were no eyewitnesses or unbiased observers who testified as to the murder-robbery. Guzman never confessed to law enforcement. Both witnesses who testified that Guzman had confessed, Cronin and Rogers [the jailhouse informant], recanted their testimony at one time or another prior to trial. There was no blood or fingerprints on the sword recovered from [the victim's] room. ...

As a result, Cronin's and Detective Sylvester's testimony was the crux of the State's case ..., and it was thus objectively unreasonable to discount the effect of bias on that crucial body of evidence under the totality of the circumstances in this case.

663 F.3d at 1354.

Finally – and without specifically explaining why it was necessary in light of the prior determinations that the state court had unreasonably applied *Giglio*'s materiality standard, and that petitioner's claim was meritorious – the Eleventh Circuit examined whether the error was harmless under *Brecht*, and concluded that it was not. See 663 F.3d at 1355-56.

**\*Sivak v. Hardison,**  
**658 F.3d 898 (9<sup>th</sup> Cir. 2011)**

In pre-AEDPA robbery-murder case, Idaho death row inmate was entitled to habeas relief as to his death sentence based on prosecutor's knowing presentation of perjured testimony by jailhouse informant regarding his motives for testifying and his expectations of receiving preferential treatment from the State. Both Sivak and his co-defendant had admitted being present when the crime occurred but each man claimed that the other was responsible for the robbery and murder. The informant, who was in jail facing burglary and escape charges, testified that Sivak confessed to being the actual killer. The informant claimed that he was testifying because he had a wife and kids out on the streets and he didn't want anything to happen to them. He denied seeking favoritism from State authorities. He stated that his escape charge was dismissed after the preliminary hearing and that a charge pending in another city was dismissed but the informant denied knowing whether the prosecutor's office was involved in the dismissals. The informant also denied that he was presently free because of his testimony against Sivak and a man charged with murder in Kansas, claiming he had traveled to Kansas for "personal" reasons. Through federal discovery Sivak obtained evidentiary proof of his allegation that false testimony had knowingly been presented concerning the informant's expectation of benefits: (1) a letter from the county prosecutor to the prosecutor in a neighboring county where the escape charge was pending urging dismissal of the charge in light of the informant's willingness to testify against several inmates facing murder charges; (2) a letter from the same prosecutor a few days later to the chairman of the state Commission for Pardons and Parole recommending that the informant be given additional consideration for parole at an upcoming hearing based on the informant's cooperation in several murder trials and a murder investigation; (3) a letter from the informant to a Kansas prosecutor complaining that an Idaho investigator had said the informant would receive assistance but the informant wasn't receiving any and adding that he wanted \$6000 in cash as witness fees; and (4) a subsequent letter from the Idaho investigator to the informant telling him his witness fees should arrive shortly, recounting that the informant had earlier been told after requesting a deal there could not be an guarantee of assistance but also setting out the "arrangements" that were made in anticipation of testimony in three murder trials: (a) the dismissal of criminal charges in two jurisdictions, (b) a reduced sentence, and (c) a parole from the Idaho State Correctional Institute. The fourth letter closed with a statement that the informant would still be in prison without the prosecution's intervention. The false testimony

was not prejudicial as to the murder conviction in light of strong evidence of guilt under either a direct felony-murder theory or an aiding-and-abetting felony-murder theory. It was prejudicial as to sentence, however. Had the informant's testimony been rejected, a second informant's testimony would have been called into doubt. And without Sivak's purported confessions, the aggravating factors were significantly weakened.

**LaCaze v. Warden Louisiana Correctional Institute for Women,**  
**645 F.3d 728 (5<sup>th</sup> Cir. 2011), cert. denied, 132 S.Ct. 1137 (2012)**

In murder case where the actual killer was the lover of LaCaze, who was the victim's wife, and the killer testified that he killed the victim at LaCaze's request, LaCaze was entitled to habeas relief because of the prosecution's failure to disclose that the prosecutor had assured the killer that his son would not be prosecuted for his role in the killing. (The son had driven his father to and from the scene of the killing. LaCaze's defense was that the victim had arranged for the killer to take his life because of the victim's failing health.) That there was not an enforceable deal concerning the son did not defeat the *Brady* claim given that the killer received an assurance from the prosecutor that the son would not be prosecuted and the killer believed the prosecutor. The Louisiana Supreme Court employed an improper legal standard when it determined that the undisclosed agreement regarding the son was immaterial because the main source of bias and motivation to lie, i.e., the killer received a forty year sentence for a manslaughter plea, had been disclosed. "The materiality inquiry does not turn on which of two competing sources of bias a court, in hindsight, determines the jury would have considered more important. Rather, the inquiry is whether an undisclosed source of bias—even if it is not the only source or even the 'main source' could reasonably be taken to put the whole case in a different light." The state court also used the incorrect standard when it found the non-disclosed agreement to be immaterial because there was sufficient evidence to support LaCaze's conviction. Given that the killer's testimony was the only direct evidence of LaCaze's intent, disclosure of his bias to the jury might have put the whole case in a different light. Notably, in its opening statement, closing argument, and rebuttal, the prosecutor argued that the killer had no reason to lie. "In circumstances like these, where 'the jury's estimate of the truthfulness and reliability of [the witness] may well be determinative of guilt or innocence,' the failure to disclose *Brady* information is material."

**Houston v. Waller,**  
**420 Fed.Appx. 501, 2011 WL 1496350 (6<sup>th</sup> Cir. April 20, 2011) (unpublished)**

Habeas relief granted to petitioner convicted of selling cocaine and aggravated assault where government withheld exculpatory evidence showing that federal agent Howell who was in charge of petitioner's case had been using cocaine and taking cocaine from controlled buys, and was later indicted for tampering with evidence and possession of controlled substances. *Brady v. Maryland* required disclosure of Howell's drug use because he was a key witness and his cocaine use "impact[ed] his credibility and recollection of events" and constituted material impeachment evidence affecting the cocaine amounts purchased.

**\*Breakiron v. Horn,**  
**642 F.3d 126 (3<sup>rd</sup> Cir. 2011)**

Habeas relief granted as to robbery conviction based on prosecution's suppression of evidence that would have impeached a jailhouse informant who testified that Breakiron had admitted to hiding in the bar's bathroom until the other patrons left and then attacking the bartender before taking her to his father's house where he finished her off. This testimony contradicted Breakiron's account of the bartender striking him first and then his blacking out before discovering the victim with a knife in her back. According to Breakiron, he only stole money from the bar as an afterthought when attempting to cover up the killing. (The district court had granted relief as to the murder conviction due to the *Brady* violation – the Commonwealth had failed to disclose that the informant had a prior conviction for assault with intent to rob, had sought a deal in exchange for his testimony against Breakiron, and was a suspect in an investigation pending at the time he testified. The Commonwealth did not appeal the grant of relief as to the murder charge.) The robbery-related *Brady* claim was reviewed de novo because it was not adjudicated on the merits by the state court. The informant's testimony was held to be material to the robbery charge as well as the murder charge in that: (1) it suggested that the incident as a whole was a premeditated and intentional plan; (2) Breakiron "finishing off" the victim at another location suggested that the money was taken prior to the victim's death; and (3) Breakiron's credibility in general was undermined by the informant's contrary account of the incident.

**United States v. Kott,**  
**432 Fed.Appx.736, 2011 WL 1058180 (9<sup>th</sup> Cir. March 24, 2011) (unpublished)**

Conviction vacated and case remanded for new trial where newly disclosed evidence, viewed collectively, is material and prosecution's failure to disclose it violated *Brady*. There was no doubt "prosecution suppressed evidence favorable to" defense, and only inquiry is whether prejudice ensued. Newly disclosed evidence of police department files suggesting key prosecution witness Allen sexually exploited minors and attempted to conceal behavior by soliciting perjury was both admissible and not cumulative because it could have been used to impeach Allen's testimony, undermine his credibility, and aid defendant's testimony. The new evidence also documented multiple "prior inconsistent statements" about payments defendant "allegedly received" and reasons for them which could have undermined Allen's credibility while bolstering that of defendant.

**Maxwell v. Roe,**  
**628 F.3d 486 (9<sup>th</sup> Cir. 2010), cert. denied, 132 S.Ct. 611 (2012)**

In murder case, habeas relief granted on *Brady* claim and claim that false evidence was presented where both claims related to jailhouse informant whose testimony was crucial to the prosecution. Maxwell was convicted, inter alia, of two murders and sentenced to life without parole. The only

evidence linking Maxwell to one murder was a palm print found on a public bench near the victim's body in an area Maxwell often visited, some muddy and consistent footprints, and a generic Bic lighter found in Maxwell's pocket at the time of his arrest. (The age of the palm print—the State's "best physical evidence"—could not be determined.) Evidence linking Maxwell to the other murder was the in-courtroom voice identification of Maxwell by a witness who had been unable to pick Maxwell out of an earlier lineup in which he spoke, and Maxwell's possession of a knife consistent with the victim's stab wound. Without physical evidence, the state "rested its case" on informant Storch who testified Maxwell had showed him an article about the killings that referenced the palm print and then stated that the mistake Maxwell had made by leaving the print was unusual for him. (The prosecution argued that Maxwell's remarks implicated him in all ten of the murders Maxwell was charged with having committed, although Maxwell was ultimately convicted of only two.) A hearing was held in state court on Maxwell's claim that Storch gave false testimony. The state court ruled that while Storch later became a sophisticated informant and established liar, Storch was a "neophyte" jailhouse informant at the time of Maxwell's trial and had not lied regarding Maxwell's confession. The federal district court denied Maxwell relief, concluding "Storch's lies about the deal he received from the prosecution and about his informant history did not prejudice Maxwell" and that any "withheld information was neither material nor prejudicial." Regarding the false testimony claim, the court of appeals held that the state court's finding that Storch had not lied about Maxwell's confession was an unreasonable determination of the facts in light of the evidence before the state court. The appeals court first noted the numerous undisputed lies that Storch had told at the trial, including false statements about his motivation for coming forward and a false denial about whether his public defender had worked out a plea agreement before Storch personally negotiated a more favorable deal in exchange for his testimony against Maxwell. The court of appeals also observed that Storch had misrepresented his sophistication and experience as an informant at the time of the Maxwell trial. In addition, the record contained evidence about Storch's signature modus operandi for "booking" fellow inmates – gaining physical access to a high-profile defendant, obtaining media accounts of the case, and then contacting the District Attorney or law enforcement with an offer to testify. The appeals court then noted the numerous times Storch had lied under oath in other cases, which ultimately led to a perjury indictment. After determining that Storch had lied about the confession, the appeals court applied circuit precedent under which knowledge by the prosecution of the false testimony need not be shown to establish a due process violation. Because the state court's rejection of the claim was premised on an unreasonable determination of the facts as to whether Storch lied, the appeals court assessed the issue of materiality de novo. Given the paucity of evidence implicating Maxwell, the content of Storch's testimony, the prosecutor's emphasis on Storch's testimony during argument, and the fact that the jury asked to see Storch's testimony during deliberations, materiality was found. As to the Brady claim, because no state court issued a reasoned decision for denying the claim, the court of appeals reviewed the "factual record de novo to determine whether the California Supreme Court's summary denial of the claim constituted an unreasonable application of *Brady*." It then found "that the state court could not have reasonably determined that the suppressed evidence relating to the deal Storch received and Storch's prior cooperation with law enforcement as an informant was not material." While Storch admitted during cross-examination

that he had received a reduced sentence of sixteen months on pending charges as a result of his testimony against Maxwell, he lied about the fact that his public defender had earlier negotiated a less favorable deal for him. “[T]he fact that Storch pursued an additional benefit to himself— independent of and subsequent to the agreement worked out by his public defender— would have provided Maxwell with impeaching evidence relevant to Storch’s motivation for testifying and of a different character than the other impeachment evidence which came to light.” In addition, “the details of Storch’s plea negotiations would have helped to establish Storch’s sophistication and directly contradicted the naivete he professed at trial.” The appeals court found: “The prosecution’s failure to correct Storch’s false testimony about his prior deals was prejudicial.” In addition, the prosecution failed to disclose that although Storch had never testified for the district attorney, he “had on several occasions aided in investigations and acted as an informant on numerous previous occasions.” Viewed cumulatively, “[t]he prosecution’s failure to disclose this impeachment evidence undermines confidence in the outcome of Maxwell’s trial, and the California Supreme Court’s decision to the contrary was an unreasonable application of *Brady*.”

**Goudy v. Basinger,**  
**604 F.3d 394 (7<sup>th</sup> Cir. 2010)**

Habeas relief granted in case involving murder and attempted murder convictions where prosecution withheld three police reports detailing eyewitness statements that: (1) implicated the key prosecution witness in the crime and conflicted with the version of events he testified to; (2) contradicted an eyewitness’s statement at trial that Goudy was the shooter on the driver’s side of the vehicle; and (3) conflicted with another eyewitness’s description of the gunmen. State court agreed prosecution suppressed exculpatory evidence, but concluded the new evidence was not material. In reaching that conclusion, the state court erred in two ways. First, although the state court initially identified the correct legal principle for determining materiality, its actual analysis required Goudy to prove the new evidence “would have” established his innocence—a burden “diametrically different” than the clearly established federal law in *Kyles v. Whitley*, 514 U.S. 419 (1995). Second, also contrary to *Kyles*, the state court failed to recognize and then assess the cumulative materiality of the suppressed evidence, but instead dismissed “each piece of suppressed evidence in seriatim.” In denying relief, the state court unreasonably applied clearly established federal law.

**Robinson v. Mills,**  
**592 F.3d 730 (6<sup>th</sup> Cir. 2010)**

Prisoner convicted of first degree murder and sentenced to life imprisonment was entitled to habeas relief where prosecution withheld material impeachment evidence “likely [to] have altered” the outcome of proceedings, i.e., evidence that the key prosecution witness was a confidential informant. Robinson and Smith were indicted for the murder of Irwin, a drug dealer. Robinson had agreed to meet Irwin to repay monies he owed to him. Smith agreed to accompany Robinson and provided him with a small handgun. At the arranged meeting, Irwin was driving a

car and armed with a 357 magnum. Sims was in the front seat passenger. Robinson got in the car and sat in the back seat. According to Robinson, Irwin threatened him and his family, and pointed the gun at him. Robinson then shot Irwin in self defense. Robinson testified Smith was not involved in the killing and Smith's statement to police corroborated Robinson's fear of Irwin. At the preliminary hearing, Sims testified that she did not see what happened when the shooting occurred and did not know if Irwin reached for his gun, but that Robinson told her "that he had to kill Irwin or Irwin would have killed him." Sims' trial testimony "differed significantly." Sims testified that after picking up Robinson, Irwin turned slowly into a parking lot while eating a sandwich, "making it unlikely" Irwin "grabbed his gun with his right hand." Sims also testified Robinson was "'smiling,'" "paint[ing] Robinson as cold and calculating" and contradicting "his assertion that" the shooting "was self-defense rather than murder." Unknown to Robinson at the time of trial was that Sims was "a paid confidential informant" for the police. Sims informed on Irwin's sister and worked and received payment on "at least seven other occasions." Just 18 days before Robinson's trial, Sims helped a detective by making a "controlled buy" from a witness who later appeared at Robinson's trial. The undisclosed impeachment evidence of Sims was not "merely" cumulative; it was "different in kind because the suppressed material would have offered insight into why Sims' testimony differed from her testimony at the preliminary hearing." The new information was "material," demonstrating Sims' "pro-prosecution bias" at trial.

**\*Simmons v. Beard,**

**590 F.3d 223 (3rd Cir. 2009), cert. dismissed, 130 S.Ct. 1574 (2010).**

Under AEDPA, habeas relief granted due to state's failure to disclose impeachment evidence related to the two primary witnesses who tied the petitioner to the crimes. The victim was an elderly woman killed in her home. Three neighbors identified the petitioner 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 petitioner 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 mention of the statement referencing the murder and she only identified the petitioner 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 petitioner's girlfriend, who had initially made statements to police that would have provided the petitioner 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 petitioner'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 petitioner 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 the hairs that were examined were consistent with the assault victim but not the petitioner. Finally, at some point prior to trial, the assault victim was shown a mug book containing the petitioner'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 [state] 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 a "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."

**\*Wilson v. Beard,**  
**589 F.3d 651 (3rd Cir. 2009)**

The Third Circuit affirmed the grant of guilt-innocence phase relief on petitioner's *Brady v. Maryland* claim in this Pennsylvania capital case. The prosecution's case against petitioner for the shooting death of a patron in a bar was "based almost entirely on the testimony of ... three witnesses," 589 F.3d at 656 – Jackson (a bar patron and eyewitness), Rahming (also a bar patron and eyewitness), and Gainer (a onetime cellmate who claimed petitioner had confessed to him). In state post-conviction proceedings, new information about all three witnesses came to light. Jackson's previously undisclosed rap sheet indicated that he had been arrested for impersonating a police officer six weeks before the shooting. A presentence report produced after that arrest revealed six more out-of-state arrests, two of which involved impersonating a police officer, as well as a history of skull fractures, apparent brain damage and memory loss, a distorted perception of reality, and a strong propensity to try to assist law enforcement. With regard to Rahming, new information indicated that on the day after he testified against petitioner, a detective transported him to a local emergency center, where he was diagnosed with schizophrenia. This revelation led to a review of Rahming's rap sheet and other documents indicating a long history of mental health problems, substance abuse, seizures, memory loss, and hallucinations. In his testimony at petitioner's post-conviction relief hearing, Rahming further admitted that he had been intoxicated at the time of the shooting allegedly committed by petitioner. As to Gainer, new information established that his longtime police handler had provided him with interest-free loans when he acted as an informant, which contradicted that officer's testimony that he had "never given [Gainer] anything." 589 F.3d at 662. After

determining that the Pennsylvania Supreme Court's denial of petitioner's claim on procedural grounds did not bar federal review, and that the absence of a merits adjudication by the state court precluded application of § 2254(d), the Third Circuit addressed the merits. The court first rejected the state's contention that Jackson's rap sheet had not been "suppressed" because it was a matter of public record accessible to trial counsel through the exercise of due diligence. The court explained that "it is clear that the prosecutor had the information ... in her file, [yet] she failed to disclose this information when asked by the court during a charging conference for the witnesses' criminal histories ...." 589 F.3d at 664. With regard to Rahming's trip to the emergency center and Gainer's interest-free loans, the court had no difficulty determining that this information was known to members of the "prosecution team" for Brady purposes. The court also rejected the state's argument that disclosure of Jackson's rap sheet and Rahming's emergency center visit would have led to discovery of the more detailed (and damaging) information about their histories. Emphasizing *Kyles v. Whitley*'s focus on what "competent counsel" could have done with favorable information, the Third Circuit concluded that, in this case, competent counsel would have pursued the additional information, and would have used it at trial. Finally, the court held that the undisclosed information was material in that it would have facilitated devastating impeachment of the three witnesses at the center of the prosecution's case:

Although the shooting occurred in a relatively crowded bar, no other eyewitnesses testified and the Commonwealth presented no physical evidence implicating Wilson as the shooter. In light of the importance of the testimony of these three witnesses and the significant impeachment value of the undisclosed information, we conclude that Wilson's right to due process ... was violated ....

589 F.3d at 667.

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

Distribution conviction reversed on direct appeal. The defendant was convicted of 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 over 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. Although the defendant was aware that the witness had a prior theft conviction, the defendant was not told that the witness had a lengthy history of convictions for theft and fraudulently using false registration tags, as well as 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,**  
**342 Fed.Appx. 331, 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 petitioner and failed to correct the witness' false testimony denying receiving 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 prisoners 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, was shot in a drive-by shooting along with a teenage girl who died. 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. 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 was reincarcerated following another violation. The witness contacted his mother, who called the prosecutor, who then 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.” The witness 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 held that both men were entitled to habeas relief. For Douglas, whose appeal had been pending in the Tenth Circuit when the witness recanted his testimony and revealed 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 petitioners was “indispensable” as the “only direct evidence linking [the petitioners] to the murder.” If the juries had discounted his testimony as not credible, they almost certainly would have acquitted the petitioners. 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 not charged with drug or weapons offenses, even though the prosecutor knew that the witness was in possession of a loaded gun and crack cocaine 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 petitioner 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 petitioner were arrested a month later. The witness testified at the preliminary hearing that he drove the vehicle and the petitioner 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)**

Habeas relief granted in double murder case on *Napue* claim because the prosecution knowingly presented false testimony from a prison psychologist. No deference was given to the state courts' conclusions because the state court refused to permit development of the factual record. Two high school students were killed while in a car parked near a junkyard. The couple had been using the location as a lovers' lane. Drake, 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. Upon finding the couple, Drake stabbed the male victim because he was groaning and Drake was in a panic. Drake took the bodies to a dump in a neighboring town but was spotted by police. While the male victim was clothed, the female victim was not. The prosecutor ultimately developed a theory that the crime had a sexual motivation. The female victim had a bruised rectum and also had post-mortem bite marks on her breasts. (At trial, a forensic odontologist testified that such bite marks are often present in sexually-related crimes.) In addition, initial reports indicated that traces of semen believed to have come from Drake were found on a slide

from the female victim's rectal cavity. Shortly before trial, however, the prosecutor learned this report was not accurate. When the prosecutor informed the forensic odontologist that semen evidence did not exist, the odontologist recommended that 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 he believed "picquerism" was involved, which he explained was a syndrome or criminal profile in which the perpetrator realizes sexual satisfaction from penetrating a victim by sniper activity or by stab or bite wounds. The prosecutor waited until the day before the expert testified to notify the defense of the intent to call him. This late notice prevented 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 that he had been provided with information only the day before and immediately formed his opinion, which was this 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. After Drake's convictions were affirmed, he discovered that the expert had exaggerated and lied about his credentials. In a federal deposition, the extent of his untruthfulness was revealed. It was also established that he had given false testimony about the extent and timing of contact he had with the prosecution about the case. Clearly established Supreme Court precedent applicable to this case required Drake to show that the prosecutor actually knew that the expert's testimony was false. The district court's finding that Drake failed to show the requisite knowledge was clearly erroneous. The prosecutor had to have known that the expert's statements about the contact the two had was not true. And the prosecutor knew that, contrary to the expert's trial testimony, the expert had not initially arrived at an opinion. Even without the depositions, the prosecutor's delayed notice to the defense about the expert and the prosecutor's resistance to a continuance led to an inference of knowing complicity in the false testimony. The record also strongly suggested that the prosecutor knew that the expert's testimony about his scholarship was intentionally misleading. The prosecutor's notes revealed that he knew the expert had not "published" any papers so he asked the expert instead if he had "written" any papers. (Notably, the prosecutor asked another expert about writing and publication.) The false testimony was material because the expert's deception about how quickly he had arrived at his conclusion, and his lie about what case information he had been exposed to, permitted him to offer testimony that appeared credible. In fact, the expert "had two weeks to conjure up his quackery. His direct testimony on picquerism, which spans twelve pages of trial transcript, consisted largely of uninterrupted and prolix exposition, weaving the complicated facts of the case into a seemingly coherent narrative, all pointing to the symptoms of the fictive syndrome called picquerism." The 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.

**United States v. Banks,**  
**546 F.3d 507 (7<sup>th</sup> 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 (2<sup>nd</sup> 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 (7<sup>th</sup> 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 (6<sup>th</sup> 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 (5<sup>th</sup> 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 (1<sup>st</sup> 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 (9<sup>th</sup> 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 (6<sup>th</sup> 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 (5<sup>th</sup> 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 (9<sup>th</sup> 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 (6<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 (9<sup>th</sup> 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, 537 U.S. 1245 (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* is 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 (2<sup>nd</sup> 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 (7<sup>th</sup> 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 (10<sup>th</sup> 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 (6<sup>th</sup> 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 (11<sup>th</sup> 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 (6<sup>th</sup> 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 (5<sup>th</sup> 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 (9<sup>th</sup> 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 (11<sup>th</sup> 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 (4<sup>th</sup> 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 (5<sup>th</sup> 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 coindictee 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 (5<sup>th</sup> Cir. 1973), overruled on other grounds, United States v. Henry, 749 F.2d 203 (5<sup>th</sup> 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.

**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.

**\*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.

### III. UNITED STATES DISTRICT COURTS

**Floyd v. Vannoy**,  
2017 WL 1837676 (E.D. La., May 8, 2017), **warden’s appeal pending**, (5th Cir. 17-30421)

In post-AEPDA second degree murder case, district court grants habeas corpus relief on *Brady* claim. Petitioner Floyd was charged with two murders of homosexual men, and he had confessed to both crimes, but after a bench trial the court found Floyd guilty only of one of the murders because the evidence showed that the other had been committed by a black man with Type A blood; Floyd is white with Type B blood. 2017 WL 1837676 at \*3. The Louisiana Supreme Court did not cite *Brady* in denying Floyd’s claim that material exculpatory evidence had been suppressed. The district court finds that the state court’s denial of Floyd’s *Brady* claim was an unreasonable application of federal law because among the suppressed items were test results for fingerprints located in one of the victims’ hotel room and in his car that indicated that the prints were NOT Floyd’s and not the victim’s, but a third party’s, “an obvious alternative suspect that the defense may point to as the true killer.” 2017 WL 1837676 at \*9. The district court considers this evidence material, even though Floyd was in fact acquitted of the murder of that victim, because Floyd’s confession to that victim’s homicide was very similar to his confession to the homicide of the other victim, there was no physical evidence linking Floyd to either crime, there were fingerprints of a third party found at the scene involving the other victim, Floyd had been drinking when he made his confessions, the interrogating officers beat him, and Floyd was susceptible to coercion. The similarity of the two murders also suggests that one person committed both crimes. “Evidence tending to show that an unknown third party—and not Floyd—killed [one victim] therefore also points to the same unknown third party—and not Floyd—as [the other victim’s] killer.” 2017 WL 1837676 at \*11. The district court also finds that a statement that a witness provided to a detective but not disclosed to the defense was favorable and material—the detective reported that the witness said that one of the victims had sex with both black and white men, but the witness actually said the victim had sex with black men, and did not mention white men. This information was favorable because it suggested that the killer was black and because it impeached the detective’s testimony that the victim had sex with black and white men. “Considering the full trial record, the Court finds that the withheld fingerprint results are—standing on their own—material to Floyd’s guilt, and that no reasonable application of clearly established federal law could support a contrary conclusion. Even if the prints alone were not enough, [the witness’s] statement to [the detective] provides additional exculpatory evidence.” 2017 WL 1837676 at \*16.

**United States v. McClellon**,  
\_\_\_ F.Supp.3d \_\_\_, 2017 WL 2115681 (S.D. Mich, May 16, 2017), **appeal dismissed**, 2017 WL 4317149 (6<sup>th</sup> Cir. 2017)

District court grants McClellon’s motion for new trial following a conviction for felon in possession of a firearm and possession of a stolen firearm, where prosecution failed to disclose that officer who testified against him (and was the prosecution’s principal witness) was suspended by the Detroit Police Department the day after he testified against McClellon pending investigation

into charges that the officer made false reports of felony charges for weapons possession, and that the officer was criminally charged for this misconduct. McClellon's attorney learned about the charges and asked the government's attorney for "*Giglio* materials" and the government's attorney informed counsel that the officer's disciplinary records were clear, but the government's attorney later learned that pending internal disciplinary investigations were confidential, so he had not been informed of the investigation against the officer. The court holds that although the government's attorney "cannot be faulted here for nondisclosure," because he did not actively suppress the information against the officer, nevertheless, the government's attorney had a duty to learn of any favorable evidence, and the officer himself clearly knew that he had been suspended with investigation into his misconduct, and this information is imputed to the prosecutor. The withheld information about the officer was favorable to McClellon because it impeached the testifying officer's credibility. The information was material, because the officer had testified at McClellon's trial that he had pursued McClellon on foot during which he saw a handgun tucked into McClellon's waistband and the officer was the only one who testified that he saw McClellon pull out the gun and toss it away. The officer's "testimony is the only basis that clearly connected the dots between . . . circumstances to make an unassailable presentation," and "[i]f that testimony is placed in serious doubt, then the case is put into a much different light." 2017 WL 2115681 at \*3. Although there was other evidence to support a conviction, "sufficiency of the evidence" is not the touchstone. *Id.* at \*4 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 n.8 (1995)).

**Castellanos v. Kirkpatrick**

**2017 WL 2817048 (E.D.N.Y., June 29, 2017), warden's appeal pending, (2<sup>nd</sup> Cir. 17-2341)**

In post-AEDPA case involving conviction for committing a criminal sexual act in the first degree and sexual abuse in the first degree, district court grants habeas relief on *Brady* claim. Following Castellanos's conviction, the defense obtained materials related to the interrogating officer who obtained Castellanos's confession, including documents containing information that the officer had obtained a confession in another case from a suspect in which a different individual later confessed to the crime, and the officer's internal affairs tracking sheet showing that the officer had been investigated on six different occasions. The state court denied relief on the grounds that defense counsel obtained some of the information about the officer independently from another case file, therefore it was not suppressed, and that the information was irrelevant because Castellanos did not allege that the officer physically mistreated him in order to secure the confession. The state court's decision was an unreasonable application of clearly established federal law. In an earlier order, the district court had determined that Castellanos met the first and second prong of *Brady* (suppression and favorability) but had not had sufficient facts to determine materiality/prejudice. In the instant opinion, the district court bases the materiality conclusion on its *in camera* review of the suppressed documents, as well as the officer's personnel file. The court concludes that trial counsel could have impeached the testimony of the officer with his prior bad acts contained in the materials, and also that the withheld documents were relevant to the defense theory that the confession was false. The fact that trial counsel may have had information about the officer's misconduct from another case (a fact that counsel denied) did not defeat Castellanos's claim because there were additional withheld documents that also strengthened the inference of the defense theory that the confession was false. The suppression of the documents related to the



officer's history for coercing and falsifying confessions was prejudicial to Castellanos because they could have been used to attack the validity of Castellanos's confession. The six-year-old alleged victim's statements and unsworn testimony alleging that Castellanos sexually abused him were insufficient alone to support the conviction, the medical findings did not establish that Castellanos sexually abused the child, and the only remaining evidence was Castellanos's confession.

**Williams v. Williams,**

**232 F.Supp.3d 1318 (S.D. Ga. 2017), warden's appeal pending (11<sup>th</sup> Cir. 17-10988)**

Adopting Magistrate Judge's Report and Recommendation to grant habeas relief on *Brady/Giglio* claims in case involving, inter alia, felony-murder committed by two assailants. At trial, Williams's co-defendant was identified as one of the shooters by three eyewitnesses, none of whom identified Williams as the second shooter. There was additional testimony, however, concerning a prior identification of Williams made through a photo lineup by one of these eyewitnesses – Fitzgerald. There was also testimony about Fitzgerald's fear of telling authorities what had happened and intimidation of Fitzgerald by Williams. Although Fitzgerald had a pending drug and firearm case, he denied that he had received a plea offer in exchange for his testimony. Undisclosed to the defense was the fact that the prosecutor had told Fitzgerald that if he testified against Williams, she would inform the ADA in the drug/firearm case of Fitzgerald's cooperation and the ADA could consider that in making a plea offer to him. Following Williams's conviction, the prosecutor made good on her promise. She sent an email to the ADA in charge of Fitzgerald's prosecution asking her to take into consideration Fitzgerald's testimony in Williams's case, which was given in spite of threats against him, and informing the ADA that she "didn't think there would have been a conviction against Williams had [Fitzgerald] not testified." In subsequent dealings with Fitzgerald's defense attorney, the ADA expressly referenced Fitzgerald's cooperation in Williams's prosecution when providing favorable offers on Fitzgerald's case. The failure of Williams's prosecutor to disclose the promise she had made with Fitzgerald and to correct his false testimony about the absence of an incentive to testify violated *Brady* and *Giglio*. The state court's finding of no deal and no materiality was unreasonable. The prosecutor's failure to disclose the "leniency incentive" she provided to Fitzgerald undermines confidence in the verdict even though some other circumstantial evidence linking Williams to the shooting existed.

**Alvarado v. Warden, Ohio State Penitentiary**

**2017 WL 878686 (N.D. Ohio, Feb. 7, 2017), adopting R&R, 2017 WL 843997 (N.D. Ohio, March 3, 2017)**

Magistrate recommends that Alvarado's motion to stay his mixed petition be granted under *Rhines v. Weber*, 544 U.S. 269, 275 (2005), in order for him to exhaust his *Brady* and *Giglio* claims in state court. Alvarado was convicted of murder in state court in Ohio and sentenced to 15 years to life. Alvarado demonstrated good cause for his failure to exhaust the claim in state court prior to filing his federal habeas petition because the basis for his *Brady* claim is primarily the recantation affidavit of a witness who at trial identified Alvarado as the person who killed a victim during a bar fight, but in his affidavit, obtained two years after conviction, indicated that the prosecution told him who to identify (coached him and persuaded him to lie on the stand) and promised him

leniency in his own case in exchange. Although recantation affidavits are viewed with skepticism, this witness was the key witness against Alvarado, and the court cannot say that the *Brady* and *Giglio* claims are plainly meritless. There is no evidence that Alvarado has engaged in dilatory tactics because he filed his petition one month after the witness executed his recantation affidavit.

**Garcia v. Hudak et al.**  
**156 F. Supp. 3d 907 (N.D. Ill. 2016)**

Plaintiff's conviction for possession of cocaine with intent to deliver was reversed and plaintiff brought action under 42 U.S.C. § 1983, alleging that defendant officers violated his right to due process by failing to disclose material, exculpatory evidence before he pleaded guilty. District court holds that plaintiff stated a claim under *Brady* because he alleged that the state suppressed evidence that the officers had fabricated the evidence used to prosecute him (they planted drugs on him), and this evidence was favorable to him because it demonstrated his innocence—that he was not in possession of narcotics when he was arrested. “The Individual Defendants did not falsely testify about the facts in the criminal matter. Instead, they fabricated a new reality—one in which Plaintiff possessed narcotics with the intent to distribute them—and then testified accordingly. This alleged behavior deprived Plaintiff of his right to receive *Brady* material and consequently, the Individual Defendants are not entitled to absolute immunity for their role as witnesses in Plaintiff's criminal case.” 156 F. Supp. 3d at 917.

**Bailey v. Lafler**  
**209 F. Supp. 3d 955 (W.D. Mich. 2016), cross-appeals pending, (6<sup>th</sup> Cir. 16-2474 & 16-2429)**

In post-AEDPA murder case, district court grants habeas relief on *Brady* claim. Petitioner Bailey was charged with first-degree premeditated murder and first degree felony murder arising from killing of 79-year old woman. An FBI profile report was prepared linking this murder with a murder that occurred years earlier, concluding that one individual was likely responsible for both because of “signature” similarities between the crimes, including that both victims were elderly, white females who lived alone in the same general area of a small town and left the door unlocked; both suffered multiple stab wounds and fractures; both had an electrical cord around the neck or head that did not appear to cause death or injury; the murder weapons were from the victims' homes; no apparent theft motive in either case; no evidence of sexual assault of either. Bailey sought to introduce the report to demonstrate that he was not likely the perpetrator of either murder, as he had been only 10 years old at the time of the earlier murder, but the trial court excluded the report and all references to the earlier murder. On appeal, the state argued that the excluded profile report was not exculpatory and in fact supported a conclusion that Bailey was responsible for both murders, including the one that occurred when he was 10. But the prosecution possessed, and failed to disclose, information that latent prints at the earlier murder scene excluded Bailey as the perpetrator. The state court's decision that the suppressed fingerprint report from the earlier murder was irrelevant and the connection between it and the crime for which Bailey was convicted is speculative is based on an unreasonable determination of the facts and contrary to clearly established federal law. A *Brady* analysis requires the court to analyze whether the withheld evidence puts the whole case, not part of a case, in a different light. Here, the fingerprint

analysis and the FBI profile reports together are directly exculpatory as to both murders, because together, they lead to the conclusion that a third person—not Bailey—is likely responsible for both. The suppression of the fingerprint evidence denied Bailey a meaningful opportunity to present a complete defense. The prosecution’s case was based largely on circumstantial evidence that was not cumulatively strong.

**\*Sears v. Chatman**

**2016 WL 1417818 (N.D. Ga., Apr. 8, 2016) (unpublished)**

District court finds that Sears has established cause and prejudice to overcome procedural bars to merits consideration of his *Brady* claim. Sears was convicted by a Georgia jury of capital murder, kidnapping with bodily injury, and armed robbery in connection with the death of victim Wilbur, and sentenced to death. While Sears’ federal habeas corpus petition was pending, the U.S. Supreme Court granted cert from the denial of state habeas corpus relief, vacated the state habeas court ruling, and remanded for further proceedings. The state court once again denied relief, finding Sears’ *Brady* claim procedurally defaulted. Sears concedes that the claim is defaulted but argues there is cause for the default and he will suffer prejudice if the court does not excuse it. The prosecution knew but did not disclose that the primary witness against Sears, Williams, had been convicted of battery for a premeditated assault while incarcerated, despite Sears’ repeated requests for Williams’ criminal history. Because Sears was entitled to rely upon the prosecution’s “open file policy” to conclude that no more adverse information about Williams existed, and because the suppressed records may have allowed Sears to undermine Williams’ testimony that Sears initiated the kidnapping that resulted in the murder, and may have discredited testimony of an officer that Sears rather than Williams was the worst inmate at the detention center, cause and prejudice is established. Court permits Sears to proceed in federal habeas on this claim.

**United States v. Hampton**

**109 F. Supp. 3d 431 (D. Mass. 2015), appeal dismissed (1<sup>st</sup> Cir. 15-1836, Jan. 20, 2016)**

Hampton pleaded guilty to one count of knowingly and intentionally conspiring to distribute 50 or more grams of cocaine base. Before the plea hearing, the government provided him with certificates of analysis reflecting that the substances recovered from controlled purchases in which he was involved contained cocaine base. At the plea hearing, Hampton did not plead to any particular transaction or amount of cocaine base; at sentencing, based on an agreement with the prosecution, he was sentenced to the mandatory minimum of 10 years followed by 60 months of supervised release, based on the government’s calculation that the substance attributable to Hampton exceeded 280 grams. The lab chemist, Annie Dookhan, who tested 14 of 18 samples of the drugs seized from Hampton, was discovered to have taken evidence from a safe, removed drug samples from the lab, and forged a coworker’s initials on an evidence log, and after she went on administrative leave she was charged and pled guilty to crimes including perjury, obstruction of justice, tampering with evidence, and falsely claiming to hold a degree. Following Hampton’s conviction, he filed a petition to vacate his sentence under 28 U.S.C. § 2255, requesting relief because the prosecutor’s failure to disclose Dookhan’s misconduct violated *Brady* and made his sentencing inherently unreliable. Although other cases involving guilty pleas and Dookhan’s

misconduct have not resulted in vacation of the plea, in this case, “Hampton’s habeas petition is not about his own behavior in making a plea but is about the actual evidentiary basis provided by the government for the imposition of a mandatory minimum” *sentence*. 109 F. Supp. 3d at 437. Although there is no evidence that Dookhan tampered with evidence in Hampton’s case, the fact that the trial judge reluctantly imposed the sentence based on the mandatory minimum corresponding to 280 grams (and mandatory minimums are now unconstitutional) demonstrates that there is a reasonable probability that if the judge had known of the Dookhan scandal, the outcome of sentencing would have been different. The court determined that it is reasonable to “infer that, in the unique circumstances of this unusual case, [that] Dookhan was a member of the prosecution team” “in light of the government’s refusal to confront the issue by way of evidence or even briefing.” 109 F. Supp. 3d at 440. (The court made this determination because when it asked the government to retest and see whether the 280 grams was actually the correct weight, the government refused.)

**United States v. Christian**  
**2015 WL 13228001 (E.D.N.Y., Dec. 18, 2015)**

District court orders disclosure of materials that are potentially discoverable under *Brady* to the court for *in camera* review. Christian was convicted of racketeering crimes, include the murder of victim Estella, based in part through testimony of cooperating witnesses. Christian had repeatedly requested intelligence records from the NYPD and FBI suggesting that the victim was killed at the instruction of the Wu Tang Clan, a noted rap music group, rather than by order of Christian and his racketeering organization. The court concludes that no documents provided at trial demonstrated this, but that by way of a 1999 FBI report that defendant received in response to a FOIA request, the defense has made sufficient showing that there may be material in the broader investigative files that was not previously disclosed that show that the murder was at the direction of people not related to Christian’s criminal enterprise. The government seeks to avoid disclosure by arguing that the defense has not sufficiently identified materials it seeks, and the court, in balancing interests, orders the government “to conduct a comprehensive review of relevant files under its control and submit for the Court’s *in camera* review material relating to reported connected between the Wu Tang Clan and [the cooperating witnesses] with respect to their actions in targeting either [the victim in another case] or Estella with the Wu Tang Clan.” 2015 WL 1322800 at \*4.

**United States v. Beech**  
**307 F.R.D. 437 (W.D. Pa. 2015)**

This discovery order includes helpful language about the timing of disclosure of *Brady* material in federal cases:

[C]ases by the Third Circuit have reiterated and encouraged adherence to the long-standing policy of promoting the early production of all types of *Brady* material, including impeachment and so-called *Higgs* [*United States v. Higgs*, 713 F.2d 39 (3d Cir. 1983)] materials. [Citations omitted.] The government’s early production of *Higgs*-type impeachment materials may well overlap with its subsequent production under the Jencks

Act and provide defendant with ‘advanced’ notice of certain witnesses the government intends to use at trial. Nevertheless, the court notes that after disclosure is made defense counsel can more fully advise his client regarding the appropriate development of the case, including consideration of any plea agreement offered by the government. In light of all of the circumstances, the government is encouraged to disclose all *Brady* impeachment material without further delay, and in any event it will be ordered to produce all such material no later than ten business days prior to trial. 307 F.R.D. at 442.

**Johnson v. Han et al.**

**2015 WL 4397360 (D. Mass., July 17, 2015) (unpublished)**

District court denies defendant-lab chemist supervisor’s motion to dismiss plaintiff-defendant’s § 1983 claim that she permitted her staff to fail to disclose exculpatory test results. Court holds that the state-employed lab chemists were members of the prosecution team with respect to the tests they conducted in Johnson’s criminal case and that a supervisor of the offending chemists may be liable for failing to disclose *Brady* materials.

**Caminata v. County of Wexford**

**2015 WL 6472645 (W.D. Mich., Oct. 27, 2015) (unpublished)**

District court denies defendant-officers’ motions for summary judgment on plaintiff-exoneree’s § 1983 lawsuit based on their suppression of material exculpatory evidence demonstrating that exoneree was not responsible for setting a fire that destroyed his girlfriend’s home (arson of a dwelling house). Evidence alleged to have been withheld included missing photographs that “clearly contradicted [prosecution expert’s] theory that a board covered a thimble hole at the time of the fire” and that the investigating officers were aware that the photographs directly contradicted the validity of the prosecution expert’s reconstruction of the location of the fire and cause thereof.

**United States v. Jones**

**2015 WL 6872358 (W.D.N.Y., Nov. 9, 2015) (unpublished)**

This discovery order includes helpful language about the timing of disclosure of *Brady*/Jencks materials in federal cases:

This Court believes that fundamental fairness and the constitutional due process requirements which underlie *Brady* mandate that the Court have some discretion with respect to the timing of the disclosure of such information, even if it may be considered combined *Brady*/Jencks material. Indeed, even with respect to purely Jencks Act materials, the Second Circuit has stated that “pretrial disclosure will redound to the benefit of all parties, counsel and the court, . . . sound trial management would seem to dictate that Jencks Act material should be submitted prior to trial . . . so that those abhorrent lengthy pauses at trial to examine documents can be avoided.” *U.S. v. Percevault*, 490 F.3d 126 (2d Cir. 1974); *U.S. v. Green*, 144 F.R.D. 631 (W.D.N.Y. 1992).

Here, the Court concludes that disclosure of such inculpatory [sic] and impeachment material, if any exists, in accordance with the common practice in this district (prior to trial so long as it is disclosed in sufficient time for the defendants to have a fair opportunity to utilize the information at trial) is sufficient. 2015 WL 6872358 at \*2.

**Robinson v. Morrow**

**2015 WL 5773422 (M.D. Tenn., Sept. 30, 2015) (unpublished)**

District court grants summary judgment and relief on Robinson’s claim in his 28 U.S.C. § 2254 habeas corpus petition that the prosecution violated *Brady* when it withheld evidence in connection with DNA testing conducted on the knife used to kill the victim. Robinson was convicted of first-degree premeditated murder in Tennessee and sentenced to life in prison. He presented a defense at trial that although he did stab the victim and inflict the fatal wounds, he did not intend to kill her and stabbed her after she cut him with the knife first. After rejecting other claims procedurally defaulted by the state court, the district court addresses the *Brady* claim as a claim “that arise[s] from facts learned through discovery in this action,” and which the court holds is not defaulted. (Later in the opinion, the court notes that Robinson has established cause and prejudice for not raising the claim in state court—the cause was the suppression, and prejudice is that the suppressed evidence was favorable and material, satisfying the elements of the *Brady* claim itself and also overcoming the statute of limitations and procedural default.) Prior to trial, the prosecution sent the butcher knife for DNA testing, but the prosecution provided no specific instructions for the testing, and the analyst assumed the purpose of the testing was to determine whether the butcher knife was used to stab the victim. She tested only one small spot on the knife, away from the cutting edge, and determined that the spot contained the victim’s blood. Had she known that it was important to test for the defendant’s blood as well, she would have tested more areas on the knife. The report disclosed to Robinson at trial stated only that the blood tested matched the victim’s; it did not also include the information that only one spot was tested and that it was not on the cutting edge of the knife. At trial, the prosecution’s theory was that Robinson’s claim that the victim had cut him was false and that instead he had cut himself with another knife after cutting the victim. The prosecutor argued that Robinson’s blood was not on the butcher knife. After Robinson’s conviction, during proceedings on his federal habeas corpus petition, the federal court granted discovery and Robinson obtained the documentation stating that only one spot on the knife was tested. The federal court granted Robinson’s motion to conduct further DNA testing, which proved that Robinson’s blood was on the tip of the knife on both sides, mixed with the victim’s blood, and was the major contributor of DNA on one side of the knife tip. The evidence was suppressed because the analyst knew that only one spot was tested and that knowledge is imputed to the prosecutor. Robinson properly relied on the prosecutor’s express statement that there was no exculpatory evidence that had not been disclosed, and was not required to request or conduct additional testing on the knife with the limited information provided to him. The withheld evidence was favorable because it both impeached the testimony of the analyst by calling into question the thoroughness of her analysis and because it undercut the prosecution’s theory that Robinson lied about being attacked by the victim. It was material because it undercut the erroneous construction of the DNA report as proof that Robinson’s blood was not on the knife, which “was one of the lynchpins of the prosecutor’s premeditation theory at trial and was an

important factor in the state court decisions that followed.” 2015 WL 5773422 at \*25.

**United States v. Blankenship**

**2015 WL 3687864 (S.D. W.Va., July 12, 2015) (unpublished)**

In this discovery order, district court finds that government “does not comply with the requirement of *Brady* by merely including all known *Brady* material within the four million plus pages of discovery” and orders the government to “specifically designate any known *Brady* material as such and disclose the same to defense counsel.” 2015 WL 3687864 at \*6.

**\*Washington v. Beard,**

**2015 WL 234719 (E.D. Penn., Jan. 16, 2015), appeal withdrawn, (3<sup>rd</sup> Cir. 15-99001, Dec. 1, 2015)**

This capital habeas petitioner was entitled to relief on a *Brady* claim, and on grounds that the prosecutor’s improper argument violated *Bruton v. United States*, 391 U.S. 123 (1968). Petitioner was convicted and sentenced to death for the murder of an unarmed security guard who was shot and killed during an armed robbery at a Save-A-Lot store in Philadelphia. Witnesses to the crime recounted that two men came into the store and purchased a bag of potato chips; one of the men pulled out a gun and demanded money; and then the two assailants ran away followed by the security guard. Witnesses heard shots fired outside but did not witness the shooting. Two witnesses positively identified petitioner’s co-defendant, Derek Teagle, as the robber with the gun. Teagle’s fingerprints were also found on the bag of potato chips left on the counter. Teagle gave a statement to law enforcement in which he implicated petitioner as the other robber and suggested that petitioner was the shooter. Neither petitioner nor Teagle testified at their joint trial. Over petitioner’s objection, Teagle’s statement was read into evidence and petitioner’s name was replaced with the word “Blank.” The trial court instructed the jury not to use this statement against petitioner. First, the State violated *Brady* by failing to disclose witnesses’ descriptions of the robbers recorded shortly after the crime and evidence that witnesses inside the store failed to identify petitioner from a photo array. The state conceded that none of these items were disclosed to the defense prior to trial. This evidence was material because the identity of the shooter was contested; the withheld evidence went directly to the issue of the shooter’s identity; and, the withheld evidence was consistent with Teagle being the only assailant seen with a gun. The undisclosed evidence would have supported the defense theory at trial and bolstered petitioner’s motion to sever his trial from Teagle’s. Moreover, the prosecutor committed misconduct by “trash[ing]” the trial court’s instructions during his closing argument by repeatedly referring to Teagle’s statement and specifically filling in the “blanks” with references to Petitioner. *Washington*, 2015 WL 234719 at \*16. The trial judge’s attempt to fix this error with a curative instruction was “tantamount to the wizard telling Dorothy to pay no attention to the man behind the curtain.” *Id.* Apart from Teagle’s statement, there was no evidence that petitioner was armed. The prosecutor’s improper argument most certainly had a substantial and injurious effect on the outcome of the case, and petitioner was entitled to relief on this ground as well.

**Johnson v. Cain,**  
**68 F.Supp.3d 593 (E.D. 2014)**

This non-capital petitioner was entitled to relief under *Brady* and *Giglio* as a result of the State's misconduct prior to his murder trial for the shooting death of Richard McClarity during an argument at a swimming pool. Petitioner admitted to shooting McClarity but claimed he acted in self-defense or, at a minimum, heat of passion when he shot at Ira Bodere, who was attacking petitioner's brother, and the bullet aimed at Bodere accidentally struck McClarity. The state suppressed a statement given by Ira Bodere to the police shortly after the shooting. At trial, the state relied heavily on Bodere's testimony that after he hit petitioner's brother during an argument, petitioner got out of his car and shot at him. Bodere claimed that he fell to the ground and pretended to be hit, but petitioner came over and started kicking him while he was laying on the ground. Bodere further asserted that McClarity attempted to help him up off the ground when petitioner started to leave, but then petitioner returned and shot twice. Bodere added that petitioner said to another witness nearby, "[i]f I had more bullets, John, I would kill you too." *Johnson*, at 611. In its closing argument, the State emphasized Bodere's testimony as evidence of petitioner's specific intent to kill. Bodere's suppressed statement, however, flatly contradicted his trial testimony and would have been useful for supporting petitioner's defense instead. In a police report recorded on the day of the shooting, Bodere told police that he punched petitioner's brother in the mouth; petitioner jumped out of his car and started shooting; Bodere fell to the ground and then heard two more shots. In this version of events, petitioner did not kick Bodere while he was on the ground, nor did petitioner return to shoot McClarity while he was trying to assist Bodere. Thus, Bodere's suppressed statement was favorable and resulted in prejudice to petitioner, particularly considering that: (1) the jury deliberated overnight and initially informed the judge that they were unable to come to a consensus; (2) the jury made several requests for additional instructions on specific intent; and, (3) the state relied exclusively on Bodere's testimony to support its argument on that very point. (The claim was considered *de novo* because it was rejected on procedural grounds by the state court. The procedural default did not preclude federal review given that the state court's ruling that the claim was untimely under state law was erroneous.)

**\*Bridges v. Beard,**  
**941 F.Supp.2d 584 (E.D. Pa. 2013), aff'd, \_\_\_ Fed.Appx. \_\_\_ (3<sup>rd</sup> Cir. Sep. 1, 2017)**

The district court granted relief in this Pennsylvania capital case, finding that the prosecution violated *Brady v. Maryland* by failing to disclose impeachment evidence concerning a key guilt-or-innocence witness. Petitioner was convicted under an accomplice liability theory, along with two co-defendants, for the murder of Gregory and Damon Banks, whom petitioner believed were responsible for an armed robbery at his home while his girlfriend was present. Petitioner admitted going to the Banks' home to confront them about the robbery, but maintained that he had not intended to kill them and was surprised when a co-defendant began shooting. To counter that claim, the prosecution presented the testimony of one George Robles, who claimed that prior to the homicides petitioner had displayed a handgun and said he was going to kill the Banks because they went into his house and put guns to his girlfriend's head. The jury accepted the prosecution's theory, convicted petitioner, and sentenced him to death. Petitioner made an



unsuccessful bid for state post-conviction relief – including a failed attempt at access to information about Robles – then sought federal habeas relief, and was permitted to conduct discovery. Through that mechanism he acquired a series of police reports showing that Robles was a suspected drug dealer who had multiple run-ins with police, and regularly offered to provide information in exchange for leniency. After the state court declined to review this new information on the ground that his *Brady* claim had already been litigated in a prior proceeding, petitioner returned to federal court. Observing that the procedural posture of petitioner’s claim was “analogous to *Cone v. Bell*, 556 U.S. 449, 472 (2009),” the district court declined to apply § 2254(d). 941 F.Supp.2d at 602. Examining the merits de novo, the district court held that petitioner was entitled to relief because: the police records were clearly impeaching, and thus favorable, in that they suggested Robles’ “motivation to lie to curry favor with the police to protect his drug business and to stay out of police custody,” *id.* at 605; the reports were generated by police agencies and not disclosed to the defense; and “the cumulative prejudicial effect of the numerous suppressed police reports about Robles shows that they are ‘material’ under *Brady*.” *Id.* at 607. “Robles’ testimony,” the court explained, “constituted the only evidence that the prosecution presented to show that [petitioner] had the intent to kill,” and the prosecution “repeatedly emphasized Robles’ trustworthiness . . . [and] describe[d] Robles as a reluctant witness.” *Id.* Without the withheld evidence, petitioner could not meaningfully challenge these claims. Finally, the withheld evidence “could have led [petitioner’s] attorneys to other witnesses who could have testified about Robles’ activities and his character.” *Id.* at 608.

**\*Keenan v. Bagley,**

**2012 WL 1424751 (N.D. Ohio April 24, 2012)**

The district court granted relief in this Ohio capital case, finding that the prosecution committed multiple *Brady v. Maryland* violations. Petitioner was convicted of killing Anthony Klann after his codefendant, Edward Espinoza, testified that he witnessed petitioner slash Klann’s throat with a knife, push him into a creek, and then tell another co-defendant, Joseph D’Ambrosio, to “[f]inish him.” 2012 WL 1424751 at \*2. Petitioner unsuccessfully pursued four applications for state post-conviction relief, raising some *Brady* claims, but much of the evidence at issue in his federal proceedings did not come to light until after his co-defendant, D’Ambrosio, obtained discovery and ultimately won relief on a *Brady* claim in his own federal habeas proceedings. After determining that § 2254(e)(2) did not bar expansion of the record, the district court noted that all of Keenan’s *Brady* claims were procedurally defaulted (either because he failed to raise them in state court or because the state court dismissed them as untimely), and proceeded to assess the merits and cause and prejudice simultaneously. Based on a review of the evidence, the court determined that Keenan had proved suppression of material evidence in the following categories: (1) evidence that another man, Paul Lewis, had motive to kill Klann because Klann had information that Lewis committed a rape for which Lewis faced charges at the time of Klann’s murder, and evidence the Lewis had information regarding the crime that was not publicly known and had asked the police to help resolve a DUI charge against him in exchange for his testimony; (2) evidence that police investigators believed that Klann’s murder occurred in some other location and his body was subsequently dumped in the creek bed because there was

no blood or evidence of a struggle near the creek where his body was found; (3) police reports concerning, and a cassette tape containing, conversations between an informant and an inmate who once lived with Klann in which the inmate may have implicated other persons in Klann's murder; (4) evidence that two of the state's witnesses had asked the police to assist them in relocating because they had been threatened by members of D'Ambrosio's family; and, (5) witness reports indicating that the crime took place at a date and time inconsistent with the state's theory at trial and implicating Lewis, not petitioner, in the events of the crime. The district court determined that each of these categories individually satisfied the first two prongs of *Brady* and thereby established cause and prejudice to excuse the procedural default. The court then conducted the *Brady* prejudice analysis by looking cumulatively at all of the withheld evidence and concluded that Keenan could have used this information in three ways. "First, Keenan could have used the evidence to impeach Espinoza, and, because Espinoza was the state's sole witness to the crime and the only evidence linking Keenan to the murder, thereby undercut the state's entire case." *Id.* at \*43. Second, "Keenan could have used the *Brady* material ... to impeach the police and call into question the thoroughness and integrity of their investigation." *Id.* at \*44. And third, he "could have used the suppressed information ... to implicate others in the murder, at a minimum creating a reasonable doubt regarding his participation in the crime." *Id.* Viewed collectively, the court concluded that there was a reasonable probability that the suppressed evidence would have produced a different verdict sufficient to undermine confidence in the outcome of petitioner's trial.

**Bies v. Bagley,**

**2012 WL 1203529 (S.D. Ohio April 10, 2012), aff'd, 775 F.3d 386 (6<sup>th</sup> Cir. 2014)**

The district court granted relief on petitioner's *Brady v. Maryland* claim in this formerly capital Ohio murder case (petitioner's death sentence was previously set aside by a state court under *Atkins v. Virginia*). Petitioner had been convicted and sentenced to death for the kidnapping, attempted rape, and aggravated murder of a ten-year-old boy. The evidence supporting the *Brady* claim did not come to light until after petitioner's federal habeas proceedings began, and his effort to exhaust the claim in state court was turned away as procedurally barred. After determining that the procedural bar was excused because the state's misconduct had been the cause of petitioner's delay in discovering and asserting the claim, the district court examined the merits. The court held that the state violated *Brady* by withholding evidence that another suspect confessed to multiple people that he had killed the victim, that two other suspects had also confessed to the crime, and that some of these suspects as well as several other sex offenders had been known to frequent the abandoned building where the victim's body was found. The court further determined that this evidence, viewed collectively, was material, particularly in light of the state's weak case against Bies. The state had no physical evidence connecting him to the crime, and had instead relied on a sighting of Bies at a park near the abandoned building where the victim was found and Bies' alleged confession to the police and a jailhouse informant. The district court noted that "[t]he strength of the confession to police is undermined by the fact that Bies is a mentally retarded man who repeatedly denied involvement in the murder prior to his final unrecorded statement to police," and that "the credibility of the jailhouse informant also can

be attacked on several bases.” 2012 WL 1203529 at \*20. The court went on to reject the “stringent evidentiary standard suggested by Magistrate Judge Merz,” under which Bies would have been required to prove that the withheld exculpatory material would have led to admissible evidence at trial by offering admissible affidavits from the witnesses discussed in the police reports. *Id.* at \*21 (citing *Jamison v. Collins*, 291 F.3d 380 (6th Cir. 2002), *Castleberry v. Brigano*, 349 F.3d 286 (6<sup>th</sup> Cir. 2003), and *D’Ambrosio v. Bagley*, 527 F.3d 489 (6th Cir. 2008)). The court also noted that Bies’ co-defendant had recently won relief on substantially the same *Brady* claim in *Gumm v. Mitchell*, 2011 WL 1237572 (S.D. Ohio. Mar. 29, 2011).

**Hash v. Johnson,**  
**845 F.Supp.2d 711 (W.D. Va. 2012)**

Petitioner Hash was entitled to habeas relief from his capital murder conviction due to the prosecution’s presentation of false testimony by a jailhouse informant concerning expected benefits from his testimony against Hash. The claim was analyzed de novo after a concession by respondent that Hash established cause and prejudice to overcome the default. (Much of the supporting evidence was obtained through federal discovery.) The inmate falsely denied that one of the State investigators had agreed to speak with the U.S. Attorney on the inmate’s behalf concerning reduction of a federal sentence and the Commonwealth’s Attorney admittedly made false and misleading statements in his closing argument about the absence of any agreement to assist the inmate in federal court. In finding a reasonable likelihood that the jury would have reached a result more favorable to Hash had the false testimony not been presented, it was noted that no physical evidence connected Hash to the crime and testimony by other witnesses implicating Hash was contradictory. (Habeas relief was also granted on other claims, including prosecutorial and police misconduct. It was found, inter alia, that the Commonwealth failed to disclose exculpatory evidence. Because of the conclusion that the assorted misconduct amounted to a due process violation, it was not determined whether a *Brady* violation also occurred.)

**Gillispie v. Timmerman-Cooper,**  
**835 F.Supp.2d 482 (S.D. Ohio 2011)**

In case involving two separate instances of kidnapping and rape, petitioner was entitled to habeas relief based on the prosecution’s suppression of evidence concerning petitioner’s elimination as a suspect by the initial investigating officers and the reasons for their conclusion that petitioner was not a viable suspect. (The reasons included a belief that a photo of petitioner did not resemble the composite sketches of the assailant, that petitioner did not match the profile of the assailant developed by the police, petitioner did not appear to be able to fit the pants size the assailant was seen to have worn, and the person who raised petitioner as a possible suspect had been exposed to the composite sketches of the assailant for a significant amount of time but only came to the police with his suspicions about petitioner after he had a nasty fight with petitioner.) Although the investigating officers opinions did not go directly to petitioner’s guilt or innocence, “they clearly go to the quality of the investigation” that took place subsequent to their investigation. In light of the total record, which included a complete absence of physical

evidence tying petitioner to the crimes, the use by the replacement investigating officer of a photo line-up almost two years after the offenses with a photo of petitioner styled differently than the other photos, and an initial jury deadlock of eight to four in favor of acquittal prior to an Allen charge, the state court's conclusion that the suppressed evidence was not material was not entitled to deference. Although one of the initial investigating officers became a defense investigator for trial counsel on petitioner's case, this did not defeat the *Brady* claim as the record established that the investigator performed only discreet tasks and was unaware that information about his work on the case had not been disclosed to trial counsel. Further, trial counsel had no reason to believe he had not been provided with everything.

**Munchinski v. Wilson,**

**807 F.Supp.2d 242 (W.D. Penn. 2011), aff'd, 694 F.3d 308 (3<sup>rd</sup> Cir. 2012)**

Petitioner was entitled to habeas relief as to his 1986 murder convictions based on the State's suppression of a report that provided the names of individuals who allegedly presented a version of events at the crime scene that was wholly inconsistent with the testimony of the key prosecution witness, who claimed to be an eyewitness to the murders, and omitted petitioner's involvement entirely. Petitioner was also entitled to habeas relief because seven pieces of suppressed evidence when considered in the aggregate presented additional, non-cumulative methods to impeach the key prosecution witness. (The additional suppressed evidence included samples of physical evidence from the crime scene that, when tested, failed to implicate petitioner. The absence of any physical evidence tying petitioner to the murders supported his position at trial that he was not present during the killings.) State court's analysis of petitioner's *Brady* claims unreasonably applied clearly established federal law by imposing a heightened standard of materiality and by failing to consider the suppressed evidence collectively. Petitioner's showing of innocence satisfied the requirements for filing a second or successive habeas petition.

**Harris v. Gov't of Virgin Islands,**

**2011 WL 4357336 (D. Virgin Islands Sept. 16, 2011)**

In murder of a police officer case, although defendant did not move for a new trial on the basis that the prosecutor knowingly employed the false testimony of an eyewitness who identified defendant as one of four assailants for the first time in court, a new trial is ordered based on plain error. (Prior to trial, the eyewitness had only been able to identify one of the charged men in a photo lineup, co-defendant Mosby. At trial, the eyewitness surprised everyone by identifying defendant, not Mosby.) Notably, the lower court had found the eyewitness's post-trial recantation credible even though the eyewitness, who had been visited by the prosecutor's investigator prior to the hearing, then repudiated his recantation. The lower court cited to the fact that the eyewitness had approached the prosecutor seven days after the trial ended and disavowed his identification of defendant. In addition, the eyewitness later met with the defense team and signed an affidavit acknowledging that he had been mistaken when identifying defendant at trial. In finding that the identification was false, the court pointed to: (1) the credible recantation; (2)

the two completely inconsistent narratives the eyewitness provided regarding how he came to observe the four assailants; (3) his three initial statements to law enforcement that he did not see any of the four men's faces; (4) his failure to pick defendant out of a photo array before trial; (5) his subsequent failure to identify co-defendant Mosby in person, despite having previously identified his photo; and (6) defendant's testimony regarding his non-involvement in the murder. As for whether the prosecutor knew or should have known that the identification was false, the court stated: "[W]e are certain that a reasonable prosecutor pursuing justice would have recognized the substantial question arising from [the eyewitness's] identification testimony and would have strongly considered the possibility that this identification was made in error. . . . Here the circumstantial evidence that [the prosecutor] knew, or should have known, that [the eyewitness] made a mistake abounds: the government's case against [defendant] was reed-thin; [the eyewitness's] inconsistent narrative and state of mind raised questions about his ability to make an accurate identification; [the prosecutor] failed to inquire into the identification's veracity when the opportunity presented itself at trial; and he subsequently withheld [the eyewitness's] recantation from [defendant's] counsel in violation of *Brady* for 15 months." In addition, the prosecutor was aware that the stress from the events had led the eyewitness to seek psychiatric care. On this record, the court found the prosecutor guilty of "willful blindness" which "satisfie[d] *Agur*'s prosecutorial knowledge element under the plain error standard." It also concluded that defendant met the plain error standard for prejudice.

**\*Browning v. Workman,**

**2011 WL 2604744 (N.D. Okla. June 30, 2011), aff'd sub nom. Browning v. Trammell, 717 F.3d 1092 (10th Cir. 2013)**

The district court granted guilt-innocence phase relief on petitioner's *Brady v. Maryland* claim in this Oklahoma capital case. Petitioner "was convicted of attempting to kill his pregnant ex-girlfriend; Cenessa Tackett; killing Ms. Tackett's parents; and setting fire to their home." 2011 WL 2604744 at \*1. His defense was that "his co-defendant Shane Pethel planned and committed these acts with Ms. Tackett, who possessed a financial motive to commit the crimes." *Id.* "Physical evidence linking [petitioner] to the crime was virtually non-existent." *Id.* Instead, the state's case rested on Tackett, who "was the key witness and sole eyewitness in the prosecution's case." *Id.* Prior to trial, petitioner moved the prosecution to produce Ms. Tackett's mental health records. After an in camera review of the records, the trial court found "that they contained no exculpatory material that must be disclosed, absent a waiver [of the psychotherapist-patient privilege] from Ms. Tackett." *Id.* The trial court then placed the documents under seal. Petitioner was convicted and sentenced to death in state court. On direct appeal, the Oklahoma Court of Criminal Appeals (OCCA) also reviewed the sealed documents and found that they contained "nothing material to either guilt or punishment" and "nothing favorable to the defendant." *Id.* at \*4. Petitioner then sought federal habeas relief, asserting that "the trial court's refusal to order disclosure of Ms. Tackett's mental health records, which were in the possession of the prosecution deprived him of his right to access exculpatory evidence under the Due Process Clause of the Fourteenth Amendment and *Brady v. Maryland*, 373 U.S. 83 (1963), and denied him the rights to cross-examination and confrontation under the Sixth Amendment." *Id.* at \*3.

Because the district court granted relief on the due process claim, it did not reach the Sixth Amendment claims. The district court found that the documents showed Ms. Tackett: (1) “was suffering from severe mental illness;” *id.* at \*6; (2) “suffered from memory deficits, poor judgment, trouble distinguishing reality from fantasy, was manipulative and was potentially a danger to others,” *id.*; (3) “exhibited a pronounced disposition to lie,” *id.* at \*7; and, (4) was “dramatically impaired [in] her ability to perceive and tell the truth.” *Id.* The district court held that the OCCA had “identified the correct legal principles by citing *Kyles*, *Bagley* and *Brady*,” *id.* at \*6 (internal citations omitted), but had unreasonably applied that law in two respects. First, the district court held, “[t]here is no reasonable argument or theory that could support the OCCA’s conclusion that the sealed material contained nothing favorable to [petitioner’s] defense.” *Id.* at \*7. “Second, the OCCA’s conclusion that the sealed mental health records contain nothing material either to guilt or punishment was an unreasonable application of Supreme Court law to the facts of this case.” *Id.* Given that Ms. Tackett was the sole witness against petitioner at trial, and that “her credibility and veracity were already shown to be suspect” due to inconsistent statements and admissions she made at trial, the district court held that the state court’s decision was unreasonable because “a fair minded jurist could determine that the withheld favorable evidence put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at \*9.

**Andazola v. Woodford,**  
**2011 WL 1225979 (N.D. Cal. March 31, 2011)**

In attempted murder case, habeas relief granted due to prosecution’s failure to disclose impeachment evidence regarding the investigating officer who testified for the prosecution that a witness had identified petitioner as the shooter. The victim was an acquaintance of petitioner. The victim testified that he went to petitioner’s home to clear the air after learning that petitioner suspected him of having stolen a CD player. The victim lifted weights and smoked marijuana in petitioner’s garage with petitioner. Several other people were present. The victim was told to leave the garage by another acquaintance after the victim denied having stolen the CD player. The victim initially moved towards petitioner to shake his hand but turned away when he saw petitioner’s angry look. As he turned, he blacked out and when he regained consciousness he realized he had been shot. Although the victim had told the investigating officers that the other acquaintance had been behind him when he was shot in the back, he testified he was “pretty sure” it was petitioner. The victim also stated, however, that he never saw a gun in petitioner’s hand. Other witnesses provided conflicting reports. Police officer Salgado testified that witness Delgado informed him that she saw petitioner shoot the victim but Delgado later denied making any such statement. Officer Salgado further testified that following her denial, Delgado privately repeated to him that she had indeed seen petitioner shoot the victim. At trial, Delgado admitted being present in the garage but denied seeing the shooting occur. Petitioner’s cousin acknowledged in his testimony that he had implicated petitioner as the shooter during a police interview but claimed he did so only because Salgado had “threatened to arrest him if he did not implicate someone as the shooter.” Two other witnesses testified that Andazola told them he had shot somebody. Petitioner was entitled to habeas relief because of the prosecution’s suppression

of evidence showing Salgado's "pattern of falsifying police reports" and a later "criminal investigation" undertaken "into [Salgado's] conduct." This evidence was material given the prosecutor's characterization of Salgado's testimony "as the 'lynchpin' in her closing argument." The state courts' denial of the misconduct claim was "contrary to, or involved an unreasonable application of clearly established federal law."

**Gumm v. Mitchell,**

**2011 WL 1237572 (S.D. Ohio Mar. 29, 2011), aff'd, 775 F.3d 345 (6<sup>th</sup> Cir. 2014)**

The district court granted relief in this previously capital (petitioner's death sentence was set aside pursuant to *Atkins v. Virginia*) Ohio murder case, finding that the prosecution violated *Brady v. Maryland*, petitioner's due process rights were violated by the admission of irrelevant prior bad act evidence, and the prosecutor's misconduct deprived petitioner of a fair trial. Based largely on his confession, petitioner was originally convicted and sentenced to death for the aggravated murder, kidnapping, and attempted rape of a 10-year-old boy. After securing relief from his death sentence under *Atkins*, petitioner pursued federal habeas relief from his conviction, and the district court concluded that he was entitled to relief on three grounds. First, the court found that the state had failed to turn over an array of *Brady* material, including: (a) inculpatory statements by three other suspects; (b) information concerning local sex offenders who were questioned about the victim's death; (c) information concerning other individuals seen in the area at the time of the crime; (d) information about others who were with the victim on the night of the crime; (e) information that would have called into question the testimony of a state witness who claimed that the victim never played in the vacant building where his body was found; (f) evidence that was inconsistent with the prosecution's theory about what time the victim was killed; and, (g) information that gym shoes belonging to another suspect matched the gym shoe marks found on the victim's body. While the state court found that the undisclosed evidence was not material and did not undermine confidence in the verdict, the district court held that this conclusion involved an unreasonable application of clearly established federal law. The court explained that although much of the undisclosed evidence was not itself admissible, it could have led defense counsel to admissible evidence. The court went on to add that "[t]here was no physical evidence linking petitioner to the crime. The police officers had only petitioner's confession which, because of his mental retardation and his heightened susceptibility to police coercion, must be viewed with some skepticism." *Id.* at \*8. Second, the district court held that petitioner was entitled to relief on his claim that the prosecution's introduction of evidence that petitioner once told his neighbor that he had "fucked a horse" violated his right to a fundamentally fair trial. The state courts held that even if this evidence should have been excluded, the prosecutor did not dwell on it and, on the whole, petitioner received a fair trial. The district court held that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented. Although the neighbor's testimony on this issue was brief, it was "egregiously unreliable" and "among the most outrageously inflammatory evidence this Court has ever read in a capital case transcript." *Id.* at \*9. Additionally, the district court held that petitioner's due process and confrontation rights were violated by the erroneous introduction of hearsay statements from his medical records which, also recounted irrelevant prior bad acts,

such as the fact that petitioner lied, became rowdy when he drank, was cruel to animals, solicited oral sex from someone, tried to rape his sister's friend, and burned a boy with a hot spoon. The state court held that the records, including the hearsay statements they contained, were admissible because petitioner's expert witness had reviewed them in formulating his opinion. The district court concluded that the fact that the expert reviewed the documents did not make the hearsay statements admissible and the admission of this evidence deprived petitioner of a fair trial. Finally, the district court held that the prosecutor's improper pattern of misconduct, evidenced primarily by the *Brady* violation and the introduction of inadmissible prior bad act evidence, deprived petitioner of a fundamentally fair trial. The state court's conclusions that petitioner received a fair trial and that any errors were harmless were contrary to, or involved an unreasonable application of, clearly established federal law.

**Merritt v. Hoke,**

**2011 WL 198104 (N.D.W.Va. Jan. 18, 2011)**

Petitioner was denied a fair trial by the State's failure to disclose its agreement with Thacker, the driver in the robbery petitioner was convicted of committing, that if she invoked the Fifth Amendment the State would request immunity for her. Disclosure of the State's "tacit pre-trial immunity agreement" with Thacker "would have been favorable for its impeachment value." Although the prosecutor told defense counsel the day of Thacker's testimony that he intended to request immunity for her if she invoked her Fifth Amendment rights, the defense was unaware of the pre-trial discussions about immunity. The nondisclosure was material for two reasons. First, an "undeniable difference" exists "between the way a juror perceives the credibility of a witness ordered to testify against her will versus a witness" following "a pre-orchestrated plan" between the prosecution and the witness' counsel. In the former, a juror could reasonably "attribute more credibility to a witness forced to testify against her will" because it would "only be human nature for a juror to expect truthful testimony from an unwilling witness." But in the latter, a "reasonable probability" exists that "a juror would allow" the prosecution's involvement, including the immunity request, to "cast at least some shadow of doubt on the witness' motivation to testify consistent with the State's theory...." Second, Thacker's testimony was the only "particularly incriminating" evidence presented. No physical evidence implicated petitioner: no fingerprints or disguises discovered, and no money recovered. The prosecutor "compounded the *Brady* violation and further undermined confidence" in the outcome by arguing "'in effect' that the State had nothing to do with the deal," and the deal had "come solely from" the trial judge. That argument was "misleading, at best, and untrue at worst." The State's "*Brady* violation" undermined "confidence in the outcome," was material, and petitioner was entitled to habeas relief.

**Valentin v. Mazzuca,**

**2011 WL 65759 (W.D.N.Y. Jan. 10, 2011)**

The district court granted relief in this New York robbery case, finding that the prosecution violated *Brady v. Maryland* when it failed to disclose the criminal history of the only testifying



eyewitness to the robbery. After agreeing with the state court's determination that the evidence was favorable and had been suppressed, see 2011 WL 65759 at \*17-18, the district court held that the state court had "erroneously and unreasonably performed a 'sufficiency of the evidence' review in deciding the materiality issue." *Id.* at \*20. The court went on to explain that the prosecution's case for guilt was "more akin to a house of cards than a foundationally sound structure, and that it was more than reasonably possible that the only eyewitness's criminal record "could have been the card that toppled the house." 2011 WL 65759 at \*21.

**\*Hodges v. Epps,**

**2010 WL 3655851 (N.D. Miss. Sept. 13, 2010), aff'd on other grounds, 648 F.3d 283 (5<sup>th</sup> Cir. 2011)**

Mississippi death row inmate entitled to habeas relief as to his sentence on numerous grounds, including claim that the prosecution presented false evidence at the penalty phase about sentencing proceedings in Hodges' prior burglary case. The murder victim, Isaac, was the brother of Hodges' ex-girlfriend, Cora. Hodges had previously pleaded guilty to repeatedly breaking into Cora's mother's home to see Cora. At the time of Hodges' plea, Cora's mother provided a victim impact statement asserting she did not feel safe with Hodges in her family's life. At Hodges' sentencing, the DA told the judge that although Cora's mother believed Hodges should be punished, "her anger had subsided." Finding that the State made no sentencing recommendation, and Cora's mother did not want Hodges incarcerated for a lengthy period, Hodges was sentenced to a 7-year prison term but was only incarcerated for about six months. Three weeks after Hodges' release, Hodges broke into Cora's home where he encountered Isaac and shot and killed him. At the capital sentencing proceeding, the prosecutor asked Hodges and his mother about Cora's mother's actions to keep Hodges out of prison on his earlier burglary charge. Both denied knowledge of any such action. An assistant district attorney testified that he had requested a 15-year prison term but that Cora's mother told him she did not want Hodges sent to prison. In his closing argument, the prosecutor argued that despite Hodges' refusal to acknowledge it, Cora's mother had bestowed on him "a huge measure of grace" and yet he killed her son after he was given a second chance of monumental proportions. On appeal, the earlier plea hearing transcript was ordered and it showed the prosecution made no recommendation on Hodges' sentence, and Cora's mother never requested Hodges receive probation or leniency. The state court, however, refused to consider the transcript because it was not part of the trial court record and the court had denied Hodges' motion to expand the record to include it. The state court also found the false evidence issue barred due to Hodges' failure to object during his cross-examination and the questioning of his mother. Finally, without consideration of the plea transcript, the state court found the requisite evidentiary basis for the questioning in the assistant district attorney's testimony. The state post-conviction court later barred the claim as *res judicata*. The federal district court expressed skepticism about the State's argument that the claim was barred due to the lack of a contemporaneous objection, observing that trial counsel "had no reason to believe" they needed "an actual transcript" of the earlier burglary plea "to correct the State's presentation of false evidence." But if "cause and prejudice" were required to overcome a procedural default, Hodges established both. The court also found Hodges was improperly

denied a fair opportunity to present his claim by a “Catch-22”: the state court failed to consider the plea transcript on direct appeal, and then on post-conviction review, the state court determined the issue was “res judicata.” Considering the prior plea transcript and testimony from an evidentiary hearing ordered by the district court, the court concluded the testimony of then assistant district attorney (now Judge) Kitchens – that, although not on the record, the State sought a 15-year imprisonment term, Cora’s mother “did not want [Hodges] to go to prison” and her “wishes were relayed to the judge” – was “factually at odds” with the record, and the State “should have known” Kitchens’ testimony at the capital trial “was false.” The record showed the State made no recommendation, and nothing indicated Hodges’ attorney spoke to Cora’s mother or that Cora’s mother told him she did not want Hodges sent to prison. The court concluded that the “State seemingly unconcerned with the accuracy of the testimony to be given in a trial where the result could be death, provided the jury with false information” “elicited to show” Hodges “is a remorseless liar who was shown kindness that he refused to acknowledge and which he repaid by murdering the son of the woman who extended it.” Concluding the state court decision was based on “an unreasonable determination of the facts,” and an unreasonable application of clearly established law, and that the facts showed a reasonable probability that “the testimony affected the jury’s judgment,” the court concluded the State’s actions undermined confidence in the verdict, and Hodges was entitled to a new sentencing hearing.

**\*Guzman v. Department of Corrections,**  
**698 F.Supp.2d. 1317 (M.D. Fla. 2010), aff’d, 663 F.3d 1336 (11<sup>th</sup> Cir. 2011)**

Death row inmate entitled to habeas relief where prosecution unwittingly presented false testimony from the key prosecution witness and the lead detective regarding whether the witness had received benefits for testifying against petitioner. The key witness, Cronin, lived with petitioner at the time of the capital crime. Cronin initially denied any knowledge about the murder but later told the lead detective that petitioner had confessed to her. At the time of the disclosure, Cronin had an outstanding arrest warrant for a probation violation and she sought a “deal.” Although the state attorney handling the case instructed the detective to arrest Cronin, the detective disregarded the directive and instead took her to a hotel where she was provided with food paid for by the police department. Cronin subsequently left the hotel without permission and law enforcement lost contact with her while she engaged in prostitution and crack cocaine use. She was twice arrested before testifying against petitioner before the grand jury and at his trial. She denied receiving any benefits in exchange for the testimony but did acknowledge being placed in a hotel room for “protection.” The lead detective denied that law enforcement or the State Attorney’s office had offered Cronin any deals in exchange for her testimony. During post-conviction proceedings it was learned that Cronin had received a payment. The detective then conceded that she delivered a \$500 money order payable to Cronin to the jail where Cronin was housed eight days before Cronin’s grand jury testimony. This was a reward that had been publicized in the media and Cronin’s mother had contacted the detective asking if the detective could get it to Cronin. Although the detective and the prosecuting attorney further testified that the prosecuting attorney had not been informed that Cronin received a reward, the false testimony was nonetheless imputed to the prosecution. The state court’s finding that the false testimony was not material was contrary to or involved an unreasonable application of Supreme Court

precedent and was based on an unreasonable determination of the facts. That Cronin's credibility was significantly challenged at trial did not render the false testimony immaterial given her importance as a witness, that exposure of the detective's false testimony could have cast doubt on the entire investigation, and the other evidence of guilt was not overwhelming. Petitioner was entitled to relief under both *Brady* and *Giglio* even if the *Brecht* standard applied.

**Blumberg v. Garcia,**  
**687 F.Supp.2d 1074 (C.D. Cal. 2010)**

Habeas relief granted in case involving convictions for attempted murder, conspiracy to commit murder and assault with a semiautomatic firearm, with a finding that the crimes were committed for the benefit of a criminal street gang, where key prosecution witnesses (police officer Hewitt, deputy sheriff Foss, and purported former gang member Reyes) provided false testimony and important impeachment and exculpatory evidence was suppressed. The prosecution theory was that petitioner and his brother had conspired to kill a rival gang member. The defense theory was that petitioner was no longer an active gang member, was unaware that his brother was armed and was surprised when his brother shot the victim. To establish motive and intent, the prosecution presented testimony from Foss linking petitioner to present gang membership. Foss's opinions were based in part on information he had received from the Los Angeles Police Department (LAPD) CRASH division. The prosecution also called Reyes who claimed that petitioner was the shooter in an incident in a park that followed a confrontation with members of the shooting victim's gang to which Reyes had belonged. According to Reyes, he quit the gang after the park shooting, which occurred 11 days before the shooting in this case. In addition, Hewitt described an incident some two years before the crime in this case where petitioner and his brother had been arrested in a rival gang's territory with weapons in the car. Petitioner had been the driver and Hewitt stated he had observed the person in the front passenger seat pass a handgun to petitioner's brother in the back seat. Hewitt also testified that the car had a hidden compartment. (Petitioner denied knowing any weapons were in the car and that there was a hidden compartment.) At the time of the arrest, Hewitt was part of LAPD's CRASH division. After petitioner was convicted, evidence surfaced that Hewitt was terminated by LAPD for excessive force and other charges for which he was under an internal investigation at the time of petitioner's trial. It was also learned that LAPD investigators had been told that Hewitt was well known to fabricate probable cause to arrest, plant evidence and falsify reports. At least one other officer from CRASH who Foss had relied on regarding gang information was also implicated in a corruption scandal. Also discovered after trial was evidence that Reyes had been an active gang member at the time of trial, contrary to his testimony. In granting relief, the district court found that Hewitt had "falsely testified" that he found two handguns in a "false compartment" in petitioner's car. This false testimony was material under *Napue v. Illinois*, 360 U.S. 264 (1959), because the prosecutor relied on that testimony, repeatedly telling the jury that given Hewitt's testimony alone, it proved petitioner lied to the jury "about everything." The false testimony "directly undermined the core" of petitioner's mere presence defense. The state court's finding that the false testimony was not material because Hewitt's testimony was merely rebutting petitioner's claim that he was no longer an active gang member was an unreasonable

determination of the facts in light of the evidence and argument at trial. Also unreasonable was the state court's conclusion that Hewitt's testimony was merely cumulative to the otherwise "overwhelming" evidence of petitioner's active gang membership at the time of the charged offense. The state court's ultimate finding of no materiality was an unreasonable application of *Napue* on the law and the facts. Foss's reliance on information from Hewitt and other later discredited CRASH officers provided an "additional consideration which undermines confidence in the jury's decision," notwithstanding testimony by Foss that his opinions would not have changed absent the tainted information. Regarding Reyes, the district court found by clear and convincing evidence that he provided false testimony when he claimed he quit being a gang member after the park shooting and that the prosecution knew or should have known of the falsity of his testimony. The district court also found a *Napue* violation involving Reyes's testimony identifying petitioner as the park shooter. Although petitioner had not established the testimony was clearly false, the prosecution had been on notice of the real possibility that it was untrue and yet pressed ahead without attempting to resolve the issue. Further undermining confidence in the outcome of the trial was testimony by Foss that misled the jury into believing that Reyes was the only percipient source of information about the shooting when in fact Reyes's nephew had told Foss it was too dark that night to make an identification of the shooter. "[C]ombined effect of multiple errors" violated due process and warranted habeas relief.

**United States v. McDuffie**,  
2009 WL 2512194 (E.D. Wash. 2009), **aff'd**, 454 Fed.Appx. 624 (9<sup>th</sup> Cir. 2011)

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**,  
642 F. Supp. 2d 251 (S.D.N.Y. 2009), **aff'd sub nom United States v. Solano**, 402 Fed.Appx. 569 (2<sup>nd</sup> Cir. 2010)

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)**

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, including misuse of a government credit card and making false statements, 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), aff’d, 454 Fed.Appx. 538 (9<sup>th</sup> Cir. 2010)**

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 counts 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)**

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’ “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), rev'd in part, 642 F.3d 126 (3<sup>rd</sup> Cir. 2011) (finding Brady violation also required grant of relief on robbery conviction)**

Habeas relief granted to death row inmate on murder conviction 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> degree murder and voluntary manslaughter, and defense “effectively conceded” guilt of 3<sup>rd</sup> 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."

**\*Tassin v Cain,**

**482 F.Supp.2d 764 (E.D. La. 2007), aff'd, 517 F.3d 770 (5<sup>th</sup> 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), aff'd, 589 F.3d 651 (3<sup>rd</sup> Cir. 2009)**

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 (10<sup>th</sup> 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 (3<sup>rd</sup> 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)**

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, 590 F.3d 223 (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 prosecutor 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.

**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."

**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.

**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 (6<sup>th</sup> 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**

**Moody v. Florida**

**210 So.3d 748 (Fla. App. 2017)**

Florida appellate court reverses Moody's denial of motion to withdraw nolo contendere plea to two counts of child abuse and orders an evidentiary hearing to consider whether evidence disclosed after his plea that the child's stepmother had engaged in abuse against the minor child was *Brady* material the suppression of which rendered Moody's plea involuntary. Moody contended that he would not have entered the plea had he had the information about the sheriff's investigation of a child abuse claim involving the child and her stepmother. Under state law, the adjudication of a claim that a plea was involuntary requires an evidentiary hearing to determine whether the defendant understood his legal rights and voluntarily entered the plea; that did not happen here, so reversal and remand is required.

**Nebraska v. Harris**

**693 N.W.2d 317 (Neb. 2017)**

Harris was convicted on charges of first degree murder and use of a deadly weapon to commit a felony. Nebraska Supreme Court holds that although the lower court did not err in denying relief to Harris on his claim that the state failed to disclose exculpatory information it obtained years after Harris's conviction, the lower court did err in concluding that exculpatory information that police officers knew about at the time of trial, but the prosecutor did not, was not suppressed, because the officers' knowledge is imputed to the prosecutor. The lower court did not consider whether the suppressed evidence would have impeached a witness's credibility or whether it was exculpatory, and the Supreme Court remands for further consideration and clarification of this point.

**State v. Coverdale**  
**2017 WL 1405815 (Del., Apr. 18, 2017) (unpublished)**

Delaware Superior Court grants motion for postconviction relief and vacates plea of guilty to four cases involving nine counts of drug dealing and possession of a firearm by a person prohibited because prosecution failed to disclose information that the chemist who tested the drugs related to one of the cases had a history of failing to follow proper testing procedures, was not candid about his errors and omissions, and did not follow protocols for avoiding sample contamination and mislabeling. When the defense asked for information about the chemist, the prosecution insisted there was nothing to disclose on the chemist other than that he resigned because he of problematic turnaround time on his case work. Whether or not the prosecution had the information on the details of the chemist's improper procedures, the knowledge is imputed to the prosecutor. The prosecutor "knew that the *Brady* materials on [the chemist] were significant to defendant, who was facing a trial where an undisputed identification of drugs and an undisputed linking of those drugs to defendant were essential elements of the State's case against him." 2017 WL 1405815 at \*4. The defense could have used the information to impeach the reliability of the chemist's conclusions. The defense relied on the prosecution's misrepresentation that there was no *Brady* information to be disclosed when Coverdale entered a guilty plea. The misrepresentation justifies the withdrawal of the plea to correct a manifest injustice, because Coverdale entered a plea he would not otherwise have entered had he had the information about the chemist—that information would have placed him in an "entirely different plea bargaining position." 2017 WL 1405815 at \*9.

**State v. Easterling**  
**2017 WL 588442 (Wash. App., Feb. 14, 2017) (unpublished)**

Court of Appeals of Washington affirms in part and reverses in part trial court order dismissing charges of rape of a child and communication with a minor for immoral purposes based on allegations that Easterling had sexually assaulted sisters, 9 and 10 years old. The state failed to disclose reports of examinations of the children upon multiple requests by Easterling, stating that the examinations had not been performed. During trial, the prosecution learned that the examinations in fact *had* been performed and provided the reports to Easterling. The reports indicated that one of the children had submitted to a genital exam and the other had not; the child who had been examined did not show obvious signs of sexual assault. The trial court determined the reports were exculpatory and dismissed all the charges. The Court of Appeals holds that the report of the examination of the child who had not submitted to genital exam was not necessarily exculpatory and that the charges stemming from possible abuse of her should not have been dismissed. The court holds that dismissal of the charges related to the first child was appropriate; that the trial court considered and rejected lesser sanctions on grounds that were well-reasoned.

**Felder v. Florida**  
**198 So.3d 951 (Fla. App. 2016)**

Florida appellate court reverses post-conviction court's summary denial of Felder's *Brady* claim

and remands for further proceedings. Felder was convicted of robbery with a firearm and aggravated battery with a deadly weapon arising from an incident in which three people attacked two victims at gunpoint. One of the victims identified Felder as one of the perpetrators. Felder claimed in post-conviction proceedings that the prosecution had failed to disclose favorable impeachment evidence that the victim who had identified him to police officers had identified a third person as her attacker. The post-conviction court denied the claim, stating that *Brady* was a trial court error not cognizable in a motion for post-conviction relief, and also stating that the trial counsel had knowledge of the identification of the third person. The District Court of Appeal concludes both that *Brady* claims may be raised in post-conviction proceedings and also that the record does not conclusively show that trial counsel was aware of the identification of the third person by the victim.

**Bosque v. Florida**  
**202 So.3d 888 (Fla. App. 2016)**

Florida appellate court reverses on *Brady* grounds the judgment and sentence on Bosque's charge of tampering with a witness/victim. Bosque was a police officer who, along with other officers, responded to a domestic dispute regarding the custody of an infant. Bosque and the child's father engaged in a physical struggle, and the child's father later went to the police station to file a complaint against him, at which time Bosque handcuffed him, having heard that the child's mother complained that the child's father tried to run over her with his car. Bosque was charged with false imprisonment, tampering with a witness/victim, and battery, on the theory of abuse of authority and retaliation. Following his conviction on the false imprisonment and tampering with a witness/victim charges, the state disclosed dispatch audio recordings that demonstrated that Bosque learned after the incident at the house of the allegation that the child's father tried to run over the child's mother, establishing that when he handcuffed him at the station he had probable cause to arrest him for aggravated assault. The audio recordings also would have served as impeachment evidence regarding the testimony of at least one witness. They were material because, had the jury heard them, the jury could have viewed Bosque's arrest of the child's father as proper and independent of the internal affairs complaint against him.

**State v. Robertson**  
**182 So.3d 942 (La. 2016)**

Supreme Court of Louisiana grants writ of certiorari, reverses decision of court of appeals, and reinstates judgment of the trial court on the ground that the trial court had discretion to order and conduct an *in camera* inspection of documents to determine whether disclosure was required under *Brady*.

**People v. Dimambro**  
**897 N.W.2d 233 (Mich. App. 2016)**

Michigan Court of Appeals affirms trial court's order granting motion for a new trial based on prosecution's failure to disclose autopsy photographs in possession of the medical examiner.

Dimambro was convicted of first-degree felony murder and first-degree child abuse stemming from the death of the two-year-old child of his former girlfriend, which occurred after the child went into a coma following a series of incidents that occurred while he was in Dimambro's care. Following Dimambro's conviction, the prosecutor obtained a disk from the medical examiner containing 32 photographs that had not previously been provided to the prosecution, the defense, or the defense expert medical examiner. The trial court entered an order granting defendant's motion for a new trial. The Court of Appeals concluded that the trial court properly concluded that a *Brady* violation had occurred because the photographs were withheld by the prosecutor (the inadvertence does not matter for *Brady* purposes), the photographs were favorable to Dimambro, and the photographs were material. The prosecution had an obligation to learn of the favorable evidence known to the government, and the medical examiner, under state law, has a "duty to act on the government's behalf in cases involving violent or unexpected deaths" and so "(1) the medical examiner may be understood as 'acting on the government's behalf' in a particular case, . . . and (2) responsibility for evidence within the medical examiner's control may be imputed to the government, even if 'unknown to the prosecution.'" 897 N.W.2d at 215 (internal citations omitted). The suppressed photos were favorable to Dimambro because they provided a basis for impeaching the testimony of the medical examiner who conducted the autopsy. The medical examiner had testified that the bruising on the child's brain was the result of blunt-force trauma and non-accidental inflicted trauma. But the suppressed photographs, analyzed by the defense, demonstrated that the bruising solely resulted from medical intervention, and that the medical evidence did not support the conclusion that the injury was intentionally inflicted. The undisclosed photos were material because they were not cumulative to evidence that was presented at trial by the defense pathologist, but instead "provided a basis for the defense to directly challenge [the state's medical examiners'] conclusion that the autopsy revealed that the child's injuries were intentionally inflicted." 897 N.W.2d at 221. This was important in this case "which involve[d] issues of abusive head trauma but include[d] no eyewitnesses, no physical evidence confirming the cause of death, and no explicit intent to kill." *Id.*

**Tempest v. Rhode Island**  
**141 A.3d 677 (R.I. 2016)**

Supreme Court of Rhode Island affirms trial court's grant of post-conviction relief and vacation of second-degree murder conviction on *Brady* grounds. Tempest was convicted following a nine-year investigation of the homicide of one victim by beating and the near-homicide of another victim who survived but whose memory was impaired. Four witnesses testified that Tempest confessed to the crime. Seventeen days before trial, one of these witnesses told the prosecutor that Tempest's brother, who was a detective at the time, hid the murder weapon—a pipe—in a closet in order to protect his brother, and that on the day of the murder, Tempest's children were excited about getting a puppy. The prosecutor took notes about this statement and wrote that it was new information: "too late-don't volunteer new info-will cause big problems." 141 A.3d at 683. The prosecutor clearly and intentionally failed to disclose this evidence. The witness's statement about the brother was inconsistent with her other statements that Tempest had said that his brother was not aware of his involvement in the murder, and that if he learned about it, he would turn Tempest in. Even if this statement was inculpatory, as the state contended, it nevertheless could have been

used to impeach the witness's credibility, which was already shaky. The statement about the puppy also had impeachment value because it established that Tempest was not living in the same complex at the time of the murder, and so it was unlikely that the witness could have seen Tempest's children and Tempest on the day of the murder as she testified. Although "the materiality of the evidence is not germane when the prosecution's failure to disclose the evidence is deemed to be deliberate" 141 A.3d at 686 (citing state law), the evidence was in fact material, because the witness was the most credible of the "four less-than-stellar witnesses" who testified that Tempest confessed to the murder. *Id.*

**State ex rel. Lorenzetti v. Sanders**  
**792 S.E.2d 656 (W.Va. 2016)**

West Virginia Supreme Court of Appeals denies writ brought by state challenging trial court order permitting defendant's counsel to review files concerning a child that are confidential under state law but that may contain material exculpatory or impeachment information. Defendant was charged with sexual abuse of his child. He sought to review files pertaining to the child maintained by the Department of Health and Human Services and in the possession of the prosecution. The trial court conducted an *in camera* review of the records following a request by counsel on the grounds that they might contain information that the child recanted her accusation against the defendant and that the child's mother might have taken a misleading position against the defendant in order to be reunited with her daughter. The trial court determined that the records contained exculpatory information material to the defense including recantations, and that defense counsel had a constitutional right to review them. The Supreme Court of Appeals notes that the information in the files is favorable as impeachment evidence and material because it could cast doubt on the child's credibility as a witness, so suppression would violate defendant's right to due process. Although the records are generally confidential, there are statutory exceptions, among which is when the court finds, upon review, that the evidence is relevant and material to the issues in the proceeding and should be made available to the defendant. The trial court must conduct an *in camera* review and balance the defendant's interest in a fair trial with the state's interest in protecting the child's confidentiality, and determine whether an order limiting the examination and use of records is necessary for the child's safety. The trial court did so in this case.

**Betancourt v. Warden**  
**2016 WL 490285 (Conn. Super. Ct., Jan. 12, 2016) (unpublished)**

Superior Court of Connecticut grants habeas corpus petition on *Brady* claim. Betancourt was convicted of first degree kidnapping, conspiracy to commit kidnapping, first degree burglary, conspiracy to commit burglary, second degree robbery, and conspiracy to commit robbery. One of the perpetrators (a codefendant) testified against Betancourt at trial, giving testimony that directly implicated Betancourt in the kidnapping, burglary, and robbery, and the state's case rested almost exclusively on this codefendant's testimony. The prosecution did not disclose any benefits given to the codefendant, and on cross-examination, the codefendant testified falsely that he had no intention of applying for or hopes of obtaining a sentence modification. Nevertheless, the prosecution intended to and did present the court in codefendant's case with an agreed-upon



disposition reducing the codefendant's prison term by 50% and cited his cooperation against Betancourt as a basis for modifying his sentence. This evidence would have been a powerful impeachment tool for the defense and therefore was material.

**People v. Horton**

**2016 IL App (2d) 141059-U (Ill. App., Oct. 12, 2016) (unpublished)**

Appellate Court of Illinois reverses trial court's denial of Horton's request for leave to file a successive post-conviction petition and remands for new trial. Horton was convicted of first degree murder and armed robbery and sentenced to life in prison. Post-conviction, he learned that one of the prosecution's key witnesses had two prior juvenile convictions, was on juvenile probation at the time of his trial testimony, and had been identified although not charged as the gunman in a shooting two weeks prior to when his cooperation in the case against Horton began. None of this information had been disclosed to Horton pretrial. The late discovery of this information established cause for failing to raise the claim earlier. Horton can establish prejudice if he is not permitted to raise the claim now because the suppressed information impeached the testifying witness by raising issues of his credibility due to his juvenile adjudications and probationary status and also his motives to testify as he was under investigation by the prosecution and was motivated to assist in order to obtain leniency. The witness's testimony against Horton at trial was central because he was the only one who testified that he arranged Horton's purchase of the murder weapon before the murder, that he saw Horton with the weapon after the shooting, that Horton said he was going to rob the victims, and that Horton asked for the name and number of a person interested in buying the gun following the murder. Furthermore, "[t]he use of a convicted felon who was suspected of shooting at a person in an ongoing investigation would have provided an opportunity to challenge the thoroughness and integrity of the officers and their failure to even consider [defendant's cousin] as an alternate suspect." 2016 IL App (2d) 141059-U at \*43. Although ordinarily the court would remand with directions to the trial court to give leave to the defendant to file his *Brady* claim, here that would be a waste of judicial resources as the state has already admitted that the witness was involved in the prior shooting, so the court simply resolves the claim and finds that the Horton is entitled to a new trial.

**\*Adams v. Nevada**

**2016 WL 315171 (Nev., Jan. 22, 2016) (unpublished)**

On appeal of denial of post-conviction petition for writ of habeas corpus in death penalty case, Supreme Court of Nevada remands to the trial court for evidentiary hearing to determine whether the state's withholding of evidence constituted good cause to overcome procedural default rules on a *Brady* claim. Adams was convicted of two counts of first degree murder and burglary for the shooting of his wife and three-year-old daughter and sentenced to death. The Nevada Supreme Court determines that Adams has provided sufficient support for his claim that the state withheld impeachment evidence concerning a key witness in the form of the witness's true identity and criminal history in order to proceed.

**Ex parte Temple**

**2016 WL 6903758 (Tex. Crim. App., Nov. 23, 2016) (unpublished)**

Texas Court of Criminal Appeals affirms trial court's grant of habeas corpus relief to petitioner Temple, convicted of the murder of his wife and sentenced to life in prison, due to state's failure to timely disclose police reports. Investigating officers had suspected a high school student who lived next door to the Temple family, and had questioned him, but told defense counsel that he was not a suspect. The prosecutor had police reports that she did not disclose to the defense because she believed she was not required to disclose favorable evidence if, in her opinion, it was irrelevant, inconsistent, or unreliable. Defense counsel asked for police reports, knowing that it was rumored that the high school student and his friends had some involvement in the murder, and counsel "made every attempt . . . to develop an alternate perpetrator defense." Many of the reports counsel requested were not provided at all, and some were provided only during trial, when it was too late for counsel to "strongly develop[ ] an alternative suspect theory and start[ ] it from the very beginning of the trial," because the trial court denied a requested continuance.

**\*Reynolds v. Alabama**

**2015 WL 5511503 (Ala. Crim. App., Sept. 18, 2015)**

On appeal of dismissal of petition for post-conviction relief, Court of Criminal Appeals of Alabama finds that Reynolds has pled a facially meritorious *Brady* claim and reverses and remands with instructions for trial court to provide Reynolds an opportunity to prove his claim. Reynolds was convicted of five counts of capital murder [note that it appears from the opinion that there were only three victims – a couple and a small child] and sentenced to death. At trial, the state presented testimony from West, Reynolds' girlfriend, that she was present in the car while Reynolds went inside the victims' home. She heard one of the victims screaming and went in the house and saw the body of the male victim and Reynolds stabbing the female victim, and during her attempts to stop Reynolds, she was stabbed as well. She followed Reynolds' instructions and took items out of the house. West also testified that she received no benefit in exchange for her testimony. Reynolds testified in his own defense that he did not participate in the homicides and was not present but instead that West told him she had been stabbed trying to protect the female victim when another perpetrator was stabbing her, and he took West to the victims' home and left her in the car when he went inside and saw the male and female victims, and tried to burn the house down to cover up West's involvement in the homicides. After his conviction, and during appellate proceedings, Reynolds learned that West received a deal from the prosecution in exchange for her testimony. Although West was arrested nearly a year prior to the homicides for drug offenses, charges were not filed until a few days after the homicides. After West testified at trial, the prosecution dismissed three of the pending drug charges against her, and she pleaded guilty to two other charges, for which she was sentenced to three years' imprisonment. Six months later, the prosecution recommended that the rest of her sentence be suspended and she be placed on probation; she was released immediately. The Court of Criminal Appeals finds that the claim was not procedurally barred, contrary to the trial court's conclusion, because the facts were unknown to Reynolds until the government recommended that her sentence be suspended, after he filed his reply brief in support of his appeal. The petition pled facts that, if true, require relief

under *Brady* and *Giglio*, because West's testimony was important to the state's case—the jury's determination regarding Reynolds' guilt depended upon weighing West's testimony against Reynolds'.

**\*Isom v. Arkansas**

**462 S.W.3d 682 (Ark. 2015)**

Supreme Court of Arkansas grants petition to reinvest jurisdiction in the circuit court to consider petition for writ of error coram nobis on grounds that state committed *Brady* violation in failing to disclose evidence to capital petitioner regarding alternative suspect. Isom was convicted by a jury of capital murder, attempted capital murder, aggravated robbery, residential burglary, and two counts of rape, and sentenced to death, along with life and terms of years sentences, arising from the robbery and killing of a 79-year old man and the rape and attack on his 72-year old caregiver. The female victim identified Isom's photo from a photo lineup on April 5, 2001. A rape-kit examination of a hair found in the female victim's vaginal opening concluded that the hair did not belong to the male victim or Isom. In his petition, Isom alleged that the state withheld (1) evidence that the female victim did not identify him as the attacker in a photo array shown on April 4, 2001; (2) evidence that she did not identify Isom from a photo array shown on April 5, 2001; (3) investigative notes about interviews with the female victim while she was in the hospital; (4) evidence that another witness knew that Isom was the main suspect before he identified him; (5) evidence that that a second witness had reason to curry favor with the police; and (6) evidence of alternative suspects. Isom also alleged that the state suppressed DNA evidence by turning over illegible copies of documents and incomplete copies of gel strips and that the state failed to correct the female victim's false testimony that she was not on pain medication in the hospital and did not make an identification without her glasses. The Arkansas Supreme Court focuses on the suppressed evidence regarding alternative suspects, and concludes that the state suppressed evidence that, pursuant to information provided by an inmate that a third party had stated that he committed the crime and that a weapon could be found in a particular location, law enforcement went to the location, found a pair of scissors and, in consideration, released the inmate who provided the information. A law enforcement officer had testified falsely during a hearing on pretrial motions that although the inmate provided this information, no weapon was found in the location he named and the inmate was not released from custody. As a result of the false testimony and suppressed evidence, the defense was precluded from presenting the officer as a witness before the jury and developing the theory that the third party had committed the murder. Because Isom's *Brady* claims appear to be meritorious, reinvestment of jurisdiction in the circuit court is the proper remedy.

**\*State ex rel. Clemons v. Larkins**

**475 S.W.3d 60 (Mo. 2015)**

Supreme Court of Missouri grants habeas corpus petition seeking vacation of conviction of two counts of first degree murder on grounds that the prosecution withheld evidence that could have led to the suppression of Clemons' confession, a critical part of the case against Clemons. Clemons, along with three other men, was accused of raping sisters aged 19 and 20 and killing

them by throwing them off a bridge. Initially the sisters' male cousin was suspected by police of having committed the offenses, and he testified that he was beaten by the police in the course of his interrogation and before he was cleared. Clemons and one of the other men charged with the rapes and homicides also contended that they had been beaten by investigators during their interrogation and were forced to confess to raping the sisters in order to stop the abuse. At trial, the officers denied beating Clemons, and although medical records and family members indicated that Clemons had bruising to his cheek following the interrogation, other witnesses testified that he did not, and Clemons did not testify. The trial court concluded that there was no evidence presented about how Clemons sustained his injuries, and precluded the defense from arguing that the police coerced Clemons' confession. In post-conviction proceedings, Clemons presented testimony of Weeks, a bail investigator working for the Missouri Board of Probation and Parole who had screened Clemons less than three hours after his arrest. Weeks testified that during the screening he observed a large bump or bruise on Clemons' right cheek and had noted it on his pretrial release form. He discussed the bruise with his supervisor, Lukanoff, who said that he believed the injury occurred during Clemons' interrogation. Weeks testified that several months later, another supervisor, Coleman, told him that the prosecutor wanted to speak with Weeks about his observation of the injury. The prosecutor showed Weeks photos of Clemons that did not depict the bruising, but Weeks told the prosecutor that the photos didn't change his mind about what he had seen and everyone else in the room during the pretrial screening had seen the same thing. The prosecutor seemed annoyed. Weeks was shown his pretrial release form and noted that the reference to the bruise/bump had been edited out. The prosecutor also testified during post-conviction proceedings that Weeks had made references to Clemons' face being swollen and that he "assumed" that a witness like Weeks would have been important to the defense. The Missouri Supreme Court determines that Clemons established cause and prejudice to overcome the procedural bars to the habeas claim because the state deliberately concealed Weeks' observations and suppressed the information in the pretrial release form by altering it. And "[t]he determination of whether prejudice resulted from the underlying error under a cause and prejudice standard is identical to this Court's assessment of prejudice in evaluating Mr. Clemons' *Brady* claims." The undisclosed evidence from Weeks, an objective, impartial witness, corroborating Clemons' statements about being beaten by officers, was favorable—it was the most immediate account of Clemons' physical appearance following the interrogation, it also impeached the credibility of the state's witnesses who testified that Clemons did not have any injuries, and it might have led the trial court to sustain Clemons' motion to suppress his confession, which was the only direct evidence that the rapes were planned, that he was on the platform when the sisters were pushed off the bridge, and that the sisters were conscious and aware of what was happening, all of which likely influenced the jury to vote for death. Even if the trial court did not suppress the confession, it may have permitted defense counsel to argue that the police beat Clemons to coerce his confession. All of the Weeks evidence (including the fact that he was urged to change his report and that he refused but the report was changed anyway) supports a reasonable inference that Clemons was beaten during his interrogation. It was material because the trial court made the decision not to suppress the confession without it—indicating that Clemons was not given a fair trial, not just at the motion to suppress but also at the trial itself, during which Weeks' testimony could have convinced the jury that Clemons had been beaten to confess.

**People v. Hubbard**

**132 A.D.3d 1013, 18 N.Y.S.3d 681 (2d Dep’t. 2015)**

The Supreme Court of New York, Appellate Division, affirms grant of motion for new trial. Hubbard was convicted of second degree murder arising from a shooting that occurred when he was 15 years old. The crucial evidence against Hubbard at trial was his admission to the shooting, taken by Detective Ronald Tavares, and testified to by Tavares. There was no physical evidence connecting Hubbard to the crime and eyewitnesses could not identify him. The state failed to disclose that Tavares had secured a false confession in a different case that led to an internal affairs investigation and a federal lawsuit against him. This evidence was favorable to the defense, known by the prosecutor, and material.

**Buffey v. Ballard**

**782 S.E.2d 204 (W.Va. 2015)**

West Virginia Supreme Court of Appeals reverses denial of habeas corpus petition and remands for entry of order granting habeas relief and permitting withdrawal of Buffey’s guilty plea due to *Brady* violation. Buffey was arrested and charged with robbery and sexual assault of an 83-year old widow. Approximately a week after the assault, he was arrested for three non-violent breaking and entering offenses at businesses and was questioned for nine hours. He admitted the burglaries and initially denied responsibility for the offenses against the widow. At 3:25 a.m. he admitted breaking into an old lady’s house but denied sexual assault and the limited information he provided was inconsistent with the victim’s repeated, consistent descriptions of the event. After more questioning, Buffey retracted his account of the incidents and said he was not responsible. He was appointed counsel who requested the production of discoverable materials and the state was ordered to provide them within seven days of arraignment. Six weeks prior to Buffey’s entering a guilty plea, entered pursuant to a time-limited plea offer made by the prosecution, an officer with the police forensic laboratory reported that Buffey was excluded as a donor of seminal fluid recovered from the rape kit, but this report was not provided to the defense despite “repeated inquiries.” 782 S.E.2d at 208. Following the filing of a habeas petition, new DNA testing was conducted and concluded that Buffey was not a primary or secondary sperm contributor, and a CODIS search indicated that the primary sperm contributor was a prison inmate who lived a few blocks away from the victim at the time of the assault and was the victim’s paper boy. The court notes that the United States Supreme Court has held that no *Brady* violation occurs when impeachment evidence is withheld prior to the trial (during the plea negotiation stage), *see United States v. Ruiz*, 536 U.S. 622 (2002), but notes that *Ruiz* “specifically distinguished impeachment evidence from exculpatory evidence.” 782 S.E.2d at 213 (citing *Ruiz*, 536 U.S. at 630). The court notes that there is a circuit split as well as other court split about whether exculpatory evidence must be revealed during the plea negotiation stage, and concludes that “the better-reasoned authority supports the conclusion that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage,” 782 S.E.2d at 217, and that a defendant may seek to withdraw a guilty plea based upon the prosecution’s exclusion of material, exculpatory evidence. The court also concludes that the fact that the police were aware that the DNA evidence excluded Buffey is imputed to the prosecution whether or not the prosecutor personally actually had this

information. The DNA results were favorable to Buffey, were withheld from the defense, and were material because both Buffey and his counsel asserted that Buffey would have pleaded not guilty had they been aware of them.

**Ex parte Carlos Flores**  
**2015 WL 5453293 (Tex. Crim. App., Sept. 16, 2015) (unpublished)**

Court grants application for writ of habeas corpus where parties agreed during post-conviction proceedings that the state failed to disclose evidence prior to Flores's guilty plea that the arresting officer was suspended for 30 days for misconduct in connection with Flores's case.

**Danforth v. Chapman,**  
**771 S.E.2d 886 (Ga. 2015)**

Petitioner was entitled to a new trial on charges of arson and felony murder because the State violated *Brady* and *Giglio* by failing to disclose three items of evidence which would have impeached the testimony of Joseph White, a jailhouse snitch who testified at trial that petitioner told him he intentionally started the fire that killed the victim. White was the only witness who testified that petitioner had confessed to the crime. It was uncontested that the State failed to disclose the following: (1) a video recording of an interview between White and the prosecutor which clearly showed that White was seeking assistance from the prosecution in exchange for his testimony – in direct contradiction to White's testimony at trial; (2) a statement from William Liner, whom White claimed had also heard petitioner's confession, in which Liner stated that petitioner never confessed and White was actively seeking help with his then-pending charges; and, (3) one page of an otherwise disclosed written statement from White to his pastor which contained instructions from White to “[h]old off on giving my statement to police. I want to see what's going on for a few days,” thereby undermining White's trial testimony that he went to authorities immediately and was not seeking help with his own charges. This evidence was material to the defense and therefore the lower court did not err when it awarded petitioner state habeas relief pursuant to *Brady* and *Giglio*.

**Propes v. Commonwealth,**  
**2015 WL 1778198 (Ky. App. 2015)**

On direct appeal, defendant was entitled to a new sentencing proceeding on charges of drug trafficking after the prosecution used incorrect testimony regarding his parole eligibility in violation of *Napue*. After jurors found defendant guilty of second-degree trafficking in a controlled substance, they were asked to fix a term of punishment. At the sentencing hearing, defendant's probation officer inaccurately testified that if defendant was sentenced to a ten-year term, he would serve a minimum of 18 months under the fifteen percent rule before he would be eligible for parole. This testimony was inaccurate because, if the jury convicted defendant of a Class D felony (instead of a Class C felony), his parole eligibility date would be calculated using the twenty percent rule, under which he would serve a minimum of 24 months of a ten year sentence before becoming eligible. The Commonwealth characterized this testimony as “at best

incomplete, or inaccurate at worst,” but the state court concluded “we discern no saving grace and deem it necessary to vacate the sentence and remand for a new penalty phase limited to the issue of punishment.” *Propes*, 2015 WL 1778198 at \*4.

**Lapointe v. Commissioner of Correction,**  
**112 A.3d 1 (Conn. 2015)**

Petitioner was deprived of a fair trial on charges of murder and arson because the State violated *Brady* when it failed to disclose a note, authored by Detective Michael Ludlow, containing details concerning the length of time the fire burned inside the victim’s apartment prior to being discovered (the Ludlow note). The victim, eighty-year old Bernice Martin, was raped, bound and murdered in her apartment, which her killer then set ablaze in an apparent effort to destroy evidence of the crime. Petitioner, then the forty-two year old mentally impaired husband of the victim’s granddaughter, Karen Martin, discovered that the victim’s apartment was on fire after a relative called and asked petitioner to make the ten-minute walk to her apartment to check on her because she was not answering her phone. Petitioner suffers from physical and mental impairments as the result of Dandy-Walker syndrome, a congenital brain disorder known to cause poor motor skills and cognitive impairments. Petitioner’s IQ is approximately 92. He was not an initial suspect in the case, had no criminal record or history of violence, and did not seem physically, mentally or temperamentally capable of the crime. However, after the murder remained unsolved for approximately two years, the case was reassigned to Detective Paul Lombardo, who decided to re-interview individuals who previously had been questioned by police. On June 8, 1989, Lombardo interviewed petitioner and took a saliva sample from him (petitioner’s blood type matched a semen stain found at the scene of the crime; petitioner is a secretor with type A blood, as is approximately one third of the male population). On July 4, 1989, Lombardo asked petitioner to come to the police station for questioning. Officers later acknowledged that the intended purpose of the interrogation was to obtain a confession from petitioner. By this time, Lombardo had become convinced of petitioner’s guilt because of his blood type, his peculiar nature and mannerisms, and his repeated questions to police about whether he was a suspect in the victim’s murder. Over the course of the next nine hours, petitioner gave three written statements in which he purported to take responsibility for the crime, although he told police that he had no recollection of the killing and stated he was confessing only because they wanted him to do so. Based on this evidence, petitioner was convicted and sentenced to life imprisonment without the possibility of release. It was undisputed that the Ludlow note was first disclosed to petitioner’s habeas counsel in 1999, in connection with his state habeas proceedings. The Ludlow note demonstrated that, a few days after the homicide, Detective Ludlow met with state fire marshals who opined that the fire in the victim’s apartment had been burning for a minimum of 30 to 40 minutes before the first responding firefighters arrived. Petitioner’s trial counsel testified in the habeas proceedings that if this information had been known at the time of trial, counsel would have called petitioner’s wife, Karen, to testify that petitioner was at home when the fire first started. Petitioner also offered opinions from two additional experts, which were consistent with the notation contained in the Ludlow note. The State offered its own expert testimony concerning the likely burn time of the fire. Under the far longer estimate proffered by the State’s expert, petitioner could not establish, even with Karen’s testimony, that he was home during the entire

period in which the fire could have started. The state habeas court found that the testimony of the State's expert was far more persuasive than the testimony of petitioner's experts and thus, concluded that the withheld information in the Ludlow note was not material because it was not reasonably probable that, if the jury had heard the testimony of petitioner's experts, it would have credited that testimony and reached a different result. The interim appellate court reversed this decision, concluding that the determination of which experts were most persuasive was an issue to be decided by the jury at a new trial. The Supreme Court of Connecticut affirmed, holding that "the testimony of petitioner's experts was more than sufficient to call into question the reliability of the petitioner's conviction. Indeed, even if that expert testimony only tended to support the petitioner's claim that he could not have murdered the victim, in view of the tenuous nature of the state's case against the petitioner – based as it was on his suspect admissions – the state's *Brady* violation would warrant a new trial because, as the United States Supreme Court has recognized, exculpatory evidence of even 'minor importance' may well be 'sufficient to create a reasonable doubt' when, as in the present case, 'the [guilty] verdict is already of questionable validity.'" (quoting *United States v. Agurs*, 427 U.S. 97, 113 (1976)).

**\*Manning v. State,**  
**158 So.3d 302 (Miss. 2015)**

State committed *Brady* violation by failing to disclose that the apartment from which the State's key witness testified he observed defendant enter the victims' apartment was vacant at the time of the crime. Defendant was convicted of murdering two elderly women in Starkville, Mississippi, and sentenced to death. Although numerous other witnesses placed defendant at the apartment complex on the day of the murder, Kevin Lucious was the only witness to testify that he saw defendant entering the women's apartment shortly before their bodies were discovered. At the time of his testimony, Lucious was a convict serving two life sentences without parole in Missouri. No witnesses testified to seeing defendant leave the apartment. Police conducted a canvass of all residents of the apartment complex during their investigation and recorded the results on index cards. An entry on the cards revealed that the apartment from which Lucious testified he observed defendant enter the victims' apartment was vacant at the time of the crime, and neither Lucious nor his girlfriend was listed as a resident on any of the apartments canvassed. The State conceded this information was not disclosed to the defense prior to trial. The Supreme Court of Mississippi concluded: (1) the evidence was favorable to defendant for impeachment of Lucious's testimony; (2) defense counsel could not have obtained this evidence themselves with reasonable diligence, given that they were not even appointed to represent defendant until three-and-a-half years after the crime; (3) the evidence was suppressed; and, (4) the evidence was material because both defense counsel and the district attorney testified that their actions in preparing and presenting the case would have been different had they possessed the evidence. "Any attorney worth his salt would salivate at impeaching the State's key witness using evidence obtained by the Starkville Police Department." *Manning*, 158 So.3d at 307. Moreover, the district attorney's admission that "he would have investigated the discrepancy between Lucious's testimony and the cards is also crucial to prong four, bolstering that a reasonable probability exists that the outcome of the proceedings would have been different." *Id.*



**Biles v. United States,**  
**101 A.3d 1012 (D.C. 2014)**

As a matter of first impression, the D.C. Court of Appeals held that *Brady* applies when the government fails to disclose information material to a suppression hearing. Defendant was arrested for peddling counterfeit DVDs at a flea market after he asked an undercover officer if the officer wanted to buy any DVDs. In the middle of defendant's bench trial, a police officer revealed that police located and searched defendant's backpack and a box of DVDs underneath the backpack as a result of a tip from a paid confidential informant, which the officers received after defendant was arrested, and thus the items were not retrieved incident to arrest, from the area of defendant's wingspan, as the police reports initially suggested. After receiving the tip, police opened the backpack and found defendant's identification inside and later determined that the DVDs in the box underneath were counterfeit. Defense counsel objected that there had been no mention of a confidential source in the pretrial discovery materials; she argued that she did not have an opportunity to do motions or investigate this issue, and she asked the court to exclude any evidence found as a result of the tip. The trial court denied the motion to suppress. Defendant was later convicted again on separate charges for a subsequent offense based largely on the same officer's testimony that she recognized defendant's backpack near a case of counterfeit DVDs because of the previous search. First, the court held that "suppression of material information can violate due process under *Brady* if it affects the success of a defendant's pretrial suppression motion." *Biles*, 101 A.3d at 1019; *see also, id.* ("[t]he only courts we know to have squarely addressed the issue on the merits have held that a failure to disclose information material to a ruling on a Fourth Amendment suppression motion can constitute a *Brady* violation."). "[T]he withheld information here, which tended to show that the search could not be justified as a routine search of a suspect's wingspan incident to arrest, was favorable for purposes of the *Brady* doctrine." *Id.* at 1020. Next, this information was suppressed because the delayed, mid-trial disclosure "foreclosed any meaningful opportunity on [defendant's] part 'to use the information with some degree of forethought,' and to frame and litigate what should have been a successful [suppression] motion." *Id.* at 1022-23 (internal quotation omitted). The evidence was material to both the first and second trial because defendant could have filed a timely suppression motion that would have been granted, thus depriving the government of the most important evidence in both cases – the DVDs and the identification cards linking defendant to them.

**Mitchell v. United States,**  
**101 A.3d 1004 (D.C. 2014)**

Defendants were entitled to relief on a *Napue* claim where the government conceded it relied on false testimony at trial, which was not harmless. Defendants were convicted of murder based on two items of evidence: (1) the testimony of Eric Lindsay that he was a passenger in the victim's car when he witnessed defendants drive by and shoot the victim; and, (2) testimony from Detective Ray Crawford that defendants knew the victim planned to testify against them in a different murder trial because the defendants were present at a preliminary hearing in which Crawford testified that the victim had identified them in connection with that crime. Crawford claimed that he specifically identified the victim by name at the preliminary hearing. However, this testimony

was false. The transcript of the preliminary hearing plainly showed that the victim's name was never mentioned in any way and he was not identified as a witness against defendants. The government conceded a *Napue* violation occurred, but argued any error was harmless. The lower court concluded that defendants failed to show a reasonable likelihood that the false testimony affected the verdict, but the D.C. Court of Appeals reversed, noting "the burden of showing harmlessness is on the government rather than the appellants and harmlessness must be proven by the constitutional standard of beyond a reasonable doubt." *Mitchell*, 101 A.3d at 1008. The government was unable to meet its burden where it had previously characterized the false evidence as "crucial to the government's theory of prosecution," and where "the testimony of the government's sole identification witness, Lindsay, was attacked in significant respects beyond the chaotic and relatively fleeting nature of the sighting, such as the fact that Lindsay did not make a positive identification of the killers for over a month following [the victim's] death and the shifting identification of the car of the killers." *Id.* at 1009. The court concluded: "[n]one of this suggests that the evidence was insufficient to convict appellants, but, in the posture of one of the two major props of the government's case resting on false testimony, the outcome of the case falls significantly short of constitutional impregnability." *Id.*

**Clack v. Ridgeland,**  
**139 So.3d 778 (Miss. App. 2014)**

In driving under the influence/careless driving case, remand for new trial where city prosecutor unintentionally failed to provide defendant with potentially exculpatory video evidence of the stop by police. (The defendant had argued there had not been probable cause for the stop. The arresting officer falsely claimed there was no video footage of the stop. Because the City failed to file an appellee's brief, the court was unable to affirm the lower court's denial of relief.)

**\*Wright v. State,**  
**91 A.3d 972 (Del. 2014)**

In robbery-murder case at a liquor store, capital conviction and death sentence reversed due to cumulative effect of multiple items of suppressed evidence, including one item the court previously found not to be material when considered alone. The suppressed evidence was: (1) a deal made by the jailhouse snitch, who claimed Wright confessed to him, in a case six months earlier where the snitch agreed to testify against his co-defendant for reduced charges and sentence; (2) a recent robbery indictment against two cousins (Jamison and Curtis) whom the

defense claimed where the actual perpetrators of this crime which would have impeached Jamison's testimony that the two cousins were not close; (3) the delayed arrest of Jamison, which occurred a month after the indictment against him and his cousin and two days after his testimony in Wright's trial; and (4) a robbery had been attempted of a nearby liquor store shortly before the robbery-murder in this case by similar looking men also involving a handgun and Wright had been excluded as a suspect. Even assuming that the prosecutor in Wright's case was unaware of the indictment of Jamison and Curtis for the unrelated robbery, "the fact that others in the Attorney General's Office were aware of the indictment at the time of trial suffices to make the evidence *Brady* material." That Jamison was technically a defense witness did not absolve the State of its duty to disclose impeaching information given that his was not a typical defense witness. And even if it would have been possible for the defense to learn of Jamison's indictment, "the fact that the State chose not to arrest Jamison until after his testimony at Wright's trial would not have been a publicly available fact at the time. Thus, the State failed to disclose exculpatory and impeachment evidence relating to Jamison that would have been useful to Wright." Similarly, the prosecutor's personal lack of knowledge about the attempted robbery did not preclude a finding of suppression. Nor did the fact that the robbery attempt received publicity demonstrate lack of suppression given that the media reports did not include the fact that Wright had been ruled out as a suspect in the attempted robbery and did not reveal the descriptions of the suspects or the existence of videotape and photographic evidence. In finding materiality when considering the suppressed evidence cumulatively, despite Wright's initial confession, the court noted that the "evidence cuts across multiple, substantive bases supporting the jury's conviction and would have permitted Wright to attack the State's case from every angle." In addition, the suppressed evidence was relevant to penalty in that it supported a residual doubt argument.

**\*State v. Ziegler,**  
**159 So.3d 96 (Ala. Crim. App. 2014)**

In capital murder case, lower court did not abuse its discretion in determining that the state violated *Brady* by failing to disclose evidence contradicting testimony that petitioner had been at a party the night before the murder where he threatened the victim by referring to him as "a walking dead man." The witness who provided this testimony at trial recanted in the post-conviction proceeding and stated that she had informed law-enforcement both before and after her testimony that she did not know petitioner. Her post-conviction testimony was found to be credible and was supported by her son who also stated that petitioner had not been present at the party and that he told this to the police. The suppressed evidence was material to the issue of intent.

**J.E. v. Superior Court,**  
**168 Cal. Rptr. 3d 67 (Cal. App. 2014)**

In juvenile dependency proceeding, the court erred in refusing to conduct an *in camera* inspection of a prosecution witness's juvenile dependency file for *Brady* evidence. The petition

was filed under a statute that allows a juvenile court to release information from juvenile files to persons who are otherwise not authorized to access the confidential files. The appellate court held that when a petitioner invokes the statute and requests that the court review a confidential juvenile file, if the petitioner has provided a reasonable basis to support a claim that the file contains *Brady* exculpatory or impeachment material, the juvenile court is required to conduct an in camera review.

**People v. Bueno,**

**\_\_\_ P.3d \_\_\_, 2013 WL 6118364 (Colo. App. Nov. 21, 2013)**

In prison killing case, trial court did not abuse its discretion in granting defendant a new trial based on the prosecution's failure to disclose information supporting part of the defense theory – that the victim had been killed by white inmates. The suppressed evidence included a letter found by a nurse at the correctional facility approximately thirty-five minutes after the victim's body was discovered. The letter announced that The Aryan Nation and the Neo Nazi Skin Heads planned to exterminate white inmates who refused to “accept their proud race . . .” While the letter specifically targeted certain individuals, it stated those inmates were only the beginning. The nurse prepared an employee incident report about the letter that also was not provided to defense counsel. Two days after the letter was discovered, one of the targeted inmates died from a pulmonary embolism; blunt force trauma to his chest was observed. The third piece of suppressed evidence was a report by a gang intelligence officer at the prison who opined that the two deaths were related. That the letter and report by the nurse were “available” to defense counsel because they were permitted to review records at the correctional facility did not defeat the *Brady* claim. Because it was undisputed that the letter and the report were in the prosecutor's file, there was an affirmative duty to disclose them.

**Liggins v. State,**

**841 N.W.2d 356 (table), 2013 WL 5963013 (Iowa App. Nov. 6, 2013) (unpublished)**

In child-murder case, post-conviction relief is granted due to the prosecution's failure to disclose that one of its crucial witnesses was a paid informant in drug cases. The absence of a direct connection between the payments and the witness's testimony in petitioner's case was immaterial: “What matters is the fact that payments were made. Whether in this case or another, they provided a powerful incentive for the witness to cooperate with the State.” Also immaterial was the supervising detective's denial of knowledge of payments to the witness. The detective had ample opportunity to verify the status of the witness as a paid informant prior to the witness's testimony and he had an obligation to do so. “[T]he State could not shirk its duty to obtain the exculpatory evidence of the witness's status as a paid informant by pointing to the fact that the payments were made in other cases or by denying knowledge of the payments. The State was obligated to unearth and disclose this critical information.” In addressing materiality, the court rejected the State's argument that it could not consider 77 suppressed police reports that the court had found failed the materiality test in a prior post-conviction proceeding. “A materiality analysis must consider all the suppressed evidence, including evidence that was addressed in a

prior proceeding.” When considered together, along with a suppressed FBI report that was presented in this second post-conviction proceeding, confidence in the verdict is undermined. The reports could have, inter alia, called into question certain trial testimony, bolstered the defense’s contention that another person had a motive to kill the victim, and cast suspicion on another party.

**Ferguson v. Dormire,**  
**413 S.W.3d 40 (Mo. App. 2013)**

Habeas relief granted in robbery-murder case where prosecution suppressed evidence of an interview with the wife of one of the prosecution’s key witnesses at trial. “The undisclosed evidence was favorable because it impeached [the witness’] explanation for his ability to identify Ferguson. The undisclosed evidence was material because of the importance of [the witness’] eyewitness identification to the State’s ability to convict Ferguson, because the evidence would have permitted Ferguson to discover other evidence that could have impacted the admissibility or the credibility of [the witness’] testimony, and because of the cumulative effect of the nondisclosure when considered with other information the State did not disclose.” The other evidence that could have been discovered absent the suppression included the fact that the police had contacted the eyewitness while he was in prison pre-release, which would have enabled Ferguson to argue that the witness felt threatened or intimidated, resulting in his sudden ability to identify Ferguson and the co-defendant. Additional evidence that had been suppressed (although discovered by the defense prior to trial) was (1) a statement by a witness as to the time a bar Ferguson and the co-defendant had been drinking in closed that contradicted the prosecution’s theory of the case; (2) a statement by the second eyewitness indicating her inability to identify either Ferguson or the co-defendant; and (3) the testifying eyewitness’s sudden ability to identify Ferguson and the co-defendant from pictures in a newspaper that the eyewitness claimed to have received from his wife while in prison. Although Ferguson learned of these bits of undisclosed information prior to trial, the delay in receiving the information impacted his ability to use the evidence in his defense. Relief was required even though a co-defendant implicated Ferguson in the robbery-murder. This was because the co-defendant’s confession was severely challenged by Ferguson, as were the investigative and interrogation tactics employed by the State in securing that confession.

**State ex rel. Woodworth v. Denney,**  
**396 S.W.3d 330 (Mo. 2013)**

In murder, assault, burglary, and armed criminal action case with weak circumstantial evidence and a third party culpability defense, convictions vacated due to suppressed evidence and newly discovered evidence undermining confidence in the verdict. The first suppressed evidence was a series of letters involving the surviving victim, the original trial judge, the local prosecutor and the special prosecutor. Letter 1 was from the surviving victim to the judge complaining about the local prosecutor’s handling of the case and begging the judge to remove him so that the case against defendant could go to the grand jury. Letter 2 was from the local prosecutor to the judge

explaining that the surviving victim had earlier been adamant that a third party, the ex-boyfriend of the victims' daughter, be charged with the crimes. The local prosecutor nevertheless requested that the judge appoint the attorney general's office to represent the State. Letter 3 was from the judge to the special prosecutor thanking the attorney general's office for taking the case, enclosing Letter 1, and explaining that was what prompted the judge to initiate the grand jury inquiry. These letters could have diminished the surviving victim's credibility when he denied having told others that the ex-boyfriend was the shooter and would also have assisted the defense in demonstrating that the State's investigation was not impartial by showing that the investigation improperly focused on defendant rather than on the ex-boyfriend once the surviving victim put pressure on the judge. Also suppressed were complaints by the victims' daughter to the police that the ex-boyfriend was violating a protection order that had issued shortly after the crimes and that he was making threats. This information would have impeached the daughter's deposition testimony denying threats by the ex-boyfriend and her denial that she informed the police when the ex-boyfriend contacted her in violation of the protection order. Finally, newly discovered evidence called into question the credibility of the ex-boyfriend's alibi and supported defendant's claim of innocence.

**People v. Gutierrez,**  
**153 Cal. Rptr. 3d 832 (Cal. App.), cert. denied, 134 S.Ct. 684 (2013)**

Refusing to overturn existing precedent holding that prosecution's duty to disclose exculpatory evidence under *Brady* applies to preliminary hearings.

**People v. Gayden,**  
**111 A.D.3d 1388 (N.Y. 2013), appeal withdrawn by 18 N.E.3d 1142 (N.Y. 2014)**

In murder case, defendant was entitled to have his judgment vacated due to the prosecution's failure to inform the defense that an essential prosecution witness was a paid informant.

**Adams v. Commissioner of Correction,**  
**71 A.3d 512 (Conn. 2013)**

In gang-related murder and assault case, petitioner was entitled to habeas relief as a result of the prosecution's failure to correct false and misleading testimony by one of the surviving victims (Andre) about the consideration he was receiving in two unrelated criminal cases in exchange for his testimony against petitioner and his co-defendants. (The trial prosecutor was unaware of the consideration because another prosecutor was handling Andre's case and they had agreed to create a "firewall" in order for the trial prosecutor to remain in the dark about any deals made. It was the judge in Andre's case that had conducted the plea discussions. At the time, the prosecutor of Andre believed there was no duty to disclose the deal because it was the product of negotiations between the judge and the surviving victim, a position abandoned in this appeal.) In finding that petitioner met the strict materiality standard applicable to *Napue* violations, the court engaged in a lengthy analysis of the evidence against petitioner and its weaknesses, and noted the

difficulty the jury had in reaching a verdict. The court acknowledged that Andre, both as a victim of the attack and as a witness to the fatal shooting of his cousin, had reason to testify against his assailants wholly apart from any promise of leniency. The court further acknowledged that Andre's veracity as a witness was tested by the vigorous cross-examination of defense counsel. The court nevertheless concluded that it was "highly probable that Andre's credibility would have been further undermined, and most likely seriously so, if the jury knew, first, that he had been promised leniency on his pending charges in return for his cooperation and, second, that he was lying when he denied that he had been promised consideration for such cooperation. Because a witness' motivation to avoid prison time is invariably a strong one, the fact that Andre's credibility otherwise had been called into question was not a substitute for cross-examination about the relationship that in fact existed between the leniency that he had been promised and his testimony on behalf of the state."

**State ex rel. Koster v. Green,**  
**388 S.W.3d 603 (Mo. App. 2012)**

In capital murder case involving a sexual assault where the mentally ill petitioner confessed to the offense, habeas court did not abuse its discretion in concluding that undisclosed evidence could reasonably be taken to put the petitioner's whole case in such a different light as to undermine confidence in the verdict. The undisclosed evidence consisted of: (1) serological test results showing that foreign semen or other biological fluids — which could not have been deposited by petitioner or by the victim's boyfriend or estranged husband — were found on the robe the victim was wearing at the time of the attack; (2) internal police documents showing that the police lab reported the exculpatory findings to the police investigating the case, and that police relied on the undisclosed serological results to exclude suspects until they obtained a confession from petitioner; (3) documents showing that fingerprints found at the crime scene, which the State claimed were mere smudges unusable for comparison, were in fact usable and excluded petitioner as the source, and were tested against numerous alternate suspects even after police obtained petitioner's confession; (4) a drawing of the crime scene made by petitioner, which a detective had asked petitioner to draw to determine if his confession was credible and which the detective concluded was not consistent with the actual layout of the crime scene; and (5) evidence that a key State witness, whose testimony that she yelled out the victim's name was pivotal to corroborating petitioner's confession, had to be hypnotized in order to provide the certain trial testimony she offered. The suppressed serological evidence, which included a handwritten report with an exculpatory finding that was crossed out and omitted from the final report that was disclosed to the defense, could have been used to both bolster the defense argument that petitioner was not the perpetrator and impeach the credibility of the investigation. Similarly, the fact that the police had arranged to have a key prosecution witness hypnotized to clarify her memory, which was not documented or disclosed to the prosecutor or defense counsel, could have been used both to impeach the witness's credibility and the integrity of the police investigation.

**Rios v. State,**  
**377 S.W.3d 131 (Tex. App. 2012)**

In case where applicant pleaded guilty to charge of driving while intoxicated, he was entitled to habeas relief based on the revelation that the breath results he had been informed of prior to the plea were invalid because the technician in charge of the intoxilyzer used to test application's blood alcohol concentration had falsified the calibration records for that machine. The plea was deemed involuntary because it had been induced by the invalid test result.

**Ex Parte Miles,**  
**359 S.W.3d 647 (Tex. Crim. App. 2012)**

In murder and attempted murder case, applicant was entitled to habeas relief on both a *Brady* claim and a claim of actual innocence. The undisclosed evidence was two police reports, one of which expressly identified a third party as the perpetrator and the other of which disclosed an altercation between the victims and another party five days prior to the shootings. The second report also contained a claim by the deceased victim's brother that the shooter was someone named Deuce. The reports could have been used both to impeach testimony by a detective that there were no other suspects and to develop an alternate theory of the crime. The report about the altercation could have impeached testimony from the surviving victim that his possession of a sawed-off shotgun was purely for personal protection and his denial of having had problems with others before the crime. In finding the suppressed evidence material, the court found significant the additional evidence that could have been developed had the first report been disclosed suggesting the third party was in fact the perpetrator. The significance of the suppressed reports was "even more obvious" when considered in the context of the trial record, which included questionable gunshot-residue analysis, suggestive eyewitness identifications, disparities between the descriptions of the shooter and applicant, and applicant's alibi.

**\*Velez v. State,**  
**2012 WL 2130890 (Tex. Crim. App. June 13, 2012) (unpublished)**

Reversal of death sentence where prosecution presented false testimony concerning the conditions of custody defendant would be subject to should he receive a sentence of life imprisonment without possibility of parole rather than death. The testifying witness and the prosecutor knew or should have known about a 2005 regulation that precluded the less restrictive conditions that the witness testified were possible for defendant to receive. In finding that the false testimony was not harmless beyond a reasonable doubt, the court noted: (1) the witness's extensive credentials that "increased his credibility as a person knowledgeable about violence in prisons and future dangerousness"; (2) the witness's testimony about the "horribles" that occur in prison, including murders and his descriptions of prison as a very violent place; (3) the witness's observation that rules can change after conceding that life without parole inmates are not allowed out on work detail without an armed guard; (4) the circumstantial nature of the case against defendant; (5) the fact that the prosecution presented no psychiatric evidence supporting a



finding of future dangerousness, nor sought to rebut the defendant's psychiatric evidence that he would not pose a future danger; (6) that other than a bar fight some 17 years prior to trial, defendant's criminal record was non-violent; and (7) that defendant had been in custody for some time prior to trial and had a clean disciplinary record.

**State v. Hollin,**

**970 N.E.2d 147 (Ind. 2012)**

In conspiracy to commit burglary case, *Brady* violation found where prosecution failed to disclose, inter alia, that there was a charge pending against the testifying former co-defendant (Vogel) for battery with a deadly weapon in a neighboring county, that there were petitions pending to revoke Vogel's probation in the neighboring county as well as the county of trial, and that Vogel's theft conviction in the other county would be reduced to a misdemeanor if he completed probation successfully. In finding the suppressed information was favorable, it is noted that Vogel did not implicate Hollin in the burglary until after he was charged with battery with a deadly weapon and two petitions to revoke his probation were filed. The suppressed evidence was deemed material given that the case involved a credibility contest between Vogel and Hollin.

**Bunch v. State,**

**964 N.E.2d 274 (Ind. App.), transfer denied, 971 N.E.2d 1215 (Ind. 2012)**

In felony-murder/arson case, post-conviction court clearly erred in denying petitioner's claim that the prosecution violated *Brady* by failing to disclose an ATF report that directly contradicted the report and testimony by an ATF agent at petitioner's trial about the presence of a heavy petroleum distillate (HPD) on two of the ten samples that had been tested. (After obtaining the actual gas chromatographs for the samples at issue, petitioner's post-conviction expert evaluated them and concurred with the findings in the suppressed report.) The post-conviction court was incorrect when it found that the ATF report was not suppressed because it constituted work product that was not discoverable. First, the State never claimed that the report was work product. Second, "the *Brady* rule can require disclosure of evidence not otherwise discoverable if the evidence is shown to be exculpatory." The post-conviction court also erred in finding no suppression because the report at issue was in the possession of the ATF and not the prosecution. "That the ATF kept the complete file on its premises does not mitigate the State's obligation to disclose exculpatory evidence in that file." The post-conviction court further erred in finding that because petitioner had the testifying ATF agent's report, petitioner did not demonstrate reasonable diligence when she made no specific request for the ATF file. Here, there was nothing in the information that petitioner possessed suggesting that the complete ATF file would contradict what had been disclosed. On this record, the complete ATF file was suppressed for purposes of meeting the first prong of the *Brady* test. As to whether the suppressed report was favorable, although it agreed with the testifying agent's finding of HPD on three of the samples, the disagreement on one of the samples was significant because that sample was the only one taken from the victim's bedroom and the prosecution's theory was that because HPD was found

in both the living room and the bedroom, there were multiple, and therefore incendiary, fires. In addition, the second sample on which there was disagreement was taken from what was identified as a pour pattern in the living room. With a finding that it tested negative for HPD, then the significance of the alleged burn pattern was significantly undercut. “The undisclosed evidence is therefore exculpatory, as it directly contradicts the State's theory of the case.” In addition, the report could have been used to impeach the ATF's agent at trial. Finally, because the undisclosed report directly contradicted the trial testimony supporting fires originating in two places, there was a reasonable probability that but for the prosecutorial failure to disclose this evidence, the result of the trial would have been different.

**\*In re Bacigalupo,**  
**283 P.3d 613 (Cal. 2012)**

Habeas relief granted as to death sentence where prosecution failed to disclose evidence that would have supported a case in mitigation at the penalty phase that petitioner committed the two murders because of a Columbian drug cartel's death threats against petitioner and his family. (Under California law, having acted under duress is a statutory mitigating factor.) At trial, the jury heard petitioner's confession in which he claimed that he had been ordered to kill the victims by the Columbia Mafia under threats to himself and his family. The man petitioner claimed had ordered the killings denied having done so and the prosecutor at both phases of the trial emphasized the absence of evidence supporting petitioner's account of the crime. The prosecution failed to reveal to defense counsel that a confidential informant had tied a high level drug dealer with a connection to a Columbian drug cartel to the killings, that the informant had been present when the drug dealer met with petitioner the night before the murders, and that the informant had been told that the killings were a contract killing rather than for robbery as the prosecution asserted at petitioner's trial. That the trial court in a pre-trial ruling had concluded that the confidential informant was not a material witness as to guilt was not dispositive of the informant's materiality as to the sentencing phase.

**\*In re Stenson,**  
**276 P.3d 286 (Wash.), cert. denied, 133 S.Ct. 444 (2012)**

In double murder case where defendant claimed one victim killed the other before committing suicide and the key evidence implicating defendant in the killings was gun shot residue (GSR) found in his front pants pocket and blood spatters on the pants, the State violated *Brady* by suppressing an FBI file and a photograph showing how the pants had been handled prior to the GSR testing. The file was favorable because it revealed that an FBI employee other than the one who testified at trial had actually conducted the GSR testing. Knowledge of this would have allowed the defense to challenge the credibility of the testifying FBI agent. In addition, the file showed that only a few particles of GSR was found in the pocket, a fact the defense was unaware of at the time of trial. Also suppressed was a photograph showing that prior to the GSR testing a detective had placed his ungloved hand in the front pant pocket. Suppression was found even assuming that a defense investigator had viewed the photograph prior to trial because there was

no disclosure to defense counsel at the time the FBI agent testified or at any other time “that something had gone into the pocket. . . .” In finding the suppressed evidence to be material, the court explained: “Had the FBI file and photographs been properly disclosed here, Stenson's counsel would have been able to demonstrate to the jury that a key exhibit in the case—Stenson's jeans—had been seriously mishandled and compromised by law enforcement investigators. It is also likely that exposure of the State's mishandling of the jeans with regard to GSR testing would have led to further inquiry by Stenson's counsel into possible corruption of the blood spatter evidence. In that regard, Stenson's defense theory at trial could have taken into account the fact that the jeans may have been folded over when the blood spatter was wet. Instead, the jury was left with only one explanation for the blood spatter, which was that it could not have appeared on Stenson's jeans after [the victim] came to his final resting place.”

**Commonwealth v. Murray,**  
**957 N.E.2d 1079 (Mass. 2011)**

In murder case, grant of new trial affirmed where prosecution failed to disclose information known to the police regarding the gang activities of “KST,” whose members included the victim and several eyewitnesses to the killing. This information, inter alia, could have been used for impeachment and to show bias.

**Freshwater v. State,**  
**354 S.W.3d 746 ( Tenn. Crim. App. 2011)**

Conviction for first degree murder reversed due to suppression of the portion of a statement from a witness claiming that Freshwater's co-defendant told him that he was the sole shooter of the victim. Provision to the defense of another part of the witness's statement, which appeared to be the complete statement, misled defense counsel who could not then be faulted for failing to discover the missing part of the statement. There was a reasonable probability that the jury, which decided sentence at the time of the 1969 trial, would have imposed a sentence less than ninety-nine years had the statement not been suppressed.

**Pena v. State,**  
**353 S.W.3d 797 (Tex. Crim. App. 2011)**

In marijuana possession case, the court of appeals erred in concluding that the due process protections afforded under *Brady* did not apply when the State failed to disclose or provide to appellant, after specific request, the audio portion, containing exculpatory statements made by appellant to police, of a videotape used by the State before the jury. The audio was favorable because it included appellant's denial that the plant material was marijuana and the charge required proof that possession of the drug was intentional and knowing. It was also favorable in that it could have impeached the arresting officer's failure to recall whether appellant had asked for testing of the plant material in that the audio confirmed appellant's claim that he did. The audio would also have precluded the prosecutor from arguing that appellant only requested testing

of the material after he knew it had been destroyed. In finding the suppressed evidence material, the court accepts appellant's argument that his defense would have been different had the audio been available in that he would have focused on lack of intent rather than on the destruction of the evidence. Also noted is how the prosecution's case would have had to change.

**Jordan v. State,**  
**343 S.W.3d 84 (Tenn. Crim. App. 2011)**

In granting post-conviction relief in second degree murder case, the appellate court ruled that the state's open file policy did not discharge its affirmative duty under *Brady* to disclose favorable, material evidence to the defendant and that the defendant was entitled to rely on the state's assertion that it provided him with its entire file. Evidence concerning the discovery of a knife near where the victim's body was found with a slashed throat was favorable even though the knife was not linked to the killing because it demonstrated a failure by the police to further investigate. In addition, defense counsel may have been able to develop exculpatory evidence through his own investigation of the knife. Also favorable was a suppressed police memorandum that impeached a third party suspect's later claim that he was not in the area at the time of the crime. Because the suspect's denial of being in the area was the basis of his being cleared by police after a caller implicated him in the murder, the memorandum could have been used by defense counsel to question the reliability of the state's investigation. After reviewing the record, the appellate court could not be "reasonably confident that every single member of the jury," after hearing evidence impugning the police investigation, would have found the petitioner guilty because the margin of sufficiency was so slim that any favorable evidence would be material."

**State v. Ferguson,**  
**335 S.W.3d 692 (Tex. App. 2011)**

In aggravated sexual assault case where alleged victim was between eight and eleven years old when the assaults occurred, trial court did not abuse its discretion in granting a new trial based on the State's failure to disclose a forensic sexual assault examination report that at least arguably undermined the alleged victim's claim to have been subjected to vaginal intercourse regularly for more than three years and supported defendant's assertion that no intercourse occurred. Had defense counsel possessed the report, he could have shifted "from the defensive argument used—that there was no physical evidence of sexual assault—to a more offensive argument—that there was physical evidence strongly suggesting that there was no sexual assault, or at least that the regularity reported by complainant was incredible."

**Ex Parte Ghahremani,**  
**332 S.W.3d 470 (Tex. Crim. App. 2011)**

In sexual assault case, applicant was entitled to resentencing based on the State's presentation of misleading testimony by the parents of one of the victims creating the false impression that the

victim's physical, emotional, and psychological problems resulted solely from her sexual encounter with applicant. Undisclosed to applicant, and known by the prosecution, was evidence showing additional sources for the victim's problems.

**Aguilera v. State,**  
**807 N.W.2d 249 (Iowa 2011)**

In second degree murder case where petitioner claimed the shooting was accidental, a *Brady* violation occurred through the prosecution's failure to disclose an Iowa Division of Criminal Investigation (DCI) file containing several witness statements, including statements from the two alleged eyewitnesses to the incident. Although a DCI agent had revealed in a pretrial deposition that eyewitness Guido had at one point claimed to have been inside when he heard the shot fired, and only then went outside where the shooting had occurred and never saw a gun, this was not enough to allow petitioner to take advantage of the evidence as the agent did not reveal: (1) the date the statement was made - the day after the shooting; (2) that Guido made a contradictory statement two days later which still differed from later deposition and trial testimony on the key issue of whether Guido saw the actual shooting; and (3) that Guido had also placed the other alleged eyewitness, Lopez, inside the house when the shooting happened. Defense counsel would have been able to far more effectively cross-examine Guido had he been provided the two statements that were inconsistent not only with the deposition and trial testimony, but with each other. Also suppressed was a statement by a witness unknown to petitioner who recounted someone shout "they're fighting" before hearing a gunshot. This account better supported the testimony of Lopez that the gun went off as petitioner and the victim were struggling, as opposed to Guido's trial testimony that the men were two meters apart when petitioner fired the shot. The State did not appeal the lower court's finding that an additional statement was suppressed, a statement expressing the belief that petitioner was extorting money from other Hispanics at work, many of whom were present at the party where the shooting occurred. Defendant's strategy at trial may have changed had he been provided with the statement as it may have uncovered bias against defendant by trial witnesses. Although the statement may not have been material in and of itself, "when viewed in connection with the other statements the State failed to turn over, it supports a finding of materiality." Additional suppressed statements contributed to the materiality finding as they made the defense theory of accidental shooting far more likely.

**DeSimone v. State,**  
**803 N.W.2d 97 (Iowa 2011)**

In sexual abuse case, the prosecution violated *Brady* by failing to disclose a witness's timecard showing that the witness could not possibly have seen the events to which she testified. (The witness, who befriended the victim prior to trial, described almost hitting a girl with her car on the night the alleged assault occurred. This corroborated the part of the victim's testimony about fleeing the petitioner's home and nearly being struck by a car.) In the post-conviction proceeding, the trial prosecutor suggested that he had hand-delivered the timecard information to defense counsel. Defense counsel in turn denied receiving it but admitted he had not reviewed

the file prior to the hearing. On this record, suppression was found because: (1) it was inconceivable that the prosecutor would have used the witness knowing that her testimony was false and that he had provided proof of the falseness to defense counsel; (2) defense counsel testified that he shared all material with petitioner and petitioner would have brought the discrepancy to the attention of defense counsel; and (3) given defense counsel's experience, it was difficult to believe that he would not have used the timecard information if he had possessed it. The suppression prong of the *Brady* test was not defeated by the fact that defense counsel had been aware that the witness's timecard was going to be sent to the police department. A reasonable attorney would have concluded that the timecard had corroborated the witness's account rather than being exculpatory and so would not have independently sought the information. The suppressed timecard was material because there was no physical evidence and the case turned on the victim's questionable credibility for which there was little corroboration. The defense theory at trial was that the victim was collaborating with persons who disliked petitioner in order to convict him. Bringing the false testimony into the conspiracy theory "completes the picture."

**State ex rel. Griffin v. Denney,**  
**347 S.W.3d 73 (Mo. 2011)**

In prison killing case, petitioner was entitled to habeas relief because of the State's failure to disclose that within minutes of the stabbing prison guards confiscated a sharpened screwdriver from another inmate as the inmate attempted to leave the area where the stabbing occurred. The evidence was favorable because it supported a viable alternative perpetrator defense. In finding prejudice, additional new evidence is discussed, including an admission by another inmate that he was the actual killer and had been assisted by the inmate who was caught with the screwdriver, the recantation of one of the witnesses who claimed to have witnessed petitioner committing the stabbing and evidence that the prosecution's other eyewitness was actually in the law library when the stabbing occurred. (There was a dissent that contended the *Brady* claim should fail because testimony by the medical examiner refuted the possibility that the screwdriver caused the victim's wounds.)

**State ex rel. Koster v. McElwain,**  
**340 S.W.3d 221 (Mo. App. 2011)**

In case involving the murder of petitioner's mother, grant of habeas relief affirmed in part because of the State's suppression of evidence that the victim had made numerous reports of abuse by her estranged husband and evidence that the victim was so fearful of her husband that she armed herself with a gun. In finding evidence of the abuse to be favorable, it is observed that such evidence could have been used to attack the thoroughness and even good faith of the police investigation. In finding prejudice, it is noted, inter alia, that the sheriff to whom the victim had reported the abuse had denied at trial that there had been any reports of domestic abuse. In addition, the evidence would have rebutted testimony suggesting that the victim had been nervous and upset in the months before her death because of her fear of petitioner.

**Jackson v. State,**  
**714 S.E.2d 584 (Ga. App. 2011)**

In robbery/assault case with two co-defendants, defendant Phillips was entitled to a new trial based on the prosecution's failure to provide the defense with a pretrial statement by one of the victims that contradicted the victim's trial testimony. In the statement the victim provided to police, he asserted that he and his mother-in-law had been robbed by two armed men. At trial, the victim testified that not only were three men involved in the crime, but that Phillips was one of the three men. Defense counsel had received a police report which indicated the victim had reported three men being involved, including the driver of the getaway car. Defense counsel did not receive a second police report that tracked the written statement. Because the witness was the only one to identify Phillips as a participant in the robbery and the other evidence was not overwhelming, the suppressed statement was material.

**State v. Bai,**  
**2011 Ohio 2206, 2011 WL 1782113 (Ohio App. May 9, 2011)**

Conviction for gross sexual imposition is reversed due to the prosecution's failure to disclose a handwritten statement by the alleged victim that was prepared not long after the incident and that presented a rather detailed recollection of the events that occurred, in contrast to her testimony where she claimed lack of a clear memory due to intoxication. The statement was highly probative of the alleged victim's claimed substantial impairment and defendant's knowledge of her alleged impaired ability to resist or consent. It also corroborated defendant's testimony about the initial consensual nature of the encounter.

**Flores v. Iowa,**  
**801 N.W.2d 32 (table), 2011 WL 1376777 (Iowa App. Apr. 13, 2011) (unpublished)**

Murder and terrorism convictions reversed and new trial granted in post-conviction proceedings based on previously undisclosed FBI interview with a witness suggesting that another person was the actual perpetrator. Although Flores' convictions had been affirmed on direct appeal, it was noted that the evidence of his guilt "was far from overwhelming," and it was a close case involving circumstantial evidence. The report was "[c]learly" favorable to the defense and its suppression affected counsel's trial preparation and undermined confidence in verdict.

**State v. Sinha,**  
**84 A.D.3d 35, 922 N.Y.S.2d 275 (N.Y.A.D. 2011), aff'd, 976 N.E.2d 223 (N.Y. 2012)**

Invoking its "interest of justice jurisdiction," the court reversed defendant's conviction for bribing a witness "because the prosecution failed to fulfill basic disclosure obligations that are essential to a fair trial." The prosecution possessed, but did not disclose until after its witness (and victim) testified, emails another prosecutor sent to the victim's mother stating she would "do everything in [her] power' to make" the prosecutors handling the case "see that [her son]

deserved a break because of what had happened to him....” Another undisclosed email described the privileges the prosecutors arranged for the victim who was incarcerated on a probation violation, including phone privileges at the youth institution and preventing his transfer to an adult facility. The prosecution’s “tardy” disclosure of the emails was “unexcusable.”

**Miller v. United States,**  
**14 A.3d 1094 (D.C. App. 2011)**

In a case involving, inter alia, charges of assault with intent to commit murder, the prosecution violated *Brady* by not disclosing until the evening before opening statements that the government’s principal eyewitness had told the grand jury that the shooter used his left hand to shoot the victim. This was material given that the defendant was right-handed and, had defense counsel known about the witness’s testimony earlier, evidence could have been developed showing that an alternative suspect was likely left-handed. (Defense counsel did attempt to present a videotape showing that the alternative suspect signed his Miranda waiver card with his left-hand but the trial court refused to allow it because both sides had rested and instructions to the jury had begun by the time defense counsel noticed this.) Defense counsel’s failure to simply ask the alternative suspect, who was “a patently untrustworthy witness,” whether he was left-handed, or to request a continuance or mistrial, did not defeat the *Brady* claim. “Deferral of disclosure of what might well (and in fact did) turn out to be critically important exculpatory information, until the night before opening statements . . . is not compatible with the Constitution, with our case law, or with applicable professional standards.” *Id.* at 1108. While not dispositive, the ABA Standards for Criminal Justice, The Prosecution Function, informed the court’s analysis.

**State v. Green,**  
**2011 WL 709726 (N.J.Super.A.D. Mar. 2, 2011) (unpublished)**

Green’s motion for discovery and new trial granted on appeal based on prosecution’s failure to disclose pending criminal charges against its key witness, Muhammad, who implicated Green in the kidnapping and murder of the victim, Williams. When defense counsel requested information about any pending charges against Muhammad, the prosecutor told the judge she would “look[] into it,” and later advised the judge she had “checked” the computer and there were no pending charges. According to the prosecutor, Muhammad’s “rap sheet is in error,” and “[e]verything has been disposed of.” *Id.*, at \*1. On cross-examination, Muhammad admitted pleading guilty to drug crimes and receiving a minimum sentence. He testified that he had reported his knowledge of Williams’ homicide to an investigator while incarcerated on drug charges, but denied favorable treatment in exchange for information. In closing, prosecutor emphasized that Muhammad “has nothing to gain,” and noted his testimony that he had “nothing pending.” In fact, that was untrue. When Muhammad testified, he had pending charges against him, including an indictment for armed robbery, possession of a handgun without a permit for use against another, and possession of a firearm for unlawful purpose and possession of a machine gun. The prosecution was obligated to disclose that information but failed to do so.



The trial judge erred in finding defendant should have discovered the withheld information “sooner than 19 years after” trial, and that even if the prosecution had disclosed the pending charges against Muhammad, a different verdict was not probable. That was the wrong legal standard as Green needed only to show that the prosecution suppressed favorable, material evidence.

**State v. Russell,**

**2011 Ohio 592, 2011 WL 494744 (Ohio App.), appeal not allowed, 951 N.E.2d 1046 (Ohio 2011)**

In gross sexual imposition case, defendant was entitled to a new trial due to the prosecution’s failure to disclose the specific dates the sexual incidents allegedly occurred. With knowledge of the exact dates, defendant could have provided documented proof of his whereabouts on those days.

**\*Johnson v. State,**

**44 So.3d 51 (Fla. 2010)**

Three death sentences vacated in successive post-conviction proceedings where prosecutor violated *Giglio* by knowingly presenting false testimony and misleading argument at suppression hearing in order to hide agency relationship with jailhouse informant who obtained incriminating statements from Johnson. If the true facts of the informant’s status as a government agent had been known, his testimony would have been inadmissible in both the guilt and penalty phases. The prosecution’s use of the informant’s testimony concerning crime details was immaterial to the guilty verdict, however, given that the defense conceded Johnson had committed the crimes and relied on an insanity defense. The testimony was material to sentence because: (1) the prosecutor twice emphasized the informant’s testimony that Johnson “play[ed] like he was crazy”; (2) there is a lesser burden of proof needed to establish mitigation; (3) the facts of the murders were not “necessarily inconsistent” with proposed mental health mitigation; and (4) the proposed mitigation was “extensive, consistent and un rebutted.”

**Bly v. Commonwealth,**

**702 S.E.2d 120 (Va. 2010)**

In drug distribution case, *Brady* violation occurred where the prosecution failed to disclose evidence that the paid confidential informant who allegedly made controlled “buys” from defendant had been giving false accounts to the drug task force of other alleged drug purchases. The lower court incorrectly assumed that the trial court, having been the trier of fact, would have convicted defendant based on other evidence even if the confidential informant’s testimony had been entirely excluded. This failed to take into account how the suppressed evidence could have been used to discredit the entire police investigation, thereby tainting the remaining evidence in the case.

Baker v. State,  
238 P.3d 10 (Okla. Crim. App. 2010)

In case involving assault and battery with a dangerous weapon, the prosecution violated *Brady* by failing to disclose the victim's pending drug charges, plea agreement, and prior felony conviction. Because the victim's credibility was critical, defendant had made a specific request for information that could be used to attack his credibility. In response, the "State attempted to keep relevant information from [defendant] through the use of semantics or a play on words. . . . This Court has repeatedly held that a criminal trial is not a game of hide and seek." *Id.* at 12.

State ex rel. Engel v. Dormire,  
304 S.W.3d 120 (Mo. 2010)

In armed kidnapping case, the prosecution violated *Brady* by failing to disclose that the chief prosecution witness who purportedly hired petitioner to commit the crime was paid for his testimony against petitioner and a co-defendant, that investigators coached the witness, and that investigators sought leniency for the witness based on his cooperation in the cases. That documents memorializing the deal did not exist at the time of trial did not defeat defendant's allegation of suppression – "it is enough that the evidence shows that the 'deal' itself already existed, even if it had not yet been documented." *Id.* at 127. And that the investigators at issue were from outside Missouri was irrelevant since they were part of Missouri's prosecutorial team in the cases against defendant and the co-defendant. That the witness was impeached on other points at trial did not defeat the *Brady* claim. "The unknown impeachment information, especially when coupled with the impeachment information presented at the time of trial, could have led the jury to a different assessment of [the witness'] credibility." *Id.* at 128. Having shown a valid *Brady* claim, defendant also established the cause and prejudice necessary to overcome the procedural bar to granting him habeas relief.

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 the alleged victim's 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 about injuries to the alleged victim's buttocks and vaginal area. The state failed to disclose the pictures of the alleged victim's buttocks and vaginal area, however, which 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 co-defendant, who had pled guilty to murder in exchange for a 50-year sentence, testified 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 co-defendant to shoot him in the leg which he did. The co-defendant also testified that his initial confessions to police and his younger brother were false. The defendant denied guilt. A jailhouse snitch testified that the co-defendant admitted involvement in the murder plot but claimed he was too scared to go through with it. The snitch also testified that the defendant had twice offered to pay him if he would tell the defendant's lawyer that the co-defendant admitted shooting the victim. The jailhouse snitch had also been facing a number of charges but pled guilty prior to the defendant's trial pursuant to a deal in which he received a 30-year sentence. Both the co-defendant 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 co-defendant'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.

**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.

**Buchli v. State,**  
**242 S.W.3d 449 (Mo. App. 2007)**

In murder case, post-conviction relief is granted based on the State's failure to disclose the entire building surveillance tape which would have cast doubt on the prosecution's timeline theory. The complete tape would have provided petitioner "with plausible and persuasive evidence to support his theory of innocence by supporting his theory that he did not have enough time to commit the crime. If believed, this evidence would have established that [petitioner] had only three and a half minutes to club [the victim] nine times with a blunt object, clean any blood from himself, and get down 13 floors to leave the building. Although the jury was free to believe that [petitioner] could have done all of these acts in less than four minutes, [petitioner] conceivably could have used [the complete tape] to persuade the jury that the 'time window' was too brief."

**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 eight 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 boyfriend 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. Vettraino,**  
**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 post-conviction 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.4<sup>th</sup> 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)**

Post-conviction 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)**

Post-conviction 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.

**\*Cook v. State,**  
**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)**

Post-conviction 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,**  
**45 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 willfully 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 co-perpetrator'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.