UNSUCCESSFUL BUT INSTRUCTIVE BRADY/NAPUE CASES
(Updated September 27, 2009)
*** capital case**

I. UNITED STATES SUPREME COURT

District Attorney's Office for the Third Judicial Dist. v. Osborne,
___ U.S. ___, 129 S. Ct. 2308 (2009)

The Court reversed the Ninth Circuit's holding in §1983 action, "relying on the prosecutorial duty to disclose exculpatory evidence" recognized in *Brady*, that Osborne was entitled to access to evidence for DNA testing to be conducted at his own expense. Osborne had been convicted in Alaska state courts of kidnaping, assault, and sexual assault. He relied on a mistaken identification defense at trial. In state post-conviction, he asserted ineffective assistance of counsel because his counsel had not sought RFLP DNA testing, which was available at the time of trial, but the state used the far less precise DQ Alpha testing that "cannot narrow the perpetrator down to less than 5% of the population." He was denied access for DNA testing and his ineffective assistance of counsel claim was denied based on counsel's strategic reasons for not requesting the testing. The court relied heavily on Osborne's admissions of guilt in an application for parole. In the §1983 action, the District Court and the Ninth Circuit ordered that Osborne had a constitutional right to DNA testing.

> The Court of Appeals affirmed, relying on the prosecutorial duty to disclose exculpatory evidence recognized in *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). While acknowledging that our precedents "involved only the right to *pre-trial* disclosure," the court concluded that the Due Process Clause also "extends the government's duty to disclose (or the defendant's right of access) to *post-conviction* proceedings." 521 F.3d. at 1128. Although Osborne's trial and appeals were over, the court noted that he had a "potentially viable" state constitutional claim of "actual innocence," *id.* at 1130, and relied on the "well-established assumption" that a similar claim arose under the Federal Constitution, *id.* at 1131; cf. *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993). The court held that these potential claims extended some of the State's *Brady* obligations to the postconviction context.

129 S. Ct. at 2315. The Court held that Osborne had a "liberty interest in demonstrating his innocence with new evidence under state law" and that this "state-created right" could in some instances be protected by due process. The Ninth Circuit "went too far, however, in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest." Osborne was not claiming that *Brady* controlled the case, but the Court addressed this finding anyway. In short, a "criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." The

"presumption of innocence" is gone. The State "has more flexibility in deciding what procedures are needed in the context of postconviction relief." Post-conviction due process rights are "not parallel to" trial due process rights. In post-conviction, the convicted "has only a limited interest in postconviction relief." In this light, "*Brady* is the wrong framework."

United States v. Ruiz,
536 U.S. 622 (2002)

"[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." 536 U.S. at 633.

***Strickler v. Greene,**
527 U.S. 263 (1999)

The prosecution's suppression of favorable evidence constitutes "cause" under the "cause and prejudice" analysis undertaken to determine whether a federal habeas corpus petitioner can overcome a procedural default. Likewise, "prejudice" as used in that test equates with the reasonable-probability-of-a-different-result materiality standard of *Brady*. As to whether criminal defendants must exercise some form of "due diligence" in order to avoid procedurally defaulting a *Brady* claim, the Court explained that, "[i]n the context of a *Brady* claim, a defendant cannot conduct the 'reasonable and diligent investigation' mandated by *McCleskey* to preclude a finding of procedural default when the evidence is in the hands of the State." With regard to materiality, the court of appeals erred by focusing solely on the sufficiency of the evidence without asking the more appropriate question "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"

United States v. Williams,
504 U.S. 36 (1992)

District Court may not dismiss an otherwise valid indictment on the ground that the government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession.

United States v. Bagley,
473 U.S. 667 (1985)

Evidence is material when there is a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense. This includes impeachment evidence other than a "deal." A constitutional error occurs only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. The *Strickland* formulation of the *Agurs* materiality standard---a reasonable probability that the result of the proceeding would have been different---is sufficiently flexible to cover all three types of situations outlined in *Agurs*.

United States v. Agurs,
427 U.S. 97 (1976)

Three situations where *Brady* applies: (1) State's case included perjured testimony of which prosecutor knew or should have known; (2) Defense requested but was denied specific evidence material to guilt; (3) Defense made general request but prosecution suppressed evidence of sufficient probative value to create reasonable doubt as to guilt.

Donnelly v. DeChristoforo,
416 U.S. 637 (1974)

"False evidence" includes the introduction of specific misleading evidence important to the prosecution's case, or the nondisclosure of specific evidence valuable to the defense---but it does not include isolated passages of the prosecutor's closing argument, which is billed in advance to the jury as opinion, not evidence.

II. UNITED STATES COURTS OF APPEALS

***Lott v. Bagley,**
569 F.3d 457 (6th Cir. 2008), cert. denied, 129 S.Ct. 2053 (2009)

Capital habeas petitioner's admission that his legal counsel knew of the facts constituting his *Brady* exculpatory evidence claim six years ago precluded his successive habeas petition, since he failed to meet the due diligence requirement of 28 U.S.C.A. § 2244(b)(2).

***Morris v. Ylst,**
447 F.3d 735 (9th Cir. 2006), cert. denied, 549 U.S. 1125 (2007)

In context of *Mooney-Napue* claim, court holds that prosecutor has duty to investigate following trial if she suspects perjury has occurred. Loss on merits.

***Alley v. Key,**
2006 WL 1313364 (6th Cir.) (unpublished), cert. denied, 548 U.S. 921 (2006)

No right to post-conviction discovery of DNA under procedural or substantive due process or *Brady*.

Barker v. Fleming,
423 F.3d 1085 (9th Cir. 2005), cert. denied, 547 U.S. 1138 (2006)

Federal court applied *de novo* review to *Brady* claim because state court's failure to conduct cumulative materiality analysis was contrary to Supreme Court precedent. Court went on to find suppressed evidence was not material.

Government of Virgin Islands v. Fahie,
419 F.3d 249 (3rd Cir. 2005)

Dismissal with prejudice may be an appropriate remedy for a *Brady* violation should the petitioner demonstrate a certain level of wilfulness and prejudice not shown here.

***Wisehart v. Davis,**
408 F.3d 321 (7th Cir. 2005), cert. denied, 547 U.S. 1050 (2006)

Prosecution was not required to disclose to defense that it had declined to prosecute a witness for burglaries it suspected the witness had committed because it didn't want to dissuade him from testifying against Wisehart. A *Brady* claim requires either an implied or an express promise. Good survey of different kinds of witness arrangements that do and do not support *Brady* claims. **Note:** The case was remanded for an evidentiary hearing on Wisehart's juror misconduct claim.

***Lovitt v. True,**
403 F.3d 171 (4th Cir.), cert. denied, 546 U.S. 929 (2005)

Where court clerk destroyed all evidence following the direct appeal without contacting anyone from the prosecutor's office, police department, petitioner's counsel, or the trial court, petitioner was not entitled to relief given findings, which were not unreasonable, that the destruction was not done in bad faith. The court also suggested that an extension of *Youngblood* to the post-conviction context would likely constitute a new rule.

***Ferguson v. Roper,**
400 F.3d 635 (8th Cir. 2005), cert. denied, 546 U.S. 1098 (2006)

Youngblood does not apply to destruction of evidence after trial. Here, during post- conviction investigation, petitioner learned that an attendant at the gas station from which victim had been abducted had turned a surveillance tape over to the police. Sometime following trial, however, the tape was destroyed. Although *Youngblood* only applies to the destruction of evidence before trial, a claim could have been raised under *Brady*, if the petitioner could show that the tape was exculpatory, (which it was likely not because petitioner placed himself in a truck outside the station), or as an ineffective assistance of counsel claim, or as a newly discovered evidence claim.

United States v. Morales-Zevala,
125 Fed.Appx. 822, 2005 WL 659027 (9th Cir. Mar. 18, 2005) (unpublished), cert. denied, 546 U.S. 929 (2005)

Brady does not apply to cases in which the government deprives the defendant of a witness by deporting the witness.

***Crawford v. Head,**

311 F.3d 1288 (11th Cir. 2002), cert. denied, 540 U.S. 956 (2003)

State court decision rejecting *Brady* claim was contrary to and/or involved an unreasonable application of clearly established Supreme Court precedent in that it "failed to recognize that the Supreme Court altered the materiality standard in *Bagley*, . . . and adopted a standard requiring only a 'reasonable probability' of a different outcome if the material had been disclosed." Specifically, with regard to prejudice, the state court had found that petitioner's claim fell short because the undisclosed law enforcement report reflecting the discovery of physical evidence potentially relevant to the case "'is not exculpatory' and because '[i]n no way does it indicate that another person committed the crime and it does not create a reasonable doubt of guilt that did not otherwise exist.'" With regard to petitioner's procedural default of his *Brady* claim, the Eleventh Circuit found that he had shown "cause" since, "despite requests from defense counsel, the State was in possession of the alleged *Brady* material, but failed to disclose it." The appeals court went on to conclude, however, that petitioner could not in fact demonstrate prejudice/materiality. Although the evidence identified in the report underlying petitioner's *Brady* claim may have contained stains suitable for DNA testing (which could, in turn, undermine the prosecution's theory as to where the murder occurred), the court determined that its prejudice/materiality inquiry would have to focus strictly on the state's nondisclosure of the report itself. This was so, the court explained, because petitioner failed to diligently seek testing of the evidence in state court insofar as he waited until the day before his evidentiary hearing to do so. This, in turn, justified the federal district court's decision "in light of both § 2254(e)(2) and Rule 6(a)," to deny petitioner's request for testing during the federal habeas proceedings. From there, the court went on to conclude that petitioner had not shown prejudice or materiality.

***Anderson v. Calderon,**
232 F.3d 1053 (9th Cir. 2000), cert. denied, 534 U.S. 1038 (2001)

"[T]he *Brady* rule relies for its determination of both favorability and materiality on state law, not federal law." Therefore, in assessing whether a *Brady* violation occurred by the prosecution's failure to reveal evidence that would have provided grounds to suppress petitioner's confession, the appeals court looks to the more favorable state law concerning suppression of confessions rather than the guiding federal cases that the California courts, at the relevant time, had declined to follow.

United States v. Howell,
231 F.3d 615 (9th Cir. 2000)

"When a prosecutor discovers material mistakes in police reports already turned over to the defense, the prosecutor must take appropriate steps promptly to notify the defense of the mistakes;" the government had a duty to disclose evidence that two police reports of defendant's arrest contained the same error, even though the error was in defendant's favor and the correct information tended to support defendant's guilt, because the existence of the errors raised an opportunity to impeach the thoroughness of the investigation.

Johns v. Bowersox,
203 F.3d 538 (8th Cir. 2000)

State's nondisclosure of evidence about a monetary reward received by a prosecution witness satisfied the first element of *Brady* -- suppression by the State. Although the reward offer was published in the local newspaper, petitioner did not have "equal access to the information." The state learned of the reward, and the witness's interest in it, from the witness himself. "Even if Johns had managed to learn from a newspaper that the reward existed, he had no way of learning that [witness] had repeatedly inquired about the reward." Petitioner failed to establish, however, that the information suppressed by the prosecution was material.

Matthew v. Johnson,
201 F.3d 353, 364 (5th Cir. 2000), cert. denied, 531 U.S. 830 (2000)

After raising *Teague sua sponte*, the court surveyed the legal landscape existing at the time petitioner's conviction became final and found itself unable to "conclude that a state court would have felt compelled to decide that a prosecutor's failure to disclose exculpatory information prior to entry of a guilty or *nolo contendere* plea was a *Brady* violation, or otherwise a violation of the Due Process Clause." The court likewise concluded that petitioner would also require the benefit of a new rule in order to prevail on his claim that the prosecution's nondisclosure of favorable evidence rendered his plea involuntary by depriving him of the ability to make a knowing and intelligent decision to forego his right to trial by jury. Finally, the court determined that the new rules petitioner sought did not fall within either of *Teague*'s exceptions.

United States v. Pelullo,
173 F.3d 131 (3rd Cir. 1999)

At a retrial, a defendant's prior testimony may be subject to suppression if the defendant testified as a result of a *Brady* violation. The government bears the burden of showing by a preponderance of the evidence that the defendant would have testified even if he possessed the later-disclosed *Brady* material. Here, the government met its burden.

Hogan v. Hanks,
97 F.3d 189 (7th Cir. 1996)

Defendant's "general request for 'all exculpatory evidence'" was "equivalent to no request at all" under *Agurs*, and prosecution's failure to turn over police reports from 1978 indicating officer's disbelief of allegations then made by victim against another person did not violate Due Process because the reports had a "tenuous" connection to defendant's case, and defense counsel knew about the victim's past allegations.

United States v. Kern,

12 F.3d 122 (8th Cir. 1993)

State's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue of *Brady* violation.

United States v. Joseph,
996 F.2d 36 (3rd Cir. 1993)

Third circuit construed its decision in *Perdomo* to mean that, where prosecution has no knowledge or cause to know of *Brady* material in a file unrelated to present case, defense must make a specific request to trigger duty of disclosure.

United States v. Streit,
962 F.2d 894 (9th Cir. 1992)

Appellate review of *Brady* claim was not precluded by defendant's inability to demonstrate that documents which he sought contained exculpatory material and his failure to allege error in *in camera* procedure.

United States v. Stuart,
923 F.2d 607 (8th Cir. 1991)

Remote possibility of the existence of *Brady* material in other files in other jurisdictions does not require wholesale disclosure to defense, nor does it require trial court to conduct in camera review of files for evidence favorable to the defense.

United States v. Tillem,
906 F.2d 814 (2nd Cir. 1990)

Government is not required to disclose evidence it does not possess or of which it is not aware.

United States v. Wilson,
901 F.2d 378 (4th Cir. 1990)

Although prosecution concealed witness's prior statements concerning CIA agent's intent to set up the defendant, *Brady* was not implicated because the defense had the opportunity to interview the witness.

United States v. Davis,
787 F.2d 1501 (11th Cir. 1986), cert. denied, 479 U.S. 852 (1986)

Brady does not apply if the evidence in question is available to the defense from another source.

Bond v. Procunier,
780 F.2d 461 (4th Cir. 1986)

Denial of relief from murder conviction affirmed where District Court, without an evidentiary hearing, determined that Williams, who claimed to have had a conversation with a key prosecution witness during which the witness admitted to the murder, was not credible based on information outside the record.

United States v. Schell,
775 F.2d 559 (4th Cir. 1985)

No violation where prosecutor failed to disclose a promise of leniency because that witness's testimony was corroborated by three other witnesses. Non-disclosure was harmless error.

Pina v. Henderson,
752 F.2d 47 (2nd Cir. 1985)

Parole officer's knowledge of exculpatory statement by witness not imputed to prosecution, therefore no *Brady* violation. Exception is where the agency can be considered an "arm of the prosecution."

United States v. Truong Dinh Hung,
667 F.2d 1105 (4th Cir. 1981)

Failure to disclose exculpatory evidence was harmless error because it was cumulative to what was in the record.

III. UNITED STATES DISTRICT COURTS

Eubanks v. United States,
2005 WL 1949474 (S.D.N.Y. August 11, 2006)

Banks v. Dretke does not represent a change in the law sufficient to constitute "extraordinary circumstances" required for review under Rule 60(b).

***Rhoades v. Paskett,**
2005 WL 3576845 (D. Idaho Dec. 29, 2005)

Legal landscape as of 1991 demonstrated uncertainty to the extent that a ruling finding that petitioner had a right to raise a *Brady* claim following an *Alford* plea was *Teague* barred.

United States v. Bin Laden,
397 F.Supp.2d 465 (S.D.N.Y. 2005)

Court rejects "reasonable forseeablity" as touchstone for determining whether government actor is sufficiently linked to prosecution as to give it constructive notice of evidence it generates. Court adopts totality of circumstances test and holds that based on the fact that U.S. Marshal Service installed $75K of teleconferencing equipment for the purposes of government access to witness Service was protecting, it could be considered an arm of the prosecution, and prosecutor was responsible for disclosing exculpatory evidence gathered by the Service. Claims denied on other grounds.

***Schmitt v. True,**
387 F.Supp.2d 622 (E.D. Va. 2005), aff'd, Schmitt v. Kelly, 189 Fed.Appx 287 (4th Cir., July 13, 2006), cert. denied, 549 U.S. 1028 (2006)

Court found impeachment information was suppressed but was not material. Good language criticizing prosecutor for his pre-trial conduct and his attitude at evidentiary hearing.

Garcia v. Dretke,
2005 WL 2263675 (S.D. Tex. August 20, 2005)

Asserting *Brady* claim in federal habeas where petitioner pled guilty is *Teague* barred.

Gayles v. Brandon,
2005 WL 1130377 (E.D. Tenn. May 12, 2005)

AEDPA barred relief on *Brady* claim where "[a]t the time of the petitioner's direct appeal . . . there was no principle established in a Supreme Court case that extended the *Brady* disclosure rule to the kind of implied inducement or indefinite offer of consideration, as existed in this case." Were the claim subject to de novo review, the district court would have found the evidence did constitute impeachment evidence that should have been disclosed.

***Lott v. Bradshaw,**
2005 WL 3741492 (N.D. Ohio 2005)

After Sixth Circuit authorized filing of successor petition raising a *Brady* violation and assertion of actual innocence, district court found respondent had good cause for discovery of trial counsel's files regarding any information concerning Lott's culpability, including polygraph results, and good cause to depose trial counsel. The court found that Lott had implicitly waived the attorney-client and work product privileges to the extent necessary for respondent to defend the actual innocence assertion Lott made in the successor petition. The court also allowed respondent to depose Lott. Although Lott was permitted to invoke the Fifth Amendment, an adverse inference would be drawn from his invocation of the right.

***Hallford v. Culliver,**
379 F.Supp.2d 1232 (M. D. Ala. 2004), aff'd 45 F.3d 1193 (11th Cir. 2006)

Petitioner demonstrated cause for procedural default of *Brady* claim concerning a deal given to petitioner's daughter where counsel had relied on prosecution's representation that *Brady* material had been produced and a review of petitioner's daughter's juvenile file did not reveal that she had received a deal in exchange for her testimony. The court rejected the state's argument that the fact that the daughter had been charged with murder and pled to a lesser offense should have led petitioner to evidence of the deal. Even if evidence of the plea raised suspicions about the deal, those suspicions did not confirm a duty on counsel to investigate in the face of the representations by the State. The claim failed, however, because petitioner did not show sufficient prejudice to overcome the default.

United States v. Mansker,
240 F.Supp.2d 902 (N.D. Iowa 2003)

In drug conspiracy case, the government's failure to provide the defendant pre-trial with the cooperating witnesses' debriefing reports that did not mention the defendant constituted a Brady violation, as did its failure to produce certain exculpatory handwritten rough notes. The court found, however, that it cured the violation in part by barring certain government witnesses from testifying. The court refused to find a *Brady* violation in the destruction of law enforcement interview notes because defendant failed to produce evidence tending to prove that the notes differed from the finalized reports in a way that would be exculpatory or material. The court went on to state: "Because there is no legitimate reason for destroying rough notes and because of the danger their destruction poses to the integrity of the criminal justice system, the court is seriously contemplating entering an administrative order that no federal law enforcement officer or state officer working with the Task Force in the Northern District of Iowa, absent a satisfactory explanation for the destruction of their rough notes, will be allowed to testify if the officer destroyed his or her notes after preparing a finalized report."

Bell v. Poole,
2003 WL 21244625 (E.D.N.Y. April 10, 2003)

Co-arrestee's prisoner movement slip, which was contained in city corrections department file, was not under the control and possession of the prosecution and thus was not *Brady* material; the slip was not used for investigative or prosecutorial purposes, and fact that prosecutor's office regularly obtained department phone and visitation records did not effectively make department an arm of the prosecution.

IV. STATE COURTS

Medel v. State,
184 P.3d 1226 (Utah 2008)

Petitioner's guilty plea waived any pre-plea constitutional violations and relief from the plea would only be permitted by a showing that the plea was entered involuntarily or unknowingly.

Although there may be circumstances where undisclosed evidence renders a guilty plea involuntary, this was not such a case given that the undisclosed evidence was affirmative defense and impeachment evidence that neither suggested factual innocence nor shook the court's confidence in the outcome of the proceedings. Note, however, that *"[i]f there is any evidence suggesting factual innocence - even if it is impeachment evidence - the prosecution will always have a constitutional obligation to disclose that evidence to the defendant before plea bargaining begins."*

Odom v. United States,
930 A.2d 157 (D.C. Cir. 2007)

In aggravated assault trial, government failed to timely disclose that witness who viewed the photo array containing defendant's photo selected a photograph of another person. The witness left town shortly afterwards, and government did not provide defendant of the witness's exculpatory evidence until over six months later. The trial court had "discretion to allow" defendant's introduction of "otherwise inadmissible exculpatory hearsay" to remedy "perceived *Brady* violation" "imped[ing] "defendant from presenting declarant's exculpatory evidence. Relief denied, however, because court found "compelling proof of appellant's identity" and "no reasonable probability" "potential non-identification testimony would have changed" outcome.

State v. Gilchrist,
885 A.2d 29 (N.J. Super. 2005)

Photograph of rape victim not relevant or exculpatory and need not be provided to defendant who claimed innocence and sought photo to determine if he knew victim.

***Commonwealth v. Lambert,**
884 A.2d 848 (Pa. 2005)

State law did not require showing of success on *Brady* merits in order to qualify for "newly discovered evidence" exception to statute of limitations. All that needed to be shown was that evidence was unavailable to petitioner and undiscoverable through due diligence. Loss on the merits.

State v. Harris,
680 N.W.2d 737 (Wisc. 2004)

Due process did not require the prosecution to disclose to the defendant, before he entered a negotiated guilty plea to first-degree sexual assault of a child, material exculpatory impeachment evidence that the alleged victim had reported being sexually assaulted by her grandfather on a different occasion. However, the defendant was entitled to such information within a reasonable time before trial under the reciprocal discovery statute. Given that the negotiated guilty plea was entered into only two weeks before the scheduled trial date, a discovery violation occurred, and

withdrawal of the guilty plea was necessary to avoid a manifest injustice.

***Allen v. State,**
854 So.2d 1255 (Fla. 2003)

Where petitioner alleged a violation of *Brady* based on the prosecution's failure to reveal that testing on hairs found in the victim's hands established that they did not belong to petitioner, the Florida Supreme Court rejected the state's contention that petitioner failed to establish suppression because he was aware the tests were being conducted and therefore could have made independent efforts to ascertain the results. "A defendant's knowledge that the State submitted evidence for testing . . .does not create a duty to inquire further. (Citation omitted.) The defendant's duty to exercise due diligence in reviewing *Brady* material applies only after the State discloses it. . . . Here, the State itself retained possession of the hair analysis, and while Allen was aware that the State was conducting such an analysis, he was never informed of the results. *Brady* does not require that the defendant compel production of exculpatory material, or even that a defendant remind the State of its obligations. Once the State obtained the results of the hair analysis, it was required to disclose them to the defendant." The claim lost, however, on the materiality prong of the *Brady* test.

People v. Valentin,
767 N.Y.S.2d 343 (N.Y. App. 2003)

In robbery case, "the failure of the People to disclose the prior convictions of the sole eyewitness violated their obligations under *Brady v. Maryland*, 373 U.S. 83." This is true despite the fact that "the prosecutor denied any contemporaneous actual knowledge of the eyewitness's criminal convictions as a consequence of his self-professed standard practice of not checking into such matters. . . . Here, the criminal record of the eyewitness was readily available to the prosecutor and certainly known to other individuals in his office who recently had prosecuted the eyewitness (see *Pressley*, 234 A.D.2d at 954, 652 N.Y.S.2d 436)." Relief is denied, however, because the court cannot find a reasonable probability of a more favorable result had the information been disclosed.

***Thornton v. Georgia,**
449 S.E.2d 98 (Ga. 1994)

Death sentence reversed on *state rule* requiring particularized notice of introduction of evidence of unproven criminal acts where state failed to provide notice and witness testified to the acts during penalty phase.

People v. House,
566 N.E.2d 259 (Ill. 1990)

Court rejected *Brady* claim, but accepted ineffective assistance of counsel claim, where defense

counsel failed to discover an exculpatory statement by the victim which was memorialized by a nurse. Prosecution had no duty to disclose this information.

Owens v. State,
305 S.E.2d 102 (Ga. 1983)

Brady and *Giglio* claims rejected, but Confrontation Clause claim accepted, where trial court had granted state's motion to prohibit defense from cross examining co-conspirator on a deal struck between his counsel and the prosecution.