

Brady v. Maryland

TABLE OF CONTENTS

Indexed Table of Authorities.....ii

A. The Ideal	1
B. The Reality	1
C. The Seminal Supreme Court Cases	2
D. The Modern Supreme Court Cases	3
E. Landmark D.C. Cases	12
F. Pre-trial v. Appellate Review: Different Standards?	12
G. Favorable Evidence in the Hands of State Officials: Constructive Knowledge Doctrine	14
H. Timing of <u>Brady</u> Disclosures	16
I. Defense’s Due Diligence	19
J. Materiality	20
a. <u>Evidence suggesting guilt of a 3rd party</u>	20
b. <u>Evidence that would help to establish a claim of self-defense</u>	21
c. <u>Impeachment of government witnesses</u>	21
i. Deals with government witnesses.....	21
ii. Criminal history of informants.....	23
iii. Bias of government witnesses.....	24
iv. Prior identifications of other suspects.....	25
v. Prior statements that eyewitness could not identify anyone...	25
vi. Misconduct by government witnesses.....	26
vii. Inconsistent statements made during polygraphs	27
viii. Other inconsistent statements	27
ix. Prosecutor and law enforcement notes from interviews with government witness.....	28
x. Personnel files , especially of testifying officers.....	29
xi. Presentence Reports of testifying witnesses.....	29
d. <u>Statements of potential witnesses not called to testify</u>	30
e. <u>Laboratory results</u>	30
f. <u>Failure to disclose prior competency examinations of defendant or witnesses</u>	31
g. <u>Other exculpatory evidence</u>	32
h. <u>Brady violation when non-disclosure deprives defense the opportunity to investigate</u>	33*
K. Sanctions	
a. <u>Whether to ask for Sanctions</u>	
b. <u>What Sanctions to ask for</u>	
c. <u>Dismissal of the Indictment</u>	

INDEXED TABLE OF AUTHORITIES

* Revised 6/04

<i>ABA Standards for Criminal Justice, Prosecution Function and Defense Function, § 3.311(a) (3d Ed. 1993)</i>	19
<i>Atkinson v. State, 778 A.2d 1058 (Del. 2001)</i>	18
<i>Ballinger v. Kerby, 3 F.3d 1371 (10th Cir. 1993)</i>	32
<i>Banks v. Dretke, 2004 WL 330040 (U.S. 2004)</i>	22
<i>Banks v. Reynolds, 54 F.3d 239 (10th Cir. 1995)</i>	20
<i>Barbee v. Maryland, 331 F.2d 842 (4th Cir. 1964)</i>	16
<i>Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002)</i>	23
<i>Bennett v. United States, 797 A.2d 1251(D.C. 2002)</i>	26
<i>Berger v. United States, 295 U.S. 78, (1935)</i>	1
<i>Boone v. United States, 769 A.2d 811 (D.C. 2001)</i>	12
<i>Boss v. Pierce, 263 F.3d 734 (7th Cir. 2001)</i> ...	19
<i>Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986)</i>	21
<i>Boyd v. French, 147 F.3d 319 (4th Cir. 1998)</i>	15

<u><i>Boyette v. Lefevre</i></u> , 246 F.3d 76 (2d Cir. 2001)	27
.....	
<u><i>Brady v. Maryland</i></u> , 373 U.S. 83 (1963).....	3, 27
<u><i>Carriger v. Stewart</i></u> , 132 F.3d 463 (9 th Cir. 1997).....	24
<u><i>Carter v. Rafferty</i></u> , 826 F.2d 1299 (3d Cir. 1987).....	27
<u><i>Castleberry v. Brigano</i></u> , 349 F.3d 286 (6 th Cir. 2003).....	20
<u><i>Clemmons v. Delo</i></u> , 124 F.3d 944 (8 th Cir. 1997)	20
.....	
<u><i>Crivens v. Roth</i></u> , 172 F.3d 991, 996-99 (7 th Cir. 1999).....	23
<u><i>Curran v. Delaware</i></u> , 259 F.2d 707 (3d Cir. 1958).....	2
<u><i>Curry v. United States</i></u> , 658 A.2d 193 (D.C. 1995).....	12
<u><i>DiLosa v. Cain</i></u> , 279 F.3d. 259 (5 th Cir. 2002)	20
<u><i>Dubose v. Lefevre</i></u> , 619 F.2d 973 (2d Cir. 1980)	23
.....	
<u><i>East v. Johnson</i></u> , 123 F.3d 235 (5 th Cir. 1997)	24
<u><i>Edelen v. United States</i></u> , 627 A.2d 968 (D.C. 1993).....	12
<u><i>Ellsworth v. Warden</i></u> , 333 F.3d 1 (1 st Cir. 2003)	33
.....	

<u><i>Ex Parte Mowbray</i></u> , 943 S.W.2d 461 (Tex. Crim. App. 1996).....	19
<u><i>Finley v. Johnson</i></u> , 243 F.3d 215 (5th Cir. 2001).....	32
<u><i>Freeman v. Georgia</i></u> , 599 F.2d 65 (5 th Cir. 1979).....	15
<u><i>Giglio v. United States</i></u> , 405 U.S. 150 (1972)...	3,
	22
<u><i>Gorman v. State</i></u> , 619 N.W.2d 802 (Minn. App. 2000).....	21
<u><i>Guerra v. Johnson</i></u> , 90 F.3d 1075 (5 th Cir. 1996).....	20
<u><i>Harridge v. State</i></u> , 534 S.E.2d 113 (Ga. App. 2000).....	31
<u><i>Hudson v. Whitley</i></u> , 979 F.2d 1058 (5 th Cir. 1992).....	25
<i>Jackson v. United States</i> , 650 A.2d 659, 661 n.4 (D.C. 1994)	
<u><i>Jacobs v. Singletary</i></u> , 952 F.2d 1282 (11 th Cir. 1992).....	27
<u><i>Jamison v. Collins</i></u> , 291 F.3d 380 (6 th Cir. 2002)	
.....	14
<u><i>Jean v. Rice</i></u> , 945 F.2d 82 (4 th Cir. 1991)	32
<u><i>Johnson v. State</i></u> , 38 S.W.3d 52 (Tenn. 2001)	31
<u><i>Killian v. Poole</i></u> , 282 F.3d 1204 (9 th Cir. 2002)	
.....	22

Kyles v. Whitley, 514 U.S. 419 (1995) .. 7, 14, 27

Leka v. Portuondo, 257 F.3d 89 (2d Cir. 2001)
..... 17

Lindsay v. King, 769 F.2d 1034 (5th Cir. 1985)
..... 25

Mastracchio v. Vose, 274 F.3d 590 (1st Cir.
2001)..... 14

Mazzan v. Warden, 993 P.2d 25 (Nev. 2000). 21

McDowell v. Dixon, 858 F.2d 945 (4th Cir.
1988)..... 25

Mendez v. Artuz, 303 F.3d 411 (2nd Cir. 2002)
..... 20

Mesarosh v. United States, 352 U.S. 1 (1956).. 2

Miller v. Angliker, 848 F.2d 1312 (2d Cir.
1988)..... 21

Mitchell v. Gibson, 262 F.3d 1036 (10th Cir.
2001)..... 31

Monroe v. Angelone, 323 F.3d 286 (4th Cir.
2003)..... 12

Mooney v. Holohan, 294 U.S. 103 (1935)..... 2

Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987)
..... 25

Napue v. Illinois, 360 U.S. 264 (1959) 2

Norton v. Spencer, 351 F.3d 1 (1st Cir. 2003) 26

<u><i>Nuckols v. Gibson</i></u> , 233 F.3d 1261 (10 th Cir. 2000).....	29
<u><i>Paradis v. Arave</i></u> , 240 F.3d 1169 (9 th Cir. 2001).....	29
<u><i>Paradis v. Arave</i></u> , 130 F.3d 385 (9 th Cir. 1997)	
.....	28
<u><i>People v. White</i></u> , 606 N.Y.S.2d 172	
(N.Y.App.Div. 1994).....	26
<u><i>Pyle v. Kansas</i></u> , 317 U.S. 213 (1942).....	2
<u><i>Reutter v. Solem</i></u> , 888 F.2d 578 (8 th Cir. 1989)	
.....	25
<u><i>Robinson v. United States</i></u> , 825 A.2d 318 (D.C. 2003	
.....	16
<u><i>Rogers v. State</i></u> , 782 So.2d 373 (Fla. 2001)	
.....	16,21,33
<u><i>Sawyer v. Hofbauer</i></u> , 299 F.3d 605 (6 th Cir. 2002).....	30
<u><i>Schledwitz v. United States</i></u> , 169 F. 3d 1003, 1014-15 (6 th Cir. 1999).....	24
<u><i>Scott v. Mullin</i></u> , 303 F.3d 1222 (10 th Cir. 2002)	
.....	20
<u><i>Silva v. Woodford</i></u> , 279 F.3d 825 (9 th Cir. 2002)	
.....	22
<u><i>Simos v. Gray</i></u> , 356 F.Supp. 265 (E.D.Wisc. 1973).....	26
<u><i>Singh v. Prunty</i></u> , 142 F.3d 1157, 1161-62 (9 th Cir. 1998).....	22

Smith v. Secretary of New Mexico Department of Corrections,
50 F.3d 801 (10th Cir. 1995) 20

Spicer v. Roxbury, 194 F.3d 547 (4th Cir. 1999)
..... 25

State v. Avelar, 859 P.2d 353 (Idaho App. 1993)
..... 26

State v. DelReal, 593 N.W. 2d 461 (Wis. App. 1999)..... 31

State v. Gonzalez, 624 N.W.2d 836 (S.D. 2001)
..... 28

State v. Harris, 713 N.E. 2d 528 (Ohio App. 1998)..... 18

State v. Huggins, 788 So. 238 (Fla. 2001)..... 30

State v. Hunt, 615 N.W.2d 294 (Minn. 2000). 32

State v. Kemp, 828 So. 2d. 540 (La. 2002)..... 18

State v. Kula, 562 N.W. 2d 717 (Neb. 1997)... 19

State v. Larimore, 17 S.W.3d 87 (Ark. 2000). 31

State v. Russo, 754 A.2d 623 (N.J.App. 2000) 29

State v. Walther, 623 N.W.2d 205 (Wis. App. 2000)..... 18

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999)..... 9, 14

United States v Young, 17 F.3d 1201 (9th Cir. 1994)..... 15

<u><i>United States v. Agurs</i></u> , 427 U.S. 97 (1976).....	4
<u><i>United States v. Antone</i></u> , 603 F.2d 566 (5 th Cir. 1979).....	16
<u><i>United States v. Bagley</i></u> , 473 U.S. 667 (1985)..	6,
	22
<u><i>United States v. Bergonzi</i></u> , 216 F.R.D. 487 (N.D. Cal. 2003).....	13
<u><i>United States v. Boyd</i></u> , 55 F.3d 239 (7 th Cir. 1995).....	26
<u><i>United States v. Brooks</i></u> , 966 F.2d 1500 (D.C. Cir. 1992).....	29
<u><i>United States v. Brumel-Alvarez</i></u> , 991 F.2d 1452 (9 th Cir. 1993).....	24
<u><i>United States v. Carreon</i></u> , 11 F.3d 1225, 1238 (5 th Cir. 1994).....	29
<u><i>United States v. Carter</i></u> , 2004 WL 825846.....	13
<u><i>United States v. Cuffie</i></u> , 80 F.3d 14 (D.C. Cir. 1996).....	15
<u><i>United States v. Cuffie</i></u> , 80 F.3d 514 (D.C. Cir. 1996).....	24
<u><i>United States v. Fairman</i></u> , 769 F.2d 386 (7 th Cir. 1985).....	31
<u><i>United States v. Fisher</i></u> , 106 F.3d 622 (5 th Cir. 1997).....	25,27

<u><i>United States v. Frost</i></u> , 125 F.3d 346 (6 th Cir. 1997).....	30
<u><i>United States v. Gil</i></u> , 297 F.3d 93 (2nd Cir. 2002).....	17
<u><i>United States v. Kelly</i></u> , 35 F.3d 929 (4 th Cir. 1994).....	27
<u><i>United States v. Kojayan</i></u> , 8 F.3d 1315 (9 th Cir. 1993).....	1,23
<u><i>United States v. Lloyd</i></u> , 71 F.3d 408 (D.C. Cir. 1995).....	32
<u><i>United States v. McVeigh</i></u> , 954 F.Supp. 1441 (D. Colo. 1997).....	19
<u><i>United States v. Minsky</i></u> , 963 F.2d 870 (6 th Cir. 1992).....	28
<u><i>United States v. Muse</i></u> , 708 F.2d 513 (10th Cir. 1983).....	29
<u><i>United States v. O'Connor</i></u> , 64 F.3d 355 (8 th Cir. 1995).....	24
<u><i>United States v. Pelullo</i></u> , 105 F.3d 117 (3d Cir. 1997).....	28
<u><i>United States v. Ramirez-Lopez</i></u> , 315 F.3d 1143 (9 th Cir. 2003).....	30
<u><i>United States v. Ruiz</i></u> , 536 US 622 (2002)	16
<u><i>United States v. Scheer</i></u> , 168 F.3d 445 (11 th Cir. 1999).....	22

<i>United States v. Service Deli, Inc.</i> , 151 F.3d 938 (9 th Cir. 1998)	28
<u><i>United States v. Severdija</i></u> , 790 F.2d 593 (10 th Cir. 1986)	32
<i>United States v. Smith Grading and Paving, Inc.</i> , 760 F.2d 527 (4 th Cir. 1985)	17
<u><i>United States v. Smith</i></u> , 77 F.3d 511 (D.C. Cir. 1996)	23
<u><i>United States v. Spagnoulo</i></u> , 960 F.2d 990 (11 th Cir. 1992)	31
<u><i>United States v. Starusko</i></u> , 729 F.2d 256 (3d Cir. 1984)	18
<u><i>United States v. Steinburg</i></u> , 99 F.3d 1486 (9 th Cir. 1996)	24
<u><i>United States v. Stiffler</i></u> , 851 F.2d 1197 (9 th Cir. 1988)	24, 29
<u><i>United States v. Sudikoff</i></u> , 36 F.Supp.3d 1196 (C.D. Cal. 1999)	14
<u><i>United States v. Tincher</i></u> , 907 F.2d 600 (6 th Cir. 1989)	28
<u><i>United States v. Washington</i></u> , 263 F.Supp.2d 413 (D. Conn. 2003)	18
<u><i>United States v. Wayne</i></u> , 903 F.2d 1188 (8 th Cir. 1990)	32
<u><i>United States v. Udechukwu</i></u> , 11 F.3d 1101 (1 st Cir. 1993)	32

White v. Helling, 194 F.3d 937 (8th Cir. 1999)
..... 25

Wilson v. State, 768 A.2d 675 (Md. 2001)..... 23

Ensuring that the Government Complies With Its

Duty To Disclose Exculpatory Evidence

A. The Ideal

- a. “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win the case, but that justice shall be done.” Berger v. United States, 295 U.S. 78, 88 (1935).
- b. Prosecutors are subject to constraints and responsibilities that don’t apply to other lawyers. See, e.g., Berger v. United States, 295 U.S. 78, 88 (1935). While lawyers representing private parties may – indeed must – do everything ethically permissible to advance their clients’ interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor’s job isn’t just to win but to win fairly, staying within the rules. United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993).
- c. Rule 3.8 of the District of Columbia Code of Criminal Conduct --
Special Responsibilities of a Prosecutor.
The prosecutor in a criminal case shall not . . .
 - (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or, in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to

the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

B. The Reality

Many prosecutors see their job as that of regular lawyers and seek to win their cases at any cost. As a result, exculpatory evidence is often withheld and/or suppressed.

C. The Seminal Supreme Court cases

- a. Mooney v. Holohan, 294 U.S. 103 (1935)
 - i. Habeas petitioner alleges that state prosecutors used perjury in his trial and suppressed the evidence that would have shown perjury.
 - ii. HELD: Petitioner states a violation of the Due Process Clause “if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.” Id. at 112.
- b. Pyle v. Kansas, 317 U.S. 213 (1942)
 - i. Allegation is that Kansas local officials and state police forced witness to perjure himself upon threat of prosecution.
 - ii. HELD: Due process is violated whenever “imprisonment results from perjured testimony, knowingly used by state authorities to obtain his conviction, and from the deliberate suppression by those state authorities of evidence favorable to him.” Id. at 216.
- c. Mesarosh v. United States, 352 U.S. 1 (1956)
 - i. Witness for government in criminal case had given similar false testimony in other proceedings.
 - ii. Court stated: “Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. . . . The government of a strong and free nation does not need convictions based on such testimony. It cannot afford to abide with them.” Id. at 14.
- d. Napue v. Illinois, 360 U.S. 264 (1959)

- i. Government witness falsely denies deal during trial.
- ii. HELD
 - 1. “[U]se of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment” (citing Curran with approval), Id. at 264.
 - 2. “It is of no consequence that the falsehood bore on a witness’s credibility A lie is a lie, no matter what its subject and, if it is in any way relevant to the case, the district attorney has the responsibility to correct what he knows to be false.” Id. at 269.
- iii. Also explained that it doesn’t matter if the subornation of perjury was intentional.

D. The Modern Supreme Court Cases

- a. Elements of a Brady violation:
 - i. Evidence favorable to the defense in the hands of state officials
 - ii. Suppressed
 - iii. Materiality
- b. Brady v. Maryland, 373 U.S. 83 (1963): In this capital case, Mr. Brady admits to first degree murder but asks for his life to be spared because he did not perform actual killing. Government does not disclose statement by co-defendant, Boblit, admitting to having performed the actual killing.
 - i. HELD: “[T]he suppression by the prosecution 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 or bad faith of the prosecution.” Id. at 87.
 - ii. RATIONALE: “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” Id. at 87.
- c. Giglio v. United States, 405 U.S. 150 (1972)
 - i. FACTS

1. Key witness testifies that he and Mr. Giglio had forged \$ 2300 in money orders, and that he believes he “still could be prosecuted.” Id. at 151.
2. Government argues in closing that witness “received no promises that he would not be indicted.” Id. at 152.
3. Grand jury prosecutor had, unbeknownst to trial prosecutor, promised witness that if he testified before grand jury he would not be indicted.

ii. HELD

1. Repeats Brady holding that non-disclosure of material evidence violates due process “irrespective of the good faith or bad faith of the prosecution.” Id. at 153.
2. “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence *affecting credibility falls within this general rule.*” Id. at 154.(internal citations omitted) (emphasis added).
3. Reversal requires a finding of materiality, which is defined as a showing that the withheld evidence could “in any reasonable likelihood have affected the judgment of the jury.” Id. at 154.

iii. DUTY OF PROSECUTOR

1. The prosecutor’s office has a duty to ensure that all material information is disclosed. “To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and insure communication of all relevant information on each case to every lawyer who deals with it.” Id. at 154.

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

i. FACTS

1. In self-defense case, police arrive at hotel room when they hear screams of respondent Agurs, and burst in. They see Sewall on top of Agurs and both were struggling for possession of a Bowie knife. Jury heard undisputed evidence that Sewall came to hotel in possession of two knives, wearing one of them in a sheath.

2. It appears from the evidence that Agurs may have been going through Sewall's pockets as he was in the bathroom and that a struggle took place.
 3. Sewall dies. He has multiple stab wounds; Agurs has no wounds at all.
 4. At trial, defense counsel makes a general Brady request. Prosecutor does not disclose Sewall's prior criminal record (ADW and CDW), even though it was clearly admissible as evidence of decedent's violent character.
 5. Agurs convicted of second degree murder by a D.C. jury in federal court.
- ii. HELD: Brady rule has three different strands.
1. First, where state officials knowingly use perjury, the court applies a "strict standard of materiality." Id. at 104.
 2. Second, where prosecutor fails to provide exculpatory evidence upon specific request, failure to make any response is seldom excusable.
 3. Third, where the prosecutor makes a general Brady request/no Brady request. Standard of materiality governs.
 - a Does not turn on the moral culpability of prosecutor; Failure to disclose highly probative evidence violates constitution even if it was wholly inadvertent, and failure to disclose trivial evidence is not a constitutional violation even if prosecutor is trying to suppress a vital fact. Suppression violates constitution because of "character of the evidence, not the character of the prosecutor." Id. at 110.
 - b Materiality standard for evidence in possession of the State" is higher than if it had been in possession of a neutral party because otherwise "there would be no special significance to the prosecutor's obligation to serve the cause of justice." Id. at 111.
 - c Standard asks whether "omitted evidence creates a reasonable doubt that did not otherwise exist," id. at 112, and looks at the entire trial to determine the answer.

4. Withheld evidence was immaterial under this standard.
 - a Evidence of guilt was strong, given that Sewal had multiple stab wounds and she had none.
 - b Jury already heard evidence about Sewall’s violent character when it heard undisputed evidence that he arrived a hotel room with two knives.
 - c It is very important that arrest record did not even arguably give rise to the suggestion of perjury.
- e. United States v. Bagley, 473 U.S. 667 (1985)
 - i. FACTS
 1. Government’s two key witnesses on narcotics and firearms charges are O’Connor and Mitchell. At trial, they testify that their statements have been made without any promises of reward.
 2. After trial, defendant filed a FOIA request with the ATF and learned that O’Connor and Mitchell had contracted with the ATF to assist them in any way. The contract listed payments of \$300 as “sum to be paid to vendor.” Each defendant had received this sum as a “reward” for his cooperation.
 3. Defendant claims in post-conviction that the failure to disclose contracts violates Brady. Court of Appeals holds that automatic reversal is required when government fails to disclose impeachment evidence of this sort because its suppression also amounts to a Confrontation Clause violation.
 - ii. ISSUE
 1. The “standard of materiality to be applied in determining whether a conviction should be reversed when the prosecutor failed to disclose requested evidence that could have been used to impeach government witnesses.” Id. at 669.
 - iii. HELD: “Impeachment evidence . . . as well as exculpatory evidence falls within the Brady rule.” Id. at 676.

1. Failure to disclose impeachment evidence is the same, under Brady, as the failure to disclose exculpatory evidence; not any worse and not any better.
2. The standard of materiality for Brady violations is the same regardless of whether a specific request occurred: whether “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” Id. at 668. (Note departure from 3 strands set forth in Agurs).
3. This standard should include consideration of “any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case.” Id. at 668.
4. Court believes that there is a “significant likelihood,” id. at 683, that failure to disclose the deal induced defense counsel to believe that witnesses could not be impeached for bias. Court remands for a determination of how the non-disclosure of the deal affected defense preparation.

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

i. BACKGROUND FACTS

1. Woman murdered in parking lot of supermarket and her car is stolen. Six eyewitnesses give statements containing physical details that are consistent with a man named Beanie, and inconsistent with Curtis Kyles.
2. Beanie, using a number of different names, contacts police several times and tells several different stories. One such story is that he has read about the case in the paper and he “believes” he has victim’s car, which he claims to have bought from Curtis Kyles. He gives a number of other inconsistent statements about how he got the car, while at the same time expressing concern that he might be a suspect in the murder.
3. Beanie also knows a number of details about the robbery, and kept asking police for a reward. Beanie also does some

suspicious things, like going to Kyles's apartment before telling police where particular inculpatory items will be located, including the murder weapon, which is found behind Kyles' kitchen stove right after Beanie leaves apartment.

4. Police put Kyles's picture, but not Beanie's, in photo lineup. Three witnesses picked Kyles, and two did not. One is not asked.

ii. GOVERNMENT FAILS TO DISCLOSE:

1. Six contemporaneous eyewitness statements.
2. Records of Beanie's initial call to the police
3. Tape recording of second Beanie conversation with police
4. Typed and signed statement originally provided by Beanie to police
5. Computer printout of all cars parked in supermarket lot immediately after the killing, which was made because police believed killer left own car when he stole victim's.
6. Internal memo in which police suggest seizure of Curtis Kyles' trash because Beanie had told them something might be in there
7. Evidence linking Beanie to other crimes in same supermarket parking lot, including one other murder.

iii. HELD:

1. There is no difference between exculpatory and impeachment evidence for Brady purposes.
2. There are four important rules that govern materiality
 - a No requirement that defense show by a preponderance that acquittal would have resulted. Reasonable probability is all that is required. Only question is whether the verdict is worthy of confidence, not whether defense can show that it is more likely than not verdict would have been different.

- b Not a sufficiency of the evidence test. Only need to show that the withheld evidence would “put the whole case in such a different light as to undermine confidence in the verdict. Id. at 434.
 - c Once materiality shown, judgment must be reversed. No additional harmless error review.
 - d Materiality of suppressed evidence must be assessed “collectively, not item by item.” Id. at 436.
- 3. The Constitutional obligation under Brady is lower than the prosecutor’s ethical obligation, which “generally calls for prosecutorial disclosures of any evidence tending to exculpate or mitigate.” Id. at 437. But although this gives government discretion, it imposes corresponding burden to review files and ensure that material evidence is disclosed. Government should establish procedures and regulations to ensure that this occurs.
- 4. Prosecutors should err on the side of disclosing evidence because “the criminal trial, as distinct from the prosecutor’s private deliberations,” id. at 440, should be the chosen forum for determining the truth about criminal charges.
- 5. Disclosure of suppressed evidence would have made a different result reasonably probable.
 - a Eyewitness statements could have impeached the eyewitnesses’ credibility because physical details were dissimilar to Kyles and similar to Beanie. “The effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others.” Id. at 445.
 - b Disclosure of much of the evidence could also have been used to attack thoroughness of police investigation. Disclosure “would have revealed a remarkably uncritical attitude on the part of the police,” id. at 445, with respect to Beanie’s potential culpability. Could have been used to call Beanie as an adverse witness or to cross examine police officers.
- g. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999)

i. FACTS

1. In case where evidence of culpability is overwhelming, government fails to disclose information that casts substantial doubt on credibility of sole eyewitness to abduction.
2. In state post-conviction proceedings, government had said that discovery was unnecessary because it maintained an “open file.”

ii. HOLDING AND REASONING

1. Reaffirms Kyles’s teaching that the prosecutor has constructive knowledge of all favorable evidence known to those acting on the government’s behalf, even if no actual knowledge of materials, and even if materials are in the file of another jurisdiction’s prosecutor.
2. Court begins its analysis by identifying the essential components of a Brady violation. They are:
 - a “The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;
 - b that evidence must have been suppressed by the State, either willfully or inadvertently;
 - c and prejudice must have ensued.” Id. at 281-82.
3. Material evidence is such that there is a reasonable probability that if the evidence had been disclosed, the result would have been different.
4. Rule encompasses evidence known to police as well as evidence known to the others acting on the government’s behalf, including the police.

iii. DISSENT

1. In his dissent, Justice Souter attempts to clarify the materiality standard employed by the Court in Brady and its progeny. Souter argues that ‘significant possibility’ rather than ‘reasonable probability’ as the legal shorthand for establishing prejudice under Brady. The use of ‘reasonable

probability’ risks confusion with the far more demanding ‘more likely than not.’

h. Banks v. Dredke, 124 S.Ct. 1256 (2004)

i. FACTS

1. In a capital murder case, the State represented that it would provide all discovery to which the defendant was entitled but failed to disclose evidence that would have allowed Banks to discredit key government witnesses—the status of Farr as a paid government informant and a pre-trial transcript revealing that Cook’s testimony had been intensively coached. The State further failed to correct false statements made by the witnesses on cross examination regarding these facts.
2. In asking for a death sentence in the penalty phase, the government relied heavily on Farr’s testimony about his and Banks’s supposed future plan to commit an armed robbery. However, in a 1999 affidavit Farr represented that he had received \$200 from a police officer to stage a set up. Farr asked Banks to obtain a gun for *Farr* to commit a robbery. He further stated that he believed that if he didn’t help the officer with his investigation, he would be arrested for drug charges.

ii. Analysis

1. The Court reiterated the three essential elements of a Brady prosecutorial misconduct claim articulated in Strickler. See *supra*.
2. Cause and prejudice requirements for a habeas claim are met by two of the elements of a Brady violation: State suppression of relevant evidence (cause) and materiality of the evidence (prejudice).

iii. HELD

1. Defendant met the cause requirement for a habeas claim because a defendant is entitled to rely on the representation of the State that it will (or has) disclose(d) all Brady material

2. Defendant met the prejudice requirement because the withheld evidence was material under the Kyles standard, see supra, because Farr's testimony was the centerpiece of the government's penalty-phase case and was seriously thrown into doubt by Farr's receipt of funds and his continuing interest in obtaining the police officer's favor. Court distinguished this case from Strickler (which found not prejudice) because in that case, there was additional physical and forensic evidence to corroborate capital murder.

E. Landmark D.C. Cases

- a. Curry v. United States, 658 A.2d 193 (D.C. 1995)
(Brady "is not a discovery rule but a rule of fairness and minimum prosecutorial obligation. Effective compliance with the prosecution's responsibilities under Brady is necessary to ensure the effective administration of the criminal justice system. . . . [A] prosecutor's timely disclosure obligation with respect to Brady material cannot be overemphasized, and the practice of delayed production must be disapproved and discouraged . . . [D]elay may imperil a defendant's right to a fair trial, and a conscientious prosecutor will not countenance it." Id at 197-98.).
- b. Edelen v. United States, 627 A.2d 968 (D.C. 1993) (The refusal by the prosecution to disclose material evidence favorable to the defense deprives the defendant of his liberty without due process of law. Although Brady claims typically 'involve' the discovery, after trial, of information which had been known to the prosecution but unknown to the defense it is now well settled that the prosecution must disclose [Brady] material at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure.).
- c. Boone v. United States, 769 A.2d 811 (D.C. 2001) (Although the coverage of Brady and the Jencks Act sometimes overlap, especially with respect to bias and impeachment material of potential government witnesses, when this overlap occurs, the Brady rule must control and compels pre-trial disclosure).

F. Pre-trial v. Appellate Review: Different Standards?

- a. Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003) (failure to disclose 10 pieces of Brady evidence not defensible on grounds of redundancy. "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." Id. at 301. In a footnote, the court explains the meaning of the term "Brady evidence":

[W]e at times refer to undisclosed, exculpatory material as "Brady evidence." We do so with the understanding that a prosecutor is obliged to disclose any material favorable to an accused even if it could not have been introduced as independent *evidence* of innocence. Further, by referring to material as "Brady evidence," we are not implying that the prosecution committed a violation in failing to disclose it; a Brady violation requires the suppression of exculpatory material to have affected the outcome of trial. Id. at 291, n.3.

- b. United States v. Carter, 2004 WL 825846
- i. In an armed robbery case, the court held that the defendant was entitled to disclosure of potential impeachment material made by a cooperating co-defendant to a psychologist during a competency evaluation.
 - ii. Court followed the standard of disclosure for pre-trial review set out in Sudkoff: "whether the evidence is favorable to the accused, ie., whether it relates to guilt or punishment and tends to bolster the defense's case or impeach prosecution witnesses." Id. *3.
 - iii. Court followed the reasoning in Sudkoff and noted the analogy between the standard of review in ineffective assistance of counsel cases set forth in Strickland v. Washington and in Brady cases; in neither case can materiality be determined pre-trial. Nevertheless, "suppression of exculpatory evidence is improper even if it does not satisfy the materiality standard of Brady and result in a due process violation." Id. *3.
- c. United States v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003) (in a securities fraud case, the government was compelled pre-trial to

comply with defense's Rule 16 request for a document prepared as a result of the company's internal investigation into the fraud, because the document would "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal" Id. at 500 (quoting United States v. Liquid Sugars, Inc., 158 F.R.D. 466, 471 (E.D. Cal. 1994)).

- d. United States v. Sudikoff, 36 F.Supp.2d 1196 (C.D. Cal. 1999)
 - i. Pretrial standard of disclosure is different because just as no judge need tolerate unreasonably deficient representation by counsel, even if non-prejudicial, no judge need tolerate the withholding of material evidence
 - ii. Evidence meets materiality standard in pretrial context for disclosure if it is:
 - 1. Favorable, which means it either bolsters the defense case or can be used to impeach prosecution witnesses
 - 2. Likely to lead to the discovery of admissible evidence. For a good discussion of Brady claims based on withholding of inadmissible evidence, see Paradis v. Arave, 240 F.3d at 1178-79.
- e. See also, infra Leka v. Portuondo; Ellsworth v. Warden

G. Favorable Evidence in the Hands of State Officials: Constructive Knowledge Doctrine

- a. The duty of disclosure is not limited to evidence in the actual possession of the prosecutor. Rather, it extends to evidence in the possession of the entire prosecution team, which includes investigative and other government agencies. Kyles v. Whitley, 514 U.S. 419 (1995); see also Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, at n.12 (1999).
- b. Jamison v. Collins 291 F.3d 380 (6th Cir. 2002) (failure to disclose Brady evidence —prior inconsistent witness statements, witness's inability to make an ID, eyewitness descriptions of assailants of differing heights and weights, evidence of other suspects etc.— caused by Ohio police policy of withholding exculpatory evidence from prosecutor. Violation exists not only in non-disclosure, but

because the prosecutor failed “to weigh the evidence for the purposes of Brady disclosure.” Id. at 388.).

- c. Mastracchio v. Vose, 274 F.3d 590 (1st Cir. 2001) (Rhode Island Supreme Court violated clearly established Supreme Court law in refusing to impute knowledge of witness payments and favors made by Witness Protection team to prosecutor).
- d. In re Sealed Case (Brady violations), 185 F.3d 332 (D.C. Cir. 1999) (Failure to disclose that snitch is informant on police payroll is a Brady violation. The court noted that whether prosecutor knew about these payments was irrelevant and that the defense need not subpoena records from the police any more than it need subpoena records from prosecutor. HELD: It doesn’t matter if the prosecutors actually know about the Brady evidence because they have a duty to look).
- e. Boyd v. French, 147 F.3d 319 (4th Cir. 1998) (perjury about whether Boyd had been drinking: “A conviction acquired through the knowing use of perjured testimony by the prosecution violates due process And, knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution.” Id. at 329. REASONING: The police are part of the prosecution, and the taint on the trial is no less if they, rather than the State’s attorney, were guilty of the nondisclosure.” Id. at 329.).
- f. United States v. Cuffie, 80 F.3d 14 (D.C. Cir. 1996) (failure to disclose perjury by police officer during motion to seal proceeding material attributed to government where prosecutor knew about the perjury).
- g. United States v. Young, 17 F.3d 1201 (9th Cir. 1994) (police give false testimony about where and how defendant’s papers were found—claims they were taped under the dashboard: Government contends that the prosecutor did not know about the false testimony. Court rejects government’s argument: “[E]ven if the government unwittingly presents false evidence, a defendant is entitled to a new trial ‘if there is a reasonable probability [that without the evidence] the result of the proceeding would have been different.’” Id. at 1204).

- h. Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979) (cop hid witness because she would have backed up defense claim that decedent was armed: “Finally, the state urges that the personally motivated actions of Sgt. Fitzgerald cannot be imputed to the state, so there was no suppression by the State and thus no Brady violation. . . . We find, however, that Sergeant Fitzgerald’s conduct is attributable to the state regardless of his motivation We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman’s conduct must be imputed to the state as part of the prosecution team.” Id. at 69.).
- i. 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."
- j. Barbee v. Maryland, 331 F.2d 842 (4th Cir. 1964) (police reports showing that guns and drugs don’t match are not disclosed. HELD: Police suppression of this information violates Brady because “the police are also part of the prosecution and the taint on the trial is no less if they, rather than the State’s attorney, were guilty of the nondisclosure” and even if the prosecutor “is the victim of the police suppression of the material information, the state’s failure on that count is not excused. Id. at 846.)
- k. Robinson v. United States, 825 A.2d 318 (D.C. 2003) (DOC tape recording of conversation in which defendant allegedly threatened complainant was in ‘possession’ for Jencks purposes when police knew tape existed but refused to request a copy).
- l. Rogers v. State, 782 So. 2d 373 (Fla. 2001) (reversing trial court determination that prosecutor was not required to disclose police reports in possession of “various and sundry jurisdictions” because, under Kyles, prosecutor deemed to have constructive knowledge of all law enforcement agencies that were part of prosecution team, which included, in this case, investigative agencies throughout State of Florida).

H. Timing of Brady Disclosures

- a. United States v. Ruiz, 536 US 622, 122 S. Ct. 2450 (2002) (government had no constitutional obligation to disclose impeachment Brady evidence during plea negotiations; the Court focused on difference between the need for *fairness* of a trial and *voluntariness* of a plea. Further, the Court noted that the government’s proposed plea agreement required that it disclose any evidence of factual innocence.).
- b. United States v. Gil 297 F.3d 93 (2d Cir. 2002) (disclosure on Friday before a Monday trial of materially exculpatory evidence buried within 2,700 pages of “3500 material” amounted to suppression when an investigator had found memo months before).
- c. Leka v. Portuondo, 257 F.3d 89 (2d Cir. 2001) (reversal based on failure to disclose Brady material in timely fashion. Nine days before trial, state disclosed name and address of off-duty police officer eyewitness who contradicted prosecution witnesses and theory.
 - i. The Court outlined the problems with late disclosure:
 1. The limited and late disclosure “could have led to specific exculpatory information only if the defense undertook further investigation. When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing.” Id. at 101.
 2. “[T]he defense may be unable to assimilate the information into its case. Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray.” Id. at 101.
 - ii. The Court reiterated the importance of ‘opportunity for use’:
 1. “The longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use.” Id. at 100.
 - iii. “The opportunity for use under Brady is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought.” Id. at 102.

- d. United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985)(The government must disclose Brady material “in time for effective use at trial.” Id. at 532.).
- e. United States v. Starusko, 729 F.2d 256, 264 (3d Cir. 1984) (Considerations of judicial economy and efficient trial management support the idea that delivery of exculpatory evidence should occur at the earliest feasible opportunity.).
- f. United States v. Washington, 263 F.Supp. 2d 413 (D. Conn. 2003) (Motion for a new trial granted where evidence of defendant’s gun possession was based on a 911 tape, and government withheld 911 caller’s conviction for making a false report until the first day of trial. Citing Leka, the court explained that investigation of the conviction could not be done during the middle of trial. Similarly, delayed disclosure prevented the defense from effectively mitigating 911 tape when it was first played and from calling character witnesses to attest to the ‘persistent lying’ of the 911 caller.).
- g. State v. Kemp, 828 So. 2d. 540 (La. 2002) (where defendant claimed self-defense, disclosure during defense case that a state eyewitness had told police she heard decedent make reference to a shootout moments before his death warranted a new trial even though eyewitness could have been recalled).
- h. Atkinson v. State, 778 A.2d 1058 (Del. 2001) (failure to disclose— until end of prosecution case— that complainant had originally told police that she had not been sexually assaulted. Citing earlier state precedent, the Court remarked, “[i]n this case we confront another instance of the prosecution pressing the boundaries of propriety with the apparent hope that the issue is likely to be held harmless error.” Id. at 1061.).
- i. State v. Walther, 623 N.W.2d 205 (Wis. App. 2000) (reversing interlocutory order denying in camera review of child complainant’s psychiatric and counseling records, where defense had made sufficient showing of materiality to convince appellate court that Brady/Kyles violation could occur if trial conducted without at least an in camera review of this potential impeachment material).

- j. State v. Harris, 713 N.E. 2d 528 (Ohio App. 1998) (dismissal warranted where prosecution disclosed during trial that it had long possessed an airport computer printout indicating that defendants had not been given baggage claim tickets when they boarded, which would have supported defense claim that third party purchased tickets and placed marijuana in luggage without their knowledge).
- k. 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 first day of trial and trial court committed plain error by denying requested continuance.).
- l. United States v. McVeigh, 954 F.Supp. 1441 (D. Colo. 1997) (Court noted that although there is no established procedure for due process disclosures under Brady, “the information should be given to the defense as it becomes available to the government, since the information and material must be available to the defense in sufficient time to make fair use of it.” Id. at 1449).
- m. 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 splatter expert’s report tending to support defense contention that victim shot himself in bed next to her).
- n. ABA Standards for Criminal Justice, Prosecution Function and Defense Function, § 3.311(a) (3d Ed. 1993) “The Court should order the government to produce Brady material at the earliest feasible opportunity.”

I. Defense’s Due Diligence

- a. Boss v. Pierce, 263 F.3d 734 (7th Cir. 2001) (failure to disclose defense witness’s statement to police that state’s eyewitness had confessed to crime. The Circuit Court found “untenable” the state court ruling that “any information possessed by a defense witness must be considered available to the defense for Brady purposes.” Id. at 740. The Court also repeated that “independent corroboration of the defense's theory of the case by a neutral and disinterested

witness is not cumulative of testimony by interested witnesses, and can undermine confidence in a verdict.” Id. at 745.).

J. Materiality

- a. Evidence suggesting guilt of a 3rd party
 - i. Castleberry v. Brigano, 349 F.3d 286 (6th Cir. 2003) (where defendant was 5’10, 220 lbs with a goatee, failure to disclose (a) eyewitness testimony that two thin men threatened victim, (b) victim’s hospital description of killer as clean shaven and shorter, (c) testimony that state’s star witness had planned to rob victim.) (Habeas).
 - ii. DiLosa v. Cain, 279 F.3d. 259 (5th Cir. 2002) (failure to disclose foreign hair samples and evidence of another neighborhood break-in to support defendant’s assertion that two men robbed his house and killed his wife. Circuit Court found the ruling ‘unsettling’ because the state had “based its case on the non-existence of evidence it knew existed.” Id. at 265.).
 - iii. Mendez v. Artuz, 303 F.3d 411 (2nd Cir. 2002), cert. denied, 123 S.Ct. 1353 (2003) (failure to disclose 3rd party confession to hiring a hit man to kill victim).
 - iv. Scott v. Mullin, 303 F.3d 1222 (10th Cir. 2002) (failure to disclose evidence that state’s witness had confessed committing the murder to his mother).
 - v. Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997) (failure to disclose internal government memo generated on day of prison killing which indicated that eyewitness saw someone else commit murder).
 - vi. Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996) (failure to disclose government witness statements to police that 3rd party and not defendant shot and killed an officer; also police intimidation of key witnesses).
 - vii. Banks v. Reynolds, 54 F.3d 239 (10th Cir. 1995) (failure to reveal that another individual had been arrested for same crime).

- viii. Smith v. Secretary of New Mexico Department of Corrections, 50 F.3d 801 (10th Cir. 1995) (failure to disclose information indicating that uncharged third party had committed the offense).
 - ix. Miller v. Angliker, 848 F.2d 1312 (2d Cir. 1988) (failure to disclose that another person committed offense).
 - x. Bowen v. Maynard, 799 F.2d 593 (10th Cir. 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 hitman, and carried same weapon used in murders).
 - xi. Mazzan v. Warden, 993 P.2d 25 (Nev. 2000)(failure 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).
 - xii. Rogers v. State, 782 So.2d 373 (Fla. 2001) (in capital murder case based largely on co-defendant’s testimony, government failed to disclose (1) co-defendant’s statement, which would have substantially impeached his trial testimony inculcating defendant, (2) tape of pre-trial interview with co-defendant, in which prosecutor “coached” testimony; and (3) evidence showing that co-defendant committed offense with different accomplice).
 - xiii. See also supra State v. Kula.
- b. Evidence that would help to establish a claim of self-defense
- i. Gorman v. State, 619 N.W.2d 802 (Minn. App. 2000)(reversing murder conviction that resulted from bar fight, where government failed to disclose victim’s violent history, including a murder conviction, and which was listed under an alias known to police, and where defense claimed that punches had been thrown in self-defense after conversation in which victim bragged about murder conviction)
 - ii. See also supra State v. Kemp.

- c. Impeachment of government witnesses.
- i. **Deals** with government witnesses
1. Giglio v. United States, 405 U.S. 150 (1972) (failure to disclose promise of immunity in exchange for testimony).
 2. United States v. Bagley, 473 U.S. 667 (1985) (failure to disclose payment of \$300 to two key government witnesses).
 3. Banks v. Dretke, 2004 WL 330040 (U.S. 2004) (failure to disclose (a) penalty phase witness's status as a paid government informant, (b) tape recording of extensive coaching of key guilt phase witness by prosecutor and police. Both witnesses testified in trial that they had not spoken to police at all; the prosecution made no effort to correct these clear errors, even after promising to provide defense with all entitled discovery).
 4. Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002), cert. denied, 123 S.Ct. 992 (2003) (failure to disclose (a) evidence of a deal between state and convicted accomplice (b) evidence of accomplice's desire to protect wife (c) post-trial letter to prosecution in which accomplice claims to "have lied his ass off for you people.").
 5. Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002), cert. denied, Woodford v. Silva, 537 U.S. 942, 123 S.Ct. 342 (2002) (remanded for evidentiary hearing to determine whether government's deal with key cooperating witness mandated witness to postpone a psychiatric competency exam until after providing trial testimony.).
 6. United States v. Scheer, 168 F.3d 445 (11th Cir. 1999) (failure to disclose threat by lead prosecutor to government witness regarding contents of testimony, where witness was on probation for charge arising out of same facts).
 7. Singh v. Prunty, 142 F.3d 1157, 1161-62 (9th Cir. 1998) (failure to disclose that star witness had a deal with government that amounted to a slap on the wrist for very serious charges).

8. United States v. Smith, 77 F.3d 511 (D.C. Cir. 1996) (failure to disclose deal in which state charges dismissed as part of federal plea).
 9. United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) (failure to disclose cooperation agreement between government and key witness).
 10. Dubose v. Lefevre, 619 F.2d 973 (2d Cir. 1980) (failure to disclose implicit deal in which state encouraged witness to believe that favorable testimony would result in leniency).
 11. Wilson v. State, 768 A.2d 675 (Md. 2001) (failure to disclose specific terms of extremely lenient plea agreement with cooperating witnesses, where prosecutor falsely argued that witnesses had nothing to gain from testimony, and failure to disclose psychiatric history of key witness).
 12. See also supra Mastracchio v. Vose; *infra* Reuter v. Solem; *infra* United States v. Boyd.
- ii. **Criminal history** of informants
1. Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 341 (2002) (failure to disclose jailhouse informant's (a) prior misdeeds as informant—drug sale and use, lies to police, theft of drugs and money from police—((b) false accusations against defendant in unrelated homicide, (c) continuing drug use (d) non-prosecution for drug use and other outstanding warrants. Evidence was material even when other—less damaging—impeachment evidence had been presented at trial. Also, when state claimed murder motivated by arson/insurance fraud, failure to disclose arson report that ruled fire accidental was independent grounds for habeas relief.).
 2. Crivens v. Roth, 172 F.3d 991, 996-99 (7th Cir. 1999) (failure to disclose crimes committed by government witness using aliases).

3. East v. Johnson, 123 F.3d 235 (5th Cir. 1997) (failure to disclose complete criminal record of star witness claiming that defendant had robbed and raped her, which would have showed witness not only had prior criminal history but had revealed in a competency exam that she suffered from bizarre sexual hallucinations).
4. Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (failure to disclose Department of Corrections file that would have showed lengthy criminal history and history of lying to police and blaming others for his own crimes).
5. United States v. Steinburg, 99 F.3d 1486 (9th Cir. 1996)(failure to disclose that informant involved in two criminal transactions at same time he was working as an informant, and that he owed defendant money).
6. United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996)(failure to disclose prior perjury of key government witness involving same conspiracy).
7. United States v. Stiffler, 851 F.2d 1197 (9th Cir. 1988) (information in government witness probation file was relevant to witness credibility and should have been disclosed as Brady material; criminal records cannot be made unavailable by being included in probation file).

iii. **Bias** of government witnesses.

1. Schledwitz v. United States, 169 F.3d 1003, 1014-15 (6th Cir. 1999) (witness portrayed as neutral and disinterested expert actually had been investigating defendant for years).
2. United States v. O'Connor, 64 F.3d 355 (8th Cir. 1995) (failure to disclose threats by one government witness against another and attempts by that same government witness to influence testimony of another government witness).
3. United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993) (failure to produce memo indicating that informant

lied to DEA, had undue influence over DEA agents, and thwarted investigation of informant's credibility).

4. Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989) (failure to inform defense that key witness had applied for commutation and was scheduled to appear before parole board in a few days).
5. Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987) (failure to disclose that key witness was incarcerated at time of testimony and had been promised immunity for testimony).

iv. **Prior identifications** of other suspects.

1. White v. Helling, 194 F.3d 937, 045-46 (8th Cir. 1999) (habeas relief granted in 27 year old robbery/murder case because of failure to disclose that government's chief eyewitness had originally identified someone else).
2. Hudson v. Whitley, 979 F.2d 1058 (5th Cir. 1992)(failure to disclose that only eyewitness had originally identified third party, and that third party had originally been arrested).
3. McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) (failure to disclose key witness' initial statement that attacker was white, compounded by prosecutor's having allowed witness to testify that she had always described her attacker as a black man.).

v. **Prior statements** that eyewitness could not identify anyone

1. Spicer v. Roxbury, 194 F.3d 547, 558-60 (4th Cir. 1999) (failure to disclose informant's initial statement to his lawyer—which the lawyer then disclosed to the prosecutor—that he had not seen the defendant running away from the crime scene.).
2. Lindsay v. King, 769 F.2d 1034 (5th Cir. 1985) (failure to disclose initial statement of eyewitness that he could not make an ID because he never saw murderer's face; story changed after witness found out there was a reward).

3. 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, on 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 that witnesses gave inaccurate physical descriptions).
4. Bennett v. United States, 797 A.2d 1251(D.C. 2002) (failure to disclose that person claiming to be eyewitness to murder had previously lied about being an eyewitness to a different murder).
5. Jackson v. United States, 650 A.2d 659, 661 n.4 (D.C. 1994) (government “wisely conceded” that its failure to “reveal the identity” of an eyewitness who was unable to identify anyone in a photo array that included a photograph of the defendant “violated both the letter and spirit of Brady”)
6. 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).
7. State v. Avelar, 859 P.2d 353 (Id. App. 1993) (Prosecution's failure to disclose that party to whom cocaine was delivered could not identify defendant as the one who delivered cocaine violated due process and required that conviction be set aside; disclosure would likely have altered defendant's trial strategy significantly).

vi. **Misconduct** by Government Witnesses

1. Norton v. Spencer, 351 F.3d 1 (1st Cir. 2003) (when 2 children originally accused defendant of separate incidents

of indecent assault, failure to disclose that one child—who did not testify—told prosecutor that there was no assault and that other boy had fabricated incidents).

2. United States v. Boyd, 55 F.3d 239 (7th Cir. 1995) (failure to disclose drug use and dealing by prosecution witness and “continuous stream of unlawful, indeed scandalous, favors” provided by prosecution to witnesses. Id at 244.).

vii. Inconsistent statements made during **polygraphs**.

1. Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) (Brady violation where government failed to disclose statements to polygraph examiner that would have contradicted her trial testimony).
2. Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987) (failure to disclose that key eyewitness had failed a polygraph and made inconsistent statements during exam).

viii. Other **Inconsistent statements**.

1. Brady v. Maryland, 373 U.S. 83 (1963) (statement by co-defendant that he and Mr. Brady had planned the killing together, but that co-defendant had performed actual killing).
2. Kyles v. Whitley, 514 U.S. 419 (1995) (failure to disclose inconsistent eyewitness and informant statements, and list of license numbers compiled by police that did not show Kyles’s car in supermarket parking lot). See supra for more detail.
3. Boyette v. Lefevre, 246 F.3d 76 (2d Cir. 2001) (failure to disclose inconsistent statements of complainant and notes of detective both confirming those inconsistent statements and “ruling out” defendant as a suspect).
4. United States v. Fisher, 106 F.3d 622 (5th Cir. 1997) (failure to disclose FBI report directly contradicting key government witness).

5. United States v. Kelly, 35 F.3d 929 (4th Cir. 1994) (failure to disclose letter written by witness that would have undermined her credibility, and failure to disclose application for warrant to search witness' house).
 6. United States v. Minsky, 963 F.2d 870 (6th Cir. 1992) (failure to disclose inconsistent statements to the FBI by key witness).
 7. United States v. Tincher, 907 F.2d 600 (6th Cir. 1989) (failure to disclose grand jury testimony of police officer, which could have been used for impeachment purposes).
 8. State v. Gonzalez, 624 N.W.2d 836 (S.D. 2001) (failure to disclose counseling records of complainant, which were in possession of government, which government denied having, and which contained a number of statements about sexual assault that were inconsistent with complainant's trial testimony).
 9. See also supra United States v. Washington; Banks v. Dretke.
- ix. Prosecutor and law enforcement **notes** from interviews with government witness.
1. United States v. Service Deli, Inc., 151 F.3d 938, 943-44 (9th Cir. 1998) (failure to disclose notes from witness interview that contained three keys pieces of impeachment information since they showed that story had changed, change may have been brought about by threats of imprisonment, and witness had claimed to have suffered a stroke).
 2. United States v. Pelullo, 105 F.3d 117 (3d Cir. 1997) (failure to disclose notes of FBI and IRS agents corroborating defendant's version of events and impeaching testimony of government agents).
 3. Paradis v. Arave, 130 F.3d 385 (9th Cir. 1997) (remanding because of failure to disclose prosecutor's notes from meeting with pathologist which totally contradicted

government's theory of the case, especially regarding where body was found).

4. Paradis v. Arave, 240 F.3d 1169 (9th Cir. 2001) (affirming grant of habeas relief due to failure to reveal prosecutor's notes from meeting with pathologist).
 5. State v. Russo, 754 A.2d 623 (N.J. App. 2000) (failure to disclose prosecutor's memorandum, which could have been used to impeach complainant, as well as police report that showed prior inconsistent statements of complainant).
 6. See also supra Atkinson v. State; Rogers v. State.
- x. **Personnel files**, especially of testifying officers
1. Nuckols v. Gibson, 233 F.3d 1261 (10th Cir. 2000) (failure to disclose impeachment evidence that key police witness, who may have prompted illegal confession by committing an Edwards violation, had flunked polygraph in connection with a theft investigation, had been under investigation by police department for sleeping on the job, and thus had motive to embellish defendant's statement and thereby ingratiate himself with police department, and had some involvement in providing money to fund a homicide)
 2. United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992) (prosecutor must search personnel records of police officer/witnesses to fulfill Brady obligations).
 3. 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.).
- xi. **Presentence Reports** of Testifying Witnesses
1. United States v. Carreon, 11 F.3d 1225, 1238 (5th Cir. 1994) (trial court must conduct in camera review of presentence reports of government witnesses to determine whether they contain Brady/Giglio material).

2. United States v. Stiffler, 851 F.2d 1197 (9th Cir. 1988) (information in probation file relevant to government witness credibility must be disclosed, and could not be deemed privileged by making it part of probation file).
- d. Statements of potential witnesses not called to testify
- i. United States v. Ramirez-Lopez, 315 F.3d 1143 (9th Cir. 2003) *opinion withdrawn, appeal dismissed by U.S. v. Ramirez-Lopez*, 327 F.3d 829 (9th Cir. 2003) (Judge Kozinski’s fiercely acerbic dissent prompted the government’s move to dismiss after winning on appeal. In alien smuggling case, 12 of 14 witnesses said that defendant was not their guide. The government deported 9 of the exculpatory witnesses. INS notes detailing these interviews were not admitted into evidence to contradict INS agent’s assertion or government counsel’s implicit argument that some of the deported witnesses said defendant was the guide. Kozinski asserted that government had violated Brady in deporting exculpatory witnesses. Further, he claimed that the exculpatory witness statements to INS agents should be considered as having the required indicia of reliability to be admitted under a hearsay exception. (See Henry Weinstein, “Appeal Lost, Yet Freedom Won,” Los Angeles Times, April 23, 2003: Metro, Part 2, Pg 1.).
 - ii. United States v. Frost, 125 F.3d 346 (6th Cir. 1997) (government does not disclose statement of exculpatory witness, but instead tells defense that that witness would provide inculpatory information if called to testify).
 - iii. State v. Huggins, 788 So. 2d 238 (Fla. 2001) (new trial ordered when state provided misleading discovery that shrouded exculpatory evidence in the veneer of immateriality, and failed to correct that error when the witness told prosecutors that he had seen defendant’s wife—and the state’s star witness—driving the decedent’s truck and not the defendant.)
- e. Laboratory results

- i. Sawyer v. Hofbauer, 299 F.3d 605 (6th Cir. 2002)(In forced fellatio case, failure to disclose report that semen on victim's underwear was not from the defendant) (Habeas).
 - ii. Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001) (in capital sentencing, where aggravating factors included alleged rape of victim, failure to disclose FBI report that contradicted police chemist's findings on presence of semen.) (Habeas).
 - iii. United States v. Fairman, 769 F.2d 386 (7th Cir. 1985) (failure to disclose ballistics worksheet that showed gun defendant was accused of firing was inoperable).
 - iv. Johnson v. State, 38 S.W.3d 52 (Tenn. 2001) (failure to disclose police report showing that bullet that injured victim fired from front of store, instead of cash register area where defendant was standing).
 - v. State v. Larimore, 17 S.W.3d 87 (Ark. 2000) (failure to disclose original medical examiner report, which had placed time of death at a period in which defendant had iron-clad alibi, and which had been changed after urging by police).
 - vi. Harridge v. State, 534 S.E.2d 113 (Ga. App. 2000) (failure to disclose lab results showing decedent had tested positive for cocaine and marijuana, which would have been favorable to defense in vehicular homicide case where decedent had been driving other car involved in crash).
 - vii. State v. DelReal, 593 N.W. 2d 461 (Wis. App. 1999) (failure to reveal fact that government had swabbed defendant's hands for gunshot residue, but did not test swabs before trial and presented affirmative testimony that no swabs had been taken).
- f. Failure to disclose **prior competency examinations** of defendant or witnesses
- i. United States v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992)(failure to disclose competency examination that would have raised serious competency issue).

- ii. State v. Hunt, 615 N.W.2d 294 (Minn. 2000)(failure to disclose psychological examination of key witness that revealed witness was incompetent to stand trial).
- iii. See also supra East v. Johnson, Silva v. Woodford.

g. Other exculpatory evidence

- i. Finley v. Johnson, 243 F.3d 215 (5th Cir. 2001) (failure to disclose restraining order against kidnapping victim that would have supported defendant's claim of 'necessity').
- ii. United States v. Lloyd, 71 F.3d 408 (D.C. Cir. 1995)(in prosecution for preparing false tax returns, government failed to disclose fraudulent tax returns from same client that had not been prepared by defendant and other exculpatory tax returns).
- iii. United States v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993) (failure to disclose information that would have supported coercion, namely that person defendant claimed had coerced her was a known, prominent drug trafficker, exacerbated by prosecutor's closing argument that there was "no evidence" to support coercion defense).
- iv. Ballinger v. Kerby, 3 F.3d 1371 (10th Cir. 1993)(failure to produce exculpatory photograph).
- v. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991) (failure to disclose audio tapes of hypnosis of rape victim and investigating officer, which had strong impeachment potential).
- vi. United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990)(failure to disclose drug transaction records that would have aided cross-examination of key witness).
- vii. United States v. Severdija, 790 F.2d 593 (10th Cir. 1986)(failure to disclose written statement by defendant to authorities negating intent).

- h. Brady violation when non-disclosure deprives defense the opportunity to investigate
 - i. Ellsworth v. Warden 333 F.3d 1 (1st Cir. 2003) (Court vacated and remanded to allow defense investigation after prosecution failed to disclose hearsay evidence of complainant's past false accusations of sexual abuse.).
 - ii. Rogers v. State 782 So. 2d. (Fla. 2001) (failure to disclose police report that memorialized uncalled witness' statement that a 3rd party—who better matched physical characteristics recalled by witnesses—had confessed involvement in murder/robbery; also, failure to disclose 2nd and more detailed confession of cooperating accomplice and tape of state's attorney coaching this same witness).

K. Sanctions

- a. Whether to ask for sanctions: Where the government fails to timely disclose Brady information prior to trial, sanctions may be in order. What sanction you ask for will, of course, depend on a number of factors, including the nature of the evidence that was suppressed, the timing of the disclosure of that evidence, the resulting damage to your ability to prepare for trial, and what best serves your client's interests.
- b. What sanctions to ask for: Given that Brady violations come in all shapes and sizes, there is no one-size-fits-all sanction. Again, the sanction you ask for will turn on the facts of your case. Some possible sanctions to think about include: (1) a continuance with the time charged to the government, (2) an instruction informing the jury that the government withheld certain evidence from the defense until the eve/middle of trial, and (3) precluding the government from putting on certain evidence, and (4) the most severe option – dismissal of the indictment with or without prejudice.
- c. In the most egregious cases, you should not hesitate to request that the court dismiss the indictment. It is an extreme sanction, but other courts, in appropriate cases, have used this both to punish the government for misconduct and to deter future Brady abuses. See, e.g., United States v. Dollar, 25 F. Supp. 2d 1320 (N.D. Ala. 1998); State v. Harris, 713 N.E. 2d 528 (Ohio App. 1998). At the very least,

you may ask the court to dismiss the indictment without prejudice.
See, e.g., United States v. Diabate, 90 F. Supp. 2d 140 (D. Mass.
2000).