SUPPRESSION OF EXCULPATORY EVIDENCE

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Author: Various articles in Voice for the Defense, 1987-2005
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SUPPRESSION OF EXCULPATORY EVIDENCE

The failure of prosecutors to reveal exculpatory evidence to defendants and their attorneys is an appropriate ground for an application for writ of habeas corpus. *Ex parte Lewis*, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979).

Review of Law

The seminal case concerning exculpatory evidence is *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* was charged with murder and tried separately from his codefendant. At Brady's trial, he admitted participation in the crime but contended that his codefendant had done the actual killing. Prior to trial, Brady's counsel requested access to the statements made by the codefendant. He was shown some statements but the prosecution withheld a statement where the codefendant admitted the killing. After Brady's direct appeal, he gained access to this exculpatory statement and brought a post conviction challenge to his conviction alleging a violation of due process based on the prosecutor withholding this favorable evidence. In *Brady*, the Supreme Court stated the following:

> "We now hold that the 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."

In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court further explored the question of suppression of exculpatory evidence and stated that "when the prosecutor receives a specific and relevant request (for exculpatory evidence) the failure to make any response is seldom, if ever, excusable." The *Agurs* court also noted that, "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." Specifically, the Court in *Agurs* distinguished three situations in which a *Brady* claim might arise: first, where previously

undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S. at 103-104, 96 S.Ct. at 2397-2398. In this situation, the Court said that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[1] *Agurs*, 427 U.S. at 103 (see also, *United States v. San Filippo*,

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[1] In *Ramirez v. State*, 2002 WL 1723751 (Tex. App. - Austin), the Court reversed a case based on the prosecution's failure to correct false testimony from a State's witness that she was not looking for money based on being a victim of the crime alleged even though she had hired a lawyer to pursue a lawsuit. The Court in *Ramirez* summarized the law as follows:

> "In *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court acknowledged that since *Mooney*, it has been clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'the rudimentary demands of justice.' *See Pyle v. Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942). And in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Court concluded that the same result obtains when the prosecution, 'although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id*. at 269, 79 S.Ct. 763. When the reliability of a given witness may well be determinative of the guilt or innocence of an accused, nondisclosure of evidence affecting credibility falls within the general rule discussed. *Giglio*, 405 U.S. at 154, 92 S.Ct. 763. This line of cases has sometimes been referred to as the *Mooney-Pyle-Napue* line of decisions. See 42 George E. Dix & Robert O. Dawson *Texas Practice: Criminal Practice and Procedure* §22.51 (2d ed.2002) (hereinafter Dix); *see also generally Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993); *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989); *Davis v. State*, 831 S.W.2d 426 (Tex. App. - Austin 1992, no pet.).
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> Although *Brady* relied upon *Mooney*, *see Kyles v. Whitley*, 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and there have been suggestions that the *Mooney* line of cases were incorporated in the later *Brady* rule, the two lines of decision are distinctive. *See United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). It has been stated: Although *Brady v. Maryland* and its progeny suggest the due process to disclose may have superseded and replaced the prohibition against the use of perjured testimony, this is not the case. The prohibition against the use of perjured testimony remains available to defendants as an alternative to *Brady* arguments. *Mooney* contentions are sometimes more attractive to defendants because the criterion for determining the materiality of improperly used perjured testimony is more lenient than that for determining the materiality of improperly suppressed exculpatory evidence under *Brady*. The difference between the two due process rules is not entirely clear. Some situations will present viable arguments that both were violated. If a defendant is able to establish both that the State knowingly used perjured testimony and that it failed to disclose evidence showing the falsity of the testimony, the defendant is entitled to relief if he or she can show the testimony used is material under the perjured testimony line of decisions and its more relaxed materiality standard. Dix §22.5 (citations omitted)
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> While appellant relies upon both due process rules, we conclude it is necessary to examine only the *Mooney-Pyle-Napue* line of decisions to reach the proper disposition of appellant's contention. We review the record to determine if the State 'used' the testimony, whether the testimony was 'false,' whether the testimony was 'knowingly used,' and if these questions are affirmatively

564 F.2d 176, 178 (5th Cir. 1977) ("due process is violated when the prosecutor although not soliciting false evidence from a government witness, allows it to stand uncorrected when it appears"); second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id*. at 104-107, 96 S.Ct. at 2398-2399; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id*. at 108, 96 S.Ct. at 2400.

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), clarified the standard of review when exculpatory evidence is suppressed. First, the *Bagley* court rejected a distinction between cases when there was a specific request for exculpatory evidence and no request. *Bagley* set out a three part test for obtaining relief based on suppression of exculpatory evidence. (1) The prosecution withheld or suppressed evidence. (2) The evidence was favorable to the defense. (3) The evidence was material to either guilt or punishment. See also, *Ex parte Kimes*, 872 S.W.2d 700, 702-03 (Tex. Crim. App. 1993). Under *Bagley* the materiality test is met and a new trial required if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. This reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome". 473 U.S. at 682, 105 S.Ct. at 3383; see also, *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (Texas has adopted the *Bagley* test for materiality determinations when exculpatory evidence is suppressed). The *Bagley* court also held that the prosecution has a duty to disclose evidence that could be used to impeach the prosecution's witnesses. In *Bagley*, the prosecution had not disclosed incentives which had been

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> answered, whether there is a reasonable likelihood that the false testimony could have affected the judgment of the jury."

offered witnesses contingent on the government's satisfaction with their testimony.

In *Bagley*, the Court expressed concern with "any adverse effect that the prosecutor's failure to respond (with exculpatory evidence) might have had on the preparation of the defendant's case." 473 U.S. at 683, 105 S.Ct. at 3384. See also, *Derden v. McNeel*, 938 F.2d 605, 617 (5th Cir. 1991) (a reviewing court may consider any adverse effects the prosecutor's failure to release information might have had on the defendant's preparation and presentation of the case).

In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court discussed the showing necessary to obtain a new trial when the prosecution withholds exculpatory evidence. Under *Kyles,* this showing does not require a demonstration that the disclosure of this evidence would have resulted in an acquittal. Rather, as the Court stated, the question is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434, 115 S.Ct. at 1566. The *Kyles* court restated the materiality test as a determination as to whether there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The Court emphasized that this was not a sufficiency of the evidence test and did not require a showing that disclosure of the suppressed evidence would have resulted in the defendant's acquittal.

The Court in *Kyles* found reversible error in the prosecutions suppression of the following evidence in a Louisiana murder case: 1) contemporaneous eyewitness statement taken by the police following the murder that were favorable to Kyles; 2) various inconsistent statements by a police informant who had implicated Kyles and 3) a computer printout of license numbers of car parked at the crime scene on the night of the murder, which did not list Kyles' car.

Knowledge of government agents, such as police officers, of exculpatory evidence is imputed

to the prosecution. *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991); *U. S. v. Auten*, 632 F.2d 478 (5th Cir. 1980). Therefore, if a police officer has exculpatory evidence, this is the same as a prosecutor having it, and it must be turned over to the defense. See *Kyles,* 115 S.Ct. at 1566, ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992) (discussing duty of prosecutor to search files of other agencies); *O'Rarden v. State*, 777 S.W.2d 455 (Tex. App. - Dallas 1989, pet. ref'd) (prosecution team includes investigators); *Carey v. Duckworth*, 738 F.2d 875 (7th Cir. 1984) (prosecution cannot evade *Brady* requirements by keeping itself ignorant of information). See also, *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988) (criticizing police for withholding information from prosecutor in order to circumvent *Brady* rule). In *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), the court held that when the government is confronted with a request by a defendant for the personnel files of testifying officers the government has a duty to examine those files and must disclose information favorable to the defense that meets the materiality standard. The court held that if the government is uncertain about its materiality the evidence should be submitted to the court.

Additionally, the duty to disclose exculpatory evidence is ongoing and the State must disclose it whenever it is discovered. *Flores v. State*, 940 S.W.2d 189, 191 (Tex. App. - San Antonio, 1996, no pet.).

In *Strickler v. Greene*, 527 U.S. 263 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the Supreme Court reiterated the standard of review for determining *Brady* claims. However, *Strickler* demonstrated the heavy burden the Courts place on defendants to demonstrate prejudice when the prosecution withholds exculpatory evidence. In *Strickler*, the court found that the prosecution withheld exculpatory evidence but concluded that the defendant did not show prejudice because

there was strong evidence in the record that the defendant in that capital murder case would have been convicted and sentenced to death even if the prosecution had revealed the suppressed exculpatory evidence. Specifically in *Strickler* the prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with an eyewitness and letters written to the detective by the eyewitness, that cast serious doubt on significant portions of her testimony. However, there was additional strong physical evidence and witness testimony that the court found to provide sufficient support for the conclusion that the defendant would have been convicted and sentenced to death even if the witness had been severely impeached or her testimony excluded entirely.

Texas courts have reversed a few cases based on the suppression of exculpatory evidence by the prosecution. The Texas courts essentially follow the same reasoning as the Supreme Court in analyzing these cases.

In *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992), the defense filed a motion requesting exculpatory evidence. The prosecutor responded in the usual way and said the state had no exculpatory evidence. At the trial, the State's witnesses testified that they saw the defendant drag the deceased behind an apartment building and shoot him. The State suppressed the following exculpatory evidence: A different witness named Walker was interviewed by the police several days after the shooting and the prosecutor personally interviewed Walker about one month after the shooting. The prosecutor and the prosecutor's investigator also interviewed Walker in the courtroom the first day of trial. After that interview, Walker disappeared and was not available to testify at trial. In all of his interviews, Walker told the State officials that he arrived at the apartment and went upstairs to watch a movie. When he arrived, he saw the defendant in front of the apartments. While Walker was upstairs, he heard arguing and gunshots in the back of the apartments. He ran

downstairs and saw the defendant in the front of the apartments. He said that the defendant could not have gotten from the back of the apartments when the shooting occurred to the front that fast because Walker ran down the stairs in a few seconds, and therefore the defendant did not do the shooting.

After trial, the defense learned of this evidence and Walker's testimony was presented at a motion for new trial. Both the trial court and Court of Appeals refused to order a new trial. However, the Court of Criminal Appeals reversed and held that there was a reasonable probability that the result of the proceeding would have been different with Walker's testimony.

Several years ago, the Texas Court of Criminal Appeals reversed a capital murder conviction based on the suppression of exculpatory evidence. In *Ex parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002), the prosecution failed to disclose the existence of a diary kept by a police officer with the Lubbock Police Department that contained substantial information that could have been used to impeach the State's star witness. This diary was written while the officer was guarding the witness during a period of protective custody. The officer who maintained the diary testified at the post-conviction writ hearing that she kept the diary to protect herself and other officers from false accusations by the witness. The diary contained information about false accusations and statements made by the witness about the officers. At the writ hearing, the officer who wrote the diary as well as five other officers testified the witness was not a truthful person. None of this information had been revealed to the defense. Based on this evidence, the Court of Criminal Appeals found that the three part test for obtaining relief under *Brady* was met. The Court specifically found that the State failed to disclose the existence of this exculpatory evidence, that the withheld evidence was favorable to the accused and that the evidence was material, that is, that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.

In *United States v. Ruiz*, 122 S.Ct. 2450 (2002), the Supreme Court held that the Constitution does not require the government to disclose material impeachment evidence prior to entering into a plea agreement.

The Court of Criminal Appeals has also held that the *Brady* rule did not apply when the accused was already aware of the information. *Hayes v. State*, 85 S.W.3d 809 (Tex. Crim. App. 2002); *Harvard v. State*, 800 S.W.2d 195, 204 (Tex. Crim. App. 1989).

If the defendant discovers previously withheld evidence during trial, or close to trial, it is necessary to request a continuance in order to preserve error for appeal. *Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. 1982); *Williams v. State*, 995 S.W.2d 754, 762 (Tex. App. - San Antonio 1999, no pet.); *Gutierrez v. State*, 85 S.W.2d 446 (Tex. App. - Austin 2002).

Specific Cases

Reversals of convictions for suppression of exculpatory evidence arise in a variety of circumstances. A sampling of such cases follows:

Supreme Court Cases

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972): Government failed to disclose impeachment evidence of a promise of immunity in exchange for testimony.

Kyles v. Whitley, *supra*: State suppressed the following evidence in murder case: contemporaneous eyewitness statements taken by the police which would have undermined the state's eyewitness testimony, various inconsistent statements made to the police by an informant and a list of cars at the crime scene.

Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967): Habeas granted where prosecution knowingly misrepresented paint-stained shorts as blood-stained, and failed to disclose the true nature of the stains.

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959): "When reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of immunity deal with witness violates Due Process.

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987): Defendant entitled to any exculpatory evidence in child welfare agencies files.

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The failure of the state to disclose that it had rehearsed the testimony of two witnesses used in both the guilt and penalty stage of a capital prosecution, especially when the witnesses denied any prior conversations with the prosecution, together with a false denial that one of the witnesses was an informant who received both money and accommodations from the state, constituted a violation of due process under *Brady v. Maryland*. In remanding the case for further consideration by a federal court considering *habeas* relief, the Court emphasized that "materiality" for the purpose of the *Brady* doctrine does not require a demonstration that, with the undisclosed evidence the defendant would have prevailed, but only a showing of reasonable probability that, with the evidence the outcome would have been different.

Youngblood v. West Virginia, 547 U.S. 867, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). *Brady* requires the government to disclose evidence which relates to impeachment as well as exculpatory evidence. It also applies to evidence known only to the police and not the prosecutors. In *Youngblood*, the police evidently knew of a handwritten statement of two alleged victims of a sexual assault which substantially impeached their testimony that their conduct with the petitioner was not consensual.

United States v. Vonn, 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). In offering a defendant a "fast track plea bargain," the government was not obligated, under either the Fifth or

Sixth Amendments, to disclose impeachment information relating to informants and witnesses. "Exculpatory evidence includes evidence affecting witness credibility, where the witness' reliability is likely determinative of guilt or innocence." However, a unanimous Court found this principle which requires disclosure prior to trial is inapplicable at the plea stage, at least with regard to information which might be useful for impeachment purposes: "It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may or may not help a particular defendant."

Texas Cases

Ball v. State, 631 S.W.2d 809 (Tex. App. - Eastland 1982, pet ref'd): Error not to disclose picture of defendant with black eye at time of arrest when self defense claimed.

Collins v. State, 642 S.W.2d 80 (Tex. App. - Fort Worth 1982): State did not tell defense material witnesses name or location.

Cook v. State, 940 S.W.2d 623 (Tex. Crim. App. 1996): Withheld evidence that the defendant knew victim and had been to her apartment and failed to disclose material inconsistent statements of a key witness to the Grand Jury.

Crutcher v. State, 481 S.W.2d 113 (Tex. Crim. App. 1972): Witnesses inconsistent statements.

Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989): Crime victims prior inconsistent statement.

Ex parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989): Inconsistent statement by witnesses.

Ex parte Lewis, 587 S.W.2d 697 (Tex. Crim. App. 1979): Existence of doctors letter stating

defendant was insane.

Ex parte Turner, 545 S.W.2d 470 (Tex. Crim. App. 1977): Fact that police officer aided in obtaining release of main witness.

Flores v. State, 940 S.W.2d 189, 191 (Tex. App. - San Antonio 1996, no pet.): Witness statement that was material in corroborating defendant's argument that victim shot herself.

Granger v. State, 653 S.W.2d 868 (Tex. App. 13 Dist. 1983), aff'd, 683 S.W.2d 387 (Tex. 1984), *cert. denied*, 472 U.S. 1012 (1985): Failure to disclose existence of a deal that changed witness's sentence from death to lie.

Ham v. State, 760 S.W.2d 55 (Tex. App. - Amarillo 1988, no pet.): Prosecution withheld doctors report which supported defense position and refuted prosecution.

Jones v. State, 850 S.W.2d 223 (Tex. App. - Fort Worth 1993): Prosecution failed to disclose in a timely manner exculpatory information in a victim impact statement which negated the evidence of defendant's intent to shoot the victim.

O'Rarden v. State, 777 S.W.2d 455 (Tex. App. - Dallas 1989, pet. ref'd): Failure to provide defense copy of Dept. of Human Resources report which indicated no sexual abuse occurred.

Thomas v. State, 841 S.W.2d 399 (Tex. Crim. App. 1992): Witness statement to police that defendant was not in a physical position to have been able to commit the offense.

Ex parte Masonheimer, 220 S.W.3d 494 (Tex. Crim. App. 2007) (double jeopardy barred a third trial of a defendant whose mistrial motions were necessitated primarily by state's intentional failure to disclose exculpatory evidence under *Brady* with the specific intent to avoid the possibility of an acquittal).

Harm v. State, 183 S.W.3d 403 (Tex. Crim. App. 2006). Child Protective Services was not acting as a State agent, and thus knowledge of records from CPS that allegedly indicated that, in the

past, victim had made unfounded allegations of sexual abuse and had engaged in inappropriate sexual behavior, could not be imputed to State as a basis for asserting that failure to disclose such information constituted a *Brady* violation in prosecution for indecency with a child; records were created in the course of an non-criminal investigation that was unrelated to defendant, but within the duties of CPS to protect the welfare and safety of the children, and the records significantly predated the allegations against defendant.

Keeter v. State, 175 S.W.3d 756 (Tex. Crim. App. 2005). Defendant did not preserve *Brady* claim for review when he moved for new trial on ground that evidence establishing innocence was withheld by material prosecution witness; the evidence allegedly showing preservation was relevant to claim of actual innocence, the defendant did not mention *Brady* in his motion or during the hearing on the motion and did not include any *Brady*-related cases in his post-hearing submission, and neither the state nor the trial court understood that the defendant was raising a *Brady* claim.

Federal Cases

Ballinger v. Kirby, 3 F.3d 1371 (10th Cir. 1993): Exculpatory photograph.

Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995): Fact that another person had been arrested for the same crime.

Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976): Prosecutor did not disclose deal with accomplice/witness for leniency.

Bowen v. Maynard, 799 F.2d 593 (8th Cir. 1986): Evidence that former police officer was initial suspect in the murder for which defendant was convicted.

Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991): Knowledge by prosecutor that her theory of the case was wrong.

Carter v. Rafferty, 826 F.2d 1299 (3rd Cir. 1987): Reports of polygraph test given to

important prosecution witness, but see *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (because polygraphs are inadmissable even for impeachment they are not subject to *Brady*).

Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984): Conviction affirmed but death sentence reversed where withheld evidence contradicted prosecution's theory of the murder and placed defendant 110 miles from the scene.

Derden v. McNeel, 932 F.2d 605 (5th Cir. 1991): Radio log that would have impeached State's witnesses.

DuBose v. Lefevre, 619 F.2d 973 (2nd Cir. 1980): State's encouragement to witness to believe that favorable testimony would result in leniency toward the witness.

Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996): Information showing police intimidation of witness and failure to disclose evidence regarding who was seen carrying the murder weapon shortly after the shooting.

Hudson v. Whitley, 979 F.2d 1058 (5th Cir. 1992): Evidence that the State's only eyewitness had initially identified someone else, and that person had been arrested.

Hughes v. Bowers, 711 F.Supp. 1574 (N. D. Ga. 1989), *aff'd*, 896 F.2d 558 (11th Cir. 1990): Evidence that the State's eyewitness to the murder stood to benefit from the life insurance policy of the victim if the defendant was convicted.

Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968): Racial misidentification case, where prosecutor failed to reveal prior identification problem.

Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992): Failure to disclose statements of witness to polygraph examiner which contradicted trial testimony.

Jean v. Rice, 945 F.2d 82 (4th Cir. 1991): State under duty to disclose information concerning hypnosis session that enabled witness to identify the defendant.

Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978): State withheld, despite defense request, a statement from coindictee who, prior to trial, had been declared material witness for prosecution, and against whom all charges were then dropped.

Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985). Suppression of initial statement of eyewitness to police in which he said he could not identify the murderer because he never saw the murderer's face.

McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988): Witness's initial statement that attacker was white when the defendant was black.

Miller v. Angliker, 848 F.2d 1312 (2nd Cir. 1988): Evidence which showed that another person committed the crimes with which defendant was charged.

Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976): Failure to furnish to rape defendant's counsel copy of lab report showing no hair or fiber evidence in defendant's undershorts or in victim's bed.

Orndorff v. Lockhart, 707 F.Supp. 1062 (E.D. Ark. 1988), *aff'd in part, vacated in part*, 906 F.2d 1230 (8th Cir. 1990): Failure to disclose that witness's memory was hypnotically refreshed during pretrial investigation.

Ouimette v. Moran, 942 F.2d 1 (lst Cir. 1991): Information about extensive criminal record of State's witness and the existence of a deal with state's witness.

Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989): Withholding of fact that key witness had applied for commutation and been scheduled to appear before parole board a few days after his testimony.

Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981): Police reports containing admissions by other persons of involvement in the offense.

Simms v. Cupp, 354 F.Supp. 698 (D. Ore. 1972): Suppression of original description by witness which differed from her trial testimony.

Spicer v. Roxbury Correctional Institution, 194 F.3d 547 (4th Cir. 1999): Inconsistent statement by government witness as to whether he was really an eyewitness to the crime.

Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986): State failed to disclose instances of codefendant's propensity for violence when this supported defense theory.

United States v. Beasley, 576 F.2d 626 (5th Cir. 1978): Failure of government to timely produce statement of prosecution witness when the statement at issue differed from witness' trial testimony.

United States v. Boyd, 55 F.3d 239 (7th Cir. 1995): Prosecutor failed to reveal to defense drug use by prisoner witnesses during trial and "continuous stream of unlawful" favors prosecution gave those witnesses.

United States v. Brumel-Alvarez, 976 F.2d 1235 (9th Cir. 1992): Memorandum by government agent containing information about credibility of informant.

United States v. Butler, 567 F.2d 885 (9th Cir. 1978): Government failed to disclose that the witness had been promised a dismissal of the charges against him.

United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984): Names and addresses of eyewitnesses to offense that State does not intend to call to testify.

United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996): Evidence that prosecution witness had previously lied under oath in proceeding involving same conspiracy.

United States ex. rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985): Police ballistics report showing gun defendant allegedly used to fire at police was inoperable.

United States v. Fisher, 106 F.3d 622 (5th Cir. 1991): Government report reflecting on

credibility of key government witness.

United States v. Foster, 874 F.2d 491 (8th Cir. 1988): Failure by prosecutor to correct false testimony.

United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974): Defendants deprived of evidence of promise of leniency by prosecutor, and failure to disclose that witness was in other trouble, thereby giving him even greater incentive to lie.

United States v. Herberman, 583 F.2d 222 (5th Cir. 1978): Testimony presented to grand jury that contradicted testimony of government witnesses.

United States v. Minsky, 963 F.2d 870 (6th Cir. 1992): Withholding from defense fact that witness lied to Grand Jury.

United States v. Pope, 529 F.2d 112 (9th Cir. 1976): Prosecution failed to disclose plea bargain with witness in exchange for testimony and argued to the jury that the witness had no reason to lie.

United States v. Sheehan, 442 F.Supp. 1003 (D. Mass. 1977): Only eyewitness to see the robber's faces unmasked during a bank robbery was not called to testify because he hesitated in his identification of the defendant.

United States v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992): Government failed to turn over a psychiatric report which indicated that the defendant may have been able to assert an insanity defense.

United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976): Prosecutor withheld evidence that witness was coerced into testifying against defendant.

United States v. Udechukwu, 11 F.3d 1101 (lst Cir. 1993): Evidence to support defendant's theory that she had been coerced into being a drug courier.

United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989): Government withheld statement from a presentence report from witness indicating that the defendant was responsible for much smaller amount of drugs than claimed.

Walter v. Lockhart, 763 F.2d 942 (8th Cir. 1985): For over twenty years, the State withheld a transcript of a conversation supporting the defendant's claim that the officer shot at him first.

Tassin v. Cain, 517 F.3d 770 (5th Cir. 2008). State's failure to disclose in murder trial the understanding or agreement between witness and state, under which witness expected to gain beneficial treatment in sentencing for related crimes provided that she testified at trial consistently with her prior statements inculpating defendant, constituted Fourteenth Amendment violation under *Giglio*, even though witness had not received a firm promise of leniency from the judge or prosecutor.

Mahler v. Kylo, 537 F.3d 494 (5th Cir. 2008). *Brady* violation based on witness statements not disclosed by prosecution to defendant consisting of pretrial statements contradicting witnesses' testimony at trial that altercation had ceased and that victim was in process of moving away from defendant's relative at time that he fired the fatal shot.

Graves v. Dretke, 442 F.3d 334 (5th Cir. 2006). Witness's out-of-court statement that witness's wife was active participant in charged murders was exculpatory, for purpose of defendant's claim that state's suppression of statement violated *Brady*.

Timing of Disclosure

The ability to effectively utilize exculpatory evidence is largely dependent on the defendant's obtaining timely disclosure. In *United States v. Hart*, 760 F.Supp. 653 (E.D. Mich. 1991), the Court held that it was the court's responsibility to fix the timing for disclosure of exculpatory evidence. Other courts have issued opinions stating that disclosure must be made in time for effective use at

trial. *United States v. Higgs*, 713 F.2d 39, 44 (3rd Cir. 1983); *United States v. Starusko,* 729 F.2d 256, 261 (3rd Cir. 1984).