DUTY TO DISCLOSE: CONSTITUTIONAL AND ETHICAL CONSIDERATIONS OF *BRADY*

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INDEX

I. THE THREE DUTIES OF THE PROSECUTOR

Generally, a prosecutor has three distinct legal obligations under the due process clause of the United States Constitution. First, the prosecution must disclose all exculpatory evidence in its possession. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Second, the prosecution must preserve and make available to the defendant any exculpatory physical evidence which the accused cannot otherwise obtain and which may be material to his defense. *See, e.g., California v. Trombetta*, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413 (1984). Third, a prosecutor has a duty not to knowingly proffer perjured testimony and to correct any perjury of which he may become aware during trial. *See, e.g., Alcorta v. Texas*, 355 U.S. 28, 31, 78 S. Ct. 103, 105, 2 L. Ed. 2d 9 (1957).

As is discussed more thoroughly *infra*, the nature and scope of a prosecutor's ethical duties to disclose or preserve evidence under the Disciplinary Rules differ from the nature and scope of the same duties under the due process clause. Moreover, the penalties for violations differ dramatically.

A. The Duty to Disclose Favorable Evidence

1. Due Process

a) In General

- The Due Process Clause of the Fourteenth Amendment is violated when a prosecutor fails to disclose evidence that is favorable to the accused which creates a probability sufficient to undermine confidence in the outcome of the proceeding. *See, e.g., Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

- A defendant need not specifically request exculpatory evidence in order to trigger the prosecutor's obligation to disclose it, and a specific request does not alter the test for whether the prosecution has a duty to disclose it. *See, e.g., Thomas*, 841 S.W.2d at 403-04 (quoting *United States v. Bagley*, 473 U.S. 677, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985)).

- The prosecutor's duty to disclose evidence is on-going. *See Granviel v. State*, 552 S.W.2d 107, 119 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977); *Flores v. State*, 940 S.W.2d 189, 191 (Tex. App. -- San Antonio 1996, no pet.).

b) The Three Part Test For Failing to Disclose Evidence

! The following three part test is used to determine when a prosecutor has violated the Due Process Clause by failing to disclose evidence. *See, e.g.*, *Ex parte Mitchell*, 853 S.W.2d 1, 4 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 183 (1993).

! A defendant must prove all three prongs of the test in order to establish a due process violation. *See, e.g., Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997), *cert. denied*, 118 S. Ct. 305 (1997).

(1) Has there been a failure to disclose evidence?

! The duty to disclose extends to evidence in the possession of any member of the "prosecution team." *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995) ("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").

! The State has an affirmative duty to seek out any favorable, material evidence in the possession of any member of the prosecution team and to deliver it to the defense. *See Kyles*, 514 U.S. at 437-38, 115 S. Ct. at 1567-68..

! There is no "good faith" exception to the duty to disclose, so that a prosecutor may not later claim mere negligence or inadvertence in failing to disclose exculpatory evidence. *See Kyles*, 514 U.S. at 437-38, 115 S. Ct. at 1567-68; *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97

! The State is not required to disclose exculpatory evidence that prosecution team does not have in its possession and that is not known to exist. *See Hafdahl v. State*, 805 S.W.2d 396, 399 n.3 (Tex. Crim. App. 1990), *cert. denied*, 500 U.S. 948 (1991)

! The State is not required to disclose evidence that the State is unaware may benefit the defendant's theory of the case, for the obvious reason that the State is usually not cognizant before trial of what the defense theory may be. *See Ragan v. State*, 887 S.W.2d 471, 473 (Tex. App.–San Antonio 1994, pet. ref'd).

- The State is not obligated to produce material that is in the public domain or otherwise available to the defendant. *See, e.g.*, *Havard v. State*, 800 S.W.2d 195, 204-05 (Tex. Crim. App. 1989)(no duty to disclose where defendant was aware of his own prior statement to police); *Jackson v. State*, 552 S.W.2d 798, 803-04 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1047 (1978)(no duty to disclose where defense counsel had equal access to evidence); *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988)(government not obligated to produce witness's probation worksheet where document was part of public record)

(2) Is the evidence favorable to the accused?

- The test for favorability is whether the evidence, if disclosed and used effectively by defense counsel, may make the difference between conviction and acquittal. *See Mitchell*, 853 S.W.2d at 4.

- "Favorable evidence" includes both "exculpatory" and "impeachment" evidence. *See Bagley*,473 U.S. at 676, 105 S. Ct. at 3380; *Thomas*, 841 S.W.2d at 403.

- "Exculpatory evidence" is testimony or evidence which "tends to justify, excuse, or clear the defendant from alleged fault or guilt." *See Thomas*, 841 S.W.2d at 404.

- "Impeachment evidence" is that which is offered "to dispute, disparage, deny, or contradict." *See Thomas*, 841 S.W.2d at 404.

(3) Does the evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding, i.e., was the evidence "material"?

- Evidence withheld by a prosecutor is "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. *See Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App.), *cert. denied*, 118 S. Ct. 305 (1997), (quoting *Ex parte Kimes*, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993)).

- The standard is that of "a 'reasonable probability' of a different result," so that the issue "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." *See Kyles*, 514 U.S. at 434, 115 S. Ct. at 1566. A "reasonable probability," then, is a probability "sufficient to undermine confidence in the outcome of the trial." *See id.* at 434, 115 S. Ct. at 1566.

- The test for materiality is not a test for sufficiency of the evidence. *See Kyles*, 514 U.S. at 434-35, 115 S. Ct. at 1566 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Rather, he must simply show "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict.").

- Materiality is determined by examining the alleged error in the context of the entire record and the overall strength of the State's case. *See Lagrone*, 942 S.W.2d at 615-16; *Thomas*, 841 S.W.2d at 404-05.

- The suppressed evidence must be considered collectively, not item-by-item. *See Kyles*, 514 U.S. at 436, 115 S. Ct. at 1567.

c) Lists of Cases Granting and Denying Relief

- Attached to this Paper as Appendix 1 is a list of cases holding generally that the withheld evidence was material. This list is reprinted verbatim and with permission from Tim Evans and Jennifer Tourje, authors of *Enforcing Brady, Giglio & Kyles*, a paper presented at the 1999 Joint Ethics Seminar sponsored by the Tarrant County Criminal Defense Lawyers Association and the Tarrant County District Attorney's Office.

- Attached to this Paper as Appendix 2 is a list of cases denying relief on *Brady* claims. This list is reprinted verbatim and with permission from Tim Evans and Jennifer Tourje, authors of *Enforcing Brady, Giglio & Kyles*, a paper presented at the 1999 Joint Ethics Seminar sponsored by the Tarrant County Criminal Defense Lawyers Association and the Tarrant County District Attorney's Office.

2. The State Bar Rules

a) Rule 3.09

- A prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, shall disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." *See* TEX. R. DISCIPLINARY R. PROF. CONDUCT 3.09(d) (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1999).

- The protective order exception, "recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest." TEX. DISCIPLINARY R. PROF. CONDUCT 3.09 cmt. 5 (1989).

- The rule is obviously more sweeping than constitutional mandates, since it requires a prosecutor to disclose not only exculpatory information, but all "mitigating" evidence as well.

- The rule does not specifically address impeachment evidence.

- The rule does not draw a distinction between material and non-material evidence. *Cf. Kyles*, 514 U.S. at 438, 115 S. Ct. at 1567 (pointing out that Brady requirements are less stringent than ABA standard, which closely parallels the Texas Disciplinary Rule).

- The rule requires disclosure not only of exculpatory or mitigating evidence, but exculpatory or mitigating "information," a much broader and vaguer term. *Compare Wood v. Bartholomew*, 516 U.S. 1, ___, 116 S. Ct. 7, 11, 133 L. Ed. 2d 1 (1996) (suggesting, but not holding, that the prosecution may have a duty to turn over material which would not be admissible at trial) *with Lagrone*, 942 S.W.2d at 615 (State has no duty to disclose inadmissible evidence).

- Application of the rule as drafted appears somewhat problematic, since it requires disclosure of mitigating punishment evidence not only to the defense, but to "the tribunal" as well. If "the tribunal" is taken as the fact-finder, then the rule apparently requires the State to adduce mitigating evidence before the jury. It is unlikely that this result was intended. *Cf. Ex parte Kunkle*, 852 S.W.2d 499, 505-06 (Tex. Crim. App. 1993) (defense withheld potentially mitigating evidence for strategic reasons); *McFarland v. State*, 845 S.W.2d 824, 848 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 963 (1993) (defendant refused to proffer potentially mitigating evidence in order to spare family "public ridicule and humiliation"); *Johnson v. State*, 810 S.W.2d 785, 786 (Tex. App.–Waco 1991, pet. ref'd) (Under article 2.01, Texas Code of Criminal Procedure, "The State's duty . . . is to disclose information of substantial value to the defense, not to present the defendant's case for him at trial.").

b) Rule 3.04

- Rule 3.04(a) bars counsel from "unlawfully" obstructing another party's access to evidence, which also might apply to a prosecutor's failure to provide exculpatory evidence to which a defendant has a "right." *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.04(a) (1989).
- Rule 3.04(e) admonishes a lawyer not to request a person to refrain from voluntarily giving relevant information to another party, which might apply to a lead prosecutor's directions to subordinates not to disclose Brady material. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.04(e)(1989).

c) Rule 4.01

! Rule 4.01(a), which prohibits an attorney from knowingly making false statements of material fact or law to a third person, might apply if a prosecutor failed to reveal exculpatory evidence to an independent expert reviewing the case. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 4.01(a)(1989).

d) Rule 8.04

! Because Rule 8.04(a), which prohibits a lawyer from violating any of the State Bar rules, and prohibits him from engaging in conduct constituting the obstruction of justice or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, is so sweeping, it may well apply whenever a prosecutor has violated the constitutional duty to disclose. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(1989).

e) Rule 8.03 – "The Duty to Snitch on Your Friends"

! Under Rule 8.03(a), a lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct "that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate disciplinary authority." *See* TEX. DISCIPLINARY R. PROF. CONDUCT 8.03(a)(1989) (emphasis added). Thus, a prosecutor or defense attorney who becomes aware of another prosecutor's *Brady* violation which also violates the disciplinary rules appear to be obligated to report the violation to the "appropriate disciplinary authority."

3. Article 2.01, Code of Criminal Procedure

! Article 2.01 governing the "Duties of District Attorneys" includes the provision that district attorneys "shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused." *See* TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon Supp. 1999).

- This admonition appears more narrow than even *Brady*, since it prohibits the suppression of evidence "capable of establishing the innocence of the accused." *But see Alvarado v. State*, 744 S.W.2d 685, 686-87 (Tex. App. -- San Antonio 1988, no pet.) (Article 2.01 provides "that district attorneys shall not suppress facts which are capable of establishing appellant's innocence or mitigating punishment").

- However, the statute also provides, "It shall be the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done." *See* TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon Supp. 1999).

B. The Duty to Preserve Potentially Useful Evidence

1. Due Process

a) In General

- Generally, the State's failure to preserve evidence that is only potentially useful to the defense does not amount to a denial of due process, unless the defendant shows that the State acted in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337-38, 102 L. Ed. 2d 281 (1988); *Hernandez v. State*, 867 S.W.2d 900, 908 (Tex. App.–Texarkana 1993, no pet.).

- The following three part test is used to determine when a prosecutor has violated the Due Process Clause by failing to preserve exculpatory evidence. *See California v. Trombetta*, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2533-34, 81 L. Ed. 2d 413 (1984); *Nastu v. State*, 589 S.W.2d 434, 441 (Tex. Crim. App. 1979), *cert. denied*, 447 U.S. 911 (1980); *McDonald v. State*, 863 S.W.2d 541, 543 (Tex. App.–Houston[14th Dist. 1993, no pet.).

- A defendant must prove all three prongs of the test in order to establish a due process violation. *See Burke v. State*, 930 S.W.2d 230, 236 (Tex. App.–Houston[14th Dist.] 1996, pet. ref'd).

b) The Test For Failing to Preserve Evidence

(1) Did the State act in bad faith or was the evidence obviously favorable to the defendant?

- To prevail on a claim that the State has improperly lost or destroyed evidence, a defendant must establish that the exculpatory value of the evidence was obvious before the State destroyed the evidence, or that the State acted in bad faith in destroying the evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337-38, 102 L. Ed. 2d 281 (1988); *Trombetta*, 467 U.S. at 488-89, 104 S. Ct. at 2533-34; *McDonald*, 863 S.W.2d at 543

- Note that the prosecutor's subjective intent, i.e. bad faith, is a consideration in failure to preserve evidence cases whereas the prosecutor's subjective good or bad faith is not a factor in the analysis for failure to turn over favorable evidence. *See Thomas*, 841 S.W.2d at 402 n.5.

(2) Was the evidence favorable to the defendant?

(3) Was the evidence "material"?

- As in claims of a failure to disclose, a defendant must also show that the evidence, if preserved, would have been favorable to him, and that the State could have expected the evidence to play a significant role in the suspect's defense. *See Trombetta*, 467 U.S. at 488-89, 104 S. Ct. at 2533-34; *State v. Rudd*, 871 S.W.2d 530, 532 (Tex. App.–Dallas 1994, no pet.).

- A showing that the lost evidence *may* or *might have been* favorable does not meet the materiality standard. *See Hernandez v. State*, 867 S.W.2d 900, 908 (Tex. App.–Texarkana 1993, no pet.); *McDonald*, 863 S.W.2d at 543.

2. The State Bar Rules

a) Rule 3.04

- Rule 3.04 requires that a lawyer, "in anticipation of a dispute," not "unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value." *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.04(a) (1989).

- As written, the rule appears to be both broader and vaguer than rules governing the constitutional duty to preserve evidence. It requires a prosecutor to preserve evidence which he might "believe" has "evidentiary value." Taken literally, the rule requires the prosecution to preserve evidence which is not covered under the constitutional duty to preserve evidence, as it applies not only to favorable material evidence, but anything which has "evidentiary value," regardless of how great or slight that value might be. *Cf. Trombetta*, 467 U.S. at 489, 104 S. Ct. at 2534 (due process requires that evidence be preserved only if it is exculpatory on its face).

- Note that the phrasing of the rule in terms of the "belief" of the attorney handling the evidence could be an awkward way of phrasing the "bad faith" requirement under the constitutional duty.

- The rule does not address the issue of whether a prosecutor has a duty to preserve evidence which may be obtained by the defense through other means, or evidence which the defense already possesses. *Cf. Havard v. State*, 800 S.W.2d 195, 204-05 (Tex. Crim. App. 1989)(prosecutor has no duty to produce material in the public domain or otherwise available to the defendant).

- The rule also does not address whether a prosecutor must preserve evidence where the defendant already possesses, or can obtain, comparable evidence through other means. *Cf. Burke*, 930 S.W.2d at 236 (in order to establish due process violation for lost evidence, defendant must prove that he was "unable to obtain comparable evidence by other reasonably available means").

! Further, the rule casts the prosecutor's duty in terms of preserving materials with "evidentiary value," suggesting that if the material at issue would be inadmissible at trial, the prosecution is under no duty to keep it. *Cf. Lagrone*, 942 S.W.2d at 615 (no duty to disclose inadmissible evidence under *Brady*).

C. The Duty Not to Knowingly Use Perjured Testimony

1. Due Process

a) In General

! A prosecutor's knowing use of perjured testimony violates the Due Process Clause of the Fourteenth Amendment. *See, e.g., Ex parte Castellano*, 863 S.W.2d 476, 479 (Tex. Crim. App. 1 993); *Blackmon v. State*, 926 S.W.2d 399, 402 (Tex. App.–Waco 1996, pet. ref'd).

! Due process also prohibits the State from intimidating a witness with the threat of prosecution for perjury, i.e., the State, under the guise of warning a witness about the penalties for perjury, may not so intimidate a witness that the witness is prevented from making "a free and voluntary choice whether or not to testify." *See Davis v. State*, 831 S.W.2d 426, 438 (Tex. App.–Austin 1992, pet. ref'd) (quoting *State v. Melvin*, 326 N.C. 173, 388 S.E.2d 72, 79-80 (1990)).

b) "Active" and "Passive" Use of Perjured Testimony

(1) "Active" Use

! The due process clause can be violated buy an "active" proffer of perjured testimony if the State actually introduces the false testimony. *See Mooney v. Houlohan*, 294 U.S. 103, 111, 55 S. Ct. 340, 341, 79 L. Ed. 2d 791 (1935) (prosecutor suborned witness's perjury).

(2) "Passive" Use

! The due process clause can be violated by a "passive" proffer of perjured testimony if the State fails to correct such testimony at trial. *See Alcorta v. Texas*, 355 U.S. 28, 31, 78 S. Ct. 103,

105, 2 L. Ed. 2d 9 (1957) (prosecutor failed to correct witness's perjury, though he did not coach the witness to perjure himself).

! The duty also extends to the duty to correct false impressions which may be engendered by a witness's presentation of evidence. *See Duggan v. State*, 778 S.W.2d 465, 467 (Tex. Crim. App. 1989).

c) Imputed Knowledge

! The State "uses" perjured testimony whenever the prosecutor "has actual or imputed knowledge of the perjury." *See Blackmon*, 926 S.W.2d at 402 (quoting *Castellano*, 863 S.W.2d at 481).

! Knowledge of the falsity of testimony will be imputed to the prosecutor where such knowledge is possessed by anyone on the "prosecution team," which includes both investigative and prosecutorial personnel acting under "color of law." *See Castellano*, 863 S.W.2d at 485; *Ex parte Adams*, 768 S.W.2d 281, 292 (Tex. Crim. App. 1989).

d) Materiality

! To constitute a due process violation , the perjured testimony used by the State must be "material". *See Castellano*, 863 S.W.2d at 485.

(1) Direct Appeal

! On direct appeal the materiality of perjured testimony is measured under the constitutional harmless error standard --the use of perjured testimony will be found to be material "unless a reviewing court is convinced beyond a reasonable doubt that the perjury did not contribute to the conviction or punishment." *See Castellano*, 863 S.W.2d at 485; v *Duggan*, 778 S.W.2d at 469.

(2) Collateral Review

! On collateral review, i.e. articles 11.07 and 11.071, the petitioner bears the "burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *See Ex parte Fierro*, 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996), *cert. denied*, 117 S. Ct. 2517 (1997).

- The habeas standard is much tougher for the petitioner to meet as he or she must show a "probability," rather than a mere possibility, that the perjured testimony contributed to the verdict. *See id.*

2. The State Bar Rules

a) Rule 3.03

- "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . . ." TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(1).

- "A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false . . . ." TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(5)

- Note that, unlike the due process rules, the ethics rules do not require a prosecutor to correct perjured or misleading testimony elicited by defense counsel. *Compare* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 & cmt. 13 (if witness testifies truthfully on direct, but offers false testimony on cross, lawyer should "urge that the false evidence be corrected or withdrawn but, the "range of obligation imposed by paragraphs (a)(5) and (b) of this Rule *do not apply to such situations*.") *with Alcorta,* 355 U.S. at 31, 78 S. Ct. at 105 (prosecutor failed to correct witness' perjury, though he did not coach the witness to perjure himself).

b) Rule 3.04

- "A lawyer shall not . . . falsify evidence [or] counsel or assist a witness to testify falsely . . . ." TEX. DISCIPLINARY R. PROF. CONDUCT 3.04(b).

II. THE REMEDIES

A. Due Process

- If a due process violation is found based on the withholding of exculpatory evidence, the proper remedy is reversal of the conviction and remand for a new trial. *See, e.g., Ex parte Mitchell*, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997), *cert. denied*, 119 S. Ct. 172 (1998); *Ex parte Mowbray*, 943 S.W.2d 461, 466 (Tex. Crim. App. 1996), *cert. denied*, 117 S. Ct. 2513 (1997) (conviction vacated in habeas proceedings); *Cook v. State*, 940 S.W.2d 623, 627-28 (Tex. Crim. App. 1996) (conviction reversed on appeal); *Carter v. State*, 848 S.W.2d 792, 797 (Tex. App.– Houston [14th Dist.] 1993, pet. ref'd) (motion for new trial granted).

- Reversal and remand is appropriate because reversal for a *Brady* violation is "not punishment for society for the misdeeds of the prosecutor, but avoidance of an unfair trial to the accused." *See Thomas*, 841 S.W.2d at 402 (quoting *Brady*, 373 U.S. at 87, 83 S. Ct. at 1197).

- The Court of Criminal Appeals has held that, even in light of intentional and egregious prosecutorial misconduct resulting in a due process/*Brady* violation, the double jeopardy clauses of both the United States and Texas Constitutions are not implicated and the defendant is subject to retrial. *See Mitchell*, 977 S.W.2d at 579-81.

B. The State Bar Rules

- Violation of the State Bar Rules may result in sanctions as severe as disbarment or as mild as a private reprimand, as well as the payment of attorneys' fees and all direct expenses associated with the disciplinary proceeding. *See Olsen v. Commission for Lawyer Discipline*, 901 S.W.2d 520, 524-25 (Tex. App.–El Paso 1995, no writ); *State Bar of Texas v. Wolfe*, 801 S.W.2d 202, 204 (Tex. App.–Houston [1st Dist.] 1990, no writ); TEX. R. DISCIPLINARY P. 1.06(T) & 3.10 (1992), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (Vernon Supp. 1999).

- Generally, the Texas Code of Professional Responsibility does not afford a criminal defendant any affirmative rights. *See Wilson v. State*, 854 S.W.2d 270, 276 (Tex. App.–Amarillo 1993, pet. ref'd); *Youens v. State*, 742 S.W.2d 855, 860 (Tex. App.–Beaumont 1987, pet. ref'd). *See also Pannell v. State*, 666 S.W.2d 96, 98 (Tex. Crim. App. 1984) ("we now hold that the disciplinary rules of the Code of Professional Responsibility are not laws of the State of Texas as were contemplated by Article 38.23").

- Violations of ethical rules generally do not entitle a defendant to a reversal of his conviction absent a showing of prejudice. *See House v. State*, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997); *Brown v. State*, 921 S.W.2d 227, 230 (Tex. Crim. App. 1996).

- If a defendant can establish that an alleged disciplinary rule violation affected his substantial rights or deprived him of a fair trial, he will be entitled to a reversal of his conviction and a new trial. *See House*, 947 S.W.2d at 253.

- Because the State Bar Rules are broader than the constitutional rules, a prosecutor can violate the State Bar Rules and be sanctioned while at the same time the defendant in the case is denied a new trial based upon the violation. *Cf. United States v. Thomas*, 474 F.2d 110, 112 (10th Cir. 1973), *cert. denied*, 412 U.S. 932 (1973); *United States v. Four Star*, 428 F.2d 1406, 1407 (9th Cir. 1970), *cert. denied*, 400 U.S. 947 (1970) (prosecutors' actions violated ethical rules, but did not void conviction).

*APPENDIX 1**

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CASES GRANTING RELIEF

The following is a list of cases holding generally that the withheld evidence was material. the cases are loosely grouped by topic, but many of these cases could as easily be included under other related headings. This is merely a representative sampling and the reader is reminded that most "Brady" cases are tied to their facts because of the necessity of a finding of materiality.

I. FAILURE TO CORRECT FALSE AND MISLEADING TESTIMONY:

A. False testimony about the deal:

1. Giglio v. United States, 405 U.S. 150 (1972).

2. United States v. Foster, 874 F.2d 491 (8th Cir. 1988). The prosecutor failed to correct false and misleading testimony which was given by witnesses who had made agreements with the government. The failure to correct these misstatements amounted to the knowing use of false testimony by the government and violated the defendant's right to due process.

3. Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986). Prosecution's knowing use of false testimony in failing to disclose witness's tentative plea agreement demands lower threshold than Bagley test; not whether the evidence would reasonably have resulted in an acquittal, but whether the false testimony could in any reasonable likelihood have affected the judgment of the jury.

B. False testimony about seeing the crime:

1. Mills v. Scully, 653 F. Supp. 885 (S.D.N.Y. 1987). At the grand jury, a witness testified that she did not actually see the defendant shoot the victim, but at trial, her memory was apparently refreshed and she testified that she did, in fact, see the shooting. The prosecutor failed to correct this misstatement. Noteworthy in this respect is that the defendant was aware of the grand jury testimony. Nevertheless, the district court in New York held that the prosecutor's failure to correct the misstatement constitutes a violation of Brady.

C. Inconsistent Statements:

1. United States v. Minsky, 963 F.2d 870 (6th Cir. 1992). It was a Brady violation to withhold from the defense the fact that a witness had previously lied to the FBI.

2. Ex Parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989)(en banc). The prosecution did not reveal the discrepancies between the written statement and the testimony of a witness nor did the prosecution correct the witness's testimony that she correctly identified the defendant in a police line up. Also, the prosecution never provided the witness's written statement to the defense. All of the

information combined was exculpatory and should have been disclosed to the defense. Since it was not disclosed, the court set aside the conviction.

D. Prosecution's use of false testimony/statements

1. U.S. v. Kelly, 35 F.3d 929 (4th Cir. 1994). "Conviction acquired through knowing use of perjured testimony by the government violates due process, regardless of whether the government solicited testimony that it knew or should have known to be false, ..." The government failed to produce letter and affidavit which both contained evidence going to victim's credibility.

2. U.S. v. Alzate, 47 F.3d 1103 (11th Cir. 1995). Government made statements to the court at side bar and during cross-examination and knew of falsehoods before case was submitted to jury. ". . . failure of prosecutor to correct his false statements was `material' to defendant's duress defense, and thus, such failure was Brady violation." Remanded for a new trial.

3. Cook v. State, 1996 WL 638229 (Tex. Crim. App. 1996). Appeal from defendant's third trial for capital murder where the first trial resulted in the death penalty and a subsequent reversal, and the second trial resulted in a mistrial. The first two trials were tainted by extreme prosecutorial and police misconduct. Evidence pointing to the guilt of an uncharged suspect was withheld. Evidence that the defendant knew the victim and had previously been to her apartment was suppressed. However, the state argued that the defendant was a stranger and therefore his fingerprint at the scene could only point to his guilt. Further the state failed to disclose material inconsistent statements of a key witness made to the grand jury.

These matters were revealed to the defense prior to the third trial. The court held that although the Brady violations from the first two trials were cured before the third trial, the third trial was tainted by the inclusion of transcript testimony taken in the prior trials of the witness who had given inconsistent statements and had died before the third trial. The court held that this witness could no longer be cross-examined. However, the prior due process violations do not prohibit a fourth trial, although the state has little evidence left.

II. IDENTIFICATIONS:

A. Prior misidentification:

1. McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988). Only one eye-witness identified the defendant. First the eye-witness stated that the assailant was white, though the defendant was black, and then the eye-witness testified that the assailant had shoulder length hair, but later that he had an afro. The prosecutor failed to reveal the prior misidentifications. This misconduct violated Brady and requires reversal of the conviction.

2. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). Prior to being hypnotized, the rape victim could not identify the defendant as the assailant. After being hypnotized, she could. The state was under a duty, pursuant to Brady, to disclose the tapes and other documents of the hypnosis sessions.

3. People v. Simmons, 36 N.Y.2d 126, 325 N.E.2d 139 (1975). The prosecution failed to inform defense counsel of the inconsistent identification made by the sole witness which the court believed to be a violation of Brady. The court reversed the conviction and ordered a new trial.

B. Hesitancy in making identification:

1. United States v. Sheehan, 442 F. Supp. 1003 (D. Mass. 1977). Only eyewitness to see the robbers' faces unmasked during the bank robbery was not called to testify at trial because he hesitated in his identification of the defendant. The court decided that this information should have been provided to the defense as Brady exculpatory evidence.

C. Prior indecisive identification:

1. People v. Wright, 480 N.Y.2d 259 (Sup. Ct. 1984). The sole witness made an uncertain identification of the defendant, but the grand jury was not informed of her indecisive response. The court held that this identification was Brady material because it was the only evidence presented to the grand jury. Since the identification of the defendant was the main issue and the only connector between the perpetrator and the defendant, the indictment was dismissed.

D. Identity of undercover agent not disclosed:

1. Roviaro v. United States, 353 U.S. 53, 77 S. CT. 623 (1957). Reversible error was committed when Court allowed the government to refuse to disclose the identity of an undercover employee who had been present at the occurrence of the alleged crime and who might be a material witness.

III. DEALS

A. Reveal the Deal

1. United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). Three people were caught smuggling drugs. Two defendants went to trial, while the third provided information to the government. The cooperating individual did not testify. During closing argument, the prosecutor argued that the third individual could not be compelled to testify. This was not true; the witness had signed a cooperation agreement and the government withheld this from the defense and the jury. This type of misconduct on the part of the government necessitated reversing the conviction.

2. Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991). The defense counsel made more than one request for exculpatory material including a renewal request at trial. The prosecution made a deal to help the main witness to avoid serving prison time for pending crimes but did not reveal such deal to the defense counsel only hinting that one existed. The court agreed that the prosecutor's actions "created at least a `reasonable likelihood' of affecting its conviction" of the defendant. The court, thus found a Brady violation and affirmed the issuing of a writ of habeas corpus.

3. United States v. LucLevasseur, 826 F.2d 158 (1st Cir. 1987). Trial court may order pre-trial disclosure of all promises, rewards and inducements made to any witness the government intended to call in its case-in-chief.

IV. REPORTS

A. Police Report

1. State v. Davis, 823 S.W.2d 217 (Tenn. Crim. App. 1991). Prosecution erred in not turning over to the defendant the Police Department memo which revealed knowledge of incorrect readings, malfunctions and possible tampering with the intoxilizer machines operated by the Department.

2. Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991). The Fifth Circuit recognized that the prosecution is not only responsible for material exculpatory items in its possession but also "is deemed to have knowledge of information readily available to it." On remand, the court instructed the lower court to hold an evidentiary hearing to determine whether the defense counsel knew of the undisclosed police report from the day of the murder which contained information relevant to impeaching the state's only witness.

B. Lie Detector Tests

1. Carter v. Rafferty, 826 F.2d 1299 (3rd Cir. 1987). Suppressed lie detector reports which revealed that the prosecution's "star witness" was utterly incapable of telling the truth were considered Brady material. (But see Wood v. Bartholomew, S. Ct., supra)

C. Ballistics Report

1. United States ex rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985). Brady was violated when the state failed to provide the defendant with police firearms work sheet showing that on day following the offense a police ballistics test revealed that the gun defendant supposedly used to fire at police was inoperable.

D. Autopsy

1. Anderson v. State of South Carolina, 709 F.2d 887 (4th Cir. 1983). Failure to furnish autopsy report in murder prosecution, despite specific request for report, was not justified by the fact that the report was supposedly available as a public record.

E. Laboratory Reports

1. People v. Kit, 450 N.Y.S.2d 319 (App. Div. 1982). Despite the defenses's request, the prosecution did not tender copies of laboratory reports prior to the close of the trial because essentially, the prosecutor did not believe the information was exculpatory. The court reversed and remanded for a new trial because the information could have aided the defendant.

2. Pennington v. Commonwealth, 577 S.W.2d 19 (Ky. Ct. App. 1984). Neither the police officer nor the coroner informed the defense counsel that the defendant took a blood alcohol test nor did the prosecution produce a copy of the report. The court held that this laboratory report contained material exculpatory evidence and the jury should have seen this information. The court reversed and remanded the case.

F. Medical Report

1. United States v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992). A new trial was required where it was determined that the government, although in good faith, had failed to turn over a psychiatric report which indicated that defendant may have been able to assert an insanity defense.

2. O'Rarden v. State, 777 S.W.2d 455 (Tex. App.--Dallas, 1989, writ ref'd). The prosecution did not provide to the defense a copy of report made by the Department of Human Resources concerning the alleged sexual abuse. The report mentioned a medical examination with a finding that no sexual abuse occurred. The defense previously had requested the production of any exculpatory evidence. The court found upon review that the fairness of the trial was undermined due to the delayed disclosure of the report and therefore affirmed its prior decision to reverse the conviction.

G. Documents protected by federal laws (e.g., FOIA and Trade Secrets)

1. U.S. v. Wood, 57 F.3d 733 (9th Cir. 1995). Defendant requested material under FED. R. CRIM. P. 16. Prosecutor told Court he had given defense everything prosecution had relied upon, but there were some other materials (Investigational New Drug Applications or INDs) protected by FOIA and Trade Secret Laws that only could be released under a strict protective order. Trial court held that what prosecution provided was sufficient and defense did not object. Defendant later discovered contents of INDs not disclosed. Court ruled INDs were Brady material and should have been disclosed to defense.

Further, even though prosecutor did not know contents of INDs at the time of the request, the FDA did and they consulted with the prosecutor. For Brady purposes, FDA and prosecutor were one and the same. Defendant had been convicted, lost his direct appeal, and served his sentence but the court held he still had the right to seek a new trial or dismissal of the charges.

V. MOTIVE TO TESTIFY

A. "There's money in it for me"

1. Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986). On remand after Supreme Court ruling in Bagley, the Ninth Circuit held that reversal was still required because the government failed to disclose that their key prosecution witness was acting under financial inducements.

B. Key witness was beneficiary of insurance policy

1. Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989). The special prosecutor denied the existence of the victim's insurance policy when an oral motion for such information was made before the court. The key witness was the victim's son and the benefactor of the insurance policy if the murder victim was not the first aggressor and thus, this information could have impeached the key witness. The court granted the petition for habeas corpus.

VI. MISCELLANEOUS

A. Witnesses

1. Impeachment of all witnesses

(a) United States v. Bravo, 808 F. Supp. 311 (S.D.N.Y. 1992). Despite the U.S. Attorney's office significant allegations of wrongdoing by the DEA unit involved in the investigation and prosecution of this case, no disclosure was made to the defense. Though none of the allegations involved this case, a new trial was required, because the defense could have impeached the veracity of the lead agent who was the focus of much of the other allegations.

(b) United States v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993). The government supplied inmate witnesses with money, clothing, radios, cameras, gifts, cigarettes, free telephone services, beer, sexually explicit conversation, and contact visits as well as conjugal visits. All this withheld information was important impeachment evidence to show the government witness's bias. A new trial was ordered on due process grounds.

2. Names and addresses of uncalled witnesses

(a) United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984). Names and addresses (but not statements) of eye witnesses to offenses charged in the indictment must be disclosed to defense even though (and perhaps because) the government does not intend to call them at trial. The Court noted that it is appropriate "... to conclude from the fact that the government did not intend to call a witness to the crime that there was a reasonable possibility that such person would be able to provide evidence favorable to the defense."

(b) Collins v. State, 642 S.W.2d 80 (Tex. App.-Fort Worth 1982). The prosecution never informed the defense of a material witness's real name or her whereabouts. The court held that this information was material to the defense and that it was a violation of Brady. Thus, the court reversed and remanded the case.

3. Witness threatened by Prosecutor

(a) Moynaham v. Manson, 419 F. Supp. 1139 (D. Conn. 1976). Prosecution's failure to disclose the fact that the witness was a target of a police investigation into a criminal scheme to deal in stolen televisions, was threatened with prosecution, but was never in fact charged required reversal of defendant's receiving stolen goods conviction.

4. Police officer effected release of main witness

(a) Ex Parte Turner, 545 S.W.2d 470 (Tex. Crim. App. 1977). The prosecution failed to reveal that the police officer aided if not caused the release of the main witness after defense counsel specifically requested any material information. Therefore, the court affirmed the decision of the trial court that the prosecution suppressed material information and set aside the conviction.

5. Failure to provide exculpatory statement of uncalled witness

(a) Thomas v. State, 841 S.W.2d 399 (Tex. Crim. App. 1992). Court adopted Bagley analysis in reversing case because prosecution withheld exculpatory evidence by suppressing a witness statement of a witness who was not called. This witness had made oral statements to the prosecutor that contradicted the two witnesses that the state chose to call.

(b) Flores v. State, 1996 WL 743484, (Tex. App.--San Antonio 1996). The prosecutor's failure to disclose exculpatory statement made by a witness to the prosecutor the day before trial warranted reversal. The prosecution argued that its Brady duty was satisfied because the defense had access to the prosecutor's file, and the file contained the name of the witness, who was available for the defense to interview. The court was not persuaded by the open file argument because the prosecutor's file would not have revealed the witness's oral statement made on the eve of trial.

6. Coercion and manipulation of witness testimony by police and prosecution

(a) Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996). In 1982 a Houston police officer was killed after stopping a car containing two men. A manhunt ensued and about an hour later one of the suspects was killed by officers after he shot one of the pursuing officers. The suspect died on top of the murder weapon and the officer's gun. The defendant, arrested nearby with a gun which was not the murder weapon was prosecuted as the trigger man and given the death penalty. At the habeas hearing, over 10 years later, trial witnesses, who were teenagers at the time, testified about all manner of coercive, suggestive and manipulative tactics of the officers and to some extent the prosecutor. These matters ranged from leaving exculpatory facts out of their written statements to displaying the defendant to them in handcuffs prior to the line-up and allowing them to discuss among themselves the identification of the "shooter" and a reenactment of the crime. Although the trial court and the Court of Criminal Appeals denied relief, the United States District Court found the witnesses' credible at the writ hearing and granted relief. The circuit court upheld the district court's assessment and affirmed the granting of the writ.

B. Government's interest in criminal prosecution was that justice was done, not that they win the case (see Kyles v. Whitley, supra)

1. United States v. Brumel-Alvarez, 976 F.2d 1235 (9th Cir. 1992). The government violated Brady by failing to turn over a memorandum by a DEA agent who severely criticized the operation and the credibility of the informant. Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence.

2. Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). Counsel for the defendant made a general request for production of all exculpatory evidence but the prosecution did not produce a radio log which was clearly an impeachment device for all of the State's witnesses. The court found this failure to disclose was a Brady violation and contributed to the due process violation which caused the court to reverse and grant a writ of habeas corpus.

C. Grand Jury's right to exculpatory evidence

These cases are not necessarily followed in other jurisdictions.

1. United States v. Williams , 899 F.2d 898 (10th Cir. 1990). After it was ordered to provide all Brady material, the government agreed to provide edited portions of the grand jury transcript. The defense then moved to dismiss the indictment because the government failed to present substantial exculpatory evidence. The court upheld the district court's finding that exculpatory evidence was withheld because it was a finding of fact. The court acknowledged that a prosecutor has a duty to present all substantial exculpatory evidence to the grand jury.

2. Page v. Superior Court, County of Marin , 90 Cal. App. 3d 959, 153 Cal. Rptr. 730 (1979). The prosecution did not reveal to the grand jury statements made by the key witness which controverted the charge of kidnaping. the court decided that the special circumstances in the indictment concerning the kidnaping charge should be dismissed.

D. Records/Files

1. Criminal records

(a) Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987). The prosecution's withholding portions of the criminal record of the prosecution's key witness, as well as failing to disclose an agreement the State had with that witness requires a reversal of the defendant's death sentence and, following a further evidentiary hearing on remand, possibly the reversal of his conviction.

(b) In re Ferguson, 5 Cal. 3d 524, 96 Cal. Rptr. 594 (1971). The prosecution did not provide the defendant with copies of the victim/witness's police report which included a felony conviction and commitments to state hospitals for sex offenses. Because the conviction depended upon the credibility of the victims, the evidence in question was material and thus, its suppression gave reason to reverse the conviction and grant a new trial.

2. Probation file

(a) United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988). The Court announced that it would reverse a conviction for a Brady violation where the trial court fails to release information from a witness' probation file if it is found that the information is probative, relevant, and material.

3. Police may not purposefully circumvent Brady rule by maintaining clandestine files

(a) Jones v. Chicago, 856 F.2d 985 (7th Cir. 1988). Certain police files were withheld from the prosecutor so that any exculpatory information in them could not be used. The court in dicta pointed out that this activity will not be tolerated if it is merely to circumvent the Brady rule. This activity helped to impose civil liability in a civil rights action under 42 U.S.C. §1983.

4. Codefendant presentence reports

(a) United States v. Moore, 949 F.2d 68 (2d Cir. 1991). When a defendant requests an opportunity to review a presentence report of an accomplice-witness, the trial court should review the presentence report to determine if there is any exculpatory information, or impeaching information contained therein and whether there is a compelling need to reveal that information to the defendant.

5. Prosecution's "open file" policy

(a) Smith v. Secretary Dept. of Corrections, 50 F.3d 801 (10th Cir. 1995). Petitioner appeals district court's order denying his petition for a writ of habeas corpus under 28 U.S.C. §2254. (Certificate of probable cause to appeal granted, conviction vacated and remanded.) There is a thorough discussion of the aspects of Brady: suppression of the evidence, exculpatory nature of the evidence, and materiality of the evidence.

This case addresses a number of issues as follows: 1) Brady is rooted in the Constitution and not the Federal Rules of Criminal Procedure. The prosecutor has an obligation to ensure that justice is done. 2) However, the prosecution does not have to come forth with every shred of evidence that could conceivably help the defense. 3) "Prosecution" includes not only the prosecutor but also the

prosecutor's office, law enforcement personnel and other arms of the state. 4) While it is best for the defense to make at least a general request, no request at all by the defense does not relieve the prosecution from its obligation to disclose evidence of an obvious exculpatory nature. 5) The more specific request requires a lesser showing of materiality to establish a violation and conversely, the more general (or non-existent) the request, the greater the showing of materiality is required to establish a Brady violation. 6) As the question of disclosure under Brady is a mixed question of law and fact, it is reviewed *de novo*, and the state court's conclusion is not entitled to a presumption of correctness under §2254(d). 7) Defense asked for police **reports** specifically. The prosecution argued that his office had an **open file policy** which discharged its Brady obligation. This court held that while such a policy may suffice to discharge the prosecutor's obligation, "it will often not be dispositive of the issue," e.g., if for some reason a piece of Brady information is in a police file and not actually in the prosecutor's file. 8) True **identity of witness** was in prosecutor's file in a police **report** but was never disclosed to defense. This was a Brady violation. 9) If witness testified under a false name and prosecution did not **correct the false testimony** that would fall under Napue (Prosecution may not knowingly fail to correct information it knows to be false.). Actual knowledge by the prosecution was not necessary as police officer had the information and the knowledge is imputed to the prosecution under Brady. 10) Clothing found in vehicle was material. Defense had no way of knowing the clothes were there as they received no police **report** and the evidence tag simply stated "article from vehicle accident." No testing on the clothing was ever done to generate a **lab report. Open file policy** insufficient to discharge Brady obligation.

(b) Givens v. State, 749 S.W.2d 954 (Tex. App.--Fort Worth 1988). Court held "if the prosecutor opens his files for examination by defense counsel, he fulfills his duty to disclose exculpatory evidence."*citing* Diaz v. State, 722 S.W.2d 482, 490 (Tex. App.--San Antonio 1986), reversed on other grounds. However, in this case the exculpatory evidence was in the file and further the defense attorney knew of it prior to trial. So, no harm, no foul.

6. Medical reports

(a) Ham v. State, 760 S.W.2d 55 (Tex. App.--Amarillo, 1988). The court found that the prosecution withheld the evidence of a doctor's report which contradicted the doctor's report presented at trial. Despite a request for all exculpatory material, the prosecution did not present the report to the defense although it could have been of material importance to the defense. The Court then ordered a new trial.

E. Statements

1. Prior inconsistent statements

(a) Jacob v. Singletary, 952 F.2d 1282 (11th Cir. 1992). The government violated Brady by failing to reveal to the defense that a witness, in a prior statement to a polygrapher, had stated that he was not sure who shot the gun. This was inconsistent with the witness's trial testimony. This was material evidence and withholding it required a new trial.

(b) United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989). At sentencing, the government furnished information in the PSI that the defendant was responsible for distributing 50 to 70 pounds of cocaine. The government withheld evidence that the witness had made a prior inconsistent statement suggesting that the defendant was responsible for a much smaller amount of cocaine. The sentence had to be set aside based on this improper withholding of evidence.

(c) Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985). State prosecutor's failure to disclose police report in which one of the eyewitnesses had initially indicated that he did not see the killer's face and could not identify him was a denial of due process where the eyewitness later changed his story after the victim's sister placed reward notices in the local newspaper.

(d) Ex Parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989) cert. denied 498 U.S. 817, 111 S. Ct. 61, 112 L. Ed. 2d 35 (1990). The court looked at the totality of circumstances involving the investigation into the crime. The detective failed to inform the defense of a witness who possessed contradicting evidence of that presented to the court. Also, inconsistent statements provided by the witnesses were not provided to the defense. The court found that the accused was not given a fair trial as required by Brady and ordered the release of the accused. Essentially, the court was appalled at the farce of an investigation that occurred.

2. Prior consistent statements of accused

(a) United States v. Severdija, 790 F.2d 1556 (11th Cir. 1986). Coast Guard officers interviewed defendant during search of vessel; failure to disclose prior consistent statements of an exculpatory nature require reversal.

3. Exculpatory statement of codefendant eyewitness

(a) United States v. Yizar, 956 F.2d 230 (11th Cir. 1992). Though an evidentiary hearing was necessary to develop the facts, the defendant made a colorable claim that the government violated Brady by failing to disclose to the defense that just prior to being brought into the grand jury, the co-defendant told the prosecutor that the defendant was not guilty of the arson with which he was charged.

(b) Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978). Statement of codefendant eyewitness, who the state declared a material witness for trial, did not mention the defendant being present at time of shooting which was a potentially exculpatory statement and should have been furnished to defense counsel upon timely demand for all exculpatory statements and all statements made by codefendant.

F. Evidence

1. Destruction of exculpatory evidence

(a) People v. Springer, 504 N.Y.S.2d 232 (App. Div. 1986). The court dismissed the indictment against the defendant due to the destruction by the police of possible exculpatory photographs. Counsel for the defendant made a general request for any Brady material. The sole issue, according to the court, was the

identification of the robber and the other evidence against the defendant was not overwhelming. The destruction of the photographs was reversible error.

(b) People v. McCann, 455 N.Y.S.2d 212 (Sup. Ct. 1982). Upon request, the defense learned that the police had failed to preserve blood scrapings and had failed to test them properly. The blood was potentially exculpatory evidence material to the issue of guilt and thus the failure to preserve it was reason for reversal.

2. Experts

(a) People v. Johnson, 38 Cal. App. 3d 228, 113 Cal. Rptr. 303 (1974). In light of the shaky evidence presented to convict the defendant, the court decided that withholding the experts' names who would corroborate the defendant's theory was suppression of material information and thus was reversible error.

(b) Ex Parte Lewis, 587 S.W.2d 697 (Tex. Crim. App. 1979). The prosecution never divulged to the appointed defense counsel the existence of a doctor's letter expressing the opinion that the defendant was insane. Therefore, the court held that this information was exculpatory and affected the defendant's guilty plea in same manner as it would affect the defendant's fair trial. The court reversed the judgment.

(c) Ex Parte Mowbray, 1996 WL 726999 (Tex. Crim. App. 1996). In Habeas proceeding, defendant was granted new trial. Prosecution hired blood spatter expert whose report tended to support the defense theory, and negate the prosecution's theory. Evidence suggested that prosecutor knew of the exculpatory nature of the expert's report seven months prior to trial, but did not forward report to defense until ten days prior to trial, and prosecutor subpoenaed the expert but did not call the expert at trial. Further, the prosecution called a second expert who later admitted that his testimony was scientifically invalid. This is an unusual case because the defendant's attorney did eventually receive the exculpatory report prior to trial. However the Habeas court ruled that under the totality of these circumstances the defendant was denied due process.

3. Bad faith failure to collect evidence

(a) Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989). A police officer's bad faith failure to collect evidence at the scene of a crime may constitute a Brady violation. A hearing is necessary to determine whether the failure to collect potential exculpatory evidence is a result of an investigator's bad faith. In this case, the law enforcement officer failed to collect and analyze the blood stained jacket of the victim after interviewing her at her apartment less than twenty-four hours after the attack.

G. Collusion between defense counsel and police investigator known to prosecution

1. Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990). The court granted the defendant's motion for an evidentiary hearing on his Brady claims because the information sought could be material to the defense. The defendant alleged that his confession was induced by the defense counsel, the

police investigator and the defense psychologist who were in collusion to write a book about the serial murderer.

H. Tape recordings

1. United States v. Latham, 874 F.2d 852 (1st Cir. 1989). Although the police claimed the transaction was not taped completely due to a malfunction in the equipment, the court decided that the tapes must be turned over to the defense because it may be used to impeach or invalidate the police officers' testimony. The court ordered the tapes turned over to the defense but also reversed and remanded for other due process reasons.

I. Insanity defense

1. Miller v. Angliker, 848 F.2d 1312 (2nd Cir. 1988). Prosecution must turn over exculpatory evidence to defense where defendant pleads not guilty by reason of insanity.

J. Suspects

1. Snitch as suspect

(a) Kee v. State, 666 S.W.2d 199 (Tex. App.--Dallas 1983). The trial court's refusal to order the state to disclose the name of its informant was reversible error. It was the defendant's theory that he had been set up for the crime by a particular individual, and if the informant was in fact the individual named by the defendant, such fact, together with the individual's inability to deny that he was the informant, would have been material to the defense by enabling the defendant to contradict the individual's anticipated denial that he was the informant or was involved in the matter at all. The Court of Appeals reversed and remanded for a new trial.

(b) Bowen v. Maynard, 799 F.2d 593 (8th Cir. 1986). Prosecution should have provided the considerable evidence in their files that a former police lieutenant had been a "primary initial suspect" in the triple murder for which defendant was convicted as such evidence could have contradicted the identification testimony at trial.

2. Possibility of multiple suspects

(a) Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). Failure to furnish defense with FBI reports indicating that there were multiple suspects in a kidnaping/murder case did not affect the jury's conviction of defendant for first degree murder, but "might have affected" the jury's decision to impose the death penalty.

K. Codefendant

1. Codefendant meets informant

(a) United States v. Vastola, 680 F. Supp. 709 (D.N.J. 1988). Defendant entitled to an evidentiary hearing to determine whether the Government possessed exculpatory surveillance evidence showing a co-defendant meeting an informant.

2. Propensity for violence of codefendant

(a) Troedel v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986). State failed to disclose instances of co-defendant's propensity for violence despite State's knowledge that defendant's theory was that it was the co-defendant who had motive, intent and violent nature.

L. Brady rule applies to the police as it does to prosecutors

1. Ex parte Castellano, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993) (en banc). A police officer in an arson investigation acted under color of law and therefore was a member of the prosecution team. Thus, his knowledge of perjured testimony of the state's witness was imputable to the prosecution. The state's use of this testimony was material and violated due process.

2. People v. Lumpkins, 533 N.Y.S.2d 792 (Sup. Ct. 1988). The police failed to reveal a Crime Stopper phone call which provided information that the defendant had not committed the crime. The court found that Brady applied to any material with "high exculpatory potential" and the duty of one law enforcement agency can be imposed upon another. Thus, the court reversed the conviction and granted a new trial.

3. State v. Johnson, 223 Kan. 119, 573 P.2d 976 (1977). The investigating detective testified at trial referring to his "field notes", but the "field notes" contained information which was not in his official report including the name of a non-testifying witness. Even though the court noted that there was no way to know if the testimony or notes would be favorable to the defendant, it held that the detective was obligated to disclose the name and address of the witness although the prosecutor had no knowledge of the witness. The court reversed the trial court and remanded to grant a new trial.

M. Victim had civil lawsuit against defendant

1. People v. Wallert, 469 N.Y.S.2d 722 (App. Div. 1983). The prosecution failed to inform defendant or the jury of the victim's civil lawsuit. Moreover, at trial the defendant was forced to admit that the victim had no reason to falsify rape charges against him. The court decided that the civil lawsuit was Brady material and thus, the conviction should be reversed because the defendant was never informed.

N. Information kept from defense after in camera inspection

1. Ridyolph v. State, 503 S.W.2d 276 (Tex. Crim. App. 1974). The defense counsel requested any favorable information which could help the accused, and the prosecution gave its file to the trial court for an in camera inspection. The trial court found one item in the file to be exculpatory but failed to mention the item in question which addressed the main issue at trial. The appellate court decided that this information about a witness was material and the district attorney had a duty to present it to the defense. A new trial was granted.

O. Prosecutor's duty to search

1. Exline v. Gunter, 985 F.2d 487 (4th Cir. 1993). In a child sex abuse case, the trial court should review the social worker's file to determine if there is any exculpatory evidence contained in the file.

2. United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992). Where there is an explicit request for an apparently very easy examination, and a non-trivial prospect that the examination might yield material exculpatory information, the prosecutor has the duty to search not only its files, but also the files of other agencies, including those of the Police Department and the Internal Affairs Division.

3. U.S. v. Lacy, 896 F. Supp. 982 (N.D. Cal. 1995). "Contrary to Jennings [U.S. v. Jennings, 960 F.2d 1488 (9th Cir. 1992)], this court reads Kyles [Kyles v. Whitley, 514 U.S. 419, 115 S. CT. 1555, 131 L. ED. 2D 4990 (1995) as holding that our constitution places the burden squarely on the prosecutor, not on agency clerks, functionaries and non-prosecuting attorneys. . . ." to be ultimately responsible for turning over exculpatory material. The prosecutor "will be burdened with reviewing materials and making a judgment call on what is and is not necessary to turn over."

4. In United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). The court held that the defendant has the right to have law enforcement agents' personnel files reviewed for evidence of misconduct if the agent is called as a witness in the trial. The duty to review the file, however, need not be undertaken personally by the AUSA prosecuting the case.

5. United States v. Joseph, 996 F.2d 36 (3d Cir. 1993). If the prosecutor has actual knowledge of exculpatory evidence located in unrelated files, he must turn it over to the defense. If the prosecutor only has constructive knowledge of exculpatory evidence in unrelated files, he has no duty to find it unless the defense makes a specific request which specifically identifies the desired material and which is objectively limited in scope.

6. United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991). There was no evidence of a prosecution witness's record in the NCIC; however, the local records (in the Virgin Islands) contained a criminal record of the witness. The prosecutor had the duty to ascertain whether such a record existed. The fact that the public defender's office had previously represented the witness does not alter the result.

P. Application in Suppression Hearings

1. United States v. Barton, 995 F.2d 931 (9th Cir. 1993). The court held that in order to protect the defendant's Fourth Amendment right of privacy, the due process principles announced in Brady and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant.

*APPENDIX 2**

***Reprinted verbatim and with permission from Tim Evans and Jennifer Tourje, authors of *Enforcing Brady, Giglio & Kyles*, a paper presented at the 1999 Joint Ethics Seminar sponsored by the Tarrant County Criminal Defense Lawyers Association and the Tarrant County District Attorney's Office.**

CASES DENYING RELIEF

I. Circuit Court of Appeals

1. United States v. Sotelo, 97 F.3d 782 (5th Cir. 1996). During trial a government narcotics agent who testified at trial learned that one of the government's "cooperating" witnesses was still involved in drug trafficking. He told a prosecutor, but allegedly not the trial prosecutor. A few days after trial the trial prosecutor learned of this and notified the defense. The court ruled that under the facts of this case, the withheld evidence did not meet the Kyles materiality test because the witness' testimony at trial was corroborated by surveillance officers and a recorded conversation setting up the drug purchase.

2. Kopycinski v. Scott, 64 F.3d 223 (5th Cir. 1995). The state failed to disclose that a witness had received a $1,000 Crimestopper reward and that he had an additional conviction for felony theft. The state also failed to correct the witness' false testimony concerning this. The court ruled that even though the state was obligated to disclose these matters, the violation was not material under Kyles because the witness was otherwise corroborated by other witnesses. The court also noted that there was no evidence indicating that the witness was involved in the murder so his story that the defendant showed him the body was corroborated when he showed police where it was located.

3. Westley v. Johnson, 83 F.3d 714 (5th Cir. 1996). The defendant was not given a supplemental report showing that a witness did not identify the type of gun at issue. The court, applying the Kyles test of "undermining confidence in the verdict" held that similar exculpatory evidence was contained in other statements of the witness that were given to the defense. Further, the defendant's claim that he should have been provided conflicting witness statements from the co-defendant's trial transcript was denied because a trial transcript is equally available to the defendant.

4. Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994). In this death penalty case the defendant claims that the failure of the state to produce a co-defendant's statement was a Brady violation. The defendant claimed he fired his gun by accident after the co-defendant's gun went off. The court, using the pre-Kyles test of a "probability that the result would be different", held that there was sufficient evidence at trial from other sources that the defendant fired after the co-defendant's gun went off for the jury to have considered the issue and rejected it. (The co-defendant's statement did say that the co-defendant dropped his gun and it discharged accidently and thereafter he heard defendant's gun fire.) The court also noted significantly, that the defendant's attorney knew that the co-defendant had given a statement and merely accepted the state's refusal to turn it over without asking for a court order, or trying to get it fromthe co-defendant's lawyer. It is not clear what effect this situation would have had if the court had ruled that the statement had contained "material" exculpatory evidence.

5. United States v. Aichele, 941 F.2d 761 (9th Cir. 1991). The government did not provide the defense counsel with a transcript of a main witness's statement which contained impeaching materials until just prior to trial. The Court held that because there was a three week break in the trial, there was

no prejudice in the preparation of his defense. "Even assuming the government's disclosure was incomplete and untimely, there was no Brady violation."

6. Tejada v. Dugger, 941 F.2d 1551 (11th Cir. 1991). The Eleventh Circuit concluded that nondisclosure of information that the government's main witness (and the defendant's ex-girlfriend) was arrested on a probation-violation warrant on the day before the trial began was immaterial. The witness testified about her probation violation on direct and cross. It was harmless error according to the court because there is no reasonable probability that disclosure of the arrest would have changed the result of the proceeding.

7. United States v. Comosona, 848 F.2d 1110 (10th Cir. 1988). The defense moved for production of all beneficial statements which was granted by the court. The defense learned at trial that a possible eyewitness made statements to the government which had not been produced before trial. The court upheld the trial court's decision that none of the statements were exculpatory. Also, the court declined to extend the Brady doctrine to statements which did not contain "any expressly exculpatory material" although the defense argued the statements could have shown discrepancies inferring someone else was guilty.

8. United States v. Presser, 844 F.2d 1275 (6th Cir. 1988). Government need not disclose impeaching material in its possession relating to any potential defense witness where that impeaching material does not meet the Brady test of being material and exculpatory.

9. United States v. Wilson, 798 F.2d 509 (1st Cir. 1986). Defendant, who failed to include alleged Brady material in appellate court record, was not entitled to "exculpatory" evidence not in possession of government but in hands of private company of which defendant was a part owner.

10. Patterson v. Black, 791 F.2d 107 (8th Cir. 1986). Applying Bagley test, the court held that failure to disclose the absence of skin or blood on keys allegedly used by the victim to scratch the defendant did not create a reasonable probability that the result of the trial would have been different as the keys were not the only evidence the prosecution used against the defendant.

11. United States v. Jackson, 780 F.2d 1305 (7th Cir. 1986). Failure to disclose that government informant who took job as undercover snoop for oil company in fuel oil theft investigation was receiving payment from the oil company was not exculpatory material as oil company would base its judgment on informant's usefulness as an informant on how instrumental he was in apprehending persons who stole from company and not on whether the defendants were ultimately convicted, thus eliminating informant's motive to lie in order to curry favor with oil company.

12. United States v. Ben M. Hogan Co., Inc., 769 F.2d 1293 (8th Cir. 1985). Failure to turn over notes taken by government attorneys during interviews with witnesses did not require reversal under Bagley standard of review.

13. United States v. Breit, 767 F.2d 1084 (4th Cir. 1985). Prosecution's failure to disclose alleged discrepancies between government witness's testimony and potential government witness's version of drug transaction was not Brady violation as at best; potential witness recollection was either "consistent with [witness's] testimony or so vague and self-contradictory that its impeachment value was nil."

14. Ruiz v. Cady, 710 F.2d 1214 (7th Cir. 1983). Agreement between state and witness which "merely" required witness to repeat testimony given at preliminary hearing in exchange for

recommendation for a change of witness' place of incarceration did not provide witness with a "motive to lie" and did not need to be disclosed sua sponte to defense counsel.

15. U.S. v. Woodley, 9 F.3d 774 (9th Cir. 1993). Prosecution's late disclosure of exculpatory material did not materially prejudice defendant, where he used all of disputed evidence at trial, and court allowed him to depose witnesses linked to exculpatory material. Defendant timely raised claim of prejudice as it was raised in sufficient time for the court to rule on it.