DIGEST OF FEDERAL CASES (IN THE PAST 20 YEARS) REVERSED OR DISMISSED FOR PROSECUTORIAL MISCONDUCT AND/OR *BRADY* VIOLATIONS

United States v. Sedaghaty, 728 F.3d 885, 898-90 (9th Cir. 2013) ("As the district court found, 'the only direct evidence about [defendant's] desire to fund the mujahideen,' came from Barbara Cabral, a witness who the prosecution showcased as critical. Despite a defense request, the government withheld material, significant, and non-cumulative impeachment evidence about Cabral, including government payments and interview notes. This *Brady* violation therefore merits a new trial.").

Aguilar v. Woodford, 725 F.3d 970, 984-85 (9th Cir. 2013) ("A reasonable state court would have concluded that there was a reasonable probability that the jury would have reached a different verdict if [officer's] dog scent identification had not been presented to the jury, or had been impeached by the evidence of [officer's] earlier misidentifications and [prior] court stipulations. The gunman's identity was the only issue in Aguilar's case. Absent [the officer's] dog scent testimony, there was no corroborating evidence for the shaky eyewitness identifications. There was no forensic evidence, murder weapon, or confession.")

LaCaze v. Warden Louisiana Correctional Inst. for Women, 645 F.3d 728, 737 (5th Cir. 2011) ("The materiality inquiry does not turn on which of two competing source of bias a court, in hindsight, determines the jury would have considered more important. Rather, the inquiry is whether an undisclosed source of bias—even if it is not the only source or even the 'main source'—could reasonably be taken to put the whol case in a different light.").

Breakiron v. Horn, 642 F.3d 126, 134-35 (3d Cir.2011) (jailhouse informant's testimony was material to a conviction and the Commonwealth's failure to disclose impeachment evidence relevant to the witness in violation of *Brady* warranted reversal).

United States v. Kohring, 637 F.3d 895, 901 (9th Cir. 2011) (reversed for new trial; withheld evidence would have provided the defendant with numerous original avenues for impeachment of the prosecution's star witnesses).

United States v. Delgado, 631 F.3d 685, 711 (5th Cir. 2011) (reversal for new trial where "an aggregation of errors" including "misconduct by members of the prosecution team" deprived the defendant of a fair trial).

Robinson v. Mills, 592 F.3d 730, 738 (6th Cir. 2010) (holding that evidence is "material under *Brady* because Sims was the [government]'s star witness and only her testimony contradicted or undermined" defendant's theory of the case).

Simmons v. Beard, 590 F.3d 223, 233-38 (3d Cir. 2009) (habeas relief granted for series of *Brady* violations related to nondisclosure of both impeachment and other favorable evidence as to key witness for the prosecution).

Wilson v. Beard, 589 F.3d 651, 658 (3d Cir.2009) ("In light of the importance of the testimony of these three witnesses and the significant impeachment value of the undisclosed information, we

conclude that [defendant's] right to due process, as set forth in *Brady*, was violated by the Commonwealth's failure to disclose this information.").

United States v. Reyes, 577 F.3d 1069, 1078 (9th Cir. 2009) (reversal for new trial in "backdating options" case where "prosecution argued to the jury material facts that the prosecution knew were false, or at the very least had strong reason to doubt").

Douglas v. Workman, 560 F.3d 1156, 1172-76 (2009) (reversal where prosecutor withheld "impeachment" evidence undermining "the witness who held the key to the successful prosecution of" the defendant).

United States v. Stevens, No. 1:08-cr-00231-EGS (D.D.C. April 7, 2009) (setting aside convictions of Senator Ted Stevens and ordering criminal contempt investigation on basis of prosecutorial misconduct).

Harris v. Lafler, 553 F.3d 1029, 1032-36 (6th Cir. 2009) ("Nor was [witness'] testimony one damning piece of evidence among many; it was the only piece of eyewitness evidence that directly linked [defendant] to the shooting. Without [witness'] testimony, the prosecution's case was circumstantial: None of the other witnesses could identify the gunman or place [defendant] at the scene, and there was no forensic or physical evidence connecting [defendant] to the crime.")

United States v. Shaygan, 661 F.Supp.2d 1289, 1322 (S.D.Fla. 2009) (Ordering monetary sanctions and public reprimand against government attorneys where "conscious and deliberate wrongs [] arose from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held").

United States v. Triumph Capital Group, 544 F.3d 149, 161-65 (2d Cir. 2008) (new trial for *Brady* violations where suppressed evidence, going "to the core of its[] case," included facts "entirely at odds with the government's theory of the case at trial").

United States v. Aviles-Colon, 536 F.3d 1, 19-21 (1st Cir. 2008) (suppressed impeachment evidence was material under *Brady* and required a new trial where verdict was entirely contingent on witness' testimony, and there was "no forensic evidence, eyewitness identification, statement, seized evidence or anything else to tie [defendant] to the[]conspiracy").

United States v. Gracia, 522 F.3d 597, 603 (5th Cir. 2008) (reversal for new trial where repeated instances of prosecutorial misconduct "cast serious doubt on the correctness of the jury's verdict").

United States v. Stein, 541 F.3d 130 (2d Cir. 2008) (Dismissal order affirmed: "We further hold that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation.").

Mahler v. Kaylo, 537 F.3d 494, 500 (5th Cir.2008) (reversal for Brady violation where state's case depended on witness whose statements were suppressed).

Tassin v. Cain, 517 F.3d 770, 781 (5th Cir. 2008) ("[f]inding a Fourteenth Amendment violation under the clear precedent of *Giglio*, *Napue*, and *Brady*," where government repeatedly "capitalized on [] testimony" that was undermined or refuted by evidence it withheld).

United States v. Zomber, 299 Fed.Appx. 130, 134-36 (3d Cir. 2008) (reversal for new trial where government violated Jencks Act)

United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007) ("Government must make [*Brady*] disclosures in sufficient time that [Defendant] will have a reasonable opportunity" "either to use the evidence in the trial or use the information to obtain evidence for use in the trial.")

DiSimone v. Phillips, 461 F.3d 181, 195 (2d Cir. 2006) ("The information in [witness'] affidavit was clearly *Brady* material. In a case in which not a single witness actually saw [defendant] stab the victim, evidence that another person had confessed to the stabbing was unmistakably exculpatory; it was 'of a kind that would suggest to any prosecutor that the defense would want to know about it.'").

United States v. Ferrara, 456 F.3d 278, 293 n.11 (1st Cir. 2006) ("When the government responds incompletely to a discovery obligation, that response not only deprives the defendant of the missing evidence but also has the effect of misrepresenting the nonexistence of that evidence.").

Graves v. Dretke, 442 F.3d 334, 344 (5th Cir. 2006) (because "state suppressed two statements of Carter, its most important witness that were inconsistent with Carter's trial testimony, and then presented false, misleading testimony at trial that was inconsistent with the suppressed facts, we have no trouble concluding that the suppressed statements are material").

United States v. Quattrone, 441 F.3d 153, 180-81 (2d Cir. 2006) (reversing convictions for obstruction and witness tampering: the erroneous admission of the email and the government's rank abuse of it "could unduly inflame the passion of the jury, confuse the issues before the jury, or inappropriately lead the jury to convict on the basis of conduct not at issue in the trial").

Conley v. United States, 415 F.3d 183 (1st Cir. 2005) (reversing conviction where undisclosed FBI memorandum contained information not reflected in witness's grand jury testimony).

United States v. Leung, 351 F.Supp.2d 992, (C.D.Cal. 2005) (Dismissal ordered: "The government has engaged in wilful and deliberate misconduct, depriving defendant of her right of access to a critical witness in her defense.");

United States v. Sipe, 388 F.3d 471 (5th Cir. 2004) (Even evidence that is (presumably) inadmissible at trial may be material for *Brady* purposes– and thus must also be disclosed where it is favorable to the accused).

United States v. Lyons, 352 F.Supp.2d 1231, 1243 (M.D.Fla. 2004) (Ordering dismissal of indictment with prejudice: "myriad [*Brady* and *Giglio*] violations that collectively reveal a prosecution run amok").

Monroe v. Angelone, 323 F.3d 286, 315-17 and n.61 (4th Cir. 2003) ("*Brady* violation undeniable, and a new trial mandated, where prosecutors "stressed" and "insisted" on "facts" during closing argument that were "significantly undermined" by suppressed evidence. Under such circumstances, and because of the prosecutors' demonstrated violation, "it is impossible to say that [defendant] received a fair trial.").

United States v. Blueford, 312 F.3d 962, 968 (9th Cir.2002) ("We conclude that the government in this case failed, both at trial and thereafter, to fulfill its responsibility to 'discharge its responsibilities fairly, consistent with due process,' and that its failure to do so was not harmless.").

Mendez v. Artuz, 303 F.3d 411, 412-14 (2d Cir.2002) (evidence was material under *Brady* and was wrongfully withheld, noting that it "supplie[d] a possible alternative perpetrator and motive" while the government's theory of motive was "weak and unlikely").

United States v. Gil, 297 F.3d 93, 103-04 (2d Cir. 2002) (ordering a new trial where suppressed evidence "b[ore] importantly on the central issue at trial," and the prosecutor attacked the defendant's credibility for testifying about facts which were supported by evidence the government improperly withheld).

Leka v. Portuondo, 257 F.3d 89, 103 (2d Cir. 2001) ("without substantive disclosure by the prosecution, the supposed failure by the defense to petition for leave to seek out [witness] cannot fairly be seen as a default or neglect, or even as an election.... to call a witness cold, [] would be suicidal.").

Nuckols v. Gibson, 233 F.3d 1261, 1266-67 (10th Cir. 2000) ("Because impeachment of the witness who held the key to successful prosecution was denied to the defense, we have no doubt Petitioner suffered prejudice as a consequence.").

United States v. Service Deli, 151 F.3d 938, 942–44 (9th Cir.1998) (reversing conviction when the prosecution's *summary* of undisclosed evidence was misleading).

United States v. Dollar, 25 F. Supp. 2d 1320, 1331-32 (N.D. Ala. 1998) (dismissal with prejudice was the appropriate remedy where the government "flagrantly [] breach[ed] its unquestioned [Constitutional] obligation to produce exculpatory and impeachment materials." "[T]he United States has defaulted on its fairness obligation in this case. In its determined effort to convict the defendants, the United States has trampled on their constitutional right to *Brady* materials. ... the United States has disregarded its constitutional and statutory obligations to the defendant and its ethical obligation to the court."). In *Dollar*, the Court concluded:

> From the outset of this case, defense counsel have been unrelenting in their effort to obtain *Brady* materials. The United States' general response has been to disclose as little

> as possible, and as late as possible-even to the point of a post-trial *Brady* disclosure. That the *Brady* materials are highly probative cannot be gainsaid; the United States has not questioned the probity of these materials.**** The United States has also breached the duty of professionalism and candor owed to the court .... Even [] after having assured the court that it had produced all *Brady* materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses.

Id.

United States v. Fisher, 106 F.3d 622, 635 (5th Cir. 1997) (new trial ordered for *Brad*y error where defendant did not attempt to call witness; withheld testimony contradicted critical witness against defendant and government's failure to produce evidence was directly responsible for defendant's trial and evidentiary decisions), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753 (2000).

United States v. Ramming, 915 F. Supp. 854, 867-69 (S.D.Tex. 1996) (Dismissal ordered: "Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path.").

United States v. Udechukwu, 11 F.3d 1101, 1102, 1105-06 (1st Cir. 1993) ("[H]ere we find a kind of double-acting prosecutorial error: a failure to communicate salient information, which, under *Brady* . . . and *Giglio* . . . should be disclosed to the defense, and a deliberate insinuation that the truth is to the contrary.").

United States v. Garland, 991 F.2d 328, 330 (6th Cir. 1993) (new trial ordered where suppressed testimony was "obviously material," and "corroborated [defendant's] story").

United States v. Salerno, 937 F.2d 797, 807 (2d Cir.1991) ("To say that the government satisfied its obligation under *Brady* by informing the defendants of the existence of favorable evidence, while simultaneously ensuring that the defendants could neither obtain nor use the evidence, would be nothing more than a semantic somersault."), *reversed on other grounds*, 505 U.S. 317 (1992).

DIGEST OF ADDITIONAL FEDERAL CASES WHICH RECOGNIZE THAT DISMISSAL IS AN APPROPRIATE REMEDY FOR EGREGIOUS PROSECUTORIAL MISCONDUCT AND/OR *BRADY* VIOLATIONS.

United States v. Russell, 411 U.S.423, 431-32, 93 S. Ct. 1637, 1643 (1973) (outrageous prosecutorial misconduct in violation of due process may operate to "bar the government from invoking judicial processes to obtain a conviction").

Gov't of the Virgin Islands v. Fahie, 419 F.3d 249, 255 (3d Cir. 2005) (Dismissal with prejudice for prosecutorial misconduct in the withholding of *Brady* material appropriate where "a defendant can show both willful misconduct by the government, and prejudice").

United States v. Strouse, 286 F.3d 767, 771-76 (5th Cir. 2002) (dismissal appropriate where government misconduct in knowingly sponsoring false testimony corrupts process and prejudices the Defendant).

United States v. Johnson, 26 F.3d 669, 683 (7th Cir. 1994) (Dismissal appropriate where the conviction could not have been obtained but for the failure to disclose the exculpatory evidence).

United States v. Bohl, 25 F.3d 904, 906, 914 (10th Cir. 1994) (Dismissal with prejudice where "government denied [defendants] a meaningful opportunity to present a defense by intentionally disposing of potentially exculpatory and highly probative evidence in the face of [defendants] repeated requests for pretrial access to that evidence").

Demjanjuk v. Petrovsky, 10 F.3d 338, 339, 352-54 (6th Cir. 1993) (prosecutorial misconduct, in the failure to disclose exculpatory evidence, which "seriously misled the court," where government attorneys "acted with reckless disregard for the truth and the government's obligation to take no steps that present an adversary from presenting his case fully and fairly").

United States v. Cooper, 983 F.2d 928, 929 (9th Cir. 1993) (dismissal with prejudice where government, in bad faith, destroyed potentially exculpatory evidence; "no alternative [means to support their defense] matches the potentially powerful exculpatory evidence destroyed by the government").

United States v. Shaffer Equipment Co., 11 F.3d 450, 462 (4th Cir. 1993) ("[T]he inherent power to dismiss a case for the misconduct of counsel is undoubtedly clear.").

United States v. Welborn, 849 F.2d 980, 985 (5th Cir. 1988) (supervisory power of the federal courts "include[s] the power to impose the sanction of dismissal with prejudice [] in extraordinary situations [] where the government's misconduct has prejudiced the defendant.").

United States v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir. 1986) (Dismissal with prejudice is proper where prosecutor's "deceptive conduct is willful, in bad faith, or relates to the matters in controversy in such a way as to interfere with the rightful decision of the case").