

**ONGOING DUTY TO DISCLOSE EXCULPATORY EVIDENCE CASES**  
**(Updated September 27, 2009)**  
**\* capital case**

**I. FEDERAL CASES**

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

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

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

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

proved guilty after a fair trial does not have the same liberty interests as a free man.” The “presumption of innocence” is gone. The State “has more flexibility in deciding what procedures are needed in the context of postconviction relief.” Post-conviction due process rights are “not parallel to” trial due process rights. In post-conviction, the convicted “has only a limited interest in postconviction relief.” In this light, “*Brady* is the wrong framework.”

**Imbler v. Pachtman,**  
**424 U.S. 409 (1976)**

"[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7-13 (1969); ABA, Standards, supra, § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of habeas corpus."

**\*High v. Head,**  
**209 F.3d 1257 (11th Cir. 2000)**

The State's duty to disclose exculpatory material is ongoing.

**Thomas v. Goldsmith,**  
**979 F.2d 746 (9th Cir. 1992)**

"We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding."

**\*Bowen v. Maynard,**  
**799 F.2d 593 (10th Cir. 1986)**

"We also agree, and the State concedes, that the duty to disclose is ongoing and extends to all stages of the judicial process."

**United States v. Piers,**  
**2005 WL 2122126 (D. Alaska. July 25, 2005)**

In § 2255 proceeding where petitioner sought full discovery of prosecution and law enforcement files, court found that petitioner was entitled to have prosecutor revisit files for any Brady material that was not disclosed during trial, including: evidence of any “side deals,” evidence regarding decision whether to prosecute chief witness’ sister, certain fingerprint evidence, and evidence related to a person named “Adam” known to law enforcement with regard to this case. In camera review was not deemed necessary unless prosecutor attempted to rely on work product privilege. Law enforcement officers were also ordered to provide affidavits indicating compliance

with Brady.

## II. STATE CASES

**\*Curl v. Superior Court,**  
**44 Cal. Rptr.3d 320 (Cal. App. 2006)**

Citing *Imbler v. Pachtman*, court holds that prosecutor has ethical obligation to disclose any information casting doubt on conviction. Remanded for further proceedings related to post-conviction discovery request pursuant to state statute.

**\*Duckett v. State,**  
**918 So.2d 224 (Fla. 2005), cert. denied, 549 U.S. 846 (2006)**

Noting existence of continuing duty to disclose, but finding that under the circumstances of this case, petitioner's *Brady/Kyles* motions would be successive.

**People v. Rawl,**  
**2005 WL 2374747 (Cal. App. Sept. 28, 2005) (unpublished)**

In drunk driving case where defendant learned after his conviction on three of four counts that law enforcement had launched an investigation of the officer who operated the spectrometer in his case for alleged mistakes in drug analysis in other cases, the court of appeal noted that the state's continuing duty to disclose meant that a *Brady* violation could have occurred despite the fact that the State was not aware of the officer's misconduct until after the conclusion of trial. On the particular facts, however, it concluded no *Brady* violation had occurred.

**People v. Sterling,**  
**787 N.Y.S.2d 846 (N.Y. Co.Ct. 2004)**

Because the state constitution's due process clause required the state to provide continuing discovery of material evidence, the application for DNA testing of person convicted in 1992 should be heard. One portion of the evidence that the applicant requested had some likelihood of being exculpatory and so it was ordered to be produced and the parties were to agree on a testing protocol. Costs of testing were assigned to the applicant.

**State v. Bennett,**  
**81 P.3d 1 (Nev. 2003)**

"The State, of course, has an affirmative duty to provide favorable evidence, if material, to a defendant even absent a request for the evidence. Moreover, that duty exists regardless of whether the State uncovers the evidence before trial, during trial, or after the defendant has been convicted." at 9 (footnotes omitted.)

**People v. Garcia,**  
**22 Cal.Rptr.2d 545 (Cal. App. 1993)**

"The duty of disclosure . . . does not end when the trial is over. '[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.' *Imbler v. Pachtman*, 424 U.S. 409, 427, fn. 25 (1976); *see also People v. Gonzalez*, 51 Cal.3d 1179, 1261 (1990); rule 5-220, Rules Prof. Conduct of State Bar; ABA Model Code Prof. Responsibility, DR 7-103(B), EC 7-13; ABA Model Rules Prof. Conduct, rule 3.8(d)."