

principle, the Court in *Miller v. Pate*¹⁰⁹⁰ overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a *habeas corpus* proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact bloodstained, and that the prosecution had known these facts.

This line of reasoning has even resulted in the disclosure to the defense of information not relied upon by the prosecution during trial.¹⁰⁹¹ In *Brady v. Maryland*,¹⁰⁹² the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In that case, the prosecution had suppressed an extrajudicial confession of defendant's accomplice that he had actually committed the murder.¹⁰⁹³ "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."¹⁰⁹⁴

¹⁰⁹⁰ 386 U.S. 1 (1967).

¹⁰⁹¹ The Constitution does not require the government, prior to entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses against the defendant. *United States v. Ruiz*, 536 U.S. 622 (2002). Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

¹⁰⁹² 373 U.S. 83, 87 (1963). In *Jencks v. United States*, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. *Cf. Scales v. United States*, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. *Palermo v. United States*, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

¹⁰⁹³ Although the state court in *Brady* had allowed a partial retrial so that the accomplice's confession could be considered in the jury's determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The defendant's appeal of this latter decision was rejected, as the issue, as the Court saw it, was whether the state court could have excluded the defendant's confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged.

¹⁰⁹⁴ *Moore v. Illinois*, 408 U.S. 786, 794–95 (1972) (finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory). *See also Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam) (holding no due process violation