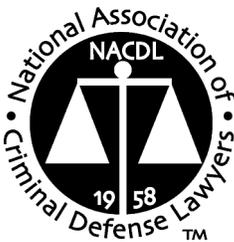


# MATERIAL INDIFFERENCE:

## How Courts Are Impeding Fair Disclosure In Criminal Cases



**STUDY SAMPLE:** A set of 1,497 federal court decisions selected at random from the approximately 5,000 federal court decisions citing *Brady v. Maryland* over a five-year time period. Within this Study Sample, 620 decisions resolve a *Brady* claim on the merits. In 22 of those decisions courts found that the prosecution violated the defendant's due process rights under *Brady v. Maryland*.



◆ **Application of the materiality standard produces arbitrary results.** The study demonstrates the arbitrary nature of the materiality standard. Even when evaluating the same information, in similar factual contexts, and applying the same articulation of the materiality standard, different courts may ultimately resolve a *Brady* claim differently.

◆ **Materiality determinations overwhelmingly favor the prosecution.** In 145 of the decisions the prosecution failed to disclose favorable information, yet it still won in 124 decisions or 86 percent of the time, with the court concluding the information was not material. On the issue of materiality, this data demonstrates that the odds are almost always in the government's favor.

◆ **Courts almost never find *Brady* was violated by the late disclosure of favorable information.** Of the 65 decisions that involve late disclosure of favorable information, only one resulted in a *Brady* violation finding. This means that, for the decisions in this Study Sample, the government has a nearly perfect record when defending late disclosure of favorable information. And, in 78 percent of these decisions, the favorable information was not disclosed until *after* the start of trial.

◆ **Disclosed late or never disclosed at all, the withholding of favorable information is rarely found to violate *Brady*.** The study identifies 210 decisions in which favorable information was disclosed late or never disclosed at all. And, within this group, the defendant prevails on the question of materiality in only one of every 10 decisions — *i.e.*, the prosecution wins in 188 of these decisions or 90 percent of the time.



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- ◆ **Statements are more likely to be disclosed late.** Of the decisions involving the late disclosure of favorable information, nearly half involved statements.
- ◆ **Some courts engage in burden shifting by denying *Brady* claims upon a finding that the defense could have obtained the information on its own with due diligence.** In just over three percent of the decisions, courts excused the prosecutor's failure to disclose favorable information by imposing a due diligence obligation on the defendant. By employing this due diligence rule, courts shift the inquiry away from the prosecutor's obligation to disclose favorable information, and instead focus on the defendant's efforts to find information.
- ◆ ***Brady* claims involving information on incentives or deals are more likely to result in a *Brady* violation finding.** The statistical analysis reveals a strong correlation between *Brady* violation decisions and incentive/deal information. Whereas 16 percent of all the decisions involve incentive/deal information, 36 percent of the *Brady* violation decisions involve incentive/deal information.
- ◆ **Favorable information is more likely to be disclosed late or withheld entirely in death penalty decisions.** Favorable information was never disclosed or disclosed late by the prosecution in 53 percent of decisions involving the death penalty, but only 34 percent of all the decisions studied.
- ◆ **Death penalty decisions are more likely to be resolved with a finding that the information is not material and almost always upon a finding that the information is cumulative.** Nearly two-thirds of the death penalty decisions resulted in a finding that the withheld information was not material. By comparison, only one-third of all the decisions studied were resolved with a not material finding.

## Mechanisms for Increasing Disclosure of Favorable Information

- ◆ **Ethical Rule Order** — In each case, defense attorneys should request, and judges should grant, orders for the prosecution to disclose all favorable information in accord with ABA Model Rule 3.8(d).
- ◆ **Amendment of Judicial Rules and Policies** — Judicial branches nationwide should amend the rules and policies regulating the prosecution's disclosure obligations to require disclosure of all favorable information.
- ◆ **Legislation Codifying Fair Disclosure** — Congress and state legislative bodies should enact laws that set forth a clear mandate for disclosure of favorable information, as well as comprehensive rules for the disclosure process.

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