



F16 Anatomy of a Brady Violation

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After attending this presentation, attendees will see that Brady violations can and do occur, and offer a cautionary tale for the expert witness “caught in the middle” between the defense and prosecution.

This presentation will impact the forensic community by helping the expert witness avoid being entangled in a potential Brady violation (non-disclosure of exculpatory evidence).

In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that *exculpatory evidence* (i.e., evidence favorable to the defendant) developed by the prosecution *must* be disclosed to the defense, if defense counsel asked for it. A “Brady violation” is a violation of this right to exculpatory evidence under the United States Constitution.

Some federal District Courts now require automatic disclosure of exculpatory evidence; some District Courts, on the other hand, do not require disclosure of Brady evidence if the defendant, using reasonable diligence, could have developed the evidence himself. Through case law, this holding has been further extended to require law enforcement officers, as well, to disclose exculpatory evidence to the defense. Many federal District Courts require Brady evidence be disclosed to defense counsel within some specific period of time ranging between at the time of arraignment up to within 28 days after the arraignment hearing. Conversely, some federal District Courts hold that the exculpatory evidence should be disclosed “...as soon as possible...” or “...before the trial...” The Texas statute does not require automatic disclosure of exculpatory evidence, and, further, the defendant “must show good cause” for discovery of such material; but there does not seem to be a specific time limit on when defense may ask for disclosure of exculpatory material.

No federal District Court has a specific remedy for a Brady violation—sanctions are fully within the discretion of the Court. Most District Courts allow sanctions for both parties for general discovery abuses. These sanctions may include exclusion of evidence at trial, a finding of contempt, granting of a continuance, and even dismissal of the indictment with prejudice. Texas statute generally, though, does not allow the harsh remedy of dismissal to remedy a Brady violation.

In this instance, expert witnesses called by the prosecution developed potentially exculpatory evidence during the course of a bite mark analysis in a Texas capital-murder case. Through no fault of the witnesses, and through no willful, intentional, or egregious act of the prosecutor, this evidence was not transmitted to defense counsel in a timely manner. When defense counsel subpoenaed evidence from the prosecution experts (only 10 days prior to the trial!) and the evidence was sent to the defense expert, the defense expert quickly realized that defense counsel was not aware of all potential suspects in the case. One of these suspects had *not* been excluded as a potential “biter” by one of the prosecution’s experts. In this case, the Court granted a lengthy continuance to allow the defense expert adequate time to perform his own thorough bite mark analysis.

Brady, Exculpatory, Evidence