EXECUTIVE SUMMARY

The integrity of the criminal justice system relies on the guarantees made to the actors operating within it. Critical to the accused is the guarantee of fair process. For the accused, fair process includes not only the right to put on a defense, but to put on a complete defense. The U.S. Supreme Court recognized the importance of this guarantee over 50 years ago, in *Brady v. Maryland*, when it declared that failure to disclose favorable information violates the constitution when that information is material. This guarantee, however, is frequently unmet. In courtrooms across the nation, accused persons are convicted without ever having access to, let alone an opportunity to present, information that is favorable to their defense.

The high-profile cases of Senator Theodore "Ted" Stevens and Michael Morton put a spotlight on this unfulfilled promise. The prosecutors in these cases possessed information favorable to the defense but failed to disclose it. Convinced of the defendants' guilt, they worked to build cases against them while ignoring information which tended to undercut their own view of the defendants' guilt. Both Senator Stevens and Michael Morton prevailed in clearing their own names, but countless others deprived of favorable information remain incarcerated or stained with a criminal record. Despite the reform that Morton's ordeal spawned in Texas, the federal system in which Senator Stevens was prosecuted remains the same and disclosure violations continue in state and federal cases nationwide.

In courtrooms across the nation, accused persons are convicted without ever having access to, let alone an opportunity to present, information that is favorable to their defense.

The frequency with which these violations occur and the role they play in wrongful convictions prompted the National Association of Criminal Defense Lawyers (NACDL) and the VERITAS Initiative of Santa Clara University School of Law (VERITAS Initiative) to come together to look at the problem from a different perspective. Many have heard about the problem of prosecutors engaging in misconduct by failing to disclose favorable information. The focus of such scholarship is typically on the individual prosecutor's behavior or the culture and policies of a particular prosecution office. Rather than look at the prosecution, with this study, NACDL and the VERITAS Initiative ask: What role does judicial review play in the disclosure of favorable information to the accused?

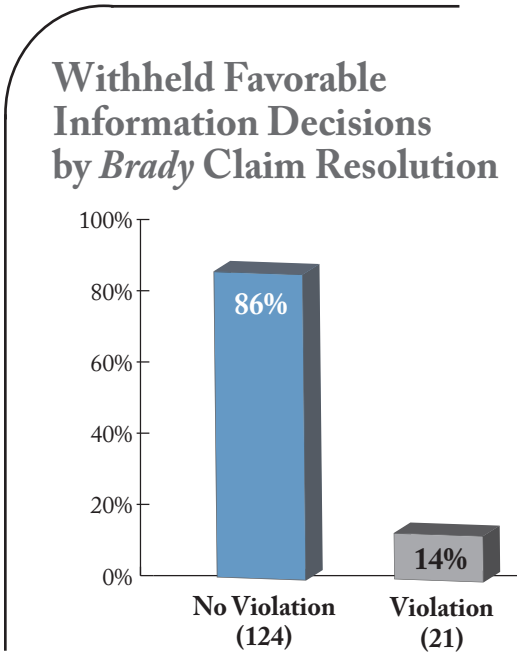
To answer that question, the authors took a random sample of *Brady* claims litigated in federal courts over a five-year period and assessed the quality and consistency of judicial review of the claims. The sample included 620 decisions in which a court ruled on the merits of a *Brady* claim. Guided by an extensive methodology, the review of these decisions included evaluating the materiality analysis employed by the courts and a variety of other factors and characteristics. The firsthand review of each decision in the sample and statistical analysis of the data as a whole reveals a variety of problems and answers the question motivating the study — through judicial review, the judiciary plays a significant role in impeding fair disclosure of favorable information.

KEY FINDINGS

◆ The Materiality Standard Produces Arbitrary Results and Overwhelmingly Favors the Prosecution

The authors reviewed, analyzed, and coded each of the 620 decisions that decided a *Brady* claim on the merits. This process revealed that courts apply the materiality standard in an arbitrary manner. Two courts could have the same favorable information before them in remarkably similar factual contexts and come out differently on the question of materiality.

Despite the arbitrary application of the materiality standard, the data shows that it overwhelmingly favors the prosecution. Of the 620 decisions in the Study, prosecutors failed to disclose favorable information in 145. The defense prevailed in just 21 of these 145 decisions — that is, in only 14 percent of these decisions did the court deem the undisclosed favorable information material and find that a *Brady* violation had occurred. The courts ruled in favor of the prosecution in the remaining 86 percent of these decisions.



◆ Late Disclosure of Favorable Information Is Almost Never a *Brady* Violation

When the prosecution discloses favorable information late, the prejudice to the defense can be the same as if the prosecution did not disclose the information at all. The study included 65 decisions in which the prosecution disclosed favorable information late. The majority of these late disclosures occurred during trial, and statistical analysis reveals that statements, rather than other types of information, are more likely to be disclosed late. Only one court, out of these 65 decisions, held that the prosecution's late disclosure violated *Brady*. In the other 64 decisions, the court rejected the notion that the prejudice to the defense was sufficient to constitute a *Brady* violation.

The defense lost in 90 percent of the decisions in which the prosecution withheld favorable information.

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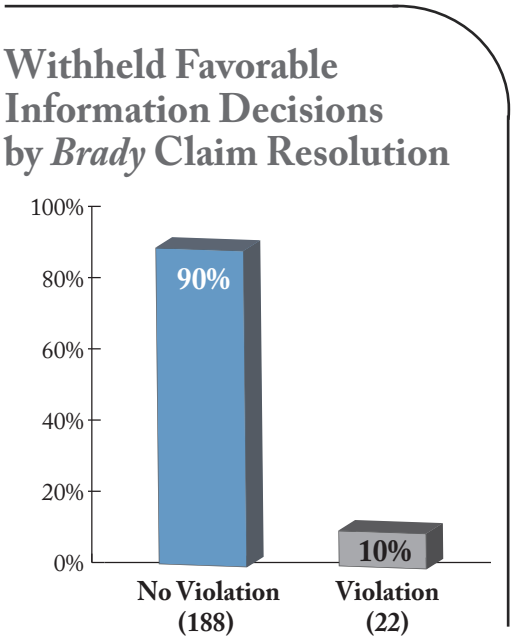

The Prosecution Almost Always Wins When It Withholds Favorable Information

The prosecution prevailed on the question of materiality in 86 percent of the decisions in which it failed to disclose favorable information, and its odds improved when late disclosure decisions are included. In 90 percent of the decisions in which the prosecution withheld favorable information — disclosed it late or never at all — the defense lost. The courts held that the prosecution's withholding of favorable information violated *Brady* in just 10 percent of these decisions.

Withholding Incentive or Deal Information Is More Likely to Result in a *Brady* Violation Finding

The defense was more likely to prevail on its *Brady* claim when the information at issue was an incentive or deal for a witness to testify. Despite being just 16 percent of the Study Sample, decisions involving incentive or deal information make up over one-third of the decisions resolved by a finding that *Brady* was violated. Further, the statistical analysis revealed a strong correlation between this type of impeachment information and findings that the prosecution violated *Brady*.

Courts 'Burden Shift' When They Employ the Due Diligence 'Rule' Against the Defendant

When the prosecution fails to disclose favorable information, courts sometimes use the due diligence rule to excuse this failure and deny a defendant's *Brady* claim. This occurred in just over three percent of the decisions. Employing the due diligence rule shifts the court's inquiry away from the prosecution's failure to satisfy its disclosure obligation, and to the defense's failure to discover the favorable information on its own. By treating the discovery process like a game of hide-and-seek, the due diligence rule runs counter to the guarantee of fair process.

This study provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging disclosure of favorable information.

◆ Death Penalty Decisions Are More Likely to Involve Withheld Favorable Information and to Be Resolved With a 'Not Material' Finding

Favorable information was withheld or disclosed late by the prosecution in 53 percent of the decisions involving the death penalty, but only 34 percent of all the decisions studied. And, in death penalty decisions, withheld favorable information was more likely to be found not material. 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

The judiciary plays a significant role in the fair disclosure of, and defense access to, favorable information. More specifically, this study provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging prosecutors from disclosing information that does not meet the high bar of materiality. Thus, any attempt to address the problems identified in this study must come from the judiciary or, should it fail to act, the legislature.

This report offers three reform mechanisms that can be applied by the judicial and legislative branches at both the state and federal levels.

The weight of legislative action is greater than any other mechanism — it is an enforceable message that fair disclosure is a requisite to fair process.

◆ Ethical Rule Order — A Court Order for Disclosure of Favorable Information in Criminal Proceedings

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). This order, known as an Ethical Rule Order, would bind prosecutors and make it possible for judges to sanction those prosecutors who fail to comply. If defense attorneys and judges make this order the norm for a particular court, jurisdiction, or even the entire judicial system, it will serve to deter willful non-disclosure. This is even more effective when judges or courts issue a standing order for all their cases. The Ethical Rule Order is one way that individual defense attorneys and judges can obtain immediate results in a particular criminal proceeding, while simultaneously encouraging broader change in disclosure practices and helping to prevent the problematic practices identified by this study.

◆ Amendment of Judicial Rules and Policies Governing Disclosure

Another mechanism for increasing fair disclosure and preventing the type of arbitrary practices evidenced by this study is amendment of judicial rules. In many jurisdictions, the judicial branch sets forth the rules that regulate the prosecution's disclosure obligations, which are then enforced by every court within that jurisdiction. These rules are often set by the highest court in a jurisdiction or, as in the federal system, a group of judges that are representative of the various courts within the system. As a result, judicial branches nationwide are well-positioned to respond to the failure of the prosecution to disclose favorable information in a timely fashion. Amendment of court rules and policies to require fair disclosure of information could decrease the sort of prosecutorial gamesmanship that has become commonplace and help restore balance to the justice system.

◆ Legislation Codifying Fair Disclosure

The most effective mechanism for reform of prosecutorial disclosure practices could come through the legislative branch. Legislation that sets forth a clear mandate for disclosure of favorable information, as well as comprehensive rules for the disclosure process, would have a significant system-wide impact. The weight of legislative action is greater than any other mechanism — it is an enforceable message that fair disclosure is a requisite to fair process. Codifying a fair disclosure process could increase defense access to favorable information and help prevent the problems identified in this study. Further, enactment of this reform may deter prosecutorial gamesmanship in the discovery context and decrease *Brady* claims system-wide.

Conclusion

Courts are impeding fair disclosure in criminal cases, and in so doing, encouraging prosecutors to disclose as little favorable information as possible. With *Brady*, the Supreme Court held that non-disclosure only violates the Constitution when the information is material. This holding established a post-trial standard of review that many prosecutors have adopted as the pre-trial standard governing their disclosure obligations. Despite ethical rules that set forth a disclosure obligation far broader than *Brady*, many prosecutor offices, and even some courts, have taken the same incorrect position — prosecutors need only disclose as much as necessary to ensure the conviction survives appeal.

EXECUTIVE SUMMARY

Across the nation prosecutors are guiding their disclosure obligations by a post-trial standard that some courts have decried as unworkable in the pre-trial context. Prosecutors are ill-equipped to apply a post-trial standard to a pre-trial obligation without the benefit of the defense perspective and with their natural biases as zealous advocates. Taking their cues from the courts, prosecutors are acting to the detriment of the defense and fair process.

This study demonstrates that the odds are in favor of prosecutors who withhold favorable information. Courts are rarely finding that the withholding of favorable information is prejudicial enough to constitute a *Brady* violation. Strict judicial adherence to the materiality standard without regard to the integrity of the process is a direct endorsement of non-disclosure of favorable information.

Until courts embrace a broader disclosure obligation, such as that embodied in the ABA Model Rules, and reject the premise that a prosecution's obligation is measured solely by *Brady*, they will continue impeding disclosure of favorable information. The status quo of material indifference must yield to the guarantee of fair process. Whether it comes through individual courts, the judiciary, or legislative action, reform is necessary.

The status quo of material indifference must yield to the guarantee of fair process.