



## What is a Brady Violation?

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A “Brady Violation” is what happens when the prosecutors in a criminal case fail to perform their constitutional duty to turn over helpful evidence to the people they have charged with crimes.

Everyone has the right to due process and a fair trial. Because of that, when the Government has evidence suggesting a person is either not guilty or deserves a lower sentence, the prosecutor has an obligation to disclose that evidence. Often called the “*Brady* rule,” this requirement originally comes from the U.S. Supreme Court’s 1963 decision in *Brady v. Maryland*. Later court cases have made the rule even stronger, requiring prosecutors to turn over this evidence **even if the defense hasn’t requested it** and even if the prosecutors claim they **didn’t know it was in their files**.

Government lawyers can violate the *Brady* rule in many different ways depending on the specific case, but in each of those cases the problem is that they failed to disclose *Brady* material.

## What is Brady Material?

*Brady* material is any evidence that the prosecution team has that they are obligated to share under the *Brady* rule. Taken broadly, that just means any

useful evidence that would be favorable to the defense. In practice, *Brady* material tend to fall into one of three general categories:

### **Evidence that someone else committed the crime**

This includes both evidence that points to another specific person as the perpetrator and evidence that would seem to exclude the defendant from the list of possible suspects. Information that someone else had the motive, means, or opportunity to commit the crime; witness identifications or descriptions of another person; and DNA or fingerprints from the crime scene that don't match the defendant would all fall into this category.

### **Evidence that a Government witness might be lying**

This category includes evidence that a witness made prior statements that are potentially inconsistent (sometimes called "***Giglio*** material"), as well as evidence that a witness had a **motive to lie**, or that the law enforcement officers, crime lab technicians, or other forensic specialists involved in the case may not be credible.

### **Evidence that the sentence in the case should be less harsh**

This includes any mitigating information that might justify or explain why the crime was committed as well as any information that would be helpful to the defense under that jurisdiction's sentencing scheme. For a federal case, this would include any information that could result in a lower sentence under the **Federal Sentencing Guidelines**

The *Brady* rule is an extremely important part of keeping our system fair. Without it, if the Government had information showing that the defendant shouldn't be convicted or punished, there would be nothing to make them share that information, and the defendant themselves might never learn of it.

## Examples of Brady Violations

As important as it is, prosecutors still don't always follow the *Brady* rule. In fact, a **recent study** discovered that prosecutors break this rule so often

that *Brady* violations have actually become the leading cause of overturned convictions in the United States.

Federal prosecutors in the Southern District of New York **made headlines** this year after they failed to disclose helpful information to Ali Sadr Hashemi Nejad prior to his trial for allegedly violating Iranian sanction laws. The *Brady* violations in this case were so egregious that the Government itself moved to dismiss the case after it had already secured a conviction against Sadr. The judge **ordered** the U.S. Attorney's Office to make a full accounting to her of what had happened and exactly what evidence had been withheld. The subsequent disclosures included emails where the government lawyers admitted to lying to the judge and to deciding to "bury" the evidence that was helpful to Sadr.

In another recent high-profile case, three men were found to have been **wrongfully convicted of double homicide** in Queens, New York. They were released after serving 24 years in prison when it came to light that the Assistant District Attorney who handled their case intentionally withheld evidence that someone else had actually committed the murders.

Meanwhile, a judge in Fairfax County, Virginia **ordered** that a prosecutor's *Brady* violation be explained in detail to the jury. In that case, the Government withheld a witness statement from the defense that showed that Kelvin Gonzalez, the eighteen-year-old young man accused of murder, may have been **acting in self-defense**.

## How to Respond to a Brady Violation

Unfortunately, the fact that *Brady* violations result in so many reversed convictions also shows that the Government usually doesn't get caught violating *Brady* until long after the defendant has been convicted. Individuals who are charged with crimes are often completely unaware that the helpful evidence even exists, so when the Government violates *Brady*, they usually don't know that their Constitutional rights have been violated.

If you become aware that the government may have withheld critical evidence in a case you're involved in, then the first step is to consult an **experienced criminal defense attorney** to help you fight for your rights.

Once you have hired a lawyer, they can file the appropriate motions to challenge the violation. Exactly which motions should be filed will depend on the court your charges have been filed in and what has happened in your case so far.

If it is the very beginning of your case, your lawyer should file a motion for discovery that includes a demand for the prosecution to disclose all *Brady* material they have in their possession. Even though the law requires the Government to give this information to the defense even when it is not asked for, it is still important to request it so that you can be sure to get the evidence as early in the case as possible.

If the prosecutors don't turn over all their *Brady* material at that point, then the next step is to seek a remedy for their violation of the rule.

## Remedies for a Brady Violation

### **Before Trial**

If a *Brady* violation is discovered before a defendant's trial, then the defense attorney can file motions challenging the evidence and charges themselves or the way they will be presented at trial.

Prior to the beginning of the trial, the defense can move to dismiss the related charges with prejudice. When charges are dismissed *without* prejudice, then the prosecutor is free to file those same charges again at a later date. If charges are dismissed *with* prejudice, however, then the defendant cannot be charged again for the same thing, and the case is essentially over.

If the judge denies the motion to dismiss with prejudice at this point, then the lawyer for the defense can ask for other remedies to help restore the injustice caused by the *Brady* violation. These sorts of remedies are often case-specific but can include a grant of additional time to investigate the newly disclosed evidence, an instruction to the jury detailing the prosecutor's violation, the admission of evidence that might not otherwise be relevant or admissible, or even ethical sanctions against the prosecutor.

### **During Trial**

Often, a violation of the *Brady* rule will not come to light until the trial of the case is already under way. If the newly disclosed evidence is strong enough to damage the Government's case or demonstrate the defendant's innocence, then the defense attorney may make a motion for a judgement of acquittal. If the motion for acquittal is granted, the judge bypasses a jury verdict, and the defendant is officially declared not guilty on the charges. Another option is to file a motion for new trial.

The judge may be unwilling to take such a big step, however. When that is the case, then in the alternative the defense can also move for a mistrial. If a mistrial is declared, then the trial will immediately end, and the Government will be forced to go through the entire trial process again at a later date if they still want to bring the charges. At any subsequent trial that occurred, the defense attorney could also bring motions for other case-specific remedies during the trial as discussed above.

- After Conviction

If, as is all too often the case, the defendant has already been convicted when the *Brady* violation is discovered, then the defense lawyer will need to file for post-conviction relief. This will take the form of either a **direct appeal** to the conviction, filing a **motion for new trial**, or a **petition for a writ of habeas corpus**, depending on what proceedings have already happened in the case. Regardless of the approach, the defense will argue that the defendant's rights to due process and a fair trial were violated when the prosecutors withheld the *Brady* material. If the appeal, motion, or petition is successful, then the defendant will be granted an opportunity for a new trial. In many cases where this happens, the Government decides not to go through the time and expense of a new trial, and the defendant walks free.

## What Is the Due Process Protections Act?

**The Due Process Protections Act**, or the "DPPA," is a recent bill designed to reduce the incidence of *Brady* violations in the federal criminal justice system. It was signed into law on October 21, 2020, and it took effect immediately.

Because of the DPPA, the law now requires federal judges to give prosecutors a pointed reminder of their obligations under the *Brady* rule at the very

beginning of each case. This is designed to encourage prosecutors not only to comply with the rule, but also to do so quickly, allowing criminal defendants time to use the information that they get. When issuing this reminder to the government attorneys, federal judges also now have to outline the specific consequences that can happen if they violate the rule.

The new law doesn't tell judges exactly what words to use or what those consequences should be, but it does direct each federal judicial district to issue a model order guiding the judges in their area on what their terminology should be and what consequences to consider. So far, only 6 of the 94 districts have done so, and the orders that have come out—from **Alabama**, **Hawaii**, **Idaho**, **New York**, **Oklahoma**, and **Virginia**—have each been a little different. Some of the potential consequences they list for *Brady* violations include excluding evidence, dismissing the related charges, and even punishing the prosecutors themselves.

It's too early to say for sure what the full results of the changes brought about by the DPPA will be. One thing is certain, however: the new law gives individuals charged with crimes an additional way to fight to preserve their rights to due process and a fair trial. The right defense attorney can use these new orders to hold the prosecution accountable and demand that they comply with their *Brady* rule obligations.

If you or someone you know is involved in a case where the Government may have committed a *Brady* violation, **contact** our experienced criminal defense lawyers for more information.