

Preserving Brady Issues Prior to Trial

Under *Brady v. Maryland*, 373 U.S. 83 (1970) and *Hicks v. State*, 232 Ga. 393, 207 S.E. 2d 30 (1974), the prosecution is required to disclose any information in its possession that is favorable to the defense. This is referred to as “exculpatory evidence” or “*Brady* material.” The prosecution is required to disclose this information no matter what form the information is in (written, oral, etc.) or when they learn of it (even if during the trial).

As soon as the case is indicted, the defense should file a pleading entitled “Motion for Discovery, Inspection, Production, and Copying of Evidence Favorable to Defendant” and request that the court order the prosecution “to preserve and produce all evidence in its possession, custody or control which may be favorable to the Defendant.” When responding to the request for exculpatory information, the prosecution must disclose not only the information in its possession, but also any information in the possession of any other law enforcement agency involved in the case. If the prosecution withholds any such exculpatory evidence, it can constitute a violation of the defendant’s due process rights and could result in the reversal of a defendant’s conviction.

In *Brownlow v. Schofield*, 277 Ga. 237, 587 S.E.2d 647 (2003), the defendant’s conviction for aggravated child molestation was reversed when the prosecution failed to disclose to the defense favorable information obtained from the alleged victim in an interview ten days before trial. When the prosecutor asked the alleged victim if the defendant committed one of the acts enumerated in the indictment, the child responded by shaking his head negatively. The prosecution did not inform the defense team of this negative response. When the child was questioned at trial, he testified that all of the acts alleged in the indictment did, in fact, occur. The Georgia Supreme Court held that the prosecution’s failure to disclose the child’s negative response during the pretrial interview constituted a *Brady* violation. The court concluded that had this favorable evidence been disclosed to the defense, there was a reasonable probability that the outcome of the trial would have been different.

It is important to note that in child molestation cases, the prosecution typically

interviews the alleged victim in the days leading up to the trial. As exculpatory evidence may be uncovered during these last-minute interviews, it is especially important for the defense to file a particularized *Brady* motion specifically requesting information gathered during these exchanges. In addition, the defense should always question the alleged victim directly about the most recent statements made to the prosecution in an attempt both to uncover potential *Brady* violations and discover inconsistencies in prior statements that tend to damage the child's credibility.

As a result of the *Brownlow* decision, it is advisable to request in every *Brady* motion that the prosecution disclose "Written statements, reports or summaries relating to any and all persons interviewed or questioned in the investigation or prosecution of the Defendant, including interviews of witnesses conducted by prosecutors in preparation for trial."