



## Too Little, Too Late for Defense Argument?

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The U.S. Court of Appeals for the 1st Circuit is considering whether the government's belated disclosure of potentially exculpatory evidence deprived criminal defendant Amit Mathur of a fair trial. The fact that Mathur's counsel received some of the evidence after the government's case in chief and declined to use it in Mathur's defense makes it unlikely that Mathur will obtain the new trial he seeks.

Four years ago, Mathur was indicted on 18 counts of mail fraud and two counts of wire fraud in connection with the operation of his hedge fund, Entrust Capital Management. During an 11-day trial, the prosecution presented evidence that Mathur presented his 15-member client base with promotional materials stating that Entrust managed approximately \$105 million in assets for 300 investors and that the fund outperformed all the major stock market indices – neither of which was true. Additionally, the government proffered evidence that Mathur took \$13.5 million from five investors and transferred the money to accounts that Mathur alone controlled. Checks signed by Mathur showed that over a third of the funds were transferred out of hedge fund accounts to pay Mathur's personal expenses including, among other things, gifts to friends and relatives, real estate ventures, automobiles, trips to Las Vegas and Atlantic City, sporting events, jewelry, and travel. To corroborate the government's documentary evidence, the government proffered testimony of five alleged victims, including testimony from Mathur's biggest client, multi-millionaire David ("Duddie") Massad.



After the prosecution closed and before the defense presented its case, the government disclosed a memorandum that the SEC had prepared in connection with its investigation of Mathur. The memorandum was important to the defense because it tended to cast doubt on Massad's credibility. With that in mind, the trial judge asked whether the defense wanted a continuance so that it could make full use of the potentially exculpatory evidence. The judge also invited the defense to call Massad as a witness. Defense counsel declined and presented its case as originally planned.

After the jury returned a guilty verdict on all counts, Mathur appealed to the First Circuit, arguing that the prosecution's belated disclosure of the SEC memorandum violated Mathur's constitutional right to potentially exculpatory evidence. At oral argument on September 15, 2010, Judge Bruce Selya asked Mathur's counsel why the trial judge's remedies were insufficient to address the alleged violation. Oddly, defense counsel responded that "first impressions had already been made to the jury" and that "nothing anybody said was going to change that view." In her judgment, the jury "had already formed impressions about the key players and heard witnesses . . . ." In conclusion, she stated, "At some point you have to take a defense lawyer's view that we can't change this now."

If defense counsel's reasoning seems nonsensical, it's because it is.

First, the prosecution always gets to make the first impression on jury members because the prosecution always goes first. The defense always goes last and thus has the advantage of leaving a final impression with the jury—what some would call an advantage. Defense counsel decided unilaterally that the structure of criminal trials would not benefit her client, so she passed on the opportunity to impeach Massad based on the SEC memorandum.



Second, defense counsel's statements at oral argument show that she prejudiced her client by her own defeatist attitude as much as she was prejudiced by the government's belated disclosure of the memorandum. Before the defense ever presented its case, defense counsel had concluded that nothing anybody said was going to change the jury's view of the case. She gave up after the prosecution presented its case, and her statement at oral argument is tantamount to a concession that the SEC memorandum was not a game changer. Mathur's counsel is now stuck arguing that her client should get a new trial to account for evidence that she treated as immaterial.

In her defense, Mathur's attorney apparently had little evidence to counter the prosecution's hard evidence. Even if one assumes, based on the SEC memorandum, that Massad was not a credible witness, his testimony simply corroborated a significant paper trail. The overwhelming evidence showed that Mathur received millions from his clients and lost or spent all but several hundred thousand dollars. It's difficult to believe the SEC memorandum would have changed the outcome for client. We'll know soon whether the First Circuit agrees.

*Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

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