

Brady and Discovery for New Prosecutors



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JANUARY 23, 2013

Basic Concepts:

- We represent the People of the State of California, everything we do is in their name.
- There is no “trial by ambush” in the State of California.
- Prosecutors have a due process, affirmative duty to do what the interests of justice require.
- Our job is not to win cases, but to see that justice is done.

Noncompliance May Result In Negative Consequences to a Case & Your Office:

- Continuance;
- Special jury instruction;
- Striking of allegations or dismissal of charges;
- Claims of outrageous conduct by defense;
- Loss of confidence in judges, jurors, & public.

Noncompliance Can Damage Us Personally:

- Reputations may be harmed;
- May result in State Bar disciplinary action (See Rule of Professional Conduct 5-220);
- May result in a civil action for damages;
- May result in criminal prosecution.

Our obligations Under *Brady*
“The Law is Simple. It’s the
Application that’s Difficult.”

Brady v. Maryland

(1963) 373 U.S. 83, 87

- Suppression of evidence favorable to an accused violates the due process clause of the 14th Amendment where the evidence was material to guilt or punishment regardless of the State's good or bad faith.

The Brady Rule:

- The prosecutor has a due process affirmative duty to disclose to the defendant all material evidence that is favorable and that is possessed by the prosecution team.
- The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution.
- Brady at 87

Favorable Evidence:

- **Favorable:** Evidence that is **exculpatory or impeaching**—Put simply: Evidence that either helps the defendant or hurts the prosecution. (Strickler v. Greene 527 U.S. 263, 280-281)
- **Material:** Reasonable probability that the result of the trial would have been different, (Strickler 280-281); Where suppression undermines confidence in the outcome, Kyles v. Whitley 514 U.S. 419, 440

Favorableness Component:

- Evidence Mitigating Punishment
- Evidence Directly/Indirectly Opposing Guilt
- Evidence Supporting Defense Testimony
- Evidence Supporting Defense Motion
- Evidence Impeaching Prosecution Witness Credibility

Does the Defense Have To Request Disclosure?

- There is a **DUTY** on the part of the prosecution to disclose even in the absence of a defense request (*U.S. v. Bagley* (1985) 473 U.S. 667).

Beyond the Brady Rule:

- The DA has the duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.
(*Strickler v. Greene* 527 U.S. 263).

Beyond the Brady Rule:

- The prosecutor's duties of disclosure following the Brady line of cases, under the due process clause, are wholly independent of any statutory discovery scheme.
- The due process requirements of disclosure are self-executing and need no statutory support to be effective.
- In other words, Brady is Constitutionally based, and is completely separate from PC 1054.
- (*Izazaga v. Superior Court*, 54 Cal.3d 356)

Brady Doesn't Apply:

- Inculpatory Evidence
- Neutral Evidence
- Immaterial Evidence
- Inadmissible Evidence
- Speculation
- Rumors
- Defense Theories

Statutory Provisions

Penal Code Section 1054.1

Prosecution MUST Provide:

- Names of witnesses;
- Statements of defendants;
- Real evidence;
- Felony convictions;
- Exculpatory evidence;
- Written/recorded statements.

Statutory Provisions:

- **Penal Code Section 1054.3** (Reciprocal Discovery) Defense must disclose:
 - Names & addresses of witnesses **intends to call** & recorded statements (except defendant);
 - Results of tests or examination;
 - Real evidence.
- **Penal Code Section 1054.5:**
 - Exclusive discovery section;
 - Provides for sanctions.

Two Rules To Keep In Mind . . .

Preliminary, challenged or speculative information is not *Brady* material.

(United States v. Agurs 427 U.S. 97, 109, fn. 16)

“Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.”

U.S. v. Agurs 427 U.S. 97, 108

Impeachment Evidence

Special Influences On Testimony:

- A bias, interest, or other motive (Evid. Code § 780 (f));
- Promises, offers, inducements or benefits to a witness (e.g.: informants), (*U.S. v. Bagley* (1985) 473 US 667; *In re Sassounian* (1995) 9 Cal.4th 535);
- Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510).

Where We May Deal With This:

- Witness is being paid to testify;
- Witness is receiving assistance through prosecution for relocation (CALWRAP), subsistence or medical treatment, e.g. domestic violence victims (V.A.P.), (note confidentiality rules may apply);
- U Nonimmigrant Status Certifications (U-Visas);
- Witness has agreed to testify truthfully in exchange for more lenient treatment (*People v. Phillips* 41 Cal.3d 29, 48).

Witness Has Past Problems:

- Pending criminal charges against a prosecution witness (*People v. Coyer*); (1983) 142 Cal.App.3d 839, 842.);
- Parole or probation status of a witness (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486);
- Felony convictions involving moral turpitude. (Evid. Code §788; *People v. Castro* (1985) 38 Cal.3d 301, 314.);
- Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297).

What Is Moral Turpitude?

- Deceitful/Stealthy Conduct;
- Dishonest Conduct;
- Conduct to Corrupt Others;
- Violent or Threatening Conduct;
- “General readiness to do evil”
 - *People v. Castro* (1985) 38 Cal.3d 301.

Disclosing Witness Criminal History Information:

- Run criminal history checks (rap sheets) of civilian witnesses that you intend to call at trial;
- Criminal history information is confidential and restricted;
- Only specific impeachment information should be disclosed, *People v. Roberts* (1992) 2 Cal.4th 271, 308;
- Remember that just because you disclose doesn't mean that it's admissible under Evidence Code Section 352!

Witness Has Specific Truthfulness or Reliability Issues:

- Statement by the witness that is inconsistent with witness' testimony (Evid. Code 780 (h));
- False reports by a prosecution witness (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244);
- Character of the witness for honesty or veracity or their opposites. (Evid. Code § 780 (e));
- Evidence undermining an expert witness's expertise (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179).

Cautions Here . . .

- Statements made to D.A. personnel such as Victim advocates;
- Statements made to D.D.A.

**SPECIAL PROCEDURES
INVOLVING DISCLOSURE OF
IMPEACHMENT EVIDENCE
RELATED TO PEACE
OFFICERS & GOVERNMENT
WITNESSES**

Harm Caused by Nondisclosure of Misconduct by Peace Officers & Government Witnesses

Examples:

- L.A.P.D. Rampart Scandal of 1998
- S.F.P.D. Drug Lab Scandal of 2010
- Biotox/ Aaron Layton Scandal 2011

Model *Brady* Alert System

- Police Officer or Government Witness Misconduct is brought to the attention of Chief Deputy;
- Chief Deputy evaluates & may request documentation of misconduct;
- Conduct evaluated by *Brady* Committee;
- Entry into *Brady* Alert System;
- Notification to Officer/Witness & Agency & Opportunity for response.

What to Do if You Get a Brady Alert?

- Notify your supervisor;
- Review *Brady* material in *Brady* Bank;
- Decide on materiality;
- If material, number & provide to defense;
- Obtain a receipt from defense;
- Annotate case file;
- Obtain protective order for matters not of public record.

Presence in the *Brady* System is NOT a “Kiss of Death”

- Court may decide to exclude under E.C. 352;
- Impact of impeachment evidence may not be significant;
- Each case must be evaluated individually;
- The *Brady* Committee will consider removal of officer from system after passage of time or change of circumstances.

When is Evidence
In OUR Possession?

In re Brown 17 Cal.4th 873

- Capital murder conviction and death sentence overturned due to prosecutor's failure to turn over a Sheriff's crime lab worksheet showing that a preliminary drug screening test was positive for P.C.P.;
- Referee had found that the Sheriff's Department had sent sheet to defense;
- Defense had testified that had not been received;
- Clear that the D.A. never had the worksheet.

People v. Uribe 162 C.A.4th 1457

- D. convicted by jury of forcible oral cop and rape of his granddaughter;
- S.A.R.T. exam performed at medical center per P.C. 13823.9;
- Photos taken using colposcope;
- Wits disagreed on existence of hymenal tear;
- D. made new trial mtn. after learning of video of exam;
- D.A. did not know of video;
- T.C. found no *Brady* violation – C.A. reversed.

People v. S.C. (Barrett) 80 C.A.4th 1305

- Defendant charged with murdering his S.P. cellmate;
- Defendant filed a discovery motion requesting CDC documents concerning investigation of the murder and other documents not related to the actual investigation such as records of incidents; criteria for cell assignments; percentage of lifers in the prison; and yard policies;
- T.C. ordered the D.A. to obtain and produce these records for in camera review with the defendant's attorney present but not the D.A. The Court of Appeal vacated this order.

Defining The “Prosecution Team”

- Includes both investigative & prosecutorial personnel;
- Includes agencies or persons that have been used by the prosecutor or the investigating agency in its work;
- Was the person or agency acting on the govt.’s behalf?
- Was there a statutory scheme that required the person or agency to provide evidence?
- Did the prosecution have greater access to the information?

Governmental Does Not Equal “Possession”

- A prosecutor does not have a duty to disclose exculpatory information unless the team actually or constructively possesses it;
- Information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the team;
- An agency may have both investigative & administrative functions in which case only the investigative information may be deemed in the possession of the team.

Duty To Search and Good Faith

- “But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecutions responsibility for failing to disclose . . . is inescapable.” (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438)

Rules to Remember

- The Duty to Disclose is solely & exclusively the prosecution's & cannot be delegated;
- The Duty is not contingent upon a defense request (informal discovery agreement);
- The Prosecution is responsible for any lapse in compliance;
- The prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation by both investigative & prosecutorial personnel (the "prosecution team").
- Resolve doubtful questions in favor of disclosure.

And the Lessons . . .

- Check with investigating agencies and experts to make sure that you have everything that they have;
- Make it clear to investigators & experts of the need to provide all information;
- Keep a “clean and complete” copy of the discovery that has been supplied;
- Verify that defense has complete report copy;
- Keep good records of when, by whom, and to whom discovery was supplied.

**CONTROVERSY RELATED TO
PROSECUTION'S DUTY TO
DISCLOSE IMPEACHMENT
INFORMATION IN PEACE
OFFICER PERSONNEL FILES**

On the One Side . . .

- *Pitchess v. Superior Court* (1974) 11 Cal.3d 531;
- Evidence Code Section 1043;
- Penal Code Section 832.7

Note: Exception for investigations or proceedings concerning the conduct of peace officers or custodial officers conducted by grand jury, D.A. or A.G.;

- *People v. Gutierrez* (2003) 112 Cal.App.4th 1463.

And on the other side . . .

- The D.A.'s Obligation mandated by the U.S. Constitution to provide *Brady* material, and
- The consequences to a conviction if after trial it is learned that impeachment
- information was contained within a peace officer personnel file.

Timing of Disclosure

When Do We Disclose Brady Material?

- The United States Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. United States v. Ruiz (2002) 536 U.S. 622;
- The California Constitution's due process clause takes precedence over statutory discovery provisions & entitles the defense to discovery for 1538.5 motions. Magallen v. S.C. (2011) 192 Cal.App.4th 1444

Office Policy On Timing Of Disclosure (*Brady* Policy page 13)

- Unless extraordinary circumstances related to witness safety or a need for investigative confidentiality *Brady* material shall be supplied to the defense prior to the witness testifying at any contested hearing & no later than 30 days prior to trial per P.C. 1054.7;
- Evidence which if true would show innocence must be disclosed immediately irrespective of witness testifying.

When Does Our *Brady* Duty End?

- Disclosure duty exists before, during and after trial;
- However, there is no disclosure obligation to disclose impeachment conduct occurring after trial since such later-occurring misconduct could not have effected the trial.
- Eulloqui v. S.C. 181 C.A.4th 1055, 1068

When Does Our *Brady* Duty End?

- 1) Duty to Ensure Disclosure
- 2) Not Delivery Service
- 3) Not Personal Advisor
- 4) Close Calls
- 5) We Call the Shots!

Closing Thought From *Brady*:

- “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.”

Thank You

