

Brady Doctrine

Joseph Chavez
CDAA Resource Attorney

1

The Brady Rule

- We (law enforcement investigative agencies and the prosecutor) have a due process affirmative duty to disclose to the defendant all material evidence that is favorable to the defendant and that is possessed by the prosecution team.

Brady v. Maryland (1983) 373 U.S. 83

2

The Brady Rule

- "The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor." (Corrigan, On Prosecutorial Ethics (1986) 13 Hastings Const. L.Q. 637)

3

What Can Happen?

Brady Error can cause:

- Continuances
- Unfavorable jury instructions
- Evidence to be excluded
- Cases to be REVERSED
- The office to be RECUSED
- Cases to be DISMISSED

4

What Can Happen?

Brady Error can cause:

- State Bar and PC 141 ramifications for the prosecutor
- The Innocent can get convicted and the Guilty set free

5

Disclaimer

- Follow your office's Brady Policy, if there is one.
- Seek guidance from supervisor and management team.
- Issue spotting & general principles.

6

What is Favorable Evidence for purposes of the Brady rule?

- Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." (*fn re Miranda* (2008) 43 Cal.4th 541, 575.)
- In deciding whether evidence is "favorable," the fact the witness who supplied the information is not very credible is irrelevant.
- It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. (*Id.* at 577.)

7

What is Material Evidence for purposes of the Brady rule?

- General Definition:
- "Evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (*Turner v. United States* (2017) 137 S.Ct. 1885, 1893.)

8

What is Material Evidence for purposes of the Brady rule?

- General Definition:
- Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*People v. Lucas* (2014) 60 Cal.4th 153, 274.)

9

Statutory Discovery Obligations PC 1054.1

- The Prosecuting attorney shall disclose to the defendant or his or her attorney, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
- PC 1054.1(e) Any exculpatory evidence.

10

What is Favorable Evidence for purposes of the Brady rule?

- Penalty Mitigation:
- Evidence which mitigates the potential punishment for a defendant is favorable evidence. In fact, in the *Brady* case, the evidence that was not disclosed was evidence bearing not on the guilt of the defendant but on the proper punishment.

11

What is Favorable Evidence for purposes of the Brady rule?

- Impeachment with Pending Charges Against Witness:
 - The fact that a prosecution witness is facing pending criminal matters "constitutes evidence 'favorable' to the defense, in that a jury could view this circumstance as negatively impacting the credibility of testimony by the witness that was helpful to the prosecution."
- (*People v. Letner* (2010) 50 Cal.4th 99, 176.)

12

What is Favorable Evidence for purposes of the Brady rule?

- **Felony Convictions:**
- Evidence Code section 788 specifically allows a witness to be impeached with prior felony convictions. Case law has required that the conviction involve a crime of moral turpitude. (*People v. Castro* (1985) 38 Cal.3d 301, 314-316.)
- EC 352 analysis.


13

What is Favorable Evidence for purposes of the Brady rule?

- **Misdemeanors:**
- EC 452.5 (b) created "a new hearsay exception for certified official court records of conviction, which may be offered to prove not only the fact of conviction, but the commission of the underlying offense."
(*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.)

14

What is Favorable Evidence for purposes of the Brady rule?

- **Impeachment**  **us:**
- The fact that a witness is presently on probation, regardless of the nature of the conduct for which the witness was placed on probation has generally been held to be information that may be used to impeach a witness and is discoverable.
- *Rationale* for allowing such impeachment is that the witness will have a motive to lie so as to avoid revocation of probation, not because the underlying crime bears on the witness' credibility. (See *Davis v. Alaska* (1974) 415 U.S. 308, 317-318.)

15

What is Favorable Evidence for purposes of the Brady rule?

- Juvenile Adjudications:
- the prosecution may introduce prior conduct evincing moral turpitude even if such conduct was the subject of a juvenile adjudication, subject, of course, to the restrictions imposed under Evidence Code section 352...; *People v. Bedolla* (2018) 28 Cal.App.5th 535, 550 [criminal conduct that was the subject of a juvenile adjudication admissible to impeach]
- W&I 827: petition juvenile court to release records.

16

Juvenile Files/Records (sealed & unsealed)

The Inquisitive Prosecutor's Guide
The Basic Brady, and Ethical Discovery Obligations Outline
(2019 Edition)
Juvenile Files, pages 116-129.

Consult with supervisor and management team.

17

What is Favorable Evidence for purposes of the Brady rule?

- Impeachment with Convictions Subject to Penal Code Section 1203.4, 1203.41, or 1203.4 Relief or a Pardon:
- The granting of section 1203.4 relief prevents a defendant from being impeached with the "expunged" conviction if the defendant is a witness in a criminal or civil case but not if the defendant takes the stand in his own defense in a subsequent criminal trial.
(Evidence Code section 788(c); *People v. Field* (1995) 31 Cal.App.4th 1778, 1785, 1787, fn. 4.)

18

What is Favorable Evidence for purposes of the Brady rule?

- Impeachment with Convictions Subject to Penal Code Section 1203.4:
- It is important to note, however, that while the fact of the witness' conviction would be excluded, the *conduct* underlying the conviction might still be admissible (subject to Evidence Code section 352) for purposes of impeachment.

19

What is Favorable Evidence for purposes of the Brady rule?

- Criminal Conduct Involving Moral Turpitude, no conviction:
- Proposition 8 gave "criminal courts broad discretion to admit or exclude acts of dishonesty or moral turpitude 'relevant to impeachment.'" *People v. Doolin* (2009) 45 Cal.4th 390;
- see also *People v. Harris* (2005) 37 Cal.4th 310, 337 "[p]ast criminal conduct involving moral turpitude . . . is admissible to impeach, subject to the court's discretion under Evidence Code section 352"]

20

What is Favorable Evidence for purposes of the Brady rule?

- Non-Criminal Conduct Involving Moral Turpitude:
- *People v. Rivera* (2003) 107 Cal.4th 107 (conduct is admissible for impeachment if it did not constitute a criminal offense)
- *People v. Ayala* (2000) 23 Cal.4th 107 (impeachment with fact witness' years about membership in gang to obtain transfer from one prison to another)
- *People v. Chan* (2005) 128 Cal.App.4th 408, 418 (false statement to police regarding actual address by 290 registrant is conduct involving moral turpitude and available for impeachment)

21

What is Favorable Evidence for purposes of the Brady rule?

- **Non-Criminal Conduct Involving Moral Turpitude:**
- Note, however, that "to the extent such misconduct amounts to a misdemeanor *or is not criminal in nature* it carries less weight in proving lax moral character and dishonesty than does either an act or conviction involving a felony."
(*People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24.).
- Consumption of time is a consideration regarding admissibility.

22

What is Favorable Evidence for purposes of the Brady rule?

- **Prosecution Witnesses Unfavorable Character Evidence:**
- If a prosecution witness has a character trait (or habit and custom) that would help bolster the defense case, this can be favorable evidence for the defense.

23

What is Favorable Evidence for purposes of the Brady rule?

- **Prosecution Witnesses Unfavorable Character Evidence:**
- In a case in which the defendant is accused of battery on a police officer and is raising the defense that he acted in response to an officer's use of excessive force.
- Evidence that the officer had a habit of using excessive force could be favorable evidence.

24

What is Favorable Evidence for purposes of the Brady rule?

- **Prosecution Witnesses Unfavorable Character Evidence:**
- [Evidence that officer had nine complaints made against him for excessive force, verbal discourtesy, and profanity had a tendency in reason to bolster [defendant's] theory that the [officer] was overly aggressive and used excessive force in his encounter with [defendant]" and characterizing prosecutor's failure to disclose such evidence as "deplorable"]

(See *People v. Sons* (2008) 164 Cal.App.4th 90, 95, 99.)

25

What is Favorable Evidence for purposes of the Brady rule?

- **Prior False Reports:**
- Evidence that a complaining witness has previously falsely accused someone of sexual assault or molestation is relevant on the issue of the complaining witness' credibility. *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424.
- [a] prior accusation of rape is relevant to the complaining witness's credibility, but *only if* the accusation is shown to be false." *People v. Winbush* (2017) 2 Cal.5th 402, 469.

26

What is Favorable Evidence for purposes of the Brady rule?

- **Prior False Reports:**
- In *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, the court held the fact an informant-witness had, in the past, repeatedly lied to law enforcement was discoverable Brady information. *Id.* at p. 1058.

27

What is Favorable Evidence for purposes of the Brady rule?

- Rehearsed Testimony :
- Evidence that witness was "coached" or "scripted" may be favorable evidence.
- *In re Sodersten* (2007) 146 Cal.App.4th 1163, the court noted that tape-recorded statements of a young child "practicing" her testimony should have been disclosed.

28

What is Favorable Evidence for purposes of the Brady rule?

- Conflicting or Inconsistent Statements:
- A government witness' prior inconsistent statement clearly satisfies the first requirement of a *Brady* violation - that the evidence be "favorable" to the defendant.
(*Smith v. Cain* (2012) 565 U.S. 73.) (ID case)

29

What is Favorable Evidence for purposes of the Brady rule?

- Failure to Remember:
- A witness's failure of recollection can have exculpatory impeachment value and should be disclosed. (See e.g., *State v. Eley* (La. Ct. App. 2016) 203 So.3d 462, 473.)
- Impeachment evidence must disclose more than "minor inaccuracies." (*People v. Padilla* (1995) 11 Cal. 4th 891, 929, overruled on other grounds)

30

What is Favorable Evidence for purposes of the Brady rule?

- Grants of Immunity:
- Any grant of immunity to a witness in exchange for testifying is favorable evidence.
- Even an informal grant of immunity (i.e., an informal promise from the government that a witness would not be prosecuted if the witness cooperated) is favorable evidence.

31

What is Favorable Evidence for purposes of the Brady rule?

- Witness Is Informant:
- If the witness acted as informant in the case in which the informant testified as a witness, this information is favorable evidence.
- The fact that a witness has *previously* worked as an informant for law enforcement in other cases has also been viewed as favorable evidence. (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1381-1382.)

32

What is Favorable Evidence for purposes of the Brady rule?

- Promises, Offers, & Inducements:
 - The prosecutor has a duty to "disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements."
- (*People v. Masters* (2016) 62 Cal.4th 1019, 1067;
People v. Phillips (1985) 41 Cal.3d 29, 46.)

33

What is Favorable Evidence for purposes of the Brady rule?

- Promises, Offers, & Inducements:
- "In general, *Brady* requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment for pending cases."
- And there is a corresponding "duty to learn of any possible inducements made by law enforcement officers or other agents of the state." (*People v. Masters* (2016) 62 Cal.4th 1010, 1067.)

34

What is Favorable Evidence for purposes of the Brady rule?

- Brady Benefits:
- Anything informant could interpret as being monetarily, personally, or legally helpful to the informant/family/other designated recipient.
- Money
- Housing (in and out of custody)
- Special treatment in custody

35

What is Favorable Evidence for purposes of the Brady rule?

- Brady Benefits:
- Phone calls & visits
- Documentation used to promote informant (Mexican Mafia example)
- Any case benefit: recalling warrant, arranging surrender, OR release or reduced bail, delayed prosecution or hearing, plea bargains, providing info to sentencing court to mitigate sentence, immigration assistance, ect...

36

P v. Dekraai (2017) 5 Cal. App. 5th 1110

- Entire Orange County DA's Office recused from prosecuting the penalty phase.
- "Benign Neglect" regarding Sheriff Department's secret jail informant program violated Defendant's statutory and constitutional rights.
- Sheriff failed to monitor informants' conduct.
- Informant spoke with represented inmates after charges had been filed and recorded conversations. Violated 6th Amend right to counsel.
- Prosecutors were deemed to have constructive knowledge of the program for Brady purposes.

37

P v. Dekraai (2017) 5 Cal. App. 5th 1110

- Prosecutors failed to look into informant's history of informing benefits received.
- First time conflict of interest of a "divided loyalty" caused an entire office to be recused.
- Institutional interests & structural incentives between the DA's and Sheriff's Offices constituted a genuine conflict of interest.
- DA's Office had an interest extraneous to its official duty – its loyalty to the Sheriff & and its desire to protect the sheriff at the expense of the Def's Constitutional & statutory rights.

38

P v. Dekraai (2017) 5 Cal. App. 5th 1110

- Sheriff conducted program to benefit DA's Office & DA's Office ignored Sheriff's violations at [REDACTED]
- The DA's office failed in its duty to [REDACTED] team, specifically the Sheriff's Office
- DA's Office failed to acknowledge [REDACTED] wrongdoing. A factor in recusal
- Prosecutors named in the opinion [REDACTED]
- Opined that court wrote a "message" opinion.

39

What is Favorable Evidence for purposes of the Brady rule?

- Unsuccessful Attempts to Get Benefits:
- Even if a witness was unsuccessful in the attempt to get benefits in return for testimony, the fact the witness even made the attempt is "favorable" evidence.

40

What is Favorable Evidence for purposes of the Brady rule?

- Unsuccessful Attempts to Get Benefits:
 - "Even though the State had made no binding promises, a witness' *attempt* to obtain a deal before testifying was material because the jury 'might well have concluded that [the witness] had fabricated testimony in order to curry the [prosecution's] favor'."
- (See *Weary v. Cain* (2016) 136 S.Ct. 1002, 1007.)

41

What is Favorable Evidence for purposes of the Brady rule?

- Secret Deals:
- Deals in which the prosecution agrees with an attorney representing a testifying witness who is facing criminal charges to dismiss or reduce those charges with the understanding that the attorney is not to tell the witness of the agreement (i.e., so that the witness can truthfully state he/she is aware of no benefits being provided) are discoverable.

42

What is Favorable Evidence for purposes of the Brady rule?

- **Secret Deals:**

- The failure to disclose such an agreement not only may violate *Brady* but failure to correct the witness' testimony he/she is receiving no benefit may violate the rule laid out in *Napue v. Illinois* (1959) 360 U.S. 264 that the government is obligated to correct any evidence introduced at trial that it knows to be false. (See *Phillips v. Ormoski* (9th Cir. 2012) 673 F.3d 1168, 1182-1186.)

43

What is Favorable Evidence for purposes of the Brady rule?

- **Witness Fees & Incidentals:**

- Minor witness fees or reimbursement may not be deemed "material" information for *Brady* purposes, but they are technically "favorable" evidence. (See *United States v. Sipe* (5th Cir. 2004) 388 F.3d 471, 488-489 [indicating evidence of witness fees and travel fees could show bias but were cumulative and thus immaterial under *Brady*])

44

What is Favorable Evidence for purposes of the Brady rule?

- **Victim Compensation:**

- In *Brown* (C.D. Cal. 2014) 2014 WL 8622753, the prosecutor's office, as required by law (see Cal. Gov't Code § 13882) notified three victims of defendant's sexual assaults that each of them was entitled to apply for reimbursement under California's victim's compensation fund for certain expenses.
- The victims applied for and received some compensation for relocation costs, lost wages, medical treatment and mental health counseling.

45

What is Favorable Evidence for purposes of the Brady rule?

- Victim Compensation:
- The federal district court held:
- Information was not "suppressed" because it was equally available to both the prosecution and defense.
- The evidence was not material because none of the victims inquired about receiving money from the victim's compensation fund.
- Rather, they were informed that they could seek funds by the prosecutor's office.

46

What is Favorable Evidence for purposes of the Brady rule?

- Victim Compensation:
- The federal district court held:
- The money that the victims received from the state's victim compensation fund was not contingent on their willingness to testify at trial. Thus, it would have little bearing on the witnesses' credibility.

47

What is Favorable Evidence for purposes of the Brady rule?

- Bias:
- "Evidence probative of a testifying witness's credibility, including the potential for bias, is evidence favorable to the accused." (*People v. Morris* (2004) 34 Cal.4th 698, 714, citing to *United States v. Bagley* (1985) 473 U.S. 667, 676;
- see also Evid. Code, § 780(f) (allowing consideration of bias in assessing credibility of witness).)

48

What is Favorable Evidence for purposes of the Brady rule?

- Civil Suits:
- If a victim or witness in a criminal case has filed a civil suit against the defendant, this is favorable evidence because it provides a potential motive, bias and interest to testify in a manner helpful to success in the civil suit.
(*In re R.D.* (Pa. Super. Ct. 2012) 44 A.3d 657, 676.)

49

What is Favorable Evidence for purposes of the Brady rule?

- Prosecution Efforts to Keep a Witness from being Deported:
- In *re Garcia* (2014) 58 Cal.4th 440: ruled fact that undocumented person is present in US is not Morale Turpitude.





50

What is Favorable Evidence for purposes of the Brady rule?

- Prosecution Efforts to Keep a Witness from being Deported:
- The U nonimmigrant status (U Visa) was created by the Victims of Trafficking and Violence Prevention Act of 2000, which included the Battered Immigrant Women's Protection Act.
- T-Visa: same as U-Visa but for victims of Human Trafficking

51

What is Favorable Evidence for purposes of the Brady rule?

- Prosecution Efforts to Keep a Witness from being Deported:
- Both U & T Visas require a Law enforcement certification:
 - victim has been, is being, or is likely to be helpful in the investigation/prosecution of the case.
- If the state took action to prevent the deportation of the witness in order to permit the witness to testify, this would be favorable (and perhaps material) evidence for the defense.
(See *People v. Kasim* (1997) 58 Cal.App.4th 1380, 1384)

52

What is Favorable Evidence for purposes of the Brady rule?

- *People v. Guzman* 2012 WL 1159008: court properly excluded immigration status and U Visa eligibility of victim where no evidence victim knew about U Visa before assaulted and where victim had no discussions and no evidence she expected help from DA or LEA re: immigration.
- *P v. Escamilla* 2016 WL 7030713 at *4: court prevented impeachment of minor victim and parents where no evidence knew of U-Visa at time made allegations, did not see advertising, no evidence they faced adverse immigration consequences or feared removal.
- Both cases: unpublished/non-citable.

53

What is Favorable Evidence for purposes of the Brady rule?

- Mental Health or Emotional Instability:
- The mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject if such illness affects the witness's ability to perceive, recall or describe the events in question.
(*People v. Samuels* (2005) 36 Cal.4th 88, 116.)

54

What is Favorable Evidence for purposes of the Brady rule?

- Alcohol or Drug Use:
- The use or addiction to intoxicants can, in certain circumstances, be favorable evidence under *Brady*.
- See *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1056 [evidence that the informant-witness was using drugs during the trial would reflect on his competence and credibility as a witness and should have been disclosed to the defense]

55

Disclosure Guidance

- The prudent prosecutor will resolve doubtful questions in favor of disclosure.
(*United States v. Agurs* (1976) 427 U.S. 97, 108.)
- See also *Kyles v. Whitley* (1995) 514 U.S. 419, 439, which warns prosecutors against "tacking too close to the wind" in withholding evidence.

56

When does Brady Material have to be Disclosed?

- California Rule:
 - Brady material must be disclosed if it might impact the outcome of a pre-trial motion.
 - Prosecution has *Brady*-based due process duty to disclose evidence that would be reasonably likely to have altered the magistrate's probable cause determination at preliminary hearing.
- Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074, 1081

57

Statutory Discovery Obligations PC 1054.1

The Prosecuting attorney shall disclose to the defendant or his



- Brady duty applies to pre-trial proceedings.
- Brady duty applies even if the information is not known to the prosecutor.

58

Statutory Discovery Obligations PC 1054.1

- PC 1054.1 (e) does not define "exculpatory evidence".
- "Exculpatory evidence" pursuant to PC 1054 (e) does not have a materiality prong; broader than Brady; exculpatory evidence is akin to favorable evidence.
- Under the reciprocal discovery statute, the prosecution must provide to a defendant, not just evidence that is material under Brady and its progeny. *People v. Cordova* (2015) 62 Cal 4th 104.

59

When is Evidence deemed to be "in Possession of the Prosecution"?

- The Prosecution Team in General:
- A prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the prosecution or the prosecution team knowingly possesses or has the right to possess.

60

When is Evidence deemed to be "in Possession of the Prosecution"?

• Members of the Prosecution Team Include:

1. Any prosecutor who has handled the case.
2. Any investigator/inspector with the prosecutor's office who handled the case.
3. Any member of the investigating agency who was personally involved in the investigation of defendant.
4. Persons who acted on the government's behalf or assisted the government's case.

61

When is Evidence deemed to be "in Possession of the Prosecution"?

• "At its core, members of the prosecution team perform investigative duties and make strategic decisions about the prosecution of the case."

• *People v. Superior Court (Dominguez)* (2018) 28 Cal.App. 5th 223 and *IAR Systems v. Superior Court (Shehayed)* (2017) 12 Cal.App. 5th 503.

62

When is Evidence deemed to be "in Possession of the Prosecution"?

• Principles:

- It is not required that the prosecution actually be aware of material within the possession of the investigating agency.
 - A prosecutor will be deemed to be possession of favorable material evidence that is "known only to police investigators and not to the prosecutor."
- (*Youngblood v. West Virginia* (2006) 547 U.S. 867, 869.)

63

When is Evidence deemed to be "in Possession of the Prosecution"?

- Principles:
 - The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including law enforcement.
 - The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has reasonable access.
- (*JAR Systems Software, Inc. v. Superior Court* (2017) 12 Cal.App.5th 503.)

64

65

When is Evidence deemed to be "in Possession of the Prosecution"?

- Victim Issues:
- Disclosed during SART – evidentiary medical examination
- Disclosed to DA victim advocate
- Contained in RAP sheets:
 - AB 2133 (recently amended PC 11105)
 - Expand access to defense attorneys to state criminal history information furnished by AG
 - Requested in course of representation
 - Equally accessible?

66

Peace Officer *Brady* – “Tip System”

- Many DA's Offices have MOU with their local LEAs setting forth parameters of *Brady* Tip System, where LEA discloses to DA's Office:
- Sustained finding of misconduct involving moral turpitude, dishonesty, bias, etc. that may be contained in officer's personnel file.
- Pending Internal Affairs investigation on an officer that raises potential credible allegation of the above (does not include frivolous claims or those based on rumor, speculation, or unverifiable hearsay)

67

“Tip System”/ALADS Case

- Evolving Practice to bridge conflict of laws between the Constitution (*Brady*) and a statute (PC 832.7, POBRA)
- Tip System is “laudable,” gold standard to bridge conflict. *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 666
- 2nd District Court of Appeal (LA): Tip System Might Violate Peace Officer Bill of Rights Act (POBRA, PC 832.7) *ALADS v. Superior Court* (2017) 13 CalApp.5th 413
- Review Granted by Cal Supremes and no longer binding

68

“Tip System”/ALADS Case

- CURRENT STATUS: *ALADS v. Superior Court* (S243855)
- Pending in California Supreme Court: Supplemental Briefing Requested and Filed in Light of Passage of SB 1421.
- Oral arguments on June 5, 2019 and waiting for opinion to be issued?
- Potential Ramifications?

69

Peace Officer Personnel Files

- As of 2018, SB 1421 amended PC 832.7, broadening the types of the Peace Officer Personnel records available for public inspection pursuant "to the California Public Records Act Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code)." (Pen. Code, § 832.7(b).)
- This modified POBRA protections.

70

Peace Officer Personnel Files

- An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
- An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

71

Peace Officer Personnel Files

- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence."

72

SB 1421 (PC 832.7/832.8) Definition of Records

- Broad definition of "records", includes:
- Investigative reports
- Photos, audios, videos
- Transcripts
- Autopsy reports
- Everything compiled and presented to the DA
- Findings and recommended findings
- Disciplinary records

73

SB 1421 (PC 832.7/832.8)

- Delay in disclosure permitted during active criminal or admin investigation for records involving discharge/use of force:
- 60 days from date of use of force or until DA determines whether to file criminal charges, whichever is soonest
- After 60 days and up to 18 months if expected to interfere with criminal enforcement proceeding against officer/someone else

74

SB 1421 (PC 832.7/832.8)

- After 18 months must disclose if criminal charges are filed
- If criminal charges are filed, must disclose until verdict or, if plea, after sentencing or after 6 months if put on probation

75

Peace Officer Personnel Files

- In *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 698 the court pointed out that a violation of due process (i.e., the *Brady* rule) can only occur "if evidence has been suppressed by the State, either willfully or inadvertently" and that "[e]vidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence." (Id. at pp. 715-716.)

76

Peace Officer Personnel (Pitchess) Files

- The amendments to Penal Code section 832.7 giving the public access to records relating to use of force and sustained findings relating to honesty or sexual assault will likely moot the issue as to whether prosecutors have a *Brady* obligation to provide these specified records since it is likely defense counsel will be deemed to have equal access to these records.
- Keep in mind, these amendments to PC 832.7 are more narrow than all categories of favorable evidence.

77

PC 141 (c) Withholding Relevant Exculpatory Evidence

- Went into effect January 1, 2017
- A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony

78

PC 141 (c) Withholding Relevant Exculpatory Evidence

- Punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 18 months, or two or three years.

79

Rules of Professional Conduct 5.1

- Responsibilities of Managerial & Supervisory Lawyers:
- There is duty on the part of prosecutor's offices to make efforts to ensure that all the attorneys in the office comply with the state bar rules, which would include the rule imposing special discovery obligations on prosecutors (rule 3.8).
- Managerial or supervisory attorneys may be subject to discipline for knowingly ratifying discovery violations committed by their subordinates or failing to take reasonable remedial action at a time when the conduct is known, and the consequences can be avoided or mitigated.

80

Post Conviction

- California case law imposes a duty to take action if evidence casting doubt on a conviction comes to light after the verdict.
- "[A]fter a conviction the prosecutor ... is bound by the ethics of his office to inform the appropriate authority of ... information that casts doubt upon the correctness of the conviction." (*People v. Curi* (2006) 140 CalApp.4th 310, 318)
- Rule of Professional Conduct 3.8 (f) & (g) also imposes a duty to take various actions when there is new, credible and material evidence causing a reasonable likelihood a convicted defendant did not commit the offense. (Clear & Convincing evidence for (g))

81

CDAА Brady Materials and Resources

- CDAА's Discovery Seminar
 - A Deep Dive Into Brady and Discovery
- CDAА Website: <https://www.cdaa.org>
- The Inquisitive Prosecutor: The Basic Brady, Statutory, and Ethical Discovery Obligations Outline (2019 Edition)
- CDAА Sidebar Community: Brady Issues/Ethics.

82

CDAА Brady Materials and Resources

- CDAА Webinars & On Demand Library
 - Brady "Epidemic" Misdiagnosis (2016)
 - Dissecting the New Rules of Professional Conduct (2018)
 - You've Been Accused of Misconduct – Now What? (2018)
 - Brady Oh Brady - What Have You Done For Me Lately? (2019)

83

CDAА Resources

Joe Chavez, CDAА Resource Attorney
 (916) 930-3038 Office
 (916) 224-8860
jchavez@cdaa.org

84

--