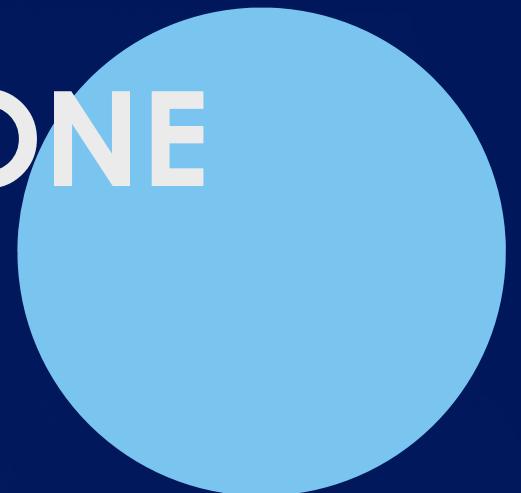


# **BRADY OH BRADY – WHAT HAVE YOU DONE FOR ME LATELY?**

**CHIEF DDA DORI AHANA, MARIN**

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# Topics Covered

- ▶ Recent Developments Impacting our *Brady Obligation* as it Relates to Peace Officers
  - ▶ ALADS case pending in the California Supreme Court
  - ▶ SB 1421 (Pen. Code sections 832.7, 832.8)
- ▶ *Brady's Impact on Training, Discovery and Disclosure Requirements with Cooperating Individuals*
  - ▶ Overview of cooperation & benefits
  - ▶ Lessons from *Kasim* to *Dekraai*
- ▶ *Brady Issues in Sexual Assault, DV, and Human Trafficking Cases*
  - ▶ Fundamentals
  - ▶ Hypotheticals

# Topics Not Covered

- ▶ **The New Rules of Professional Responsibility**
  - ▶ **Covered in another Webinar available on the CDAA Website**
- ▶ **Options and Considerations in Addressing a Prosecutorial Misconduct Claim**
  - ▶ **Also covered in another Webinar available on the CDAA Website**
- ▶ **A Deep Dive Into Discovery and Brady**
  - ▶ **Attend CDAA's Discovery Seminar**

# The Guiding Principle

The [Prosecution team] is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest in a criminal proceeding is not that it shall win a case, but that justice shall be done.

*Berger v. United States (1935) 295 U.S. 78, 88*

# 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 (1963) 373 U.S. 83*

# 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
- ▶ State Bar and PC 141 Ramifications for the Prosecutor
- ▶ The Innocent can get convicted and the Guilty set free

# Peace Officer Brady

- ▶ Brady Duty to disclose impeachment evidence on witnesses extends to Peace Officer witnesses.
- ▶ Potential Peace Officer Brady impeachment information
  - ▶ On-duty conduct
  - ▶ Testifying dishonestly
  - ▶ Dishonesty in an investigation, such as report-writing
  - ▶ Dishonesty during an IA (cover-up worse than the crime)
  - ▶ Off-duty conduct

# Peace Officer Brady

- ▶ **Several Sources**
  - ▶ **Criminal Filing submitted to the DA's Office**
  - ▶ **Testimony in Court**
  - ▶ **Pitchess Motions**
  - ▶ **Inconsistencies between Report and Other Evidence (Video, other Reports, etc.)**
  - ▶ **Media Reports or Citizen Reports**
  - ▶ **Officer Sub'd and Learn on Admin Leave**
  - ▶ **“Tip System” from Agency**

# 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 turp, 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)

# “Tip System”/ALADS Case

- ▶ Evolving Practice to bridge conflict of laws between the Constitution (Brady) and a statute (PC 832.7, POBRA)
- ▶ 2015: *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696
  - ▶ Tip System is “laudable,” gold standard to bridge conflict
- ▶ 2017: *ALADS v. Superior Court* (2017) 13 Cal.App.5th 413
  - ▶ 2<sup>nd</sup> District Court of Appeal (LA): Tip System Might Violate Peace Officer Bill of Rights Act (POBRA, PC 832.7)
  - ▶ Review Granted by Cal Supremes and no longer binding

# “Tip System”/ALADS Case

- ▶ **CURRENT STATUS:** *ALADS v. Superior Court (S243855)*
- ▶ **ISSUE:** When a law enforcement agency creates an internal *Brady* list (see Gov. Code, § 3305.5), and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion? (See *Brady v. Maryland* (1963) 373 U.S. 83; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Pen. Code, §§ 832.7-832.8; Evid. Code, §§ 1043-1045.)

# “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 (next slides)
  - ▶ Hopefully argued by end of year and Opinion  
Issued?
  - ▶ Potential Ramifications?

# SB 1421 (PC 832.7/832.8)

- ▶ **Modified POBRA Protections, Effective 1/1/19**
- ▶ **Applies to the following peace officer personnel records:**
  - ▶ Discharge of firearm at a person
  - ▶ **Use of force resulting in death or GBI**
  - ▶ **Sustained finding** engaged in **sexual assault**
    - Note: includes propositioning or committing any sex act while on duty
  - ▶ **Sustained finding** of **dishonesty**
    - Note: limited to dishonesty relating to reporting/investigating/prosecuting a crime, or reporting/investigating misconduct of another officer

# SB 1421 (PC 832.7/832.8)

- ▶ Such records **no longer confidential**, shall be made available for public inspection
- ▶ **Regardless of 832.7(a), 6254(f), or any other law**

# SB 1421 (PC 832.7/832.8)

- ▶ Broad definition of “records”
- ▶ Includes all:
  - investigative reports
  - Photos, audios, videos
  - transcripts
  - autopsy reports
  - everything compiled and presented to DA
  - findings and recommended findings
  - disciplinary records

# 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**
  - ▶ **After 18 months must disclose unless criminal charges are filed**
  - ▶ **If criminal charges are filed may delay disclosure until verdict or, if plea, after J&S or after 6 months if put on probation**

# SB 1421 (PC 832.7/832.8)

- ▶ **DISCUSSION QUESTIONS**
- ▶ **Does it apply to DA's Offices? *Brady* materials?**
- ▶ **Does it apply retroactively?**
- ▶ **Do we have to provide records reflecting work product/deliberative processes?**
- ▶ **Do we have to redact the records?**
- ▶ **Should DA Offices make CPRA requests to their LE agencies regarding sexual assaults and dishonesty for *Brady* purposes?**
- ▶ **Because these items are no longer in sole possession of prosecution team and defense has equal access, does that relieve us of our *Brady* obligation?**

# Cooperating Individuals & *Brady*

- ▶ Cooperators & benefits
- ▶ *Brady* pitfalls
- ▶ Practice tips



# Types of Cooperation



- ▶ **Investigative vs. Testifying**
- ▶ **Law Enforcement Cooperators**
  - ▶ “Hip Pocket” cooperator
  - ▶ Working off an un-submitted case
- ▶ **Mercenary**
  - ▶ Working for money
- ▶ **DA Cooperators**
  - ▶ Incarcerated with Target
  - ▶ Uncharged but liable Cooperators
  - ▶ Charged Cooperators

# Brady Benefits

- ▶ Anything that the CI could interpret as being monetarily, personally, or legally helpful to the CI, CI's family or other designated recipient of benefit at the request of CI
  - ▶ Money
  - ▶ Housing (in and out of custody)
  - ▶ Special treatment in custody
  - ▶ Goods/services/food
  - ▶ Phone calls & visits
  - ▶ Letters & documentation used to promote CI
  - ▶ Any case benefit
    - ▶ Recalling warrants, arranging surrender, reduced or no bail, delayed prosecution or hearing, reduced charges, plea bargains, providing information to a sentencing court to mitigate sentence, immigration assistance, etc...



# Brady Pitfalls with LE Cooperators

## ► **Systemic Issues**

- Liability for LE actions, known and unknown
- Lack of centralized recordkeeping and interagency information sharing
- Fear of the Evidence

# Brady Pitfalls with LE Cooperators

## ► Specific Issues

- Lack of training/legal knowledge regarding use of informants and disclosure obligations
- Failure to disclose *Brady* issues with Investigative CI's
  - Bias, impeachment, benefits
- Understanding scope of Testifying CI use and prior benefits
  - Lack of communication
  - Lack of documentation
  - Lack of knowledge of LE systems of documentation and control

# CI Lessons from the Southland

- ▶ San Diego: *People v. Kasim* (1997) 56 Cal.App.4th 1360
  - ▶ Lack of inquiry into history of cooperation, LE benefits, and reliance on what was told to the informants rather than the realistic implication of what they were doing on sentences. **New Trial, misconduct finding.**
- ▶ Riverside: *Baca v. Adams* (2004, 2015) 2004 unpub, 2015 appeal withdrawn
  - ▶ Lack of knowledge of history of cooperation and reliance on DDA “hyper technical parsing” instead of common sense expectation of benefits for testimony. **New Trial, DDA accused of crime.**
- ▶ Orange County: *People v. Dekraai* (2016) 5 Cal.App.5<sup>th</sup> 110
  - ▶ **Lack of training on 6<sup>th</sup> amendment**, lack of supervision and knowledge of LE operations and databases, lack of inquiry into informant history and reliance on DDA “hyper technical parsing” instead of common sense expectation of benefits for testimony. **Recusal of DA’s office, removal of DP, misconduct finding.**

# CI Practice Tips

- ▶ Know the Law
  - ▶ Brady and progeny
  - ▶ 6<sup>th</sup> Amendment, Massiah & Perkins
  - ▶ Informant cases
- ▶ Know your LE Agencies
  - ▶ Data systems
  - ▶ Documentation practices
  - ▶ Investigative practices
- ▶ Document Everything
  - ▶ Centralized recordkeeping
  - ▶ Written contracts
  - ▶ Timelines, reports, memos
- ▶ Don't FEAR the EVIDENCE
  - ▶ Own the benefits, prep the witness, argue the corroboration



# Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals

- ▶ **Victim is generally not considered to be part of the prosecution team.**
- ▶ **Favorable information in the mind of or the possession of the victim/witness that is unknown to us cannot be imputed to us.**
- ▶ **“The People had no duty to discover the existence of or to seek or obtain, (the evidence) not provided to the police by the victims.” (P v. Sanchez (1998) 62 Cal.App.4<sup>th</sup> 460)**
- ▶ **Victim’s attorney (US v. Plunk (9<sup>th</sup> Cir. 1998) 153 F.3d 1011.)**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ **Favorable information in the medical or psychiatric records of the victim or witness is not part of prosecution team. (P v. Webb (1993) 6 Cal.4<sup>th</sup> 494.)**
- ▶ **Information from victim to advocate working at CBO not part of prosecution team**
  - ▶ **Assisting victim cope with crime; not assist prosecution**
  - ▶ **Privileges: Psychotherapist-patient (EC 1010), Sexual assault counselor-victim (EC 1035.8), DV counselor-victim (EC 1037.5), HT caseworker-victim (EC 1038)**
    - ▶ **If acting as therapist, counselor, caseworker**

# Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals

- ▶ IAR Systems v. Superior Court (Shehayed) (1<sup>st</sup> DCA 2017) 12 Cal.App.5<sup>th</sup> 503
  - ▶ Holding: at its core members of the prosecution team perform investigative duties and make strategic decisions re: prosecution
  - ▶ Prosecution team may also include those who submit to direction of DA and aid in the investigation
  - ▶ Q= whether person 1) actively investigates case, 2) acts under direction of DA, 3) crafts trial strategy
  - ▶ Dominguez: Utilized IAR approach and added agency analysis: What degree of control did DA exercise over agent? Level of involvement of entity in case?

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ When does favorable information from or about a victim become imputed to us?
- ▶ Information is possessed by prosecution team when:
  - ▶ Disclosed to another DA in office, DAI, V/W advocate; LE ofcr.
    - ▶ Look at their connection to this prosecution/investigation; type of information; how documented; how shared; how large is office; special prosecution team
    - ▶ Q is not who the person is but what the person did that determines membership (US v. Stewart (2<sup>nd</sup> Cir. 2006) 433 F.3d 273); partial team concept (P v. Sup. Ct. (Barrett))
    - ▶ DA not to consider “credibility” of source of favorable information in deciding if facially exculpatory (In re Miranda (2008) 43 Cal.4<sup>th</sup> 541)

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ When does favorable information from or about a victim become imputed to us?
- ▶ Information is possessed by prosecution team when:
  - ▶ Disclosed during SART – evidentiary medical examination
  - ▶ Disclosed to DA victim advocate
  - ▶ Contained in RAP sheets:
    - ▶ AB 2133 (amending PC 11105) – equally accessible?
    - ▶ Expand access to defense attorneys to state criminal history information furnished by AG
      - ▶ Requested in course of representation
      - ▶ Redaction; material witness; privacy

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Hypo #1: Victim tells you that she no longer wants to cooperate with the prosecution and is thinking of moving away from the jurisdiction.**
  - ▶ **Is this information disclosable?**
- ▶ **When you tell her that you still plan to proceed with prosecution, she next says that she lied to police when she made the report?**
  - ▶ **What if anything do you do with this information?**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ Lack of cooperation or desire to recant
  - ▶ Reluctance to testify is probably not in and of itself favorable evidence (Ramirez v. US (D.C. 1985 499 A.2d 451))
  - ▶ Turns on the reason for the reluctance?
    - ▶ Because she told police a false story but unwilling to say it under oath
    - ▶ Fear of retaliation, coercion, harm
    - ▶ Same analysis re: desire to drop charges (see Holloway v. State (Miss. Ct. App. 2015) 196 So.3d 962)
    - ▶ But statement may still be disclosable under 1054.1

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Death or unavailability of witness**
  - ▶ **Com. V. Friedenberger (Pa. Super. Ct) 2014 WL 10920398** –DA did not disclose death of three critical witnesses, although other witnesses still available. Court found death rendered prosecution more difficult but not impossible. Death of witnesses not evidence. DA did not make factual misrepresentations when said ready for trial. Dissent said that deaths were “favorable” and criticized majority for not addressing whether Brady violation.
  - ▶ **Matter of Wayne M. (1983) 467 NYS2d 798** – permanent unavailability of main witness violation of state code of professional conduct.
  - ▶ **CA Rule of Prof conduct 5-110:** if DA becomes aware charges not supported by PC, member shall promptly advise the court

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Death or unavailability of witness**
  - ▶ **Ethical violation for DA to make an affirmative misrepresentation to court/counsel re: availability of witness**
  - ▶ **Question = do you know witness absolutely will be unavailable**
  - ▶ **P v. West 2003 WL 22753633 witness was fugitive so would be difficult to secure his attendance in court to testify in case but it does not mean witness unavailable at time of trial.** Court stated: The DA's duty to disclose exculpatory evidence does not extend to difficulties that may arise in securing of witnesses to present its case.

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ Prior false report/false claims to police is favorable
  - ▶ If we have that information we must disclose it
  - ▶ What if defense obtains this recanting statement from victim?  
Are they obligated to turn it over to us?
    - ▶ Defense has no obligation under 1054.3 to disclose statements taken from DA witnesses that it may use to cross-examine witness, (Izazaga v. Sup. Ct. (1991) 54 Cal.3d 356) unless:
    - ▶ Reasonably anticipates calling defense investigator who took the statement (Izazaga; P v. Landers (2019) 31 Cal.App.5<sup>th</sup> 288)
    - ▶ Show, read, disclose writing to witness (EC 768)
    - ▶ Refresh recollection (EC 771)

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Hypo #2:** In January 2019 there was a restraining order hearing at which the victim petitioned for a DV RO. The respondent/defendant argued to court that victim fabricated underlying DV incident because he said he would leave her and would try to get custody of their child. Court did not issue DV RO.
- ▶ Is the fact that the court did not issue DV RO bear on victim's credibility?
- ▶ If we know about what occurred at the DVRO obligated to obtain transcript and provide to defense?

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ Adverse findings does not necessarily equate to a finding that victim lied
- ▶ US v. Woodard (10<sup>th</sup> Cir. 2012) 699 F.3d 1188 – did judicial finding specifically address witness's veracity or generally? Under oath? Lied about significant issue? Witness's explanation/motivation for lie.
- ▶ Defense/defendant claim that victim lied is not trustworthy because self-serving (P v. Jordan (2003) 108 Cal.App.4<sup>th</sup> 349)
- ▶ Improper for one witness to opine about another's credibility (P v. Melton (1988) 44 Cal.3d 713)

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Hypo #3: DV/Sexual assault case.** Victim is in need of emergency shelter. The local shelter is full. Your office puts the victim up in a hotel and provides money for incidentals. Your victim/witness advocates tell her that she can seek compensation for medical treatment from the state.
- ▶ **Is this information disclosable?**

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Payments to cover relocation expenses**
- ▶ **Arrangements to protect safety of witness not necessarily favorable**
- ▶ **But if witness received money to cover expenses disclosable (P v. Verdugo (2010) 50 Cal.4<sup>th</sup> 263.)**
- ▶ **Non-statutorily mandated witness fees/incidentals may be favorable (US v. Wicker (5<sup>th</sup> Cir. 1991) 933 F.2d 284)**

# Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information

- ▶ Victim seeking compensation for medical, relocation, counseling, and lost wages from state victim's compensation fund
  - ▶ Brown v. Gonzales (C.D. Cal.2014) 2014 WL 8622753 [court found not material – declined to state “not favorable” – also information equally accessible to defense & not contingent on cooperation]
  - ▶ Not inducement and administered by entity separate from DA
  - ▶ But see Moore v. Marr (10<sup>th</sup> Cir. 2001) 254 F.3d 1235 while court did not find a Brady violation, because fund was administered in part by that DA's office could be favorable as incentive to victim to paint himself as victim and vilify defendant

# Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information

- ▶ Mental health or emotional instability or related treatment
  - ▶ Person's credibility is not in question merely because he/she is receiving treatment for mental health problem (P v. Pack (1988) 201 Cal.App.3d 679.)
  - ▶ But a witness's mental illness or emotional instability can be relevant where such illness affects the witness's ability to perceive, recall, or describe events in question (P v. Samuels (2005) 36 Cal.4<sup>th</sup> 96)
  - ▶ P v. Abel (2012) 53 Cal.4<sup>th</sup> 891: non-disclosure of witness' psychiatric records not DP violation or affect defendant's ability to prepare/present a defense where there was no indication in the records of issues that affects witness's ability to perceive, recall, describe events or the ability and willingness to tell the truth (despite references to anti-social personality disorder and psychopathy)
    - ▶ But see US v. Butt (1<sup>st</sup> Cir. 1992) 955 F.2d 77 drawing distinction between depression and other personality disorders and schizophrenia and attendant hallucinations etc.

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Hypo #4: Is the fact that victim was 5150'd favorable/disclosable?**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ Is WI 5150 disclosable?
  - ▶ Turns on whether when the commitment occurred relative to this case, the reason for the commitment, nature of disorder, placement in hospital following evaluation, and the defense theory
  - ▶ Was the 5150 subsequent to event and because of the trauma inflicted by defendant? If so, arguably inculpatory
  - ▶ If the 5150 incident preceded event, was unconnected to the crime and related to ongoing psychiatric condition may be favorable

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ Alcohol or drug use
  - ▶ Narcotic addiction not admissible to impeach credibility of witness unless it shows that he/she was under the influence while testifying or when the events to which he testified occurred or that his/her mental faculties were actually impaired by the habit (P v. Smith (1970) 4 Cal.App.3d 403)
  - ▶ Note: remember that as to psychiatric or drug/alcohol treatment records SDT'd by the defense they should not be opened and reviewed in camera pre-trial (Hammon)

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Hypo #5: Victim in a serious sexual assault case works for your drug task force as an informant in a different case from five years ago. There are no other witnesses to the sexual assault. Victim had a pending drug case that she worked off through the task force. The case is pending PH.**
- ▶ **Questions:**
  - ▶ **Is work as informant disclosable?**
  - ▶ **If so, need it be disclosed pending PH?**
  - ▶ **If TF asserts EC 1040/1041 privilege**
  - ▶ **What procedure for disclosure of this information?**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Other examples of favorable information:**
- ▶ **Grant of immunity in exchange for testifying**
- ▶ **Criminal and non-criminal misconduct involving moral turpitude**
- ▶ **Bias**
- ▶ **Rehearsed/coached/scripted testimony (In re Sodersten (2007) 146 Cal.App.4<sup>th</sup> 1163 – recordings of young child practicing her testimony)**

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Hypo #6: Adult victim in a human trafficking case is undocumented. You are aware that your office filled out a portion of the T-Visa application confirming cooperation.**
  - ▶ **What are the DA's obligations to inquire as to the victim's immigration status?**
  - ▶ **Is the victim's undocumented status admissible in court?**
  - ▶ **What are the DA's disclosure obligations?**
  - ▶ **What arguments would the DA make to exclude this information in court?**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Non-citizen/undocumented status**
  - ▶ **P v. Viniegra (1982) 130 Cal.App.3d 577** arguably favorable evidence (DA asked defense witness if testifying for defendant because would otherwise be turned in as illegal alien)
  - ▶ **But see new law re: admissibility of immigration status in court (EC 351.3 and 351.4)**
  - ▶ **See also In re Garcia (2014) 58 Cal.4<sup>th</sup> 440:** CSC said fact that undocumented is present in US is not MT
  - ▶ **P v. Scales 2004 WL 1759259** illegal immigration status did not reflect a pattern of deceit as there are a number of ways an undocumented alien could enter US (such as when child)

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ Considerations re: favorable/disclosable
  - ▶ Is victim testifying for fear that she or others will be turned into ICE
  - ▶ Vulnerable to real/imagined pressure from government
  - ▶ Evidence of falsification of government documents, fabrication of employment or aid applications
  - ▶ Note: Values Act (GC 72846) – can't inquire into immigration status
- ▶ DA efforts to keep victim/witness from being deported & motivation to “be helpful” or cooperate is favorable
  - ▶ P v. Kasim (1997) 56 Cal.App.4<sup>th</sup> 1360; US v. Blanco (9<sup>th</sup> Cir. 2004) 392 F.3d 382

# Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information

- ▶ U or T Visas defined:
- ▶ U-Visa: provides temporary relief from deportation for victims of DV or SA
  - ▶ Requires that LEA/DA certify that victim been/being helpful in investigation/prosecution
- ▶ T-Visa: same as U-Visa but for victims of Human Trafficking
  - ▶ Requires that LEA/DA certify that victim been/being helpful in investigation/prosecution
  - ▶ Victims 14 yo or younger who are unable to cooperate because of physical/psychological trauma exempt

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ U or T Visas
- ▶ Fact that victim is eligible for U/T Visa or has sought one is favorable
- ▶ **State v. Valle (Oregon 2013) 298 P.3d 1237:** fact that victim applied for U Visa relevant impeachment in SA trial because jury could infer victim had personal interest in testifying consistent with application
- ▶ **But see P v. Escamilla 2016 WL 7030713 at \*4:** court prevented impeachment of SA 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

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **U or T Visas**
- ▶ **P 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
- ▶ **Note:** if relative of victim applies for U-Visa based on victim's allegations, that fact is favorable and should be disclosed

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Hypo #7: Victim in a sexual assault/human trafficking case has a juvenile history. Her juvenile matters were sealed but you know that in one of those cases the juvenile committed a grand theft person and lied to the police.**
- ▶ **What is the DA's duty to obtain/disclose?**
- ▶ **How does the fact that the records were sealed effect ability to obtain/disclose?**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Juvenile Records**
- ▶ **Release governed by WI 827 (DA can access but cannot disseminate)**
- ▶ **Brady compliance with unsealed records**
  - ▶ **File own 827**
  - ▶ **Notify defense and have them file 827**
  - ▶ **Johnson approach – equally accessible**
  - ▶ **JE v. Sup. Ct. (2014) 223 Cal.App.4<sup>th</sup> 1329**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ **Juvenile Records**
- ▶ **Brady compliance with sealed records**
- ▶ **Records deemed not to have existed**
- ▶ **Amendments to WI 781 and 786**
- ▶ **Record can be accessed, inspected, or utilized by DA\* to meet statutory or constitutional obligation to disclose favorable or exculpatory evidence**
- ▶ **Not all sealing statutes have been amended**
- ▶ **P v. Espinoza (2002) 95 Cal.App.4<sup>th</sup> 1287 [can call witnesses to testify to information independent of juvenile record]**

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ Hypo #8: DV victim has a Facebook account. She posts information on her public page about the defendant and how he hurt her and how he cheated on her and how angry she is. She also has private postings but neither the DA nor the defense knows the content of those postings. The defense believes these private postings will be favorable to the defendant. The defense SDT'd Facebook for the private information.
- ▶ Does the defense have a right to privileged third party information pre-trial?

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ Limits to what the defense can discover pre-trial:
  - ▶ P v. Hammon (1997) 15 Cal.4<sup>th</sup> 1117 (seminal case on pre-trial disclosure of privileged information)
  - ▶ Def not constitutionally entitled to pre-trial discovery
  - ▶ CSC held no discovery of potentially privileged information should be ordered from third party prior to trial
  - ▶ Procedure upheld: Facebook, Inc. v. Sup. Ct (2018) 4 Cal.5<sup>th</sup> 1245 (FB I)

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ **P v. Hammon (1997) 15 Cal.4<sup>th</sup> 1117:**
- ▶ **Sex assault case; defense served SDTs on victim's psychotherapists on theory that records are necessary to challenge credibility**
- ▶ **Court need not do pre-trial review of privileged SDT'd records**
- ▶ **Rejected defense claim that need to confront/cross ex/fair trial**
- ▶ **When defense proposes to impeach a DA witness at trial with privileged information the court has sufficient information to better able balance def's need for cross-ex and the privilege**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ **Facebook, Inc. v. Sup. Ct (2017) 15 Cal.App.5<sup>th</sup> 729 (FB II) review granted:**
  - ▶ **Attempt murder**
  - ▶ **Victim public postings: updates on recovery, court, personal use of guns, drugs, desire to rob and kill**
  - ▶ **Defense claims private FB info is favorable**
  - ▶ **Lack of access: SCA & Victim uncooperative & DA no SW**

## **Brady Issues in Sexual Assault, DV, and HT Cases: Ex. of “favorable” information**

- ▶ If Facebook successfully quashes the SDT, may the court:
  - ▶ Order the DA pre-trial to produce the information to the defense?
  - ▶ Order the victim to consent?
  - ▶ Order the DA to obtain a SW for the information?
  - ▶ Sanction the DA if it fails to do either?

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ **Can court compel victim's consent?**
  - ▶ **Victim = 3rd party; compulsion under threat of sanctions = DP violation**
  - ▶ **Subverting victim's constitutional and statutory privileges**

# **Brady Issues in Sexual Assault, DV, and HT Cases: Fundamentals**

- ▶ Can court compel DA SW?
  - ▶ No PC (no constitutional or statutory basis); separation of powers
- ▶ Can court sanction DA for not searching for and obtaining this information?
  - ▶ Victim not part of prosecution team, so cannot compel search or sanction
  - ▶ Unknown exculpatory value to private postings

# QUESTIONS?

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