

Training Bulletin

Over four decades ago, the United States Supreme Court decided the case of *Brady v. Maryland* (1963) 373 U.S. 83, establishing the rule that a prosecutor has a “*due process*” affirmative duty to disclose to a charged criminal defendant all “*material evidence*” that is favorable to the defense and that is possessed by the “*prosecution team*.”

“*Due Process*” is the constitutional provision under the Fifth and Fourteenth Amendments guaranteeing that a person’s “*life, liberty or property*” will not be taken from him or her without first being accorded “*due process*,” i.e., being treated with “*fundamental fairness*.”

Information that qualifies as “*material evidence*,” and that which does not, will be discussed in this training bulletin.

The “*prosecution team*” includes the prosecutor and any law enforcement agency involved with the particular case in issue.

Since *Brady* was decided, a myriad of new cases have fine-tuned, and sometimes confused, the legal obligations of the public prosecutor as to what is, and what is not, “*discoverable*” (i.e., the information that must be given to the defense in a criminal prosecution). The following are the main points under this *Brady* discovery obligation:

A prosecutor has a duty to learn of favorable evidence known to other prosecution and investigative agencies acting on the prosecution’s behalf, including police agencies. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.)

There is a “duty on the part of the prosecution, even in the absence of a request therefore, to disclose all substantial material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness.” (*People v. Ruthford* (1975) 14 Cal.3rd 399, 406.)

“The prosecutor’s duties of disclosure under the due process clause are wholly independent of any statutory scheme of reciprocal discovery. The due process requirements are self-executing and need no statutory support to be effective. . . . (I)f a statutory discovery scheme exists, these due process requirements operate outside such a scheme. The prosecutor is obligated to disclose such evidence voluntarily, whether or not the defendant makes a request for discovery.” (*Izazaga v. Superior Court* (1991) 54 Cal.3rd 356, 378.)

Failing to comply with the rules under *Brady* results in what is commonly known as a “*Brady violation*.” A “*Brady violation*” will likely lead to a reversal of a conviction on appeal and/or a new trial for the accused.

There are three components to a *Brady* violation:

- The evidence at issue must be favorable to the accused because it is exculpatory, or because it is impeaching;
- The evidence must have been suppressed by the State, either willfully or inadvertently; and
- Prejudice must have ensued. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.)

The suppression of favorable evidence produces “*prejudice*” to a defendant only if the suppressed evidence is “*material*.” Evidence is “*material*” only if “‘there is a reasonable probability’ that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense.” (*Strickler v. Greene, supra.* at pp. 289.)

There are six separate categories of “favorable” evidence:

- Evidence mitigating punishment. (*Brady v. Maryland, supra.*)
- Evidence *directly* opposing guilt. (E.g.; *People v. Jackson* (1991) 235 Cal.App.3rd 1670, 1676; A witness belatedly (during jury deliberations) coming forward saying that he saw someone else commit the crime.)
- Evidence *indirectly* opposing guilt. (E.g.; *People v. Clark* (1992) 3 Cal.4th 41, 133-134; *People v. Kaurish* (1990) 52 Cal.3rd 648, 684-687; Evidence of other similar crimes committed by another person, circumstantially proving that this other person, and not the defendant, committed the present offense.)
- Evidence supporting defense testimony. (E.g.; *People v. Collie* (1981) 30 Cal.3rd 43, 54; Information that tends to reestablish the credibility of defense witnesses.)
- Evidence supporting a defense motion that would weaken the prosecution’s case. (E.g.; *United States v. Gamez-Orduno* (9th Cir. 2000) 235 F.3rd 453, 461; evidence relevant to a defense motion to suppress.)
- Evidence impeaching a prosecution witness’s credibility (*United States v. Bagley* (1985) 473 U.S. 667, 676.), *such as*:
 - Contrary, conflicting statements.
 - False Reports.
 - Inaccurate statements and reports.
 - Other evidence contradicting prosecution witness statements and/or reports.
 - Promises or offers of leniency, or other inducements, express or implied.
 - Felony convictions.
 - Misconduct involving moral turpitude.
 - Misdemeanor convictions involving moral turpitude.
 - Pending criminal charges.
 - Parole or Probation status.
 - Reputation for untruthfulness.
 - Alcohol and/or drug use.
 - Gang membership.
 - Bias toward the defendant.

What is NOT Brady material:

“Rumor” and “speculation” is not evidence that must be revealed pursuant to *Brady*. (*Sledge v. Superior Court* (1974) 11 Cal.3rd 70, 75; *People v. Breaux* (1991) 1 Cal.4th 281, 298-299; *United States v. Agurs* (1976) 427 U.S. 99, 109, fn. 16.)

The *Brady* rule does not apply to “inculpatory” evidence; i.e., evidence against a defendant, or evidence tending to convict. (*People v. Hill* (1998) 17 Cal.4th 800, 849.)

Nor does it include “neutral” evidence; i.e., evidence that tends neither to convict nor exonerate the defendant. (*United States v. Rhodes* (2nd Cir. 1978) 569 F.2nd 384; *United States v. Bryan* (9th Cir. 1989) 868 F.2nd 1032, 1037.)

Brady does not include “immaterial” evidence; i.e., evidence not reasonably probable to produce a different result. (*People v. Earp* (1999) 20 Cal.4th 826 870.)

The Brady Index: As a result of the above, the District Attorney’s Office has established what is now known as “the Brady Index.” The *Brady* Index is a centralized repository for potentially discoverable information (i.e., “*Brady Information*”) about law enforcement witnesses that is already in the possession

of the District Attorney's office. The *Brady* Index will act like the hub of a wheel to allow prosecutors from any and all divisions and branches to submit and receive discoverable information about a law enforcement witness.

Will the Index intrude into Peace Officer Personnel Files?

No! The *Brady* Index is *not* about a deputy district attorney ("DDA") rummaging through a law enforcement officer's personnel files or changes to the *Pitchess* discovery process (E.C. §§ 1043-1045). It deals with information already in the possession of the District Attorney's Office. The District Attorney will notify every defendant on every case on the cover page of every set of discovery that law enforcement personnel files are not reviewed by the District Attorney, but rather that *Pitchess* is the process for such review.

Why create the Brady Index?

To avoid the granting of new trial motions and reversals on appeal due to discovery or ethics violations related to material *Brady* information *already in the possession of the District Attorney's office*. Discovery rules mandate that trial prosecutors provide discoverable information known to *any* member of the District Attorney's Office (not just what the trial DDA knows). A DDA needs to know about it to evaluate it for discovery. A centralized *Brady* Index allows the individual DDA to do so in a large office. The *Brady* Index will also protect an officer's reputation and integrity against unfounded allegations from witnesses, defense, prosecutors, and other officers that might otherwise spread through uncontrolled rumor and baseless speculation; a situation which has happened in the past.

What are the goals of the Brady Index Project?

It has been determined that there is a need to automatically alert any particular DDA of the existence of potentially discoverable information already in the possession of the District Attorney's office, and to track information that has already been provided in discovery by other DDAs in other cases. The *Brady* index is necessary to effectively protect the entire District Attorney's Office, county-wide, from discovery failures due to communication gaps. It is also important to protect law enforcement officers from inappropriate dissemination of harmful or inaccurate rumor, opinion, or speculation by setting up a screening process for information before it goes into the *Brady* Index.

How does the Brady Index system work?

Information regarding a *Brady* Index candidate must be submitted to the "*District Attorney Brady Index Committee*." The Committee consists of senior DDAs with expertise in trial and discovery obligations, and the Chief of the District Attorney Bureau of Investigations. The Committee will screen the information and concerns of the submitter, discerning between legitimate potential *Brady* discovery and baseless speculation or misunderstandings. Following a Committee determination that the officer should be in the Index, a summary of any material to be kept as potential *Brady* discovery will be kept in the District Attorney's Special Operations Division in a secure system. This summary is made available to a trial DDA as the need arises in any particular prospective case. Where determined to be potentially relevant to a prospective case, the trial DDA will then be allowed access to the relevant *Brady* information for a final determination of whether it is something, pursuant to *Brady v. Maryland*, that must be provided to the defense.

Does the Brady Index review include a P.C. § 832.7 demand for information in personnel files?

No. The District Attorney's Office will *not* routinely make a P.C. § 832.7 (law enforcement confidential personnel file) demand for personnel information as part of the *Brady* Index review of an officer. However, in the event an officer is prosecuted for any criminal offense, a P.C. § 832.7 demand by the District Attorney's Office could result in personnel file information coming into the possession of the District Attorney's Office and, as a result, then becoming reviewable for use in both the criminal prosecution *and* the *Brady* Index review process.

Will the officer and agency get notice and input as to information in Brady Index?

Yes. Once the *Brady* Index Committee determines information should be maintained within the *Brady* Index, notice will be sent to both the officer and officer's agency that material is to be included in the *Brady* Index, and that further information and input from the officer and/or agency is welcome. Additional material or information received from the officer and/or agency will be reviewed by the Committee to determine if the screened material should be removed from the *Brady* Index or that the additional submitted material should also be included in the *Brady* Index for review by DDAs in the future.

Will the officer or agency be notified if a candidate officer is NOT put into the Index following Committee review?

Only upon written request. Given the sensitive nature of these matters, the District Attorney's Office will *not* publicize reviews that result in *non-inclusion* in the Index. It is only when an officer is placed into the Index that he or she and the officer's agency is automatically notified.

Can an officer or agency submit material to the Index Review Committee before the review?

Yes. The District Attorney's Office will review any additional information the agency or the officer wishes to provide either before or after a *Brady* Index candidate review.

Can information be submitted to the District Attorney for "Brady Index review purposes only?"

No. Information will *not* be accepted by the District Attorney's Office under any kind of "conditional waiver of privilege just for Index review purposes" since once such information is in the District Attorney's possession, *Brady* discovery obligations apply. However, there may be occasions where information is provided to the District Attorney under a statutory privilege (e.g., P.C. § 832.7). In such a case, the privilege will be maintained by the District Attorney's Office to the extent the law allows. *Brady* obligations, however, supersede statutory privilege. This means that the District Attorney can continue to protect as non-discoverable any privileged non-*Brady* material received, but *cannot* avoid its *Brady* obligations even though the information is otherwise privileged.

If an officer is in the Index, does it mean the officer cannot or should not be used as witness?

No. The purpose of the Index is to provide a centralized repository of information that must be reviewed for potential discovery when the officer is a witness. The nature of the information and role of officer in the case will be considered in making issuing and witness-choice decisions, thus allowing the prosecutor to evaluate discovery obligations, impeachment issues, and other case impact when the officer testifies.

Will prosecutors provide impeachment information regarding an officer who is not in the Index?

Yes. Impeachment information about an officer in the possession of the District Attorney's Office is discoverable whether or not the officer is in the Index (or is still pending review).

Will an officer who is "cleared" by an internal investigation still be in the Index?

Yes, at least where the derogatory information otherwise qualifies for inclusion. Favorable results of an internal law enforcement investigation and review are *not* determinative of the *Brady* Index inclusion issue. A favorable finding by an agency's Internal Affairs unit is a conclusion from a different process, with different legal standards, than the *Brady* discovery responsibilities of a prosecutor. However, since the determined facts and conclusions that result from an internal investigation process may contain information relevant to the *Brady* Index process, the officer

may wish to provide information to the District Attorney under either a statutory privilege (e.g., P.C. § 832.7) or a privilege waiver. The P.C. § 832.7 privilege can be maintained by the District Attorney to the extent the law allows, remembering that *Brady* obligations supersede a statutory privilege. This means that the District Attorney can continue to protect as non-discoverable any privileged non-*Brady* material received, but will be obligated to make discoverable any *Brady* information even though it is otherwise privileged. An officer may also choose to waive his or her privileges and submit to the District Attorney the complete internal investigation file. Since many believe an “internal investigation/personnel matter privilege” is held by both the officer and the agency, the agency and officer should discuss the need or impact of jointly waiving the privilege to avoid any conflict with each other.

Is it possible for an officer to be removed from the Index?

Yes. In the event additional information from the officer or other sources reviewed by the District Attorney results in a determination by the District Attorney that the original basis of Index inclusion (discoverability) no longer applies, the officer may be removed from the Index.

How long does an officer remain in the Index?

Brady discovery obligations have no set washout period in terms of years. Discovery obligations are based upon the “*materiality*” of the information that is contained in the Index, as well as the concerned officer’s degree of involvement and his or her need to be used as a witness in the particular case at issue. “*Materiality*,” therefore, must necessarily be determined on a case-by-case basis.

Conclusion: These rules, procedures and policies are intended to be a quick-reference guide, and should not be used to resolve issues on any specific case involving a *Brady* Index candidate or criminal prosecution. Discovery is determined on a case-by-case individualized basis, guided by statutory obligations and ever-evolving case-law.

It is also recognized, however, that law enforcement officers are entitled to be aware of the fact of, and the extent of, the collection and retention of potentially adverse information that may, in future criminal prosecutions, be provided to defense counsel. The *Brady Index* procedure is to remain an open, cooperative effort, thus encouraging trust between agencies while meeting the constitutional obligations of the “*law enforcement team*” to do justice.

Officers and deputies are encouraged to recognize the necessity of these procedures, as dictated by the United States Supreme Court, in the joint endeavor between sworn law enforcement officers and prosecutors to seek justice and ensure the conviction and punishment of the guilty. Law enforcement officers working *with* prosecutors, and prosecutors working *with* law enforcement officers, will help to achieve this result.

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