Managing the Impact of *Brady v. Maryland*: The Enactment of Senate Bill 313

When you mention Brady to most people, it invokes a fond memory of a 1960's television show that revolved around the story, of a lovely lady, who was bringing up three very lovely girls.

But for prosecutors, PORAC Legal Defense Fund panel attorneys, and police administrations, managing "the Brady Bunch" is a very different program that is extraordinarily difficult.

As frustration increased over the impact of the Brady Rule in police discipline cases, the Peace Officers Research Association of California introduced legislation that prevents a police officer from being fired, demoted, or disciplined solely for being on a Brady list.

The Decision in *Brady v. Maryland*

Since 1963 when the United States Supreme Court decided *Brady v. Maryland* (1963) 373 U.S. 83, prosecutors have been obligated to provide criminal defendants with exculpatory evidence that is material to either guilt or punishment.

California courts have defined "material" as follows: "The 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. Roberts* (1992) 2 Cal. 4th 271, 330. "Exculpatory" means favorable to the accused. "Evidence is ‘favorable’ if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." *In re Miranda* (2008) 43 Cal. 4th 541, 575.

In *Giglio v. United States* (1972) 405 U.S. 150, 154-55, the Brady duty was expanded to include the obligation to disclose information concerning the credibility of prosecution witnesses. This includes impeachment evidence that can be used against police officers that investigate crimes or make arrests in a case. *People v. Gaines* (2009) 46 Cal. 4th 172. Although prosecutors have no obligation to "communicate preliminary, challenged, or speculative information," *United States v. Agurs* (1976) 427 U.S. 97, 109, fn. 16, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 108.
Prosecutorial obligations expanded even further when the Court found that prosecutors were required to disclose *Brady* material even if the defendant did not make a request for the information. *United States v. Agurs* (1976) 427 U.S. 97. Further, once the Court decided that prosecutors had a "duty to learn of any favorable evidence known to others acting on the government's behalf," prosecutors were deemed to have constructive knowledge of *Brady* material in the hands of the law enforcement agencies working as part of the prosecution team. See, *Kyles v. Whitley* (1995) 514 U.S. 419. In other words, the rule covers information known only to the police department and not the prosecutor.

In order to find a way to deal with their compliance obligations, district attorney offices throughout the State began developing formal *Brady* lists, which contain the names of police officers whom they believe had committed some act that, when presented to a jury, might be used for impeachment purposes or as exculpatory evidence in criminal trials.

The standard for placing officers on *Brady* lists varies from county to county. Some counties implement and maintain a *Brady* policy with no discernable standards for inclusion or mechanisms for appeal, which results in the arbitrary and perpetual placement of officers on the *Brady* list. Other agencies have detailed procedures with extensive mechanisms for challenging placement on a *Brady* list.

Although prosecutors have no *Brady* obligation to "communicate preliminary, challenged, or speculative information, because "the prudent prosecutor will resolve doubtful questions in favor of full disclosure, many district attorney offices were disclosing more than the law requires. This escalated after the Court in *Kyles v. Whitley* (1995) 514, 419, 439, warned prosecutors against "tacking too close to the wind" in withholding evidence.

Because prosecutors enjoy absolute prosecutorial immunity, challenging an officer's placement on a *Brady* list was impossible. When public agencies began taking punitive action against police officers simply because they were placed on a *Brady* list - whether or not the misconduct actually occurred - Senate Bill 313 was born.

**Senate Bill 313 - Government Code section 3505.5**

Government Code section 3505.5 prevents a public safety employer from taking punitive action, or denying promotion, simply because an officer's name has been placed on a *Brady* list, or simply because the officer's name may be subject to disclosure under *Brady v. Maryland*. Rather, the agency must first *prove* that the employee engaged in the conduct that resulted in his/her placement on the *Brady* list before it can rely upon the fact that the officer is on a *Brady* list to support the level of disciplinary action, e.g., termination, that it chose to impose.
Avoiding *Brady* Issues

It is imperative that peace officers know and accept that they are held to a higher standard of conduct than virtually any other profession. Repeatedly in disciplinary actions, I find that agencies routinely quote from *Lukin v. City and County of San Francisco*, 187 Cal. App. 3d 807 (1986):

> [P]eace officers hold a peculiar and delicate position in society involving a high degree of public trust and confidence. Because of the faith entrusted in law enforcement agencies, our courts have always upheld the application of very strict standards in reviewing the conduct of police officers.

187 Cal. App. 3d at 817.

The California Supreme Court in *Pasadena Police Officers Association v. City of Pasadena* (1990) 51 cal. 3d 564, 571-572 also recognized that the public expects peace officers to be "above suspicion of the very laws [they are] sworn ... to enforce." The Court further explained that, historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them."

There are very easy steps to avoiding *Brady* issues:

- Understand the importance of accurate police reports. Carefully review reports before submission, and avoid cut-and-paste. Further since we live in an age where more and more departments are routinely capturing police incidents on audio by digital recorders carried by the officers, and on video through body cameras and mobile audio-visual units installed in patrol cars, it is important to review those materials before submitting the final report. (See, *United States v. Howell* (9th Cir. 2000) 231 F.3d 615: Major mistakes in police reports are subject to *Brady* disclosure requirements.)

- Recognize that the "you lie, you die" doctrine is alive and well in law enforcement. Dishonesty - even for small "white lies" - routinely results in termination. Be honest to a fault. While the truth may sometimes be ugly, the ugly truth, while sometimes embarrassing, is rarely fatal to a law enforcement career. However, dishonesty is always fatal.
• Facebook and other social media results in bravado and exaggeration that often causes *Brady* issues and becomes fuel for criminal defense attorneys and internal investigators.

• Off-duty conduct involving moral turpitude has *Brady* implications. Avoid crossing the line from law enforcer to law violator.