
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1328 **Hearing Date:** July 14, 2015
Author: Weber
Version: July 8, 2015
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Discovery: Prosecutorial Duty to Disclose Information*

HISTORY

Source: California Attorneys for Criminal Justice

Prior Legislation: AB 885 (Ammiano) Vetoed 2014

Support: (all support to prior version of the bill) California Public Defenders Association;
Legal Services for Prisoners with Children

Opposition: (all opposition to prior version of the bill) Association of Deputy District
Attorneys; Association for Los Angeles Deputy Sheriffs; California Association
of Code Enforcement Officers; California College and University Police Chiefs
Association; California Narcotic Officers Association; California State Sheriffs'
Association; California Police Chiefs Association; Judicial Council; Los Angeles
County District Attorney's Office; Los Angeles Police Protective League; Office
of the San Diego County District Attorney; Riverside Sheriffs Association

Assembly Floor Vote: 41 - 36

PURPOSE

The purpose of this bill is to require a court to inform the State Bar if it finds that a prosecutor deliberately and intentionally withheld relevant exculpatory materials or information in violation of the law and to allow the court on its own motion to disqualify a person or an office from prosecuting a case when it finds a prosecutor deliberately and intentionally withheld relevant exculpatory materials under specified circumstances.

Existing law requires the prosecuting attorney to disclose to the defendant or his or her attorney all of the following materials and information, 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:

- The names and addresses of persons the prosecutor intends to call as witnesses at trial;
- Statements of all defendants;
- All relevant real evidence seized or obtained as a part of the investigation of the offenses charged;
- The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial; and
- Any exculpatory evidence.

- Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial. (Penal Code Section 1054.1.)

Existing law requires the defendant and his or her attorney to disclose to the prosecuting attorney:

- The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial; and,
- Any real evidence which the defendant intends to offer in evidence at the trial. (Penal Code § 1054.3(a).)

Existing law states, before a party may seek court enforcement of any of the required disclosures, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with the disclosure requirements and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. (Penal Code §1054.5(b).)

Existing law allows a court to prohibit the testimony of a witness upon a finding that a party has failed to provide materials as required only if all other sanctions have been exhausted. The court shall not dismiss a charge unless required to do so by the Constitution of the United States. (Penal Code § 1054.5(c).)

Existing law provides that the required disclosures shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. “Good cause” is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. (Penal Code § 1054.7.)

This bill provides that if a court determines that a prosecuting attorney has deliberately and intentionally withheld relevant exculpatory materials or information in violation of the law, the court shall inform the State Bar of California of the violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or if identified before the conclusion of the trial seriously limited the ability of a defendant to present a defense.

This bill provides that a hearing to consider with a prosecuting attorney or his or her office should be disqualified shall be initiated only upon the court's own motion.

This bill provides that upon its own motion, a court may disqualify an individual prosecuting attorney from a case if the court determines that the prosecuting attorney deliberately and intentionally withheld relevant exculpatory materials or information in that case in violation of the law and that the prosecuting attorney acted in bad faith.

This bill provides that the court may also disqualify the prosecuting attorney's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly participated in or sanctioned the intentional withholding of the relevant exculpatory materials or information and that withholding is part of a pattern and practice of violations.

This bill provides that this section does not limit the authority or discretion of the court or other individuals to make reports to the State Bar regarding the same conduct or otherwise limit other available legal authority, remedies, or actions.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the sponsor:

The United States Supreme Court has made clear that prosecutors are required by the Constitution to provide the defense with all evidence that may be favorable to a defendant. Prosecutors are not independent parties who may “win at all costs.” Instead, they are officers of the court whose exclusive obligation is to pursue the “truth” and to ensure due process of the law.” A prosecutor 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.” *Brady*, 373 U.S. 83, 88. In addition, prosecutors are required to ensure that law enforcement officers involved in the case also provide all evidence in their possession that may be favorable to the defense.

There is a growing problem with prosecutorial misconduct throughout the country and in California. As recently as this February, 9th Circuit Judge Alex Kozinski has described rampant Brady violations as a growing “epidemic.” Kozinski says that judges must put a stop to such injustice. CACJ does not see sufficient action by judges, judicial council, or the CA Supreme Court; as such, CACJ believes there is a necessity to take legislative actions to address this injustice of “epidemic” proportions to the defendant in California.

2. Brady and a Fair Trial

In a criminal trial, a defendant is presumed innocent and the prosecution has the burden to prove beyond a reasonable doubt that the defendant is guilty. In order to ensure a fair trial, the prosecuting attorney has a constitutional and statutory duty to disclose specified information to the defendant. The jury instructions on reasonable doubt states, "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the people have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty." (CALCRIM No. 103.)

In the landmark case of *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that where a prosecutor in a criminal case withholds material evidence from the accused person that is favorable to the accused, this violates the Due Process Clause of the 14th Amendment. (*Ibid* at 87, see also *Giglio v. United States*, 405 U.S. 150 (1972).) *Brady* and *Giglio* impose on prosecutors a duty to disclose to the defendant material evidence that would be favorable to the accused. The Supreme Court in a later case explained "[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.' [Citing *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.] Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." (*California v. Trombetta* (1984) 467 U.S. 479, 485.)

Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. (*United States v. Agurs* (1996) 427 U.S. 97,112.) Generally, a specific request is not necessary for parties to receive discovery, however, an informal discovery request must be made before a party can request formal court enforcement of discovery. (Penal Code Section 1054.5(b).)

3. Sanctions for “*Brady*” Violations

The prosecuting attorney is required, both constitutionally and statutorily, to disclose specified information and materials to the defendant. In California, the defendant is also statutorily required to disclose specified information and materials to the prosecution. (Penal Code §1054.3(a).) Failure to divulge this information may result in a variety of sanctions being imposed on the prosecution including, e.g., striking a witnesses’ testimony or complete reversal of a conviction. “Reversal is required when there is a ‘reasonable possibility’ that the error materially affected the verdict.” (*United States v. Goldberg*, 582 F.2d 483, 488 (9th Cir. 1978), *cert. denied*, 440 U.S. 973, 59 L. Ed. 2d 790, 99 S. Ct. 1538 (1979).) A federal court recently described why this obligation is imposed: “Prosecutors are entrusted with the authority and responsibility to protect public safety and uphold the integrity of the judicial system. They perform the latter, in part, by ensuring that criminal defendants are offered all potentially exculpatory or impeaching information.” (*Lackey v. Lewis County*, 2009 U.S. Dist. LEXIS 94674 (D. Wash. 2009).) The court may also advise the jury of any failure or refusal to disclose and of any untimely disclosure. (Penal Code Section 1054.5(b).) Under existing law, courts have the discretion in determining the appropriate sanction that should be imposed because of the untimely disclosure of discoverable records and evidence.

While sanctions exist for “*Brady*” violations it is unclear how effective they have been. According to a Yale Law Journal article, “[a] prosecutor’s violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies.” The very nature of *Brady* violations—that evidence was suppressed—means that defendants learn of violations in their cases only fortuitously, when the evidence surfaces through an alternate channel. Nevertheless, a recent empirical study of all 5760 capital convictions in the United States from 1973 to 1995 found that prosecutorial suppressions of evidence accounted for sixteen percent of reversals at the state postconviction stage. A study of 11,000 cases involving prosecutorial misconduct in the years since the *Brady* decision identified 381 homicide convictions that were

vacated “because prosecutors hid evidence or allowed witnesses to lie.” (Footnotes omitted; Dewar, A Fair Trial Remedy for *Brady* Violations, Yale Law Journal (2006) p. 1454.)

When a prosecutor is inclined against disclosing a piece of arguably favorable evidence, few considerations weigh in favor of disclosure. Trial courts are reticent to grant motions to compel disclosure of alleged *Brady* evidence, examine government files, or hold prosecutors in contempt. Defendants only rarely unearth suppressions. And, even when they do, their convictions are rarely overturned because they face a tremendous burden on appeal: showing that the suppression raises a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' Finally, lawyers' professional associations do not frequently discipline prosecutors for even the most egregious *Brady* violations. (Footnotes omitted; *Id.* at p. 1456.)

The author of the article proposed:

[W]hen suppressed favorable evidence comes to light during or shortly before a trial, the trial court should consider instructing the jury on *Brady* law and allowing the defendant to argue that the government’s failure to disclose the evidence raises a reasonable doubt about the defendant’s guilt. . . . [I]nstead of curing the *Brady* violation through reversal on appeal, the remedy corrects the trial itself. In contributing to a jury’s decision to acquit, the remedy would provide more immediate relief than a postconviction reversal. Yet, because the remedy would not free or even grant a new trial to defendants of whose guilt the government has sufficient evidence, the remedy would not run afoul of those who decry the social costs of other 'punishments' for prosecutors, such as overturning convictions or dismissing charges. (Footnotes omitted; *Id.* at pp. 1456-1457.) The remedy would exist primarily for the benefit of defendants when the government’s tardiness or failure to disclose favorable evidence permanently prejudiced the defense. Permanent prejudice might consist of the disintegration of tangible evidence or the death or disappearance of a witness or alternative suspect. In such cases, neither granting a continuance for further investigation nor the fact that the defendant may be able to make some use of the belatedly disclosed evidence is a sufficient remedy. (Footnotes omitted; *Id.* at p. 1458.)

4. CALCRIM 306 Jury Instruction

In addition to sanctions, untimely disclosure of required evidence is addressed in the CALCRIM 306 jury instruction, which reads in relevant part:

Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.

An attorney for the (People/defense) failed to disclose: _____
 <describe evidence that was not disclosed> [within the legal time period].

In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.

"[However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.] ...

5. Report to the State Bar

Under this bill, if a court determines that a prosecuting attorney has deliberately and intentionally withheld relevant exculpatory materials or information in violation of the law and that violation was in bad faith and the impact of withholding contributed to a guilty verdict, guilty or nolo contendere plea or seriously limited the ability of the defendant to present a defense then the court shall report the attorney to the State Bar.

6. Disqualification of the Attorney or the Office

This bill provides that in a situation where the court determines that the prosecuting attorney deliberately and intentionally withheld relevant exculpatory materials or information in violation of the law and when the prosecuting attorney acted in bad faith, the court on its own motion may disqualify the individual prosecuting attorney from a case.

The bill also allows the court to disqualify the prosecuting attorney's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly participated in or sanctioned the intentional withholding of the relevant exculpatory materials or information and that withholding was part of a pattern and practice of violations.

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