SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 1909	**Hearing Date:**	June 28, 2016
Author:	Lopez		
Version:	May 27, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Falsifying Evidence***

HISTORY

Source: California Attorneys for Criminal Justice

Prior Legislation: AB 256 (Jones-Sawyer) Chapter 463, Stats. 2015
AB 1328 (Weber) Chapter 467, Stats. 2015

Support: Alameda County Public Defender; California Public Defenders Association; Communities United Restorative Youth Justice; Santa Ana Boys and Men of Color

Opposition: None known

Assembly Floor Vote: 60 - 18

PURPOSE

The purpose of this bill is to expand existing provisions of law that make it a felony for a peace officer to willfully and intentionally tamper with evidence to include a prosecutor who intentionally and in bad faith withholds exculpatory evidence.

Existing law makes it a misdemeanor for a person to knowingly, willfully, and intentionally alter, modify, plant, place, manufacture, conceal, or move any physical matter, with specific intent that the action will result in a person being charged with a crime, or with the specific intent that the physical matter be will be wrongfully produced as genuine or true upon any trial, proceeding or inquiry. (Penal Code § 141 (a).)

Existing law makes it a felony for a peace officer to knowingly, willfully, and intentionally alter, modify, plant, place, manufacture, conceal, or move any physical matter, with specific intent that the action will result in a person being charged with a crime, or with the specific intent that the physical matter be will be wrongfully produced as genuine or true upon any trial, proceeding or inquiry. (Penal Code §141 (b).)

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: a) The names and addresses of persons the prosecutor intends to call as witnesses at trial; b) Statements of all defendants; Makes it a misdemeanor for a person to knowingly,

willfully, and intentionally alter, modify, plant, place, manufacture, conceal, or move any physical matter, with specific intent that the action will result in a person being charged with a crime, or with the specific intent that the physical matter be will be wrongfully produced as genuine or true upon any trial, proceeding or inquiry. (Penal Code §141 (a).)

Exiting law requires the defendant and his or her attorney to disclose to the prosecuting attorney: a) 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, b) 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, subd. (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 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 jail felony punishable by 16 months, 2 or 3 years.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several 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 December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 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).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 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 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 author:

> Current law does not adequately provide a deterrent for bad-acting prosecutors from withholding exculpatory evidence from the defense. Current law requires a court to notify the state bar of such a knowing and intentional Brady violation. However, besides this option, there are no criminal consequences for such intentional acts. When a prosecutor intentionally withholds exculpatory evidence, an unknowing and innocent defendant can be convicted, sentence, and incarceration for a long time. These bad-acting prosecutors rarely, if ever, face any actually consequences for their actions. AB 1909 would provide an actual consequence for such bad actors in hopes of deterring such unscrupulous actions.
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> One of the most comprehensive studies on the issue of prosecutorial misconduct in California comes from the Veritas Initiative out of Santa Clara University. See Preventable Error: A Report on Prosecutorial Misconduct in California.
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> Last year, Judge Alex Kozinski highlighted the issue making national headlines coming out of Riverside County. Judge Kozinski famously stated in 2014 that prosecutorial misconduct is an epidemic in our country.

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.
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> "[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. Jail Felony for Intentionally and in Bad Faith Altering, Modifying or Withholding Physical Evidence

This bill would make it a jail felony for a prosecuting attorney to intentionally and in bad faith alter, modify or withhold 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 material or information will be concealed or destroyed or fraudulently represented as the original evidence upon a trial, proceeding or inquiry.

6. Support

According to the California Attorneys for Criminal Justice:

> This bill would create criminal penalties for bad-acting prosecuting attorneys that knowingly and intentionally withhold exculpatory evidence from the defense in violation of their ethical, state and constitutional duties under *Brady v. Maryland,* 373 U.S. 83 (1963).
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> Firstly, we would like to acknowledge that the large majority of prosecuting attorneys do their jobs well, with integrity and dignity. These prosecutors seek to find justice above all other matters. However, the small group of bad-actors spoil the reputation of prosecutors.
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> CACJ has made it an organizational priority to highlight and address issues of prosecutorial misconduct. In 2014, prominent 9th Circuit Justice, Alex Kozinski, stated that prosecutorial misconduct is an epidemic in our criminal justice system. Nationwide, we've seen stories of innocent persons being sent to prison for decades because of a bad-acting prosecutor placing their self-interest and conviction rate ahead of seeking justice.
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> This epidemic has created a much larger growing lack of confidence in our criminal justice system. According to the National Registry of Exonerations, a project of the University of Michigan Law School, there has been 1.700 exonerations nationwide since 1989. Forty five (45) percent of the exonerations found were as a result of official misconduct, which is AB 1909 Page 6 defined as police, prosecutors, or other governmental officials significantly abusing their authority or the judicial process in a manner that contributed to the exoneree's conviction. California has also experienced a number of Brady violations.
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> In a report by the Veritas Initiative from the Santa Clara School of Law, a review on 10 years of prosecutorial misconduct occurring in California showed that California court repeatedly failed to take meaningful action when the court found that the prosecutorial misconduct was harmful.
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> Current law, as passed last year in AB 1328, requires a court to notify the state bar of such a knowing and intentional Brady violation. However, besides this option, there are no criminal consequences for such intentional acts. When a prosecutor intentionally withholds exculpatory evidence, an unknowing and innocent defendant can be convicted, sentence, and incarceration for a long time. These bad-acting prosecutors rarely, if ever, face any actually consequences for their actions.

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