

Brady and Law Enforcement: Tips for Working with Local Police

TDCAA Brady and Ethics Training
2014

“In Possession of the State”

- While we represent the State, we do not control it.
 - Leading
 - Training
 - Administrating



Leaders Motivate, What Motivates Police?



KEEP CALM & FOLLOW THE RULES

Why Officers Don't Supply Brady Information.

- "If it did not help solve the case why would the prosecutor want it?"
- "The victim deserves my protection."
- "I don't want to get crossed on this."
- "My job is to get bad guys, not help them."
- "I want this case filed."
- What!?! Work harder?



Why Officers Should Supply Brady Information.

- Bad guy could get away.
- Case could get reversed.
- Prosecutor could get hurt.
- Police are professionals.
- It could affect my reputation or the reputation of the department.
- It is the rule or policy.



Leaders Set Tone

- What we teach inadvertently.
 - "It is important we win this case."
 - "...and the worst thing that could happen is we get a not guilty."
 - "The public expects this case to be solved, and quickly!"
 - "Defense lawyers are scum."
 - "Cut to the chase!"
 - "Don't tell me that!"

Leaders Communicate Clearly on Mission, Roles, Expectations, and Reasons

- "To see that Justice is Done"
- "Prosecutors are never afraid of the truth."
- "I am the advocate, you are the witness."
- "The truth, the whole truth, and nothing but the truth."
- "Do the right thing, to the right person, the right way, for the right reasons."

Training Police Officers

- Brady as a part of every training.
- Role calls.
- ???
???

Model Brady Power Point for Law Enforcement

DISCOVERY

WHAT YOU MUST PRESERVE
AND
TURN OVER TO ENSURE
FAIRNESS

QUESTION:

What should the officer tell or give me the
Prosecutor?

ANSWER:

EVERYTHING!!

REASON

- When you give it to the ADA, it
STOPS being your headache.

One Team, Different Roles



One starts the investigation



The Other must take the ball and run with it



Both players must know what the other is doing.

2.01 Code of Criminal Procedure

“It shall be the primary duty of all prosecuting attorneys...not to convict, but to see justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.”



Rule 3.09 TDRPC:

“A prosecutor must disclose *all evidence or information* known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentence, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor.....”

BERGER v. UNITED STATES, 295 U.S. 78 (1935).

and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Brady v. Maryland:

“suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material to either guilt or punishment...”

BRADY MATERIAL

- Anything good for the suspect.
- Anything that suggests the suspect did not commit the crime.
- Anything that reduces the suspect’s culpability.
- Anything that reduces a prosecution witness’s credibility.

EXAMPLES

- Direct Evidence
 - Such as a witness statement exculpating the suspect.
- Impeachment Evidence
 - Such as a witness’s prior criminal record.

EXAMPLES

- Misidentifications
- Non-identifications
- Witness Statements
 - He didn’t do it!
 - He wasn’t there!
 - He wasn’t the shooter!
 - I wasn’t there!
 - I wasn’t looking!
 - I didn’t see anything!

EXAMPLES – Direct Evidence

- Pre-trial witness Statements
 - Truth-on-the-installment plan
 - Multiple versions of a story
 - Inconsistencies
 - Lies

RED FLAGS

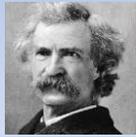
- Good to stop and consider
- Don't get caught in one theory of the case



"It ain't so much the things that people don't know that makes trouble in the world, as it is the things people know that ain't."

-Mark Twain

Cognitive Bias



EXAMPLES

- Things you do to gain cooperation and trust from a witness.
- Payments to the witness
- Payments to the witness's family
- Consideration for a witness' pending case – lower bail, delay arrest.
- Promises made to the witness or the witness' family
- Relocation
- Jobs

EXAMPLES

- Impeachment Evidence for witness:
 - Prior Drug Use
 - Criminal Record
 - Prior Arrests
 - Uncharged Crimes – Stuff He Got Away With
 - ACS Complaints
 - Alcohol, Psychiatric Issues

CONSEQUENCES

Question: Is a conviction safe, if you (the cop) don't tell me (the ADA) about the existence of this material and it is never made available to the defendant?

Answer: NO!

Question: What if it wasn't turned over because of an honest mistake?

Answer: It doesn't matter. The police and the ADA will be held responsible

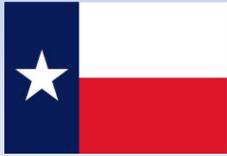
US Supreme Court holds:



- If you know about something that is Brady material
- Then it must be turned over, even if the ADA doesn't know about it.

Who is the State?

- Prosecutor
- Police
- Jail
- CPS
- Federal Agents?



US Supreme Court holds:

- If you don't tell me, **and**
- I didn't know about it, **and**
- I didn't turn it over to the defendant, **then**
- The conviction gets REVERSED!
AND
- A dangerous guilty person could go free.

EXAMPLE

- **Facts:** Police never told prosecutor that a trial witness, who claimed to have seen the murder, initially said that she was not there.
- **Result:** Murder conviction reversed, defendant gets a new trial.

EXAMPLE

- **Facts:** Police never told prosecutor that assault victim was a police informant on other matters.
- **Result:** Reversed. Why? Police were more likely to support the victims' version because of the prior relationship and jury should have known.

EXAMPLE

- **Facts:** Police Department's Internal Affairs reports were not turned over, although they "were significantly at variance with the prosecution's evidence at trial" and "favorable to the accused."
- **Result:** Conviction Reversed. Why? Knowledge by some is knowledge by all!

EXAMPLE

- **Facts:** Police fail to preserve surveillance photos or audiotapes of drug deal between undercover and perpetrator.
- **Result:** Conviction reversed because failure to preserve led to loss of "potentially" exculpatory evidence.

EXAMPLE

- **Facts:** Big case, many detectives. Reports from non-testifying detectives that contain favorable defense material was not turned over to the prosecutor or defense.
- **Result:** Big case is in big trouble.

To be Brady Evidence the information must be:

- 0% 1. Admissible.
- 0% 2. Credible.
- 0% 3. Truthful.
- 0% 4. Reasonable.
- 0% 5. Not frivolous.
- 0% 6. Helpful to the actual defense theory.
- 0% 7. In the possession of the Prosecutors office.
- 0% 8. None of the above

LESSONS LEARNED

- Failure to preserve things you should keep fuels defense speculation that exculpatory material exists when it doesn't.
- The courts, defense and juries can speculate
 - That paperwork was harmful to your case
 - That you destroyed it on purpose.
- Conviction reversed, defendant goes free!

LESSONS LEARNED

- If you are the case detective, don't just get your own paper work... get everyone else's who worked on that case.
- We are in this together.
- We are responsible for each others decisions.

CONSEQUENCES

- ⊙ Conviction reversed or reduced
- ⊙ New trial ordered
- ⊙ Indictment dismissed
- ⊙ Proceedings delayed
- ⊙ Civil liability to municipality, police department and/or police officer

CONSEQUENCES

- Guilty defendant may go free after reversal or new trial
- Innocent person may have been convicted
- The real perpetrator is still at large committing more crimes!
- Personal and professional issues.

SOLUTION

- Give the ADA everything.
- Let the ADA figure out what to do with information.
- Let the ADA decide when to turn over the information to the defense.
- That is what the ADA is trained to do.

“It takes less time to do a thing right than explain why you did it wrong.”

-Henry Wadsworth Longfellow



End of a Quick Model Power Point.

Administrative

- Create Office Policy.
- Create Filing or Submission Policies.
- Help departments create policies.
- Have a plan to address officer misconduct cases.

Add info on model (cali) policy

What do you do with officer misconduct cases?
