

**Brady Issues and Post-Conviction Relief
San Francisco Training Seminar
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**“CHEAT SHEET”
AUTHORITIES ON *BRADY* & STATE HABEAS PRACTICE**

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I. BASICS OF *BRADY*

- Leading federal authorities: *Brady v. Maryland* (1963) 373 U.S. 83; *United States v. Bagley* (1985) 473 U.S. 667; *Kyles v. Whitley* (1995) 514 U.S. 419; *Strickler v. Greene* (1999) 527 U.S. 263; see also *Cone v. Bell* (2009) __ U.S. __, 129 S.Ct. 1769.
- Leading state authorities: *In re Brown* (1998) 17 Cal.4th 873; *People v. Salazar* (2005) 35 Cal.4th 1031.
- Elements of a *Brady* violation.
 - Favorable evidence.
 - Prosecutorial suppression.
 - Materiality – “reasonable probability” of more favorable outcome.
- Trials vs. pleas
 - Trials. *Brady* disclosure duty definitely requires pre-trial disclosure of material impeachment evidence concerning prosecution witnesses (including priors, deals with informants, prior inconsistent statements, etc.). See, e.g., *United States v. Bagley* (1985) 473 U.S. 667.
 - Pleas. But *Brady* does not require prosecutorial disclosure of impeachment evidence prior to a guilty plea. *United States v. Ruiz* (2002) 536 U.S. 622.
 - But *Ruiz* limitation applies only where impeachment is the sole exculpatory function of the evidence. *Brady* may still provide basis for challenging a plea conviction where the undisclosed evidence goes beyond impeachment and bears directly on guilt or innocence. Cf. *In re Miranda* (2008) 43 Cal.4th 541, 581-582 & fn. 6.
- State law plea withdrawal motion vs. habeas petition on *Brady*

- Case law applying Pen. Code § 1018 may provide broader grounds for plea withdrawal motion than *Brady*'s federal constitutional rule.
 - Failure to disclose exculpatory evidence *may* provide basis for plea withdrawal under § 1018, where it materially affected decision to plead. See *People v. Ramirez* (2006) 141 Cal.App.4th 1501; *People v. Dena* (1972) 25 Cal.App.3d 1001.
 - But that ground is only available where timing allows a plea withdrawal motion – i.e., before judgment (on a state prison case) or within 6 months of an order placing defendant on probation.
 - Where too late for a plea withdrawal motion, only available remedy is a habeas petition on *Brady* grounds, and *Ruiz* limitation for impeachment evidence applies.
- Prosecutorial suppression.
 - Doesn't require that prosecutor actually know of the information or even that it be in prosecutor's files.
 - Information known to law enforcement agencies acting on behalf of prosecution (the "prosecution team") is "imputed" to the prosecutor.
 - That includes information known to a police crime lab. *In re Brown* (1998) 17 Cal.4th 873.
- Materiality. See generally *United States v. Bagley* (1985) 473 U.S. 667; *Kyles v. Whitley* (1995) 514 U.S. 419; *Strickler v. Greene* (1999) 527 U.S. 263.
 - Prosecutorial non-disclosure of exculpatory information isn't enough to set aside conviction – must prove "materiality."
 - "Reasonable probability" of a more favorable outcome.
 - Does not require showing that more favorable verdict would have been "more likely than not."
 - "Reasonable probability" is a probability sufficient to "undermine confidence" in the verdict.
 - Where multiple items of undisclosed evidence, court must assess *cumulative effect* of non-disclosure. Materiality of "suppressed evidence [is] considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. at 536.
 - Most *Brady* claims turn on the materiality issue.
 - E.g., *In re Brown* (1998) 17 Cal.4th 873: Undisclosed crime lab test indicative of PCP deemed material where results could have supported a "credible diminished capacity" defense" to premeditation. 1st degree murder conviction conditionally reduced to 2nd degree murder.
 - Compare *People v. Salazar* (2005) 35 Cal.4th 1031: Undisclosed impeachment evidence of medical examiner's change of testimony in

a prior infant murder case deemed not material in current case, where other medical testimony corroborated examiner's opinion of non-accidental death and defendant had given inconsistent accounts.

II. BASICS OF STATE HABEAS PRACTICE

- Jurisdiction and choice of forum.
 - Superior courts, appellate court, and Cal. Supreme Court all have “original” jurisdiction to hear habeas petitions.
 - Petition should ordinarily be filed first in superior court, and appellate court will generally decline to exercise original jurisdiction in first instance.
 - Appellate courts do commonly exercise original jurisdiction where habeas petition filed during pendency of direct appeal. E.g., *People v. Frierson* (1979) 25 Cal.3d 142, 158.
 - If appellate court issues OSC, can make it returnable either before itself or before superior court.
 - Will typically make it returnable in superior court if evidentiary hearing appears likely.
 - But petition may still be filed in superior court during appeal pendency, where petition's claims do not implicate appellate court's jurisdiction over the direct appeal. Pendency of appeal does not prevent superior court jurisdiction over habeas petition which rests on matters outside appellate record which could not be raised on appeal (such as post-judgment *Brady* claim). See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634, 645-646.
- General authorities on state habeas procedure.
 - Guide to OSC & post-OSC practice, including prima facie case standard for OSC; post-OSC formal pleadings (return & traverse); standards for assessing necessity of evidentiary hearing. *People v. Duvall* (1995) 9 Cal.4th 464.
 - Procedural bars to habeas petitions and exceptions to those bars, including unreasonable delay, “successive petition,” failure to raise on appeal, etc. *In re Clark* (1993) 5 Cal.4th 750; *In re Harris* (1993) 5 Cal.4th 813.
- Crucial role of an order to show cause (OSC).
 - Pre-OSC practice. “Informal” opposition & reply. Cal. Rules of Court, rules 4.551(b) (superior courts); 8.385(b) (appellate courts).
 - Most petitions summarily denied without an OSC.
 - Prior to an OSC, court can deny a petition, but can't grant it. *People v. Romero* (1994) 8 Cal.4th 728.

- “Prima facie case” standard for an OSC.
 - Petition should "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." *People v. Duvall* (1995) 9 Cal.4th 464, 474.
 - In practice, courts generally require that petition's factual allegations be supported by competent proof (usually declarations, court records or other judicially-noticeable documents).
 - In determining whether petition states prima facie case, court should take petition’s factual showing as true and assess whether alleged facts would support relief. If so, OSC must issue. *Duvall* at 474-475; Cal. Rules of Court, rule 4.551(c)(1).
- Discovery
 - Even after judgment, “prosecutors have a continuing duty to disclose information favorable to the defense, and we expect and assume that they will perform this duty promptly and fully.” *In re Steele* (2004) 32 Cal.4th 682, 694; see *People v. Garcia* (1993) 17 Cal.App.4th 1169.
 - But no mechanism for court-ordered discovery *until after an OSC has issued*. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1255-1261.
 - Statutory exception providing for post-judgment discovery in special circumstance cases. Pen. Code § 1054.9.
 - After issuance of OSC, habeas court has authority to order discovery. *In re Scott* (2003) 29 Cal.4th 783, 815.
 - Prop. 115 statutes on pre-trial discovery (Pen. Code § 1054 et seq.) don’t apply to habeas, but court may look to them for guidance. *Scott, supra*.
- Right to counsel
 - Issuance of an OSC (by either appellate or trial court) requires appointment of counsel for indigent petitioner. *In re Clark* (1993) 5 Cal.4th 750, 780; Cal. Rules of Court, rule 4.551(c)(2).
 - Court also has discretion to appoint counsel for habeas petitioner prior to an OSC.
- Post-OSC “formal” pleadings – “return” and “traverse” (also called “denial”). See generally *People v. Duvall* (1995) 9 Cal.4th 464; Cal. Rules of Court, rules 4.551(d)-(e) (superior courts), 8.386(c)-(d) (appellate courts).
- Conduct of habeas evidentiary hearings. See generally *In re Fields* (1990) 51 Cal.3d 1063.

- Petitioner must prove allegations by preponderance of evidence. *In re Cox* (2003) 30 Cal.4th 974, 997-998.
- Must prove allegations with competent evidence. Ordinary rules of evidence apply, including hearsay rules. *Fields* at 1070.
 - Declarations and other hearsay documents submitted with petition won't be considered at evidentiary hearing unless they come within a hearsay exception (or parties stipulate to admission).
- Court and parties may utilize usual trial tools for the production of evidence, including subpoenas. Court is authorized "to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." Pen. Code § 1484.
- Appellate review.
 - Prosecution can appeal grant of habeas relief. Pen. Code § 1506
 - But petitioner can't appeal superior court habeas denial, regardless of whether there was an OSC.
 - Instead mechanism to obtain appellate review is filing new habeas petition within "original" jurisdiction of appellate court. *In re Clark* (1993) 5 Cal.4th 750, 767 fn. 7.
 - No fixed deadline for appellate habeas filing (in contrast to a notice of appeal).
 - Must be filed without "unreasonable delay" after the superior court denial.
 - Gap of more than two months runs risk of appellate filing being considered untimely (unless reasons for delay explained), and six months considered "presumptively" untimely.
 - Even if state reviewing courts don't invoke delay in denying petitions, federal courts might deem the state appellate filings untimely and refuse to "toll" federal habeas statute of limitations. Cf. *Evans v. Chavis* (2006) 546 U.S. 189; *Waldrip v. Hall* (9th Cir. 2008) 548 F.3d 729, 734-735.