



DEPARTMENT OF JUSTICE
CIVIL ENFORCEMENT DIVISION

MEMORANDUM

DATE: March 18, 2013

TO: Honorable Floyd Prozanski, Chair
Senate Judiciary Committee

FROM: Aaron Knott, Legislative Director

SUBJECT: SB 492

RECOMMENDED ACTION

This testimony is presented in opposition of SB 492. We recommend that the Committee does not approve SB 492.

THE STATE'S DISCOVERY OBLIGATION UNDER BRADY v. MARYLAND

Under *Brady v. Maryland*, 373 US 83 (1963), the government is required to disclose to the defense all evidence in its possession that it is favorable to the defendant and is material to either guilt or punishment. The rule imposed by *Brady* has been further refined by the Supreme Court and the obligations it imposes on prosecutors and police are well-established.

SB 492 EXPANDS THE STATE'S DISCOVERY OBLIGATION WELL BEYOND BRADY

- SB 492 replaces or removes key words of the *Brady* rule.
 - Under *Brady*, the government must disclose evidence that “*is favorable*” to the defense, whereas under SB 492, the government must disclose material that “*reasonably appears to be favorable*.”
 - SB 492 removes the prerequisite that the evidence be “*material*.” Under *Brady*, evidence is material if there is a reasonable probability that, had the evidence been disclosed, the outcome would have been different.
 - SB 492 removes the prerequisite that the prosecution or police know of the exculpatory evidence.
- SB 492 significantly broadens the type of material that must be disclosed.
 - *Brady* imposes an obligation on the prosecution and police to disclose the existence of favorable and material evidence or information - *i.e.*, facts related to

the case - to the defense. SB 492 would broaden that requirement to include such things as data, documents, tangible objects, or information.

- Although *Brady* requires disclosure of favorable evidence that is material to guilt or punishment, SB 492 imposes an additional obligation to disclose material that reasonably appears to be favorable with respect to a “preliminary matter.”

SB 492 WOULD CREATE SIGNIFICANT UNCERTAINTY

The discovery rule articulated by the US Supreme Court in *Brady* has been in practice for 40 years and is well-known to the courts, the state, and the defense. SB 492 would replace the familiar requirements of *Brady* with new wording of unknown import. A foreseeable consequence of such a sweeping change is uncertainty with respect to convictions and years of costly litigation as the courts and parties struggle to understand the scope of the new rule created by SB 492.

THERE IS NO KNOWN FISCAL IMPACT FOR DEPARTMENT OF JUSTICE

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