



ABOUT TDCAA JOB BANK EXPERT WITNESS LIST MEMBERSHIP CONTACT US LINKS

Jury Charges

User Forums

The Prosecutor, The Report & Case Summary Archives

Publications

Case Summaries Sign-up

Forms, Briefs, etc.

Prosecutor Questions Answered

Seminars

- [→ SITE MAP](#)
- [→ CASE OF THE DAY](#)
- [→ ET AL](#)
- [→ LAW QUIZ](#)
- [→ ISSUES IN PROSECUTION](#)

## OUR COMMUNITY

[New Topic](#) [Post A Poll](#) [\\* PopIt!](#) [Post Re](#)

[MyPop™](#) | [register](#) | [search](#) | [faq](#) | [forum hom](#)

Previou

» You are not logged in. [Login](#) or [register](#)

[TDCAA](#) » [TDCAA Community](#) » [Criminal](#) » [exc](#)

Page 1

**Author**      **Topic:** **define: exculpatory**

**Drew Gibbs** posted **12-13-06**

Member

The Prosecutorial Ethics handbook covers plenty of ground describing Brady material, but it sticks mostly to evidence murder trial when defining "favorable".

If an officer reveals that his reason for a traffic stop resul DWI was based on a mistake of law, is this Brady materia

In this case the officer stopped a driver for defective tail l His opinion was that it was defective b/c it was not workir manufactured(one was much brighter than the other). Unfortunately, right before suppression he revealed to me he would not be able to testify as we'd discussed earlier, the tail lamp was not visible from 1000 feet, b/c in fact h believed it was visible.

Knowing this, I had two options. Avoid suppression by ma low ball plea offer OR dismiss.

I erred on the side of dismissing the case. I still feel I did right thing regardless of the answer to this question, but i leaves me wondering. The information is most definitely material in that it would obviously change the outcome of case. But **is lack of a reason for the stop considered "favorable" and is this subject to Brady?**

The reason for the stop has nothing to do w/ the alleged offense. After all, the driver was most definitely guilty of

Posts: **26** | From: **Athens, TX - Henderson County** | Registered: **06**

**GG**  
Member

posted **12-13-06**

Certainly the lack of a reason for a stop is Brady, but mor would be the fact that you got one story initially and anot story later.

---

 Posts: **842** | From: **Texas** | Registered: **12-26-01**
**Drew Gibbs**  posted **12-14-06**  “ ” 

Member

Is it really that simple? For evidence to be favorable it must "tend(s) to justify, excuse, or clear the defendant from all fault or guilt." 841 S.W.2d 399, 404. the charge is DWI, not defective tail lamp. So, despite my actions to the contrary not seeing how the fact that the officer's definition of "defective tail lamp" didn't fit the legal one does anything to justify, excuse or clear the defendant of DWI. It certainly results in suppression of all of my evidence, but it doesn't seem to fit the definition of 'favorable' under the three-prong test and I haven't uncovered any case on point.

I'm surprised this has drawn such slight interest.

---

 Posts: **26** | From: **Athens, TX - Henderson County** | Registered: **06**
**Larry L**  posted **12-14-06**  “ ” 

Member

### Favorable

Can you really say that evidence that will most likely change the outcome from guilty to not guilty (or, more likely, disprove the charge) will not "clear ... the defendant of guilt"? The evidence of the deficiency in the initial stop results, present in suppression of all subsequent evidence. Assume the defendant is convicted, and later discovers this evidence (a prison writ-writer helps him) - he files a complaint with the State Bar - are you comfortable telling them that the evidence was not "favorable" to the accused even though it would have changed the outcome? Having said all that, I would make a very diligent investigation for ANY other rationale for the stop - speeding, any other "warnings" on the citation, ANYTHING - if you find something, great. If you do not find anything, use this as a lesson for your officers. Also remember that the probable cause for the stop does not require that the offense (tail lamp) be committed, only that the officer believe the offense was being committed. I had a case several years ago where the P/C for the stop was a window tint violation - on a 1978 (I think) truck that was later searched and found to contain LOTS of cocaine. Motion to suppress was denied even though there was no window tint violation because of the model of the vehicle - because the officer BELIEVED an offense had occurred. BUT, if there really is a bad stop, don't mess up the law by pursuing the case. If the defendant is really a bad guy he'll mess up again, probably sooner rather than later.

---

 Posts: **105** | From: **Texas, USA** | Registered: **11-16-04**
**Scott Holden**  posted **12-14-06**  “ ” 

Member

When it comes to Brady. I use Clay's definition for what it is:

Brady and should be turned over to defense.

"When you read your file and you see something that mal you go, "OH, SH\*T!" That is Brady!"

Works everytime! 

---

Posts: **30** | From: **Palestine, TX** | Registered: **03-05-03**

**Drew Gibbs**  posted **12-14-06**  “ ” 

Member

### **Favorable v. Material**

obviously this information would change the outcome, bu goes to materiality and only covers one of the three prong

i guess the Clay approach is the best one though. i definit said "OH SH\*T!" when the officer told me he could definit both tail lamps from 1000'. and i would not feel comforta would i want to be in the position of defending my ethics appeal in these circumstances. perhaps that's why there appears to be no case law on the subject. no one wants t the issue, nor did i.

---

Posts: **26** | From: **Athens, TX - Henderson County** | Registered: **06**

**GG**  posted **12-14-06**  “ ” 

Member

I do really think it is simple. My policy has always been, d everything and then I have nothing to worry about. I thin did the right thing in dismissing the case.

Clay A. is a very knowledgeable man, and far be it from r contradict his personal rule. But my personal rule has alw been, if it makes you ask whether you should be disclosin then you should.

Having seen other experienced prosecutors either have tr problems with this issue(i.e. witness on the stand tells ju D attorney that they did tell something significantly excul to prosecutor prior to trial, and it was not reported to the defendant's counsel...it makes things go south real fast ir and makes the prosecutor look like a truth hider) or appellate/writ allegations of misconduct with witnesses te post-trial counsel they revealed exculpatory information t prosecutors which was not revealed.

I've never had to testify in an allegation of failing to revea exculpatory evidence, but me thinks I wouldn't like to. I\' others have to do it and it didn't look like a witness chair want to sit in.

There is no bright line rule. Reading the cases will help.

It does seem simple to me if an officer reveals that he ha

legal reason to make an investigatory stop, or that he was mistaken in that reason, that this fact is certainly exculpatory. If he tells you that he thought something was a crime, and the mistaken belief was the entire basis for his stop, then think you are bound to reveal that fact.

Another question I would ask is: is that something I would know if I were the defendant (or his attorney)?

---

Posts: **842** | From: **Texas** | Registered: **12-26-01**

**Gordon  
LeMaire**  
Member

 posted **12-14-06**  “ ” 


I had an officer tell me he couldn't be sure the person sitting at the defense table was the person he arrested. Jury was not to be seated, officer was the only witness who could identify the defendant. I moved for a dismissal before the jury was brought in.

I think if an officer states he can't identify a defendant or suppress evidence for the stop, I don't want him on the stand. 1) I don't think it's the right thing to do. 2) You know he cannot be a good witness for you. 3) It will only leave a bad taste from the experience.

---

Posts: **412** | From: **Cherokee County, Rusk, Tx** | Registered: **07-11**

**David  
Newell**  
Member

 posted **12-14-06**  “ ” 

exculpatory - adj. 1) something courts determine you should have disclosed after you've already withheld it. 2) to be considering the possibilities of living life as the former wife of actor Robert Culp.

[This message was edited by David Newell on 12-15-06 at 11:00 AM]

---

Posts: **525** | From: **richmond, texas, u.s.a.** | Registered: **10-19-01**

**SAProsecutor**

 posted **12-15-06**  “ ” 

Member

Real funny David. You're not gonna start making obscure references to I Spy or The Greatest American Hero, are you?

---

Posts: **91** | From: **San Antonio** | Registered: **01-27-04**

**GG**  
Member

 posted **12-15-06**  “ ” 

### Words of Wisdom

quote:

---

Originally posted by David Newell:  
exculpatory - adj. 1) something courts determine you should have disclosed after you've already

withheld it.

---

Words to live by when you are grappling with the issue of exculpability.

---

Posts: **842** | From: **Texas** | Registered: **12-26-01**

**David  
Newell**  
Member

 posted **12-15-06**   

---

quote:

---

Originally posted by SAProsecutor:  
Real funny David. You're not gonna start making obscure references to I Spy or The Greatest American Hero, are you?


---

well . . . not now.

---

Posts: **525** | From: **richmond, texas, u.s.a.** | Registered: **10-19-01**

**GG**  
Member

 posted **12-15-06**   

---

quote:

---

Originally posted by SAProsecutor:  
Real funny David. You're not gonna start making obscure references to I Spy or The Greatest American Hero, are you?

---

Could this thread take a discussion turn regarding womer went for the other half of I-SPY, as recently discussed in 1 news? Could Cosby's alleged ex's also be exculpatory sinc didn't go for Culp to begin with?

Only David Newell, Scottie B or AP can hold the answer to mystery of life...

---

Posts: **842** | From: **Texas** | Registered: **12-26-01**


**Scott  
Brumley**  
Member

 posted **12-15-06**   

---

**Believe it or not, I'm walkin' on air ...**

Back in the day, I'd have been happy to find out that Con Seleca was "exCulp-atory." And "exKatt-atory".

As for the other ladies referenced, I suppose they should have a Coke and a smile. And some Jello pudding. 

Posts: 672 | From: **Amarillo, Texas, USA** | Registered: 03-15-01

**David Newell**  
Member

 posted 12-15-06  “ ” 

**Sweet, Sweet Connie**

actually she was exBuck-atory having been married to gil gerrard for many years. though i'm not sure she listened lot of grand funk railroad, particularly not now that she's married to john tesh.

there's a motion to renew the restraining order next weel can't go because that would bring me within 300 hundrec

[This message was edited by David Newell on 12-15-06 a

Posts: 525 | From: **richmond, texas, u.s.a.** | Registered: 10-19-01

**GG**  
Member

 posted 12-18-06  “ ” 

**Stalking just means I REALLY REALLY LOVE YOU!**

quote:

Originally posted by David Newell:  
there's a motion to renew the restraining order next week, but i can't go because that would bring me within 300 hundred feet.

[This message was edited by David Newell on 12-15-06 at .]

That's ok David, you know it's the THOUGHT that counts!

Posts: 842 | From: **Texas** | Registered: 12-26-01

**JB**  
Member

 posted 12-18-06  “ ” 

**Refreshment**

It's not all that incredible that an officer can't recognize a years after an arrest. Why couldn't the officer look at the booking photo and refresh his memory? Or, why can't the prosecutor connect the defendant to the arresting officer the booking photo and identifiers that match from the off report to the booking sheet?

This is not the same thing as an officer not being able to

identify someone he received a rock of cocaine from 6 months ago, who he now has to identify to make an arrest.

We let an officer do an offense report to memorialize information. Same thing, sometimes, for a photo.

I apologize in advance for dragging this thread into the weight of seriousness.

---

Posts: **3215** | From: **Williamson County, Texas** | Registered: **01-25-06**

**David  
Newell**  
Member

 posted **12-18-06**  “ ” 


### seriously, though

if the officer can't recognize the guy sitting at the table, is that exculpatory? what i take from gordon's comment is that he could rely upon something to refresh the officer's recollection but he doesn't feel proceeding with the case is the right thing to do because it raises too many questions about the quality of the case, or as chris rock says about single-parenting, "sure you can do it, but you can also drive your car with your knees doesn't mean it's to be done."

---

Posts: **525** | From: **richmond, texas, u.s.a.** | Registered: **10-19-01**

**JB**  
Member

 posted **12-18-06**  “ ” 

### Another Factor

In a USSC case, *United States v. Ruiz*, 122 S. Ct. 2450, the question of whether a prosecutor had a duty to disclose exculpatory material before a guilty plea was addressed. The Court said that the Due Process Clause, which is the source of a prosecutor's obligation to disclose exculpatory evidence, applies only in cases that go to TRIAL.

When a defendant pleads guilty, he forgoes the opportunity to challenge the evidence and, therefore, no longer has a right to exculpatory evidence. [The SC left open the question as to whether that would apply to evidence that established absolute innocence.]

Consistent with that case, a prosecutor could resolve a legal issue (or even a factual issue) by making a plea offer. The prosecutor is not obligated to inform the defense attorney of the details of the legal issue or even the factual issue, absent a specific question from the defense attorney [The Classic: the victim still around to testify?]

So, in *Ruiz*, the prosecutor refused to turn over co-defendant statements that might have provided the defendant with impeachment material. The prosecutor didn't want the defendant to see those statements unless there was going to be a trial.

a trial. The SC said that was OK, even though the defend had to make the choice to plead guilty without the benefi that information.

And, as prosecutors, we do something like that all the tim Does any defendant really get full discovery before a guil plea? No. That would defeat the purpose of the plea -- to reduce the work required by the prosecutor in exchange f reduced sentence for the defendant.

Our plea papers even have an express waiver of the right exculpatory information, just to make things abundantly That waiver is also helpful in subsequent writs, providing answer to claims of innocence or ineffective assistance of counsel.

Posts: 3215 | From: Williamson County, Texas | Registered: 01-25

Clay A.  
Member






 posted 12-18-06  “ ” 

**same/same**

BTW CG your rule and mine sound exactly the same. We the good guys, we don't hide the ball. Problems with PC d make the defendant not guilty, but do you really want to message to all your officers that you pull fast ones. I hate exclusionary rule, but not enough to skirt it by a hyper te application of a moral, ethical and practical duty to disclo:

Posts: 149 | From: Austin, TX, US | Registered: 09-12-02

All times are CT

[New Topic](#)
[Post A Poll](#)
[Post Reply](#)

[Printable](#)

[Email a Friend](#)

[PopIt!](#)

[MyPop™](#)

[Private Topics](#)

Hop To:

[TDCAA](#)

© TDCAA, 2001. All Rights Reserved.

Powered by  **INFOPOP** ©2002

OpenTopic 3.1.0