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CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

REPORT AND RECOMMENDATIONS ON COMPLIANCE WITH THE PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY EVIDENCE.

Introduction.

The Commission's Report and Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers, issued October 18, 2007, noted that the failure to disclose exculpatory evidence was a leading ground for reversal of California criminal convictions based on claims of prosecutorial misconduct during the ten year period ending December 31, 2006. The duty to disclose exculpatory evidence has been recognized as a constitutional imperative since 1963, when the United States Supreme Court decided the case of *Brady v. Maryland,* 373 U.S. 83 (1963). The obligation is commonly referred to as the "*Brady*" obligation or duty.

Prosecutorial compliance with the *Brady* duty includes the duty to disclose materials relevant to impeach prosecution witnesses, *Giglio v. United States,* 405 U.S. 150 (1972), and to materials that are in the possession or control of investigating law enforcement agencies, placing the onus upon prosecutors to insure that police or other investigative agencies have fully reported on the

existence of potentially exculpatory evidence. *Kyles v. Whitley,* 514 U.S. 419 (1995). A potential source of non-compliance is that the *Brady* duty is limited to "material" exculpatory evidence. Prosecutors may not fully realize the ways in which potentially exculpatory evidence can be put to material use by criminal defense lawyers.

The prosecutor's *Brady* duty to disclose exculpatory evidence under the due process clause of the United States constitution is wholly independent of any statutory scheme. It is self-executing and needs no statutory support to be effective. *Alford v. Superior Court,* 29 Cal.4th 1033, 1046 n.6 (2003).
But the issue of access to records of misconduct complaints against police officers, which may be relevant to challenge their credibility in a criminal case, is closely related to and frequently overlaps with the *Brady* duty. Under California law, upon a showing of good cause and materiality, a court will review an officer's personnel file to determine whether it contains any information that should be disclosed to the defendant. *Pitchess v. Superior Court,* 11 Cal.3d 531 (1974); California Evidence Code §§ 1043-45; California Penal Code §§ 832.7-832.8. Such requests are commonly referred to as "*Pitchess* Motions." *Pitchess* requirements limit the access of both prosecutors and defense lawyers to police personnel records, and limit the disclosure of such records.

The Rampart Task Force Recommendations.

In 1999, the exposure of a pattern of false arrests, perjured testimony and the planting of evidence by L.A.P.D. officers assigned to the Crash Unit of the Department's Rampart Division led the Los Angeles District Attorney [LADA] to dismiss nearly 100 cases in which felony convictions had been obtained, many of them on pleas of guilty. In 2001, the Los Angeles County Bar Association convened a special Rampart Task Force to make recommendations relating to all parts of the justice system that could prevent this type of misconduct in the future.[1] Their Report, issued in April, 2003,[2] included a number of key recommendations addressing *Brady* and *Pitchess* obligations and compliance.

In anticipation of the public hearing convened by our Commission, we asked witnesses to address whether existing office policies and procedures implemented by District Attorney Offices and Public Defender Offices were adequate to ensure full compliance by all deputies with discovery obligations, and whether any legislative or administrative changes were needed to assure full compliance with the requirements for disclosure of

[1] The Task Force, chaired by U.S. District Judge Audrey Collins, a former state prosecutor, included former prosecutors, public defenders, private practitioners, judges and academics.

[2] Los Angeles County Bar Association Task Force on the State Criminal Justice System, *A Critical Analysis of Lessons Learned: Recommendations for Improving the California Criminal Justice System in the Wake of the Rampart Scandal,* April, 2003.

evidence. We also asked whether four specific recommendations of the Rampart Task Force should be implemented on a statewide basis:

> 2.1 To implement prosecutors' responsibility for obtaining and producing *Brady* material, prosecuting agencies should establish procedures to gather *Brady* material in a systematic fashion from all appropriate sources. To assist prosecutors in the fulfillment of their obligations, governmental agencies should establish procedures to gather all *Brady* material and to provide that material to prosecuting agencies in a timely manner. Other options for obtaining *Brady* material should be utilized by prosecutors before resorting to *Pitchess* motions.
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> 2.2 *Brady* . . . material should be collected in a central database under the control of the prosecuting agency.
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> 2.3 Production of *Brady* material to the defense must be timely. In particular, *Brady* material tending to establish factual innocence or an affirmative defense should be revealed before a guilty plea is entered.
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> 2.4 In felony cases, prosecutors should be required to execute a declaration affirming that inquiries have been made of all appropriate sources and that all *Brady* material obtained has been reviewed and disclosed.

We also invited written submissions to address the question whether the Rampart Task Force's detailed recommendations on the collection and dissemination of *Pitchess* material should be implemented on a statewide basis.

The Commission received thoughtful responses to these questions, both in the form of written submissions[3] and oral testimony.[4] Based upon these submissions, the Commission is in agreement that statewide legislation is not the most appropriate vehicle to assure full compliance with *Brady* and *Pitchess* obligations. The size and organization of prosecutors' offices throughout the State of California varies substantially, and assuring full compliance with these obligations is best addressed by the adoption of clear administrative policies within each office that are available for public scrutiny. Such policies should describe the standard to be used in determining whether information should be disclosed, and should require the maintenance of a "*Brady* List," identifying witnesses as to whom *Brady* material exists.

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[3] The responses of the California District Attorneys Association, the Los Angeles County District Attorney, and the Ventura County District Attorney are available on the Commission's website, www.ccfaj.org.

[4] Santa Clara County District Attorney Dolores Carr testified on behalf of the California District Attorneys Association; Deputy District Attorney Lael Rubin testified on behalf of the Los Angeles County District Attorney's Office; and Special Assistant District Attorney Michael Schwartz testified on behalf of the Ventura County District Attorney's Office.

District Attorney *Brady* Policies.

The Commission has examined the publicly available office policies of the Los Angeles County District Attorney's Office, the Ventura County District Attorney's Office, and the Santa Clara County District Attorney's Office. The response of the California District Attorneys Association [CDAA] notes that "other offices . . . have opted not to have a specific policy, but to require their deputies to follow the statutory and case law on these subjects."[5] The Commission believes that compliance with *Brady* obligations should not be left up to each individual deputy's own interpretation of statutory and case law. A written Office Policy and training regarding this policy can help insure that all prosecutors will fully comply with their *Brady* obligations.

In accordance with the Rampart Task Force recommendations, procedures should be established to gather *Brady* material in a systematic fashion from all appropriate sources, consistent with the requirements of *Pitchess*. The material should be identified and a record should be kept of when and how it was delivered to the defense. Material determined to be relevant to factual innocence or an affirmative defense should be disclosed as soon as that determination is made, and prior to entry of a guilty plea.

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[5] California District Attorneys Association, *Position Statement of the California District Attorneys Association Regarding "Focus Questions for Hearing on Professional Responsibility Issues" of the California Commission on Fair Administration of Justice, July 11, 2007,* at p. 13.

When there is information about a witness that may be subject to disclosure requirements under *Brady*, the identity of that witness should be maintained on a "*Brady* List" for use in other cases. The Commission does not believe that a formal declaration of full *Brady* compliance needs to be signed by the prosecutor, but prosecutors should be ready to offer assurances to both the defense and the court that inquiries have been made of all appropriate sources, and all *Brady* material received has been reviewed and disclosed in accordance with all legal obligations.

The CDAA finds most of these recommendations appropriate. CDAA, however, suggests that existing policies and procedures are adequate to ensure full compliance, and that "in establishing policies for *Brady* databases, one size does not fit all. Each prosecutor's office should design and implement procedures to deal with *Brady* evidence that works for that jurisdiction."

The Commission does not suggest a uniform policy and procedure for every District Attorney's Office in the State of California. We are in full agreement that each prosecutor's office should design and implement procedures that work for that jurisdiction. But the Commission strongly believes that public accountability requires such policies and procedures be in written form and available for public scrutiny. Consultation with law

enforcement agencies, peace officer associations representing law enforcement officers, and Public Defender Offices will be helpful in formulating effective policies that are widely accepted and understood. In many counties, such policies are already the product of such collaboration.

The process of devising a written policy frequently exposes friction points that can be directly addressed and eliminated. A written policy also provides a basis for consistent training of personnel and evaluation of their compliance. Therefore, the Commission recommends that every District Attorney's Office in California formulate and disseminate a written Office Policy to govern *Brady* compliance, and that this policy provide for gathering *Brady* material in a systematic fashion from all appropriate sources, tracking the delivery of the material, and disclosing material determined to be relevant in a manner that is consistent with *Pitchess.* The policy should require that material relevant to factual innocence or an affirmative defense be disclosed as soon as that determination is made, and prior to entry of a guilty plea. Policies should be regularly reviewed and updated to reflect evolving changes in judicial interpretation of the *Brady* duty and *Pitchess* limitations.

The Limitations of *Pitchess*.

With respect to the Rampart recommendations regarding *Pitchess* material, both the CDAA and the LADA point out that some of these recommendations are precluded by the subsequent ruling of the California Supreme Court in *Alford v. Superior Court,* 29 Cal.4th 1033 (2003). The Court held that protective orders issued in compliance with California Evidence Code Section 1045(e) must require that material disclosed pursuant to a defense *Pitchess* Motion may only be utilized for the case in which the motion was made, and that the prosecution has no automatic right to police personnel records that are disclosed to the defense pursuant to a *Pitchess* Motion. The inclusion of *Pitchess* material in a database for future disclosure does not appear to be feasible under the strictures of *Alford.* But the maintenance of an office "*Brady* List," identifying particular officers with credibility problems, is not precluded by *Alford* if information obtained from a *Pitchess* motion is not disclosed, and such a list can provide a useful tool in alerting prosecutors to the need to further investigate the need for *Brady* disclosures, including a subsequent additional *Pitchess* motion. The recent ruling of the California Supreme Court in *Chambers v. Superior Court,* 42 Cal.4th 673 (2007) may permit defense counsel and defender offices to maintain a list of the names of officers as to whom *Pitchess*

motions have been granted, so that when another *Pitchess* motion in a different case is granted as to the same officer, counsel can access derivative information in the previous case.

The system utilized by Ventura County provides a useful model. Complaints regarding the credibility of a police officer are evaluated as they are received, with an opportunity for the officer and the employing law enforcement agency to provide input. If the Office concludes that material evidence exists regarding an officer's credibility, the officer's name is placed on a "*Brady* List." Past cases in which the officer testified are researched and identified, to determine if the defense should be advised of the new information. In future cases in which the officer will be a prosecution witness, the prosecutor is required to consult with a designated supervisor as to how to proceed. Normally, the officer is not called as a witness, or the *Brady* information is disclosed. If there is doubt as to whether the information is material, an *in camera* evaluation for a judicial determination is sought.

The Commission is in agreement with Recommendation 6.2 of the Rampart Task Force, that a database organized and maintained by the prosecutor's office should be created pursuant to procedures and standards established by that office and containing the names of police officers and

other recurring witnesses for whom *Brady* material exists. Case-specific *Pitchess* Motions can then be filed by either the prosecution or the defense, or both. Again, we are aware that one size does not fit all. But we cannot accept the suggestion that such procedures are not necessarily appropriate for smaller jurisdictions where officers with credibility problems are more readily known to those in the legal community. Compliance with *Brady* requirements is too important to rely upon courthouse gossip as a substitute for systematic procedures.

Standards for "*Brady* List" Determinations.

The Rampart Report recommended a standard of reasonable suspicion for information questioning a witness' credibility, before that witness is put on a "*Brady* List" to alert prosecutors to potential *Brady* problems. This appears consistent with the "substantial information" standard employed by the Ventura County and Santa Clara County District Attorneys' policies:

> "Substantial information is facially credible information that might reasonably be deemed to have undermined confidence in a later conviction in which the law enforcement employee is a material witness, and is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event."

The standard adopted by the Los Angeles County District Attorney requires "clear and convincing evidence":

> "The decision to include such material (concerning a peace officer or governmentally employed expert witness) will be made using a standard of clear and convincing evidence which is higher than a preponderance of evidence but less than beyond a reasonable doubt. In other words, without clear and convincing evidence that the potential impeachment evidence is reliable and credible, it will not be included in the alert system."

While a "Brady List" is not a public record, [6] prosecutors must be cognizant that a decision to place an officer on the list due to a "credibility problem" can have a damaging impact upon the officer's career and reputation, and even result in termination. While established instances of dishonesty or moral turpitude must be disclosed, "preliminary, challenged, or speculative information" does not come within *Brady,* and should not result in placing an officer on a *Brady* list. *United States v. Agurs,* 427 U.S. 97, 109 n.16 (1976). Where evidence challenging an officer's credibility is disputed, the existence of a dispute itself should not exempt the material from the *Brady* requirement of disclosure. The dispute, of course, must be resolved.

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[6] *Coronado Police Officers Association v. Carroll,* 106 Cal. App. 4th 1001 (2003).

Whether the resolution requires "facial credibility" or "clear and convincing evidence" is not for this Commission to decide. The suggestion has been made that in actual practice, there is little difference between the standard utilized in Los Angeles County and the standard applied in Ventura and Santa Clara Counties. Others disagree. The disagreement itself underscores the importance of defining the standard in writing and making it publicly available.

Brady policies should include an opportunity for the affected officer and the employing law enforcement agency to provide input before a determination is made to include an officer's name on a "*Brady* List. The officer and employing agency should also be given an opportunity to seek review of the determination by senior management of the District Attorney's Office. The policies of Ventura and Santa Barbara Counties include such provisions. The dramatic effect a *Brady* determination may have upon both the officer and the employing department requires fundamental fairness in making the determination. Receiving this input will also assist the District Attorney in understanding and evaluating the evidence. The policies must provide for expedited procedure for cases in which immediate disclosure is required, such as the discovery of information during trial.

The Commission believes all California District Attorneys should heed the warnings from the U.S. Supreme Court that "the prudent prosecutor will resolve doubtful questions in favor of disclosure," *United States v. Agurs,* 427 U.S. 97, 108 (1976) and that prosecutors should avoid "tacking too close to the wind." *Kyles v. Whitley,* 514 U.S. 419, 439 (1995).

The Need for Training.

Written policies and procedures alone, of course, will not suffice if the policies and procedures are not part of the training of the deputies who will be expected to follow them. As the policies and procedures are interpreted and applied to specific cases, examples will be available to further the understanding of deputies through training programs. The Commission learned of an innovative approach to training regarding *Brady* issues recently undertaken in Santa Clara County. The Santa Clara County Bar Association sponsored a joint training, for both deputy public defenders and deputy district attorneys at the same time. Such joint training programs can be used to promote a collaborative and cooperative approach to troublesome discovery issues.

There is no question but that California prosecutors generally take their constitutional obligations to disclose exculpatory evidence seriously, and many District Attorney Offices have devoted considerable time and

resources to the drafting, promulgation and implementation of excellent written policies. In recommending that all California District Attorneys follow their example, the Commission is hopeful that no legislative action will be necessary to assure full compliance with *Brady/Pitchess* obligations.

RECOMMENDATIONS

1. The California Commission on the Fair Administration of Justice recommends that all District Attorney Offices in California formulate and disseminate a written Office Policy to govern *Brady* compliance, and that this policy provide for gathering *Brady* material in a systematic fashion from all appropriate sources in a manner that is consistent with *Pitchess*, tracking the delivery of the material, and disclosing material determined to be relevant. The policy should provide that material relevant to factual innocence or an affirmative defense be disclosed as soon as that determination is made, and prior to entry of a guilty plea.

2. The California Commission on the Fair Administration of Justice recommends that a list organized and maintained by each District Attorney's office should be created pursuant to procedures and standards established by that office, in consultation with law enforcement agencies, peace officer associations representing law

enforcement officers, and Public Defender Offices. The list should contain the names of police officers and other recurring witnesses as to whom there is information that may be subject to disclosure requirements under *Brady*. This would include all facially credible information that might reasonably be deemed to undermine confidence in a conviction in which the law enforcement employee is a material witness, and is not based upon mere rumor, unverifiable hearsay, or an irresolvable conflict in testimony about an event.

3. The California Commission on the Fair Administration of Justice recommends that training programs be conducted to assure that all deputy district attorneys understand and apply office policies and procedures with regard to *Brady* disclosure and *Pitchess* Motions. If feasible, joint training programs should be organized to include prosecutors, public defenders and other criminal defense lawyers.

4. The California Commission on the Fair Administration of Justice recommends that all police and other investigative agencies formulate policies and procedures to systematically collect any potential *Brady*

material and, consistent with the statutory protections for personnel records, promptly deliver it to prosecutors.

5. The California Commission on the Fair Administration of Justice recommends that training programs for peace officers include full treatment of the obligation to disclose *Brady* material to the prosecutor.

Respectfully submitted,

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