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JONES & MAYER

Attorneys at Law

3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

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CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: Martin J. Mayer, Esq.

ATTORNEY GENERAL STATES AGENCIES CAN NOTIFY D.A. OF NAMES OF OFFICERS WHO "MAY" HAVE BRADY MATERIAL IN THEIR FILES

On October 13, 2015, the California Attorney General (AG) issued a published opinion, No. 12-401, which states that "Penal Code Section 832.7(a), does not authorize a District Attorney (DA), for the purpose of complying with the United States Supreme Court's ruling in *Brady v. Maryland*, to directly review the personnel files of peace officers who will or are expected to be prosecution witnesses."

However, the Opinion also states that "To facilitate compliance with *Brady v. Maryland*, [a law enforcement agency] may lawfully release to the DA's office the names of officers against whom findings of dishonesty, moral turpitude, or bias have been sustained, and the dates of the earliest such conduct."

Analysis

Although the Opinion addresses whether the California Highway Patrol can provide such information, it applies to all law enforcement agencies. The issue arose when Greg Totten, the DA of Ventura County and the California District Attorneys' Association (CDAA) proposed a policy to facilitate compliance with the prosecutor's *Brady* obligations when an officer of the California Highway Patrol (CHP) is expected to testify as a witness. Since the CHP operates in all 58 counties, and there are 58 individual DA's, the CDAA wanted to establish a uniform policy which could be utilized in all of those counties.

"The proposed policy calls for CHP to provide to the DA a list of names of officers who have sustained findings of misconduct against them that reflect moral turpitude, untruthfulness, or bias within the preceding five years (a "Brady list"). The CHP argues that the proposed policy is invalid under Penal Code Section 832.7(a), which provides that peace officer personnel records are confidential and may not be disclosed without a court order."

The AG notes that since these two questions were presented to her office for an opinion, three years ago, "the California Supreme Court issued an opinion in *People v. Superior Court (Johnson),* which squarely considered and decided our first question. There, the Court held that 'the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a Pitchess motion, in order to seek information in those records."

But, as to the second question, the Supreme Court praised the policy which existed between the San Francisco Police Department (SFPD) and the San Francisco District Attorney which involved SFPD notifying the DA of potential Brady material in an officer's file.

The AG states, "We believe the Supreme Court's approval of the policy was logically necessary to its decision, and we therefore regard the *Johnson* decision as good authority for the proposition that such a policy is legally valid. We now explicitly find that Penal Code Section 832.7(a) does not preclude CHP from providing Brady list information to a DA for purposes of facilitating *Brady* compliance."

[For details on the *Johnson* decision, see Jones & Mayer Client Alert Memo dated July 10, 2015-Vol. 30 No. 17, "The District Attorney Must Serve A Pitchess Motion Before Accessing A Peace Officer's Personnel File."]

The AG's Opinion goes into great detail explaining the history of *Brady v. Maryland,* explaining the legal framework behind the law, and the reason for the conclusion reached in the AG's Opinion. It is an extensive and in depth explanation and analysis of the law. Among other things, the Opinion states that "(t)he Supreme Court later extended *Brady* to impose a duty on prosecutors to volunteer exculpatory matter to the defense even when no request is made, and that exculpatory matter includes impeachment evidence, such as evidence that bears on the credibility of a government witness. Evidence is 'material' for purposes of *Brady* 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"

"The prosecution's *Brady* obligation extends beyond evidence in the prosecutor's actual possession. Rather, the duty 'applies to evidence the prosecutor, or the prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel.' Thus, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.' Indeed, the prosecutor is held accountable for evidence 'known only to police investigators and not to the prosecutor,' and knowledge of such evidence is imputed to the prosecution."

The Opinion also extensively discusses the process established under *Pitchess v. Superior Court*, and the protections it provides for confidential personnel information of peace officers. The Opinion explains the relationship between *Brady* and *Pitchess* and how they work in conjunction with each other. "There is plainly some overlap between *Brady* and *Pitchess* principles."

The AG notes that "Pitchess, a state-created procedural mechanism for criminal defense discovery, must be viewed against the larger background of the People's *Brady* obligations, which have their foundation in the United States Constitution and cannot be

defeated by state statutes. The prosecution's constitutional obligation to disclose material exculpatory evidence is distinct and independent from the defendant's statutory right to obtain discovery from an officer's confidential files."

"The CDAA has proposed an 'External Brady Policy' ("the Policy") to govern the review of personnel files of CHP officer-witnesses for potential Brady information. The Policy is modeled on policies already in use by a number of DA's offices and law enforcement agencies."

"Under the proposed Policy, a qualified representative of CHP would examine the files of CHP officers who have been the subject of internal investigations or complaints, and files of CHP officers who have been arrested, for the purpose of identifying (1) officers against whom there have been sustained findings of misconduct within the preceding five years that reflect moral turpitude, untruthfulness, or bias on the part of the officer; and (2) officers who have been convicted of a moral turpitude offense, or who are on probation for any offense, or have criminal charges pending against them."

"Based on these CHP file examinations, a secure database or list would be created containing the names of the officers who have sustained findings of misconduct against them that reflect moral turpitude, untruthfulness, or bias, and, for each officer, the earliest date of such misconduct. The conduct itself would not be described. Prosecutors would have access to this Brady list and could search it for the names of officers who have been subpoenaed to testify in upcoming criminal trials. Officers whose names are placed on the Brady list would be so informed, and would have the opportunity to administratively appeal the inclusion of their names on the list."

"If an officer whose name was on the Brady list were expected to be a witness in a criminal case, the DA would file a so-called Pitchess/Brady motion under Evidence Code Section 1043, with notice to both the CHP and defense counsel. A trial court would conduct an in camera review of the relevant records in order to determine what information should be disclosed and to issue any appropriate protective orders."

The CHP opposed this policy arguing that (1) they are not part of the "prosecution team." The AG found that, "when its officers act on the government's behalf or assist the government's case, both the officers and CHP itself are part of the prosecution team."

The CHP also argued that (2) a policy such as the one proposed improperly delegates the prosecution's Brady duty to CHP. The AG opines that since "its officers are part of a prosecution team, the law already imposes such a duty on CHP."

The next argument was that (3) the CHP is not qualified to determine what material in its officers' files is relevant for Brady purposes, because it lacks the perspective on the case that such a determination requires. The AG concludes that "a law enforcement agency can indeed be capable of facilitating compliance with *Brady* by screening its personnel files for certain categories of information.

The final argument was that (4) the compilation and disclosure of Brady list information would violate officers' privacy rights under the Public Safety Officers Procedural Bill of Rights Act (POBRA). The AG states that POBRA "expressly contemplates that an officer's name may be placed on a Brady list or otherwise disclosed pursuant to Brady."

HOW THIS AFFECTS YOUR AGENCY

There is no doubt that *Brady v. Maryland*, and its progeny, "requires a prosecutor to disclose material evidence that is favorable to a defendant's case." As stated above, "(t)he Supreme Court later extended *Brady* to impose a duty on prosecutors to volunteer exculpatory matter to the defense even when no request is made, and that exculpatory matter includes impeachment evidence, such as evidence that bears on the credibility of a government witness." That duty includes seeking out, among members of the prosecution team, material which would be classified as *Brady* material.

Furthermore, the California Supreme Court, in the *Johnson* case, concluded that the prosecutor did not have the right to access an officer's personnel file to identify any such material. But, the Court stated that the process established by the San Francisco Police Department was "laudatory," and that policy included this type of notification. There is no information provided to the DA as to the underlying charges discovered in the personnel file, only that there "may" be *Brady* material in the file of a material prosecution witness.

It is now necessary for law enforcement agencies and prosecutors to develop a process whereby the agency will alert the DA to the existence of such information. Failing to notify the DA will not serve any purpose since knowledge on the part of the law enforcement agency is imputed to the DA.

It is important to note that the failure to disclose *Brady* material will result in the overturning of a conviction, if one is obtained. That is, obviously, contrary to the wishes of either the agency or the prosecutor. As such, it is up to the respective organizations to come together and generate a process to comply with *Brady* obligations.

As with all legal matters, it is necessary to seek out and secure the advice and guidance of your agency's legal counsel. However, if you wish to discuss this matter in greater detail, feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

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