LEGAL DEFENSE TRUST TRAINING BULLETIN

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APPELLATE COURT ADDS ANOTHER DECISION TO THE *BRADY* MIX

Second Appellate District Files Brady Opinion At The Same Time D.A. Cooley Promulgates Brady Policy -- An Interesting Contrast.

In a recent Training Bulletin, we examined Los Angeles County District Attorney Steve Cooley's new *Brady* policy. Cooley's policy establishes responsibilities for both prosecutors and law enforcement agencies in Los Angeles County, when facts appear in a case at the time of filing criminal charges or later, that may suggest so-called "*Brady* material" possibly exists in witness-officers' peace officer personnel records.[1]

Just before the effective date of Steve Cooley's policy(May 28, 2002), the Second Appellate District, Division Three, filed its opinion in *People v. Northup*, No. B150933, May 16, 2002, ___Cal. App. 4th___.

Among many others, Riverside Sheriffs' Association (RSA) Director Tony Pradia and RSA Field Representative Les Lang spotted the contrasts in the *Northup* opinion and the Cooley policy after reading our Training Bulletin. Riverside County District Attorney Grover Trask is not presently persuaded to adopt the *Cooley* policy guidelines, preferring apparently to adhere to a less-*agg*ressive (not a less-*pro*gressive) approach to dealing with a criminal defendants' right of access to "evidence in their [prosecutors] 'possession' which is favorable to the defendant and material to guilt or punishment." *Northup, supra* (internal quotations and bracketed material added), citing *Brady v. Maryland* (1963) 373 U.S. 83. Other county district attorneys may follow Cooley in enacting similar policies.

Probably the principle distinction between Cooley's policy and the *Northup* opinion is the way in which the *Brady* "duties" are defined, and the implications for both prosecutors and police insofar as there is any responsibility to "go in the hunt" for possible *Brady* material in officers' records. As our many articles and bulletins on the subject over the past three years show, this is a "tough nut to crack"; *it is even tougher for peace officers and their associations to swallow the nutmeat.* However, as we have said so often, the implications for police personnel are of "career-sized proportions." *So, let us have your attention, please.*

THE BACKGROUND

Northup was busted for possession of methamphetamine by LASD Deputies Looney and Inge. Charged with this crime, and facing sentence enhancement for prior felony convictions, Northup filed a *Pitchess* motion for any complaints against the deputies for planting evidence, false reports, perjury and other forms of misconduct that would reflect on the deputies' character for truth, honesty and veracity. The trial court ordered LASD to provide the names and addresses of persons who had filed this category of complaints against the deputies. Northup filed a second motion asking for complaints filed by a specific, identified person. Thereafter, Northup filed a demand that the *prosecutor* examine the deputies' personnel

[1] *See*: Training Bulletin, Volume V, Issue No. 3, May 2002. D.A. Cooley's policy is examined in detail therein, as well as the ramifications of the policy on police careers.

records and provide all *Brady* material in those files to Northup, or dismiss the case against him. Northup argued that *Pitchess* procedures do not limit a prosecutor's *Brady* obligations.[2] Without question, such a "demand" is not in compliance with the statutory motion requirements of *Evidence Code* §1043.

The prosecutor resisted this demand, noting that neither the People nor the prosecutor had access to the personnel records and that Northup should seek the records from the LASD. Important to note, there was apparently one complaint by a person against one or both deputies for dishonesty. That person's name and address had been previously given to Northup as a result of the two *Pitchess* motions described above. Northup however, claimed he could not locate this complainant with just his name and address, and therefore he asked for "something more" in the "demand" for *Brady* material.

The trial court declined to order further production, opining that the *Pitchess* motion provided Northup with all that he was entitled to, from the personnel records.

Northup's conviction got him eight years. He appealed, contending that "*Brady* error" occurred. "*Brady* error" is not simply that the trial court failed to compel disclosure of evidence *characterized* as "*Brady* material." Instead, "*Brady* error" means that there *was* material and favorable evidence that was not disclosed, and its *absence* deprived Northup of a fair trial, resulting in a verdict *not* worthy of confidence; that is, whether the absence of that undisclosed evidence puts "the whole case in such a different light as to undermine confidence in the verdict."

THE *NORTHUP* OPINION

Brady and its progeny place "a duty (on prosecutors) to *learn* of any favorable evidence known to persons acting on the government's behalf in the (or this) case, including the police." *Northup, supra,* citing *Kyles v. Whitley*, 514 U.S. 419 (1995). The words, "in the (this) case" turn out to be pivotal in the *Northup* Court's opinion.

The Court distinguished *Pitchess* discovery requirements from *Brady* obligations, but found the two doctrines are not in conflict with one another. It is the first California case to clearly (albeit in a somewhat complex analysis) define what the requirements of each doctrine really are, and how they each impose different requirements on the participants in a criminal case: the defense, the prosecution, the police, and the courts.

Northup claimed that the *Brady* obligations require the prosecution to (in *every* case) *investigate* the personnel files of significant police witnesses, and disclose to the defense any *complaints* which *may* either exculpate the defendant or impeach police witnesses. The Court disagreed, noting that the *Brady* obligations extend only to disclosure of evidence which is favorable and material; not to *complaints* which *might* lead to the discovery of favorable and material evidence.

LASD "investigated" (through the efforts of Deputies Looney and Inge) Northup's crime. But, LASD did not compile personnel records on Looney and Inge in pursuit of the investigation of Northup. Hence, LASD did not act on the "government's behalf" in the Northup case (i.e., "in the case"; see *ante*) by investigating complaints against Looney and Inge. Indeed, it was performing its "administrative" responsibilities of management and supervision in so doing, and was not performing an investigative role "in the (or this) case." Hence, LASD, acting in its administrative capacity and as custodian of the personnel records, was not acting on the People's behalf, and was therefore not "part of the prosecution team".

This decision limits the "*Brady* obligations upon the prosecution team" to only those police and prosecutors who are part of the criminal investigative and prosecutorial efforts in the particular case which

[2] *See: Pitchess v. Superior Court* (1974) 11 Cal.3d 531. "*Pitchess* procedures" refers to the statutory discovery procedures mandated in *Evidence Code* §§1043-1047, whenever a civil or criminal litigant seeks information maintained in peace officer personnel records, commonly called a "*Pitchess* Motion".

results in, or is connected with, the prosecution of that case.[3]

Northup may well undermine some of the assumptions which define the prosecutor's duties in the Cooley policy -- and therefore, the legitimate requirements placed upon local law enforcement by that policy.

Northup of course, was not an assault on Cooley's policy which first appeared close in time to the filing of the *Northup* opinion; however, one cannot read *Northup*, without wondering about the philosophical and legal underpinnings of the Cooley policy.

Surely there will be more to this story -- stay tuned. Confused? Everyone is, but the logic of the *Northup* opinion is difficult to ignore.

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[3] The Cooley policy appears to assume that the "prosecution team" to which *Brady* obligations extend, include the agency which employs the officer-witnesses; not just the officer-witnesses themselves -- a huge distinction.