LEGAL DEFENSE TRUST
TRAINING BULLETIN

MICHAEL P. STONE, GENERAL COUNSEL
6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (909) 653-5152 Fax (909) 656-0854

Vol. II, Issue No. 6 NOVEMBER 1999

THE "NEW" THREAT TO POLICE CAREERS: Revisiting *Brady v. Maryland*

We recently wrote for you, an article dealing with the profound effects upon your police career, of sustained findings of dishonesty and false reports.[1] Now, we look at the problem confronting us all, and how it will change police discipline in the new millennium.

Since the last article on this subject, PORAC Legal Defense Fund circulated a protocol that will be recommend to the California Attorney General, in connection with the formulation and publication of an Attorney General Opinion on the subject of a criminal defendants's entitlement to "Brady" material consisting of sustained findings of dishonesty, false reports, and acts of moral turpitude in the personnel records of an officer-witness.
Mr. Mike rains, Esq. Of Pleasant Hill (formerly with Carroll, Burdick and McDonough), has studied this issue extensively over the past year, and has drafted, with explanation, a comprehensive suggested protocol for courts, law enforcement and prosecutors to follow, when issues of reliability appear in the personnel records of members who are material witnesses in the prosecution. The protocol, with explanatory notes, is an excellent forecast of how courts, prosecutors, chiefs and sheriff's will treat these issues in the future. Hence. Liberal reference to Mr. Rains' work is necessary and appropriate here. We should all gratefully acknowledge his efforts.

So, why all of the sudden is *Brady* such a big deal? The answer is partly historic, and partly recent development. Historically speaking, *Brady v. Maryland, 373 U.S. 83 (1963)* has been the major statement from the United

---

[1]That article, "Truth or Consequences"-- The Path to Career Destruction", reviewed current trends in police discipline, to discharge any member who has been found to have made false or misleading statements or who has been dishonest in
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx..
..article may be read as an extension of the trends reported therein. This article focuses on why administrators can be expected to demonstrate a "zero tolerance" approach to dishonesty, and why it is absolutely imperative that every member understand what is at stake: the career in police work.

States Supreme Court defining the criminal defendant's right to information which will likely aid the defense. The *duties* imposed by *Brady* are initially placed upon the prosecutor - - an affirmative obligation to turn over information that is bot unfavorable and material to the defense.

Generally speaking, the *Brady* issue has not been much of concern to the law enforcement officer, since the obligations imposed by *Brady* are directed, at least initially, to the prosecutor.

On the other hand, most law enforcement members are well aware of so-called "Pitchess discovery" (after *Pitchess v. Superior Court (1974) 71 Cal. 3d 531*). These "motions" are brought by the defense discovery, for example, evidence of prior use of excessive force, in a case where the defendant is charged with resisting or assault of an officer. But *Brady* is different, and is addressed to any information in the hands of the prosecutor which could aid the defense. So, it is broader in scope, and doesn't require a motion.

Brady was followed in 1995 by another U.S. Supreme Court Case, Kyles v. Whitely, 514 U.S. 419 (1995). Kyles extended the Brady obligations to include all members of the "prosecution team"; i.e. investigating officers. The obligation thus was extended to favorable and material evidence on information known to the police involved in the case.

This "extension" in the *Kyles* case set the stage for the present problem. Where a *police* witness in a criminal case has sustained findings of dishonesty, false reports or misconduct involving moral turpitude, that information may logically amount to Brady material, because it might aid the defense in impeaching the credibility of the officer-witness. Such personnel record information might very well permit the defense a substantial measure of doubt about the truthfulness of the officer-witness, and is thus both "material" and "favorable" to the defense.

As we mentioned in "Truth or Consequences" two months ago, prosecutors are urging the law enforcement agency to turn over materials in the files of officer-witnesses that meet the threshold test, i.e. sustained findings of dishonesty, false statements, or moral turpitude.

The question of an appropriate protocol for the interested parties to follow is the heartland of Mr. Rains' fine paper. For us, the lesson in all of this is much "closer to home" and simpler than the incredibly complex issues of a proper protocol.

One way or another, police and sheriff administrators will be called upon to produce, whether for initial review by a prosecutor, or more likely, for review by a judge *in camera*, materials from personnel records of police witnesses which reveal sustained findings within the enumerated categories of misconduct.

Prosecutors, on the other hand, who ultimately decide whether to initiate a criminal prosecution, are not going to be inclined to pursue a case if the police witnesses are going to be impeached with evidence of misconduct. So, we have seen some prosecutors, already aware of such misconduct, decline to file *any*

cases involving the affected officer. And, the officer's inability to testify may render him unfit for further retention in employment. Then, chiefs and sheriff's are likely to move to discharge such an employee for "unfitness".

However, and more to the point here, police chiefs and sheriffs can be expected to refuse to retain any officer or deputy who is charged and found guilty (administratively) of acts of dishonesty or moral turpitude, to avoid the whole problem.

What is moral turpitude? The term generally refers to acts which are morally offensive and would include for example sex crimes, including sexual battery, and other misconduct that is a flagrant violation of, and inconsistent with, the public trust (fraud, theft, embezzlement, for example).

The focus of this article is upon the member--do not permit yourself to be accused of any of these forms of misconduct, for they are career-threatening. Second, administrators should be very careful about charging and sustaining accusations involving dishonesty in act or word. Third, police and sheriff's departments should give serious thought to the mandatory retention periods for police personnel records whether continued retention of same of these records is necessary, by consultation with the department legal advisors.