



## **Brett W. Ligon**

District Attorney  
9th Judicial District

**Michael R. Holley**  
First Assistant District Attorney

**Christopher R. Smith, Chief Investigator**  
**Melisa G. Appleton, D.A. Administrator**

February 29, 2017

Sheriff Rand Henderson  
Montgomery County Sheriff's Office  
1 Criminal Justice Dr.  
Conroe, Texas 77301

Re: Agency Compliance with the Disclosure Requirements

Dear Sheriff Henderson:

I am writing to respectfully request your assistance in complying with our joint legal responsibility to disclose certain information within your Agency's possession. Specifically, I am asking that we engage in systematic sharing of personnel and disciplinary information regarding your employees.

As you know, there are matters that must be disclosed in every criminal case. These requirements arise from Federal and State laws, court orders, as well as various ethical rules.

### **Federal Requirements**

To begin with, the United States Constitution places an unqualified obligation on the State to turn over all material evidence favorable to the accused where that evidence may be exculpatory or may mitigate punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence favorable to the accused includes any evidence that may be used to impeach State witnesses. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). Responsive information possessed by **any** State officer, not only the prosecutor, must be disclosed. *Kyles v. Whitley*, 514 U.S. 419 (1995). In other words, it is no defense to the State's responsibilities under *Brady* that the prosecution did not know about information in the possession of a law enforcement agency. Prosecutors are held responsible for knowing everything that the officer and agency know. Furthermore, prosecutors have an affirmative obligation to seek out exculpatory and impeachment evidence in the possession of law enforcement.

Failure to make required disclosures under *Brady* can bring serious consequences for the State and the defendant, including the suppression of evidence, the reversal of cases, and inappropriate verdicts or sentences. In addition, police officers and agencies may be sued and forced to pay damages for failure to make disclosures required under *Brady*. See *Carrillo v. County of Los Angeles*, 798 F.3d 1210 (9<sup>th</sup> Cir. 2015)(holding that police officers were not entitled to assert qualified immunity in a suit filed under 42 U.S.C. Section 1983 where police officers had violated the constitutional rights of various defendants by failing to make *Brady* disclosures.) Finally, a Court has the authority to hold an individual Officer, or supervisor of an Officer, in contempt for certain failures to comply with the law.

### **State Requirements**

A relatively new Texas law imposes even broader discovery disclosure requirements than *Brady*. Specifically, Texas Code of Criminal Procedure Article 39.14(h), otherwise known as the Michael Morton Act, requires the State to disclose:

... any exculpatory, *impeachment*, or mitigating document, item, or information in the possession, custody or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. (emphasis added).

This formulation, unlike the language of *Brady*, does not state that information must be “material” for disclosure to be required. In addition, by referring to any “document, item, or information,” the statute arguably eliminates any requirement that the item to be disclosed must be admissible. No significant case law exists elaborating upon the precise meaning of Section 39.14(h). In the absence of such guidance, we must look to the plain language of the statute and conclude that the State’s statutory discovery requirements in Texas are broader than those under the United States Constitution.

### **State Ethical Rules**

Under the Texas Rule of Professional Conduct 3.09(d), a prosecutor in Texas must:

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

A recent decision of the Texas Board of Disciplinary Appeals interpreting this provision holds that it requires broader disclosure than constitutionally required under *Brady*. *Schultz v. Comm'n for Lawyer Discipline*, No. 55649, 2015 WL 9855916 (Tex. Bd. Disp. App. Dec. 17, 2015).

Failure to comply with the Texas Rules of Disciplinary Conduct can result in severe sanctions for prosecutors, up to and including disbarment.

### **Information Concerning Agency Personnel/Disciplinary Matters**

The legal principles discussed above require a high level of cooperation between law enforcement and prosecutors in identifying and disclosing responsive information. In light of the breadth of the disclosures required, there may be information contained in agency personnel or disciplinary files or otherwise within the knowledge of the Agency that is necessary for proper case analysis and preparation and that must be disclosed to the defense. Information indicating an officer had any history of lying in official matters, falsifying reports, or expressing racial or ethnic biases would be obvious examples.

In order to assist the Montgomery County District Attorney and to best ensure discovery compliance, we are requesting that the Agency agree to disclose to the District Attorney any and all personnel and disciplinary information or items it possesses, or of which it is otherwise aware, that would be exculpatory, mitigating or could be used to impeach the testimony of Agency personnel. We request that the Agency agree to provide this information with respect to any of its personnel who are, or have ever been, involved with the investigation of criminal cases. The information disclosed shall include, at a minimum, the following: the name and rank of the officer or other employee involved; the date and a description of the conduct involved with the violation; an explanation of the law or policy violated; and the date that the Agency made the determination that the law or policy was violated. When practicable, the disclosure shall be made in writing. If an occasion requires expedited disclosure, we ask that the disclosure may be made orally and then later documented by a written disclosure. We further ask that additional explanatory detail be provided as necessary to explain or clarify the nature and scope of the impeachment items.

We are asking you to provide District Attorney personnel with access to Agency files and documents related to disclosed information to further assist with making required discovery disclosures. We ask that you disclose this information to Lieutenant Heather Cash. If for some reason Lieutenant Cash is not available, we will provide you with the name of another representative of our Office in writing.

To facilitate the disclosures discussed in this letter, we are asking that you designate, in writing, an appropriate official to serve as the point of contact concerning the Agency's potential impeachment information (the "Agency Official"). We request that the Agency Official be responsible for providing the information discussed above to Lieutenant Cash or her designee as well as for responding to inquiries that may arise from these disclosures. We would ask that if you designate another person as the Agency Official, you please notify us of this change.

#### **Determining the Scope of Disclosable Information**

Given the wide range of factual scenarios at issue in criminal cases, the exact parameters of potential impeachment evidence are difficult to determine. As an aid to the Agency in complying with required disclosures, the District Attorney provides the following as an **illustrative and non-exhaustive** list of potential personnel/disciplinary information that may constitute disclosable information:

- A. Any criminal conviction, deferred adjudication, pretrial diversion or similar disposition for any offense other than a traffic violation;
- B. Any pending charge or investigation for any offense other than a traffic violation;
- C. Any sustained findings of misconduct for or related to:
  - 1. Lack of truthfulness;
  - 2. Racial profiling;
  - 3. Discrimination on the basis of race, religion, ethnicity, national origin or gender;
  - 4. Unlawful use of force;
  - 5. Handling of evidence;
  - 6. Reckless or intentional false or misleading statements in reports or similar case related documents;

7. Use of cooperating individuals, confidential informants, or similar individuals providing assistance or information to law enforcement;

8. Searching for or seizing evidence;

9. Conducting interviews or interrogations.

D. Any pending administrative, civil service, or other department related proceeding relating to the items mentioned in category C;

E. Any finding by a court, administrative tribunal, or similar tribunal that an officer has intentionally or recklessly provided false or misleading testimony;

F. Any finding by a court, administrative tribunal, or similar tribunal that an officer has intentionally acted unlawfully in obtaining or collecting evidence or in detaining or arresting an individual;

G. Any finding by a court, administrative tribunal, or similar tribunal that an officer was or is not credible;

H. Any condition of mind or body that materially adversely affects an officer's ability to perceive or recall facts or the truth.

As noted above, the list is for illustration purposes only. It does not limit the obligation of your Agency to disclose information that calls into question the veracity or accuracy of statements or testimony of an officer or your Agency employee. Consistent with the long-standing policy of the District Attorney, we request that any law enforcement agency submitting cases to the District Attorney produce all discoverable material. Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information.

#### **Treatment of Disclosed Impeachment Information**

In order to satisfy the discovery required by law, the District Attorney will maintain a Law enforcement Disclosure List (the "List"), containing the names of officers and other employees who have engaged in conduct that may be required to be disclosed by the prosecution to the defense. All cases submitted to the District Attorney will be reviewed against the List.

Where necessary for the prosecution of the case, the District Attorney will provide to the court and/or defense the information related to the conduct where the officer or employee is or may be a witness. When practicable, the disclosure will be written and will notify the defense of the means by which additional information concerning the disclosure can be obtained. Generally this will be a request via a Public Information Act directed to the Agency Official. If an occasion requires expedited disclosure, the disclosure may be made orally to defense counsel and later documented.

We ask that the Agency Official comply with appropriately submitted requests for impeachment information by the Defense. Impeachment material that is disclosed to the defense will not always be admissible at trial. If legally appropriate, the prosecutor handling the case will file a written motion, such as a motion in limine, seeking to limit or preclude the use of the impeachment information or seeking a protective order to limit dissemination of the information. In addition, where legally appropriate, the prosecutor will submit the disclosed documents or information to the court for in camera inspection, so that the judge may make a private determination of admissibility without further detail being disclosed to the defense. To facilitate efforts by the State to limit or stop the use of potential impeachment information, we ask that the Agency Official provide any information, documents or other items provided to the defense to Lieutenant Cash or her designee at the same time it is provided to the defense.

The Disclosure List will be kept secure and only personnel of the District Attorney will have access to the List or the information contained in it. Use of the List by office personnel will be restricted to that which is necessary for the prosecution of cases. The District Attorney recognizes that much of the information contained in the List will be sensitive information that should not be reviewed or released without a case-related need.

To ensure the accuracy of impeachment information disclosed by the District Attorney, no District Attorney employee will maintain an independent list or similar collection of information concerning law enforcement impeachment information.

The requirements and procedures outlined in this letter are not intended to replace the obligation of individual law enforcement officers to inform prosecuting attorneys of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases, the prosecuting attorney

should be able to obtain impeachment information directly from the law enforcement witness during the normal course of investigations and/or preparations for hearings or trials. Prosecutors should be able to have candid conversations with the officers with whom they work regarding any potential impeachment information.

**Summary**

We greatly appreciate your Agency's assistance in these important matters. By way of summary, we are asking you to do the following:

- 1. Review your personnel files for information that would be subject to disclosure.**
- 2. When disclosable information is identified, please contact Lieutenant Heather Cash at 936-538-8115.**
- 3. When formally requested by a Defendant, please provide the documents that are responsive to the request.**
- 4. When providing documents to a Defendant, please provide a copy of the documents to our Office.**
- 5. Contact our Office as disclosable information becomes known to you.**

Please let us know if we can help clarify any the requests made above. Myself, my First Assistant, Mike Holley, as well as my Bureau Chiefs, Bill Delmore, Kelly Blackburn, and Tyler Dunman also stand ready to answer any questions you or members of the Agency may have. Thank you in advance for your cooperation.

Warm regards,

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Brett W. Ligon  
District Attorney