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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL DIVISION, KEARNY MESA BRANCH

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. **DOUG BUCKLEY,** Defendant.	Case No: 20T127973C **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DISCOVERY AND FOR MONETARY SANCTIONS [Penal Code § 1054 et. seq.]** DATE: TIME: 9:00 AM DEPT: A

The Defendant DOUG BUCKLEY by and through his attorney COLEEN M. CUSACK submits the following points and authorities in support of his Motion to Compel Discovery and for Monetary Sanctions.

STATEMENT OF FACTS

On or about August 1, 2020, California Highway Patrol issued a Notice to Appear to Doug Buckley charging a violation of Vehicle Code § 22349(a), which states:

> Except as provided in Section 22356, no person may drive a vehicle upon a highway at a speed greater than 65 miles per hour.

STATEMENT OF CASE

Doug Buckley was released pursuant to his promise to appear. [Vehicle Code 40500.] and was directed to appear before the Superior Court at 8950 Clairemont Mesa Blvd on or before October 7, 2020. Thereafter, the defendant, by and through counsel, pled not guilty to the charge and waiving time in which to do so, set the matter for trial. Due to the global COVID-19 pandemic and the related health concerns of Mr. Buckley and his attorney, the matter was continued for trial until May 14, 2021 at 9:30 AM.

The Defendant though his counsel served an eight-page Informal Discovery Request upon the Office of the City Attorney on April 7, 2012 via U.S. Mail. (Lodgment of Exhibits, Exhibit A). In a one-page response dated April 14, 2021, the City Attorney through its Senior Clerk Typist, Julia Ulloa, replied,

> The San Diego City Attorney's Office does not appear on nor participate in any infraction case tried in Kearny Mesa Traffic Court. This citation was directly filed with Kearny Mesa Traffic Court and we are not in receipt of any discovery on this matter.
>
> Any discovery that you are seeking must be obtained from the law enforcement agency that issued the citation. On the reverse of this letter is a list of the contact information for the law enforcement agencies that regularly submit cases to Kearny Mesa Traffic Court.
>
> (Exhibit C.)

To date, no response has been received from the California Highway Patrol. (See proof of services, Exhibit B.)

On May 11, 2021, when asked to explain their offices refusal to provide discovery in counsel's infraction matters, City Attorney Mara Elliott and Assistant City Attorney John Hemmerling told San Diego City Council that the City Attorney's office does not appear on infractions in Kearny Mesa Traffic Court, does not handle infractions and does not prosecute infractions.[1] (Exhibit D.) Thereafter, on May 12, 2021, counsel for the Defendant issued letters to City Attorney Mara Elliott, Assistant City Attorney John Hemmerling, District Attorney Summer Stephan and California Attorney General asking if the San Diego City

[1] Budget Review Committee Archived Videos. (May 11, 2021). *Budget Review Committee May 11, 2021* (3 hr 45 min). Retrieved on May 12, 2021 from: http://sandiego.granicus.com/ViewPublisher.php?view_id=54

Attorney is not the prosecutor of infractions in City of San Diego, then who is? (Exhibit E.) No responses have yet been received.

I.

THE DISCOVERY RULES THAT APPLY TO MISDEMEANOR PROSECUTIONS ALSO APPLY TO INFRACTION PROSECUTIONS

The criminal case category in California is made up of felonies, misdemeanors, and infractions. *See* Judicial Council of California 2018 Court Statistics Report: Statewide Caseload Trends 2007-2008 through 2016-2017.[2] Throughout the state, in the most recent year for which data was available, while there were 189,013 cases filed as felonies and 766,782 cases filed as misdemeanors, infraction filings accounted for 3,562,687 or approximately 79% of all criminal filings in the state.[3]

Penal Code §19.7 provides, "[e]xcept as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace officers, jurisdiction of courts, periods for commencing action and for bringing a case to trial and burden of proof." In infraction prosecutions, the defendant faces a fine and not jail or imprisonment. The defendant charged with an infraction is entitled to be represented by an attorney but is not entitled to court-appointed counsel and does not get the benefit of a jury trial but instead faces bench proceedings. However, there are no laws preventing application of the discovery procedures used in misdemeanors to infraction prosecutions and hence, all provisions of law relating to criminal discovery in misdemeanor proceedings apply with equal force to this proceeding. *See* Penal Code §19.7.

II.

THE PROSECUTOR IS CONSTITUTIONALLY, STATUTORILY AND ETHICALLY OBLIGATED TO PROVIDE DISCOVERY

Even without constitutional mandate or enabling legislation, the power of a trial court to provide for discovery in criminal cases is inherent among the duties ascribed to all courts "to develop rules of procedure aimed at facilitating the administration of

[2] This report is available on the California Courts website: www.courts.ca.gov/12941.htm#id7495

[3] While the instant matter is but one of those filings, systemic abuses as are raised within would have an even broader impact upon a much larger segment of the population at the infraction level than at the misdemeanor or felony levels.

criminal justice and promoting the orderly ascertainment of the truth." *Joe Z. v. Superior Court* (1970 3 Cal.3d 797, 801-802; see also *Reynolds v. Superior Court* (1974) 12 Cal.3d 834, 837.

A defendant's right to discovery is founded on an accused's fundamental and constitutional right to a fair trial and to due process of law. *Brady v. Maryland* (l963) 373 U.S. 83, 87; *Pitchess v. Superior Court* (l974) 11 Cal.3d 531, 535. "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on the issues in the case[.] [Citations.]" *Hill v. Superior Court* (l974) 10 Cal.3d 812, 816. The defendant need not establish that the requested information exists nor that it would be admissible. *People v. Zamora* (l980) 28 Cal.3d 88, 96; *People v. Coyer* (l983) l42 Cal.App.3d 839, 842.

A. The Prosecutor's Constitutional Obligation to Provide Discovery

Citing to a long line of cases from the United States Supreme Court, one California appellate court recently summarized the prosecution's constitutional duties to disclose information to the defense:

Brady v. Maryland, supra, 373 U.S. 83, held the prosecution must disclose to the defense any evidence that is "favorable" to the accused and "material" on the issue of guilt or punishment. (*Ibid.; Kyles v. Whitley* (1995) 514 U.S. 419, 432-433 [131 L.Ed.2d 490, 115 S.Ct. 1555]; *United States v. Bagley* (1985) 473 U.S. 667, 682; *In re Brown* (1998) 17 Cal.4th 873, 879.) *United States v. Agurs* (1976) 427 U.S. 97,, extended *Brady* to impose a duty on prosecutors to volunteer exculpatory matter to the defense even without a request for such material.

A prosecutor's duty under *Brady* to disclose material exculpatory evidence 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. (See *In re Brown, supra*, 17 Cal.4th at p. 879; *People v. Robinson* (1995) 31 Cal.App.4th 494, 499.) The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it. (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380.) The important determination is whether the person or agency has been "acting on the government's behalf" (*Kyles v. Whitley,*

supra, 514 U.S. at p. 437) or “assisting the government's case” (In re Brown, supra, 17 Cal.4th at p. 881).

The obligation to disclose favorable evidence under *Brady* includes evidence that serves to impeach the testimony of a prosecution witness. (*Strickler v. Greene* (1999) 527 U.S. 263, 280-281; *United States v. Bagley*, supra, 473 U.S. at p. 676.)

The constitutional duty that requires prosecutors to disclose exculpatory evidence to a criminal defendant under *Brady* is independent from the statutory duty to provide discovery under section 1054.1. (Izazaga v. Superior Court, supra, 54 Cal.3d at p. 378; § 1054, subd. (e).) Thus, evidence that is material under Brady must be disclosed to the defenses, notwithstanding any failure of the defense to enforce its statutory right to discovery. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 359.)

The prosecutor's duties of disclosure under the due process clause are wholly independent of any statutory scheme of reciprocal discovery. The due process requirements are self-executing and need no statutory support to be effective. Such obligations exist whether or not the state has adopted a reciprocal discovery statute. Furthermore, if a statutory discovery scheme exists, these due process requirements operate outside such a scheme. The prosecutor is obligated to disclose such evidence voluntarily, whether or not the defendant makes a request for discovery.

No statute can limit the foregoing due process rights of criminal defendants, and the new discovery chapter does not attempt to do so. On the contrary, the new discovery chapter contemplates disclosure outside the statutory scheme pursuant to constitutional requirements as enunciated in Brady, supra, 373 U.S. 83, and its progeny. *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378, [italics in original].

CalJur states the proposition: “A statute that conflicts with either the federal or the state constitution, or that deprives a person of a constitutional right, is to that extent void.” (13 CalJur 3d (Rev) Part 1, Constitutional Law, §75, p. 161.) In *Brady v. Maryland* (1963) 373 U.S. 83, 87, the United States Supreme Court held that due process forbids a prosecutor from suppressing “evidence favorable to an accused upon request where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” (See also *Giglio v. United States* (1972) 405 U.S. 150, 164.

Evidence that is not disclosed should be suppressed even when it is "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Failure to disclose such evidence can deny both the Fifth Amendment right to a fair trial and right to effective confrontation as promised by the Sixth Amendment. *United States v. Robinson*, 583 F3d 1265, fn.1 (10th Cir 2009).

Evidence discoverable under the Constitution includes not only admissible impeachment information for use on cross-examination at trial, but information that may lead to the discovery of impeachment material. *Id*. On timeliness, disclosure should be made when it becomes known to the prosecution, "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial." *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) And the material does not have to be admissible to be subject to disclosure. Information that can lead to other exculpatory and admissible evidence must be disclosed.

The Body Worn Camera evidence, should it exist, will likely contain the defendant's pre- and post-arrest statements, statements of the arresting officer and may contain visual evidence of the commission of the offense. It's materiality and favorability cannot simply be dismissed upon the claim that the prosecutor doesn't have possession of the evidence. It is the duty of the prosecutor to inquire about the existence of the evidence, review it to see if it is material or favorable and provide the discoverable portions to the defendant even in the absence of a request by the defendant. This duty to disclose favorable evidence under *Brady* material is an ongoing obligation of the prosecutor. See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60.

Moreover, should the Body Worn Camera evidence be found not to exist, that fact would also bear on the officer's credibility, and prompt additional requests for remedies as the failure to capture and preserve such evidence would be in clear violation of the published policy.

The Body Worn Camera evidence of the other officers at the scene, should they exist, will likely contain the defendant's pre- and post-arrest statements, statements of the arresting officer and may contain visual evidence of the commission of the offense. It's materiality and favorability cannot simply be dismissed upon the claim that the

prosecutor doesn't have possession of the evidence. It is the duty of the prosecutor to inquire about the existence of the evidence, review it to see if it is material or favorable and provide the discoverable portions to the defendant. This duty to disclose favorable evidence under *Brady* material is an ongoing obligation of the prosecutor. See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60.

"A criminal defendant's constitutional right to compulsory process was intended to permit him to request governmental assistance in obtaining likely helpful evidence, not just evidence that he can show beforehand will go to the heart of his case." *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 808.

Evidence, however, may be critical to a defense even if it will not lead to exoneration. For example, evidence may establish an "imperfect defense," a lesser included offense, a lesser related offense, or a lesser degree of the same crime; impeach the credibility of a prosecution witness; or, as in capital cases, establish mitigating circumstances relevant to the penalty determination. A criminal defendant's constitutional right to a fair trial includes these aspects of his defense. *Delaney v. Superior Court*, *supra,* 50 Cal.3d 785, 809.. Defendant must show a " ' "plausible justification" ' " for the requested discovery. *Hill v. Superior Court* (1974) 10 Cal.3d 812, 817 [112 Cal.Rptr. 257, 518 P.2d 1353, 95 A.L.R.3d 820]. "A showing ... that the defendant cannot readily obtain the information through his own efforts will ordinarily entitle him to pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, *if it appears reasonable that such knowledge will assist him in preparing his defense* .... (Traynor, Ground Lost and Found in Criminal Discovery (1964) 39 N.Y.U.L.Rev. 228, 244 ...." (*Ibid*., internal quotation marks omitted, italics added in *Hill*.)

B. <u>The Prosecution's Statutory Obligation to Provide Discovery</u>

Penal Code section 1054 provides a statutory framework for the informal exchange of discovery between the parties. Its purposes include:

(a) To promote the ascertainment of truth in trials by requiring timely pretrial discovery;

(b) To save court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested.

(c) To save court time in trial and avoid the necessity for frequent interruptions and postponements.

(d) To protect victims and witnesses from danger, harassment and undue delay of the proceedings.

Every one of these purposes is frustrated by the City Attorney's deliberate and willful refusal to do its job. "The rationale behind California's discovery statute is to prevent trial by ambush," yet that is exactly what the prosecutor is occasioning, not just in the instant case but in every case in which they aren't forthcoming in providing Brady evidence. "A trial is a search for the truth, and procedural rules, including those of discovery, are designed to ensure that the search is fair, reasonably pursued and based on reliable information. *People v. Bell* (App. Dist. 2004) 118 Cal.App.4th 249. There are none of those assurances when, as here, the prosecution has doggedly avoided its obligations.

C. The Prosecution's Ethical Obligation to Provide Discovery

And newly revised in November, 2018, Rules of Professional Conduct 3.8, which delineate the Special Responsibilities of a Prosecutor, proscribe:

> The prosecutor in a criminal case shall:
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

In commentary, the prosecutor is cautioned that the prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to rectify the conviction of innocent persons. And further expounded, "The disclosure obligations in paragraph (d) are not limited to evidence or information that is materials as defined by *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny.

The prosecutor's willful refusal to do its job is an ethical violation subjecting it to State Bar discipline.

III.

THE PROSECUTOR CANNOT DELEGATE ITS CONSTITUTIONAL, STATUTORY AND ETHICAL DUTIES AS A PROSECUTOR TO NON-ATTORNEYS AND LAW ENFORCEMENT WITNESSES

Under *Brady,* it is the prosecutor who has an affirmative duty to learn of the existence of material evidence and disclose it to the defense unless determining, only after its review, that it contains no favorable evidence material to guilt or punishment. This is a legal obligation of the City Attorney and therefore a duty that can neither be declined nor delegated. Under Penal Code 1054.1, et. seq., the statutory framework promulgated by the state legislature for the production of discovery, the request is to be directed to the prosecutor and not to the witness in a particular case.

Further, the rules of Professional Responsibility that apply to attorneys licensed to practice law in this state impose the duty of discovery production, even beyond that required of Brady, to the prosecutor and does not impose these duties upon laymen and witnesses.

In this case, there is no assurance that an attorney has read or reviewed the IDR nor read and approved the response submitted on its behalf by a nonattorney Senior Clerk Typist. While the facilitation of discovery production could be delegated to a non-attorney, a letter providing a legal opinion as to why the City Attorney is not obligated under the law is not such a menial task and requires response from an attorney admitted to practice law.

1. Non-Delegable Duty

The San Diego City Attorney has authority vested in it to prosecute by the terms of the City Charter, Article V, Section 40, wherein it provides, in pertinent part:

> It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; . . . to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law; . . .

By charter, this task falls upon the San Diego City Attorney and its assistants, which necessarily excludes those who work outside the Office of the City Attorney. The task

also excludes non-attorneys. The City Attorney cannot delegate their legal authority to a non-attorney lest they engage in solicitation or aid and abet in the commission of the Unauthorized Practice of Law, a misdemeanor.

2. **Unauthorized Practice of Law**

A showing that the prosecution knew of an item of favorable evidence unknown to the defense does not necessarily amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. *Kyles v. Whitley* (1995) 514 U.S. 419, 437–38.

This task cannot be delegated to a paralegal or police officer as it is one requiring legal analysis, advice and action. Given the City Attorney's role in drafting and reviewing the Body Worn Camera policy of the law enforcement agencies under the city's umbrella and the Office's familiarity with the body worn camera policies and practices in conjunction with its involvement in misdemeanor prosecutions, the Office of the City Attorney has every reason to believe body worn camera evidence would exist in this and most infractions. Even armed with this knowledge, the Office of the City Attorney made no attempt to inquire as to whether any body worn camera evidence existed, nor did they review such evidence for its materiality and favorability to otherwise determine such footage was unavailable or undiscoverable. Instead, the letter from a paralegal made a legal representation that the City Attorney's office did not participate at all in the case, had no discovery, was not obligated to provide discovery in criminal infraction prosecutions and referred the defendant and his counsel to figure out which police agency amongst those provided in a list would have the information sought and to make the discovery request directly to the witness.

Business and Professions Code §6126 provides:

> (a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or by both that fine and imprisonment.

While neither the typist who wrote the letter or the law enforcement officer expected to perform the prosecutor's discovery function are holding themselves out as entitled to practice law, the typist and the law enforcement officer are being asked to practice law despite that neither are licensed to do so. To "practice law" is defined "as the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure, as well as the provision of legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. *Benninghoff v. Superior Court* (App. 4 Dist. 2006) 136 Cal.App.4th 61, rehearing denied, review denied.

While there are many tasks in law firm that nonattorney may carry out, such work must be preparatory in nature and supervised by attorney, if nonattorney's work is not to violate California prohibition against unauthorized practice of law. *In re Carlos*, (Bkrtcy.C.D.Cal.1998) 227 B.R. 535.

The letter from the Court Clerk I (Exhibit C) purports to provide legal analysis, that the City Attorney has no legal obligation to provide discovery since it elects not to participate in the court proceedings and by implication that it is otherwise not obligated to provide discovery not in its possession. The letter also seeks to provide legal advice, directing the defendant and his counsel to seek the discovery by contacting the witness directly. Both the analysis and the advice are in error.

Should the police be enlisted to respond to and fulfill defendant's request for discovery, this will necessarily involve the use of a nonattorney to know and understand the defendant's constitutional discovery rights, to review all evidence to determine if it is discoverable and to make a legal determination. The officer's inexperience with the law could inure to the benefit of the defendant, by providing discovery beyond that which the law requires but in so doing, could compromise the department. It could also fall short of the prosecutor's obligations under the law to the detriment of the accused. It is unlawful for a layman, such as a police officer, to prepare legal papers or furnish other legal services regardless of whether such services are incidental to his profession. *Agran v. Shapiro* (1954) 127 Cal.App.2d Supp. 807.

3. Police and Prosecutors Are Held To Different Standards

Allowing the police officer to play the role of prosecutor in fulfilling the defendant's discovery request is fraught with the potential for harm. Police officers do not take the Professional Responsibility exam required of practicing attorneys in California and are not trained in the ethical obligations or the legal obligations of discovery production. Moreover, police are trained that deception is permissible in the pre-trial investigative phase. See, eg., *People v. Mays* (2009) 174 Cal. App. 4th 156, 164.

Prosecutors, however, are held to a higher standard than that to which police are held, and even higher than attorneys who even than the duty imposed on other attorneys who do not represent the public as prosecutors. While police can lie to suspects about the existence of evidence, deny favorable evidence exists and fabricate the existence of evidence of guilt, prosecutors must instead:

> Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

California State Bar Rules of Professional Conduct, Rule 5-110

Thus, the police agency is not trained or equipped to assume the prosecutorial function of providing all the discovery to which the defendant is otherwise entitled to under the Constitution and the prosecutor is negligent, at best, and willfully derelict in its duty, to attempt to assign its discovery obligations to a nonattorney police officer. Moreover, to ask the police agency to take over this responsibility would then create another conflict as one cannot both advocate and testify for the same client. The police officer, after advocating on behalf of the City in furnishing discovery that it determined to be relevant and discoverable under the law and in refusing all other such requests that it determines improper cannot thereafter be permitted to testify as a percipient witness on behalf of the City, a task that the prosecutor would not, ethically, be able to do.

The prosecutor lacks authority for its claims and its willful failure to perform its Constitutional obligations are egregious and repetitive, meriting the imposition of monetary sanctions to prevent further such violations from occurring.

/ / /

A. Brady Compliance is the Exclusive Responsibility of the Prosecution

Responsibility for Brady compliance lies exclusively with the prosecution, including the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case ['including the police']." *(Kyles v. Whitley* (1995) 514 U.S. 419, 437 (*Kyles)*.) Whatever the reason for failing to discharge that obligation, the prosecution remains accountable for the consequence. *(Id*. at pp. 437-438).

... The scope of this [Brady] disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf ...." (*Kyles*, *supra*, 514 U.S. at p. 437 [115 S.Ct. at p. 1567].) Courts have thus consistently "decline[d] 'to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.' " [Citation.] "A contrary holding would enable the prosecutor 'to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial,' [citation]."

This is exactly the advantage the prosecutor has gained by its willful refusal to do its job. Thus, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." *(Giglio v. United States* (1972) 405 U.S. 150; *Kyles, supra,* 514 U.S. at p. 439.)

As a concomitant of this duty, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. *(In re Brown (1998)* 17 Cal.4th 873, 878-879 [footnote omitted].) "We believe that the purposes of Brady would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure....." [Citation.]

Any other rule would leave the defendant's due process rights to the fortuity of a subordinate agency's procedural protocol, which the Supreme Court has squarely rejected. "[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation

to ensure fair trials." *(Kyles, supra,* 514 U.S. at p. 438; *In re Brown* (1998) 17 Cal.4th 873, 880-881.) Thus, under both Federal and state constitutional principles, the prosecution has the duty to learn of any Brady material known to the police. Knowledge on the part of the police of any Brady material is imputed to the prosecution.

IV.

MONETARY SANCTIONS SHOULD BE IMPOSED AGAINST THE PROSECUTOR

The sanctions imposed should serve a punitive, deterrent and retributive purpose. The practice of the City Attorney in neglecting to do its prosecutorial duties and seeking to delegate those duties to a nonattorney has created a systemic injustice that threatens not only the defendant in the instant case, but the defendant in all infractions prosecuted in the name of the City. Monetary sanctions, and nothing less, will act to curtail prosecutorial abuses not only in this case but also in other matters Monetary sanctions should incentivize the prosecution to seek to address its systemic abuses to ensure the preservation of the rights of the accused.

Moreover, the practices of the Office of the City Attorney tangibly created a undue financial burden and hardship upon counsel or defendants seeking to represent themselves. A monetary sanction that, at least in part, reimburses opposing counsel for its time spent beyond that which would have been necessary in a misdemeanor proceeding would help to restore the parties time investment and remedy the wrong occasioned by the Office of the City Attorney in the dereliction of its duties.

A discovery sanction may include an element of punishment provide the record supports a finding of significant prejudice or willful conduct. *People v. Bowles* (2011) 198 Cal.App.4th 318. A trial court may, in the exercise of its discretion, consider a wide range of sanctions in response to a violation of a discovery order. *People v. Lamb* (2006) 136 Cal.App.4th 575. The defense is not obligated, however, to bring motion to compel discovery before sanctions can be imposed. In *People v. Jackson* (1993) 15 Cal.App.4th 1197, the prosecutor was not so obligated to bring motion to compel discovery before sanctions were imposed against the defense nor was the prosecution deemed to have waived its right to evidence and protection of sanctions by not bringing

a motion to compel. The defendant seeks punitive and compensatory sanctions in an amount subject to proof at time of hearing.

CONCLUSION

For all the foregoing reasons, Doug Buckley requests the City Attorney be compelled to provide the discovery as ordered and pay the monetary sanctions imposed by the Court.

Dated: _____

Respectfully submitted,

_____

COLEEN M. CUSACK
Attorney for Defendant
Doug Buckley