CDAA
California District Attorneys Association

June 9, 2022

The Honorable Tani G. Cantil-Sakauye, Chief Justice
and Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication (Cal. Rules of Court, rule 8.1125(a)(1))
People v. Houser (2022) 78 Cal.App.5th Supp. 1 [292 Cal.Rptr.3d 759]
Superior Court Appellate Division, Case No. 211A900016C
Trial Court, Case No. 19T049326C

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

On April 13, 2022, the Appellate Division of the Superior Court of San Diego County (Appellate Division) filed a published opinion in *People v. Matthew Sterling Houser* (2022) 78 Cal.App.5th Supp. 1, __; 292 Cal.Rptr.3d 759 (*Houser*). For the reasons discussed herein, particularly the gross misapplication of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the California District Attorneys Association [hereafter "CDAA"] respectfully requests depublication of that opinion pursuant to rule 8.1125 of the California Rules of Court.

INTEREST IN SEEKING DEPUBLICATION

CDAA is the statewide organization of California prosecutors. It is a professional organization that has been in existence for over 90 years and was incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutors' views in letters seeking depublication in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

This case presents issues of statewide interest and concern to prosecutors as it erroneously expands the *Brady* rule beyond what was intended by *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny. It is the first published decision to address the scope and manner of meeting *Brady* obligations in infraction cases in California (and perhaps the first in the nation). The misapplication and analysis of *Brady* in the published *Houser* decision will have far-reaching implications that will cause much confusion regarding discovery in general, and *Brady* in particular. It imposes a weighty undue burden upon prosecutorial offices across the state if courts apply *Houser's* analysis to the hundreds of thousands of infraction matters, both traffic and non-traffic, that this Court has recognized should not be treated with the formality of felonies and misdemeanors.

DISCUSSION

A. Factual and Procedural Background

On January 31, 2019, Officer Greenan of the San Diego Police Department (SDPD) cited defendant Matthew Sterling Houser with an infraction for unlawful overnight camping in Balboa Park in violation of San Diego Municipal Code section 63.0101, subdivision (b)(12). (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 760.) On September 16, 2019, Houser's trial counsel served an informal discovery request on the San Diego City Attorney's office (City Attorney). On September 23, 2019, the City Attorney responded with a form letter, informing counsel that the office "does not appear on nor participate in any infraction cases tried in Kearny Mesa Traffic Court," and referred counsel to "the law enforcement agency that issued the citation" for discovery. (*Id.* at pp. 760-761.)

On October 10, 2019, trial counsel submitted an informal discovery request and subpoena duces tecum to the SDPD custodian of records, requesting discovery including but not limited to footage regarding the incident from Office Greenan's body-worn camera. (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 761.) On November 4, 2019, Officer Greenan appeared in the trial court and provided counsel with a copy of the citation, a three-page dispatch log and instructions for requesting body-worn camera footage from SDPD. (*Ibid.*) The court denied a defense motion to dismiss the case but ordered SDPD and the City Attorney's office to provide defense counsel with a compact disc containing Office Greenan's body-worn camera footage related to his contact with Houser. (*Ibid.*) The court also set a back-up order to show cause for any noncompliance with the order. (*Ibid.*) SDPD and the City Attorney's office failed to provide the ordered discovery to defense counsel. (*Id.* at pp. 761-762.)

On December 19, 2019, trial counsel filed a formal motion to compel discovery and impose monetary sanctions, a motion to hold the "defaulting witness" in contempt and a motion to continue the trial date. (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 762.) On January 28, 2020, the City Attorney filed an opposition to the motion to compel discovery, arguing that there was "'no prosecuting attorney for purposes of discovery under Penal Code section 1054'" and consequently the City Attorney's office was "'not the proper recipient for any discovery request or [the trial court's discovery] order.'"

(*Ibid.*) The City Attorney further argued that "'the nature and volume of infraction cases 'necessitates their exemption from the requirements of Penal Code section 1054.'" (*Ibid.*)

On February 4, 2020, the trial court held a hearing on the pending motions. (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 762.) Deputy City Attorney Jonathan Lapin attended the hearing, stating that he was appearing not as the prosecuting attorney but rather as a witness. (*Ibid.*) Consistent with the written opposition, Lapin argued that the City Attorney's office "'no longer facilitates nor answers infraction defendants' discovery requests'" since it does not act as the prosecuting attorney for infractions. (*Ibid.*) Lapin maintained that discovery is instead the responsibility of the law enforcement agency issuing the infraction. (*Ibid.*) Nonetheless, the City Attorney maintains involvement in infraction cases on behalf of the People through the issuance of subpoenas, handling of appeals and appearing in court when directed by the court. (*Ibid.*) Trial counsel responded that her informal discovery requests to law enforcement in such cases are "routinely rebuffed" and require formal motions. (*Ibid.*) Lapin explained that SDPD typically allows defendants to view body camera footage and the City Attorney would facilitate such a viewing, but SDPD will not release a copy of the footage to the defense in the absence of a court order.[1] (*Id.* at p. 763.)

Expressing its frustration with the City Attorney's office, the trial court ordered SDPD to provide the defense with seven specific discovery items – the names of three additional officers present during the incident; videos from Officer Greenan's and the other officers' body-worn cameras during the incident; redacted complaints generated or relating to the officers' law enforcement activities that resulted in Houser's citation; any surveillance video of the incident; any facial recognition evidence collected or submitted regarding Houser; contact information for Houser maintained by SDPD in a database for homeless individuals or otherwise; and a copy of both sides of Houser's citation with any notes written by Officer Greenan regarding the incident. (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 763.) The court further ordered that any non-existing or destroyed discovery be accompanied by a declaration stating such. (*Ibid.*)

On February 19, 2021, a sergeant with SDPD's court liaison unit sent an unsigned letter to trial counsel acknowledging receipt of the discovery order, naming three other

[1] We note in passing that the duty to disclose does not require making copies of video footage if the defense is otherwise given an opportunity to view the video. (See *People v. Zaragoza* (2016) 1 Cal.5th 21, 51 ["By alerting the defense to the existence of the videotape and making it available for viewing offsite, the prosecution complied with its obligations under section 1054.1, subdivision (e) to disclose exculpatory evidence in its possession."]; *Schaffer v. Superior Court (People)* (2010) 185 Cal.App.4th 1235, 1237-1238 ["The People comply with section 1054.1 by affording the defendant an opportunity to examine, inspect, *or* copy the discoverable items."], emphasis added.)

officers present during the incident, stating that one of the other officers was merely present while the two other officers appeared and left, representing that there were no body-worn camera videos from any of the three additional officers, and stating that "[a]ll other information would need to be provided by the City Attorney office."[2] (*Houser*, *supra*, 292 Cal.Rptr.3d at pp. 763-764 [italics omitted].) Subsequently, trial counsel filed a motion to dismiss for lack of prosecution, a motion to compel discovery, and a motion to impose sanctions. (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 764.)

On July 20 and 21, 2021, a hearing was conducted on the motions. (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 764.) A former Assistant City Attorney testified at the hearing that, prior to 2015, the City Attorney's office prosecuted all infractions as required by the City Charter. (*Ibid.*) There was no appearance by anyone on behalf of the prosecution. (*Ibid.*) The trial court found the People failed to comply with the court's discovery order and dismissed Houser's case as a sanction for the discovery violation. (*Ibid.*)

The City Attorney appealed the judgment to the Appellate Division of the Superior Court, which issued a published opinion on April 13, 2022, affirming the judgment of dismissal by the trial court. (*Houser*, *supra*, 292 Cal.Rptr.3d at pp. 763, 767.)

B. The Appellate Division's Decision

The Appellate Division held the discovery provisions of Penal Code sections 1054, et seq., apply to infractions, and rejected the City Attorney's public policy argument that infraction cases warrant an exemption from discovery statutes because they are more numerous and less serious than misdemeanors. (*Houser*, *supra*, at pp. 765, in part citing Pen. Code, § 19.7.) The Appellate Division found neither the City Attorney nor SDPD fully complied with the trial court's lawful discovery order, and that court had discretion to make any necessary order to remedy the noncompliance. (*Id.* at p. 765, citing Pen. Code, § 1054.5, subd. (b).) However, the Appellate Division recognized that Penal Code section 1054.5, subdivision (c), bars the dismissal of a criminal charge as a remedy unless required by the federal Constitution. (*Ibid.*)

Because *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) provides the only constitutionally mandated discovery for prosecutors, the Appellate Division turned to whether a *Brady* violation occurred in Houser's case. (*Houser*, *supra*, 292 Cal.Rptr.3d at p. 766.) Finding the City Attorney's Office served as the prosecutor for *Brady* purposes in infraction cases (citing Gov. Code, § 26900, subd. (a), and San Diego City Charter, §

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[2] The Appellate Division's opinion does not explain why trial counsel and the court acquiesced to more than a year's delay for the SDPD response to the discovery orders. (See *Houser*, *supra*, 292 Cal.Rptr.3d at pp. 763-764.) Presumably, this was due to COVID emergency measures implemented by the courts.

40), the Appellate Division held the City Attorney's office violated its affirmative duty to seek and learn of any *Brady* material and there was consequently a violation of Houser's constitutional rights warranting dismissal under Penal Code section 1054.5, subdivision (c). (*Id*. at pp. 766-767.) The Appellate Division affirmed the judgment of the trial court. (*Id*. at p. 767.)

C. The Appellate Division's *Brady* Analysis is Flawed, Unprecedented and Should Not Be Allowed to Stand in a Published Decision

The Appellate Division's *Brady* analysis and holding in this case is unprecedented, seriously flawed and should not be allowed to stand in a published citable decision. Accordingly, depublication of the Appellate Court's decision is warranted.

Under the Due Process Clause of the Fourteenth Amendment, prosecutors have a duty to disclose evidence which is "both favorable to the defendant and material on either guilt or punishment." (*In re Sassounian* (1995) 9 Cal.4th 535, 543, citing *United States v. Bagley* (1985) 473 U.S. 667, 674.) This duty in response to a defense request was originally recognized in *Brady, supra*, 373 U.S. 87. However, it has been subsequently held that the duty to disclose favorable and material evidence exists "whether the defendant makes a specific request [citation], a general request, or none at all." (*In re Brown* (1998) 17 Cal.4th 873, 879.) The prosecution is required to divulge favorable and material evidence which the prosecution or the prosecution team knowingly possesses or has the right to possess." (*IAR Systems v. Superior Court (Shehayed)* (2017) 12 Cal.App.5th 503, 514; *People v. Superior Court (Barrett*) (2000) 80 Cal.App.4th 1305, 1314-1315; accord *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 902-903; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475.)

Favorable evidence is that which "either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." (*In re Sassounian, supra*, 9 Cal.4th at p. 544; see also *People v. Coddington* (2000) 23 Cal.4th 529, 589-590; *People v. Jenkins* (2000) 22 Cal.4th 900, 954.) Evidence is material if there is a reasonable probability of a different result had it been disclosed to the defense. (*In re Sassounian, supra*, 9 Cal.4th at p. 544.) "The requisite 'reasonable probability' is a probability sufficient to 'undermine [ ] confidence in the outcome' on the part of the reviewing court." (*Ibid*., quoting *United States v. Bagley*, *supra*, 473 U.S. at p. 678.) "[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97.) That is, the defendant must show the lack of disclosure was prejudicial: "Evidence is not 'material' unless it is 'prejudicial,' and not 'prejudicial' unless it is 'material.'" (*Bailey v. Rae* (9th Cir. 2003) 339 F.3d 1107, 1116, fn. 6*;* see also *People v. Lucas* (2014) 60 Cal.4th 153, 274 [the prejudice that must ensue for a true *Brady* violation to occur "focuses on 'the materiality of the evidence to the issue of guilt or innocence'"].)

The defendant bears the burden of showing "that the evidence allegedly withheld was favorable and material." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 52.) Significantly, "not every nondisclosure of favorable evidence denies due process." (*In re Brown*, *supra*, 17 Cal.4th at p. 884.) Also, mere "speculation that favorable and material evidence might be found does not establish a violation of *Brady*." (*People v. Zaragoza, supra,* 1 Cal.5th at p. 52, citing *People v. Williams* (2013) 58 Cal.4th 197, 259.)

The Appellate Division's *Brady* analysis conflicts with these precedents. That court failed to recognize that a *Brady* claim consists of three elements: 1) the existence of evidence favorable to the defendant; 2) the suppression of that evidence; and 3) materiality of the evidence on the outcome of the case. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176 [citing the "three components of a true *Brady* violation"]; *People v. Salazar* (2005) 35 Cal.4th 1031, 1047-1050 [same].) Thus, to establish a *Brady* violation, the "defendant must show that the prosecution suppressed evidence, that the suppressed evidence was favorable to the defense, and that it was material." (*People* v. *Zaragoza*, *supra*, 1 Cal.5th at p. 52.) The Appellate Division ignored each of these elements required for the finding of a *Brady* violation in its decision, and none are satisfied by the record in this case.

The record does not contain, and the Appellate Division fails to cite to anything, showing the requested discovery or anything else in the possession of SDPD or the City Attorney consisted of evidence favorable to Houser. Likewise, there is nothing in the record showing any favorable evidence was suppressed, undisclosed or material on the issues of guilt or punishment. Instead, the Appellate Division speculates as to the possible existence of such evidence by reasoning "that if the City Attorney had executed its *Brady* responsibility in this case and had found nothing, the record would reflect that." (Opn. at p. 10.) Again, "speculation that favorable and material evidence *might be found* does not establish a violation of *Brady*." (*People v. Zaragoza*, *supra*, 1 Cal.5th at p. 52 [emphasis added]; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 922 [speculation fails to establish materiality under *Brady*], overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 636; see also *People v. Letner and Tobin*, *supra*, 50 Cal.4th at pp. 175-176 ["there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."].)

Although prosecutors have a duty to learn of favorable and exculpatory evidence in the possession of law enforcement agencies acting on their behalf in a particular case (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1315, citing *Kyles v. Whitley*, *supra*, 514 U.S. at pp. 437-438), they have "'no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense'" (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1049, quoting *In re Littlefield* (1993) 5 Cal.4th 122, 135 [emphasis in original]). The Appellate Division essentially conflates failure to execute these *Brady* duties with proof of an actual *Brady* violation.

Moreover, contrary to the Appellate Division's holding, prosecutors may delegate their *Brady* duties as long as they remain ultimately responsible for the provision of all required discovery. (See, e.g., *United States v. Dent* (3d Cir. 1998) 149 F.3d 180, 191; *United States v. Herring* (9th Cir. 1996) 83 F.3d 1120, 1121-1123; *United States v. Jennings* (9th Cir. 1992) 960 F.2d 1488, 1490-1492; *United States v. McKee* (D. Nev. 2016) 157 F.Supp.3d 879, 887; *United States v. Lujan* (D. N.M. 2008) 530 F.Supp.2d 1224, 1249, fn. 6; *United States v. Colima-Monge* (D. Ore. 1997) 962 F.Supp. 1337, 1339-1340.)[3]

Such a delegation would be consistent with how this Court has generally accommodated prosecutorial obligations in the context of infractions. For example, this Court has "recognized the permissibly summary handling of infraction cases by excepting them from rules required in misdemeanor cases" due to the nature and high volume of infraction cases. *In re Kathy P.* (1979) 25 Cal.3d 91, 98-99 [citing cases exempting infractions from statutory requirements for recorded plea waivers, attorney-judges and the presence of a prosecuting attorney, as well as bars to subsequent prosecutions for more serious offenses].) Recently, Division One of the Fourth District of the Court of Appeal reaffirmed that "'[e]conomic realities preclude the presence of prosecuting attorneys at most infraction trials" and held prosecutors may not be compelled to participate in suppression motions raised in traffic court. (See *People v. Cotsirilos* (2020) 50 Cal.App.5th 1023, 1025, 1035, citing *People v. Carlucci* (1979) 23 Cal.3d 249, and quoting *People v. Marcoft* (1992) 6 Cal.App.4th Supp. 1, 4; see also *People ex rel. Kottmeier v. Municipal Court* (1990) 220 Cal.App.3d 602, 610 [holding

[3] The appellate division of the Superior Court in *Houser* relied heavily on language from *Kyles v. Whitley* (1995) 514 U.S. 419, 438 for the proposition that the prosecution may not delegate *Brady* responsibilities. (*People v. Houser*, *supra*, 292 Cal.Rptr.3d at p. 766].) However, as pointed out by the Ninth Circuit in *United States v. Herring* (9th Cir. 1996) 83 F.3d 1120, 1122 (a case upholding the process under which a law enforcement agency could examine its personnel files and notify the prosecution of any potential *Brady* material), the High Court in *Kyles* recognized that prosecutors could alleviate the burden of the duty to investigate "by establishing procedures and regulations to facilitate the communication of relevant information." (*Herring*, *supra*, at p. 1122.) Moreover, as the *Herring* court observed, "*Kyles* was a post-conviction case, not a pre-trial discovery order case" and "[t]here is no reason to believe that when the Supreme Court decided *Kyles*, it even had in mind the … question of a district court's authority to issue pre-trial discovery orders requiring prosecutors to conduct searches for *Brady* material and to impose sanctions for noncompliance." (*Herring*, at p. 1122.)

Gov. Code, § 26500 does not require the presence of prosecuting attorneys at infraction trials]; *People v. Daggett* (1988) 206 Cal.App.3d Supp. 1, 5 [same].)

Finally, contrary to the Appellate Division's holding, imposing dismissal as a sanction for the alleged *Brady* violation was improper. While the intent of the prosecutor is irrelevant in determining whether a *Brady violation* has occurred (*Brady, supra*, 373 U.S. at p. 87), the sanction of dismissal ordinarily requires both a showing of prejudice and bad faith. In *People v. Ramirez* (2006) 141 Cal.App.4th 1501 the court held that dismissal is an appropriate *sanction* for a *Brady* violation *only* where less drastic alternatives are not available *and* bad faith is involved. (*Id*. at p. 1503, fn. 1 [citing to *United States v. Kearns* (9th Cir.1993) 5 F.3d 1251, 1254; see also *Mendibles v. Superior Court* (1984) 162 Cal.App.3d 1191, 1198 ["even in instances in which prosecutorial misconduct is willful and apparently motivated by bad faith, the extreme sanction of dismissal is rarely appropriate unless a defendant has established prejudice by the failure of the People to comply with the discovery – lesser sanctions must be utilized by the trial court, unless the effect of the prosecution's conduct is such that it deprives defendant of the right to a fair trial"]; see also *Government of the Virgin Islands v. Fahie* (3rd Cir. 2005) 419 F.3d 249, 255 ["retrial is normally the most severe sanction available for a *Brady* violation" absent a showing of willful misconduct and prejudice].) Indeed, even to exclude evidence (let alone dismiss a case) for a discovery violation, there must be a "showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial." (*People v. Fultz* (2021) 69 Cal.App.5th 395, 431;*People v. Jordan* (2003) 108 Cal.App.4th 349, 358; accord *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758; see also *People v. Superior Court (Mitchell)* (2010) 184 Cal.App.4th 451, 454-455, 459 [despite prosecution's blatant disregard of the trial court's orders to provide discovery, exclusion of evidence was improper because other alternative sanctions were not exhausted].) [4] Here, there was no showing of prejudice nor of a willful desire to obtain a tactical advantage at trial. Accordingly, the Appellate Division's conclusion that "[t]he trial court appropriately dismissed this action as a sanction under Penal Code section 1054.5, subdivision (c)" is contrary to law. (See *Houser*, *supra*, 292 Cal.App.3d at p. 767 [footnote omitted].)

CONCLUSION

In light of the multiple legal errors and significant misapplication of *Brady* in the Appellate Division's opinion, it will remain a source of confusion, conflict and misdirection on the law of *Brady* and its progeny if allowed to stand as citable authority. Accordingly, the California District Attorneys Association respectfully requests that the

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[4] CDAA acknowledges that once a court issues a discovery order, the prosecuting agency should comply with the order unless the order is unlawful, at which time the order may be challenged via the writ process. (See Pen. Code, § 1512.)

opinion in this case be depublished pursuant to rule 8.1125 of the California Rules of Court.

Respectfully Submitted,

Gregory D. Totten, SBN 106639
Chief Executive Officer

DECLARATION OF ELECTRONIC SERVICE

Case Name: *People v. Houser* (2022) 78 Cal.App.5th Supp. 1 [292 Cal.Rptr.3d 759]
Case No.: Superior Court Appellate Division, Case No. 211A900016C

I declare:

I am employed by the California District Attorneys Association. I am 18 years of age or older and not a party to this matter. On June 9, 2022, I electronically served the attached Request for Depublication by transmitting a true copy via this Court's TrueFiling system to the following parties:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct, and that this declaration was executed on June 9, 2022, at Sacramento, California.

Laura Bell ____________ Laura Bell ____________
Declarant Signature