

OFFICE OF THE STATE PUBLIC DEFENDER

1111 Broadway, 10th Floor
Oakland, California 94607-4139
Telephone: (510) 267-3300
Fax: (510) 452-8712



September 23, 2016

Board of Trustees
c/o Elizabeth R. Parker, Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Support for Proposed Amended Rule 5-110

Dear President Pasternak and Members of the Board:

The Office of the State Public Defender ("OSPD") was founded in 1976 to provide indigent criminal defendants their right to counsel on appeal. Since the 1990s, OSPD's mission has been to focus primarily on death penalty cases. *See* Govt. Code § 15421. OSPD currently handles 99 death penalty cases.

OSPD has commented at three previous points in the process in support of proposed amended rule 5-110. We write once more to urge the Board to adopt the proposed rule as a necessary step to protect the public and restore confidence in the legal profession.

The Commission Was Correct to Reject Alternative 2 to Proposed Amended Rule 5-110(D)

The Rules Revision Commission ("RRC") considered and properly rejected an alternate version ("alt. 2") of proposed amended Rule 5-110(D), which would have limited a prosecutor's ethical duty to "compl[iance] with all statutory and constitutional obligations, as interpreted by relevant case law." The Board should follow the recommendation of the RRC.

While the RRC dissenters acknowledged that California law already provides that prosecutors' duty of disclosure extends to *all* exculpatory evidence, whether or not it is "material," *see Barnett v. Superior Court*, 50 Cal.4th 890, 901 (2010), many of the prosecutors who commented on the proposed rule supported alt. 2 because they believed their disclosure obligations were, and/or should be, limited to evidence that is "material" within the meaning of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Brady case law demonstrates, however, that it is precisely in deciding what evidence is and is not “material” that most prosecutors go wrong. *See, e.g., Weary v. Cain*, 136 S.Ct. 1002, 1004 (2016) (summarily reversing a capital case in which the prosecutor withheld several items of exculpatory evidence on the rationale that none of them, individually, were material); *Smith v. Cain*, 132 S.Ct. 627, 630 (2012) (“The State does not dispute that Boatner’s statements . . . were favorable to Smith and that those statements were not disclosed to him. The sole question before us is thus whether Boatner’s statements were material to the determination of Smith’s guilt.”)

The Supreme Court has expressed repeatedly the hope that “the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.” *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (citing *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *United States v. Bagley*, 473 U.S. 667, 711, n.4 (1985) (Stevens, J., dissenting); *United States v. Agurs*, 427 U.S. 97, 108 (1976)). But, too often, prosecutors take refuge in materiality and resolve close calls in favor of nondisclosure, betting that their omission (if discovered) will not be judged serious enough to result in reversal of the conviction.

As one commentator noted recently, Supreme Court justices have expressed frustration with prosecutors’ reliance on *Brady*’s after-the-fact materiality test to limit discovery at the trial level. *See* Bidish Sarma, *Do Supreme Court Justices Understand How Prosecutors Decide Whether to Disclose Exculpatory Evidence?*, American Constitution Society Blog (March 17, 2016), <https://www.acslaw.org/acsblog/do-supreme-court-justices-understand-how-prosecutors-decide-whether-to-disclose-exculpatory>. For example, during oral argument in *Smith v. Cain*, the following occurred:

JUSTICE GINSBURG: . . . There was a prior inconsistent statement. Shouldn’t that be the end of it? **A prior inconsistent statement, one that is favorable to the defense, has to be turned over, period.** I thought was what *Brady* requires.

MS. ANDRIEU: And in this case –

JUSTICE SCALIA: I -- may I suggest that –

MS. ANDRIEU: Yes.

JUSTICE SCALIA: – you stop fighting as to whether it should be turned over? **Of course, it should have been turned over.** I think the case you’re making is that it wouldn’t have made a difference.

MS. ANDRIEU: Made a difference. Yes.

JUSTICE SCALIA: And – and that’s a closer case, perhaps, **but surely it should have been turned over. Why don’t you give that up?**

Transcript of Oral Argument at 51-52, *Smith v. Cain*, 132 S.Ct. 627 (2006) (No. 10-8145) (emphasis added), https://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf.

This exchange illustrates that equating a prosecutor’s duty of disclosure with the standard for reversible, constitutional error generates confusion and is difficult to administer. Since much of the case law concerning prosecutors’ discovery obligations comes from criminal appeals and habeas cases that often turn on the degree of prejudice to the defendant, incorporating “relevant case law” into the rule, as alt. 2 would have done, risks confusing and diluting the ethical standard.

The proposed rule (alt. 1), is the *Brady* rule without the prejudice/materiality requirement. See Proposed Rule 5-110 cmt 3. It consists of a simple mandate to disclose all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. It is what California law already requires. *Barnett*, 50 Cal.4th at 901. It does not ask prosecutors to assess the significance of the evidence to the defense – which they are ill-equipped to do. And it does not invite prosecutors to seek out loopholes and conclude, for example, that because a particular type of information was not found “material” in one case, there is no need to disclose it in another.

The proposed rule should not, as the dissenters suggested, be rejected as “aspirational” because it asks more of prosecutors than the minimum required to avoid violating a defendant’s constitutional right to due process.

The Proposed Rule is Essential to Protect the Public and Improve Confidence in the Legal Profession

In undertaking its revision of the Rules of Professional Conduct, the Commission was asked, among other things, to “[a]ssure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992; . . . [p]romote confidence in the legal profession . . . and [e]liminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.” State Bar of California, *Commission for the Revision of the Rules of Professional Conduct*, <http://ethics.calbar.ca.gov/committees/RulesCommission.aspx> (last visited Sept. 22, 2016). Proposed amended rule 5-110 furthers all of these aims.

First, it is essential to protect the public, as developments over the last two decades have underscored. As noted in our previous comments, government misconduct, including the improper withholding of exculpatory evidence, was a contributing cause to wrongful conviction in over 42 percent of all exonerations nationwide and in 56 percent of homicide exonerations. See Samuel R. Gross & Michael Shaffer, *Exonerations in the U.S. 1989-2012: Report by the National Registry of Exonerations*, June 2012 at 32, 67 (analyzing details of 873 exonerations nationwide, 79 of which were in California). A major scandal involving the failure to disclose an extensive informant operation in Orange County is still unfolding. See R. Scott Moxley, *More Evidence Emerges on OC Law Enforcement’s Bad Acting and Perjury in Snitch Scandal*, OC Weekly (Sept. 8, 2016), <http://www.ocweekly.com/news/more-evidence-emerges-on-oc-law-enforcements-bad-acting-and-perjury-in-snitch-scandal-7490406>; Jordan Smith, *Anatomy of a Scandal: How Orange County Prosecutors Covered Up Rampant Misuse of Jailhouse Informants*, The Intercept (May 14, 2016), <https://theintercept.com/2016/05/14/orange-county-scandal-jailhouse-informants/>. Judges on the Ninth Circuit Court of Appeals have chastised the California Attorney General for defending convictions tainted by egregious prosecutorial misconduct and cited an “epidemic” of prosecutorial misconduct in the State. Maura Dolan, *U.S. Judges See ‘Epidemic’ of Prosecutorial Misconduct in State*, LA Times (Jan. 31, 2015) <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html>; United States Court of Appeals for the Ninth Circuit, *13-56132 Johnny Baca v. Derral Adams* (Jan. 8, 2015) <https://www.youtube.com/watch?v=2sCUrhgXjH4> (providing video of oral arguments).

Second, since California is the only state that does not have a version of ABA Model Rule 3.8 concerning the special responsibilities of prosecutors, adopting the proposed rule will finally bring California into line with the rest of the nation.

Finally, for the Board to reject or dilute this proposed rule when the need for it is so clear would be a betrayal of the public trust and further undermine public confidence in the Bar as an organization and the legal profession as a whole.

Sincerely,



Mary K. McComb
State Public Defender

Christina A. Spaulding
Supervising Deputy
State Public Defender