

10:PD Nicole Solis

ENDORSED  
FILED  
SAN FRANCISCO COUNTY  
SUPERIOR COURT

2010 MAY 25 PM 4:04

CLERK OF THE COURT  
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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 CITY AND COUNTY OF SAN FRANCISCO

10 PEOPLE OF THE STATE OF CALIFORNIA,  
11 Plaintiff,

12 v.

13 FRANCISCO HERNANDEZ,  
14 Defendants.

MCN: 2426893  
SCN: 206250

PEOPLE'S OPPOSITION TO  
DEFENDANT'S MOTION TO SET  
ASIDE THE INFORMATION FOR  
FAILURE TO PROVIDE DISCOVERY

DATE: June 11, 2010  
TIME: 9:00 AM  
DEPT: 23

16 TO THE HONORABLE JUDGE IN DEPARTMENT 23 OF THE SUPERIOR COURT AND  
17 TO THE ABOVE NAMED DEFENDANT BY AND THROUGH HIS ATTORNEY, NICOLE  
18 SOLIS:

19 PLEASE TAKE NOTICE that on June 11, 2010, at 9:00 AM, or as soon thereafter as the  
20 matter can be heard in Department 23 of the above entitled court, the People will oppose the  
21 Defendant's Motion to Set Aside the Information for Failure to Provide Discovery.

KAMALA D. HARRIS  
DISTRICT ATTORNEY

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## I. STATEMENT OF THE CASE

The preliminary hearing in this case was held on October 22, 26, and 27, 2009, and at its conclusion, Defendant Francisco Hernandez (hereafter "Defendant") was held to answer on the following felony complaint charges: Count I: a violation of Health and Safety Code section 11378 for unlawful possession of methamphetamine for sale; Count III: a violation of Penal Code section 186.22(a) for participation in a criminal street gang; and Count IV: a violation of Health and Safety Code section 11357(a) for the unlawful possession of concentrated cannabis.<sup>1</sup> On November 10, 2009, Defendant was arraigned on the Information and pleaded not guilty to the above charges. On April 28, 2010, Defendant filed a motion to set aside the information for failure of discovery. This matter is to be set for Jury Trial on July 2, 2010 in Department 22.

## II. STATEMENT OF FACTS<sup>2</sup>

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On July 10, 2009, at approximately 11:18 P.M., San Francisco Police Officer Roger Morse (Star No. 1923) was on duty with Sergeant Molina and Officer Archilla. (RT 5:13-6:19.) As Officer Morse was walking towards Our Place Bar, Sergeant Molina pointed Defendant out as a 22nd and Bryant Norteno. (RT 7:7-12.) When Officer Morse spoke with Defendant, Defendant said he was on probation for possession of a firearm. (RT 7:24-28.) Officer Morse then conducted a search of Defendant's person, and Officer Archilla and Sergeant Molina conducted a search of Defendant's truck. (RT 8:1-12.) Sergeant Molina located a pill bottle, which based on his training appeared to be marijuana and hashish chunk, and he also seized a wooden turtle, and an aluminum bat. (RT 8:13-18.) Defendant was placed under arrest for the narcotics and another unit arrived to transport him, and the officers then went to Defendant's home address to conduct a probation search for further contraband. (RT 8:20-28.) During a search of Defendant's room, Officer Archilla

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<sup>1</sup> See Felony Complaint and Information, attached to Defendant's Motion as Exhibits A and C respectively for allegations on the charges.

<sup>2</sup> The Statement of Facts is derived from the Reporter's Transcript (RT) from the Preliminary Hearing heard on October 22, 26, and 27, 2009.

1 located \$2,400 in U.S. currency, a ceramic turtle, some IDs, and some plastic baggies. (RT 10:1-3  
2 Officer Morse located a plastic baggie and a scale in the ceiling tiles. Based on his training, Officer  
3 Morse believed the crystal-like substance in the baggie to be methamphetamine. (RT 10:26-11:4.)

4 At the preliminary hearing, the narcotics evidence envelope was marked as People's Exhibit 7  
5 and contained both the substance found in Defendant's car (7-A), as well as the narcotics seized  
6 from Defendant's room (7-B). (RT 16:25-19:17.) Officer Morse seized the narcotics in this case,  
7 and put the sealed envelope into the narcotics drop box. (RT 17:6-18:3.) Officer Morse testified  
8 that during a video teleconference with chemist Tasha Smith, an employee of the SFPD Crime Lab,  
9 he asked her all relevant Prop 115 questions about the narcotics in this case, using SFPD 150  
10 Narcotics Form. (RT 19:18-22:28; 51:16-24.) Ms. Smith stated that she had 41.29 grams gross  
11 methamphetamine; 2.31 grams gross concentrated marijuana; and 1.24 grams net marijuana. (RT  
12 23:1-7.)

### 13 III. ARGUMENT

#### 14 I. INTRODUCTION

15 *Brady* exculpatory evidence, which includes impeachment evidence, is the only substantive  
16 discovery mandated by the Constitution. Information disclosed in advance of trial is not considered  
17 suppressed, even assuming it should have been disclosed to the defense earlier. In addition, the  
18 focus of *Brady* materiality is on the outcome of defendant's trial. Because defendant is now in  
19 possession of the information concerning Criminalist Madden's criminal convictions and the  
20 problems at the Crime Lab, and this case has not yet proceeded to trial, no *Brady* violation, i.e., no  
21 constitutional violation, has occurred.

22 Judge Massullo's Order filed May 17, 2010, (*Hereinafter, Judge Massullo's ruling, the Order*  
23 *of May 17, 2010, or Order page:line*) finds that the San Francisco District Attorney's Office's  
24 failure to produce evidence in its possession regarding Madden and the Crime Lab is a violation of  
defendants' constitutional rights. (*Order at 17:4-5.*) This finding is contrary to law. A

1 constitutional error occurs, and a conviction must be reversed, only if the evidence is material in the  
2 sense that its suppression undermines confidence in the outcome of the trial. (*U.S. v. Bagley* (1985  
3 473 U.S. 678; *Kyles v. Whitley* (1995) 514 U.S. 419, 434.) Defendant's trial has not yet begun.  
4 Moreover, information disclosed in advance of trial is not considered suppressed, even assuming it  
5 should have been given to the defense earlier. (*People v. Superior Court (Meraz)* 163 Cal. App.4<sup>th</sup>  
6 28, 51.)

7 Judge Massullo's Order filed May 17, 2010, further finds that the District Attorney's Office  
8 did not have policies or procedures to comply with *Kyles, Brady/ Giglio*, or California statutory  
9 discovery obligations regarding criminal histories of SFPD witnesses. (*Order* at 13:4-5; 14:11-13;  
10 14 fn. 7.) The Court's finding is inaccurate and legally irrelevant. The District Attorney's Office  
11 had a policy, which was to follow the law, rely on the SFPD, and that inquiries were made on a case  
12 by case basis. (RT of April 15, 2010 at 8:27-9:13; 13: 22-23; 14:2-9; 15:9-13.) The District  
13 Attorney's Office did not have a *written* policy. (RT of April 15, 2010 at 13:21; 13:27-14:1; 14:2-  
14 9; 15:9-13; 28:19.) The Court itself acknowledged this distinction at the hearing. (RT of April 15,  
15 2010 at 13:27-14:1; 15:9-13; 28:20-21.) Nowhere in Penal Code section 1054 et seq., the statutory  
16 discovery provisions regarding discovery, has the California Legislature required a district  
17 attorney's office to have a written policy on securing criminal history information from a police  
18 department. And, while stating that procedures can be established to carry the prosecutor's burden  
19 and insure communication of relevant information to each lawyer who handles the case, *Kyles v.*  
20 *Whitley* (1995) 514 U.S. 419, 438 and *Giglio v. U.S.* (1972) 405 U.S. 150, 154, never held that the  
21 failure to have written policies in place rises to the level of a constitutional violation.

22 Finally, Judge Massullo's May 17, 2010, Order finds that by November 19, 2009, the District  
23 Attorney's Office was aware of problems with Madden and the Crime Lab and failed to disclose this  
24 exculpatory information actually in their possession to the defense. (*Order* at 13:1-3; 16:11-12;  
16:21-17:2.) The Court's assertion is unsupported by the factual record upon which it relies. The  
Court cites the November 19, 2009, email from an Assistant District Attorney to her supervisor.  
(*Order* at 4:7-18.) The email notes that Madden had become increasingly undependable for

1 testimony by not appearing for court and calling in sick on days when she was needed to testify; that  
2 there was anecdotal evidence that Madden was unhappy with the lab and picked times to be sick that  
3 would have the greatest impact on lab work; and until the SFPD could figure out what was going on  
4 with Madden, the District Attorney's Office might not file cases in which she had tested the  
5 narcotics. (*Order* at 4:10-18.) Nothing contained in this email qualifies as *Brady* material. That  
6 an employee had court attendance issues coupled with unsubstantiated rumors of job dissatisfaction  
7 is neither material, exculpatory, nor sufficiently specific to rise to the level of *Brady* material. *Brady*  
8 does not compel the production of speculation based on rumor and hearsay. (See *U.S. v. Johnson*  
9 (7<sup>th</sup> Cir. 2000) 223 F.3d 665, 674; *Smith v. Stewart* (9<sup>th</sup> Cir. 1998) 140 F.3d 1263, 1273.) The  
10 District Attorney's Office did not, therefore, fail to disclose exculpatory information actually in our  
11 possession.

NO DISCOVERY

12 **II. DEFENDANT WAS NOT DENIED A SUBSTANTIAL RIGHT BECAUSE THERE IS**  
13 **NO STATUTORY OR CONSTITUTIONAL RIGHT TO DISCOVERY BEYOND THE**  
14 **CRIMINAL COMPLAINT AT THIS STAGE OF THE PROCEEDING**

15 The California Supreme Court has recognized the availability of a non statutory motion to  
16 dismiss where a defendant has been denied a substantial right not apparent on the transcript of a  
17 preliminary hearing. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 294.) However, there is no  
18 general constitutional right to discovery in a criminal case, and *Brady* (*Brady v. Maryland* (1963)  
19 373 U.S. 83) did not create one. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60, quoting  
20 *Weatherford v. Bursey* (1977) 429 U.S. 545, 559). As a criminal defendant has no general  
21 constitutional right to discovery (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; *People v.*  
22 *Gonzalez* (1990) 51 Cal.3d 1179, 1258), "*Brady* exculpatory evidence is the only substantive  
23 discovery mandated by the United States Constitution." (*People v. Superior Court (Barrett)* (2000)  
24 80 Cal.App.4th 1305, 1314; see *Gray v. Netherland* (1996) 518 U.S. 152, 168.

Under *Brady, supra*, 373 U.S. at page 87, a prosecutor must disclose any evidence that is  
favorable to the defendant and material on the issue of guilt or punishment. (*City of Los Angeles v.*  
*Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7; *People v. Jordan* (2003) 108 Cal.App.4th 349)

1 The *Brady* disclosure obligation encompasses both impeachment and exculpatory evidence, and  
2 exists regardless of whether the defendant makes a specific request for the information. (*Strickler v.*  
3 *Greene* (1999) 527 U.S. 263, 280; *United States v. Bagley* (1985) 473 U.S. 667, 676; *Brandon,*  
4 *supra*, at p. 8; *In re Brown* (1998) 17 Cal.4th 873, 879) “The scope of this disclosure obligation  
5 extends beyond the contents of the prosecutor’s case file and encompasses the duty to ascertain as  
6 well as divulge ‘any favorable evidence known to the others acting on the government’s behalf,’  
7 including the police. (*In re Brown, supra*, at p. 879; *Strickler v. Greene, supra*, 527 U.S. at pp. 280-  
8 281; *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438)

9 Evidence is material under *Brady* if there is a reasonable probability that the result of the  
10 proceeding would have been different had the evidence been disclosed. (*Brandon, supra*, at pp. 7-8;  
11 *Strickler v. Greene, supra*, 527 U.S. at pp. 289-290) “A ‘reasonable probability’ of a different result  
12 is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the  
13 outcome of the trial.’ [Citation]” (*Kyles v. Whitley, supra*, 514 U.S. at p. 434; *In re Brown, supra*, 17  
14 Cal.4th at p. 886) “Although *Brady* disclosure issues may arise ‘in advance of,’ ‘during,’ or ‘after  
15 trial’ [citation], the test is always the same. [Citation] *Brady* materiality is a ‘constitutional standard’  
16 required to ensure that nondisclosure will not ‘result in the denial of defendant’s [due process] right  
17 to a fair trial.’ [Citation]” (*Brandon, supra*, at p. 8) *Brady*, however, does not require the disclosure  
18 of information that is of mere speculative value.

18 The exclusive mechanism for discovery in a criminal case in California are the provisions set  
19 forth in Cal. Penal Code §1054 et.seq. Penal Code §1054 states in relevant part, “To provide that no  
20 discovery shall occur in criminal cases except as provided by this chapter, other express statutory  
21 provisions, or as mandated by the Constitution of the United States”. (*Cal. Penal Code §1054(e)*)  
22 Penal Code §1054.5 further adds that, “No order requiring discovery shall be made in criminal cases  
23 except as provided by this chapter. This chapter shall be the only means by which the defendant  
24 may compel the disclosure or production of information...” (*Cal. Penal Code §1054.5(a)*)

The time frame for discovery as set forth in Penal Code § 1054.7 requires that discovery  
enumerated by statute and required by the Constitution shall be provided within 30 days of trial.

1 (Cal. Penal Code §1054.7) §1054.7 goes further and allows for the discovery of information by the  
2 People to defendant within that 30 day window upon a showing of good cause. §1054 et.seq. is the  
3 exclusive mechanism defining the discovery process in California, and it provides no right  
4 whatsoever to discovery at this stage of the proceeding.

5 Possible discovery at this stage of the proceeding can be grouped into three distinct categories:  
6 1) those items specifically enumerated in §1054 et.seq. 2) that discovery mandated by the  
7 Constitution [as noted before that is limited to "Brady" discovery, and 3) *Pitchess* discovery [a  
8 subset of *Brady*]. To the extent that defendant argues that §1054 is somehow inapplicable to this  
9 stage of the proceedings or that defendant relies on factual findings or statements of law contained in  
10 the Honorable Anne-Christine Massullo's Order and Statement of Decision Re Motion to Dismiss or  
11 to Compel Disclosure of Documents and For a Protective Order issued on May 17, 2010,  
12 (Hereinafter, Judge Massullo's ruling, the Order of May 17, 2010, or Order page:line) a review of  
13 the genesis and aftermath of Proposition 115<sup>3</sup> and *Pitchess*, including a review of the involved  
14 statutes and case law, establishes that discovery (including the *Pitchess* and *Brady* discovery  
15 contemplated by the Order of May 17, 2010) was never intended to be a pre-preliminary hearing  
16 right.

Write

16 It is well settled that:  
17 In ascertaining the legislature's intent, we turn first to the language of the statute,  
18 giving the words their ordinary meaning. [Citations] We must follow the statute's  
19 plain meaning, if such appears, unless doing so would lead to absurd results the  
20 Legislature could not have intended. [Citations] If our examination of the statutory  
21 language leaves doubt about its meaning, we may consult other evidence of the  
22 Legislature's intent, such as the history and background of the measure. [Citations].

20 (*People v. Birkett* (1999) 21 Cal.4th 226, 231-232, citations omitted, hereafter, *Birkett*.)

23 <sup>3</sup> We mean to include those constitutional provisions and statutes that were enacted with the  
24 passage of Proposition 115, namely sections 1054 et.seq. as described in *In re Littlefield* (1993) 5  
Cal.4th 122, 129, *Izazaga v. Superior Court* (1991) 356, 364-365, and *Jones v. Superior Court*  
(2004) 115 Cal.App.4th 48, 59

1 The same principles that normally govern statutory construction, as mentioned above, are  
2 applicable in interpreting statutes added by initiative. (See *Robert L. v. Superior Court* (2003) 30  
3 Cal.4th 894, 900-901 and *People v. Briceno* (2004) 34 Cal.4th 451, 459.) Additionally, the statutory  
4 language “must also be construed in the context of the statute as a whole and the overall statutory  
5 scheme in light of the electorate’s intent.” (*People v. Briceno, supra*, 34 Cal.4th at 459.) When the  
6 language is ambiguous, courts “refer to other indicia of the voters’ intent, particularly the analyses  
7 and arguments contained in the official ballot pamphlet.”(*Ibid.*)

8 In section 866, the drafters explicitly addressed preliminary hearing discovery. Its provisions  
9 are unambiguous. That statute governs the evidence the defense may produce at a preliminary  
10 hearing and came into existence the day Proposition 115 was enacted. Section 866, subdivision (a),  
11 allows the defense to present witnesses at the preliminary hearing once the People rest, subject to  
12 limitations. It states in pertinent part:

13 Upon the request of the prosecuting attorney, the magistrate shall require an offer of  
14 proof from the defense as to the testimony expected from the witness. The magistrate  
15 shall not permit the testimony of any defense witness unless the offer of proof  
16 discloses to the satisfaction of the magistrate, in his or her sound discretion, that the  
17 testimony of that witness, if believed, would be reasonably likely to establish an  
18 affirmative defense, negate an element of a crime charged, or impeach the testimony  
19 of a prosecution witness or the statement of a declarant testified to by a prosecution  
20 witness.

21 (*§ 866, subd. (a).*)

22 Section 866, subdivision (b), provides:

23 It is the purpose of a preliminary examination to establish whether there exists  
24 probable cause to believe that the defendant has committed a felony. *The examination  
shall not be used for purposes of discovery.*

(*§ 866, subd. (b)*, emphasis added.)

21 The plain language of subdivisions (a) and (b) needs no construction. In particular, subdivision (b)  
22 explicitly states that the preliminary hearing shall not be used for discovery. (*People v. Fuhrman*  
23 (1997) 16 Cal.4th 930, 937 [If the statutory language is clear and unambiguous, construction is  
24 unnecessary and courts should not indulge in it].) Section 1054.7’s mandate that “[t]he disclosures  
required under this chapter shall be made at least 30 days prior to the trial...,” serves to further

1 emphasize the point that there shall be no right to discovery before the preliminary hearing.

2 In the event that defendant claims that section 866, subdivision (b), applies only to the  
3 examination itself, not to pre-preliminary hearing discovery, this interpretation would lead to absurd  
4 results. For example, a defendant would be free to obtain *Pitchess* discovery but would not be able  
5 to examine *Pitchess* witnesses at the preliminary hearing to flesh out the discovery obtained.  
6 *Pitchess* discovery, would delay the preliminary hearing solely to discover potential impeachment  
7 evidence against the officers; impeachment evidence of doubtful materiality when all that is required  
8 of the magistrate is to find some rational ground to believe an offense was committed and Petitioner  
9 was guilty of it. (*People v. Slaughter* (1984) 35 Cal.3d 629, 637; See also *People v. Orin* (1975) 13  
10 Cal.3d 937, 947)

11 Thus, to allow discovery to occur before the preliminary hearing, makes a mockery of  
12 section 866's prohibition of using the preliminary hearing as a discovery tool. Furthermore,  
13 applying the *Pitchess* scheme pre-preliminary hearing tends to bring all of the panoply of rights  
14 reserved for trial, down to the preliminary hearing. (*People v. Holman* (1981) 29 Cal.3d 480, 483,  
15 485) However, with the enactment of Proposition 115 and section 866, a statute that specifically  
16 governs preliminary hearings, such a maneuver is prohibited. (*Pacific Legal Foundation v.*  
17 *Unemployment Ins. Appeals Board* (1981) 29 Cal.3d 101, 115; *Fuentes v. Workers' Comp. Appeals*  
18 *Bd.* (1976) 16 Cal.3d 1, 7-8.)

19 Assuming, however, that statutory construction is necessary, the clearest evidence that the  
20 drafters of the Criminal Discovery Statute intended to end mandatory discovery pre-preliminary  
21 hearing is found in section 859, the statute governing initial appearances before a magistrate. Prior  
22 to the enactment of Proposition 115, section 859 imposed the following requirements upon the  
23 People:

24 The prosecuting attorney shall deliver to, or make accessible for inspection and  
copying by, the defendant or counsel, copies of the police, arrest, and crime reports,  
upon the first court appearance of counsel, or upon a determination by a magistrate  
that the defendant can represent himself or herself. If unavailable to the prosecuting  
attorney at the time of that appearance or determination, the reports shall be delivered  
within two calendar days.

(Stats. 1985 c. 877, § 1)

These provisions were repealed by Proposition 115. (Prop. 115, § 15; Section 859; and  
*Izazaga, supra*, 54 Cal.3d 356, 365.) Their removal clearly demonstrates that the electorate  
intended to eliminate mandatory pre-preliminary hearing discovery. Therefore, an interpretation

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1 that mandates *Pitchess* discovery before the preliminary hearing is illogical and absurd in light of  
2 the repeal of the requirement to provide a police report, which is unquestionably far more relevant  
3 discovery.<sup>4</sup> Indeed any interpretation that mandates discovery prior to 30 days before trial flies in  
4 the face of a plain reading of the relevant statutory authority.

5 The final question is that of the evidence described in §1054 et.seq. as being “mandated by  
6 the United States Constitution”. Discovery mandated by the United States Constitution is discussed  
7 in Section III below.

8 It is clear from the aforementioned authority and the discussion in Section III below, that this  
9 court need not reach the question of whether the alleged absence of discovery would constitute a  
10 denial of a substantial right. At this stage of the proceeding, the People have complied with their  
11 sole discovery obligation, which is to provide a copy of the criminal complaint.

12 **III. INFORMATION DISCLOSED IN ADVANCE OF TRIAL IS NOT**  
13 **CONSIDERED SUPPRESSED. CONSEQUENTLY, BECAUSE THE**  
14 **INFORMATION REGARDING CRIMINALIST MADDEN AND THE CRIME**  
15 **LAB HAS BEEN DISCLOSED TO THE DEFENSE, THE SAN FRANCISCO**  
16 **DISTRICT ATTORNEY’S OFFICE HAS NOT VIOLATED DEFENDANT’S**  
17 **CONSTITUTIONAL RIGHTS.**

18 “If there was no *Brady* violation, then there was no conceivable basis for concluding the  
19 federal Constitution required dismissal.” (*People v. Ashraf* (2007) 151 Cal. App. 4<sup>th</sup> 1205, 1212) In  
20 the instant case, the information requested by defendant is either available to the defense or in the  
21 actual possession of the defendant.

22 Judge Massullo’s May 17, 2010, Order finds:

23 Separate and apart from the failure of the District Attorney’s Office to implement  
24 policies and procedures to identify and produce *Brady/Giglio* information regarding SFPD

25 <sup>4</sup> In fact, in order to bring a *Pitchess* motion seeking allegations of excessive force by a  
26 peace officer, a defendant must as a matter of law attach a copy of the “police report setting forth the  
27 circumstances under which the party was stopped or arrested.” (Evidence Code § 1046.) Proposition  
28 115 has amended section 859 such that a defendant no longer has a right of access to the police  
29 reports prior to the preliminary hearing and therefore as a matter of law would not be able to bring a  
30 *Pitchess* motion based on allegations of excessive force. (See also *Garcia v. Superior Court* (2007)  
31 42 Cal.4th 63, 70–71. fn.6.)

1 witnesses, its failure to produce information *actually in its possession* regarding Madden and  
2 the Crime Lab is a violation of the defendants' constitutional rights. (May 17, 2010 Order at  
16:2-5.)

3 The suppression by the prosecution of evidence favorable to the defendant violates due  
4 process where the evidence is material either to guilt or punishment, irrespective of the good or bad  
5 faith of the prosecution. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) The duty to disclose includes  
6 impeachment evidence. (*United States v. Bagley* (1985) 473 U.S. 667, 676; *Strickler v. Greene*  
(1999) 527 U.S. 263, 280.)

7 The sole concern in *Brady* was the fairness of the trial. (*Eulloqui v. Superior Court* (2010)  
8 181 Cal. App.4<sup>th</sup> 1055, 1065.) In *United States v. Bagley* (1985) 473 U.S. 667, the United States  
9 Supreme Court repeatedly noted that *Brady* materiality pertains to the result of the trial. (*Id.* at p.  
10 1066). ““For unless the omission deprived the defendant of a fair trial, there was no constitutional  
11 violation requiring that the verdict be set aside; and absent a constitutional violation, there was no  
12 breach of the prosecutor’s constitutional duty to disclose.... [¶] ... But to reiterate a critical point,  
13 the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of  
14 sufficient significance to result in the denial of the defendant’s right to a fair trial.”” (*Eulloqui*,  
15 *supra*, 181 Cal. App.4<sup>th</sup> at p. 1066, quoting *Bagley, supra*, 473 U.S. at pp. 675-676, quoting *United*  
16 *States v. Agurs* (1976) 427 U.S. 97, 108; *People v. Superior Court (Meraz)* (2008) 163 Cal. App.4<sup>th</sup>  
17 28, 51.) A constitutional error occurs, and a conviction must be reversed, only if the evidence is  
18 material in the sense that its suppression undermines confidence in the outcome of the trial. (*Bagley*,  
*supra*, 473 U.S. at p. 678.)

19 Ten years after *Bagley*, the United States Supreme Court emphasized that the focus of *Brady*  
20 materiality is on the outcome of the trial. (*Eulloqui, supra*, 181 Cal. App.4<sup>th</sup> at p. 1066.) ““The  
21 question is not whether the defendant would more likely than not have received a different verdict  
22 with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in  
23 a verdict worth of confidence.” (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.) A reasonable  
24 probability of a different result is shown when the government’s suppression of the evidence

1 undermines the confidence in the outcome of the trial.” (*Kyles, supra*, 514 U.S. at p. 434.)<sup>5</sup>

2 The California Supreme Court has also underscored the importance of the undisclosed  
3 evidence to the trial. (*Eulloqui, supra*, 181 Cal. App.4th at p. 1066.) In *People v. Pensinger* (1991)  
4 52 Cal.3d 1210 the Court explained materiality under *Brady* as, “Under the federal Constitution,  
5 “the conviction must be reversed, only if the evidence is material in the sense that its suppression  
6 undermines confidence in the outcome of the trial.”” (*Id.* at p. 1272. quoting *Bagley, supra*, 473  
7 U.S. at p. 678.) In *In re Brown* (1998) 17 Cal.4th 873, the Court stressed the standard: “[W]e turn  
8 to the question of materiality, for not every nondisclosure of favorable evidence denies due process.  
9 “[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the  
10 defendant of a fair trial. Consistent with ‘our overriding concern with the justice of the finding of  
11 guilt,’ [citation] a constitutional error occurs, and the conviction must be reversed, only if the  
12 evidence is material in the sense that its suppression undermines confidence in the outcome of the  
13 trial.”” (*Eulloqui, supra*, 181 Cal. App.4th at p. 1067, quoting *Brown, supra*, 17 Cal.4th at p. 885,  
quoting *Bagley, supra*, 473 U.S. at p. 678.)<sup>6</sup>

14 Although *Brady* disclosure issues may arise in advance of, during, or after trial, the test is  
15 always the same. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 8.)  
16 “[E]vidence that is presented at trial is not considered suppressed, regardless of whether or  
17 not it had previously been disclosed during discovery.” (*People v. Morrison* (2004) 34 Cal.4th  
18 698, 715 (emph. added).) It follows that **information disclosed in advance of trial is not**  
19 **considered suppressed, even if it should have been given to the defense earlier.** (*Meraz, supra*,  
20 163 Cal. App.4th at p. 51 [evidence disclosed day before final jury selection and opening statement.  
(*Id.* at pp. 37, 44.)].) To escape the *Brady* sanction, disclosure must be made at a time when the

21  
22 <sup>5</sup> “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.”  
(*Strickler, supra*, 527 U.S. at p. 281.)

23 <sup>6</sup> See also *People v. Zambrano* (2007) 41 Cal.4th 1082, overruled on other grounds, *People v. Doolin*  
24 (2009) 45 Cal.4th 390, 421 fn. 22 [“Evidence is material [under *Brady*] if there is a reasonable  
probability its disclosure would have altered the trial result.” (*Id.* at p. 1132.)].)

1 disclosure would be of value to the accused. (*Ibid.*)

2 No general constitutional right to discovery exists in criminal cases, and *Brady* did not create  
3 one. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 59, citing *Weatherford v. Bursey* (1977) 429 U.S.  
4 545, 559.) *Brady* is a trial right, not a pretrial right of discovery. While the evidence concerning  
5 Criminalist Madden and the Crime Lab should have been disclosed to the defense earlier, the San  
6 Francisco District Attorney's Office has not violated defendant's constitutional rights because the  
7 evidence has now been disclosed. (*Morrison, supra*, 34 Cal.4<sup>th</sup> at p. 715; *Meraz, supra*, 163 Cal.  
8 App.4<sup>th</sup> at p. 51.)

9 To repeat, the information concerning Madden and the Crime Lab has now been disclosed to  
10 the defense. It has been disclosed in advance of trial. Information disclosed in advance of trial is not  
11 considered suppressed, even if it should have been given to the defense earlier. (*Meraz, supra*, 163  
12 Cal. App.4<sup>th</sup> at p. 51; *Morrison, supra*, 34 Cal.4<sup>th</sup> at p. 715.) Defense counsel is now in possession  
13 of the information concerning Madden's criminal convictions and the problems concerning the  
14 Crime Lab in time for its effective use at trial. (*Meraz, supra*, 163 Cal. App.4<sup>th</sup> at p. 51.)

15 The focus of *Brady* materiality is on the outcome of defendant's trial. (*Eulloqui, supra*, 181  
16 Cal. App.4<sup>th</sup> at p. 1066; *Kyles, supra*, 514 U.S. at p. 434; *Bagley, supra*, 473 U.S. at p. 678;  
17 *Strickler, supra*, 527 U.S. at p. 281; *Pensingler, supra*, 52 Cal.3d at p. 1272; *Brown, supra*, 17 Cal.4<sup>th</sup>  
18 at p. 885.) Defendant's trial has not yet begun. Moreover, the People will not be calling Criminalist  
19 Madden as a witness at trial, so the evidence concerning Madden's criminal conviction is irrelevant.  
20 Finally, the defense now possesses the material concerning the Crime Lab and thus has the  
21 opportunity to use it at trial. (*Meraz, supra*, 163 Cal. App.4<sup>th</sup> at p. 51.) Defendant has not,  
22 therefore, been denied a fair trial.

23 Because defendant has not been denied a fair trial, the San Francisco District Attorney's  
24 Office has not violated its constitutional duty to disclose. (*Bagley, supra*, 473 U.S. at pp. 675-676;  
*Agurs, supra*, 427 U.S. at p. 108; *Eulloqui, supra*, 181 Cal. App.4<sup>th</sup> at p. 1066.) For these reasons,  
Judge Massullo's ruling that the District Attorney's failure to produce information regarding  
Madden and the Crime Lab is a violation of the defendants' constitutional rights is contrary to law.

1  
2 **IV. CONCLUSIONS CONTAINED WITHIN JUDGE MASSULLO'S ORDER OF MAY 17,**  
3 **2010, ARE NOT DISPOSITIVE OF THE ISSUE OF THE DENIAL OF A**  
4 **SUBSTANTIAL RIGHT SINCE THE FINDINGS AND CONCLUSIONS ARE**  
5 **MERELY COMMENT ON THE COLLATERAL ISSUE OF ADMINISTRATIVE**  
6 **POLICY.**

7 On May 17, 2010, Judge Massullo issued the Order and Statement of Decision Re Motion to  
8 Dismiss or to Compel Disclosure of Documents and for a Protective Order. In the Order of May 17,  
9 2010, the Court indicates that the District Attorney had an obligation to identify and produce the  
10 information at issue, did not comply with that obligation, and hence the motion to compel will be  
11 granted. (*Order 2:18-20*) As we have made clear in Section I, for those defendants not yet within  
12 30 days of a scheduled trial, the People have no discovery obligation as it pertains to the information  
13 at issue. Even for those who are within the 30 day time frame, the People's previous production of  
14 the information at issue means that no evidence has been suppressed for purposes of *Brady*, and no  
15 substantial right has been denied. (*People v. Morrison* (2004) 34 Cal. 4<sup>th</sup> 698, 715).

16 That the People may have an eventual obligation to produce information to the defendant does  
17 not grant the Court the authority to order its disclosure outside of the statutory mechanism  
18 established by §1054 et.seq. Importantly, nowhere within the statutory scheme is there a reference  
19 to a finding of a Constitutional violation as a per se conclusion stemming from the ordering of the  
20 production of discovery, and nowhere within the Order of May 17, 2010, is there any discussion or  
21 analysis of the prejudice suffered by the defendants that would be necessary to make a finding of a  
22 Constitutional violation. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282)

23 Additionally, the People had already produced or made available that information to which the  
24 Court refers, with the exception of those items that had been submitted for a determination as to the  
issue of privilege.

The Order of May 17, 2010 goes on to articulate that the People have a *Brady* obligation in  
criminal cases, which we acknowledge, but fails to discuss or consider that *Brady* [or §1054  
discovery] is governed by statute as to both the timing of the discovery as well as the methodology.

The Order states as a finding that the District Attorney's Office did not have policies or

1 procedures to comply with *Kyles, Brady/Giglio*, or California statutory discovery obligations  
2 regarding the criminal histories of SFPD witnesses. (*Order 13:4-6*). Putting aside the question of  
3 the accuracy or inaccuracy of the Court's statement regarding the District Attorney's policy  
4 regarding discovery, this finding is collateral to the issue of the People's discovery obligations and  
5 the central question of whether a substantial right has been denied to the defendant. The Separation  
6 of Powers Doctrine mandates that the Judiciary is separate and distinct from the Executive branch of  
7 government. The Court has no authority to mandate internal policy within the District Attorney's  
8 Office, and the sole question before the Court is not *how* have the People complied with their  
9 obligations, but *whether* the People have complied with their obligations. As to that question of law,  
10 the record and the law as articulated in Sections II & III make clear that the People have complied  
11 with their existing discovery obligations and that there is no denial of a substantial right to the  
12 defendant.

13 The Order goes on to state as a finding that at least the SFPD, and certainly by November 19,  
14 2009, the District Attorney was aware of problems with Madden and failed to disclose this to  
15 defense. (*Order 16:11-12*). The Order also notes that the District Attorney failed to produce  
16 exculpatory information actually in their possession. (*Order 13:1-4*) There are two issues with the  
17 Court's assertion regarding this matter. First, as a statement of fact, these assertions are false. The  
18 record as established in the Order demonstrates only that an Assistant District Attorney had sent an  
19 internal email noting that Debbie Madden's attendance in court had become problematic, that there  
20 was anecdotal evidence that Madden was unhappy in her work, and that the problem was sufficient  
21 that unless Madden became more reliable in her attendance, the District Attorney's would consider  
22 not filing cases in which she had tested the narcotics. (*Order 4:5-18*) This is the sole reference in  
23 the Order to information regarding Debbie Madden in the actual possession of the District  
24 Attorney's Office. There is nothing contained in this information that would qualify as *Brady*  
material. That an employee has work attendance issues coupled with unsubstantiated rumors about  
unhappiness at work is neither material, exculpatory, nor sufficiently specific to rise to the level of  
*Brady* material. *Brady* does not compel the production of speculation based on rumor and hearsay.

1 (Johnson, supra, at 674; 674; Smith, supra, at 1273) The failure to attend work, or an unhappiness  
2 with work, does not immediately indicate malfeasance or acts of moral turpitude. There is nothing  
3 contained in the email referenced in the Order that would lead anyone to believe that *Brady* material  
4 existed.

5 Second, these assertions regarding what information the District Attorney's Office actually  
6 possessed are again collateral to the issue of whether the People had met their discovery obligations  
7 and the central question of whether a substantial right has been denied to the defendant. Nowhere in  
8 the Order is there any discussion or analysis of what information was available at the time of the  
9 order, or in what procedural posture each of the named defendants' case stood. Absent that  
10 discussion, the Court's finding is not germane to the issue at hand. To the extent that the Court  
11 relies on its belief that the District Attorney's Office was actually in possession of the information at  
12 issue as part of its analysis, the analysis is flawed and the finding without weight.

13 To the extent that the Court makes a finding of any Constitutional violation, that finding is  
14 flawed since it is based on an improper reading of the law and fails to consider or discuss issues  
15 central to any determination. The Court in the Order makes several assertions regarding what it  
16 perceives as the District Attorney's obligation under *Brady* and the connection between those  
17 perceived obligations and its ultimate finding that the District Attorney's Office was not in  
18 compliance with *Brady*. Specifically, the Court states that "Failure to implement any type of  
19 procedure to ascertain and disclose criminal convictions of SFPD employees is a violation of *Kyles*,  
20 *Giglio* and California statutory discovery obligations in criminal cases." (Order 14:11-13) This is  
21 incorrect and again substitutes the question of *how* the District Attorney's Office complied with its  
22 *Brady* obligation, with *whether* it complied. The specific internal process by which the District  
23 Attorney's Office obtains *Brady* material is outside the purview of the Court's authority and  
24 irrelevant to the question of whether a substantial right has been denied. To the extent that the Court  
relies on this perceived "failure" as part of its analysis, the analysis is flawed, and the finding  
without weight. That the court relied on its perception of the District Attorney's Office's policy is  
apparent on the face of the Order. The Court cites no authority for the proposition that the failure to

1 implement a policy is a per se violation of *Kyles*, et al. Instead the court cites to a footnote  
2 expressing its frustration with the perceived “indifference” to the Court’s repeated requests. That  
3 the District Attorney’s office declined to engage in a discussion with the Court regarding internal  
4 procedures that fell outside of the scope of the issue before the Court does not constitute a basis for a  
5 finding of a deprivation of a substantial right.

6 Finally, the Court in the Order of May 17, 2010, relies for its findings and conclusions on the  
7 assertion that the District Attorney’s Office not only may, but in fact has an affirmative obligation  
8 to, run CLETS inquiries on SFPD witnesses. In reaching this conclusion, the Court incorrectly  
9 reads the central holding of *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.  
10 App. 4<sup>th</sup> 430. The Order identifies the central issue as whether a defendant may circumvent *Pitchess*  
11 by asking the District Attorney to get information from police procedural files. (*Order 15:5-7*). The  
12 holding in *Garden Grove* goes further. As the court notes, “The issue is whether the court, without  
13 complying with Evidence Code sections 1043 and 1045, can order the police department to disclose  
14 an officer’s birth date to the district attorney so the district attorney can run a criminal records check  
15 on an officer.” (*Garden Grove, supra*, at 433, fn. 3). While the Court in the Order of May 17, 2010,  
16 comments that the “District Attorney cannot hide from her affirmative obligation behind a  
17 procedural mechanism designed for a separate and unrelated purpose” (*Order 16:1-3*), the holding in  
18 *Garden Grove* characterized the importance of the *Pitchess* process in a very different way:  
19 “Reimann’s [Defendant] motion circumvented the *Pitchess* process by requesting the officers’  
20 criminal records from the district attorney and not from the police department. We cannot allow  
21 Reimann to make an end run on the *Pitchess* process by requesting the officers’ personnel records  
22 under the guise of a Penal Code section 1054.1 and *Brady* discovery motion.” (*Garden Grove,*  
23 *supra*, at 434-435) The Order of May 17, 2010, correctly states that *Brady* is not “trumped” (*Order*  
24 *16:1*) by *Pitchess* but fails to discuss or acknowledge that the *manner* in which *Brady* must be  
complied with as it relates to police personnel files is governed by *Pitchess*. “Contrary to  
[Defendant’s] assertion, the *Pitchess* scheme does not unconstitutionally trump a defendant’s right to  
exculpatory evidence as delineated in *Brady*. Instead, the two schemes operate in tandem.” (*People*

1  
2 v. *Gutierrez* (2003) 112 Cal. App. 4<sup>th</sup> 1463, 1474-1475) *Gutierrez* makes clear that the Order's  
3 assertion that the People have an obligation to review police personal files is incorrect. "Gutierrez'  
4 assertion that the prosecutor was obliged to conduct a review of the files of "all significant police  
5 officer witnesses" and disclose any *Brady* material likewise fails. The *Pitchess* procedure is the only  
6 avenue by which citizen complaints may be discovered. (*People v. Jordan* (2003) 108 Cal.App.4th  
7 349, 360) "[A] prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to  
8 evidence the prosecutor, or the prosecution team, *knowingly possesses or has the right to possess*"  
9 that is "actually or constructively in its possession or accessible to it." (Italics added.) Because under  
10 *Alford* (*Alford v. Superior Court* (2003) 29 Cal. 4<sup>th</sup> 1033) the prosecutor does not generally have the  
11 right to possess and does not have access to confidential peace officer files, Gutierrez's argument for  
12 routine review of the complete files of all police officer witnesses in a criminal proceeding  
13 necessarily fails." (*Gutierrez, supra*, at 1475)

14 The Court in the Order of May 17, 2010, outlines the People's *Brady* obligations in the most  
15 general terms. However, as the aforementioned case law makes clear, that obligation is governed by  
16 a set of statutes and principles, among them that there is **no** obligation for routine review of the  
17 complete files of all police officer witnesses in a criminal proceeding. The Order goes on to  
18 proscribe that if the People choose not to circumvent established legal processes, they would be  
19 precluded from calling the witnesses in question at trial. Given the absence of any other previous  
20 action or sanction by Judge Massullo as a result of her perception of a discovery violation, this order  
21 (even assuming a discovery violation) is void on its face as violative of Penal Code § 1054.5(c).

22 It is important to distinguish that it is not the People's intent to avoid their discovery  
23 obligation in disagreeing with the Order of May 17, 2010. However, to the extent that the findings  
24 and conclusions of the Order are based on misstatements of the law or the facts, those findings are  
without merit and carry no weight in these proceedings.

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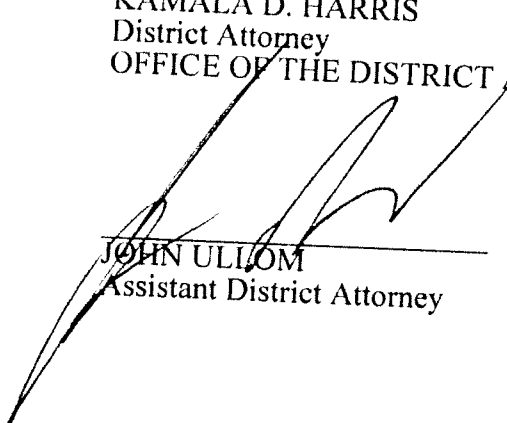
**V. CONCLUSION**

For the foregoing reasons, the People respectfully request that this Court deny Defendant's Motion to Set Aside the Information for Failure to Provide Discovery.

Date: May 25, 2010

Respectfully submitted,

KAMALA D. HARRIS  
District Attorney  
OFFICE OF THE DISTRICT ATTORNEY



JOHN ULLOM  
Assistant District Attorney

**DECLARATION OF SERVICE**

MCN: 2426893

I, John Ullom, state:

I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco and not a party to the within action; that my business address is 850 Bryant Street, San Francisco, CA 94103.

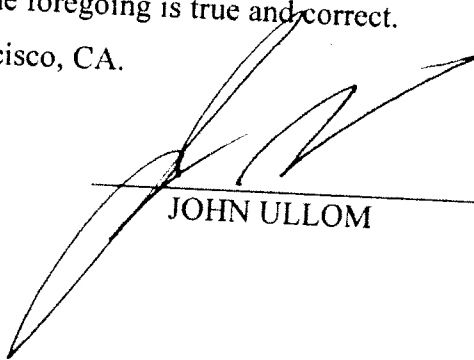
On MAY 25, 2010, I served the attached People's Opposition to Defendant's Motion Dismiss for Failure to Provide Discovery to:

Office of the Public Defender
Nicole Solis

- Placing said envelope in a box reserved for Public Defender discovery in the District Attorney's Office, the contents are picked up by an employee of the Public Defender's Office on a daily basis.
- Placing said envelope with the correct postage paid for collection by the United States Mail in the regular place for collection of mail.
- Faxed this Motion to attorney for the defendant on/at May 3, 2010 and informed him of the anticipated opposition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 2010 at San Francisco, CA.

  
\_\_\_\_\_  
JOHN ULLOM