

Gauger updated outline provided at MCLE seminar July 15, 2010

Federal Cases

- 2005 Federal cases (Burt & Tamburello) (we lost)
- Madden case of 2 grams (on CACJ website)
- 2006 Philipsborn/Burt (see CACJ) cross most SF lab error galore we lost)

2007 Domestic Violence

- October 2nd Arrest (police report - Felony 273.5 & 245(a)(1)) -bailed
- Nov. 15 report arrest to superiors
- Nov. 17 internal investigation starts

2008 Domestic Violence Trial

- February 11: San Mateo County Trial starts (we have full TX-- Mudge's testimony included in current discovery):
- February 19: James Mudge (SF Crime Lab Director) testifies as a character witness for Madden.
- Feb. 20: Conviction 273.5(a) & 594(B)(2) misdemeanors by jury

Domestic Violence Conviction

- May 9 Madden is sentenced.

Sentence:

- ISS/3 years formal probation/104 hours DV counseling/alcohol counseling/30 days CJ SWAP/fines and assessments/abstain from using alcohol/do not possess any alcohol/do not own or possess any firearms/participate in alcohol counseling rehab program as deemed appropriate by probation officer/protective order/ no firearms.

Discipline

- June 2: Chief of Police notifies Madden of disciplinary hearing by letter for July 8.

- July 8th hearing.
- 2 letters re suspension from July 22 for 60 days or 30 days; Madden acknowledges receipt.
- February notes in disciplinary file (closed 2-17) as to “Brady” “Brady implications” and “further Brady review.”
- Oct – date that Madden admits to using cocaine (per news article)

Issues Related to Lab

- September 2009: e-mail from Lois Woodworth to Greg Barge (misd manager) re complaints on Madden’s testimony
- Nov 19, 2009: DA supervisor notes that Madden is unreliable and failing to show to court
- Nov 23, 2009: other tech notices bin in disarray asks Madden, who denies (crime lab security informed of breach), Madden admits looking in sample bin later
- Nov. 24, 2009: Chief Asst DA sends letter to police about crime lab staffing shortage
- Nov 20, 2009: ASCALD report period (done but unsure of official release date?)
- Dec. 13, 2009: Madden says will miss court & work due to fender bender (Per sister’s call later that day: Madden has actually fallen off wagon and is in 30-day rehab)
- December 16, 2009: Madden’s sister finds vial of white, shiny powder in zip-lock bags. Provides to rehab facility where it is presumably destroyed.
- December 17, 2009: Lois Woodworth (SF lab supervisor) write memo of discovery to police risk management.
- “Later in December”: Woodworth begins internal audit (25 random samples: 7 had cocaine shortage 2 grams in one case)

Fallout - 2010

- March: Lab shut
- March 17: Russ Giuntini’s admission of Madden’s prior conviction in letter to PD and defense bar.

- March 18: DA Guintini's denial of PD request for more discovery due to pending investigation citing 1054.7PC
- March-April Drug DA Nancy Tung vacation & moved to DV
- Chief Guintini retires, criminal head Ross to head Gen lit, Sharon Woo to Chief Criminal Division, David Pfeifer to Chief Assistant, Rema Breall to head Narcotics Unit.
- July: Matt Gabriel quits DNA lab– DNA will be sent out (note there was an anonymous tip regarding DNA lab misconduct in hiding error, that SF reply to ASCALD referenced—they deny)

Litigation Summary

- March 12: Judge Haines denies DA continuances to retest
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- March 16? : Jim Senal get in-camera hearing in Massullo's court (4,000 docs) continuing Dept 25
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- March 19: Dismissals for NTW cases on the trial calendar (abt 750 dismissed) DA claims right to re-file
- March 25: Motion for discovery (Bilboa; now Tina Barfield is lead) (on CACJ website)
- May 17: Written discovery order, protective order , continuing discovery (DA no writ, but files scathing response to 995 in *Hernandez*; later dismissed) (Order on CACJ website, 995 response on CACJ's website)
- June: 170.1 filed (judge answered) judge to decide be appt'd by Judicial Council (Pleadings on CAJC website).
- July 29, Dept 25 discovery "On to set" (most pending cases dismiss (17 defendants left most habeas plea withdrawals)
- Motion to set aside PX
- Common-law motion to dismiss for discovery violation pre-prelim : *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265; *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586. Many wins here
- Where Madden tested (including PC 872.5 police hearsay & stipulations), or where a EC sec. 1280 official record form used at PX., 995s and non -tatutory 995s usually granted (reviewer cases?) Samples on CACJ website

- Chain of custody as to reviewer?
- Issue 115 of non madden (smith, case)
- Retests, presumptive tests used at prelims.

Motions to Withdraw Pleas (PC 1018)

- PD has added all drug cases within 6 months we have to review whether to withdraw/
- Placeholder (sample on CACJ website) allowed – file and then decide: check with client (withdraw?); add real exhibits, have hearing.
- These cases are in Judge Breall court Dept 23
- Conflict in July cases to Dept 29 & 19; but waive-able if disposition, no hrgs)
- Exhibits (common reference to PD exhibit when filed is allowed; & may incorporate by reference the standard law in PDs' cases)
- If proceeding to hearing: you need to refer to real exhibit filed in court (news accounts will be insufficient). You will need client and attorney declarations.
- Criminal Chef Sharon Woo originally agreed that the DQA would not raise foundational objections as to the discovery that they have given us. That is, not that it is true but that on the time and date noted the document reflects a report to the DA. ***Before going to hearing make sure this applies in your case, in at least one case where the DA was not informed he objected to the exhibits as hearsay and kept them out.
- Your client and or you may have to testify (DA does not have to accept these Declaration without cross examination) make sure you are prepared and have other counsel to help. The key to this motion is how specific this information is: why did your client take the deal, would this information have affected that decision? How? Why?
- Lose first motion to withdraw plea before Judge Bolanos: failure to show clear & convincing evidence that DA different jury verdict would have resulted! Abuse of discretion on review – wrong standard -- we may appeal.
 - Correct standard is did defendant show by clear & convincing evidence that the defendant's will was overcome (See PC 1018)

- Key cases:
 - *People v. Dena* (1972) 25 Cal. App. 3d 1001 (MTWP -Brady violation)
 - *People v. Ramirez* (2006) 141 Cal.App.4th 1501 (MTWP Brady)
 - *United States v. Ruiz* (2002) 536 U.S. 622. (bad: habeas not state MTWP)
 - A hypo on constitutionality of federal fast track plea system (it is)
 - Note: Thomas concurrence (8 others think there might be impeachment evidence that would affect the voluntariness of a plea—usually impeachment t i s a trial right
 - Constitutional *Brady* violation in a habeas (vs. statutory rules under 1018)

Pitchess and police misconduct – timeline & cases

- Reports of 80 to 130 police with priors (DUI lab Anne- Marie Gordon)
- Identities not discovered (DA claims not to have police officer Dates of Birth - negotiation with POA on release)
- 3 possible categories: 1) arrests & convictions (see Massullo’s and Haines’s orders); 2) DUIs and non-discoverable stuff; 3) *Brady* material in file (e.g. Officer Vargas) = “bradioactive”
- Recommendations: File own *Pitchess*; ask for DOB in motions and while officer on stand (at hrgs); ask for misconduct *Brady* on stand (at hrgs) within pleadings (*Pitchess*, Discovery).
- ***Brady & Pitchess***
 - Parallel schemes but if conflicting, then possible constitutional issue. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1 see fn 2 –open question; see also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39; *Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055 (post-conviction discovery : no *Pitchess* duty but *Brady* duty!).
 - *People v. Gutierrez* (2003) 112 Cal.App.4th 1463 (*Brady* narrower than *Pitchess*, scheme not unconst., no duty to review file every time for *Pitchess*)
 - ***Garden Grove Police Dept. v. Superior Court (Reiman)* (2001) 89 Cal.App.4th 430** (Def cannot end run *Pitchess* by asking DA to run CLETs as DOB is in personnel file!!!) Outlier case: See Masullo & Haines orders – limit this case as standing against defense strategem to circumvent *Pitchess*: DA has independent duty.

- A prosecutor cannot “purposely make himself ignorant of the details [of evidence impeaching the credibility of a prosecution expert] by taking a ‘see no evil or hear no evil’ approach.” *In re Brooke P. Halsey, Jr.* (Cal. State Bar Court, Hearing Dept. 02-O-10195-PEM, Aug. 1, 2006)