PERILS OF PUBLIC OFFICIALS AND EMPLOYEES: ETHICS LAW INVESTIGATION FROM START THROUGH APPEAL

Discovery Considerations and Concerns

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I. Ethics Commission Investigations

Many criminal investigations of public officials in Alabama begin with a complaint submitted to the Alabama Ethics Commission ("Commission"). Under the Alabama Ethics Act ("Act"), the Commission has the power to investigate complaints made regarding the conduct of individuals and entities subject to the Act.[1] *See* Ala. Code § 36-25-4. Complaints and investigations are given the same protections afforded to grand juries under Alabama's Grand Jury Secrecy Act, Ala. Code 12-16-214, *et seq. See* Ala. Code § 36-25-4(c).[2]

Prior to 2010, the Commission did not have subpoena power. As part of the larger overhaul to the Ethics Act in 2010, the Alabama Legislature granted subpoena power to the Commission. Now the Commission has the power to issue subpoenas for testimony and subpoenas duces tecum for documents. The subpoena power and procedure governing the Alabama Ethics Commission is located in Ala. Code 36-25-4(h), which provides:

> (h) **In the course of an investigation, the commission may subpoena witnesses and compel their attendance and may also require the production of books, papers, documents, and other evidence.** If any person fails to comply with any subpoena lawfully issued, or if any witness

[1] Individuals and entities subject to the Act's restrictions include public officials, public employees, their family members, businesses with which they are associated, lobbyists, and principals. *See* Ala. Code §§ 36-25-1, -5, -5.1, -7.

[2] Although seldom used, the Ethics Act also provides a procedure whereby the Commission itself may initiate a complaint. *See* Ala. Code § 36-25-4(d). In that scenario, a complaint may be initiated by a vote of four members of the commission, provided, however, that the commission shall not conduct the hearing, but rather the hearing is conducted by a panel of three judges appointed by the Chief Justice of the Alabama Supreme Court. Ala. Code § 36-25-4(d); *see also Ex parte E.J.M.*, 829 So. 2d 105, 109 (Ala. 2001) ("[C]omplaints initiated in-house by the Ethics Commission, which are governed by the strictures and safeguards of § 36-25-4(c) [now section 4(d)] mandat[e] referral to a three-judge panel.").

> refuses to produce evidence or to testify as to any matter relevant to the investigation, it shall be the duty of any court of competent jurisdiction or the judge thereof, upon the application of the director, to compel obedience upon penalty for contempt, as in the case of disobedience of a subpoena issued for such court or a refusal to testify therein. A subpoena may be issued only upon the vote of four members of the commission upon the express written request of the director. **The subpoena shall be subject to Rules 17.1, 17.2, 17.3, and 17.4 of the Alabama Rules of Criminal Procedure. The commission upon seeking issuance of the subpoena shall serve a notice to the recipient of the intent to serve such subpoena upon the expiration of 10 days from the service of the notice and the proposed subpoena shall be attached to the notice. Any person or entity served with a subpoena may serve an objection to the issuance of the subpoena within 10 days after service of the notice on the grounds set forth under Rule 17.3(c) of the Alabama Rules of Criminal Procedure, and in such event the subpoena shall not issue until an order to dismiss, modify, or issue the subpoena is entered by a state court of proper jurisdiction, the order to be entered within 30 days after making of the objection.** Any vote taken by the members of the commission relative to the issuance of a subpoena shall be protected by and subject to the restrictions relating to secrecy and nondisclosure of information, conversation, knowledge, or evidence of Sections 12-16-214 to 12-16-216, inclusive.

Ala. Code 36-25-4(h) (emphasis added). Pursuant to that section, the Commission must follow the following procedure before actually issuing a subpoena:

1. Issue a notice to the recipient of the intent to serve such subpoena.
2. The proposed subpoena shall be attached to the notice of the intent to serve the subpoena.
3. The person served with the subpoena has ten days to object.
4. If objection is made, "a state court of proper jurisdiction" (presumably, a circuit court in Montgomery County), has 30 days to rule on the objection.
5. If objection is made, the subpoena cannot be issued until the court orders the modification or issuance of the subpoena.

Defense counsel should be vigilant in ensuring that the Commission follows its statutorily-defined procedure for the issuance of subpoenas.

Unlike subpoenas in more complex cases in federal court, subpoenas from the Commission rarely (if ever) include specifications for how the requested materials are to be produced.

For many minor cases, the Commission itself has the power to administratively resolve the matter. *See* Ala. Code § 36-25-27(b). For more complex and high-profile cases, the Commission has the authority to refer the case to the District Attorney of the appropriate jurisdiction or the Attorney General's office. *See* Ala. Code §§ 36-25-4(i) and -27(c).

II. Special Grand Jury Investigations

Once a matter has been referred to the appropriate District Attorney or Attorney General, the Commission will generally await the outcome of law enforcement's investigation and/or prosecution before deciding whether to take action against the public official, conduct further investigation, or close the case without taking action. Ethics-related matters referred to the Attorney General's office currently are primarily handled by the Special Prosecutions Division under Alice Martin and Matt Hart. The primary method of post-Commission investigation is through the use of a special grand jury.

Like any grand jury, special grand juries convened by the Attorney General's office have the power to issue subpoenas for testimony and subpoenas duces tecum. As a threshold matter, counsel must be aware of the jurisdictional limitations of the special grand juries. Technically, a grand jury may only "inquire into" and only has "inquisitorial powers over all indictable offenses found to have been committed or to be triable within the county." Ala. R. Crim. P. 12.3(c)(2) and (d).

Like current subpoenas duces tecum from the Commission, subpoenas from the Attorney General's special grand juries may include little to no specifications as to the format in which the requested materials were to be produced. More recently, the Attorney General's grand jury and special grand jury subpoenas have begun requesting that not only hardcopy documents be produced but also any documents that were maintained in an electronic format. Still, there may be no specific direction provided as to how the documents are to be produced.

While this lack of instruction appears on its face to ease the burden on the individual or entity making the production, it will likely have a tremendous impact on the individual or entity under investigation. The Attorney General's office has indicated that the format in which it receives documents directly affects the manner in which the

State will produce these documents in post-indictment Rule 16.1 discovery. The Attorney General's office takes the position that any processing of these documents by the Attorney General's office (for example, making the text of the documents electronically searchable and loaded into a document review platform like Summation) is the work product of the Attorney General's office and not subject to disclosure or production to the defendant.

Therefore, if you are defending someone believed to be the subject of the investigation, you should talk to the investigator(s) and/or prosecutor(s) handling the case to discuss exactly what hardcopy or electronic specifications should be applied to your client's production of documents pursuant to the subpoena.

III. Post-Indictment Discovery

a. Substance of Discovery: Rule 16.1 and Brady

The prosecution's post-indictment discovery obligations include the obligations set forth in Ala. R. Crim. P. 16.1 in addition to the obligation to produce exculpatory and impeaching material pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, § 6 of the Constitution of the State of Alabama as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), *Kyles v. Whitley*, 514 U.S. 419 (1995), and their progeny.

Generally, Rule 16.1 requires the production, upon written request of the defendant, of the following: (1) statements of the defendant, co-defendants or accomplices; and (2) documents and tangible objects material to preparation of the defendant's defense. Defense counsel is advised to file a motion requesting this information, listing each category from Rule 16.1 separately in order to ensure the request is formally made in the record.

Brady v. Maryland requires the prosecution to disclose evidence favorable to an accused when such evidence is material to guilt of punishment. *Brady*, 373 U.S. at 87. Evidence favorable to the accused includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). The case of *Giglio v. United States*, 405 U.S. 150 (1972), "made plain . . . [that] [i]mpeachment evidence is Brady material prosecutors are obligated to disclose." *Connick v. Thompson*, 131 S.Ct. 1350, 1381 (2011). Any "distinction between impeachment evidence and exculpatory evidence" in the *Brady* context has been rejected. *United States v. Bagley*, 473 U.S. 667, 676 (1985). *Brady* mandates disclosure of all evidence that favors that defendant and is material to guilt or punishment. *Brady*, 373 U.S. at 87. Unfortunately, defense counsel's view of what is favorable or material is

frequently at odds with that of the Attorney General's office, hence there are often battles over the scope of the State's *Brady* production.

The Attorney General's office has taken a stance on its *Brady* obligations that is arguably incorrect. It has argued that pursuant to *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) the State's determination as to what material in its files is subject to disclosure under *Brady* is "final unless the defense brings to the Court's attention other evidence it believes should be produced as exculpatory." *State's Response to Motion for Production* at 2, *State of Alabama v. Michael G. Hubbard*, No. 43-CC-2014-000565 (Feb. 17, 2015). This position completely ignores another principle espoused in *Ritchie*, that the duty to disclose *Brady* material is ongoing. *Ritchie*, 480 U.S. at 60. Moreover, this position, as enunciated in *Ritchie*, is grounded on the situation where the defendant has made a general, rather than a specific, request for exculpatory evidence.

> In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final.

Ritchie, 480 U.S. at 59 (emphasis added). This passage from *Ritchie* emphasizes why a specific enumeration of requests pursuant to Rule 16.1 can be very important. Additionally, the *Ritchie* court recognized that, notwithstanding the finality of the State's decision as to the characterization of evidence as exculpatory when there is merely a general request for the production of *Brady* material, there remains an ongoing burden on the State to determine whether evidence in its possession is exculpatory.

As stated previously, in order to bolster defense counsel's position in these *Brady* fights, which most courts appear reluctant to resolve in favor of defendants, defense counsel are advised to make their requests for *Brady* information as specific as possible. In practice, this task is increasingly difficult due to the restrictions of Alabama's Grand Jury Secrecy Act,[3] making independent investigation by defense counsel all the more important. While defense counsel cannot ask a witness who appeared before the special grand jury what he or she testified to, counsel certainly can ask the witness fact-based questions that do not reference the special grand jury.

Another post-indictment discovery issue central to *Brady* is the production of transcripts of exculpatory testimony given by witnesses to the special grand jury. Taking

[3] *See* Ala. Code § 12-16-214 *et seq.*

an increasingly narrow view of what constitutes exculpatory testimony, the Attorney General's office has shown a reluctance to produce transcripts of exculpatory testimony before special grand juries. The most effective way to obtain the production of such testimony is by requesting that the transcripts of specific witnesses be produced *ex parte* and *in camera* to the trial judge for review. Once again, Alabama's Grand Jury Secrecy Act is the elephant in the room that complicates defense counsel's task of potentially knowing who testified before the grand jury and whether their testimony would have been exculpatory. Again, this makes defense counsel's independent investigation all the more important. And the sooner defense counsel undertakes that investigation, the better.

At least one Alabama court has followed the lead of other jurisdictions in undertaking an *in camera* review of grand jury transcripts, upon request of defense counsel, to ascertain the correctness of the State's *Brady* determinations. *See Order* at 2, *State v. Hubbard*, No. 43-CC-2014-000565 (July 10, 2015). Such relief, however, cannot always be expected.

In addition to being highly resistant to producing the grand jury transcripts themselves, the Attorney General's office has been even more unwilling to produce audio recordings of witness testimony before special grand juries, arguing that producing audio recordings in addition to transcripts would be "duplicative." *See Hubbard's Motion for Production of Audio and/or Video Recordings*, *State v. Hubbard*, No. 43-CC-2014-000565 (September 10, 2015). This argument is contrary to well-established precedent in other jurisdictions finding that audio recordings are not duplicative of transcripts, which "remove[] nuances of inflection which give words added meaning beyond that reproducible on paper." *Dismukes v. Dep't of Interior*, 603 F. Supp. 760, 762 (D.D.C. 1984). Alabama should follow the general rule that a written transcript is "sterile in comparison" to the actual live testimony of a witness and cannot reflect the "demeanor, body language, tone, and reactions of the live witnesses." *United States v. Lobsinger*, No. CR15-4024-MWB, 2015 WL 4647810, at *8 (N.D. Iowa Aug. 5, 2015) (citations to other authority omitted).

b. Form of Production

In addition to the numerous issues regarding the substance of the State's production, the form of the State's post-indictment production provides fertile grounds for disagreement. With the ever-increasing reliance on and use of electronically stored information ("ESI"), the form in which the prosecution produces documents is extremely important. This is especially true in larger-scale cases involving a large number of documents. The time and expense required to properly review and analyze a large-scale production can reach up to hundreds of hours and hundreds of thousands

of dollars, and the form in which the prosecution produces documents can be the difference in a review costing $10,000 versus $100,000.

Regardless of the form in which documents are produced to the State at the investigatory stage, the practice of the Attorney General's office appears to be producing documents to defendants in .pdf format,[4] rather than the documents' native formats.[5] This can lead to myriad issues in cases involving a large number of documents. The produced documents are usually not organized in any reasonable way, the text of the documents is not searchable, and the documents often have been re-named during the State's review and production process. All of these issues can typically be addressed through the production of a "load file," which is a file used to import data into a document review platform that provides additional underlying information about the documents (known as "metadata"). This metadata serves to assist in the review process by making documents easier to index and review, but it also provides defendants necessary information about who originally produced the document to the State, what native format it was produced in, what its original file name was, whether it was produced to the State in the same way the State produced it to the defendant, and whether any privilege is claimed. Production of load files is commonplace at the federal level, yet the Attorney General's office has refused to produce load files at the state level despite having the ability to do so. The State has taken the position that its process of making the electronic documents searchable is work product, making the resulting text-searchable documents not subject to production. With just a couple of computer clicks, the State can follow typical e-discovery practices and produce text-searchable documents, native files, and load files to ease the burden on the defendant. By not doing so, the State at the very least needlessly and unjustifiably creates additional expense for defendants. In the worst case, the State attempts to hide information from the defense.

Performing a "document dump" on defendants is tantamount to engaging in prosecutorial gamesmanship that raises significant *Brady* issues. A position previously relied upon by the Attorney General's office is that by producing to the defendant all of the documents that were produced to them, its *Brady* obligation has been fulfilled. In essence, the State's position is that its *Brady* obligation has been fulfilled because any potential exculpatory information is included somewhere in the entirety of its massive production. Courts, however, have identified circumstances in which the government's voluminous production might actually violate its *Brady* obligations.

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[4] ".pdf" stands for Portable Document Format. It is a file format that has captured all the elements of a printed document as an electronic image.

[5] "Native format" is the format of an electronic document as defined by the application that originally creates it, such as a ".doc" created in Microsoft Word, or ".ppt" created in Microsoft PowerPoint.

> The Supreme Court long ago recognized that one of the overriding objectives of the rules of discovery was to make a trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." More recently, the Court has invoked the games of "gambling," "hide and seek," and "scavenger hunts" to characterize the perverse conduct of prosecutors in seeking to avoid their responsibilities under *Brady*. Indeed, there is probably no better context in which to examine prosecutorial gamesmanship than in connection with the *Brady* rule.

Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531, 538 (2007) (footnotes omitted); *see also United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.D.C. 1998) ("The Government cannot meet its *Brady* obligations by providing . . . 600,000 documents and then claiming that [the defendant] should have been able to find the exculpatory information . . . .").

In *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009) *aff'd in part, vacated in part on other grounds, remanded*, 561 U.S. 358 (2010), the Court noted: "We do not hold that the use of a voluminous open file can never violate *Brady*." There the Court found no *Brady* violation because "the government did much more than drop several hundred million pages on Skilling's doorstep. The open file was electronic and searchable. The government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to Skilling's defense. The government created indices to these and other documents. The government also provided Skilling with access to various databases concerning prior Enron litigation." *Skilling*, 554 F.3d at 577; *see also United States v. Vujanic*, No. 3:09-CR-249-D (17), 2014 WL 3868448, at *1 (N.D. Tex. Aug. 6, 2014) ("The panel noted that '[t]here is no evidence that the government found something exculpatory but hid it in the open file with the hope that [the defendant] would never find it.'"); *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010) ("Here, the government did not engage in any conduct indicating that it performed its *Brady* obligations in bad faith. First, there is no proof that the government larded its production with entirely irrelevant documents. Furthermore, it cannot be said that the government made access to the documents *unduly* onerous.").

IV. Conclusion

Discovery in cases involving public officials has been a recent hotbed for disagreement among defense counsel and prosecutors. With the ever-evolving area of e-discovery playing an integral role in this discovery process, defense counsel must be cognizant of producing electronic documents in an organized an efficient manner to

alleviate potential issues with the form of production back from prosecutors. Additionally, as with discovery in all criminal cases, prosecutors in Ethics cases must be strictly held to their constitutionally-mandated obligations under *Brady v. Maryland.*