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John F. Hollway
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Governor Edmund G. Brown, Jr.
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Dear Governor Brown:

The Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School writes this letter in support of proposed legislation AB 1909, "Falsifying Evidence," which would provide an important measure of accountability for egregious cases of intentional and bad faith withholding of evidence in criminal cases by prosecutors in California. Importantly, this accountability is already the law for police officers; AB 1909 merely extends the same standards of professional responsibility to prosecutors.

The Quattrone Center is a non-partisan research and policy center dedicated to the prevention of errors in the criminal justice system. We take an interdisciplinary, data-driven "systems approach" to implement quality improvement, quality assurance, and safety principles in collaboration with prosecutors, defense attorneys and other criminal justice professionals. While our research includes all aspects of the criminal justice system, we have a particular focus on the prosecutorial role.

AB 1909 will provide a measured and careful standard of accountability for the most egregious cases of prosecutorial misconduct for which deterrence is the primary means of prevention. It will help to prevent cases of misconduct that tarnish the reputations of honest, hardworking prosecutors throughout the state and do lasting damage to the legitimacy of California's criminal justice system in the eyes of its citizens.
The legislation provides that:

> A prosecuting attorney who <u>intentionally and in bad faith</u> alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, <u>knowing that it is relevant and material to the outcome of the case</u>, <u>with the specific intent</u> that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is

guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

(emphasis added).

AB 1909 would address intentional and unconstitutional withholding of exculpatory evidence by prosecutors, in violation of the U.S. Supreme Court's ruling in Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Such misconduct is a substantial problem in California and nationwide and generates substantial political and economic cost. U.S. Ninth Circuit Court of Appeals Judge Alex Kozinski has written of an "epidemic of Brady violations,"[1] and such violations led to the exoneration and release of 45 wrongly convicted individuals in California between 1989 and 2012, at a direct cost to taxpayers of forty-four million dollars ($44,000,000) in incarceration, compensation, and appeals costs.[2]

The problem of prosecutorial misconduct in violation of Brady persists despite universal awareness of Brady, a rule that has existed for over 50 years. One reason for the persistence of the problem is an almost total lack of accountability for even intentional withholding of material exculpatory information. Although the behaviors proscribed by AB 1909 already violate constitutional norms and state ethics rules, prosecutors acting in their prosecutorial role have absolute immunity from civil liability, and bar associations across the country, including California, almost never act on ethics complaints regarding Brady.[3][4] Thus, even in situations where the withholding of evidence is deliberate, accountability is lacking, with predictable damage to defendants, taxpayers, and the legitimacy of the system as a whole. As Judge Kozinski wrote: "When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven . . . we endorse and invite their repetition."[5]

AB 1909 is a measured response, limited to only the subset of cases where the prosecutor's misconduct is egregious enough that a colorable claim of intentional bad faith can be brought. Accordingly, it can be expected that such cases will be few and far

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[1] U.S. v. Olsen, Dec 10, 2013 (Kozinski, J., dissenting), available online at http://legaltimes.typepad.com/files/usca9-brady.pdf.

[2] Silbert, R. and Hollway, J., "Criminal (In)justice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System," Berkeley Law, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741863, at 29.

[3] There were 4741 public disciplinary actions reported in the *California State Bar Journal* between 1997 and 2009, only six (6) involved prosecutors' actions in a criminal case. Ridolfi, K., "Preventable Error: A Report on Prosecutorial Misconduct in California, 1997-2009," available online at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs.

[4] California has not adopted ABA Model Rule of Professional Conduct 3.8(g) or (h), which articulate the obligation to turn over exculpatory evidence as an ethical obligation; accordingly, the CA State Bar has less authority to address intentional, bad faith violations of the Brady rule.

[5] U.S. v. Olsen, *supra* note 1, at 15.

between.[6] By discouraging intentional misconduct, AB 1909 will also serve the interests of the many honest, ethical prosecutors throughout the state who comply with their Brady obligations, but who are nonetheless tarnished when high-profile cases of prosecutorial misconduct are brought to public light.

While enforcement of AB 1909 will certainly have some cost, the cost will likely be quite low. First, language identical to AB 1909 has existed for police officers since 2000 without any substantial cost implications for Californians.[7] No data suggest that criminal cases brought against police under this section of the Penal Code have added material expense, and by analogy it seems reasonable to expect that AB 1909 will not create substantial increases in workload for any District Attorney's Office or the Attorney General.[8] Second, any costs incurred by the bill would have to be balanced against the $44 million price tag caused by just that subset of Brady violations that are known to have occurred in California in recent years, costs that might have been avoided had this legislation been available to exert a deterrent effect.

By extending a statute that sets out appropriately limited and well-defined accountability for only the most egregious, intentional, bad-faith manipulations of evidence by prosecutors, AB 1909 takes an important – and importantly prudent – step to deterring prosecutorial conduct that has caused great injury to Californians, at a substantial cost. We strongly urge its passage.

Respectfully yours,

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[6] For example, it appears that only some of the 45 cases in the 23 years between 1989 and 2012 in which a Brady violation led to the exoneration of a convict in California were the result of "intentional and bad faith" withholding of evidence; thus, we can expect less than 2 cases per year to be brought under AB 1909 as written.

[7] California Penal Code § 141.

[8] The assertion of the Attorney General's Office that "[a] new unit will need to be created within the Criminal Law Division in order to avoid conflicts of interest" does not necessarily imply substantial cost; such a "unit" could consist of as little as a single attorney who is deployed on other cases except when a charge is brought under AB 1909.