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ADVISORY OPINION NO. 2022-03

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Ethics Commission Duties / Investigations /
Discovery / Exculpatory Information / Grand
Jury Secrecy

The Ethics Commission is not required or permitted to disclose exculpatory information or Brady material to respondents of complaints filed with the Ethics Commission.

The Office of the Attorney General of Alabama has written this office to convey their conclusion that the Commission is legally obligated to produce exculpatory information, as well as impeachment evidence, to all respondents with cases before the Commission. The statutes and Administrative Rules governing the Commission, however, require that all materials filed with the Commission or discovered during an investigation be kept confidential pursuant to Alabama's Grand Jury laws.

In light of the nature of evidence in cases before the Commission, the differing opinions that prosecutors have with the respect to what evidence may or may not be exculpatory or impeaching evidence subject to the Brady rule, and whether Brady material is required to be produced pre-grand jury by an accusatory body, it is necessary that the Commission fulfill its statutory obligation to interpret the Ethics Act and Administrative Rules governing the production obligations of the Commission pursuant to Ala. Code § 36-25-4(a)(9).¹

¹ “[The Attorney General’s] Office does not render opinions regarding the Alabama Ethics Law.” Ala. Op. Atty.

In response to the conclusion drawn by the Attorney General, the Commission must determine whether the Ethics Act and Administrative Rules require the production of Brady material considering the function the Commission serves as a pre-grand jury accusatory body that does not have the authority to determine guilt or deprive any person of life, liberty or property.

If there is such a requirement, the Commission must determine whether to require an open-file system of discovery, which conflicts with the statutory mandate that our investigations be protected from disclosure except as provided for in Ala. R. Crim Pro 16.1, or make a determination on a case-by-case basis and specifically direct the staff to disclose Brady material in the same way that Circuit Judges in Alabama may.

The Commission finds itself in the position of having to resolve the statutory mandates that “the laws of due process shall apply [in all matters that come before the Commission]” and that “a complaint...together with any statement, evidence, or information received from the complainant, witnesses, or other persons shall be protected by and subject to the same restrictions relating to secrecy and nondisclosure of information, conversation, knowledge, or evidence of Sections 12-16-214 to 12-16-216” and issues this opinion to provide such guidance.²

FACTS

All complaints, statements, evidence, or other information that the Ethics Commission receives, and any investigatory activities conducted by the Commission’s staff are protected by Grand Jury Secrecy, and such restrictions shall also apply to all information and evidence supplied to the Attorney General or district attorney.³ The disclosure of any such information, except as necessary to permit the sharing of information and evidence with the Attorney General or a district attorney, constitutes a Class C felony. The only exception to this prohibition against disclosure is the requirement that the Commission provide discovery to respondents pursuant to the Alabama Rules of Criminal Procedure.⁴

The Rules of Criminal Procedure permit defendants to inspect and copy any written or recorded statement made by the defendant or any co-defendant or accomplice, and it requires the prosecutor to disclose the substance of any oral statements made by the defendant to any law enforcement officer, official, or employee which the state intends to offer in evidence at trial.⁵ The

Gen. No. 2022-007 (Ala.A.G.).

² Ala. Code §§ 36-25-4(c) & (f).

³ Ala. Code § 36-25-4(c).

⁴ Ala. Code § 36-25-4(f).

⁵ Ala. R. Crim. P. 16.1(a), (b).

Rules of Criminal Procedure require the prosecutor to permit the defendant to analyze, inspect, and copy or photograph books, papers, documents, photographs, tangible objects, controlled substances, buildings or places, or portions of any of these things, which are within the possession, custody, or control of the state/municipality and (1) which are material to the preparation of the defendant's defense (excluding certain items and statements made by prospective state witnesses), (2) which are intended for use by the state as evidence at trial, or (3) which were obtained from or belong to the defendant.⁶ The Rules of Criminal Procedure also require the prosecutor to disclose any results or reports of physical or mental examinations, tests, or experiments.⁷ Rule 16.1(e) excludes the discovery of reports, memoranda, witness lists, or other internal state documents made by the prosecutor or the prosecutor's agents, or by law enforcement agents, in connection with the investigation or prosecution of the case, or of witness statements.⁸ Rule 16.1(f) states: "Nothing in this Rule 16.1 shall be construed to limit the discovery of exculpatory material or other material to which a defendant is entitled under constitutional provisions or other provisions of law."⁹

While Rule 16.1(f) does not limit the discovery of exculpatory material to which a defendant is entitled under constitutional provisions or other provisions of law, Rule 16.1 does not compel the production of exculpatory material if the defendant is not entitled to the exculpatory material under constitutional provisions or other provisions of law.

Therefore, since the investigations conducted by the Ethics Commission are subject to Grand Jury Secrecy, the Commission may only produce exculpatory material, which is not otherwise required to be produced under Rule 16.1(a-d), if the constitutional provisions that provide defendants with a right to exculpatory material are applicable to respondents of an investigation into a complaint filed with the Ethics Commission or if there are other provisions of law that entitle respondents to such exculpatory material.

QUESTION PRESENTED

Is the Ethics Commission staff required to disclose exculpatory information and impeachment evidence (Brady material) to respondents who have had complaints filed against them alleging a violation of the Ethics Act or the Fair Campaign Practices Act?

ANALYSIS

⁶ Ala. R. Crim. P. 16.1(c).

⁷ Ala. R. Crim. P. 16.1(d).

⁸ Ala. R. Crim. P. 16.1(e).

⁹ Ala. R. Crim. P. 16.1(f).

When an investigation into a complaint filed with the Ethics Commission is commenced, the Alabama Rules of Criminal Procedure as applicable to the grand jury process apply and remain in effect until the complaint is dismissed or disposed of in some other manner, and in all matters that come before the Commission concerning a complaint on an individual, the laws of due process shall apply.¹⁰

The “laws of due process” are not defined. However, Section 6 of the Alabama Constitution provides the following rights of persons in all criminal prosecutions:

1. To be heard by himself and counsel;
2. To demand the nature and cause of the accusation and to have a copy thereof;
3. To be confronted by the witnesses against him;
4. To have compulsory process for obtaining witnesses in his favor;
5. To testify in all cases, in his own behalf if he elects to do so;
6. And, in all prosecutions by indictment, a speedy, public trial by an impartial jury
7. He shall not be compelled to give evidence against himself
8. He shall not be deprived of life, liberty, or property except by due process of law.¹¹

Ala. Admin. Code r 340-X-1-.01, Policy for The Handling of Cases Being Presented To The Alabama Ethics Commission, addresses several of the rights outlined in Section 6 of the Constitution of Alabama and specifically limits the right to be confronted by witnesses, the right to compel witnesses, and the right to a public trial or hearing.

Prior to any hearing before the Ethics Commission, the respondent shall be given written notice that a complaint has been filed, a summary of the charges, an opportunity to testify, and the right to be represented by retained legal counsel.¹² Neither the complaint nor the identity of the complainant is provided or required to be provided as they are protected by grand jury secrecy.¹³ The respondent shall be given an opportunity to testify but may not be compelled to do so.¹⁴ There is no right of cross-examination of witnesses by either the complainant or respondent.¹⁵ During the presentation of the complaint’s case, neither the respondent nor their attorney may be present in the hearing room.¹⁶ “The rules of evidence shall not be strictly applied, and hearsay testimony or evidence may be considered by the Commission.”¹⁷ The respondent does not have a right to

¹⁰ Ala. Code § 36-25-4(d).

¹¹ Ala. Const. Art. I, § 6.

¹² Ala. Admin. Code r 340-X-1-.01(1).

¹³ Ala. Code § 36-25-4(c)

¹⁴ Ala. Admin. Code r 340-X-1-.01(5)(c).

¹⁵ Ala. Admin. Code r 340-X-1-.01(5)(a).

¹⁶ Ala. Admin. Code r 340-X-1-.01(5)(b).

¹⁷ Ala. Admin. Code r 340-X-1-.01(4)(b).

compel witnesses.

“No person shall be deprived of life, liberty, or property without due process of law.”¹⁸ The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires the state to provide defendants with exculpatory material in its possession for a defendant to receive a fair trial.¹⁹ The US Supreme Court established in Brady v. Maryland “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”²⁰ In U.S. v Bagley the Supreme Court extended the Brady rule to include impeachment evidence as well as exculpatory evidence.²¹

Such evidence is “evidence favorable to an accused,” Brady, 373 U.S., at 87, 83 S.Ct., at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) (“The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend”).²²

Bagley held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of Blackmun, J.); id., at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment).²³

To determine what constitutional due process rights apply to the proceedings before the Commission, it is necessary to consider the function of the Commission. The Ethics Commission has no independent authority to prosecute any violations of the Ethics Act.²⁴ “After receiving or initiating a complaint, the Commission has 180 days to determine whether probable cause exists.”²⁵ After a finding of probable cause by the Commission, “the case and the commission’s findings shall be forwarded to the district attorney for the jurisdiction in which the alleged acts occurred or to the Attorney General. The case, along with the commission’s findings, shall be

¹⁸ U.S. Const. amend. V.

¹⁹ See Brady v. Maryland, 373 U.S. 83 (1963).

²⁰ Brady at 87.

²¹ United States v. Bagley, 473 U.S. 667 (1985).

²² Id. at 676.

²³ Kyles v. Whitley, 514 U.S. 419, 433–34 (1995).

²⁴ Allen v. State, 380 So.2d 313 (Ala.Crim.App.1979), writ denied 380 So.2d 341, certiorari denied 101 S.Ct. 121, 449 U.S. 842, 66 L.Ed.2d 49.

²⁵ Ala. Code § 36-25-4(i).

referred for appropriate legal action.”²⁶ The Commission’s finding of probable cause does not toll the statute of limitations or restrict the prosecuting authority from taking any action or no action at all.

Section 6 of the Constitution of Alabama of 1901 “deal[s] specifically with criminal prosecutions in which a person has been accused of a crime and will be deprived of life, liberty, or property if found guilty.”²⁷ The Ethics Commission does not adjudicate guilt and has no authority to sentence or punish any respondent. The formal vote taken by the Commission regarding any referral states as follows:

Based on the evidence as presented to this Commission, there **exists cause** to hold that **RESPONDENT**, has violated the Alabama Ethics Act. I further move that this case be **referred for review** and appropriate legal action to:

1. The **District Attorney** of the appropriate Judicial Circuit.
2. The **Attorney General** of the State of Alabama. _____

There are no writs issued based on a probable cause finding by the Commission, and no one is deprived of life, liberty, or property based on the referral for appropriate legal action to a district attorney or the Attorney General.

A district attorney or the Attorney General may prosecute a person for violating the ethics law without the commission first investigating the matter, and a prosecution may be initiated even if the Commission finds no probable cause. So, a probable cause hearing with due process protection is not a prerequisite to prosecution.²⁸

In Gibbons v. State of Alabama Ethics Commission, the Respondent appealed a probable cause finding by the Commission to the circuit court. The circuit court dismissed the petition, and the Respondent appealed to the Court of Criminal Appeals. The Court of Criminal Appeals found that the circuit court had no jurisdiction to consider the petition: “[b]ecause the Commission's probable-cause determination was not a final decision in a contested case, the circuit court had no jurisdiction to review the determination, and its judgment of dismissal was a void judgment.”²⁹ Gibbons provided the following description of the role of the Ethics Commission and its similarity to a grand jury:

²⁶ Id.

²⁷ R.O. v. Pike County Dept. of Human Resources, 578 So.2d 1312, 1313 (Ala.Civ.App. 1990).

²⁸ Hunt v. Anderson, 794 F.Supp. 1557 (M.D.Ala.1992), affirmed 976 F.2d 744.

²⁹ Gibbons v. State Ethics Com’n, 827 So. 2d 801, 804 (Ala.Civ.App. 2001).

A probable-cause determination by the Commission is a preliminary finding; it does not finally adjudicate a party's "legal rights, duties, or privileges." As the federal district court for the Middle District of Alabama observed, "[T]he State Ethics Commission does not perform an adjudicatory function." Hunt v. Anderson, 794 F.Supp. 1557, 1565 (M.D.Ala.1992). Instead, the Commission performs an investigatory function, much like a grand jury. See United States v. Powell, 379 U.S. 48, 57, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) (stating that an administrative agency's "investigative function, in searching out violations with a view to securing enforcement of [its enabling] Act, is essentially the same as [a] grand jury's"). See also § 36-25-4(b), Ala.Code 1975 (mandating that proceedings before the Commission be subject to the "secrecy and nondisclosure" requirements of §§ 12-16-214 to 12-16-216, inclusive, relating to grand jury proceedings). "[A] grand jury sits not to determine guilt or innocence, but to assess whether there is an adequate basis for bringing a criminal charge." Ex parte Gonzalez, 686 So.2d 204, 206 (Ala.1996).³⁰

"The grand jury is an institution separate from the courts, over whose functioning the courts do not preside." United States v. Williams, 504 U.S. 36, 46, 112 S.Ct. 1735, 1742, 118 L.Ed.2d 352 (1992). Rather, it serves as a kind of buffer between the government and the people. Williams. In Williams, the issue was whether a federal district court could dismiss an otherwise valid indictment because the Government had failed to disclose to the grand jury substantial exculpatory evidence in its possession. The Supreme Court held that requiring the prosecutor to present such exculpatory evidence would turn the grand jury, which has always been an accusatory body that sits to assess whether there is an adequate basis to bring an indictment, into an adjudicatory body sitting to determine guilt or innocence.³¹

In Hunt v. Anderson, the Court determined that the way in which the Ethics Commission conducted itself in the investigation, the Commission was "sufficiently 'accusatory' in nature to require some form of due process under the Jenkins decision, in addition to the due process being required by the Ethics Law itself."³² The Jenkins decision referenced was simply a determination of whether a Plaintiff had standing to challenge the constitutionality of a state Commission, not whether the Plaintiff should have been afforded procedural due process and was not. Jenkins states:

We do not mean to say that this same analysis applies to every body which has an accusatory function. The grand jury, for example, need not provide all the procedural guarantees alleged by appellant to be applicable to the [Louisiana Labor-

³⁰ Id. at 803.

³¹ Ex parte Gonzalez, 686 So. 2d 204, 206 (Ala. 1996)

³² Hunt at 1566.

Management Commission of Inquiry]. As this Court noted in Hannah, ‘the grand jury merely investigates and reports. It does not try.’ 363 U.S., at 449, 80 S.Ct., at 1518. Moreover, ‘(t)he functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history.’ Id., at 489—490, 80 S.Ct. at 1544 (Frankfurter, J., concurring in the result). Finally the grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court. See Stirone v. United States, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960); Ex parte Bain, 121 U.S. 1, 11, 7 S.Ct. 781, 786, 30 L.Ed. 849 (1887); Hannah v. Larche, supra, 363 U.S., at 497—499, 80 S.Ct., at 1547—1548 (dissenting opinion). Investigative bodies such as the Commission have no claim to specific constitutional sanction. In addition, the alleged function of the Commission is to make specific findings of guilt, not merely to investigate and recommend. Finally, it is clear from the Act and from the allegations of the complaint that the Commission is in no sense an ‘independent’ body of citizens. Rather, its members serve at the pleasure of the Governor, La.Rev.Stat. Ann. s 23:880.1 (Supp.1969), and it cannot act in the absence of a ‘referral’ from the Governor, La.Rev.Stat. Ann. ss 23:880.5, 23:880.6 A (Supp.1969).³³

Unlike the Louisiana Labor-Management Commission of Inquiry at issue in Jenkins, the Ethics Commission merely refers a complaint for appropriate legal action by a prosecutor, it does not make a specific finding of guilt. The Commission members do not serve at the pleasure of any public official. Rather, they are appointed by the Governor, Lieutenant Governor, and the Speaker of the House and confirmed by the Senate, but thereafter they act independently of any public official or legislative body as a member of an executive branch agency.

Hunt was decided in 1992. In 1995, the Legislature enacted the grand jury protection provision as a well as the obligation of the Commission to comply with discovery requirements in ARCrP 16.1. Additionally, in 1998, the Commission adopted Administrative Rules for the Commission. Ala. Admin. Code r. 340-X-1-.01 specifically restricts any cross-examination of witnesses and does not permit the Respondent to be present for any testimony or introduction of evidence. Further, it permits the use of hearsay evidence and does not require the testimony of any fact witness for the Commission to find probable cause. Consequently, the analysis in the Hunt decision does not address the grand jury secrecy protections passed by the Legislature or the limitations to procedural due process resulting from the adoption of Ala. Admin. Code r. 340-X-1-.01 after its release. Therefore, its utility in evaluating the due process rights required for respondents before the Commission is limited.

There is no right to discovery at a preliminary hearing or a presentation to a grand jury

³³ Jenkins v. McKeithen, 395 U.S. 411, 430-431 (1969).

determining probable cause.³⁴ The foundation for the Brady rule is for the accused to receive a fair trial at the adjudicatory phase of the criminal justice process. At the adjudicatory phase, the jury is the trier of fact, and the judge is the trier of law. In circumstances where there is a question whether evidence is exculpatory, the judge reviews that evidence *in camera*, or in chambers, and determines whether the evidence is material and exculpatory and therefore subject to being produced as Brady material.

There is no tribunal or independent arbiter to make a similar determination in a hearing before the Ethics Commission because it is not an adjudicatory hearing. The Commission hearing is not a trial, and there is no finding of guilt or innocence. There is no cross-examination at a Commission hearing by anyone other than Commission staff or commissioners. There is no opportunity for a respondent to use impeachment evidence to test the credibility of a witness because there is no right to cross-examine any witness or requirement that any fact witness testify for the Commission to find probable cause. The intent of the Brady rule and its progeny is to allow the accused the opportunity to present the factfinder with information that may change the outcome of a trial in their favor. For their consideration at a hearing, the Commission is presented with all material information gathered by the investigator. Therefore, the Commission, who is the factfinder, has all exculpatory and impeaching information upon which to base their decision about whether there is probable cause to believe a violation has occurred, and the intent of the Brady rule is satisfied.

The effect of the application of the Brady rule to a pre-grand jury proceeding would ignore the grand jury protection provided by the Ethics Act. Kyles established that regardless of whether there is a request, the state is obligated to disclose Brady material to the accused.³⁵ The Commission investigates every complaint that contains credible and verifiable information that a violation may have occurred if the facts as set out are true.³⁶ Many of the cases that are investigated are recommended by the agent to be closed based on a lack of probable cause. However, there is no way to know the result of an investigation until it is concluded, and the Commission reviews the evidence. Were the Brady rule to be followed without exception by the Commission, the disclosure of exculpatory information, primarily witness statements, including their identities, would be required for all cases, regardless of the anticipated outcome of the hearing. This requirement would be unnecessary in many cases where the respondent would not realistically be subject to being referred and may never know an investigation was undertaken because the complaint was dismissed.

³⁴ See Williams, United States v. Williams, 504 U.S. 36 (1992); See also Dees v. State, 2021 WL 4704767 (Ala.Crim.App. 2021) (holding that the defendant was not entitled to mandamus relief on her claim that the district court was required to order the State to provide her with discovery at the preliminary-hearing stage, and the circuit court erred by failing to order the district court to provide the requested discovery).

³⁵ Kyles v. Whitley, 514 U.S. 419, 433 (1995).

³⁶ Ala. Code § 36-25-4(i).

There is no statute or administrative rule requiring the disclosure of Brady material that exceeds the production permitted under Rule 16.1 pertaining to hearings or investigations conducted by the Ethics Commission. Additionally, while the applicable Administrative Rule restates the requirement for the Commission to provide discovery, it does not provide a requirement for the production of exculpatory information. Instead, the Administrative Rule specifies that the substance of any statements made by prospective witnesses are not discoverable, and it does not provide an exception for exculpatory information or Brady material.³⁷

While the Legislature articulated that the “laws of due process shall apply” to hearings before the Ethics Commission, they also specifically exclude due process rights provided in Section 6 of the Alabama Constitution, including the right to confront and compel witnesses. The Legislature and the Commission each addressed due process rights in 1995 and 1998, respectively, and did not provide a right to exculpatory material. Instead, the Legislature implemented grand jury protections to complaints and investigations conducted by the Commission, and the Commission specifically restricted discovery by stating: “[t]he respondent shall not be entitled to...the substance of any statements made by prospective witnesses.”³⁸ Therefore, the Commission cannot assume the right to exculpatory evidence by a respondent is implied by the provision that the “laws of due process shall apply” because Section 6 of the Constitution of Alabama of 1901 does not apply outside of criminal prosecutions that will deprive the accused of life, liberty, or property if found guilty.³⁹

It is the prosecuting authority’s responsibility to comply with Brady, not the investigating authority. While the Ethics Commission has some function beyond mere investigations by determining whether probable cause exists to believe that a violation has occurred, the Ethics Commission does not act as a prosecutorial authority. District Attorneys around the state and the Attorney General garner their authority from the Constitution of the state of Alabama. As Constitutional officers of the court, they have the duty to comply with Brady in the exercise of that Constitutional authority. Nothing in the statutory body that created the Ethics Commission divests or supersedes the authority of any District Attorney or the Attorney General. Therefore, the proper authority with the discretion and duty to assess and disclose what information might be exculpatory is the District Attorney or the Attorney General rather than this Commission.

Further, the Commission is not a court of competent jurisdiction that has been given the legal authority to order grand jury protected information and evidence to be released to a respondent and cannot assume that role even in the interest of disclosure or fairness. Therefore,

³⁷ Ala. Admin. Code r 340-X-1-.01(3): Discovery. The commission shall provide discovery to the respondent pursuant to the Alabama Rules of Criminal Procedure.

(a) The respondent shall not be entitled to the commission’s investigatory report, memoranda, witness lists, or other internal documents made by any employee or agent of the Ethics Commission in connection with the investigation of the case or the substance of any statements made by prospective witnesses.

³⁸ Ala. Admin. Code r 340-X-1-.01(3)(a).

³⁹ R.O. at 1313.

absent a specific statute or rule requiring the disclosure of Brady material, the Commission must abide by the grand jury protections provided in the Ethics Act to the complaint, statements, evidence, or information received during an investigation, and Brady material is not required or permitted to be produced to a respondent who is the subject of an investigation by the Commission.

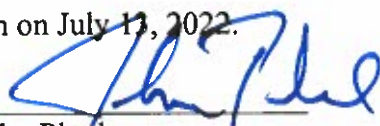
Therefore, unless exculpatory information falls within one of the categories of discoverable information provided within Rule 16.1(a-d), the Commission is not required or permitted to disclose exculpatory information or Brady material to respondents of complaints filed with the Ethics Commission. If the Commission finds probable cause at a hearing, all of the investigative materials are forwarded to the Attorney General or the district attorney for their review. As is the case in every criminal prosecution, the prosecutor will be responsible for disclosing any exculpatory or Brady material at the adjudicatory phase or trial of the accused.

CONCLUSION

The Ethics Commission is not required or permitted to disclose exculpatory information or Brady material to respondents of complaints filed with the Ethics Commission.⁴⁰

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on July 13, 2022.



John Plunk
Chair
Alabama Ethics Commission

⁴⁰ The effect of this Advisory Opinion is prospective only, and the questions raised herein have not been addressed previously either by the Commission or a court of law. For that reason, this Opinion should not be read to criminalize conduct that occurred prior to its effective date.