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SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 STEPHEN TILLOTSON,

12 Plaintiff,

13 vs.

14 BONNIE DUMANIS, individually and in her  
15 official capacity as District Attorney for the  
16 County of San Diego, COUNTY OF SAN  
17 DIEGO, a municipal corporation,

18 Defendants.

CASE NO. 10CV1343 WQH (AJB)

**ORDER**

19 HAYES, Judge:

20 The matter before the Court is the Motion to Dismiss the First Amended Complaint  
21 filed by Defendants. (ECF No. 13).

22 **BACKGROUND**

23 On June 25, 2010, Plaintiff Stephen Tillotson filed a Complaint (ECF No. 1) and on  
24 August 9, 2010, Plaintiff filed a First Amended Complaint ("FAC"). (ECF No. 10). The  
25 FAC names Bonnie Dumanis, individually and in her official capacity, and the County of  
26 San Diego as Defendants. *Id.* at 1. The FAC alleges that Defendants violated Plaintiff's  
27 Constitutional rights pursuant to 42 U.S.C. § 1983 by creating, maintaining, and placing  
28 Plaintiff on the San Diego County *Brady*<sup>1</sup> Index.

<sup>1</sup> *Maryland v. Brady*, 373 U.S. 83 (1963).

1 On August 23, 2010, Defendants filed a Motion to Dismiss pursuant to Rule  
2 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 13). On September 20, 2010,  
3 Plaintiff filed an Opposition to the Motion to Dismiss. (ECF No. 14). On September 27,  
4 2010, Defendants filed a Reply. (ECF No. 15).

### 5 ALLEGATIONS OF THE COMPLAINT

6 Plaintiff alleges that “Defendants have administratively created, and maintained a  
7 *Brady* Index File Review Policy.” (ECF No. 1 at ¶ 15). Plaintiff alleges that “Defendants  
8 are under no legal mandate to create or maintain a formal *Brady* list or index.” *Id.* at ¶ 16.  
9 “Defendants’ *Brady* Index File Review Protocol is an official policy, regulation, or custom  
10 formally adopted by the County of San Diego.” *Id.* at 7 ¶ 37.

11 Plaintiff alleges that in 1993, Plaintiff graduated from the San Diego Police  
12 Academy. *Id.* at 3, ¶ 8. Plaintiff alleges that in 1994, Plaintiff was hired as a Deputy  
13 Sheriff by the San Diego County Sheriff’s Department. *Id.* at ¶ 9. Plaintiff alleges that in  
14 December 1998, “Plaintiff’s employment was terminated with the San Diego County  
15 Sheriff’s Department after Plaintiff admitted to being dishonest about a firearm  
16 qualification.” *Id.* at ¶ 10. Plaintiff alleges that in June 2000, Plaintiff was hired by the  
17 Sycuan Tribal Police Department after disclosing the prior incident of dishonesty. *Id.* at ¶  
18 11. Plaintiff alleges that in 2006, the Sycuan Tribal Police was recognized as a federal law  
19 enforcement authority by the U.S. Bureau of Indian Affairs. *Id.* at ¶ 12.

20 Plaintiff alleges that in 2006 and 2007, Plaintiff applied for a commission with the  
21 U.S. Bureau of Indian Affairs. *Id.* at 4 ¶ 13. Plaintiff alleges that his “commission was  
22 delayed for over a year while the Chief of the Sycuan Tribal Police Department and the  
23 D.A.’s Office reviewed whether or not the now-over-eight-year incident involving  
24 dishonesty constituted a *Brady* concern and whether Plaintiff should be put on the D.A.  
25 Office’s *Brady* Index.” *Id.* at ¶ 14. Plaintiff alleges, “After a thorough 13-month review of  
26 the case, the D.A.’s Office determined that Plaintiff should not be included on the *Brady*  
27 Index and Plaintiff received his commission.” *Id.* at 5 ¶ 22.

28 Plaintiff alleges that in September or October of 2008, Plaintiff applied to work as a

1 Volunteer Reserve Police Officer for the Coronado Police Department and disclosed the  
2 prior incident of dishonesty. *Id.* at ¶ 23. Plaintiff alleges that the Coronado Police  
3 Department background unit “contacted the D.A.’s Office to ensure that no *Brady* issue  
4 existed.” *Id.* Plaintiff alleges: “Notwithstanding its previous decision not to place Plaintiff  
5 on its *Brady* Index, the D.A.’s Office now opted to include Plaintiff.” *Id.* at ¶ 24. Plaintiff  
6 alleges that he “was given no opportunity to appeal his inclusion on the Index.” *Id.* at ¶ 25.  
7 Plaintiff alleges that the Coronado Police Department refused to hire him and after the  
8 Sycuan Tribal Police Department was notified that Plaintiff was included on the *Brady*  
9 Index, his employment was terminated. *Id.* at ¶ 26-27. Plaintiff alleges that he has been  
10 disqualified from employment with several law enforcement agencies because he is listed  
11 on the *Brady* Index including the “Coronado Police Department; San Diego Police  
12 Department; Riverside County Sheriff’s Department; El Cajon Police Department; La Mesa  
13 Police Department; Desert Hot Springs Police Department; Indio Police Department; and  
14 the National City Police Department.” *Id.* at 6 ¶ 33. Plaintiff alleges that “[f]or a law  
15 enforcement officer, being placed on a District Attorney’s *Brady* Index is tantamount to  
16 being placed on a government blacklist . . . .” *Id.* at 4 ¶ 21.

17 Plaintiff alleges that on “December 15, 2009, Plaintiff filed a Petition for Writ of  
18 Mandate to compel the County to disclose its *Brady* Index Policy.” *Id.* at 6 ¶ 30. Plaintiff  
19 alleges that on “January 13, 2010, pursuant to settlement of Plaintiff’s Petition for Writ of  
20 Mandate, the County provided Plaintiff with a copy of its ‘*Brady* Index File Review  
21 Protocol.’” *Id.* at ¶ 31. Plaintiff alleges: “This protocol contains no discernable standard of  
22 review for placing or retaining officers on the Index. It contains no standards for an officer  
23 to appeal or challenge his continued inclusion on the list. It contains no standards for when  
24 officers should be removed from the list.” *Id.* Plaintiff also alleges that the County’s  
25 policy “allows individual Deputy D.A.’s to use their own arbitrary standard for including  
26 Officers on the County *Brady* Index.” *Id.* at 4 ¶ 20.

27 Plaintiff alleges: “Notwithstanding the fact that Plaintiff’s single act of dishonesty,  
28 with no nexus to any criminal prosecution, occurred twelve years ago, the County refuses to

1 remove Plaintiff from its *Brady* Index or even provide him with a means for challenging his  
2 continued inclusion on the Index.” *Id.* at 6 ¶ 32.

3 Plaintiff alleges that “[t]he arbitrary, continued inclusion of Plaintiff on the Index is  
4 a result of D.A. Bonnie Dumanis’ decision as an official policy maker of the County.” *Id.*  
5 at 7 ¶ 36. Plaintiff alleges that “[i]t was or should have been plainly obvious to any  
6 reasonable policy making official of the County that the acts and omissions of Defendants  
7 . . . directly violated and continued to violate Plaintiff’s clearly established constitutional  
8 rights.” *Id.* at ¶ 38.

9 Plaintiff seeks, “general, special, and compensatory damages from the County only  
10 according to proof.” *Id.* at 7. (emphasis omitted). Plaintiff seeks, “[a] declaratory  
11 judgment that Defendants’ policies, practices, and customs violate the Fourteenth  
12 Amendment to the United States Constitution as to Plaintiff.” *Id.* Plaintiff also seeks an  
13 injunction that requires Defendants to remedy constitutional violations, provide Plaintiff  
14 with meaningful notice of the grounds for his inclusion on the *Brady* Index and an  
15 opportunity to rebut the charges, and require Defendants to remove Plaintiff from the *Brady*  
16 Index. *Id.* at 7-8.

### 17 STANDARD OF REVIEW

18 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a  
19 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under Rule  
20 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient  
21 factual allegations to support a cognizable legal theory. *See Balistreri v. Pacifica Police*  
22 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). When considering a motion to dismiss, a court  
23 must accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, --- U.S. ----,  
24 129 S. Ct. 1937, 1950 (2009). “[F]or a complaint to survive a motion to dismiss, the  
25 non-conclusory factual content, and reasonable inferences from that content, must be  
26 plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*,  
27 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

28

1 **CONTENTIONS OF PARTIES**

2 Defendant County of San Diego moves to dismiss Plaintiff’s claim for damages  
3 against the County of San Diego. Defendant contend that “[t]he County cannot be liable  
4 for damages based on any actions taken by the District Attorney in her official capacity  
5 because when developing the *Brady* index and deciding who should be placed on the index,  
6 the District Attorney was acting as a state, not County, official.” (ECF No. 31-1 at 8).  
7 Defendant contends that the District Attorney represents the state, not the county, when  
8 developing policy related to the *Brady* index because the policy is related to state  
9 prosecutions. Defendants County of San Diego and Bonnie Dumanis further seek to  
10 dismiss Plaintiff’s substantive and procedural due process claims because Plaintiff does not  
11 have a property interest right in future employment. Finally, Defendants seek dismissal of  
12 Plaintiff’s claims for injunctive and declaratory relief because Plaintiff’s procedural and  
13 substantive due process claims fail.

14 Plaintiff contends his claim for damages against the County of San Diego is proper  
15 because Bonnie Dumanis was not acting for the state when making the Brady policy for the  
16 County. Plaintiff contends that *Brady* policies vary from county to county and cannot be  
17 said to represent state policy. Plaintiff also contends that his substantive and due process  
18 claims are adequately alleged because he has a right to pursue the occupation of his choice  
19 and he is being prevented from doing so based on arbitrary government action which  
20 contains no rational basis.

21 **DISCUSSION**

22 **I. Damages**

23 A local government may be liable for a constitutional tort committed by its officials  
24 through municipal policy, practice, or custom pursuant to 42 U.S.C. § 1983. *Weiner v. San*  
25 *Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000) (citing *Monell v. Department of Social*  
26 *Servs.*, 436 U.S. 658, 690-91 (1978)). “To hold a local government liable for an official's  
27 conduct, a plaintiff must first establish that the official (1) had final policymaking authority  
28 ‘concerning the action alleged to have caused the particular constitutional or statutory

1 violation at issue' and (2) was the policymaker for the local governing body for the  
2 purposes of the particular act." *Weiner*, 210 F.3d at 1028 (quoting *McMillian v. Monroe*  
3 *County Alabama*, 520 U.S. 781, 785 (1997)). The court must determine whether the  
4 official acted for the state or the locality by considering state law. *Id.*; *see also McMillian*,  
5 520 U.S. at 786-89, 791-93.

6 California statutory authority weighs in favor of a finding that the district attorney  
7 acted on behalf of the state while performing prosecutorial functions. *Compare* Cal. Const.  
8 art. V, §13 (stating that the attorney general is the chief law officer of the state and has  
9 authority over every district attorney); Cal. Const. art. XI, §1 (establishing counties as  
10 subdivisions of the state); Cal. Gov't Code § 100 (requiring that all prosecutions shall be  
11 conducted in the name of and through the authority of the State of California); Cal. Gov't  
12 Code § 12550 (establishing that the attorney general has supervisory power over district  
13 attorneys); Cal. Gov't Code § 12524 (stating that the attorney general may call district  
14 attorneys to conference "with the view of uniform and adequate enforcement of the laws of  
15 this state . . ."); Cal. Gov't Code § 25303 (explaining that the county board of supervisors  
16 shall not "obstruct the investigative and prosecutorial function of the district attorney of a  
17 county"); Cal. Penal Code § 684 (requiring that a "criminal action is prosecuted in the name  
18 of the people of the State of California . . ."); *with*, Cal. Gov't Code § 24000 (enumerating  
19 the district attorney as an officer of the county); Cal. Gov't Code § 25300 (explaining that  
20 the county board of supervisors shall prescribe the compensation and conditions of  
21 employment for all county officers); Cal. Gov't Code § 29601 (enumerating travel expenses  
22 incurred while prosecuting a case as county charges) .

23 The California Supreme Court has analyzed state law and held that "a district  
24 attorney was a [California] state official for purposes of § 1983 liability while acting in his  
25 prosecutorial capacity." *Weiner*, 210 F.3d at 1028 (citing *Pitts v. County of Kern*, 17  
26 Cal.4th 340, 362, 70 Cal. Rptr. 2d 823, 837, 949 P. 2d 920, 934 (1998)). The California  
27 Supreme Court also held: "Just as we have concluded that in California a district attorney  
28 represents the state when preparing to prosecute and when prosecuting criminal violations

1 of state law, we further conclude it logically follows that he or she also represents the state,  
2 and not the county, when training and developing policy in these areas.” *Pitts*, 17 Cal.4th  
3 at 362, 70 Cal. Rptr. 2d at 837-38, 949 P. 2d at 934-35; *see also Goldstein v. City of Long*  
4 *Beach*, Case No. CV 04-9692 AHM (Ex), 2009 WL 6929458, at \*1-2, 9 (C.D. Cal. Sept.  
5 23, 2009) (concluding that the District Attorney acted as a state officer in failing to institute  
6 a policy to require prosecutors to obtain and disclose *Brady* information regarding  
7 informants).

8 In this case, Plaintiff asserts a claim for damages against the County of San Diego  
9 based on District Attorney Bonnie Dumanis’ *Brady* Index File Review Protocol policy.  
10 The Court finds that the facts alleged in the Complaint are not adequate to conclude that the  
11 District Attorney was acting as a county official when developing this *Brady* policy.  
12 *Weiner*, 210 F.3d at 1028; *Pitts*, 17 Cal.4th at 362. Defendant’s Motion to Dismiss  
13 Plaintiff’s claim for damages against the County of San Diego is GRANTED.

## 14 II. Due Process

15 “A threshold requirement to a substantive or procedural due process claim is the  
16 plaintiff’s showing of a liberty or property interest protected by the Constitution.”  
17 *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (citing *Bd. of*  
18 *Regents v. Roth*, 408 U.S. 564, 569 (1972)). “To have a property interest, a person clearly  
19 must have more than an abstract need or desire.” *Nunez v. City of L.A.*, 147 F.3d 867, 872  
20 (9th Cir. 1998). “A mere ‘unilateral expectation’ of a benefit or privilege is insufficient;  
21 the plaintiff must ‘have a legitimate claim of entitlement to it.’” *Id.* (quoting *Roth*, 408 U.S.  
22 at 577). Protected property interests are not created by the Constitution, but by “existing  
23 rules or understandings that stem from an independent source such as state law, rules or  
24 understandings that secure certain benefits and that support claims of entitlement to those  
25 benefits.” *Thorton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (citing *Roth*,  
26 408 U.S. at 577). “A reasonable expectation of entitlement is determined largely by the  
27 language of the statute and the extent to which the entitlement is couched in mandatory  
28 terms.” *Wedges/Ledges of Cal.*, 24 F.3d at 62 (internal quotation marks omitted).

1            “[T]he right to ... follow a chosen profession free from unreasonable governmental  
2 interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment ...”  
3 *Greene v. McElroy*, 360 U.S. 474, 492 (1959). The liberty component of the Fourteenth  
4 Amendment’s Due Process Clause may be violated by “a complete prohibition of the right  
5 to engage in a [professional] calling.” *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999); *see*  
6 *also Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003).

7            In this case, Plaintiff alleges:

8            For a law enforcement officer, being placed on a District Attorney’s *Brady*  
9 Index is tantamount to being placed on a government blacklist, which when  
10 publicized to prospective law enforcement employers effectively excludes  
11 the blacklisted individual from his chosen occupation in law enforcement,  
12 much as if the government had yanked the license of an individual in an  
13 occupation that required a license.

14 (ECF No. 10 at 4-5 ¶ 21). Plaintiff’s Complaint asserts that Plaintiff is subject to “a  
15 complete prohibition of [his] right to engage in a [professional] calling.” *Conn*, 526 U.S. at  
16 291-92. The Court concludes that the Complaint has alleged sufficient facts to state a claim  
17 that Plaintiff has a liberty or property interest protected by the Constitution against District  
18 Attorney Bonnie Dumanis in her official capacity. *Wedges/Ledges of Cal.*, 24 F.3d at 62.  
19 Defendants’ Motion to Dismiss is DENIED.

20            **A. Procedural Due Process**

21            “A procedural due process claim has two distinct elements: (1) a deprivation of a  
22 constitutionally protected liberty or property interest, and (2) a denial of adequate  
23 procedural protections.” *Brewster v. Board of Educ. of Lynwood Unified School Dist.*, 149  
24 F.3d 971, 982 (9th Cir. 1998). “[T]he requirements of due process are ‘flexible and cal[1]  
25 for such procedural protections as the particular situation demands[.]’” *Wilkinson v. Austin*,  
26 545 U.S. 209, 224 (2005) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Courts  
27 generally consider the following factors to determine procedural due process:  
28

          First, the private interest that will be affected by the official action; second,  
the risk of an erroneous deprivation of such interest through the procedures  
used, and the probable value, if any, of additional or substitute procedural  
safeguards; and finally, the Government’s interest, including the function  
involved and the fiscal and administrative burdens that the additional or  
substitute procedural requirement would entail.



1 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

2 In this case, Plaintiff alleges that he “was given no opportunity to appeal his  
3 inclusion on the Index.” (ECF No. 10 at ¶ 25). Plaintiff alleges that the *Brady* Index File  
4 Review Protocol contains no discernable standard of review for placing or retaining  
5 officers on the Index. *Id.* at ¶ 31. Plaintiff alleges that, “It contains no standards for an  
6 officer to appeal or challenge his continued inclusion on the list.” *Id.* Plaintiff alleges that,  
7 “It contains no standards for when officers should be removed from the list.” *Id.* Plaintiff  
8 also alleges that the policy “allows individual Deputy D.A.’s to use their own arbitrary  
9 standard” to include Officers on the *Brady* Index. *Id.* at 4 ¶ 20.

10 The Court concludes that the Complaint has alleged sufficient facts to state a claim  
11 that Plaintiff’s procedural due process rights were violated. Procedural due process  
12 requirements will be dictated by the “protections as the particular situation demands.”  
13 *Wilkinson*, 545 U.S. at 224 (citation omitted). Defendants’ Motion to Dismiss Plaintiff’s  
14 procedural due process claim is DENIED.

15 **B. Substantive Due Process**

16 The Ninth Circuit has held that “a plaintiff can make out a substantive due process  
17 claim if she is unable to pursue an occupation and this inability is caused by government  
18 actions that were arbitrary and lacking a rational basis.” *Engquist v. Oregon Dept. of*  
19 *Agriculture*, 478 F.3d 985, 997 (9th Cir. 2007). A violation of substantive due process  
20 must be demonstrated by more than mere harm; it is demonstrated by conduct that shocks  
21 the conscious. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-49 (1998). Conduct that  
22 “shocks in one environment may not be so patently egregious in another...” *Id.* at 850.  
23 “Deprivations of liberty caused by ‘the most egregious official conduct,’ may violate the  
24 Due Process Clause.” *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (quoting *Lewis*, 523  
25 U.S. 846, 847-48, n.8).

26 In this case, Plaintiff has alleges that “[t]he arbitrary, continued inclusion of Plaintiff  
27 on the Index is a result of D.A. Bonnie Dumanis’ decision as an official policy maker . . . .”  
28 (ECF No. 10 at 7 ¶ 36). “It was or should have been plainly obvious to any reasonable


1 policy making official . . . that the acts and omissions of Defendants . . . directly violated  
2 and continued to violate Plaintiff's clearly established constitutional rights." *Id.* at ¶ 38.

3 The Court concludes that the Complaint fails to alleged sufficient facts to state a  
4 claim that Plaintiff's substantive due process rights were violated. *See Chavez v. Martinez,*  
5 538 U.S. at 774; *Lewis,* 523 U.S. at 846-49. Defendants' Motion to Dismiss Plaintiff's  
6 substantive due process claim is GRANTED.

7 **CONCLUSION**

8 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 13) is GRANTED  
9 in part and DENIED in part. Plaintiff's claim for damages against the County of San Diego  
10 and Plaintiff's claim that his substantive due process rights were violated are DISMISSED.  
11 Defendant's Motion to Dismiss is DENIED in all other respects.

12  
13 DATED: November 5, 2010

  
14 **WILLIAM Q. HAYES**  
15 United States District Judge

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