

**OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF VENTURA**

BRADY DISCOVERY OF LAW ENFORCEMENT EMPLOYEE MISCONDUCT
(INTERNAL POLICY)

Revised April 22, 2010

INTRODUCTION

The following is an “internal” policy that addresses information in the actual possession of the District Attorney’s office as opposed to information contained in peace officer personnel files. In order to comply with our discovery obligations, procedures are necessary (1) to ensure that instances of law enforcement employee and expert witness misconduct and credibility issues that come to the attention of the District Attorney’s office are reviewed to determine if disclosure is required under *Brady v. Maryland* (1963) 373 U.S. 83, (2) to maintain a depository for such information, and (3) to ensure that deputy district attorneys know of the existence of such information regarding potential witnesses so that disclosure can be provided to the defense.

This policy includes information that may bear on the credibility of peace officer witnesses, as well as other employees of law enforcement agencies and experts who may be witnesses in criminal cases. As explained below, some of the procedural protections contained in this policy are limited to peace officers and custodial officers, in light of the special legal obligations and

protections regarding peace officer and custodial officer personnel records. (Evid. Code §§ 1043-1047; Penal Code §§ 832.5, 832.7.)

I. WHAT CONSTITUTES *BRADY* MATERIAL

A. The District Attorney is obligated to provide the defense in criminal cases with *exculpatory* evidence that is *material* to either guilt or punishment. (*Brady v. Maryland*, *supra*, 373 U.S. 83, 87.) Reviewing courts define “material” as follows: “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) “Exculpatory” means favorable to the accused. This obligation includes “substantial material evidence bearing on the credibility of a key prosecution witness.” (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) Such impeachment evidence must disclose more than “minor inaccuracies.” (*People v. Padilla* (1995) 11 Cal.4th 891, 929, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

B. Impeachment evidence is defined in Evidence Code section 780, CALCRIM No. 105, and CALJIC 2.20. Examples of impeachment evidence that may come within *Brady* are as follows:

1. The character of the witness for honesty or veracity or their opposites. (Evid. Code § 780 (e).)
2. A *bias*, interest, or other motive. (Evid. Code § 780 (f).)

3. A statement by the witness that is *inconsistent* with the witness's testimony. (Evid. Code § 780 (h).)
 4. Felony convictions involving moral turpitude. (Evid. Code § 788; *People v. Castro* (1985) 38 Cal.3d 301, 314.) Discovery of *all* felony convictions is required regarding any material witness whose credibility is likely to be critical to the outcome of the trial. (Penal Code § 1054.1 (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177.)
 5. Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.)
 6. False reports by a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)
 7. Pending criminal charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)
 8. Parole or probation status of a witness. (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486.)
 9. Evidence undermining an expert witness's expertise. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)
 10. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.)
- C. The duty of disclosure applies even to completed cases. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.) However, it does not apply to cases in which the defendant pled guilty or no contest. (*United States v. Ruiz* (2002) 536 U.S. 622.)
- D. The government has no *Brady* obligation to “communicate preliminary, challenged, or speculative information.” (*United States v. Agurs* (1976) 427 U.S. 97, 109 fn. 16.) However, “the prudent prosecutor will resolve doubtful questions in favor of disclosure.”

(*Id.* at p. 108.) See also *Kyles v. Whitley* (1995) 514 U.S. 419, 439, which warns prosecutors against “tacking too close to the wind” in withholding evidence.

II. RELATIONSHIP BETWEEN *BRADY* AND *PITCHESS*

- A. Criminal defendants may seek disclosure of peace officer and custodial officer personnel records and complaints from the law enforcement agency pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and Evidence Code sections 1043-1047. The *Pitchess* process operates in parallel with *Brady*. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.) The availability of the *Pitchess* procedure does not always satisfy the obligation of the prosecution to provide material exculpatory evidence in the possession or constructive possession of the prosecution. For example, the District Attorney’s office has a discovery obligation as to exculpatory information in its actual possession that may not be included in the officer’s personnel file.
- B. In *Pitchess* motions, the prosecuting attorney shall request that the court issue a protective order against disclosure of the material in other cases pursuant to Evidence Code section 1045, subdivisions (d) and (e). (See *Alford v. Superior Court* (2003) 29 Cal.4th 1033.) The *Pitchess* procedure shall also apply to personnel records of peace officers employed by the District Attorney’s office.
- C. No discovery will be provided for any information in or from a law enforcement employee’s personnel file without the court first examining the materials in camera. If a

deputy district attorney is aware of information in a peace officer or custodial officer's personnel file that may qualify for disclosure under *Brady*, the district attorney's office may file a motion for in-camera examination under *Brady* or *Pitchess*, or defense counsel may be invited to file a *Pitchess* motion.

- D. If the deputy district attorney is aware of potential *Brady* material that was disclosed through a *Pitchess* hearing that is *more than* five years old, the District Attorney's office may seek in-camera review of the materials to determine if disclosure is required.
- E. At the present time, the District Attorney's office has no legal duty to examine a peace officer's personnel file. It is the policy of the Ventura County District Attorney's office to not seek to examine a peace officer's personnel file for *Brady* purposes.

III. PROCEDURE FOR REVIEW OF POTENTIAL *BRADY* INFORMATION

- A. Upon learning of any apparently credible allegation involving law enforcement employee or expert witness misconduct or credibility that may be subject to discovery under *Brady*, deputy district attorneys and district attorney investigators shall timely report this information to their immediate supervisor. For example, evidence of untruthfulness may come to light during a criminal trial, or from credible reports of other law enforcement employees based on sources other than personnel records. Such allegations must be substantial and may not be limited to a simple conflict in testimony about an event. The notification itself ultimately might be examined in camera and/or be discovered, so

carelessness in wording or premature conclusions are to be avoided. If and when such information is obtained, the District Attorney's office will conduct a thorough analysis pursuant to the procedures outlined herein to determine if it is required to disclose the information pursuant to *Brady*.

B. Deputy district attorneys and district attorney investigators shall also advise their supervisors if they become aware of any of the following information regarding a law enforcement employee or expert witness:

1. Any information available to the attorney regarding the disclosures made pursuant to a *Pitchess* motion, and the existence of any protective or limiting order regarding future dissemination of the information. (See Evid. Code § 1045 (d) & (e).)
2. Criminal convictions of law enforcement employees.
3. Prosecutions initiated against law enforcement employees.
4. Rejections of requests for initiation of prosecution against law enforcement employees.
5. Any administrative discipline imposed against a law enforcement employee that may have a bearing on credibility.

C. Following receipt of such a report, the attorney or investigator's supervisor shall obtain all available information concerning the alleged misconduct, including the transcript of any testimony provided, and shall forward the materials to the Special Assistant District Attorney.

D. The Special Assistant District Attorney shall review and analyze the materials in light of applicable law. If some cases, it may be necessary and appropriate for the District

Attorney's office to obtain copies of additional court documents or police reports, or interview witnesses. However, absent extraordinary circumstances, the District Attorney's office will not seek to interview the officer in question or other employees of the employing law enforcement agency.

- E. The standard of proof for disclosure of information shall be the "substantial information" standard. Substantial information is defined as facially credible information that might reasonably be deemed to have undermined confidence in a later conviction in which the law enforcement employee is a material witness, and is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event.
- F. Following the initial review and analysis described above, the Special Assistant District Attorney shall recommend, and the Chief Assistant District Attorney shall decide, which of the following conclusions is appropriate: (1) the materials do not constitute *Brady* material (see paragraph G, below); (2) it appears that disclosure may be required under *Brady* (see paragraph H, below); or (3) further investigation, including interview of the officer in question or other employees of the employing law enforcement agency, should be undertaken by the employing law enforcement agency (see paragraph I, below).
- G. If the Chief Assistant District Attorney concludes that based on the initial review, it is clear that the materials do not constitute *Brady* material, the matter shall be closed.

H. If it appears after the initial review that disclosure regarding a peace officer may be required under *Brady*, the officer and the head of the employing law enforcement agency will be invited to provide written comments, objections and/or additional information that may bear on the decision of what information, if any, shall be provided. Given the need to provide prompt discovery to the defense in criminal cases, the opportunity to comment, object or provide information may of necessity be brief.

1. The Special Assistant District Attorney shall evaluate all information received and shall make a recommendation to the Chief Assistant District Attorney.

Recommendations may include but are not limited to the following actions:

- a. No further action based upon conclusion that no *Brady* material exists.
- b. Discovery is required in a specific case only.
- c. Discovery must be provided in additional cases in which the law enforcement employee is or was a material witness. In appropriate cases, a computer search of pending and/or past cases may be conducted so that counsel may be notified.
- d. In some cases, presenting the material to a judge for in-camera review may be an appropriate manner of resolving the discovery issue. (See Section IV, below.)
- e. In rare cases, blanket notification to representatives of the Public Defender's Office, Conflict Defense Associates, and Ventura County Bar Association may be appropriate as a back-up form of notification in situations in which we cannot be confident that we have identified all of the affected parties. Such blanket notification shall be limited to a statement that *Brady* material may exist, with defense counsel to either contact the District Attorney's office and request information regarding a specific identified case, or make a motion for disclosure. Blanket notification shall not be made of information obtained from peace officer personnel files.

2. After receipt of the recommendation, the Chief Assistant District Attorney will determine what disclosure, if any, is appropriate. If the information pertains to the credibility of a peace officer, the Chief Assistant District Attorney shall send written notification to the officer and the head of the employing law enforcement agency and shall provide a copy of the materials regarding the officer that will be provided to the defense.
 3. The peace officer shall then have 30 days to respond in writing or request a meeting with the Chief Assistant District Attorney to discuss the allegation and supporting materials. An attorney or any representative may accompany the officer to the meeting. In the event that the officer requests further time and no urgency exists to complete the evaluation, the Chief Assistant District Attorney may extend the time for a written response or meeting for a reasonable period of time.
- I. In some cases, after the initial review, the Chief Assistant District Attorney may conclude that the District Attorney's office is not in possession of sufficient information to conclude that conduct coming within *Brady* has occurred, but that further investigation is appropriate .
1. Absent extraordinary circumstances, the District Attorney's office will not seek to interview the officer or other employees of the officer's agency. In such cases,

the matter shall be referred to the employing law enforcement agency to conduct an investigation in accordance with the Public Safety Officers Procedural Bill of Rights.

2. If, after conducting this investigation, the employing law enforcement agency concludes that the complaint is unfounded, exonerated or not sustained (see Penal Code §§ 832.5, 832.7(c)), then disclosure is not warranted because the information is “preliminary, challenged, or speculative.” (*United States v. Agurs, supra.*)
3. If the employing law enforcement agency sustains the complaint, the District Attorney’s office shall, when the officer is a material witness in a case, make a motion under *Pitchess* or *Brady* for the court to examine the information in camera and determine whether disclosure must be made. (See section IV, below.)
4. This policy shall not limit the authority of the District Attorney’s office to conduct criminal investigations.

IV. IN CAMERA REVIEW

- A. The District Attorney’s office may submit potential *Brady* evidence to a judge for in-camera review to determine if discovery to the defense is required. (*United States v. Agurs* (1976) 427 U.S. 97, 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502.) The

option of submitting *Brady* material for in-camera review shall be considered in all cases, in consultation with the Special Assistant District Attorney.

B. If the Chief Assistant District Attorney concludes that disclosure of material regarding a law enforcement officer may be required under *Brady*, the in-camera procedure shall be employed regarding the following:

1. Any materials contained in or obtained from a peace officer's personnel file, including information of which the District Attorney's office became aware through a *Pitchess* motion in a different case that was released without a protective order, or which is more than five years old.
2. Material regarding any incident that is the subject of a pending internal investigation by the employing law enforcement agency.
3. Material that is remote in time or has questionable relevance to the present case.
4. Any potentially privileged materials.
5. When it is unclear whether the law requires the information be disclosed.

C. Non-sworn employees of law employment agencies have a qualified right to privacy in their personnel files. (Cal. Const., art. I, § 1; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526.) Materials contained in the personnel file of a non-sworn employee shall be sought only with consent of the employee or when authorized by a court following in camera review. (Evid. Code §§ 1040, 915(b); see *Johnson v. Winter* (1982) 127 Cal.App.3d 435.)

- D. The District Attorney's office shall, in appropriate cases, request that the court issue a protective order limiting or prohibiting the disclosure of the material in other cases.

- E. If material regarding the credibility of a law enforcement employee is discovered to the defense pursuant to *Brady* after an in-camera review, the assigned deputy district attorney shall provide the Special Assistant District Attorney with a copy of the material ordered by the judge to be discovered. The Special Assistant District Attorney shall then include this material in the administrative file maintained for that law enforcement employee, unless the court has made a limiting order regarding disclosure of the material. If the materials to be disclosed include materials from an officer's personnel file, the fact that such materials were disclosed shall be noted, but neither the materials themselves nor the substance of those materials shall be retained in the administrative file.

V. ADMINISTRATIVE FILES

- A. The materials reviewed and memoranda of conclusions reached shall be maintained in a separate *Brady* administrative file that will be maintained in a secure location in the District Attorney's executive office area. In those cases where the review determined the misconduct allegations are subject to discovery under *Brady v. Maryland*, a discovery *Brady* packet shall be included in the file for purposes of complying with the discovery obligation in future cases.

- B. The information contained in these administrative files shall only be accessed for case-related purposes, and a written record shall be maintained as to the name of each employee who accesses the information and the case for which access was obtained. The substance of the information in the administrative files shall not be included in any computerized database.
- C. Upon written request, the District Attorney's office shall inform any law enforcement employee and/or the employing law enforcement agency whether or not a *Brady* administrative file exists regarding that employee. The employing law enforcement agency, and the affected law enforcement employee and/or his or her attorney or other representative, shall have the right to inspect the officer's *Brady* administrative file at a time mutually convenient to the parties or within 15 days of receipt of a written request for inspection. The District Attorney's office retains the right to exclude from inspection materials protected by the attorney-client, deliberative process, or official information privileges.
- D. The District Attorney's office should not retain confidential personnel records from other agencies, and shall not provide such records to the defense absent an in-camera review and a court order. (See Penal Code § 832.7, subd. (a).) The employing law enforcement agency is the appropriate custodian of these records.

VI. PROVIDING *BRADY* DISCOVERY TO THE DEFENSE

- A. The management assistants shall maintain a list of law enforcement employees and expert witnesses for whom administrative files have been created based on possible *Brady* material, as described above. The Special Assistant District Attorney shall maintain a separate list (“*Brady* list”) of law enforcement employees for whom, based upon the procedures and determinations discussed in this policy, discovery of a *Brady* packet may be required when the officer is a material witness in future cases. The “*Brady* list” will be accessible only to attorneys using a shared computer drive. Deputy district attorneys must review the “*Brady* list” during trial preparation to determine whether a *Brady* packet exists for each case in which the employee is subpoenaed by or will testify on behalf of the prosecution.
- B. Disclosure of law enforcement employee misconduct is not required in a particular case if the evidence would not impact the employee’s credibility in that case. For example, if the misconduct relates to a bias against a particular racial group, discovery may not be required in cases that do not involve members of that group. The Special Assistant District Attorney shall be consulted on all *Brady* issues regarding the credibility of law enforcement employees. If the assigned deputy district attorney is of the opinion that the *Brady* packet shall not be provided in a particular case, after consultation with the Special Assistant District Attorney, this decision shall be documented in the administrative file for that officer. If it is not clear whether disclosure is required in a particular case, the matter shall be submitted to the court for in-camera review.

- C. Where discovery to defense counsel regarding law enforcement employee or expert witness misconduct or credibility is required, it shall be made by the deputy district attorney prosecuting the case by providing the *Brady* packet in discovery before trial. Fulfillment of the prosecution's obligation to provide discovery of *Brady* material is the sole responsibility of the individual deputy district attorney assigned to the case and shall be done without a defense request.
- D. Whenever *Brady* material is provided to the defense in a case, the Special Assistant District Attorney shall place in the administrative file for that witness a memorandum documenting that discovery was provided, including the name of the case, case number, name of defense counsel and the date the *Brady* packet was sent to the discovery unit.
- E. Deputy district attorneys reviewing declarations in support of arrest warrants and affidavits in support of search warrants shall consult the "*Brady* list" to determine if the declarant or affiant is an employee for whom the office has determined that *Brady* material must be provided. The attorney shall not approve the arrest warrant or search warrant unless it discloses a summary of the *Brady* material so that the magistrate may consider it in assessing the credibility of the individual.

VII. IMMEDIATE DISCLOSURE REQUIREMENTS

- A. The nature of the constitutional obligation created by the *Brady* doctrine and the statutory time limits for trial and for providing of discovery in criminal cases will, in certain instances, require immediate disclosure to the defense of information in the possession of or known to the District Attorney's office. In such instances, it may not be possible or feasible before the information is provided to the defense to conduct the full review procedure described above, to provide the law enforcement officer with advance notice or an opportunity to provide comments, objections, or additional information, or to provide a written response or meet with the Chief Assistant District Attorney. In such cases, immediate disclosure may be made to the defense.
- B. Immediate disclosure regarding peace officer information shall only be made under the following conditions:
1. With the express consent of the Chief Assistant District Attorney or District Attorney or, if neither of them can be contacted within the time during which discovery is required, with the express consent of a Chief Deputy District Attorney, or
 2. After the information is submitted to a judge in camera, and the judge determines that disclosure is required.
- C. In cases in which "immediate disclosure" is required, peace officers will be afforded a more abbreviated opportunity to be heard if it is feasible to do so. Once the decision to disclose has been made, both the department and the officer will be notified of the disclosure and will be provided with a copy of the materials disclosed.

VIII. ADMISSIBILITY OF EVIDENCE

Discovery and admissibility are different and the assigned deputy shall decide if admissibility of matters discovered is to be challenged.