DISCOVERY COMPLIANCE SYSTEM MANUAL

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I. INTRODUCTION

A California prosecutor's obligation to provide exculpatory and impeachment information arises from the federal Due Process Clause of the Fourteenth Amendment as applied by the United States Supreme Court in *Brady* v. *Maryland* (1963) 373 U.S. 83 (constitutionally-mandated discovery), *Giglio v. United States* (1972) 405 U.S. 150, and California's Criminal Discovery Statute as codified in Penal Code section 1054.1(e) (statutorily-based discovery). Both the federal and state rules require that the prosecution provide evidence favorable to the defendant on the issue of guilt or punishment. Favorable evidence may consist of exculpatory information factually specific to a case (exculpatory evidence) or impeachment information undermining the credibility of a prosecution witness (impeachment evidence).

In *Brady* v. *Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused 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."[1] A failure to disclose *material* favorable evidence to an accused (a *Brady* violation) can result in a dismissal, reversal or modification of a judgment. A judge may also, pursuant to the supervisory powers of the judiciary, dismiss a case with prejudice due to a *Brady* violation "to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury" and to "deter future illegal conduct."[2] The rule established in *Brady* (*Brady* rule) is independent of the Criminal Discovery Statute.[3]

In Penal Code section 1054.1, the California legislature set forth a list of discovery materials and information which the prosecution is required to disclose to the defense before trial, including 1054.1(e) ("The prosecuting attorney shall disclose to the defendant . . . any exculpatory evidence.").[4] In enacting Penal Code section 1054.1(e), the legislature codified and expanded the *Brady* rule. In providing for the disclosure to the defense of "[a]ny exculpatory evidence," the legislature broadened the *Brady* rule to mandate California prosecutors to disclose exculpatory evidence to the defense *without regard to materiality*.[5]

A failure to reveal or produce exculpatory and/or impeachment information pursuant to the *Brady* rule and Penal Code section 1054.1(e) may also violate Rules of Professional

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[1] *Brady v. Maryland* (1963) 373 U.S. 83, 87

[2] *United States v. Bundy* (9th Cir. 2020) 968 F.3d 1019, 1030, citing *United States v. Struckman* (9th Cir. 2020) 611 F.3rd 560, 574.

[3] *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.

[4] The term "exculpatory evidence" as used in Penal Code section 1054.1(e) is a symbolic term used to describe *Brady* evidence and includes impeachment evidence. See, e.g., *United States v. Bagley* (1985) 473 U.S. 667, 676 ("This Court has rejected any [constitutional] distinction between impeachment evidence and exculpatory evidence."); *Strickler v. Greene* (1999) 527 U.S. 263, 281 ("Thus the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence . . . ."); *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1381 ("[L]aw enforcement agencies (1) possessed significant exculpatory evidence bearing on the credibility of the key prosecution witnesses."); *Snow v. Sirmons* (2007) 474 F.3d 693, 711 ("Exculpatory evidence includes impeachment evidence.").

[5] *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; see also *People v. Bowles* (2011) 198 Cal.App.4th 318, 326.

Conduct, Rule 3.4(b) ("A lawyer shall not suppress any evidence that the lawyer . . . has a legal obligation to reveal or produce") and Penal Code section 141 (A prosecutor who intentionally withholds relevant, exculpatory information is guilty of a felony). Reversal of a judgment based, in whole or in part, on the misconduct of a prosecutor will trigger a report to the State Bar.[6] Deputy District Attorneys (DDA) should therefore resolve questions relating to discovery in favor of disclosure.

Commentary

The Discovery Compliance System Manual provides general guidance on complying with applicable state and federal laws. However, it is not a substitute for DDAs researching the specific factual and/or legal issues which may arise in individual cases. DDAs shall affirmatively seek relevant discovery from members of the prosecution team in every case.[7]

Information in the Discovery Compliance System (DCS) database may be limited and insufficient to satisfy a DDAs obligations under Brady as it does not contain all information which may be exculpatory on a particular case or impeaching on a particular witness.

II. THE *BRADY* RULE

A prosecutor has an affirmative due process duty to disclose to the defendant all favorable, material evidence possessed by the prosecution team.[8] This *Brady* rule applies even though there has been no defense request.[9]

A. *BRADY* EVIDENCE MUST BE FAVORABLE

Evidence is "favorable" to a defendant if it either helps the defendant or hurts the prosecution.[10] Evidence is favorable to a defendant when it is exculpatory or can be used to impeach the testimony of a material prosecution witness.[11]

1. Exculpatory Evidence

"Exculpatory" evidence pursuant to *Brady* is information which, if true, could show that a defendant is innocent or less culpable for the crime charged and which must be disclosed to the defendant without request.

Examples of exculpatory evidence include, but are not limited to, evidence that:

Directly opposes guilt;[12]

Mitigates punishment;[13]

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[6] Bus. & Prof. Code, § 6068, subd. (o)(7).
[7] DDAs are encouraged to make frequent reference to Pipes & Gagen, California Criminal Discovery (4th ed. 2008), a treatise in this area.
[8] *In re Brown (1998)* 17 Cal.4th 873, 879.
[9] *United States v. Agurs* (1976) 427 U.S. 97, 107.
[10] *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.
[11] *United States v. Bagley* (1985) 473 U.S. 667, 676.
[12] *Castleberry v. Brigano* (6th Cir. 2003) 349 F.3d 286, 293.
[13] *In re Miranda* (2008) 43 Cal.4th 541, 567-577.

Negates an element of a charged offense;[14]

Supports defense testimony;[15]

Supports an affirmative defense;[16] and

Supports a defense motion.[17]

a. Evidence directly opposing the defendant's guilt

Evidence that directly opposes a defendant's guilt is evidence which, if believed, would exonerate the defendant or mitigate the defendant's culpability. This would include witnesses who told police that the defendant was not the shooter, *People v. Jackson* (1991) 235 Cal. App. 3d 1670, and *In re Lee* (1980) 103 Cal. App. 3d 615, evidence of a taped interview with the defendant shortly after the crime that showed defendant's gross intoxication, *People v. Filson* (1994) 22 Cal. App. 4th 1841, or even material generated in the prosecution's investigation, such as an accident reconstruction by an expert that concluded another person was at fault for a fatal accident, *People v. Drake* (1992) 6 Cal. App. 4th 92. Disclosure is required even if the evidence does not positively exclude the defendant as the perpetrator. In *People v. Robinson (*1995) 31 Cal. App. 4th 494, the court held the failure to disclose a witness statement that identified another person who could have caused an arson the defendant was charged with was a *Brady* violation.

b. Evidence that mitigates the punishment of the defendant

Evidence mitigating the defendant's punishment was the type of evidence at issue in the *Brady* case, where a detective failed to provide a statement made by an accomplice that he, not Brady, was the actual killer. Brady was sentenced to death after a jury trial and the Supreme Court held that the suppression of the accomplice's statement violated Brady's due process rights. Evidence that reduces the level of the defendant's culpability in the crime and is favorable for the defendant regarding the sentence to be imposed, is included in the *Brady* rule. *Strickler v. Greene* (1999) 527 U.S. 263.

c. Evidence that negates an element of a charged offense

In *Youngblood v. West Virginia* (2006) 547 U.S. 867, a suppressed note written by alleged sexual assault victims could have supported a consensual-sex defense. Youngblood argued that such suppression violated the State's federal constitutional obligation to disclose evidence favorable to the defense, and in support of his argument he referred to cases citing and applying *Brady v. Maryland, supra.* The information in the suppressed note was at odds with the testimony provided by the State's three chief witnesses and was also entirely consistent with the defense that the sexual encounters were consensual, which negated an element of the charged offense.

d. Evidence that supports the testimony of a defense witness

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[14] *Youngblood v. West Virginia* (2006) 547 U.S. 867.
[15] *People v. Collie* (1981) 30 Cal.3d 43, 54; *Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670, 688.
[16] *United States v. Ross* (9th Cir. 2004) 372 F.3d 1097, 1108-1109 (Evidence supporting entrapment defense is favorable to defendant.).
[17] *United States v. Gamez-Orduno* (9th Cir. 2000) 235 F.3d 453, 461; *United States v. Barton* (9th Cir. 1993) 995 F.2d 931, 935.

No California case directly requires disclosure of evidence supporting the testimony of defense witnesses. However two decisions have included dicta that indicate such disclosure would be constitutionally mandated. In *People v. Collie* (1981) 30 Cal. 3d 43, 54, the California Supreme Court stated that the rationale of *Wardious v. Oregon* (1973) 412 U.S. 470 might require the prosecutor to divulge information to the defense that might support the credibility of a defense witness or otherwise establish the truth of his direct testimony. In *Hobbs v. Municipal Court* (1991) 233 Cal. App. 3d 670, the court held that the continuing reciprocal discovery obligations under Penal Code section 1054.3 required the prosecution to turn over to the defense any reports about disclosed defense witnesses or evidence. The court characterized evidence that might establish the truth of defense witness's testimony as being exculpatory in nature.

e. Evidence that supports an affirmative defense

The court in *United States v. Ross* (9th Cir. 2004) 235 F.3d 1097, 1108-1109 stated that "if the defendant is able to put entrapment [an affirmative defense] at issue, the government bears the burden of negating the defense beyond a reasonable doubt." See *Johnson v. United States* (1992) 503 U.S. 540, 548-549. A *Brady* violation would exist in a case if the new information undermines confidence in the jury's conclusion that the suspect was not entrapped. However, the court found that the entrapment defense failed because of the suspect's predisposition to commit the crime was such that this attenuated argument was insufficient to "put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 109.

f. Evidence supporting a defense motion

In *United States v. Barton* (9th Cir. 1993) 995 F. 2d 931, 935, the Court of Appeals held that "the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant." In *Anderson v. Calderon* (9th Cir. 2000) 232 F. 3d 1053, the Court of Appeal seemed to accept that the failure to disclose a tape-recorded interview where the defendant invoked his rights prior to a suppression hearing could violate *Brady*. However, the Court ultimately held that the defendant did not invoke his rights on the withheld tape. See *People v. Memro* (1985) 38 Cal. 3d 658, 680-684, where the Supreme Court held that the trial court's denial of a discovery motion deprived the defendant of relevant evidence to be used during a motion to exclude his statement. Though not directly discussing or citing *Brady*, the rationale of the Court in *Memro* maintained the idea that the prosecution must disclose evidence that would support a defendant's motion if that motion would weaken the prosecution's case or reduce the defendant's exposure to punishment.

2. <u>Impeachment Evidence</u>

"Impeachment" evidence pursuant to *Brady* is information about a witness that a fact finder may consider in determining whether that witness is telling the truth. Evidence impeaching the credibility of a material prosecution witness is different conceptually from other kinds of evidence favorable to a criminal defendant in that impeachment evidence generally does not concern itself with the question of whether the defendant is guilty or not guilty of the charges against him or her. Yet, impeachment evidence is subject to the same *Brady* rules of disclosure as any other kind of evidence favorable to the defendant.[18] "Relevant impeachment

[18] Pipes & Gagen, California Criminal Discovery (4th Edition), sec. 1:23:1.

information" means information which has a "tendency in reason"[19] to potentially impeach or is likely to lead to[20] evidence to potentially impeach, the testimony of a recurrent People's witness.

Examples of impeachment evidence include:

Felony convictions involving moral turpitude;[21]

Misdemeanor or other conduct that reflects on believability;[22]

Misconduct involving moral turpitude;[23]

False reports by a prosecution witness;[24]

Pending criminal charges against a prosecution witness;[25]

Parole or probation status of a prosecution witness;[26]

Evidence contradicting a prosecution witness's statements or reports;[27]

Evidence undermining a prosecution witness's expertise (e.g., inaccurate statements or expert opinions);[28]

An administrative finding of misconduct that reflects on a prosecution witness's truthfulness, bias or moral turpitude;[29]

Evidence that a prosecution witness has a reputation for untruthfulness;[30]

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[19] See, Evid. Code, § 210 ("'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any *tendency in reason* to prove or disprove any disputed fact that is of consequence to the determination of the action." [Emphasis added.]); Evid. Code, § 780 ("The court or jury may consider in determining the credibility of a witness any matter that has any *tendency in reason* to prove or disprove the truthfulness of his testimony at the hearing, including . . . His character for honesty or veracity or their opposites. . . The existence or nonexistence of a bias, interest, or other motive . . . ." [Emphasis added.]).

[20] *People v. Gaines* (2009) 46 Cal.4th 172, 182 (A trial court's duty to disclose Pitchess discovery from police personnel files encompasses inadmissible evidence which may lead to admissible evidence.).

[21] *People v. Castro* (1985) 38 Cal.3d 301, 314.

[22] *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297; California Criminal Jury Instructions No. 105.

[23] *Wheeler, supra,* 4 Cal.4th at p. 297, fn. 7.

[24] *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.

[25] *People v. Coyer* (1983) 142 Cal.App.3d 839, 842.

[26] *Davis v. Alaska* (1974) 415 U.S. 308, 319; People v. Price (1991) 1 Cal.4th 324, 486.

[27] *People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569.

[28] *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.

[29] *Cf. Wheeler, supra,* 4 Cal.4th at p. 293; also see *Dreary v. Gloucester* (1st Cir. 1993) (Ten-year-old disciplinary finding that an officer falsified overtime records admitted for impeachment purposes.)

[30] Evid. Code, § 780; see *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 479 (Evidence that a prosecution witness has a reputation for manipulation and dishonesty is evidence tending to exculpate the defendant and must be disclosed to the defendant.).

Evidence that a prosecution witness has a racial, religious or personal bias against the defendant individually or as a member of a group;[31]

Evidence that a prosecution witness has violated an individual's constitutional rights:[32]

Evidence of interest or other motive;[33]

Alcohol and/or drug use;

Evidence of prior use of unreasonable or excessive force;

Evidence of gang membership;[34] and

Promises, offers or inducements to a prosecution witness, express or implied, including a grant or promise of immunity.[35]

a. Prior felony convictions involving moral turpitude or dishonesty

Prosecutors have an affirmative *Brady* obligation to disclose witnesses' prior felony convictions to the defense. See *In re Ferguson* (1971) 5 Cal.3d 525, 533, and *Hill v. Superior Court* (1974) 10 Cal. 3d 812, 820, as well as a statutory obligation under Penal Code section 1054.1. In *People v. Little* (1997) 59 Cal. App.4th 426, the court held that the prosecution's failure to disclose prior felony convictions as to a witness who testified to information that few other persons could provide was a violation of both the statutory duty and *Brady*. Not all felony convictions may be used to impeach a witness. The felony conviction must involve dishonesty or moral turpitude. *Castro, supra,* 38 Cal. 3d at p. 316. Moral turpitude is a "general readiness to do evil." *People v. Jackson* (1985) 174 Cal. App. 3d 260, 266. The "prior" conviction which can be used to impeach a witness can occur after the charged crime if the conviction is before the witness testifies. *People v. Halsey* (1993) 21 Cal. App. 4th 325, 328. If the witness has not yet been sentenced, the witness may be impeached with the felony conviction, even if the case could be reduced by the judge at sentencing. *People v. Martinez* (1998) 62 Cal. App. 4th 1454.

California case law has held that the following crimes involve moral turpitude:

- Penal Code § 32, Accessory to a felony
- Penal Code § 69, Threatening a police officer
- Penal Code § 136.1, Threatening a witness
- Penal Code § 148.5, False Information to Police
- Penal Code § 148.9, False Information to Police
- Penal Code § 187, Murder

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[31] Evid. Code, § 780; *In re Anthony P*. (1985) 167 Cal.App.3d 502, 507-510.
[32] *Milke v. Ryan* (2013) 711 F.3d 998
[33] Evid. Code, § 780(f),
[34] See *United States v. Abel* (1984) 469 U.S. 45; *Association of Los Angeles Deputy Sheriff's v. Superior Court* (2019) 8 Cal.5th 28, 52-53.
[35] *United States v. Bagley* (1985) 473 U.S. 667, 676-677; *Giglio v. United States* (1972) 405 U.S. 150, 153-155.

- Penal Code § 192, Manslaughter, voluntary/involuntary
- Penal Code § 203, Mayhem
- Penal Code § 207, Kidnapping
- Penal Code § 237, False imprisonment by violence
- Penal Code § 240, Assault, simple
- Penal Code § 243, Battery
- Penal Code § 243(c), Battery on a police officer
- Penal Code § 243(d), Battery with serious bodily injury
- Penal Code § 243.4(d), Sexual Battery
- Penal Code § 245, Assault
- Penal Code § 245(a)(1) and (2), Assault with deadly weapon/firearm
- Penal Code § 246, Shooting into an inhabited dwelling
- Penal Code § 246.3, Firearm, Negligent Discharge
- Penal Code § 261, Rape
- Penal Code § 261.5, Statutory rape
- Penal Code § 266(h), Pimping and pandering
- Penal Code § 266(i), Pimping and pandering
- Penal Code § 273(a), Child endangerment
- Penal Code § 273(d), Child endangerment, corporal Punishment
- Penal Code § 273.5, Battery on a spouse
- Penal Code § 281, Bigamy
- Penal Code § 285, Incest
- Penal Code § 286(c)(2), Sodomy, forcible
- Penal Code § 288(c), Child molestation
- Penal Code § 288a, Oral copulation
- Penal Code § 290, Failure to Register as a Sex Offender
- Penal Code § 314, Indecent exposure
- Penal Code § 417, Brandishing a deadly weapon
- Penal Code § 422, Threats
- Penal Code § 451, Arson
- Penal Code § 459, Burglary
- Penal Code § 470, Forgery
- Penal Code § 487, Theft
- Penal Code § 496, Receiving stolen property
- Penal Code § 594, Vandalism
- Penal Code § 647(b), Prostitution
- Penal Code § 653f(b), Solicitation to commit murder
- Penal Code § 664, Attempted burglary/murder
- Penal Code § 1320.5, Failure to Appear (Felony)
- Penal Code § 12020, Possession of Illegal Weapons
- Penal Code § 12280(b)(1), Assault Weapon, possession of
- Penal Code § 17500, Possession of weapon with intent to assault another
- Penal Code § 25400, Carrying a concealed firearm
- Penal Code § 25850(a), Carrying a loaded firearm in public place

- Penal Code § 29800(a)(1), Felon in possession of a firearm
- Penal Code § 4501.5, Assault/Battery by inmate on non-inmate
- Penal Code § 4530(c), Failure to return to custody
- Penal Code § 4532, Escape by convicted felon
- Penal Code § 30605, Assault Weapon, possession of
- Fish and Game Code § 3004, Discharging firearm by hunter
- Health and Safety Code § 11350, Controlled substance, straight possession
- Health and Safety Code § 11351, Controlled substance, possession for sale
- Health and Safety Code § 11352, Controlled substance, sale
- Health and Safety Code § 11357, Controlled substance, possession of marijuana
- Health and Safety Code § 11358, Controlled substance, cultivation of marijuana
- Health and Safety Code § 11364, Drug paraphernalia, possession
- Health and Safety Code § 11366, Controlled substance, maintaining place
- Vehicle Code § 2800.2, Evading police
- Vehicle Code § 10851, Auto theft
- Vehicle Code § 20001, Hit and Run with injury
- Vehicle Code § 23152, DUI involving drugs or aggravating factors
- Vehicle Code § 23175, DUI with three priors
- W&I § 10980, Welfare fraud

This is not an exhaustive list. DDAs shall conduct their own research and stay abreast of current case and statutory law

b. Misdemeanor convictions involving moral turpitude or dishonesty

The court in *Wheeler, supra*, 4 Cal. 4th at page 295, held that past criminal conduct amounting to a misdemeanor may be admissible to impeach a witness if the conduct involved dishonesty or moral turpitude. Under *Wheeler*, it was necessary to call live witnesses to prove the underlying conduct that resulted in the misdemeanor conviction because there was no hearsay exception allowing the use of the record of the misdemeanor conviction to prove the underlying conduct. However, Evidence Code section 452.5(b) provides that an official record of a conviction certified in accordance with subdivision (a) of Evidence Code section 1530 is admissible to prove the commission, attempted commission, or solicitation of a criminal offense. See *People v. Duran* (2002) 97 Cal. App. 4th 1448, 1460. DDAs may also want to stipulate to the information when the information is verifiable or was provided through our DCS.

Some of the moral turpitude crimes listed above may be wobblers and prosecuted as misdemeanors. Examples of moral turpitude misdemeanors include theft, burglary, brandishing a weapon, giving false information to a peace officer, assault, battery, and vandalism.

c. Instances of misconduct involving moral turpitude or dishonesty not resulting in a conviction

Wheeler, *supra,* also held that misconduct involving dishonesty or moral turpitude, not resulting in a conviction, could be used to impeach a witness. In *People v. Lee* (1994) 28 Cal. App. 4th 1724, the court extended the *Wheeler* rule to admit evidence of a witness's misconduct while a juvenile, where that misconduct involved moral turpitude.

Where the witness is a police officer, instances of misconduct involving moral turpitude or dishonesty not resulting in a conviction must also be disclosed. A prosecutor has a duty to disclose misconduct evidence even if it is in the hands of law enforcement. *Association for Los Angeles Deputy Sheriffs (ALADS) v. Superior Court* (2019) 8 Cal.5th 28. However, if the information qualifies as a confidential personnel record pursuant Penal Code section 832.7, such a record cannot be disclosed except by discovery pursuant to Sections 1043 of the Evidence Code. A prosecutor who has reason to believe such misconduct information is contained in a personnel record must advise the defense of that belief.

Some police agencies, for instance, choose to provide prosecutors with a list of officers who have potential *Brady* material in their personnel file without providing any additional details. Any such alerts must be communicated to the defendant and/or their defense counsel and are sufficient to provide the defense and the prosecution with sufficient good cause under *Pitchess* to seek discovery of any relevant misconduct information contained in personnel records. *ALADS, supra*; also see *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696. DDAs should file *Pitchess* motions for the information in all cases where the officer is material or may be called as a witness. If the defense files a *Pitchess/Brady* motion pursuant to a *Brady* alert, DDAs may join in the motion but the better practice is to file a prosecution initiated *Pitchess* motion and then share any *Brady* information which is disclosed with the defense. DDAs should also be aware that in joining a defense *Pitchess* motion, it may be construed as an affirmation to the contents of the affidavit and may disallow a future challenge to the validity of impeachment information.

If an order to disclose confidential personnel information is granted, the court must issue a protective order limiting the disclosure of the records. *Pitchess* disclosures are typically limited to a period of five years under Evidence Code section 1045(b)(1), and the disclosure itself is generally limited to the complainants' and/or witnesses' names and addresses. While *Pitchess* has a five year limitation, in *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, the Supreme Court held that if prosecutors are aware of misconduct that would constitute *Brady* evidence, they are required to provide it to the defense even if that evidence falls outside of the five-year period. Hence, DDAs shall object to protective orders which preclude the LADA from uploading the information to a database or otherwise using the information to comply with its *Brady* obligations in other cases. If information is produced pursuant to a *Pitchess* motion which is not subject to these limitations, the information shall be sent to DCU forthwith.

Police misconduct information contained in documents such as charge evaluation worksheets, police reports, some force investigations, dishonesty or sexual assault findings are not confidential personnel records and can be disclosed without filing a *Pitchess* motion and without a protective order. A protective order may only be sought on these types of *Brady* material upon a showing of good cause and with the concurrence of the handling DDA's supervisor. (See section X below at pages __ through __ for specific guidelines on when and what type of protective orders are appropriate.) The mere fact that a document such as a charge evaluation worksheet, police report or non-confidential investigation is placed in a personnel file as part of an administrative investigation or otherwise does not render it a confidential personnel record.

d. False reports by a witness

"Courts have held that the type of information [false reports of sex offenses by the victim] appellant requested in this case is both discoverable and admissible because of its potential impact on credibility." *People v. Bittaker* (1998) 48 Cal. 3d 1046, 1097, citing *People v. Hayes* (1992) 3 Cal. App. 4th 1238, 1245. In *Benn v. Lambert* (2002) 283 F. 3d 1040, the Court of Appeals held that the failure to disclose previous false reports by the jailhouse informant about the defendant was a *Brady* violation.

e. Pending charges against the witness

People v. Coyer (1983) 142 Cal. App. 3d 839, 842 held that a defendant is entitled to discovery of criminal charges currently pending against prosecution witnesses because the pendency of criminal charges is material to a witness's motivation in testifying, even where no express promises of leniency or immunity have been made. See also *Currie v. Superior Court* (1991) 230 Cal. App. 3d 83, where the failure to disclose a pending misdemeanor charge of filing of a false report was found to be *Brady* error. Where a law enforcement officer is under investigation, criminal charges are under consideration, or criminal charges have been filed by the LADA, the responsible DDA shall immediately forward this information to DCU, including a copy of the police report.

If the responsible DDA believes disclosure to the defense that there is a pending investigation or that criminal charges are under consideration may jeopardize the safety of the alleged victim(s) and/or the ongoing investigation or prosecution, the DIC of DCU must be so advised in writing. The same procedure should be employed with respect to the disclosure of any police reports related to the pending investigation. A protective order may be sought and/or the information may need to be sanitized or kept confidential until a filing decision is made. (See section VI.B below at pages 23 through 24 for further guidance on protective orders.) A decision on how to proceed with the information should be made by the DDA in consultation with their supervisor, the DDA handling the case against the officer witness and the DIC of DCU. In some cases, dismissal of the current charges against a defendant where an officer witness is being prosecuted by our office should be considered and may be necessary to avoid producing *Brady* evidence when a protective order is deemed insufficient to sufficiently guard against compromising the prosecution against the officer witness.

Once a filing decision is made, the risk of compromising an investigation or prosecution is reduced and police reports containing impeachment information shall be turned over on pending cases where the officer is a witness. A protective order may nonetheless be sought and/or some information may need to be redacted while the prosecution is pending, but only under limited circumstances, i.e. when there is good cause to seek a protective order.

On post-conviction cases, police reports should be provided when the information is material within the meaning of *Brady* in that it is favorable to the defendant, the information was willfully or inadvertently suppressed by the prosecution, and prejudice ensued from the failure to timely provide the information. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-82.) Stated another way, the evidence is material if there is a "reasonable probability" that the outcome of the trial or conviction would have been different had the evidence been disclosed by the prosecutor. *Kyles v.*

Whitley (1995) 514 U.S. 419, 434. For more guidance on materiality, see below section B at pages 15 through 15.

Additionally, DDAs should consider stipulating to the officer witness's underlying misconduct in order to avoid having the defense call a witness to prove the underlying misconduct. Such a stipulation, for instance, may be particularly appropriate when the officer is a witness in a pending case being prosecuted by the office and calling the officer may in any way compromise or interfere with the prosecution of the case where the officer is a defendant.

f. Status on probation or parole

Evidence of a witness's status on probation or parole is evidence that can impact the credibility of that witness. In *Davis v. Alaska* (1974) 415 U.S. 308, 319, the Supreme Court held that the prosecution must disclose whether a witness is on probation, since that fact can be used to establish that the witness's testimony is biased. *People v. Price* (1991) 1 Cal. 4th 324, 486, held that the disclosure was required as to a witness's status on parole. When a law enforcement officer is a witness, the DDA shall run the officer in DCS. If the information in DCS involves a criminal case, the DDA shall determine whether the officer/former officer has a conviction and/or has been placed on parole or probation. DDAs shall use caution when calling an officer/former officer witness to testify who is on probation or parole. The DDA shall immediately inform their supervisor when calling an officer witness to testify who is on an active grant of parole or probation.

g. Evidence which contradicts the witness

People v. Filson, *supra*, held that the tape-recorded interview of the defendant showed his gross intoxication just after the crime had been committed and contradicted several witnesses that the defendant was not intoxicated. This evidence would have shown that the sole defense claimed by the defendant, that he was too intoxicated to form the specific intent necessary for the crime, was supported. It was error for the prosecution to withhold the recording since it contradicted several prosecution witnesses.

h. Inconsistent or conflicting statements

Evidence in an investigator's notes and records of his interviews with a witness and written materials by that witness, all of which contained statements that were inconsistent or conflicted with the trial testimony of that witness, should have been disclosed. *Strickler v. Greene*, *supra*. In *People v. Boyd* (1990) 222 Cal.App.3d 541, the court held that the prosecution's failure to disclose a witness's denial of earlier statements, obtained as the prosecution prepared for the rebuttal portion of the case, was a *Brady* violation.

i. Inaccurate statements

In *United States v. Howell* (2000) 231 F.3d 615, the Court of Appeals held that the failure to disclose errors in police reports as to a critical piece of evidence could raise the opportunity to attack the thoroughness and good faith of the investigation and could constitute a *Brady* violation. In *People v. Garcia* (1993) 17 Cal.App.4th 1169, an accident reconstruction expert's faulty calculations and inaccurate testimony in other cases should have been disclosed to the defendant. The burden is on the defense to prove that the statements or reports are inaccurate. *People v. Coddington* (2000) 23 Cal.4th 529, 589-590.

j. Finding of misconduct

Misconduct involving moral turpitude may suggest a willingness to lie. (See *Castro, supra,* 38 Cal.3d at pp. 314-315; *People v. White* (1904) 142 Cal. 292, 294. This inference is not limited to conduct which resulted in a felony conviction. The court in *Wheeler, supra,* 4 Cal.4th at page 295 concluded that if past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, the conduct is admissible, subject to trial court discretion. The *Wheeler* case involved a relatively recent conviction for grand theft, an offense necessarily involving both moral turpitude and dishonesty, and was found to be highly relevant to credibility.

k. Reputation for untruthfulness

In *Corriger v. Stewart* (1997) 132 F.3d 463, a defendant convicted of capital murder was deprived of due process by the prosecution witness's long history of lying to police and blaming his crimes on others. The prosecution acknowledged that the case came down to whether the witness was telling the truth or whether the witness committed murder and framed the defendant. When the state relies on testimony of a witness with a criminal history, it is the state's obligation under *Brady* to turn over all information bearing on that witness's credibility.

l. Racial, religious or personal bias

In the case of *In re Anthony P*. (1985) 167 Cal.App.3d 502, the case hinged entirely on the credibility of one witness. The trial judge allowed defense counsel to pose only one question on the issue of this witness's possible bias against persons of a certain race. The court found this violated the appellant's constitutional right to cross-examine the witness against him. This denial of the right of effective cross-examination of the principal prosecution witness was found to be reversible *per se.*

m. Promises, offers or inducements made to the witness

Promises, offers or inducements made to a prosecution witness must be disclosed to the defense, whether explicit or implied. These include promises in the current case or related to past cases. *United States v. Bagley* (1985) 473 U.S. 667, involved written contracts with undercover witnesses providing for payment for their services. *People v. Ruthford* (1975) 14 Cal.3d 399, involved promises to an accomplice who testified against the defendant based on promises that the accomplice's wife would not be sent to prison. *In re Sassounian, supra,* 9 Cal.4th 535, involved promises to a jailhouse informant. *Giglio v. United States, supra,* 405 U.S. 150, involved implied promises of leniency along with threats to prosecute the witness if they did not testify against Giglio. "[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility and the jury was entitled to know of it." *Id.* at p. 155. See also *In re Malone* (1996) 12 Cal. 4th 935, 976-977.

Impeachment evidence is favorable to a defendant when it undermines the credibility of a prosecution witness.[36] Evidence impeaching the testimony of a material prosecution witness becomes favorable evidence pursuant to the *Brady* rule only when the witness *testifies* as a

[36] *United States v. Bagley* (1985) 473 U.S. 667, 676; *People v. Morris* (1988) 46 Cal.3d 1, 30; *People v. Phillips* (1985) 41 Cal.3d 29, 46.

prosecution witness.[37] It is not evidence favorable to a defendant when the prosecution witness does not testify or when the witness testifies as a defense witness.

n. Cases presented to office for filing consideration

As set forth above, when a case involving a recurring witness such as a police officer is presented to the office for filing consideration, the filing deputy and/or their supervisor shall immediately notify the DIC of DCU in writing via memorandum or email. The fact that a case has been presented to the office for filing consideration and the nature of the charges will be uploaded to DCS and the information shall be disclosed to defense counsel on pending cases. Instructions on whether or not the information is subject to a protective order will be provided by DCU in the DCS entry. Once a filing decision is made, the filing deputy and/or their supervisor shall forthwith send a copy of the charge evaluation worksheet or complaint to DCU. The police reports should have been sent to DCU pursuant to section II.A.2.e above. However, if they were not previously sent, the police reports shall accompany the charge evaluation worksheet or complaint.

B. *BRADY* EVIDENCE MUST BE MATERIAL

Evidence is "material" if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed.[38]

1. Material Witness

A prosecution witness is a "material witness" when that witness's testimony is so important that there is a reasonable probability that its absence would affect the outcome of the prosecution's case.[39] Specifically, a "material witness" provides testimony at trial on an important issue which is not cumulative, i.e., testimony which no one else can give on a disputed issue.[40]

2. Reasonable Probability

A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial.[41] The term should not be confused with, or used interchangeably with, the term "reasonable possibility." "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[42]

Commentary

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[37] See *United States v. Haskell* (8th Cir. 2006) 468 F.3d 1064, 1075; *People v. Cook* (2006) 39 Cal.4th 566, 589.
[38] *Strickler v. Greene*, *supra*, 527 U.S. at p. 289.
[39] E.g., *Strickler v. Greene* (1999) 527 U.S. 263, 291-296; *People v. Williams* (1997) 16 Cal.4th 635, 653; *Ruthford*, *supra*, 14 Cal.3d at p. 406; *Giglio v. United States* (1972) 405 U.S. 150, 154-155; *In re Ferguson*, *supra*, 5 Cal.3d at p. 535.
[40] E.g., *People v. Salazar* (2005) 35 Cal.4th 1031, 1049-1051; *Banks v. Dretke* (2004) 540 U.S. 668, 700-701; *United States v. Fallon* (7th Cir. 2003) 348 F.3d 248, 252; *Bailey v. Rae* (9th Cir. 2003) 339 F.3d 1107, 1116-1119.
[41] *Kyles v. Whitley*, *supra*, 514 U.S. at p. 434.
[42] *People v. Hoyos* (2007) 41 Cal.4th 872, 917-918, 922, citing *United States v. Agurs* (1976) 427 U.S. 97.

This constitutional interpretation of the term "materiality" sharply contrasts with the requirement of Penal Code section 1054.1(e) to disclose exculpatory evidence without regard to materiality.[43] As discussed post, DDAs should therefore disclose any exculpatory or impeaching evidence to the defense on pending cases whether or not it is "material" within the meaning of Brady v. Maryland.

C. *BRADY* "EVIDENCE" MUST BE EVIDENCE

The materiality component requires limiting the *Brady* rule to evidence.[44]

Commentary

Brady information may be either admissible evidence or information which is likely to lead to admissible evidence.[45] Therefore, ***DDAs should disclose evidence which is favorable to the defendant even though that evidence itself is inadmissible, because inadmissible evidence can lead to admissible exculpatory or impeachment evidence.***

III. PENAL CODE SECTION 1054.1(e)[46]

Penal Code section 1054.1 provides:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> (b) Statements of all defendants.
>
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> (e) Any exculpatory evidence.
>
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Subdivision (e) codifies the *Brady* rule. As used in that subdivision, the phrase "exculpatory evidence" includes both exculpatory and impeachment evidence.[47] Subdivision (e) also expands

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[43] *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; see also *People v. Bowles* (2011) 198 Cal.App.4th 318, 326.
[44] *Sledge v. Superior Court* (1974) 11 Cal.3d 70, 75.
[45] *People v. Gaines* (2009) 46 Cal.4th 172, 182 (A trial court's duty to disclose Pitchess discovery from police personnel files encompasses inadmissible evidence which may lead to admissible evidence.).
[46] General office policies for the management of discovery pursuant to Penal Code section 1054 et seq. are set forth in the LADA Legal Policies Manual (August 2019), sections 9.02 and 11.01.
[47] The United States Supreme Court has rejected any constitutional distinction between exculpatory evidence and impeachment evidence and has specifically stated that "impeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule" (*United States v. Bagley* (1985) 473 U.S. 667, 676). Similarly, the California Supreme

the *Brady* rule by requiring a prosecutor to disclose to the defendant *any* exculpatory evidence, not just *material* exculpatory evidence.[48] A failure to disclose *any* exculpatory evidence (Penal Code 1054.1(e) violation) can result in various discovery sanctions pursuant to Penal Code section 1054.5(b), including dismissal of a case.[49]

IV. RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Rule 3.8 was approved by the California Supreme Court and became effective on June 1, 2020.

The rule provides that prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
(e) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.
(f) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
    (1) Promptly disclose that evidence to an appropriate court or authority, and
    (2) If the conviction was obtained in the prosecutor's jurisdiction,
        (i) Promptly disclose that evidence to the defendant unless a court authorizes delay; and
        (ii) Undertake further investigation or make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.
(g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction

The Rule follows Penal Code 1054.1 but emphasizes that a prosecutor's obligation regarding disclosure of exculpatory evidence is greater (broader) than just *Brady*, which requires materiality. The Rule uses the phrase "knows or reasonably should know tends to negate ..." as the criteria regarding such disclosure. The Rule also states, in comment no. 3 following the rule,

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Court has rejected any distinction between the phrase "exculpatory evidence" as utilized in Penal Code section 1054.1(e) and the prosecutor's Brady disclosure duty under the Due Process Clause (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372).

[48] *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.

[49] Pen. Code, § 1054.5, subd. (c).

"The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny."

V. DISCLOSURE

A. THE PROSECUTION TEAM

A prosecutor has a duty to disclose favorable material evidence to the defendant even if there has been no defense request.[50] If favorable material evidence is contained in the prosecution attorney's files or office, the prosecutor is in actual possession of it and has a duty to disclose it.[51] Moreover, if the favorable material evidence is contained in the files of an agency connected to the investigation of the case, the prosecutor is in constructive possession of it, and has a duty to disclose it.[52] "Courts have . . . consistently decline[d] to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."[53]

A prosecutor must disclose favorable material evidence in the possession of the "prosecution team," including "information possessed by others acting on the government's behalf that [was] gathered in connection with the investigation."[54] The prosecution team includes the prosecutor's office, the investigating agency, and assisting agencies or persons (for example, crime labs[55] and sexual assault response teams [SART][56]) connected to the investigation or the prosecution of the case.[57]

Examples of information possessed by a prosecution team member which must be disclosed include, but are not limited to, a crime lab report generated by a lab, that was part of the investigative team, which contained exculpatory test results;[58] a videotape of a SART examination, initiated by a law enforcement referral in the investigation of criminal conduct, which offered potential evidence impeaching a prosecution expert witness's testimony;[59] notes generated by a victim-witness advocate, who was employed by the prosecuting agency, which contained exculpatory statements;[60] and awareness by a law enforcement agency, which assisted the prosecution by housing a witness in a witness protection program, that the witness committed

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[50] *United States v. Agurs* (1976) 427 U.S. 97, 107; *People v. Ruthford* (1975) 14 Cal.3d 399, 406.

[51] See *Giglio v. United States* (1972) 405 U.S. 150, 154 ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.").

[52] See *People v. Lucas* (2014) 60 Cal.4th 153, 274.

[53] *In re Brown* (1998) 17 Cal.4th 873, 879; People v. Prince (2007) 40 Cal.4th 1179, 1234; People v. Jordan (2003) 108 Cal.App.4th 349, 358.

[54] *Strickler v. Greene* (1999) 527 U.S. 263, 281 ("In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'"); *Kyles v. Whitley, supra,* 514 U.S. at p. 437; *United States v. Price* (9th Cir. 2009) 566 F.3d 900, 908; *In re Brown* (1998) 17 Cal.4th 873, 879, 881 ("[T]he crime lab's failure to apprise the prosecution of the worksheet did not relieve the prosecutor of his obligation to review the lab's files for exculpatory evidence.").

[55] *In re Brown* (1998) 17 Cal.4th 873, 879.

[56] People v. Uribe (2008) 162 Cal.App.4th 1457.

[57] *In re Brown* (1998) 17 Cal.4th 873, 879; In re Steele (2004) 32 Cal.4th 682, 697.

[58] *In re Brown* (1998) 17 Cal.4th 873.

[59] *People v. Uribe* (2008) 162 Cal.App.4th 1457.

[60] *Commonwealth v. Liang* (2001) 434 Mass. 131 [747 N.E.2d 112].

misconduct.[61] In contrast, a prosecutor has "'no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.'"[62]

The *Brady* rule does not require the disclosure of impeachment evidence before a defendant pleads guilty or no contest.[63] However, it is the policy of this office to provide all exculpatory and impeaching information to the defense prior to a plea of guilty or no contest. California courts are consistent with this policy and have held that prosecutors must disclose impeachment information before a defendant pleads guilty or no contest. Information establishing the factual innocence of a defendant or that is otherwise materially exculpatory must be disclosed when it becomes known. Plea waivers "cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'"[64]

Prosecutors need not reveal their personal assessment of the credibility of witnesses.[65] Their opinions regarding trial issues are "opinion work product" and not discoverable pursuant to *Brady*.[66] In contrast, prosecutors have a duty to immediately correct any testimony of its own witnesses which they know was false or misleading.[67] This duty applies not only to false or misleading testimony regarding substantive evidence, but also to false or misleading testimony regarding impeachment evidence.[68] Furthermore, this duty applies to testimony prosecutors later learn is false or misleading.[69]

B. ASSIGNED DDA RESPONSIBLE FOR DISCLOSURES

The fulfillment of the prosecution's obligation under the *Brady* rule and Penal Code section 1054.1(e) to provide exculpatory and impeachment evidence is the sole responsibility of the individual DDA assigned to a case and shall be done without a defense request. Officer credibility is essential to the evaluation of a case. The Filing DDAs shall query DCS prior to case evaluation and consider any such information in the filing decision. Filing DDAs are involved in reviewing case files submitted by law enforcement to determine whether a criminal action should be filed. Discovery obligations are triggered when there is a criminal action. A filing DDA does not have an obligation to inform defense attorneys about discoverable information because the

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[61] See *United States v. Wilson* (7th Cir. 2001) 237 F.3d 827, 832.
[62] *People v. Panah* (2005) 35 Cal.4th 395, 460, quoting *In re Littlefield* (1993) 5 Cal.4th 122, 135.
[63] *United States v. Ruiz* (2002) 536 U.S. 622. However, *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074, *People v. Gutierrez* (2013) 214 Cal.App.4th 343, Penal Code section 1054.1(e), and the LADA policy may require disclosure of impeachment information before a defendant pleads guilty or no contest.
[64] *Sanchez v. United States* (9th Cir. 1995) 50 F.3d 1448, 1453, quoting *Miller v. Angliker*, (2nd Cir. 1988) 848 F.2d 1312, 1319-20, cert. den., (1988) 488 U.S. 890; see also *In re Miranda* (2008) 43 Cal.4th 541, 581-582.
[65] *People v. Seaton* (2001) 26 Cal.4th 598, 647-648.
[66] *Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735, 742.
[67] *People v. Morales* (2003) 112 Cal.App.4th 1176, 1193, citing to *In re Jackson* (1992) 3 Cal.4th 578, 595 (The prosecution has the "basic duty . . . to correct any testimony of its own witnesses which it knew . . . was false or misleading."); *United States v. Alli* (9th Cir. 2003) 344 F.3d 1002, 1007, citing to *United States v. LaPage* (9th Cir. 2000) 231 F.3d 488, 492.
[68] *United States v. Alli* (9th Cir. 2003) 344 F.3d 1002, 1007, citing to *Napue v. Illinois* (1959) 360 U.S. 264, 269-270 (The government's obligation to immediately take steps to correct known misstatements of its witnesses applies regardless of whether the government solicited the false testimony or whether the false testimony only goes to the credibility of the witness, not to substantive evidence.).
[69] *United States v. Rodriguez* (9th Cir. 2014) 766 F.3d 970, 970; *United States v. Houston* (9th Cir. 2011) 648 F.3d 806, 814.

filing DDA's involvement in the case precedes the existence of a criminal action. A filing DDA's involvement is concluded once the filing decision is made and a filing deputy does not have a practical means or vehicle by which to transmit that information to defense counsel.

A filing DDA, however, is obligated to note the existence of potential discovery information, to evaluate that information in making their filing decision, and to notate, in a Statement of Facts when the decision is to file, or in the Charge Evaluation worksheet, when the decision is to decline to file, their actions in reviewing the information and the impact of that information. A filing DDA is obligated to review DCS entries to determine whether, in light of all the available evidence, there is sufficient credible, admissible evidence to prove criminal charges beyond a reasonable doubt.

If, due to extraordinary circumstances, the filing deputy is unable to check DCS prior to filing, the reason therefore should be noted in the file and the deputy appearing at the arraignment must ensure that DCS is queried and any exculpatory and/or potentially impeaching information is turned over to the defense at the arraignment.

To ensure compliance with the *Brady* rule, the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to err on the side of disclosure.[70] "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[71] DDAs should resolve doubtful questions in favor of disclosing any potentially exculpatory or impeaching information:

> In the end, the trial judge, not the prosecutor, is the arbiter of admissibility, and the prosecutor's *Brady* disclosure obligations cannot turn on the prosecutor's view of whether or how defense counsel might employ particular items of evidence at trial. "It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is 'the criminal trial, as distinct from the prosecutor's private deliberations' that is the 'chosen forum for ascertaining the truth about criminal accusations."[72]

Commentary

To ensure full compliance with the Brady rule and the LADA policy, DDAs must disclose facially exculpatory or impeaching information even when they believe that the information is inadmissible or false.

C. DISCLOSURE OF IMPEACHMENT EVIDENCE FROM CRIMINAL OFFENDER RECORD INFORMATION

As referred to *ante,* the *Brady* rule imposes a constitutional duty upon a prosecutor to disclose to the defense evidence impeaching the credibility of a material prosecution witness. *Brady* impeachment evidence includes, but is not limited to, felony convictions involving moral turpitude, misdemeanor or other conduct that reflects on believability or involving moral turpitude, pending criminal charges, and parole or probationary status of a prosecution witness.

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[70] *Kyles v. Whitley, supra,* 514 U.S. at p. 440.

[71] *United States v. Agurs* (1976) 427 U.S. 97, 108; see also *Kyles v. Whitley, supra,* 514 U.S. at p. 439 (Warning prosecutors against "tacking too close to the wind" in withholding evidence.).

[72] *In re Miranda* (2008) 43 Cal.4th 541, 577, citations omitted.

At the same time, Penal Code section 1054.1(d) imposes a broader statutory duty upon a prosecutor to disclose to the defense, not just felony convictions which involve moral turpitude, but *all* felony convictions of a material witness. This duty to disclose felony convictions extends to those which have been expunged pursuant to Penal Code section 1203.4.[73]

Criminal offender record information, i.e., rap sheets, are records and data compiled by criminal justice agencies for the purpose of identifying criminal offenders and of maintaining as to each offender a summary of arrests, pretrial proceedings, disposition of criminal charges, and sentencing.[74] Although a criminal offender record itself is not discoverable,[75] impeachment information found therein about a prosecution witness's felony convictions, misdemeanor or other conduct that involve moral turpitude, pending criminal charges, and parole or probationary status, constitutes evidence to which the defendant is entitled. Since criminal offender records are "reasonably accessible" to prosecutors, DDAs are held to a duty to disclose information from those records which impeach the credibility of material prosecution witnesses.[76] In executing this duty, DDAs must provide the information on a separate document but should never give a witness's criminal offender record itself to the defense.[77]

Instead, DDAs should restrict the release of information to the name of the crime, case number, the date and place of arrest and/or conviction,[78] and the case number, if available.

1. Peace Officer Criminal Offender Records

Practically speaking, peace officer witness criminal offender records are not "reasonably accessible" to the prosecution without the officer's date of birth unless the officer has been arrested for an offense, investigated for a criminal offense presented to the LADA, or has been charged with a criminal offense by the LADA. Birth date information contained in a peace officer's personnel file is confidential and may generally only be disclosed to the prosecution by the officer's employing agency by means of a *Pitchess* motion.[79] To ensure compliance with the *Brady* rule and Penal Code section 1054.1(d), and to avoid the respective burdens placed on the law enforcement agencies' custodians of record, the courts, and the LADA by repetitive *Pitchess* motions, the LADA has requested all law enforcement agencies in Los Angeles County comply with the following procedure:
Whenever a law enforcement agency employee, e.g., peace officer or expert, who has testified for the prosecution in the past or who the agency reasonably and in good faith believes will testify as a witness for the prosecution in the future, is arrested for, or convicted of a crime, the employing agency shall provide the following information to the LADA Bureau of Investigation (BOI) on-duty personnel at the LADA Command Center:

- Employee Name

[73] *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1079 ("Irrespective of the expungement's effect on the convictions' admissibility at trial, the prosecution still bore the burden of investigating and divulging the existence of such convictions."); Evid. Code, § 788, subd. (c) (Expunged convictions are inadmissible.).
[74] Pen. Code, § 13102.
[75] *People v. Roberts* (1992) 2 Cal.4th 271, 308.
[76] *People v. Little* (1997) 59 Cal.App.4th 426, 433.
[77] See General Office Memorandum (GOM) 09-03, "Disclosure of Rap Sheets," for a full discussion.
[78] GOM 09-03.
[79] *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430; *Johnson, supra,* 61 Cal.4th 696.

- Employee Number

For arrests:

- Arrest Date
- Arresting Agency Name
- Arresting Agency File Number (e.g., DR Number, URN Number)
- Booking Number
- Charge(s)

For convictions:

- Conviction Date
- Court Case Number
- Crime(s) Convicted of

2. Duties of Bureau of Investigations Personnel

The Command Center BOI on-duty personnel shall forward the information to the LADA BOI lieutenant assigned to the Justice System Integrity Division (JSID), who shall procure potential impeachment information therefrom.

The JSID lieutenant shall forward the potential impeachment information forthwith, along with accompanying arrest reports as soon as they are available, to the DIC of DCU for evaluation and inclusion in the DCS. The United States Supreme Court has strongly suggested that large prosecution offices establish procedures and regulations "to insure communication of *all relevant information* on each case to every lawyer who deals with it."[80] Since constitutional disclosure requirements "apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor,"[81] the LADA created the DCS to ensure that all DDAs are informed of relevant impeachment information that comes to the attention of the LADA. The assigned DDA shall query the DCS at all stages of the prosecution to determine if any information, not known at the time of filing, was subsequently added to the database.

VI. DISCOVERY COMPLIANCE SYSTEM (DCS)

The DCS is comprised of the *Brady* and Officer and Recurrent Witness Information Tracking System (ORWITS) databases. The term "recurrent [People's] witness" includes peace officers, experts, and other witnesses who the People reasonably expect to testify in multiple cases.

Personnel from the DCU maintain the DCS, along with the underlying documents for each entry, and determine whether information pertaining to a recurrent witness will be placed into the *Brady* or ORWITS databases. The DCS is interfaced with the Adult and Juvenile Subpoena Management Systems to notify a DDA, by way of the Master Witness List (MWL), that a recurrent People's witness is in the DCS. Although *Brady* and ORWITS remain separate and distinct databases within the DCS, deputies can now perform a single simultaneous search for

[80] *Giglio v. United States, supra,* 405 U.S. at p. 154, emphasis added.
[81] *Benn v. Lambert, supra,* 283 F.3d at p. 1053.

witnesses in both databases. Additionally, at the same time the case is filed, and witness information is entered, the filing deputy and supervisor (DIC, Assistant Head Deputy and Head Deputy) are automatically notified whenever *Brady* or ORWITS information exists on a witness. It is the supervisor's responsibility to ensure that the handling DDA is aware of this and it is the handling DDA's responsibility to query DCS before the arraignment.

Additionally, on the date of arraignment, pretrial, preliminary hearing setting, preliminary hearing, or jury trial for any case, if information exists in DCS for any witness input into PIMS, the filing deputy and supervisor will receive an alert on the case to check DCS. The handling DDAs also get alerts any time a witness is subpoenaed by way of the MWL. In all of these instances, the handling DDA is obligated to manually access the DCS to check the accuracy of the MWL prior to making any disclosures regarding a recurrent witness even if DCS was previously queried due to the fact that entries are made on a rolling basis and new information may be available. When a DDA adds a recurrent witness to the MWL, or corrects information therein, they shall simultaneously check the DCS for an entry associated with the individual.

A. CONFIDENTIAL NATURE OF THE DCS

The DCS is a secure computer system of summaries of potential impeachment information, as well as information likely to lead to potential impeachment information, regarding recurrent People's witnesses. It is maintained by the DCU, which reviews information involving recurrent People's witnesses and determines whether to enter it into the DCS (*Brady* database or ORWITS).[82]

The DCU's categorization and conclusions, as reflected in the form of *Brady* or ORWITS summaries, are privileged work product pursuant to Code of Civil Procedure section 2018.030(a). These conclusions and summaries are made available to DDAs to assist them in the discharge of their constitutional and statutory obligations and in the preparation of their cases. These conclusions and summaries are not discoverable via Penal Code section 1054[83] or via California Public Records Act (PRA) requests.[84] The underlying documents, however, such as charge evaluation worksheets, newspaper articles, court documents, police reports, and responses to Senate Bill (SB) 1421 requests, are not work product. The exemption from CPRA disclosure of conclusions and summaries is not waived when a DDA, in the discharge of his or

[82] Reviews of DDA referrals of potential impeachment information involving recurrent People's witnesses are conducted by the Director of the Bureau of Prosecution Support Operations, to determines whether or not to enter the information into the DCS and/or refer the information to JSID and/or refer the information to the relevant law enforcement agency.

[83] See Pen. Code, § 1054.6 ("Work product privilege. Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.").

[84] Gov. Code, § 6254, subd. (k) ("6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following: . . . (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.").

her legal obligations, provides defense counsel with potential impeachment information learned from the DCS, because its disclosure is required by law.[85]

B. ENTRIES INTO THE DCS AND PROTECTIVE ORDERS

The DCU is responsible for making the entries into the DCS. Information will only be entered into the DCS if it has a tendency in reason to potentially impeach or is likely to be utilized by the defense to potentially impeach the testimony of a recurrent People's witness However, information based on mere rumor, speculation, or unverifiable hearsay will not be entered into the DCS.

DCS entries will often include supporting documents as attachments. Neither blanket nor *ex-parte* protective orders shall be sought prior to turning over *Brady* evidence. The DCU will make every effort to properly redact confidential and/or sensitive information from these documents. Nevertheless, it is incumbent upon the disclosing DDA to review these documents and ensure that only private information required by law or court order has been redacted prior to disclosure. DDAs are to keep in mind that public information is not subject to redaction. Public information includes, but is not limited to, information subject to a public records act request, newspaper articles, media, and court filings unless they have been filed under seal. LADA case declinations involving law enforcement suspects are subject to an ongoing public records act request and shall also be disclosed to the defense without a protective order.

Police Reports and other confidential or quasi-confidential information will occasionally be uploaded as source documents into the DCS. While the information may not be a public record, if it contains *Brady* information, it must be disclosed to the defense.

DDAs shall not seek a protective order when disclosing *Brady* information except under the following circumstances:

1. The DDA obtains permission to seek a protective order from their DIC or Head Deputy;
2. The DDA can articulate good cause to seek a protective order. Examples of good cause include, but are not limited to, when disclosure would jeopardize a pending investigation/case, or when a person named in the report could be placed in danger by the disclosure. The mere fact that the police report or other evidence contains information about the misconduct of a police officer is insufficient to seek a protective order. As previously mentioned, police reports are not personnel records and are not rendered such because they are also contained in a personnel file or are made part of an administrative investigation. Hence, the provisions of Penal Code section 832.7, Evidence Code section 1045, subdivision (d) and *Pitchess v. Superior Court, supra*, 11 Cal. 3d 531, do not apply to a protective order sought for information not deemed a confidential personnel record.
3. The DDA provides the defense with sufficient written notice of the request to seek a protective order to allow time for a meaningful response; and

[85] Gov. Code, § 6254.5, subd. (b) provides that, while, in general, any public disclosure of a record constitutes a waiver of applicable exemptions, disclosure of a record "[m]ade through other legal proceedings or as otherwise required by law" does not constitute such a waiver.

4. Good cause to seek the protective order is set forth in the written motion or attached declaration to the motion such as specific and articulable facts about an ongoing investigation or threat and why a protective order is necessary;
5. The protective order is narrowly tailored, does not prevent defense counsel from sharing the information with other members of their office for the purpose of representing their clients, but may prevent dissemination to the public and media.

After a DDA determines that it is appropriate to disclose an underlying police report but seeks a protective order, if the Court does not grant the People's request for a protective order, the DDA shall nonetheless follow the judge's order and make the disclosure without the protective order. However, the DDA shall notify their Head Deputy and DCU.

Additionally, if an unredacted police report involving an *off-duty* victim of a crime such as, but not limited to, a sexual assault, domestic violence or child abuse, is disclosed with or without a protective order, the assigned DDA shall immediately attempt to notify the involved victim of the disclosure.

Commentary

DCU will endeavor to conduct all legally required redactions from police reports prior to uploading them to DCS. If a police report which has been uploaded to DCS is redacted but the DDA or the court determines that the redacted information is relevant to the case, the DDA should be able to get unredacted versions of the reports from either DCU, PIMS, or the DDA who handled or is handling the underlying case.

DCS entries are accompanied by the following disclaimer statement:

> *Entry of information into this system is not an endorsement of the validity of an allegation of misconduct. The purpose of the system is to facilitate the distribution of information to DDAs. The information contained herein is the only information that was provided to the Discovery Compliance Unit. It is up to the handling deputy to ascertain whether any additional information exists and, if so, whether the information obtained must be provided to the defense. Additionally, this information may contain work product and/or personal information, such as birthdates, addresses and phone numbers. It is your responsibility to make any necessary redactions required by law or court order.*

C. THE *BRADY* DATABASE

The *Brady* database contains exculpatory or impeaching information of recurrent witnesses. This includes some felony and misdemeanor convictions or other misconduct that has been gathered and reviewed which may reflect on the credibility of a witness. However, this does not mean that there is no other such exculpatory or impeaching information out there that has not been brought to the DCU's attention. As a general rule, all information in our *Brady* database shall be disclosed to the defense in pending cases without a protective order,[86] even if the witness will not be called to testify.

[86] See exceptions set forth above in section B on Entries into the DCS and Protective Orders.

D. THE ORWITS DATABASE

ORWITS is an informational database that contains material on recurrent witnesses that may be constitutionally or statutorily discoverable depending on the facts of a case. Nevertheless, publicly available information (e.g., JSID declinations, media stories, court records, etc.) included in ORWITS, should be disclosed to the defense immediately and without a protective order. Consultation with a supervisor regarding the disclosure of publicly available information is not necessary.

Although information in ORWITS may not appear impeaching on its face, it may be relevant in a particular proceeding. Additionally, reasonable minds may differ on whether information is impeaching, and the relevance of potentially impeaching information to the particular facts of a case can vary greatly. Accordingly, ORWITS information will be managed and maintained separate and apart from *Brady* information but available to all DDAs to evaluate.

E. DDA REFERRAL MEMORANDUM

A DDA Referral Memorandum itself is considered attorney work product and, as such, should generally not be turned over to the defense. Nevertheless, deputies have the discretion, after consulting with their supervisor, to disclose the information found in a DDA Referral Memorandum, along with any supporting documentation if the information contained therein contains exonerating or impeaching information. Deputies shall not seek a protective order on any such information unless there is good cause to do so and pursuant to the process articulated above relating to police reports. (See section x, infra, at p. __.)

VI. DCS USER GUIDE

A. DDA ACCESS TO THE DCS PERMITTED ONLY AS NECESSARY TO PERFORM OFFICIAL DUTIES

DDAs and paralegals under the supervision of a DDA are authorized to access the DCS only as necessary to perform their official duties. A security log built into the DCS is maintained by the Systems Division. The log tracks every DCS inquiry. Misuse of this system may subject an employee to disciplinary action.

Through an icon on their computer workstations, DDAs and paralegals may search the DCS by entering a DR number, court case number, or DA case number and a recurrent People's witness's name or employee number.

DDAs should access the DCS as needed to obtain information regarding People's recurrent witnesses. DDAs must check the DCS prior to filing, prior to arraignment, prior to the preliminary hearing, 30 days before trial, *and* prior to any case disposition, to meet the prosecution's ongoing duty to disclose exculpatory and/or potentially impeaching information. As previously mentioned, if, due to extraordinary circumstances, the filing deputy is unable to check DCS prior to filing, the reason therefore should be noted in the file and the deputy appearing at the arraignment must ensure that DCS is queried and any exculpatory and/or potentially impeaching information is turned over to the defense at the arraignment.

Commentary

DDAs presenting cases to the Grand Jury must check the DCS (Brady and ORWITS) before eliciting testimony from a recurrent People's witness. DDAs reviewing declarations in support of arrest warrants and affidavits in support of search warrants should also check the DCS (Brady and ORWITS) before approval. If a declarant or affiant is listed in the DCS (Brady or ORWITS), DDAs should recommend using another peace officer as a declarant or affiant, or insist that a summary of the potential impeachment material be included in the search warrant for the magistrate's consideration prior to approval.

B. NOTIFICATION TO DA SUPERVISORS OF CASES POTENTIALLY AFFECTED BY A DCS ENTRY

Upon the decision to include a recurrent People's witness in the *Brady* database of the DCS, the DCU staff will generate a PIMS Ad Hoc run of all cases in which the individual is listed as a witness and will analyze the run beginning with the date of the misconduct for any specific cases potentially affected by the witness's inclusion in the *Brady* database of the DCS. Supervisors of offices which are handling or handled potentially affected *Brady* cases will be given a list of their respective cases and requested to confirm, for pending cases including those cases pending sentencing, whether the individual is a potential witness for the prosecution. Supervisors must ensure defense counsel or the defendant, if appearing *in propia persona,* is notified and take appropriate action including modification of the charges or dismissal of the case if the information is determined to be material to the case. For post-sentencing cases, supervisors must notify attorneys of record or defendants who appeared *in propria persona* of the potential impeachment information. If the individual was a material witness within the meaning of *Brady*, i.e. had the information been known there is a "reasonable probability of a different result,"[87] supervisors shall seek to remedy the conviction or sentence pursuant to Penal Code section 1385, Penal Code sections 1170(d) or 1170.03, or any other legal mechanism deemed appropriate in the case.

PIMS Ad Hoc runs will not be generated when a recurrent People's witness is included in the ORWITS database of the DCS.

Commentary

In practice, when a Brady PIMS Ad Hoc run is generated and analyzed as discussed in this section, DCU's notifications to the subject recurrent witness and his or her employing agency head of the Brady DCS entry are made before its notifications to DA supervisors of specific cases potentially affected by that Brady DCS entry. The notifications to a subject recurrent witness and his or her agency head are made at the same time the entry is input into DCS. The notifications to DA supervisors shall be made as soon as practical after the entry is input into DCS.

Recognizing that DA supervisors who manage offices in the geographic area in which a recurrent witness is currently assigned have an immediate need to know of that witness's entry into the DCS, the DIC of DCU shall notify those supervisors, if identifiable, as well as the head deputies in special units who handle pending cases, of that recurrent witness's inclusion in the

[87] *Kyles v. Whitley, supra,* 514 U.S. at p. 434.

DCS at the same time the witness and his or her agency head are notified. Once DCU completes the Brady PIMS Ad Hoc run analysis of specific cases potentially affected by the witness's inclusion in DCS, supervisors of all impacted offices will be notified.

C. DEFENSE NOTIFICATION

If the individual was represented by the Los Angeles County Public Defender's Office, the notification letter shall be emailed to the Law Enforcement Accountability Unit at LEAU@pubdef.lacounty.gov.

If the individual was represented by the Los Angeles County Alternate Public Defender's Office, the notification letter shall be emailed to lacapd@apd.lacounty.gov.

If the individual was represented by a private attorney who is now deceased, notification shall be mailed to the defendant. A "good faith" effort of notification is required.

VII. PEACE OFFICER PERSONNEL RECORDS

A. DDA ACCESS TO PEACE OFFICER PERSONNEL RECORDS IS LIMITED

While police officer personnel records are confidential and not accessible for routine inspection by prosecutors, in *ALADS, supra,* 8 Cal.5th 28, the court held that law enforcement agencies do not violate *Pitchess, supra,* 11 Cal.3d 531, by sharing with prosecutors limited information such as the identity of potential witnesses on open cases with *Brady* information. (*Id*. at p. 43.) Limited disclosure to the prosecutor, on a case-by-case basis, of an officer's name and serial number, allows the prosecutor to have the requisite good cause to make an appropriate *Pitchess* motion. See *ALADS, supra,* at 36, citing *Johnson, supra,* 61 Cal.4th at p. 721.

Law enforcement agencies, as part of the prosecution team, are required to share *Brady* material with prosecutors. (*ALADS, supra*, 8 Cal.5th at p. 52.) They can satisfy their obligation by providing the prosecution with a list of officers with *Brady* material in their personnel files who have pending cases. (*Id*. at p. 52,) While this method of *Brady* compliance by law enforcement agencies has been referred to as "laudible" by the California Supreme Court, it is not the only mechanism available for law enforcement agencies. However, "[t]he harder it is for prosecutors to access that material, the greater the need for [officers] to volunteer it." (*Id*. at p. 52.) There are over 65 different law enforcement agencies in Los Angeles County. In February of 2021, the LADA formally requested in writing that all of these agencies either provide us with a list of their *Brady* officers or advise DCU on every pending case whether their officers have *Brady* material in their personnel file so that deputies may satisfy their *Brady* obligation by turning that information over to the defense and determine whether to file a *Pitchess* motion for the underlying reports or investigation which led the agency to determine that the officer has *Brady* material in their personnel file.

While all law enforcement agencies in Los Angeles County are attempting to comply with LADA's requests for *Brady* lists and/or the names of officers on pending cases who may have *Brady* material in their personnel file, compliance has not been uniform and is sometimes delayed. Moreover, given the confidential nature of internal police records in California and publicized reports making it clear that many officers are still employed after misdemeanor convictions, are fired and reinstated, or are disciplined for any number of policies involving bias, dishonesty or other moral turpitude-type violations that are not a matter of public record, DDAs

should take the additional affirmative step of specifically requesting and/or confirming that this information has been provided for any law enforcement witnesses in their case. DCU can advise which agencies have fully complied with the requests for the names of officers with *Brady* information in their personnel file, which agencies are in the process of complying, and which agencies have chosen to satisfy their *Brady* obligation by providing names of officers on pending cases on a periodic basis in lieu of providing a list.

B. DDA NOTIFIED THAT PEACE OFFICER PERSONNEL RECORDS MAY CONTAIN POTENTIAL IMPEACHMENT INFORMATION

DDAs are occasionally put on notice that a peace officer witness's personnel file may contain potential impeachment information either due to an entry in DCS or when, for example, they learn that the peace officer has been placed on leave pending an administrative investigation, or a law enforcement agency notifies the LADA that a peace officer employee's personnel file contains potential impeachment information.[88] Under these circumstances, DDAs must directly report this information to the affected defense attorney. Additionally, DDAs shall immediately notify both their immediate supervisor and DCU if the information they received is not already in DCS.

If the defense files a successful *Pitchess* motion, the prosecutor may suffer a disadvantage, as any information ordered disclosed to the defense retains its peace officer personnel record confidentiality and no authority exists to compel the defense or the court to share it with the prosecution.[89] Therefore, to defend against a surprise defense attack against a prosecution peace officer witness, DDAs are strongly encouraged to file their own *Pitchess/Brady* motion.[90]

C. DDA ACCESS TO PEACE OFFICER PERSONNEL RECORDS

1. *Pitchess/Brady* Motion

Pitchess motions alone are inadequate to satisfy the *Brady* rule, because the scope of the court's in camera review is temporally restricted. Evidence Code section 1045, subdivision (b)(1), restricts the court's review to complaints occurring less than five years before the event that is the subject of the litigation. The *Brady* rule by contrast has no temporal limitation. Recognizing this disharmony, the California Supreme Court in *Brandon, supra*, 29 Cal.4th at pages 13-14, held that the statutory five-year time limit is not an absolute bar to disclosure of complaints that are older than five years, since the *Pitchess* process "operates in parallel with *Brady*" and *Pitchess* does not prohibit the disclosure of *Brady* information. Whenever information exists to believe that a material peace officer witness's personnel files may contain potential impeachment evidence, DDAs may access those files for that information by means of a *Pitchess/Brady* motion as previously discussed in section II, subdivision (A)(2)(c) above at pages __ to __.

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[88] See *ALADS, supra,* 8 Cal.5th 28.

[89] *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046.

[90] *Johnson, supra*, 61 Cal.4th at p. 722 ("The prosecution need not do anything in these circumstances beyond providing to the defense any information it has regarding what the records might contain . . . .").

The *Pitchess/Brady* motion shall conform to the requirements set forth in Evidence Code section 1043 and shall request that the court review the information provided by the agency's custodian of records in camera, *ex parte*, pursuant to Evidence Code section 1045 and the *Brandon* case, to determine whether to disclose any information.[91] If the court discloses any information, the DDA shall object to protective orders which preclude the LADA from uploading the information to a database or otherwise limit the LADA from using the information to comply with its *Brady* obligations in other cases. The DDA shall also object to a protective order of any information disclosed which is publicly available or is not a confidential personnel record. If any information is produced without a protective order, the information shall be sent to DCU.

If the court releases information and issues a protective order limiting the use of the information to the case before the court, the DDA shall inform the DCU, in writing, only that disclosure of potential impeachment information was made and that a protective order was issued. To comply with the court's order, DCU shall *not* be informed of the specific information disclosed. The DDA should also attach copies of the People's moving papers to the memorandum sent to DCU. If the contents of the potential impeachment information are subsequently revealed in open court such as during the cross examination of the officer, the DDA should request a copy of the transcript, prepare a memorandum summarizing the impeaching information and submit both to DCU.

While a defense attorney has no obligation to share the fruits of a successful *Pitchess* motion with the prosecutor, the prosecutor must share potential impeachment evidence disclosed by a *Pitchess/Brady* motion with the defense.[92]

If the defense files a *Pitchess* motion and if the People have not already filed a *Pitchess/Brady* motion, DDAs should consider filing a People's *Pitchess/Brady* motion. The justification is that California Constitution, article I, section 29, guarantees the People due process of law to prepare and defend the People's case against attacks by a defendant, and that, if the court determines that there is good cause for disclosure to the defendant of information from peace officer personnel records which is material to the pending litigation, disclosure of the same information to the People is essential for the preparation of its case against the defendant.

2. Maintaining Confidentiality of Peace Officer Personnel Records

It is important to note that the "disclosure of peace officer personnel records in violation of Penal Code section 832.7 may constitute a crime pursuant to the terms of Government Code section 1222 . . . ."[93] Therefore, before disclosure of such information, DDAs must abide by any protective orders issued by the court pursuant to Evidence Code section 1045. After disclosure and as soon as the information is no longer needed by the handling DDA, if subject to a protective order, it should be secured in a sealed envelope and placed in the DA file.[94] The

[91] A Pitchess/Brady motion template may be accessed on the ORWITS database Main Page in Lotus Notes.
[92] See *Alford, supra,* 29 Cal.4th at p. 1046.
[93] 82 Ops.Cal.Atty.Gen. 246 (1999). Gov. Code, section 1222, states: "Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor."
[94] In the future, confidential documents may also be scanned and uploaded to the access restricted "Z" section of the case file using the e-folder application in PIMS.

sealed envelope should be labeled with identifying case information and the notation "Protected Evidence Code 1043 Discovery Information."

3. Certain Peace Officer Records Available Pursuant to SB 1421

Effective January 1, 2019, pursuant to SB 1421, as codified in Penal Code section 832.7 and as guided by 832.8, certain peace officer and custodial officer personnel records and records relating to specified incidents, complaints and investigations related to the following four categories of incidents are no longer confidential and are subject to disclosure pursuant to a PRA request:

a. Discharge of a firearm at a person;
b. Use of force against a person that resulted in death or great bodily injury;
c. A *sustained* finding by a law enforcement agency or oversight agency of having engaged in sexual assault involving a member of the public;
d. A *sustained* finding of dishonesty relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any *sustained* finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

Accordingly, after the passage of the new law, the LADA launched the SB 1421 PRA Request Application, which allows individual deputies to: (1) search for prior PRA requests; (2) generate PRA requests; (3) track the status of pending PRA requests; and (4) review responsive documents produced by law enforcement. Furthermore, the DCU will routinely submit comprehensive PRA requests to agencies, seeking SB 1421 information.

Upon receipt of responsive information from either a PRA request generated by an individual deputy or DCU, the information will be manually uploaded into (1) the SB 1421 PRA Request Application and (2) the Discovery Compliance System (DCS). Deputies will not be able to generate a PRA request seeking the production of SB 1421 records that were previously provided to our Office by a law enforcement agency, pursuant to either the terms of a prior PRA request or Memorandum of Understanding.

C. AUSA ACCESS TO PEACE OFFICER PERSONNEL RECORDS OF DISTRICT ATTORNEY INVESTIGATORS FOR POTENTIAL *GIGLIO/BRADY* INFORMATION

A District Attorney investigator (DAI) may become a material witness in a federal case prosecuted by the United States Attorney's Office (USAO). The Assistant United States Attorney (AUSA) handling the case may, pursuant to *Giglio* v. *United States, supra,* 405 U.S. 150 and *Brady* v. *Maryland, supra,* 373 U.S. 83, request to review the DAI's personnel records for potential impeachment information. Under federal law there is no privilege for peace officer personnel records and no procedure analogous to the *Pitchess* process.

To avoid unauthorized disclosure in violation of California's peace officer personnel records privilege (Penal Code section 832.7), all requests pertaining to a filed federal prosecution from the USAO for potential impeachment information contained in the personnel records of DAIs

must be made by means of a *subpoena duces tecum* (SDT) issued by the federal court and directed to the Captain of the Administration Division (AD Captain) of the BOI as the custodian of records. When the SDT process is unavailable because the federal prosecution has not yet been filed, the USAO must submit a written request for the potential impeachment information to the AD Captain. The written request must contain a representation that the USAO will seek a protective order before disclosure to the defense of any information provided by the LADA unless the information is subject to public disclosure such as pursuant to SB 1421. Upon receipt of the SDT or written request, the AD Captain shall forward copies to the subject DAI and to the Chief of the BOI.

In responding to the SDT or written request, the Captain shall conduct a preliminary review of the personnel records of the subject DAI for potential *Giglio/Brady* impeachment information and, if found, shall deliver the personnel records file(s) containing such information to the DIC of the DCU for review. After review, the DIC shall provide copies of any responsive documents to the Captain. The documents shall be enclosed in a sealed envelope with the text of a proposed protective order affixed to the outside of the envelope. The DIC shall also return the personnel files to the Captain.

If the request is by SDT, the AD Captain, as the custodian of records, shall follow the instructions on the SDT, provide the responsive documents to the federal court **under seal**, and request that the federal court issue a **protective order** limiting the disclosure and use of the information to the particular case in which the subpoena was issued if authorized under federal law. If the request is by written request, the AD Captain shall provide the responsive documents to the USAO.

If documents containing potential impeachment information are provided to the federal court or the USAO, the DCU shall enter the fact that information was provided into ORWITS, but not the specific information disclosed. The DCU shall maintain a file containing the SDT or written request and, in a sealed envelope, the documents disclosed.

E. DDA ACCESS TO PEACE OFFICER PERSONNEL RECORDS TO INVESTIGATE CRIMINAL ALLEGATIONS

Penal Code section 832.7, subdivision (a), specifically allows a DDA access to peace officer personnel records in "investigations or proceedings concerning the conduct of peace officers . . . or an agency or department that employs those officers .... ." DDAs shall use this right of access when determining whether to file criminal charges against a peace officer.[95]

F. DDA ACCESS TO PUBLICLY-EMPLOYED EXPERT WITNESS PERSONNEL RECORDS

Non-sworn employees of public entities have a qualified right to privacy of their personnel files.[96] Information contained in the employee's personnel file is protected by the official

[95] "Checking for *Brady* material is not an investigation for these purposes. A police officer does not become the target of an investigation merely by being a witness in a criminal case." *Johnson, supra,* 61 Cal.4th at p. 714.
[96] Cal. Const., Art. I, § 1; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526.

information privilege.[97] Whenever information exists to believe that a publicly-employed expert witness's personnel file may contain potential impeachment evidence, access to that file for the information will be made only by means of the consent of the public entity or its authorized representative, or, absent its consent, by means of a court order following an in camera review pursuant to an Evidence Code section 915 (Disclosure of Privileged Information) motion. If the court releases any information, the DDA shall not request a protective order unless there is good cause to do so as required for protective orders involving law enforcement witnesses and appropriate steps are followed as set forth in section x, at pages __ to __ , and section y, at pages __ to __ above. In addition, the DDA shall inform the DCU, in writing of the potential impeachment information. If the potential impeachment information was subject to a protective order, DCU shall only be informed that information was disclosed and that a protective order was issued. To comply with a court's protective order, the DCU shall *not* be informed of the specific information disclosed. The DDA should also attach a copy of the People's moving papers, if any, to the memorandum sent to the DCU.

G. DDA ACCESS TO PRIVATELY-EMPLOYED EXPERT WITNESS PERSONNEL RECORDS

The prosecution of a case may at times require the retention of an expert witness who is employed by a private organization. Whenever information exists to believe that a privately-employed expert witness's personnel file may contain potential impeachment information, access to that file for the information will be made only by means of the consent of the expert witness, or, absent their consent, by means of an SDT directed to the employing agency pursuant to Penal Code sections 1326 and 1327. DDAs shall obtain a protective order limiting the disclosure and use of the information to the particular case in which the SDT was issued only if there is good cause to do so and appropriate steps are followed as set forth above. In addition, if a protective order is issued, the DDA shall inform the DCU, in writing, only of the facts that disclosure of potential impeachment information was made and that a protective order was issued. To comply with the court's order, the DCU shall *not* be informed of the specific information disclosed. The DDA should also attach a copy of the People's moving papers, if any, to the memorandum sent to the DCU.

[97] Evid. Code, § 1040.