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) 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 or reversal or modification of a judgment. The rule established in *Brady* (*Brady* rule) is independent of the Criminal Discovery Statute.[2]

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.").[3] 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.*[4]

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

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[1] *Brady* v. *Maryland* (1963) 373 U.S. 83, 87.
[2] *Izazaga* v. *Superior Court* (1991) 54 Cal.3d 356, 378.
[3] 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.").
[4] *Barnett* v. *Superior Court* (2010) 50 Cal.4th 890, 901; see also *People* v. *Bowles* (2011) 198 Cal.App.4th 318, 326.

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.[5]

Commentary

While this Discovery Compliance System Manual is consistent with applicable state and federal law, DDAs must not utilize it as a substitute for research of specific legal issues which may arise in an individual case.[6]

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.[7] This *Brady* rule applies even though there has been no request.[8]

A. *BRADY* EVIDENCE MUST BE FAVORABLE

Evidence is "favorable" to a defendant if it either helps the defendant or hurts the prosecution.[9] Evidence is favorable to a defendant when it is exculpatory or can be used to impeach the testimony of a material prosecution witness.[10]

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 evidence that:

Directly opposes guilt;[11]

Mitigates punishment;[12]

Negates an element of a charged offense;[13]

Supports defense testimony;[14]

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[5] Bus. & Prof. Code, § 6068, subd. (o)(7).
[6] DDAs are encouraged to make frequent reference to Pipes & Gagen, *California Criminal Discovery* (4th ed. 2008), a treatise in this area.
[7] *In re Brown* (1998) 17 Cal.4th 873, 879.
[8] *United States* v. *Agurs* (1976) 427 U.S. 97, 107.
[9] *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.
[10] *United States* v. *Bagley* (1985) 473 U.S. 667, 676.
[11] *Castleberry* v. *Brigano* (6th Cir. 2003) 349 F.3d 286, 293.
[12] *In re Miranda* (2008) 43 Cal.4th 541, 567-577.
[13] *Youngblood* v. *West Virginia* (2006) 547 U.S. 867.
[14] *People* v. *Collie* (1981) 30 Cal.3d 43, 54; *Hobbs* v. *Municipal Court* (1991) 233 Cal.App.3d 670, 688.

Supports an affirmative defense;[15] and

Supports a defense motion.[16]

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 that 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 that 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. But other courts have found no *Brady* violation where the undisclosed witness was not a credible witness. *Bonin v. Calderon* (9th Cir. 1995) 59 F. 3d 815.

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

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

[15] *United States* v. *Ross* (9th Cir. 2004) 372 F.3d 1097, 1108-1109 (Evidence supporting entrapment defense is favorable to defendant.).
[16] *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.

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*. 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. Impeachment Evidence

"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 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.[17] "Relevant impeachment

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

information" means information which has a "tendency in reason"[18] to potentially impeach, or is likely to lead to[19] evidence to potentially impeach, the testimony of a recurrent People's witness.

Examples of impeachment evidence include:

Felony convictions involving moral turpitude;[20]

Misdemeanor or other conduct that reflects on believability;[21]

Misconduct involving moral turpitude;[22]

False reports by a prosecution witness;[23]

Pending criminal charges against a prosecution witness;[24]

Parole or probation status of a prosecution witness;[25]

Evidence contradicting a prosecution witness's statements or reports;[26]

Evidence undermining a prosecution witness's expertise (e.g., inaccurate statements or expert opinions);[27]

A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on a prosecution witness's truthfulness, bias or moral turpitude;[28]

Evidence that a prosecution witness has a reputation for untruthfulness;[29]

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[18] 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.]).

[19] ***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.).

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

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

[22] ***People*** v. ***Wheeler*** (1992) 4 Cal.4th 284, 297, fn. 7.

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

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

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

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

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

[28] Cf. ***People*** v. ***Wheeler*** (1992) 4 Cal.4th 284, 293.

[29] 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;[30] and

Promises, offers or inducements to a prosecution witness, including a grant of immunity.[31]

a. Prior felony convictions involving moral turpitude or dishonesty

A prosecutor's duty to disclose prior felony convictions is a *Brady* obligation, (see *In re Ferguson*, supra, at p. 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. *People v. Castro* (1985) 38 Cal. 3d 301, 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, as long as 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.

b. Misdemeanor convictions involving moral turpitude or dishonesty

People v. Wheeler (1992) 4 Cal. 4th 284, 295, held that past criminal conduct amounting to a misdemeanor may be admissible to impeach a witness as long as 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.

c. Instances of misconduct involving moral turpitude or dishonesty

People v. Wheeler, supra, held that misconduct involving dishonesty or moral turpitude, not resulting in a felony 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, the prosecutor's duty to disclose acts of misconduct involving moral turpitude is also governed by Evidence Code section 1043 and the case of *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531. In *California Highway Patrol v. Superior*

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[30] Evid. Code, § 780; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.

[31] *United States* v. *Bagley* (1985) 473 U.S. 667, 676-677; *Giglio* v. *United States* (1972) 405 U.S. 150, 153-155.

Court (Luna) (2000) 84 Cal. App. 4th 1010, the court held that *Pitchess* governed the prosecutor's duty to provide evidence of misconduct by peace officers. But in *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal. 4th 1, the Supreme Court said that if a prosecutor was aware of misconduct that would constitute *Brady* evidence, he was required to provide it to the defense, even if that evidence fell outside of the five-year period for which *Pitchess* discovery is limited. The court in *Brandon* did not specify whether the prosecution would have access to police personnel records to comply with their *Brady* obligation if that were to happen. Since such misconduct is most likely contained in a personnel complaint, which is privileged pursuant to Penal Code section 832.7, the prosecutor would be required to comply with Evidence Code section 1043 and make a motion to discover the material underlying the old complaint. See *People v. Superior Court (Gremminger)* (1997) 58 Cal. App. 4th 397. But such disclosure is limited to five years under Evidence Code section 1045(b)(1) and is further limited to the names and addresses of complainants and witnesses. See *Carruthers v. Municipal Court* (1980) 110 Cal. App. 3d 439.

d. False reports by the 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.

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.

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 witness 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 *People v. Castro (1985)* 38 Cal.3d 301, 314-315; *People v. White* (1904) 142 Cal. 292, 294, and this inference is not limited to conduct which resulted in a felony conviction. The court in *People v. Wheeler* (1992) 4 Cal.4th 284, 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 trial court in *Wheeler* concluded that a relatively recent conviction for grand theft, an offense necessarily involving both moral turpitude and dishonesty, was 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 decides to rely 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*, *supra*, 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*, involved promises to a jailhouse informant. *Giglio v. United States*, *supra*, 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." *Giglio*, *supra*, 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.[32] Evidence impeaching the testimony of a material prosecution witness becomes favorable evidence pursuant to the *Brady* rule only when the witness *testifies* as a *prosecution witness*.[33] It is not evidence favorable to a defendant when the prosecution witness does not testify or when the witness testifies as a defense witness.

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.[34]

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.[35] 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.[36]

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[32] *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.
[33] See *United States* v. *Haskell* (8th Cir. 2006) 468 F.3d 1064, 1075; *People* v. *Cook* (2006) 39 Cal.4th 566, 589.
[34] *Strickler* v. *Greene* (1999) 527 U.S. 263, 289.
[35] E.g., *Strickler* v. *Greene* (1999) 527 U.S. 263, 291-296; *People* v. *Williams* (1997) 16 Cal.4th 635, 653; *People* v. *Ruthford* (1975) 14 Cal.3d 399, 406; *Giglio* v. *United States* (1972) 405 U.S. 150, 154-155; *In re Ferguson* (1971) 5 Cal.3d 525, 535.
[36] 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.

2. Reasonable Probability

A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial.[37] 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."[38]

Commentary

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,[39] as discussed post.

C. *BRADY* "EVIDENCE" MUST BE EVIDENCE

The materiality component requires limiting the *Brady* rule to evidence.[40]

Commentary

Brady information may be either admissible evidence or information which is likely to lead to admissible evidence.[41] 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. In assessing such evidence, however, DDAs must be mindful that information, which is irrelevant, spurious, diversionary, or not probative of the issues before the court, do not advance the purpose of a trial and is not subject to disclosure.

III. PENAL CODE SECTION 1054.1(e)[42]

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.

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[37] *Kyles* v. *Whitley* (1995) 514 U.S. 419, 434.

[38] *People* v. *Hoyos* (2007) 41 Cal.4th 872, 917-918, 922, citing *United States* v. *Agurs* (1976) 427 U.S. 97.

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

[40] *Sledge* v. *Superior Court* (1974) 11 Cal.3d 70, 75.

[41] *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.).

[42] 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.

(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.[43] Subdivision (e) also expands the ***Brady*** rule. Its language requires a prosecutor to disclose to the defendant ***any*** exculpatory evidence, not just ***material*** exculpatory evidence.[44] A failure to disclose ***any*** exculpatory evidence (PC 1054.1(e) violation) can result in various discovery sanctions pursuant to Penal Code section 1054.5(b), but generally not in dismissal.[45]

IV. RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(Rule approved by the California Supreme Court, ***effective Nov. 1, 2018***)

The 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;

[43] 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 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).
[44] ***Barnett*** v. ***Superior Court*** (2010) 50 Cal.4th 890, 901.
[45] Pen. Code, § 1054.5, subd. (c).

(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,
    (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
    (b) 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 PC 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 footnote #3, "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.[46] 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.[47] 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, if the prosecutor has reasonable access to it, the prosecutor has a duty to disclose it.[48] "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."[49]

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

[47] 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.").

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

[49] ***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.

A prosecutor must disclose favorable material evidence in the possession of the "prosecution team,"[50] including "information possessed by others acting on the government's behalf that [was] gathered in connection with the investigation."[51] The prosecution team includes the prosecutor's office, the investigating agency, and assisting agencies or persons (for example, crime labs[52] and sexual assault response teams [SART][53]) connected to the investigation or the prosecution of the case.[54]

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;[55] 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;[56] notes generated by a victim-witness advocate, who was employed by the prosecuting agency, which contained exculpatory statements;[57] and awareness by a law enforcement agency, which assisted the prosecution by housing a witness in a witness protection program, that the witness committed misconduct.[58] In contrast, a prosecutor has "'no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.'"[59]

The *Brady* rule does not require the disclosure of impeachment evidence before a defendant pleads guilty or no contest.[60] However, California courts have held that prosecutors must disclose impeachment information before a defendant pleads guilty or no contest. In contrast, 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.'"[61]

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[50] However, prosecutors have no duty to search peace officer personnel records, because such records are not possessed by the "prosecution team."

[51] *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* (1995) 514 U.S. 419, 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.").

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

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

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

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

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

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

[58] See *United States* v. *Wilson* (7th Cir. 2001) 237 F.3d 827, 832.

[59] *People* v. *Panah* (2005) 35 Cal.4th 395, 460, quoting *In re Littlefield* (1993) 5 Cal.4th 122, 135.

[60] *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.

[61] *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.

Prosecutors need not reveal their personal assessment of the credibility of witnesses.[62] Their opinions regarding trial issues are "opinion work product" and not discoverable pursuant to *Brady*.[63]

In contrast, prosecutors have a duty to immediately correct any testimony of its own witnesses which they knew was false or misleading.[64] This duty applies not only to false or misleading testimony regarding substantive evidence, but also to false or misleading testimony regarding impeachment evidence.[65] Furthermore, this duty applies to testimony prosecutors later learn is false or misleading.[66]

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.

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.[67] "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[68] 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.'"[69]

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[62] *People* v. *Seaton* (2001) 26 Cal.4th 598, 647-648.
[63] *Morris* v. *Ylst* (9th Cir. 2006) 447 F.3d 735, 742.
[64] *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.
[65] *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.).
[66] *United States* v. *Rodriguez* (9th Cir. 2014) 766 F.3d 970, 970; *United States* v. *Houston* (9th Cir. 2011) 648 F.3d 806, 814.
[67] *Kyles* v. *Whitley* (1995) 514 U.S. 419, 440.
[68] *United States* v. *Agurs* (1976) 427 U.S. 97, 108; see also *Kyles* v. *Whitley* (1995) 514 U.S. 419, 439 (Warning prosecutors against "tacking too close to the wind" in withholding evidence.).
[69] *In re Miranda* (2008) 43 Cal.4th 541, 577.

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, inter alia, 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. 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.[70]

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, inter alia, arrests, pretrial proceedings, disposition of criminal charges, and sentencing.[71] Although a criminal offender record itself is not discoverable,[72] 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.[73] In executing this duty, DDAs should never give a witness's criminal offender record itself to the defense.[74] Instead, DDAs should restrict the release of information to the name of the crime, the date and place of arrest and/or conviction,[75] and the case number, if available.

Practically speaking, however, peace officer witness criminal offender records are not "reasonably accessible" to the prosecution without the officer's date of birth, i.e., information contained in the peace officer's personnel files. Birth date information contained in a peace officer's personnel file is confidential and may be disclosed to the prosecution by the officer's employing agency only by means of a ***Pitchess*** motion.[76] To ensure compliance with the ***Brady***

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[70] ***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.).

[71] Pen. Code, § 13102.

[72] ***People*** v. ***Roberts*** (1992) 2 Cal.4th 271, 308.

[73] ***People*** v. ***Little*** (1997) 59 Cal.App.4th 426, 433.

[74] See General Office Memorandum (GOM) 09-03, "Disclosure of Rap Sheets," for a full discussion.

[75] GOM 09-03.

[76] ***Garden Grove Police Department*** v. ***Superior Court*** (2001) 89 Cal.App.4th 430; ***People*** v. ***Superior Court (Johnson)*** (2015) 61 Cal.4th 696.

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 Los Angeles District Attorney has requested all law enforcement agencies in Los Angeles County to 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
    - 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

- The Command Center 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, along with accompanying arrest reports, when available, to the Discovery Compliance Unit for evaluation and inclusion in the Discovery Compliance System. 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."[77] Since constitutional disclosure requirements "apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor,"[78] the LADA created the DCS to ensure that all DDAs are informed of relevant impeachment information that comes to the attention of the Office.

[77] *Giglio* v. *United States* (1972) 405 U.S. 150, 154, emphasis added.
[78] *Benn* v. *Lambert* (9th Cir. 2002) 283 F.3d 1040, 1053.

VI. DISCOVERY COMPLIANCE SYSTEM

The Discovery Compliance System (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.

The Discovery Compliance Unit (DCU) will 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 witnesses in both databases. Additionally, at the same time the case is filed and witness information is entered, the filing deputy and supervisor(s) shall be notified whenever Brady or ORWITS information exists on a witness.

Whenever the MWL indicates "Check *BRADY*" or "Check ORWITS" alongside a subpoenaed recurrent witness's name, 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. When a DDA adds a recurrent witness to the MWL, or corrects information therein, he or she shall simultaneously check the DCS for an entry associated with the individual, if any.

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 or not to enter it into the DCS (*Brady* database or ORWITS).[79]

The DCU's conclusions, 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[80] or via the California Public Records Act (CPRA) requests.[81] The exemption from CPRA disclosure is not waived when a

[79] 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, who determines whether or not to enter the information into the DCS.

[80] 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.").

[81] 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

DDA, in the discharge of his or her legal obligations, provides defense counsel with potential impeachment information learned from the DCS, because its disclosure is required by law.[82]

B. ENTRIES INTO THE DCS

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 ORWITS.

Often times, these DCS entries will include supporting documents as attachments. The DCU will make every effort to properly redact confidential and/or sensitive information from these documents. Nevertheless, it is incumbent upon the disclosing deputy to review these documents and ensure that they have been properly redacted prior to their disclosure.

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 the necessary redactions.*

C. THE *BRADY* DATABASE

The *Brady* database contains all exculpatory and impeaching information of recurrent witnesses that is discoverable per se. This includes felony and misdemeanor convictions or other misconduct that reflects on the credibility of a witness. As a general rule, this information shall be disclosed to the defense without a protective order, even if the witness will not be called to testify.

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

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which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.").

[82] Government Code section 6254.5, subdivision (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.

order. Consultation with a supervisor regarding the disclosure of publicly available information is no longer 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.

E. DDA REFERRAL MEMORANDUM

A DDA Referral Memorandum itself is considered attorney work product and, as such, must never 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 properly redacted supporting documentation. Deputies must seek to obtain a protective order if non-publicly available information from the DDA Referral Memorandum is being disclosed.

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 should check the DCS, at a minimum, prior to 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.

Commentary

DDAs reviewing matters for filing should check the DCS (Brady and ORWITS) before filing complaints, if practical. DDAs presenting cases to the Grand Jury must check the DCS (Brady and ORWITS) before eliciting testimony from a recurrent People's witness. If practical, DDAs reviewing declarations in support of arrest warrants and affidavits in support of search warrants should 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 disclosing a summary of the potential impeachment material for the magistrate's consideration.

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 determine, for pending cases, whether the individual will testify as a witness for the prosecution, or, for closed cases, whether the individual was a material witness for the prosecution, and, if so, to notify attorneys of record or defendants who appeared in *propria persona* of the potential impeachment information.

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, the 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 the DCS. The notifications to DA supervisors are made sometime after the entry is input into the DCS, because the Brady PIMS Ad Hoc run analysis for specific cases potentially affected by the entry is time-consuming.

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 the DCU shall notify those supervisors, if identifiable, as well as the Hardcore Gang Division head deputy, of that recurrent witness's inclusion in the DCS at the same time the witness and his or her agency head are notified. Once the DCU completes the Brady PIMS Ad Hoc run analysis of specific cases potentially affected by the witness's inclusion in the 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

Several cases upholding the confidentiality of peace officer personnel files lead to the conclusion that such files are not in possession of the prosecution team, so routine inspections for potential *Brady* impeachment evidence by a prosecutor are not required. In rejecting an argument that the prosecution is entitled to the fruits of a successful defense *Pitchess* motion, the Supreme Court, in *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045, characterized the custodian of peace officer personnel records as a "third party custodian," and the *Pitchess* process of discovering peace officer personnel records as "what is essentially a third party discovery proceeding." In *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475, the court rejected the defendant's argument that the prosecutor must review peace officer personnel records for *Brady* evidence, holding that prosecutors do not possess or have the right to possess officer personnel records on prosecution witnesses.

The foregoing principles were reinforced by the California Supreme Court in *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696 (*Johnson*) which held that "the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion, in order to seek information in those records."[83] The Court found that criminal defendants and the prosecution have equal ability to seek information in confidential personnel records.[84]

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 when, for example, they learn that the peace officer has been placed on leave pending an administrative investigation, or, pursuant to a legally valid written policy, a law enforcement agency notifies the LADA that a peace officer employee's personnel file contains potential impeachment information.[85] Under these circumstances, DDAs must

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[83] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705.

[84] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705.

[85] See __ Ops.Cal.Atty.Gen. __ (Oct. 13, 2015) (Attorney General opinion discussed a specific policy proposed by the California District Attorneys Association to govern the review by the California Highway Patrol [CHP] of its peace officer personnel files for potential *Brady* information in order to create a "*Brady* list" of the names of those officers whose personnel files contain such information and found that Penal Code section 832.7(a) does not preclude the CHP from providing the *Brady* list to a district attorney for the purpose of *Brady* compliance); *City of Richmond* v. *Superior Court* (1995) 32 Cal.App.4th 1430, 1440 (The provision of Penal Code section 832.7 which makes peace officer personnel records confidential has the effect of creating a privilege against their disclosure.); *Davis* v. *City of Sacramento* (1994) 24 Cal.App.4th 393, 401, and *San Francisco Police Officers' Association* v. *Superior Court* (1988) 202 Cal.App.3d 183, 189 (The confidentiality privilege relating to peace officer personnel records created by Penal Code section 832.7 is held jointly by the individual officer and by the law enforcement agency holding those records.); see Evid. Code, §912, subd. (b) (Where there are two or more joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.).

bring the possible existence of impeachment evidence to the attention of the defense.[86] DDAs also have a right, but not an obligation, to bring a *Pitchess* motion.

Commentary

If, after a DDA notifies the defense attorney of the possible existence of impeachment evidence in a peace officer witness's personnel file, the attorney opts not to file a Pitchess motion, but leaves open the possibility that s/he would cross-examine the peace officer witness regarding the possible impeachment evidence, the DDA may inform the peace officer of options if confronted on cross-examination: (i) answer the defense questions or (ii) refuse to answer the defense questions, assert the Penal Code section 832.7 privilege,[87] *or request that the court conduct an Evidence Code section 915 (Disclosure of Privileged Information) hearing.*[88] *If, after a section 915 hearing, the court strikes the officer's testimony from the record, the prosecution's case will have to be re-evaluated.*

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, it is recommended that DDAs file their own *Pitchess/Brady* motion,[90] as discussed below.

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 *City of Los Angeles* v. *Superior Court (Brandon)* (2002) 29 Cal.4th 1, 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

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[86] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705, 715, 716, 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 . . . .").

[87] Penal Code section 832.7 enacted a conditional confidentiality privilege for peace officer personnel records and provides, in pertinent part: "Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

[88] Evidence Code section 915 authorizes an in camera hearing to enable the court to rule on a claim of privilege.

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

[90] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 719 ("The prosecution also has a statutory right to bring a *Pitchess* motion and might want to do so sometimes for its own reasons. . .. [But] we hold . . . that it is not constitutionally required to do so.").

personnel files may contain potential impeachment evidence, DDAs may access those files for that information by means of a *Pitchess/Brady* motion.

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 ensure that it does so with a protective order pursuant to Evidence Code section 1045, subdivision (e), limiting the disclosure and use of the information to the particular case in which the motion was made.[92]

If the court releases information and issues a protective order, 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, the 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 the 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.[93]

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.

If the *Pitchess/Brady* motion is successful and the court releases information with the requisite protective order, 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, the DCU shall *not* be informed of the specific information disclosed. The DDA should also attach copies of all moving papers to the memorandum sent to the DCU.

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 . . . ."[94] Therefore, before disclosure of such information, DDAs must abide by the

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[91] A *Pitchess/Brady* motion template may be accessed on the ORWITS database Main Page in Lotus Notes.
[92] *Alford* v. *Superior Court* (2003) 29 Cal.4th 1033, 1042 (The language "may not be used for any purpose other than a court proceeding pursuant to applicable law" means the "statutory *Pitchess* scheme.").
[93] See *Alford* v. *Superior Court* (2003) 29 Cal.4th 1033, 1046.
[94] 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."

confidentiality rules which apply pursuant to Evidence Code section 1045, subdivision (e), or any other applicable provision of law. After disclosure and as soon as the information is no longer needed by the handling DDA, it should be secured in a sealed envelope and placed in the DA file.[95] The 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 Senate Bill 1421

Effective January 1, 2019, pursuant to Senate Bill (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 Public Records Act (PRA) request:

1. Discharge of a firearm at a person;
2. Use of force against a person that resulted in death or great bodily injury;
3. A ***sustained*** finding by a law enforcement agency or oversight agency of having engaged in sexual assault involving a member of the public;
4. 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 Office 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 equest generated by an individual deputy or DCU, the information will be manually uploaded into (1) the SB 1421 PRA Request Application and, if appropriate, (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.

D. 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* (1972) 405 U.S. 150 and *Brady* v. *Maryland* (1963) 373 U.S. 83, request to review the DAI's personnel records

[95] 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.

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 (Captain) of the Bureau of Investigation (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 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. Upon receipt of the SDT or written request, the 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 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 the request is by written request, the 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 into the ORWITS the fact that information was provided, 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 …. ." The LADA will use this right of access as necessary when it is involved in investigations of specific allegations of suspected criminal wrongdoing by peace officers.[96]

[96] "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." *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 714.

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.[97] Information contained in the employee's personnel file is protected by the official information privilege.[98] 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 ensure that it does so with a protective order limiting the disclosure and use of the information to the particular case in which the motion was made. In addition, 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.

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 his or her 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. In addition, 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] Cal. Const., Art. I, § 1; ***Board of Trustees*** v. ***Superior Court*** (1981) 119 Cal.App.3d 516, 525-526.
[98] Evid. Code, § 1040.