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NAPA COUNTY DISTRICT ATTORNEY POLICY DIRECTIVE

To:	ALL DEPUTY DISTRICT ATTORNEYS	From:	MICHAEL D. O'REILLEY Chief Deputy District Attorney

Re:	*BRADY* PROTOCOL

1. YOUR RESPONSIBILITY UNDER *BRADY*

The purpose of this memorandum is to provide you with the information necessary to properly fulfill your discovery responsibilities under federal and state law. Integrity and candor are essential traits for this office's deputy district attorneys. But good intentions are not enough. DDAs are expected to know, understand, and comply with their legal and ethical obligations in every case they prosecute, whether the defendant is represented by counsel or appearing *pro per*.

A. What does Brady Require?

Under *Brady v. Maryland* (1963) 373 U.S. 83, you are required to disclose to the defense evidence that is (a) favorable to a defendant, (b) exculpatory to a defendant, (c) impeaching of a prosecution witness, or (d) material to guilt or punishment. Evidence is favorable to a defendant if it either helps the defendant or hurts the prosecution (*In re Sassounian* (1995) 9 Cal.4th 535, 543-544.)

In *Strickler v. Greene* (1999) 527 U.S. 203, 280-281, the United States Supreme Court said: "In *Brady* this court held 'that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good or bad faith of the prosecution.' (*Brady v. Maryland*, supra, 373 U.S. at 87.) We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused. (*United States v. Agurs* (1976) 427 U.S. 9, 107), and that the duty encompasses impeachment evidence as well as exculpatory evidence. (*United States v. Bagley* (1985) 473 U.S. 667, 676.) Such evidence is material 'if there is a reasonable possibility that had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *id* at 682; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434]."

Important! You must also be aware of *Tennison v. City and County of San Francisco* (9th Cir. 2008) 548 F.3d 1293, where the Ninth Circuit ruled that "exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have

it." This decision is consistent with *Newsome v. McCabe* (7th Cir. 2001) 256 F.3d 747, which held that, "it was clearly established . . . that police could not withhold exculpatory information about fingerprints and the conduct of a line-up from prosecutors."

B. What is "Brady material?"

I. Material evidence

For this category, you need to picture what an appellate court would consider "material evidence" in a decision on appeal from a conviction You already know that an appellate court would hold that "evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. A reasonable probability of a different outcome is shown where suppression undermines confidence in the outcome." (*Kyles v. Whitley*, supra; *U.S. v. Bagley*, supra; *People v. Padilla* (1995) 11 Cal.4th 891, 929-932; *People v. Clark* (1992) 3 Cal.4th 41, 133-134). Accordingly, if you are aware of evidence that has a specific, plausible connection to the case, and it demonstrates more than minor inaccuracies in the prosecution case, it must be disclosed.

II. Exculpatory evidence

Exculpatory evidence is evidence favorable to the defendant and material to the issue of guilt or punishment.

III. Impeachment evidence

Evidence Code section 780 states in part: "Except as otherwise provided by statute, 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 but not limited to any of the following:

a. His character for honesty or veracity or their opposites.

b. The existence or nonexistence of a bias, interest, or other motive.

c. A statement made by him that is inconsistent with any part of his testimony at the hearing. CALCRIM 226 incorporates the above-listed factors and adds conviction of a felony and past criminal conduct of a witness amounting to a misdemeanor as well as several other considerations. If impeachment evidence is based upon the commission of a crime, the crime must involve moral turpitude to be admissible (*People v. Castro* (1985) 38 Cal.3d 301, 314 [felonies]; *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297 [misdemeanor conduct]).

IV. Further examples of possible impeachment of as material include:

a. False reports by a prosecution witness (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244);

b. Pending criminal charges against a prosecution witness (*People v. Coyer* (1983) 142 Cal.App.3rd 839, 842);

c. Parole or probation status of a witness (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486);

d. Evidence contradicting a prosecution witness's statements or reports (*People v. Boyd* (1990) 222 Cal.App.3rd 541, 568-569);

e. Evidence undermining a prosecution witness's expertise (e.g. inaccurate statements) (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179);

f. A finding of misconduct by an administrative hearing panel that reflects on a witness's truthfulness, bias, or moral turpitude (cf. *People v. Wheeler*, supra, 4 Cal.4th at p. 293). Note that generally the burden of proof at an administrative hearing is preponderance of the evidence;

g. Evidence that a witness has a racial, religious, or personal bias against the defendant individually or as a member of a group (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510);

h. Evidence that a witness has a reputation for untruthfulness (3Witkin, Cal.Evid.4th Ed. §§ 288-290);

i. Promises, offers, or inducements to the witness, including a grant of immunity (*United States v. Bagley*, supra, 437 U.S. 667, 676-677; *Giglio v. United States* (1972) 405 U.S. 150, 153-155);

j. A witness's inability to recall (*In re Sodersten* (207) 146 Cal.App.4th 1163);

k. Facts supporting a suppression motion (*United States v. Gamez-Orduno* (9th Cir. 2000) 235 F. 3d 453);

l. Witness's offer to testify for leniency (*People v. Dickey* (2005) 35 Cal.4th 884);

m. Evidence that identical crimes (signature MO) continued after defendant's incarceration (*United States v. Jemigan* (9th Cir. 2007) 492 F. 3d 1050);

n. Witness's incompetence (drugs, alcohol, mental, sight, hearing) (*Silva v. Brown* (9th Cir. 2005) 416 F. 3d 980.)

You should make a thorough review of all other types of information concerning a material witness before reaching a determination concerning the credibility of any impeachment evidence. But, if you are uncertain, remember that, "The prudent prosecutor will resolve doubtful questions in favor of disclosure." (*United States v. Agurs*, supra, 427 U.S. 97, 108.)

C. What is not "Brady material."

This is straightforward and uncomplicated. The following are not "*Brady* material:" allegations that cannot be substantiated or already have been determined to be unfounded. Further, you are not obligated to disclose or to investigate preliminary, challenged, or speculative information. Pending criminal or administrative investigations are considered "preliminary." (*United States v. Agurs*, supra, 427 U.S. 87, 109.)

2. KEEPING TRACK OF *BRADY* MATERIAL FOR FUTURE USE: CREATION OF THE DISTRICT ATTORNEY BRADY INDEX SYSTEM

A. Your obligation

If a DDA becomes aware of potential *Brady* material for a prosecution witness, that DDA must inform the Chief Deputy District Attorney (CDDA)[1]. If the CDDA concurs with the DDA that the information is potential *Brady* material, the DDA will write a memorandum summarizing the information and explaining why it meets *Brady* criteria. In that case, the CDDA will include the memorandum and supporting evidence into the newly-created District Attorney Brady Index System (BIS). In such cases, the CDDA will also provide notice to the witness and, where applicable, to the witness's agency. If it is determined the information does not meet *Brady* criteria, see section 3(a) below.

If it is determined that the *Brady* information amounts to a crime, the assigned DDA on the case must forward the memorandum and copies of supporting evidence (such as transcripts, police reports, expert reports) as follows: two copies to the CDDA – one that will be used for inclusion into the BIS and, where appropriate, one that the CDDA will provide to the witness's agency. A third copy should be sent to the Chief Investigator in order to facilitate or coordinate further investigation.

B. Access to the BIS

The BIS will consist of computer-based records with an alert capacity. The system is designed to include known historical and current *Brady* information. The BIS will not create secondary personnel files on law enforcement officers or other government employed witnesses. The only information other than *Brady* material from a witness's employee file to be included in BIS is that which is received pursuant to *Pitchess* motions (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; see also, Evid. Code §§ 1043-1045) where a court has released information without a protective order prohibiting dissemination of the information, or pursuant to an investigation resulting in a criminal charge filed against the witness.

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[1] In all situations where this memorandum directs a DDA to contact the CDDA on a *Brady* issue, the DDA should contact the Assistant District Attorney or the District Attorney if the CDDA is unavailable.

Every DDA will be able to access BIS to determine whether *Brady* information on a particular witness exists. BIS will confirm if information exists as well as providing a brief summary. DDAs will then need to contact the CDDA for further details if necessary.

At arraignment on a felony complaint or an information, or as soon thereafter as possible, the DDA assigned to a case must access BIS to determine whether impeachment information exists for any prosecution witness. In misdemeanor cases, the DDA should check BIS once the case is set for trial. In all cases a DDA should also access BIS prior to 30 days before trial. Any *Brady* information discovered from BIS and to be used in a case must be included in the case file. The DDA assigned to appear in court on the case has the responsibility for notifying the defense of any existing *Brady* information. That DDA also has the responsibility of recording in the file what information was provided, the date it was provided, and specifically to whom it was provided. Any *Brady* information disclosed will be conveyed to the defense counsel only in that particular case. Conveying of *Brady* information to anyone else for any other purpose is prohibited.

Important note! It is the policy of this office that in felony cases *Brady* information should be disclosed before preliminary examination.

A security log will be inputted into BIS and will be maintained and reviewed by the Chief Investigator. The log will track BIS inquiries.

3. CRITERIA FOR INCLUSION ON INFORMATION IN BIS

A. Who makes the decision and how it is made

The CDDA will decide whether to include information concerning a peace officer or government employed witness in the BIS. The decision will be made after an investigation of the allegations by the employee's agency, another law enforcement agency, another authorized investigator, or by the DA Chief Investigator.

The decision to include such information in BIS will be made by using a standard of "clear and convincing evidence" which is higher than a "preponderance of evidence but lower than "beyond a reasonable doubt." In other words, without clear and convincing evidence that the potential impeachment evidence is reliable and credible, it will not be included in BIS.

Using the above standard, if the CDDA determines preliminarily that *Brady* information exists, he will notify the District Attorney, the Assistant District Attorney, the witness, and the witness's agency of that finding. The witness and the agency will be invited to respond if they wish. If the *Brady* finding is upheld, the CDDA will notify the DDA handling the applicable case or his supervisor regarding the manner in which the defense will be notified.

Only the CDDA or his designee will input or delete information from BIS.

B. Pending investigations

If, while a matter is under investigation, the CDDA determines that there already is sufficient, credible evidence potentially constituting *Brady* material, and that it is necessary to present such evidence to a court (such as where a trial is in progress), he will advise the trial DDA to request an *ex parte*, in camera hearing to present the relevant evidence to the court. The DDA will ask the court to make a decision whether the evidence should be disclosed to the defense. If the court rules the evidence should be disclosed, the DDA will move for a protective order before the evidence is released to the defense. Regardless of the outcome of this process, the trial DDA must send a memorandum to the CDDA informing him of the court's decision and reasoning.

4. PITCHESS MOTIONS AND BRADY POLICIES

A. Prosecution Pitchess motions

As noted above (see 2(b)), disclosure of citizen complaints and other information from peace officers' or custodial officers' personnel files under *Pitchess v. Superior Court*, supra, 11 Cal.3d 531 is codified at Evidence Code sections 1043-1047. The threshold showing for obtaining *Pitchess* information is relatively low. (*City of Santa Cruz v. Municipal Court)* (1989) 49 Cal.3d 74). However, a threshold does exist. The information must be material to the issue before the court. (*People v. Nguyen* (2007) 151 Cal.App.4th 1473).

Pitchess and *Brady* are not the same thing. They operate in a parallel fashion. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1.) *Pitchess* merely requires a party (usually defendant) to show the evidence sought is "material." On the other hand, *Brady* requires a showing that the evidence likely will affect the outcome of the trial. In short, *Brady* essentially is a "gamechanger." Obviously, anything that is *Brady* is also *Pitchess*, but not vice versa.

Pitchess motions generally are brought by defense counsel in criminal actions, but they may be brought by any party in any type of case, criminal or civil. Consequently, although the prosecution has no automatic right to information disclosed as the result of a defense *Pitchess* motion, the prosecution may make its own. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463.)

It is important to remember that we do not ever represent law enforcement agencies. We are not a party to proceedings where the defense is seeking *Pitchess* material. Similarly, if we file a *Pitchess* motion, defense counsel is not a party. In any *Pitchess* motion, the law enforcement agency generally is represented by county counsel, the city attorney, or the Attorney General. Note that *Pitchess* procedures also apply to investigators with our office.

B. Our policy on filing prosecution Pitchess motions

Unless this office is conducting an investigation or prosecution of law enforcement officers, our policy generally is not to file *Pitchess* motions in the first instance. Instead, the standard procedure is to informally request that law enforcement agencies review the personnel files of those employees likely to testify (officers, criminalists, dispatchers, etc.). The agencies ordinarily will search for criminal

convictions, pending criminal charges, or any sustained findings of misconduct in which the decision is final and then advise us whether a *Pitchess* motion may be warranted. However, there undoubtedly will be occasions when the agency declines to provide information at all voluntarily, or other circumstances that will justify our filing a *Pitchess* motion. A DDA who believes it is appropriate to do so in a case should consult the CDDA.

If pursuant to an informal request, or otherwise, an agency informally advises this office that potential *Brady* material may exist on an employee who could be called to testify, the agency ordinarily would provide no further details other than a possible time frame. In such cases the CDDA will input the employee's name into BIS with an advisory alert of the *possible* existence of *Brady* material. If the employee later appears on a prosecution witness list, the assigned DDA will be alerted by checking BIS and should then file a *Pitchess* motion. The DDA should in any case invite defense counsel to do so on the record. Note that in circumstances where *Brady* information is 5 years old or older, that information will be reviewed by the CDDA, ADA, and DA, for a decision on whether it should be purged from BIS. (Evid. Code, §1045.)

No discovery of any information in or from a law enforcement officer's personnel file will be disclosed by any DDA with this office without a court first examining the file in camera. If the court orders information disclosed pursuant to a *Pitchess* motion, the DDA must move the court for a protective order restricting use of the information and any derivative information from it to that case only (Evid. Code, § 1045(d) & (e); *Alford v. Superior Court*, supra, 29 Cal.4th 1033; *Chambers v. Superior Court* (2007) 42 Cal.4th 673.) No DDA with this office may use information received through a *Pitchess* motion, regardless of who filed the motion, for any purpose other than that ordered by the court.

The above paragraphs apply only to law enforcement personnel records (see Pen. Code, §§ 832.5, 832.7, 832.8; Gov. Code, §§ 3300 et seq.). This office may of course compile its own information on officers for inclusion into BIS from other sources, such as court transcripts or other evidence. *Pitchess* protections do not apply to investigations by this office concerning the conduct of law enforcement officers, a grand jury, or the Attorney General. (*Fagan v. Superior Court* (2003) 111 Cal.App.4th 607.)

Final note on *Pitchess*: No DDA should ever provide to the defense any information from a criminal history (CLETS rap) other than that required by *Brady* on a law enforcement officer. In addition, no DDA should ever provide any identifying criteria on a law enforcement officer to the defense which might enable the defense to run a criminal history on an enforcement officer. Such efforts by the defense are improper. They are an effort to disclose confidential information in violation of Penal Code section 832.7 and are an attempt to circumvent *Pitchess*. (*Garden Grove Police Department v. Superior Court* (2001) 8 Cal.App.4th 430.)

5. CONCLUSION

Compliance with all provisions of this directive is mandatory. Such compliance will help us fulfill our primary mission of fairly prosecuting those who commit crimes in Napa County.