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MARIN COUNTY, CALIFORNIA

Prevention ✯ Prosecution ✯ Protection

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MARIN COUNTY DISTRICT ATTORNEY'S OFFICE *BRADY* POLICY
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I. PURPOSE.

Law enforcement personnel records are protected from disclosure by the statutory procedure for *Pitchess* motions. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code §§ 1043-1047; Pen. Code § 832.7.) Additional important protections regarding personnel records are contained in the Public Safety Officers Procedural Bill of Rights Act (Government Code section 3300, et seq.) and in the right to privacy under the California Constitution (article I, section 1). At the same time, the District Attorney has a constitutional obligation under *Brady v. Maryland* (1963) 373 U.S. 83, to provide criminal defendants with exculpatory evidence, including substantial evidence bearing on the credibility of prosecution witnesses. In several respects under the current law, the scope of the prosecution's obligations under *Brady* exceeds the information available to the defense under *Pitchess*. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 12, 14.)

The prosecution's duty of disclosure extends to evidence in possession of the "prosecution team," which includes the investigating law enforcement agency. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305; *Brandon, supra*, at p. 8; see *Brandon,* at p. 12, fn. 2.)

In addition, there is federal court authority that police have a due process obligation to disclose exculpatory evidence to the prosecution. (*Jean v. Collins* (4th Cir. 2000) 221 F.3d 656; *Newsome v. McCabe* (7th Cir. 2001) 256 F.3d 747, 752.)

Specifically, the Ninth Circuit has held that the police not only have a *Brady* duty but may be civilly liable for failure to affirmatively disclose exculpatory evidence to the prosecution irrespective of the good faith of an officer. The court declined to grant officers immunity under these circumstances. (*Tennison v. City and County of San Francisco* (9th Cir. 2009) 570 F.3d 1078.)

The District Attorney and Marin County law enforcement agencies are committed to full compliance with the rights of criminal defendants to a fair trial and due process of law. We recognize that effective enforcement and prosecution of crime are jeopardized by failure to comply with discovery law and that such violations may result in the reversal of convictions, sometimes years after the trial is concluded.

More importantly, we recognize that the honesty of law enforcement employees is a cornerstone of our criminal justice system. On those rare occasions when a law enforcement employee has engaged in conduct that has a negative bearing upon his or her credibility, we are obligated to disclose this information as required by law.

At the present time, based on the California Supreme Court decision in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, the District Attorney's Office has determined that we will not directly access or inspect peace officer personnel files.[1]

Instead, we have adopted a procedure in which law enforcement agencies advise the District Attorney's Office of the names of officers who have information in their personnel files that may require disclosure under *Brady.* The District Attorney's Office will confirm receipt of the information from the law enforcement agency by letter or e-mail correspondence. This advisement is followed by a modified *Pitchess* motion procedure, whereby potential impeachment or exculpatory material is gathered by the agency so it can be reviewed in-camera by a court. This utilizes an appropriate judicial forum to reconcile a defendant's constitutional right to a fair trial with a law enforcement employee's right to confidentiality. The *Pitchess* procedure described herein shall also apply to personnel records of peace officers employed by the District Attorney's Office.

It is anticipated that changes in this procedure will be necessary as developments occur in the case law interpreting *Brady*. Also, our experiences with the procedure may lead to the need to make modifications. Prosecutors, law enforcement agencies and peace officer associations will be kept apprised of any changes that are made.

II. ***BRADY*** **MATERIAL DEFINED.**

The District Attorney is obligated to provide the defense in criminal cases with exculpatory evidence that is material to either guilt or punishment. (*Brady v. Maryland, supra*, 373 U.S. 83, 87.) Reviewing courts define "material" as follows: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) "Exculpatory" means favorable to the accused. This obligation includes "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991)

[1] This policy does not cover investigations conducted by the Grand Jury, District Attorney's Office, or Attorney General's Office under Penal Code section 832.7(a).

1 Cal.App.4th 752, 758.) Such impeachment evidence must disclose more than "minor inaccuracies." (*People v. Padilla* (1995) 11 Cal.4th 891, 929; overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Evidence of conduct involving dishonesty, improper use of force, or that tending to show bias, which occurs in the course of exercising peace officer powers and while interacting with the public or engaging in investigatory functions, may be deemed *Brady* material.

Brady material may be more comprehensively described as follows:

1. A sustained finding[2] of misconduct based on a lack of truthfulness. (*United States v. Bagley* (1985) 473 U.S. 667, 676; *People v. Morris* (1988) 46 Cal.3d 1, 30.)

2. A sustained finding of misconduct based on a bias or prejudice relating to race, ethnicity, sex, sexual orientation, age, or religion. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.)

3. A sustained finding by the agency for any conduct involving moral turpitude such as theft, domestic violence, excessive use of force, sexual assault, or false statements (regardless of whether there was an arrest or criminal conviction for the offense). (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297; *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)

4. Evidence that the employee committed a crime of moral turpitude such as theft, domestic violence, excessive use of force, sexual assault, or false statements, regardless of whether the employee was arrested or convicted of a criminal offense). (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297; *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)

5. Evidence that the employee suffered a criminal conviction for any felony. (*People v. Castro* (1985) 38 Cal.3d 314; *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)

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[2] A complaint is considered sustained for purposes of this policy when it has been approved by the agency head after a hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, if applicable, or when the discipline has been imposed, whichever occurs first.

6. Evidence that the employee is currently on probation to any court for any law violation. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1245.)

7. Evidence that the employee has a pending criminal prosecution for any misdemeanor or felony, in any jurisdiction. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 379; *People v. Martinez* (2003) 103 Cal. App.4th 1071, 1080-1082.);

8. Evidence that an employee is currently under suspension within the department for conduct relating to their truthfulness. (*People v. Price* (1991) 1 Cal.4th 324, 486; *Davis v. Alaska* (1974) 415 U.S. 308, 319.);

9. Factual statements made intentionally by an employee about an incident which contradict the same employee's prior factual statements regarding the same incident. This does not refer to statements that are based on preliminary, speculative, or incomplete information, statements that are hypothetical in nature, or that are the result of mere inadvertence or typographical error. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569.)

10. Evidence that an employee has a reputation for being untruthful. (3 Witkin, *California Evidence* (4th Ed. 2000); *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463.)

11. Evidence undermining an employee's expertise when the employee is being proffered by the agency or the prosecution as an expert. Required disclosures include evidence of false or inconsistent statements about an individual case which are NOT the result of having received new or additional evidence; intentionally false statements as to the expert's prior training, experience and education; and evidence that the expert does not personally believe in the veracity of the expert opinion he or she has offered in this or any prior case. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1047 - 1048*; People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)

12. Evidence of promises of leniency, inducements, or immunity given to an employee or any witness. (*United States v. Bagley* (1985) 473 U.S. 667, 676.).)

Brady material does not include allegations that have been determined by the law enforcement agency to be unsubstantiated, not credible, based only on rumor or speculation, or unfounded.

III. PROCEDURE FOR LAW ENFORCEMENT REVIEW OF FILES AND NOTIFICATION TO DISTRICT ATTORNEY'S OFFICE

1. In order to meet our constitutional *Brady* obligations and to ensure that law enforcement's statutory right to confidentiality is upheld, the District Attorney requests that each law enforcement agency have their designated Performance Standards Officer or senior law enforcement administrator search its personnel files for potential *Brady* material.

2. A personnel file review is requested for all peace officer employees, including community service officers, evidence technicians, dispatchers, and other employees whose job duties may include handling evidence, documenting incidents relating to criminal cases, or who are likely to testify in criminal cases. [3]

3. The District Attorney's Office will send out a letter to the involved agency in each case where this comprehensive review is requested. That letter will name the witnesses who have been determined material to the prosecution of the case. The letter will serve to trigger the review.

4. If a particular law enforcement employee is subpoenaed on multiple cases, a repetitious review of the file is not required each time a District Attorney letter is received by the agency. Instead, we request a file review every six months in order to accommodate any new information lodged in the file.

5. For purposes of this interim policy/procedure, the term "personnel files" relates to the actual personnel files and sustained internal investigation and citizen complaint files/records of the law enforcement employee retained by the law enforcement agency.

6. Once the agency has concluded its review, it will send out a letter to the attorney assigned to the case (the attorney who authored the letter requesting review) indicating that the review has been completed. If no *Brady* material exists in the employees' files the letter should so indicate.

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[3] Law enforcement employees/witnesses include both sworn and non-sworn employees of California Attorney General's Office, District Attorney Offices, sheriffs' offices, coroner's offices, municipal police departments, federal law enforcement agencies, and employees of the California Department of Justice.

7. If potential *Brady* materials exist, the agency representative will indicate as such on the letter and contact the Chief Deputy District Attorney and inform him of the existence of the materials. Written notification by the agency will consist of a statement identifying the employee, that there may be *Brady* material regarding the employee in his/her personnel files, and the employment status of the individual. No actual materials from the file will be provided to the District Attorney's Office at this time.

8. The law enforcement agency may choose to provide the same written notification to the involved employee.

9. The obligation to provide *Brady* documents is ongoing. If the law enforcement agency receives any new *Brady* information regarding an employee, the agency will endeavor to provide timely notice to the Chief Deputy District Attorney.

IV. PROCEDURE FOR JUDICIAL REVIEW AND DISCLOSURE OF MATERIAL FROM LAW ENFORCEMENT PERSONNEL FILES.

1. When the District Attorney's office subpoenas or intends to call a law enforcement officer for whom notification of possible *Brady* material has been given, the District Attorney shall apply to the court for in-camera review of the records. The request for in-camera review shall be made pursuant to *Pitchess* (see Evid. Code §§ 1043, 1045; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046) and *Brady* (*United States v. Agurs*, *supra*, 427 U.S. at p. 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502; *Brandon, supra*, at p. 14). As to non-sworn employees, the request shall be made pursuant to Evidence Code sections 1040 and 915(b). (See *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526; *Johnson v. Winter* (1982) 127 Cal.App.3d 435.) At the time of application, the defense, the involved employee and the employing law enforcement agency will be notified of the request for in-camera review.

2. The *Pitchess* procedure requires 16 court days' notice to the law enforcement agency and to the officer/employee. When circumstances necessitate it, the assigned Deputy District Attorney may seek waiver of those notice requirements from the parties, or attempt to secure a court order upon a showing of good cause for full or partial relief from that requirement. Should those options be unavailing, the assigned attorney should address the issue

with the court and defense to ascertain whether a continuance of the trial is necessitated.

3. If, following in-camera review, the court orders disclosure under *Pitchess* and/or *Brady*, disclosure shall only be made to the defendant's attorney of record (or to defendant if not represented by counsel), to the involved employee, to the employing law enforcement agency, to those members of the District Attorney's Office as needed for handling of the case, and to the court pursuant to law. The prosecuting attorney shall request that the court issue a protective order against disclosure of the material in other cases pursuant to Evidence Code section 1045, subdivisions (d) and (e). (See *Alford v. Superior Court*, *supra*.)

4. To ensure that officers' privacy rights in their personnel files are protected, *Brady*/*Pitchess* motions shall be made in each future case in which the officer is a material witness unless otherwise indicated by the agency and/or the employee.

5. Discoverability does not equate to admissibility. The assigned case attorney shall seek all appropriate protective orders and file motions in limine to preclude the use of improper evidence at trial.

V. PROCEDURE FOR REVIEW AND DISCLOSURE OF MATERIAL FROM PUBLIC RECORDS (NON-LAW ENFORCEMENT PERSONNEL FILES).

1. Should the District Attorney's Office learn of potential *Brady* information from sources extrinsic to a law enforcement agency's personnel files (i.e., through our internal DARWIN, CLETS, or DMV record checks that are conducted for all witnesses) the assigned Deputy District Attorney will confer with the other members of the *Brady* committee as to whether disclosure under *Brady* is warranted.

2. While the responsibility for discovery compliance rests with the assigned trial attorney, the *Brady* committee of the District Attorney's Office often comprised of the Chief Deputy District Attorney, Law and Motions Coordinator, and assigned trial attorney, is a resource that the assigned attorney should use to discuss and evaluate whether a discovery obligation exists in a particular case. This resource is most often used to evaluate information received by the District Attorney's Office through extrinsic sources.

3. A decision on *Brady* discovery shall be made as early as possible so that in the case of a law enforcement witness, advance written notification by the assigned case attorney can be directed to the peace officer witness and the head of the employing law enforcement agency. Advance notification will provide the peace officer and the law enforcement agency an opportunity to provide any relevant information on the anticipated disclosures. Given the need to provide prompt discovery in criminal cases, the opportunity to comment, object or provide information may of necessity be brief. When advance notification can be made the date of the disclosure to the defense will be stated, along with the name of the Deputy District Attorney responsible for any *Brady* discovery. The timeline for disclosure should guide the identified law enforcement employee as to the most appropriate communication medium.

4. Copies of any *Brady* discovery provided to the defense shall be provided to the involved law enforcement employee. Address information for any witnesses in the documents provided shall be deleted.

5. The nature of the constitutional obligation created by the *Brady* federal constitutional mandates, and the California statutory time limits for trial and for providing of discovery in criminal cases will, in certain instances, require immediate disclosure to the defense of information in the possession of, or known to, the District Attorney's office. In such instances, it may not be possible to provide advance notification to the effected law enforcement employee witnesses. However, every effort will be made to provide such notice. In those instances where advance notification was not possible, post disclosure notification shall be made to the effected law enforcement employee.

6. Discoverability does not equate to admissibility. The assigned case attorney shall seek all appropriate protective orders and file motions in limine to preclude the use of improper evidence at trial.

VI. DISTRICT ATTORNEY ADMINISTRATIVE FILE

1. If it is determined by the *Brady* committee that *Brady* material does exist for a law enforcement employee, a memorandum documenting that conclusion and the materials reviewed will be maintained in a separate *Brady* administrative file in the District Attorney's DARWIN (District Attorney Records and Workflow Information Network) case management system. A *Brady* flag will

thereafter appear in DARWIN notifying the attorney handling a trial, evidentiary hearing, and/or reviewing a warrant affidavit where the employee is a material witness that potential *Brady* information may exist for that individual. Only the Chief Inspector or Supervising Inspector (or their designee), the District Attorney, Chief Deputy District Attorney, and Assistant District Attorney will have access to the *Brady* administrative file/server. The information contained in this administrative file shall only be accessed for case-related purposes. An employee whose information may be contained in the administrative file may schedule a review of his/her file with the Chief Inspector.

2. If the *Brady* material disclosed in a criminal proceeding came from law enforcement agency personnel files, that confidential material will be returned to the law enforcement agency following the completion of a criminal case.

VII. CONCLUSION

The Marin County District Attorney's Office acknowledges the cooperation of our law enforcement agencies in the implementation of this procedure.