

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

MCLE AGENDA

LEGAL ETHICS, DISCOVERY, AND OFFICE POLICIES

September 11, 2017

Michael D. Bradbury Conference Room

Instructor: Michael D. Schwartz, Special Assistant District Attorney

MCLE Credit: 3.25, including 2.25 hours legal ethics

8:30 – 9:30 Legal Ethics

9:30 – 10:45 Criminal Discovery, including statutory requirements and *Brady v. Maryland*

10:45 – 11:00 Break

11:00 – 12:00 Office Policies

ACTIVITY EVALUATION FORM FOR CALIFORNIA MCLE

Please complete and return to Provider (Please Print)

Provider Name: Ventura County District Attorney's Office Provider Number: 1130

Title of Activity: Legal Ethics, Discovery, and Office Policies

Date(s) of Activity: September 11, 2017

Time of Activity: 8:30 a.m. - 12:00 p.m.

Location of Activity: Michael D. Bradbury Conference Room

Please indicate your evaluation of this course by completing the table below

Question	Yes	No	Comments
Did this program meet your educational objectives?	<input type="checkbox"/>	<input type="checkbox"/>	
Were you provided with substantive written materials?	<input type="checkbox"/>	<input type="checkbox"/>	
Did the course update or keep you informed of your legal responsibilities?	<input type="checkbox"/>	<input type="checkbox"/>	
Did the activity contain significant professional content?	<input type="checkbox"/>	<input type="checkbox"/>	
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?	<input type="checkbox"/>	<input type="checkbox"/>	

Please rate the instructor(s) of the course below

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Michael Schwartz: Legal Ethics, Discovery, Policy	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—



**Ethics
Discovery
and
Policy**

ETHICS

- State Bar Act (Bus. & Prof. Code 6000 et seq.)
- Rules of Professional Conduct
- Case law

State Bar Act: Bus & Prof 6068

- Support federal & state constitution
- Maintain only legal & just actions
- Seek truth – never mislead the court
- Cooperate with Bar investigations

State Bar Act: Bus & Prof 6068

- **Maintain respect due to courts and judicial officers**
- **Advance no fact prejudicial to honor or reputation of party or witness, unless required by the justice of the cause**

Courteous professional * Effective advocate	Obnoxious jerk * Effective advocate
Courteous professional * Incompetent advocate	Obnoxious jerk * Incompetent advocate

Bus & Prof 6068

- **Self-report to State Bar of imposition of sanctions by court, filing of felony, certain convictions, reversal based on misconduct**

Bus & Prof. 6106

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

Rules of Prof. Conduct

- 2-100: Communication with represented party
- 3-600: Organization as a client

Rules of Prof. Conduct

5-110 (amended 5/1/17):

- (A) Member in gov't service requires probable cause
- (B) Assure accused has been advised of & opportunity to obtain counsel
- (C) Not seek waivers from unrepresented defendant unless court has approved pro per

Rules of Prof. Conduct

5-110 (amended 5/1/17), continued:

- (E) Reasonable care to prevent improper trial publicity
- (F) & (G) Duties when new evidence of innocence

Rules of Prof. Conduct, con't

- 5-120: Trial publicity likely to prejudice proceedings
- 5-200: Mislead judge or jury, cite invalid authority
- 5-210: Member as witness before jury

Rules of Prof. Conduct, con't

- 5-220: Suppression of evidence
- 5-300: Ex parte communications
(see Code of Jud. Ethics, Canon 3(B)(7))
- 5-320: Communications with jurors

Berger v. U.S. (1935) 295 U.S. 78

- Prosecutor's interest is not to win, but to see justice done
- Guilt shall not escape nor shall innocence suffer
- Should prosecute with earnest and vigor and may strike hard blows
- Duty to refrain from improper methods



Conviction Integrity Deputy

Created October 2012

Discriminatory prosecution

Murgia v. Municipal Court
(1975) 15 Cal.3d 286

- Equal protection violated if prosecutions deliberately based upon unjustifiable standards
- race, religion, other arbitrary classification

Vindictive / retaliatory prosecution

- Raise the ante after exercise of constitutional rights
- OK to withdraw pretrial offer

Duty During Voir Dire

- Not use voir dire to present inadmissible facts
- Use peremptory challenges only for proper purpose (*Wheeler/Batson*)



Duty with Witnesses

- Interview and prepare
 - You should know what they will say
 - Instruct re inadmissible evidence
- Do not suggest answers or influence content of testimony
- Plan questions carefully
 - Not elicit inadmissible evidence
 - Good faith belief



Duty with Witnesses (continued)

- Do not advise not to talk with defense (*Walker v. Superior Court* (1957) 155 Cal. App. 2d 134, 140; *People v. Hannon* (1977) 19 Cal.3d 588, 601)
- Do not threaten defense witnesses with arrest (*In re Martin* (1987) 44 Cal.3d 1)

Duty During Opening

- Do not overstate case
- Do not speculate
- Do not ask to observe def's demeanor
- Pretrial rulings on evidence, charts
- No arguing



Duty During Closing

- Argue based on admitted evidence and jury instructions
- No comment on def's failure to testify (*Griffin* error)
- No comment on invocation of *Miranda* rights (*Doyle v. Ohio*)
- No disparaging counsel

- No personal vouching for witnesses
- No facts outside the record
- No misleading jury
 - Facts or law
- No improper appeal to passion or prejudice
- No personal beliefs about guilt



Civil Liability

- Violations of Civil Rights (42 USC 1983) or tort claims



Absolute Immunity

“Intimately associated” with judicial proceedings

Filing and trying cases

May not apply when case is over

Qualified Immunity

Authorized Acts

- Immunity unless violating clearly established right, reasonable official would have understood that violating right
- Advice to police
- Statements to news media
- Authorizing search warrant

DISCOVERY

Discovery

- *Brady v. Maryland* (1963) 373 US 83
- *Pitchess v. Superior Court* (1974) 11 Cal.3d 531
- Penal Code section 1054 et seq.





“There is an epidemic of *Brady* violations abroad in the land.”

United States v. Olsen (9th Cir. 2013) 704 F.3d 1172, reh. en banc denied, 737 F.3d 625 (dis. opn. of Kozinski, C.J.)

Brady

- **Constitutional due process duty to disclose evidence that is**
 - **Favorable to the accused**
 - and
 - **Material to guilt or punishment**

***Brady v. Maryland* (1963) 373 U.S. 83**

Material

Reasonable probability disclosure would have produced a different result in the proceeding

Reasonable Probability

A probability sufficient to undermine confidence in the outcome

Penal Code § 1054.1 (e)

Must disclose any exculpatory evidence, needn't be material

***Barnett v. Superior Court* (2010) 50 Cal.4th 890**

What to Disclose

- Evidence directly opposing guilt, e.g., new witness
- Third party culpability
- Inconsistent statement of witness
- Evidence that reduces degree of culpability

The *Brady* obligation includes “substantial material evidence bearing on the credibility of a key prosecution witness.”



People v. Ballard (1991) 1 Cal. App. 4th 752, 758; *Giglio v. United States* (1972) 405 U.S. 150

What to Disclose

- Promises, inducements (informant)
- Prior felony convictions
- Prior incidents of untruthfulness or moral turpitude
- Pending charges
- Probation status

What to Disclose

- False Reports
- Racial, religious or personal bias
 - Evid. Code § 780 (f); *In re Anthony P.* (1985) 167 C.A.3d 502, 507-510

Credibility Information

Duty to run rap sheet on material civilian witness and disclose any information bearing on credibility

The prosecution's duty includes evidence in possession of

- The prosecuting attorney and
- The "prosecution team" (investigating law enforcement agencies)



No duty to disclose preliminary, challenged or speculative information

(*United States v. Agurs* (1976) 427 U.S. 97, 109, fn. 16)

Brady

- No defense request required
- Ethical duty even after conviction
(*Imbler v. Pachtman* (1976) 424 U.S. 409, 427 fn. 25; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179)

**Disclosure of impeachment
evidence not required if
guilty plea**

(U.S. v. Ruiz (2002) 536 U.S. 622)

**Evidence of actual
innocence must be
disclosed**

Need not disclose "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.)*

**Resolve doubtful questions
in favor of disclosure**

*(United States v. Agurs
(1976) 427 U.S. 97, 108)*

**Avoid "tacking too
close to the wind"**

*(Kyles v. Whitley (1995)
514 U.S. 419, 439)*



Disqualification & State Bar

Court may **disqualify** prosecutor, and must report to **State Bar**, if it finds prosecutor deliberately, intentionally, and in bad faith withheld relevant or materially exculpatory evidence, and that it contributed to a guilty verdict, guilty or nolo plea, or seriously limited the ability to present a defense. (Gov. Code § 6086.7(a)(5); Penal Code § 1424.5, effective 1/1/2016)

Felony withholding

Felony for prosecutor to intentionally and in bad faith withhold any physical matter, digital image, video recording or relevant exculpatory material or information, knowing it is relevant and material to outcome of case, with specific intent that it be concealed or destroyed. (Penal Code § 141(b), effective 1/1/17 (AB 1909).)

Unresolved Issues

Conflicting authority re:

- whether to be material under *Brady*, evidence must be admissible.
- whether *Brady* applies to evidence relevant to a suppression motion.
- whether disclosure required if public record or available through reasonable diligence

In re Benjamin T. Field (State Bar Court, Review Dept.)

- **Brady:** fail to disclose exculpatory statements of witnesses before trial
- **Moral turp./dishonesty:** (& mislead court): unable to locate witness "at that address"
- "Ben, just don't do it."
Ignore court's directives re search warrant and dental exam

Peace Officer Records

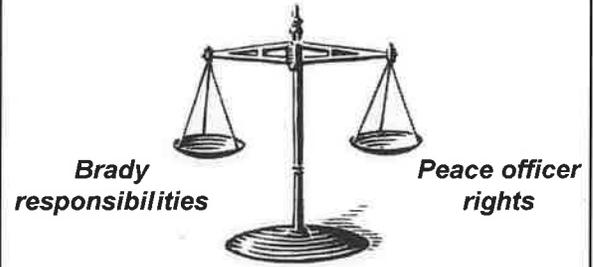
- Information from peace officer personnel records may only be disclosed pursuant to a *Pitchess* motion.
(Evidence Code §§ 1043-1047;
Penal Code § 832.7)



Pitchess vs. Brady

- Written motion and “good cause” showing required
- 5-year limitation
- Dates and witness information only
- Prosecution must disclose with or without request
- No specific time limit
- Must disclose material evidence

Issue: How to balance



Internal Brady Policy

- Advise supervisor of potential *Brady* information re officers
- Check *Brady* list for witnesses
- Consult with Special Asst. DA on how to proceed

External Brady Policy

- Law enforcement agencies advise DA's office that officer has *Brady* material in personnel file
- DDA checks *Brady* list for witnesses
- DDA makes *Pitchess* motion

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

- *Pitchess* and *Brady* operate in parallel
- On its face, *Pitchess* does not violate due process

Alford v. Superior Court (2003)
29 Cal.4th 1033

- *Pitchess* protective order limits use of information to that case.
- DA has limited role at *Pitchess* hearing
- DA does not get materials disclosed as result of defense *Pitchess* motion
- DA can make its own *Pitchess* motion

*People v. Superior Court
(Johnson)* (2015) 61 Cal.4th 696

- The prosecution does not have unfettered access to personnel files of peace officer witnesses to identify *Brady* information
- DA or defense can make *Pitchess* motion – equal access
- Police “laudably established” policy to provide DA with names of officers whose files contain potential *Brady* information
- DA must pass on that information to defense



The Pretend Supreme Court

**98 Ops.Cal.Atty.Gen. 54
(2015)**

External Brady policy is
"legally valid"

ALADS v. Superior Court

(2017) 13 Cal.App.5th 413
petition for review filed 8/18/17
(S243855)

- Sheriff may not provide DA with names from Brady list because it violates Pitchess

**CRIMINAL
DISCOVERY
STATUTE**

**What to Disclose
(Penal Code § 1054.1)**

- Witness names, addresses, statements
- Defendants' statements
- All relevant real evidence
- Felony conviction of any material witness

What to Disclose (Penal Code § 1054.1)

- Any exculpatory evidence, needn't be material
(Barnett v. Superior Court (2010) 50 Cal.4th 890)
- Results of physical or mental examinations, scientific tests, experiments, or comparisons intended for trial use

Discovery from Defense (Penal Code § 1054.3)

- Witness names, addresses and statements
- Results of physical or mental examinations, scientific tests, experiments, or comparisons intended for trial use
- Real evidence defense intends to offer

Discovery Procedure (Penal Code § 1054.5)

- Exclusive procedure
- Informal request deemed made at arraignment
- Discovery order if not comply within 15 days.
- Must provide at least 30 days before trial
- Sanctions: immediate disclosure, contempt, exclude evidence, continuance

Resources

**CDA, Professionalism
sourcebook**

**Hoffstadt, Cal. Criminal
Discovery (Lexis/Nexis)**

S/Brady file/Brady outline

S/Brady file/Pitchess outline



**You may be dealing with
the same attorneys for a
long time**



**Don't sink
to their level**



Ask for what you want



Visualize your plan



**Individual style –
To thine own self be true**



**Ethics
Discovery
and
Policy**

DA Policies – The Consolidated Version

(For full text of all policies please refer to the DA Policy Manual, on the DA Web)

(DA Web also contains links to Internet and Technology Use Policies, County Personnel Rules, Criminal Justice Attorneys Association of Ventura County MOA, etc.)

For other County policies, including County Administrative Policy Manual, go to
<http://myvcweb/index.php/forms-and-policies>

Content revised September 2010
Minor changes July 2015; June 29, 2016; August 2, 2017

CHECK-IN/CHECK-OUT SHEET

We need to be able to find you.

BADGES, ID CARDS, LETTERHEAD

For use in performance of official business.

EXPENDITURES

Before incurring costs on behalf of the office, complete an ERF (Expenditure Request Form), now completed on-line. See DA Web for instructions.

OUTSIDE EMPLOYMENT, OUTSIDE SPEAKING ENGAGEMENTS, MEMBERSHIP ON COMMITTEES

All require approval.

COMPUTERS

Occasional personal use permitted. Internet use may be monitored. Emails must be courteous, professional and businesslike. See various technology use policies on DA web.

CONFIDENTIAL INFORMATION

Access and disclosure on need-to-know basis. Criminal penalties for disclosure of rap sheets, DMV information.

SEXUAL HARASSMENT

It's unprofessional, it's illegal, and it can be expensive.

D.A. LEGAL OPINIONS

Law enforcement agency must make written request to District Attorney.

REQUESTS FOR INVESTIGATIONS

Fill out "Request for Investigation" form and have supervisor approve. (Be aware that investigator assistance in misdemeanors is the exception, not the rule.)

ROLE OF THE ATTORNEY IN INVESTIGATIONS

1) Pending Cases

You must try to avoid becoming a witness in your own case – this means you should not conduct your own witness interviews, but should request assistance from the police agency or a DA Investigator. If you do become aware of new information you must promptly document the information as well as your role in obtaining it.

2) Original Investigations

Deputy District Attorneys are rarely involved in original investigations, and you may not become involved, in any way, unless specifically assigned to do so. If you believe an investigation is warranted you should contact your supervisor who will then bring it to the attention of the proper person or persons.

3) Surreptitious Tape Recording

Surreptitious tape recording is generally not allowed by DDAs. This is a situation where you will need the assistance of a police officer or DA Investigator.

4) Use of Criminal / Driving Record Information

Access to criminal and driving record information is prohibited except for case-related purposes. Any such information received for case-related purposes is confidential and shall not be disclosed except as allowed by law.

Defendant's rap sheets are discoverable to the defense.

Witness rap sheets are not discoverable, but some information on the raps may be. If your witness has a rap sheet and you are unsure what to do with the information, consult a more experienced DDA for advice.

INTERPRETERS

If you need an interpreter in court for a witness, make advance arrangements with the interpreter. Languages other than Spanish may take some time.

TRANSCRIPTS

Misdemeanor cases are recorded on courtroom recording devices. The disks can be ordered from the court clerk's records department. If necessary you may have portions of the tapes transcribed by our Word Processing Unit.

Felony cases are reported by court reporters. Complete an Expenditure Request Form, with supervisor's approval, to obtain a transcript.

CHALLENGES TO JUDGES

A deputy may not challenge a judge under CCP 170.6 without supervisor's approval.

JUDGE PRO TEM

Supervisor's approval is required to accept a judge pro tem

NEWS MEDIA

1) DA Spokesperson

Only the District Attorney, Chief Assistant District Attorney, Chief Deputy District Attorney and Chief Investigator are spokespersons for the District Attorney's Office. No other employee may ever represent themselves as spokesperson without express prior authorization. However, you may talk to the news media about cases assigned to you.

2) Furnishing Information to the News Media

Attorneys relations with the news media are governed by Rule 5-120 of the California Bar Rules of Professional Conduct. You should be familiar with that rule before making any comment to the news media.

3) Information that May NOT Be Disclosed to News Media

Character, reputation, or record of the defendant

Possibility of a plea bargain

Existence or contents of any statements of an accused or of the accused's refusal to talk or the performance or results of any tests administered to the accused

Identity or nature of physical evidence

Identity, credibility, or expected testimony of any witness

Opinions as to guilt or innocence, weight of evidence, or merits of the case

Inflammatory statements or representations, which might affect the trial

Any information protected by any gag order or other protective order

Any identifying information of a victim of sexual assault or child abuse

Any information about any juvenile case

CONFLICT OF INTEREST

If you believe you may have a conflict of interest with any case pending in this office, for any reason (witness in case, previous involvement with parties, family member or friend is defendant or victim, etc.), you must immediately inform the Chief Deputy or Chief Asst.

JURY TRIAL REPORTS

After every jury trial, within one week of verdict, you shall complete a jury trial report. The form for this report is available on VCIJIS and includes:

The full name, city of residence, and occupation of each juror

A list of significant excused jurors – ones that others DDA's will need to know about if they ever show up again

Brief factual summary

Under "comments about jurors":

A brief explanation of any significant facts about specific jurors that would be helpful to a DDA in the future when considering whether to select this juror

Comments from the foreperson or other jurors regarding issues or evidence of concern to the panel and what might be done in the future to enhance prosecution efforts

Jury trial reports are generally not discoverable: *People v. Braley*(1969) 1 Cal.3d 277, 293-94; *People v. Quicke* (1969) 71 Cal.2d 502; *People v. Airheart* (1968) 262 Cal.App.2d 673; *People v. Darmiento* (1966) 243 Cal.App.2d 358.

PUBLIC RECORDS ACT REQUESTS AND SUBPOENAS FOR D.A. RECORDS

Requests for D.A. records by way of Public Records Act requests, subpoena duces tecum, or deposition subpoena should be referred to Special Assistant District Attorney.

POLYGRAPHS

No DA employee may offer, administer, or agree to offer, or administer a polygraph, or agree to enter such results in evidence or to base the investigation or disposition of a case in any way upon the outcome of any polygraph without express, written consent of the Chief Deputy District Attorney.

DISCOVERY

Every item that the defense is entitled to inspect under the rules of discovery shall be made available completely and promptly whether or not a formal order exists. For copies, we charge Public Defender and Conflict Defense Attorneys 3 cents/page, other attorneys 15 cents/page. Attorneys who do not want to pay can examine a copy in DA's office or can bring own machine or photocopy service.

INFORMANTS AND IMMUNITY

There are special policies regarding use of informant witnesses and grants of immunity.

CASE DISPOSITION

For misdemeanors, the defendant shall plead guilty to the most serious offense charged, and no less than one-third of all offenses charged. The DDA may not offer less than the arraignment offer without supervisor approval.

For felonies, the defendant shall be required to plead guilty to those provable charges which most accurately describe his criminal conduct. The DDA may not offer less than the Information Review offer without supervisor approval.

FORMATTING

Letters: Very truly yours

Court documents: Calif. Style Manual
Cal. Rules of Court, rule 2.104 et seq.
DA Document Style Manual on DA web



Rule 5-110 Special Responsibilities of a Prosecutor

Current Rules

Rules of Professional Conduct

Rule 5-110 Special Responsibilities of a Prosecutor

(Rule Approved by the Supreme Court, Effective May 1, 2017)

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) Reserved.
- (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 5-120.
- (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



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.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] Reserved.

[4] Reserved.

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of



the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

September 1, 2017

The Honorable Chief Justice Tani Cantil-Sakauye
& Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: Association for Los Angeles Deputy Sheriffs v. Superior Court,
No. S243855
Second District Court of Appeal, No. B280676 (13 Cal.App.5th 413)
Los Angeles Superior Court No. BS166063

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The California District Attorneys Association (CDA A) respectfully submits this amicus curiae letter in support of the petition for review filed by the Real Parties in Interest, Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles. (Cal. Rules of Court, rule 8.500(g).) Review is necessary to secure uniformity of decision and settle an important question of law, namely, whether law enforcement agencies may disclose to prosecutors prior to a formal *Pitches* motion, solely the names of peace officers whose personnel files include incidents of dishonesty or moral turpitude that may affect their credibility as prosecution witnesses.

We also respectfully request that the Court order that the opinion may not be cited.

INTEREST OF AMICUS CURIAE

CDA A has been in existence since 1910 and was incorporated as a non-profit corporation in 1974. CDA A has over 2,700 members including all of California's 58 district attorneys, the Attorney General of California, city attorneys engaged in criminal prosecutions, deputy district attorneys, deputy attorney generals, and deputy city attorneys. CDA A is dedicated to promoting justice through enhanced prosecutorial excellence. CDA A advocates the highest professional standards for prosecutors, including but

not limited to education and training, effective advocacy, integrity, and compliance with constitutional and other legal mandates.

CDAAs have a full-time staff in Sacramento and provide training seminars, educational publications, and legislative advocacy on issues affecting the criminal justice system. CDAAs have more than 35 committees, including the Appellate Committee and Ethics Committee, which use and coordinate the resources of prosecutorial agencies throughout the state to address cases that may have major statewide impact upon the prosecution of criminal cases.

CDAAs provide periodic training seminars specifically addressing criminal discovery. CDAAs developed and proposed a policy for the California Highway Patrol similar to that addressed in the current case. (98 Ops. Cal. Atty. Gen. 54 at *1 (2015).¹) CDAAs filed amicus briefs regarding the prosecution's *Brady*² obligations in both the Court of Appeal and the Supreme Court in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696 (hereafter *Johnson*).³

The Los Angeles County Sheriff's policy involved in the current case shares the essential characteristics of policies used by many jurisdictions throughout the state to harmonize *Brady* and *Pitchess*⁴, and to ensure

¹ Although the Attorney General opinion upheld the legality of such a policy, the CHP has not implemented the policy.

² *Brady v. Maryland* (1963) 373 U.S. 83.

³ The prosecutors who wrote this letter in support of review have extensive expertise regarding *Brady*. All have taught courses for CDAAs and other audiences on *Brady* and criminal discovery. They have administered *Brady* policies for their offices, have written appellate briefs on the subject, and have served on and/or chaired CDAAs committees including the Appellate Committee, Legislation Committee, and Training and Publications Committee. If review is granted, it is expected that they will participate in writing an amicus brief on the merits.

⁴ We use *Pitchess* interchangeably to refer to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to the statutes that codify *Pitchess* motions (Pen. Code, § 832.7; Evid. Code, §§ 1043-1047), and to motions made pursuant to these provisions.

compliance with prosecutors' *Brady* obligations. Under these policies, law enforcement agencies provide the district attorney (sometimes not in reference to a specific case prosecution involving a law enforcement witness) with the names of officers whose personnel files may contain information relevant to dishonesty or moral turpitude. The prosecution then provides these "alerts" to the defense so that it may make a *Pitchess* motion, or the prosecution makes a *Pitchess* motion itself. We are informed and believe that some 22 counties have such policies: Alameda, Amador, Calaveras, Contra Costa, Fresno,⁵ Inyo, Marin, Monterey, Nevada, Placer, Sacramento, San Francisco, San Joaquin, San Luis Obispo, Santa Barbara, Santa Clara, Solano, Sonoma, Tuolumne, Ventura, Yolo and Yuba. The ruling of the Court of Appeal in this case calls these widespread policies and practices into question.

The current case has a significant impact upon the ability of prosecutors throughout the state to comply with our duties under *Brady v. Maryland* and to ensure that defendants are afforded due process of law.

NECESSITY FOR REVIEW

Review is necessary to secure uniformity of decision and to settle important questions of law. (Cal. Rules of Court, rule 8.500 (b)(1).)

In this case, the Court of Appeal ruled that it would violate *Pitchess* for the sheriff to provide the district attorney with the names of deputies "whose personnel files contain sustained allegations of misconduct allegedly involving moral turpitude or other bad acts relevant to impeachment." (*Association for Los Angeles Deputy Sheriffs v. Superior Court* [hereafter *ALADS*], slip opinion, p. 4.) The court further held that *Brady* did not require such disclosure. (*Id.*, at pp. 30-35.) The policy examined in *ALADS* is in material respects the same policy that your Supreme Court has called "laudably established" (*Johnson*, 61 Cal.4th at p. 721 [upholding policy of San Francisco Police Department and San Francisco District Attorney's Office]) and that the Attorney General of California has found

⁵ The Fresno County District Attorney's Office has an informal agreement with some law enforcement agencies in its jurisdiction.

“legally valid.” (98 Ops.Cal.Atty.Gen. 54 at *2 [concluding that proposed policy for California Highway Patrol was lawful]).

The parties in the lawsuit at bar represent two stakeholders in this issue: the association representing the peace officers, and the head of the law enforcement agency. Statewide, there are at least two additional stakeholders to this controversy: prosecutors and criminal defendants. If review is granted, this Court can expect prosecutors and defense attorneys to offer amicus briefs setting out their views. If the path of the *Johnson* litigation is followed, the amicus briefs will likely reflect a *shared* prosecution/defense position seeking review of *Brady* material, to support practical and legal acquisition and discovery of such material and fair criminal trials; the Court of Appeal decision here *hinders* those laudable and shared goals.

“*Brady* and *Pitchess* are not perfectly congruent.” (98 Ops.Cal.Atty.Gen. 54 at *5.) Under *Brady*, prosecutors have an affirmative duty, with or without a defense request, to disclose information in possession of the prosecution or investigating agencies that bears on the credibility of prosecution witnesses. (*Johnson* at p. 709.) Under *Pitchess*, the prosecution is not in possession of personnel information of investigating agencies; the defense or prosecution must bring a motion and show good cause for disclosure; and only the date of incident, witness names, and contact information are provided. (*Id.* at p. 713; Evid. Code, § 1043; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)⁶

The “‘*Pitchess* process’ operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information.” (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.) But the *Pitchess* “procedural mechanism for criminal defense discovery . . . must be viewed against the larger background of the prosecution’s constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant’s right to a fair trial.” (*Ibid.*) This Court has upheld the validity of the *Pitchess* statutes in general, but has reserved the issue of whether the exclusivity of the *Pitchess* statutes “would be constitutional if

⁶As the record in *Johnson* reflected, materials turned over by the trial court under *Brady* are far more extensive than the limited statutory material allowed after a *Pitchess* motion for the same case.

it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*.” (*Id.* at p. 12, fn. 2; see also *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1047, fn. 6: “To the extent a prosecution-initiated *Pitchess* motion yields disclosure of such information, the prosecutor’s obligations, as in any case, are governed by constitutional requirements in the first instance.”)

Based upon the legal landscape described above, district attorneys in a number of California counties have adopted policies in an attempt to reconcile *Pitchess* and *Brady*. The law enforcement agency advises the prosecution of the names of officers whose personnel files contain potential *Brady* information, with no further information provided. The defense or prosecution then brings a *Pitchess* motion so the court may determine whether information from the file should be provided. The policy incorporates the essential protections of the *Pitchess* process including in camera review by a judicial officer and a protective order for any information provided.

Some law enforcement agencies supply such names only when a specific officer is subpoenaed as a material witness in a specific case; that situation was essentially the compromise upheld by the Los Angeles trial court herein, but reversed by the Court of Appeal. Other agencies go further and provide advance notice of potential *Brady* names regardless of witness or case status (as in *Johnson*). Giving advance notice is more efficient because it eliminates the requirement that the prosecutor ask for, or the law enforcement agency search for, information every time an officer receives a subpoena. Only this Court’s continuing acceptance of such a broader policy as it labeled “laudable” in *Johnson* would allow all such progressive programs in California to continue. Adopting the more limited approach that the trial court did below could hinder *Brady* discovery in the most progressive counties.

In recent years, the courts, the public, and the Legislature have given increased attention to the issues of peace officer misconduct and *Brady* disclosures. One jurist has claimed that there is an “an epidemic of *Brady* violations abroad in the land.” (*United States v. Olsen* (9th Cir. 2013) 737

F.3d 625, 626 (Kozinski, J., dissenting from denial of rehearing en banc.)⁷ More recently, the Legislature has enacted statutes authorizing disqualification of prosecutors and requiring a report to the State Bar for deliberate and intentional withholding of relevant, material exculpatory evidence. (Pen. Code, § 1424.5 and Bus. & Prof. Code, § 6086.7, subd. (a)(5), enacted by Stats. 2015, c. 467 (Assem. Bill No. 1328), amended by Stats. 2016, c. 59 (Sen. Bill No. 1474).) Last year, the Legislature amended Penal Code section 141 to make it a felony for a prosecutor to intentionally and in bad faith withhold exculpatory information. (Stats. 2016, c. 879 (Assem. Bill No. 1909).) In addition, the State Bar proposed, and your Court earlier this year approved in part, amendment of rule 5-110 of the Rules of Professional Conduct regarding Special Responsibilities of a Prosecutor.

While CDAA does not agree with all of the criticism leveled against police or prosecutors, we are cognizant of the heightened emphasis on compliance with *Brady* responsibilities. We are sincere in our desire to comply with these responsibilities, both to ensure that defendants receive due process, and to safeguard the validity of convictions we obtain. The Court of Appeal opinion in the current case takes a step backwards by limiting the ability of both the prosecution and the defense to access information bearing on the credibility of peace officer witnesses.

The Court of Appeal leaves prosecutors (and the defense) the option of filing a *Pitchess* motion without any notification from a willing agency of potential *Brady* information. But the fact that either the prosecution or the defense may seek impeachment information through *Pitchess* may not be an adequate basis for disclosure. Just to accomplish the preliminary step of getting the personnel file before a judge for in camera review, good cause must be shown. (Evid. Code, § 1043, subd. (b)(3).) Traditionally, this has required a showing of a “specific factual scenario” which establishes a “plausible factual foundation.” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1020.) An alternative good cause showing is the existence of a *Brady* “alert” under a policy like that at issue here, and “some explanation

⁷ While we agree that compliance with *Brady* obligations is important, we do not agree that there is an “epidemic” of violations. (See Coleman & Lockey, *Brady “Epidemic” Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It* (2016) 50 U.S.F. L. Rev. 199.)

of how the officer's credibility might be relevant to the proceeding.” (*Johnson*, 61 Cal.4th at p. 721.) This alternative showing would be eliminated by the Court of Appeal opinion in *ALADS*. The prosecution does not realistically have the option of making a *Pitchess* motion in every case, because in the absence of an “alert” system, often the traditional showing of good cause cannot be made.

Thus, for many situations, the Court of Appeal has created a Catch-22 for police agencies, prosecutors, and the defense. Under the Court of Appeal's construction of the law, the police agency may know of *Brady* evidence as to an officer, but may not advise the parties of it in the absence of a *Pitchess* motion. The prosecution will not know of the potential *Brady* evidence, and thus will have no reason to bring a *Pitchess* motion, and no good cause to set forth in such a motion in any event. The defense will be in the same situation as the prosecution. If the *Pitchess* procedure is to be interpreted and applied as the Court of Appeal would do, then a member of the prosecution team – the police agency – having possession and knowledge of the information, must not give either the prosecution or the defense any means to know of or have access to it. Instead of harmonizing *Brady* and *Pitchess*, the Court of Appeal stands them on their heads.

If the Court of Appeal opinion in this case is allowed to stand, the prosecution and the defense may go through trial completely ignorant as to dishonesty or moral turpitude conduct that could have a bearing on an officer witness's credibility, even though the officer and the employing agency are fully aware of it. This outcome is contrary to the principle that prosecutors are required to provide the defense with impeachment and other exculpatory evidence, even if the information is in the hands of the police and not in the hands of the prosecution. (*People v. Whalen* (2013) 56 Cal.4th 1, 64, overruled on another point in *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17; *Tennison v. City and County of San Francisco* (9th Cir. 2009) 570 F.3d 1078, 1087.)

REQUEST FOR DECERTIFICATION OF PUBLICATION

Because the Court of Appeal opinion was certified for publication, it is currently citable authority. (Cal. Rules of Court, rule 8.1115 (d).) The opinion thus precludes law enforcement agencies at this time from advising the prosecution of information in personnel files that may come within *Brady*. If review is granted, unless the Court orders otherwise, the opinion

will remain citable, although only for potentially persuasive value. (Cal. Rules of Court, rule 8.1115 (e)(1).) Because the opinion hinders the ability of law enforcement and prosecutors from performing their duties under *Brady*, we respectfully request that the Court order the opinion not be citable. (Cal. Rules of Court, rules 8.1105 (e)(2) and 8.1115 (e)(3).)

CONCLUSION

The Court of Appeal recognized that this case “raises issues of public importance that must be resolved quickly.” (*ALADS* slip opinion at p. 20.) As that court noted, the *Pitchess* procedure “affects every state and local law enforcement agency in California, and potentially every state criminal prosecution wherein a state or local peace officer is a witness.” (*Id.*, at p. 19.)

This case squarely presents important questions about the practical application of *Pitchess* and *Brady*: May law enforcement agencies notify the prosecution that the personnel file of a peace officer witness contains information that may have a bearing on the officer’s credibility? May the disclosure be made when the information is learned, or only in the context of a particular case in which the officer is a witness? Does *Pitchess* allow such disclosures, and if not, do the constitutional mandates of *Brady* override the *Pitchess* statutes to that extent? Are “*Brady* alert” policies “laudably established” (*Johnson*, 61 Cal.4th at p. 721) and “legally valid” (98 Ops.Cal.Atty.Gen. 54 at *2), or are they unlawful? (*ALADS* slip opinion at pp. 29, 35.)⁸ Prosecutors, police agencies, defense attorneys, and courts, addressing these matters every day, need to know what is permissible. The *ALADS* opinion, following on the heels of *Johnson*, throws the whole area into confusion. For these reasons, review by this Supreme Court is essential.

⁸ To be clear, CDAAs ask this Court to grant review to address whether the Los Angeles Sheriff’s policy of advance notice does not violate *Pitchess*, but rather harmonizes *Pitchess* with *Brady*, as your Court in *Johnson* seemed to indicate. Whether or to what extent advance notice may be mandated by *Brady* need not be considered on the issue of whether review should be granted.

Very truly yours,

MARK ZAHNER, Chief Executive Officer
California District Attorneys Association

MICHAEL D. SCHWARTZ
Special Assistant District Attorney
Ventura County District Attorney's Office

JERRY P. COLEMAN
Special Assistant District Attorney
San Francisco County District Attorney's Office⁹

ALBERT C. LOCHER
Assistant District Attorney (Retired)
Sacramento County District Attorney's Office

⁹ Writing on behalf of CDAA and not the San Francisco District Attorney's Office, which has submitted a separate letter in support of review. CDAA concurs in the arguments in the San Francisco District Attorney's letter.

DECLARATION OF SERVICE

I, Laura Bell, declare:

I am 18 years of age or older and not a party to this matter. On September 1, 2017, I served the within

“Letter to the Honorable Chief Justice Tani Cantil-Sakauye, and the Honorable Associate Justices, California Supreme Court, RE: Association for Los Angeles Deputy Sheriffs v. Superior Court, No. S243855”

in this matter by placing a true and correct copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named below, addressed as follows:

Richard Shinee
Elizabeth J. Gibbons
Green & Shinee
16055 Ventura Blvd., Suite 1000
Encino, CA 91436

Hon. James Chalfant
Superior Court of Los Angeles
County
111 North Hill St., Department 85
Los Angeles, CA 90012

Geoffrey Scott Sheldon
James Edward Oldendorph, Jr
Alexander Yao-En Wong
Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Flr.
Los Angeles, CA 90045

Frederick Bennett
Superior Court of Los Angeles
County
111 North Hill Street, Room 546
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 1, 2017, at Sacramento, California.

Laura Bell