

MONTEREY COUNTY DISTRICT ATTORNEY'S

BRADY POLICY 2010



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Exculpatory Evidence

“Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.”

Justice White, United States v. Wade (1967)

I. Introduction

Justice White used the phrase “law enforcement officers” in the *Wade* opinion to include both peace officers and prosecutors. Opinions interpreting the *Brady* decision set out the duties of the “prosecution team” to provide a defendant with exculpatory evidence prior to trial. As the courts use that phrase, the “prosecution team” includes not only prosecutors but also peace officers. Although California law allows peace officer agencies and district attorneys to operate independently of each other, that independence cannot insure public safety unless there is also cooperation. There must be cooperation to insure that criminals are held accountable. But there must also be cooperation to insure that the innocent are not wrongly convicted. California law codifies the right of peace officers to privacy in their personnel records. The *Brady* decision, on the other hand, can sometimes demand the breach of that privacy. By and large, California law permits prosecutors little or no access to peace officer personnel records. To carry out their duties under the *Brady* line of decisions, prosecutors must rely on the integrity of those leading peace officer agencies to carry out their obligations to secure justice by revealing when an officer may have *Brady* information in his or her personnel records. This policy is aimed at fostering cooperation between prosecutors and peace officers to insure that justice is done.

II. Prosecutors' Duties under the Constitution, Statutes and Ethics Rules

Rule of Professional Conduct 5-220 requires that: "A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce." In addition, *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1149, 10 L.Ed.2d 215, requires all members of law enforcement belonging to the prosecution team to disclose exculpatory evidence to the defendant.

Prosecutors must comply with both the professional rule and *Brady* case law. Prosecutors must keep themselves well informed about the requirements of each. Prosecutors can achieve that goal by educating themselves about developments in case law and being familiar with *Brady* issues as discussed in such publications as the California District Attorneys Association's *Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors* (Revised 2004) and L. Douglas Pipes and William E. Gagen., *California Criminal Discovery* (4th Ed.).

In addition, prosecutors should educate law enforcement members of the prosecution team about the duty to disclose exculpatory evidence.

Furthermore, prosecutors should be mindful that exculpatory evidence is not limited to witness statements and the impeachment of witnesses. Exculpatory evidence may also include physical evidence such as photographs, recordings, fingerprints, biological evidence, weapons and so on. There can be no comprehensive policy on this topic since physical evidence is unique to each case. But prosecutors should be careful to assess the potential of physical evidence to exculpate an accused and, if such evidence exists, to disclose the evidence to the defense. Finally, prosecutors must be aware that

ethical rules and discovery statutes are not identical to *Brady* requirements and may demand more extensive disclosure of evidence than required by the U.S. Constitution.¹

The remainder of this policy addresses exculpatory evidence involving law enforcement witnesses and civilian expert witnesses. “Law enforcement witnesses” includes all peace officers, whether they are members of the Sheriff’s Office, a police department, the Highway Patrol or another agency. Under California law, exculpatory evidence which may be in a peace officer’s personnel files is subject to restrictions on access and release. “Law enforcement witnesses” also includes non-sworn personnel employed by law enforcement agencies. A few examples are: criminalists, fingerprint technicians, evidence custodians, county code enforcement officers, investigators for state agencies, in short, anyone employed to investigate violations of laws carrying criminal penalties. The non-sworn members of the law enforcement team also have a right to privacy in the contents of their personnel files.

This policy implements a mechanism to comply with our constitutional obligations. The policy encourages high ethical standards among law enforcement, since past conduct contravening *Brady* principles and documented only in personnel files will certainly be subject to in camera judicial review whenever a law enforcement member is a material witness.

III. Outreach

Educating our law enforcement colleagues about the duty to disclose exculpatory evidence is the most important activity we can undertake to comply with the requirements of *Brady v. Maryland*. The District Attorney’s Office will provide educational programs and materials for the leadership of the various law enforcement

agencies. At least once a year, a member of the District Attorney's management will contact each agency to review *Brady* obligations. The relevant agencies are not only those employing peace officers. Also included are agencies we deal with on a recurring basis whose duty is to enforce statutes or ordinances carrying a criminal penalty. The Monterey County Building Services Department, the County's Health Department and the Agriculture Department's Weights and Measures Division are examples, to name only a few. The District Attorney's Office will also contact the supervisors of crime laboratories whether they are local or state operated.

For those agencies employing peace officers, the oral or written instruction will remind the leadership that *Brady* is not simply a peace officer matter. Even non-sworn personnel involved in the investigation of crimes may be the subject of *Brady* disclosure.

Each manager conducting outreach pursuant to this policy will document in writing the date of the contact, the persons contacted and the subjects discussed within one week of the contact. The documentation will be delivered to the Chief Assistant District Attorney who has the responsibility to insure that at least one leadership member of each agency is contacted annually.

Finally, education for the District Attorney's staff is also important. The District Attorney's Office shall conduct annually at least one continuing legal education class on *Brady* compliance.

IV. Peace Officer Witnesses

A. Exculpatory Evidence Derived from Personnel Files of Peace Officers

Peace officer personnel records are confidential and are only subject to discovery pursuant to the *Pitichess* procedures set forth in Evidence Code §§1043 – 1045.² Further,

prosecutors do not have the right to access police personnel records when a law enforcement officer is a witness in a case and therefore cannot review records for *Brady* evidence without prior judicial approval.³ Nor may a prosecutor disclose the contents of a peace officer's personnel file without judicial approval.⁴ Therefore:

1. All law enforcement agencies in Monterey County should advise either the District Attorney or the Chief Assistant District Attorney of the names of officers who have information in their personnel files that may require disclosure under *Brady*. *Brady* material in personnel files of law enforcement agency employees is defined to include:
 - a) Any finding of misconduct sustained by the agency head or his or her designee that reflects upon truthfulness, bias or moral turpitude,⁵
 - b) Any felony conviction;
 - c) Any misdemeanor conviction involving moral turpitude;
 - d) Any pending criminal charge;
 - e) Any current probationary status for a criminal conviction.
2. The notification should be in writing and state only that there may be *Brady* material regarding the employee and the date of the misconduct. No actual materials from the file should be provided to the District Attorney's Office at that time. The notification should be made as soon as the investigation is complete unless unusual circumstances require an earlier disclosure.
3. The District Attorney's Office will provide legal opinions to law enforcement agencies about: 1) Whether specific conduct involves a *Brady* problem for a law enforcement employee; and 2) If there is a *Brady* problem, how that may affect the employee's ability to be an effective witness in a criminal proceeding. These legal opinions will be issued only by attorney managers. If a deputy district attorney is asked

for an opinion by a law enforcement agency, that attorney will refer the question to his or her supervisor.

4. The Chief Assistant District Attorney shall maintain a list of law enforcement employees for whom law enforcement agencies have given notification that possible *Brady* material may exist, as described above. Deputy district attorneys must review the list to determine whether a law enforcement employee who is subpoenaed by or who will testify on behalf of the prosecution is on the list.

5. Whenever a case involves a material witness for whom notification of possible *Brady* material has been received, the prosecutor shall either notify the defense or shall apply to the court for an in camera review of the records pursuant to Evidence Code §§1043 and 1045. Initiation of this procedure in a particular case is the responsibility of the prosecutor assigned to the case and shall be undertaken without a defense request.

6. If, following in camera review at the prosecution's request, the court orders disclosure of documents or information, the prosecutor shall make further disclosure only to the defendant's attorney of record (or to defendant if not represented by counsel) and to those members of the District Attorney's Office needed to handle the case. Subject to court orders, the prosecutor may use the matters disclosed to present evidence in the court proceeding for which disclosure was made. The prosecutor will abide by any court protective order made pursuant to subdivisions (d) and (e) of §1045 of the Evidence Code.

7. Because disclosure of the contents of police personnel files requires judicial approval⁶ and to ensure that officers' privacy rights in their personnel files are protected, the District Attorney's Office shall not maintain a depository of information obtained

from personnel files pursuant to an in camera hearing if the court issues a protective order. Instead, the procedures described herein shall be used in each future case in which the officer is a material witness. If the court does not issue a protective order, disclosed contents of peace officer personnel records shall be maintained in a *Brady* administrative file described in Sections C. 4, 5 & 6 below.

B. Security of List

Only prosecutors will have access to the list of law enforcement employees for whom law enforcement agencies have given notification that possible *Brady* material may exist. The list will only be accessible by computer protected by a password. It is a violation of Monterey County District Attorney policy to copy, print, or download the list in any fashion. The information may only be used by a prosecutor to ascertain whether a witness in a criminal case is on the list. It is also a violation of office policy to disseminate the list or its contents in any fashion inconsistent with the terms stated in this policy. Only the Chief Assistant District Attorney, in consultation with the Assistant District Attorneys, may make changes to the list. Violation of these security provisions will be subject to discipline.

C. Exculpatory Evidence Derived From All Sources Except Peace Officer Personnel Files

Upon learning of any apparently credible allegation involving a peace officer's misconduct or credibility that may be subject to discovery under *Brady*, deputy district attorneys and district attorney investigators shall timely report this information to their immediate supervisors. For example, evidence of untruthfulness may come to light during a criminal trial, from credible reports of other law enforcement employees based

on sources other than personnel records, or from requests for filing of criminal charges against law enforcement employees. Such allegations must be substantial and may not be mere rumor or speculation. Because such an allegation can ruin an officer's reputation and professional career, prosecutors and investigators should be careful in the words used to report an allegation to a supervisor whether orally or in writing. If and when such information is obtained, the District Attorney's Office will conduct a thorough analysis pursuant to the procedures outlined herein to determine if it is required to disclose the information pursuant to *Brady*.

1. Following receipt of such a report, the attorney's or investigator's supervisor shall obtain all available information concerning the alleged misconduct, including the transcript of any testimony provided, and shall forward the materials to the Chief Assistant District Attorney.
2. The Chief Assistant District Attorney shall review and analyze the materials in light of applicable law and determine, in consultation with the Assistant District Attorneys, which of the following conclusions is appropriate: (1) the materials do not constitute *Brady* material, in which case the matter shall be closed; or (2) the materials may constitute *Brady* material, in which case the matter shall be referred to the agency which employs the peace officer to conduct an investigation.
3. If, after conducting this investigation, the employing law enforcement agency concludes that the complaint is frivolous, unfounded, exonerated or not sustained, then disclosure is not warranted because the information is "preliminary, challenged, or speculative."⁷ Under these circumstances, the District Attorney may conclude that the information is not discoverable under *Brady*.

4. If the employing law enforcement agency sustains the complaint, the employing law enforcement agency should comply with the procedure set forth in Section A above. When the officer is a material witness in a case, the District Attorney's Office shall also comply with the procedure set forth in Section A above. The materials and any documents generated in support of the referral to the employing law enforcement agency shall be maintained in a separate *Brady* administrative file for purposes of complying with the discovery obligation in future cases.
5. The information contained in these administrative files shall only be accessed for case-related purposes. The substance of the information in the administrative files shall not be included in any computerized database. Names of peace officers with administrative files shall be included on the *Brady* list described in Section A. 4. Prosecutors must review the list to determine whether a law enforcement employee who is subpoenaed by or who will testify on behalf of the prosecution is on the list. Prosecutors shall consult with the Chief Assistant District Attorney concerning the discovery of information in an administrative file. Any decision to disclose or not to disclose information contained in an administrative file shall be documented in the administrative file for that officer.
6. Initiation of this procedure in a particular case is the responsibility of the individual prosecutor assigned to the case and shall be undertaken without a defense request.
7. Although referral to the employing law enforcement agency is preferred, the District Attorney's Office may elect to conduct the investigation of possible peace officer misconduct in unusual circumstances.

V. Non-sworn Law Enforcement Employees

Because non-sworn law enforcement employees have a right to privacy in their personnel files, these employees and their employers may assert a privilege not to disclose information from their personnel records. As with peace officers, prosecutors do not have the right to access these personnel records without consent or judicial approval.

And because law enforcement agencies routinely conduct internal affairs investigations concerning allegations of misconduct for both sworn and non-sworn employees, the same procedure described above for peace officers will apply with one procedural exception.

1. The prosecutor should disclose to the defense the possible existence of *Brady* evidence in a non-sworn law enforcement personnel file. A motion pursuant to Evidence Code §§ 1043 and 1045 is not available to reach these personnel records. The defense should make a discovery motion for exculpatory evidence. In the event of such a motion, the prosecutor should arrange to have the custodian of the records appear at the hearing with the personnel file to assert any claim of privilege under Evidence Code §1040 and participate in an in camera review pursuant to Evidence Code §915 if the court so orders. It may be necessary for the prosecutor to serve the custodian of the personnel file with a subpoena duces tecum to properly conduct this hearing. Unlike the Pitchess procedures, there is no statute compelling the custodian's attendance at the motion.

2. The preferred method is to refer any question about the credibility of a law enforcement employee to the employing agency for investigation. The District Attorney's Office will conduct the investigation only in unusual circumstances.

VI. Expert Witnesses

This group does not include persons directly employed by a law enforcement agency. These witnesses may be self-employed or work for a private corporation, educational institution or a government agency. We cannot assume there will be timely cooperation from these employers let alone that they will understand our duties under *Brady* or how to conduct a proper investigation. The burden will generally be on the District Attorney's Office to carry out an investigation of potentially disclosable exculpatory evidence.

Prosecutors should be alert to information from any source that an expert employed to assist the People in presenting a case has any shortcomings with respect to integrity or competence. On obtaining such information, a prosecutor should discuss the matter with her or his supervisor and the Chief Assistant District Attorney.

Should an expert witness be found to have a *Brady* problem, the District Attorney's Office will also determine its impact on past or pending cases.

Expert witnesses with credibility or competence issues will be on the *Brady* list.

VII. In Camera Review of Brady Administrative Files

The District Attorney has the duty to identify and disclose exculpatory evidence. In some instances, the District Attorney's Office may need to submit potential *Brady* evidence from its administrative files to a judge for in-camera review to determine if disclosure to the defense is required.⁸ The option of submitting *Brady* material for in camera review shall be considered in consultation with the Chief Assistant District Attorney.

1. The types of cases which may justify in camera review include:

- a) Any materials contained in or obtained from a peace officer's personnel file, including information of which the District Attorney's office became aware through a Pitchess motion in a different case that was released without a protective order, or which is outside the five-year limitation period;
 - b) Material regarding any incident that is the subject of a pending internal investigation by the employing law enforcement agency;
 - c) Material that is remote in time or has questionable relevance to the present case;
 - d) Any privileged materials;
 - e) When it is unclear whether the law requires the information be disclosed.
2. The District Attorney's office shall, in appropriate cases, request that the court issue a protective order limiting or prohibiting the disclosure of the material in other cases.
3. If information regarding the credibility of a material witness is provided to the defense from a *Brady* administrative file after an in camera review, the assigned deputy district attorney shall inform the Chief Assistant District Attorney about the material ordered by the judge to be discovered and whether there is a protective order. The Chief Assistant District Attorney shall include this information in the administrative file maintained for that law enforcement employee.

VIII. Warrant Review

Although not a true *Brady* issue, the validity of a search or arrest warrant depends on the credibility of law enforcement personnel, both sworn and non-sworn, who provide information to support the issuance of the warrant. Prosecutors reviewing declarations in

support of arrest warrants and affidavits in support of search warrants shall consult the *Brady* list to determine if the declarant, affiant or any other law enforcement employee providing information is on the list. No prosecutor shall approve any warrant which depends on the credibility of a law enforcement employee on the *Brady* list without first consulting with his or her supervisor.

IX. Admissibility of Evidence

Discovery and admissibility of evidence are different and the assigned prosecutor shall decide if admissibility of matters discovered is to be challenged.

FOOTNOTES

¹Penal Code section 1054.1(e). For example, *Brady* does not apply to impeachment evidence not disclosed at the time of plea. (*United States v. Ruiz* (2002) 536 U.S. 622.) *Brady* exists to safeguard the right to a fair trial. In contrast, Penal Code section 1054.1(e) is not ostensibly limited only to trial and may apply pre-plea.

²*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1038.

³*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475.

⁴*Fagan v. Superior Court* (2003) 111 Cal.App.4th 607.

⁵ 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 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.)

The government has no *Brady* obligation to “communicate preliminary, challenged, or speculative information.” (*United States v. Agurs* (1976) 427 U.S. 97, 109 fn. 16.) However, “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” (*Id.* at p. 108.) See also *Kyles v. Whitley* (1995) 514 U.S. 419, 439, which warns prosecutors against “tacking too close to the wind” in withholding evidence.

Impeachment evidence is defined in Evidence Code section 780 and in CALJIC 2.20. Examples of impeachment evidence that may come within *Brady* are as follows:

1. The character of the witness for honesty or veracity or their opposites. (Evid. Code § 780 (e).)
2. A bias, interest, or other motive. (Evid. Code § 780 (f).)
3. A statement by the witness that is inconsistent with the testimony of the witness. (Evid. Code § 780 (h).)
4. Felony convictions involving moral turpitude. (Evid. Code § 788; *People v. Castro* (1985) 38 Cal.3d 301, 314.) Discovery of all felony convictions is required regarding any material witness whose credibility is likely to be

critical to the outcome of the trial. (Penal Code § 1054.1 (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177.)

5. Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.)
6. False reports by a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)
7. Pending criminal charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)
8. 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.)
9. Evidence undermining the expertise of an expert witness. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)
10. 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.)

⁶ *United States v. Agurs*, *supra*, 427 U.S. 97, 109 fn. 16.

⁷ *Id.*, at 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502.)

⁸ *Fagen v. Superior Court*, *supra*.