BRADY LAW AND POLICIES

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NOT SHEPARDIZED

I.

STANDARD FOR DISCLOSURE

A. The prosecution is obligated to provide the defense in criminal cases with *exculpatory* evidence that is *material* to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.)

B. The prosecution must disclose information in possession of the "prosecution team," including "information possessed by others acting on the government's behalf that were gathered in connection with the investigation." Does not include governmental agencies with no connection to the investigation or prosecution of the case. (*In re Brown* (1998) 17 Cal.4th 873, 879; *In re Steele* (2004) 32 Cal.4th 682, 697.) But may include law enforcement agencies from other states if acting on the prosecution's behalf or assisting the prosecution of the case. (*Barnett v. Superior Court* (2006) 146 Cal.App.4th 344, 365.)

1. In *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, the court held that CDC has a hybrid status: part investigatory agency that is part of the prosecution team (its investigation of murder inside the prison), and part third party whose records may be obtained only though an SDT (records kept by CDC in the course of running the prison such as inmate movement records, etc.)

2. In one case of attorney discipline, the prosecutor "purposely made himself ignorant of the details [of evidence impeaching the credibility of a prosecution expert] by taking a 'see no evil or hear no evil' approach." The State Bar Court ruled that the prosecutor could not avoid *Brady* responsibilities by "looking the other way." *In re Brooke P. Halsey, Jr.* (Cal. State Bar Court, Hearing Dept. 02-O-10195-PEM, Aug. 1, 2006) http://members.calbar.ca.gov/courtDocs/02-O-10195.pdf .)

C. "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.)

D. *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5, disapproved of the statement in *People v. Morris* (1988) 46 Cal.3d 1, 30 fn. 14, that "the prosecution's duty of disclosure extends to all evidence that reasonably appears favorable to the accused ...." Instead, disclosure is required "only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *Sassounian* at p. 545, fn. 6, also disapproved of a statement in *Morris* that evidence is material if it "tends to influence the trier of fact because of its logical connection with the issue." The correct test is whether it raises "reasonable probability that, had [it] been disclosed to the defense, the result ... would have been different [citation]— that is to say, a probability sufficient to "undermine[ ] confidence in the outcome." (*Ibid.*)

E. A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. The reversal of a conviction is required upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. (*Youngblood v. West Virginia* (2006) 547 U.S. ___, ____, 165 L.Ed.2d 269, 273, 126 S.Ct. 2188, 2190; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1227.)

F. "Although *Brady* disclosure issues may arise 'in advance of,' 'during,' or 'after trial' [citation], the test is always the same." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7-8.)

G. Whether evidence comes within *Brady* can rarely be determined in advance since the determination of materiality is fact specific. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1052, fn. 8.) The cumulative effect of the suppressed evidence is evaluated rather than item by item. (*Kyles v. Whitley* (1995) 514 U.S. 419, 434-436; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1228.)

H. Discovery should not be withheld just because it is inconsistent with the prosecution's theory. However, a witness's statement was not material and did not need to be disclosed where it was the "epitome of noncredibility," included "assertions that could not possibly be true," were refuted by more credible witnesses, and had been thoroughly investigated and rejected. (*In re Cox* (2003) 30 Cal.4th 974, 1007-1008.)

I. An extreme case: *Strickler v. Greene* (1999) 527 U.S. 263. Inconsistent statements of an eyewitness regarding identification of the defendant were not material under *Brady* because in light of the sufficiency of other evidence against defendant, "petitioner has not shown that there is a reasonable *probability* that his conviction or sentence would have been different had these materials been disclosed." (*Id.* at p. 296.) The court reached this conclusion even though it acknowledged that the witness's testimony "was

prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial" (*Id.* at p. 289) and there was a reasonable *possibility* of a different result. (*Id.* at p. 291.)

J. There is a conflict of authority as to whether to be material under *Brady*, undisclosed information or evidence acquired through that information must be *admissible*. (See *Paradis v. Arave* (9th Cir. 2001) 240 F.3d 1169, 1179 [citing conflicting cases]; *United States v. Sipe* (5th Cir. 2004) 388 F.3d 471, 485 & fn. 34 [inadmissible evidence may be material under *Brady*]; *Norton v. Spencer* (1st Cir. 2003) 351 F.3d 1, 9 ["inadmissible evidence is by definition not material" unless it provides "so promising a lead to strong exculpatory evidence"]; *United States v. Gonzalez* (D. Del., 1996) 938 F. Supp. 1199, 1208 [polygraph evidence not discoverable because inadmissible].) In *Wood v. Bartholomew* (1995) 516 U.S. 1, the court held that failure to disclose polygraph evidence did not constitute *Brady* error because it was inadmissible, and because the defense failed to show that it would have affected investigation or cross-examination by the defense, i.e., only speculation rather than a reasonable probability that it would have affected the outcome. *Wood* was cited in *People v. Salazar* (2005) 35 Cal.4th 1031, 1043, for the statement (probably dictum) that materiality under *Brady* "requires more than a showing that the suppressed evidence would have been admissibile . . . ."

K. Conflicting authority as to whether *Brady* applies to evidence relevant to a suppression motion. (*United States v. Stott* (7th Cir. 2001) 245 F.3d 890, 902.)

L. Standard of proof for disclosure under Ventura County DA policies: "substantial information," i.e., "facially credible information that might reasonably be deemed to have undermined confidence in a later conviction in which the law enforcement employee is a material witness, and is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event."

1. "Substantial information" standard also adopted in the Santa Barbara District Attorney's *Brady* policy.

2. We have not adopted the Los Angeles County District Attorney's "clear and convincing evidence" standard.

M. 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, quoting the concurring opinion of Justice Fortas in *Giles v. Maryland* (1967) 386 U.S. 66, 98.)

1. Followed in *United States v. Diaz* (2nd Cir. 1990) 922 F.2d 998, 1006: no *Brady* error in failing to communicate "suspicions" that a government informant had stolen $18,000; the government did not have "knowledge" that he had stolen the money until after the trial had concluded.

2. Followed in *United States v. Amiel* (2nd Cir. 1996) 95 F.3d 135, 145-146. Discredited government witness, Mongelli, claimed another witness, Wallace, was deeply involved in organized crime and had committed several murders. Police questioned Wallace and found that he was not a suspect in any investigation and was not arrested in connection with any organized crime activity. "After investigating possible wrongdoing by Wallace, the. . . prosecution found no evidence to support Mongelli's accusations. Pursuant to *Diaz*, it had no obligation to inform the defense."

3. At least two cases have taken a more limited view of the exception. In *United States v. Kiszewski* (2nd Cir. 1989) 877 F.2d 210, 215-216, the Court of Appeal held that the trial court should have examined the personnel records of a government witness that included allegations that he was "on the take," even though an FBI investigation had exonerated the witness on that charge. In *United States v. Veras* (7th Cir. 1995) 51 F.3d 1365, 1372-1376, the court held that the government was required to disclose claims by a convicted drug dealer and perjurer that an officer stole money and lied on search warrant applications. The court rejected the argument that the allegations were not corroborated, and held that they had "some grounds" and were serious enough to warrant a two-year investigation.

4. *Brady* does not require disclosure of material that is only *unfavorable* to defendant, or information that is of mere speculative value, including where "mere speculation that there might have been something useful for impeachment purposes." (*People v. Ashraf* (2007) 151 Cal.App.4th 1205 (not final).)

5. Courts factor in governmental interest in confidentiality of ongoing investigation, including privacy interests in victims and witnesses. (*People v. Jackson* (2003) 110 Cal.App.4th 280, 288; see *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, 764-765.)

N. 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.)

O. No *Brady* obligation to disclose complaints about peace officer misconduct where the only evidence of such misconduct is defense testimony at an unrelated criminal trial. (*People v. Jordan* (2003) 108 Cal.App.4th 349.) Prosecution is not required to catalogue the testimony of every defense witness in every criminal trial, cull out complaints about peace officers, and disclose whenever that officer is a witness in another case. "Defense attacks upon the integrity of a police officer are a common feature of criminal trials. Given that the proponent of the evidence has a strong incentive to avoid conviction, such complaints do not immediately command respect as trustworthy or indicate actual misconduct on the part of the officer...[e]ven if the unrelated trial results in acquittal...." (*Id.* at p. 362.)

P. "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure." (*United States v. Agurs, supra,* 427 U.S. 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.

Q. The prosecution should not be penalized for determining that certain evidence might come within *Brady*. In *People v. Salazar* (2005) 35 Cal.4th 1031, 1052, fn. 8, the district attorney had assembled boxes of potentially impeaching material regarding an expert witness to make available for defense attorneys to examine. The court held that the boxes had nothing to do with whether there was a *Brady* violation at trial. "Although there seems to have been a lively debate within the [district attorney's] office as to whether these Ribe boxes were assembled 'out of an abundance of caution' or because of a belief the information *had* to be produced to the defense, this court need not defer to a prosecutor's opinion that information already identified is or is not *Brady* material."

R. Ventura County District Attorney Legal Policies Manual, page 2-32, states, "All information favorable to the defense shall be disclosed to the defense or shall be submitted by the prosecution to a court for an in camera review, unless clear authority permits nondisclosure."

S. Failure to provide exculpatory evidence before trial in violation of *Brady*, resulting in vacating of judgment on habeas corpus, does not bar retrial under double jeopardy principles. (*Sons v. Superior Court* (2004) 125 Cal.App.4th 110.)

T. Discovery and admissibility are different. The fact that we have disclosed information does not preclude us from arguing that it is inadmissible.

II.

EXAMPLES OF BRADY EVIDENCE

A. Evidence directly opposing guilt, e.g., statement of witness that he saw another person was the shooter. (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1676.)

B. Third party culpability evidence, but only if it tends to exclude the defendant as the perpetrator of the crime. The reasonable probability standard "presents a heavy burden in establishing the materiality of investigation files in similar but uncharged crimes." (*People v. Jackson* (2003) 110 Cal.App.4th 280, 289.)

C. "Substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) For example:

1. Inconsistent statements of witness regarding the case. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569.)

2. False statements by witness.

   a. In *Banks v. Dretke* (2004) 540 U.S. 668, the prosecution failed to correct testimony of a witness that he had not given a statement to police and had only talked to an officer a few days before trial. In truth, he had been "intensively coached" by law enforcement during several "practice sessions" leading to "closely rehearsed" testimony. The prosecution failed to produce a 74-page transcript of an interview of that witness. The Supreme Court held that the defendant was entitled to appeal this issue on *Brady* grounds (but did not resolve whether it violated *Brady*).

   b. In *People v. Dickey* (2005) 35 Cal.4th 884, 907-910, the prosecution failed to disclose false statement by witness to prosecutor that he had been released on his own recognizance in return for his testimony pursuant to an agreement with another prosecutor. Statement was favorable in that it tended to impeach credibility of witness, but was not material in light of jury's knowledge that witness was a drug addict, was motivated by monetary reward, that he wanted revenge against defendant, etc.

3. Prior interview of witness suggesting coaching or pressure that might affect courtroom testimony. (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1230-1232 (suggestive interview technique for child witness); *In re Brooke P. Halsey, Jr.* (Cal. State Bar Court, Hearing Dept. 02-O-10195-PEM, Aug. 1, 2006) http://members.calbar.ca.gov/courtDocs/02-O-10195.pdf (prosecutor coaching expert during practice session, including writing out suggested testimony).)

4. Promises or inducements to informant. (*In re Jackson* (1992) 3 Cal.4th 578, 593-597, overruled as to materiality standard in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6; *United States v. Bagley* (1985) 473 U.S. 667, 676 [government withheld evidence that witnesses were paid for their testimony].)

   a. In *Banks v. Dretke*, *supra*, 540 U.S. 668, the court found *Brady* error in failing to disclose that a witness was a paid informant. The prosecution did nothing to correct the witness's false testimony that he had not been paid, and argued that the witness was honest.

   b. *People v. Dickey, supra,* 35 Cal.4th 884: Witness falsely testified that he received no favors from prosecution; in fact prosecution had arranged for landlord to provide witness with room and board to be later compensated from money by anticipated monetary reward. "When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required if there is any reasonable likelihood the false testimony could have affected the judgment

of the jury." No reversal here because harmless error in light of the evidence against defendant.

c. See Section V(D) below regarding limitations on informant testimony.

5. Prior felony convictions. All felony convictions of material witness must be disclosed. (Evid. Code § 788; Pen. Code § 1054.1, subd. (d).) However, only those involving moral turpitude are admissible, to be determined in the abstract. (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1401.)

6. Prior moral turpitude conduct or conduct showing dishonesty, including misdemeanors, whether or not they led to conviction. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; *People v. Jordan* (2003) 108 Cal.App.4th 349, 362.)

a. The "least adjudicated elements" test has been applied to misdemeanor convictions admitted under *Wheeler*. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) However, *People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90 notes that this approach is inconsistent with *Wheeler* since no conviction is required; instead, the court must determine if the *conduct* constitutes moral turpitude. (See also *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381, fn. 3, questioning whether impeachment with misdemeanors should be limited to the elements of the offense.)

b. Dishonesty need not be case related or job related to be discoverable. For example, peace officer convicted of petty theft or spousal battery, peace officer lies at internal investigation.

c. Moral turpitude offenses include "crimes that necessarily involve an intent to defraud or intentional dishonesty for the purpose of personal gain." (*In re Duggan* (1976) 17 Cal.3d 416, 422.) Moral turpitude has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*Henry H. v. Board of Pension Comrs.* (1983) 149 Cal.App.3d 965, 975-976.) In the context of administrative action against licensees and discipline of public employees, "moral turpitude" may be defined in the context of fitness to perform that vocation. (*Brewer v. Department of Motor Vehicles* (1979) 93 Cal.App.3d 358, 365.) See *People v. Steele* (2000) 83 Cal.App.4th 212, 222 (furnishing false information to a peace officer is a moral turpitude offense).

d. See *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, upholding the termination of a peace officer for accessing DMV and CLETS information without a legitimate law enforcement purpose, and his

unauthorized disclosure of those records, but not discussing the moral turpitude or *Brady* issues.

7. Juvenile records of witness may be discoverable. (*Davis v. Alaska* (1974) 415 US 308.) However, you need to petition the juvenile court to release records, even from the DA juvenile file. (Welf. & Inst. Code § 827; Cal. Rules of Court, rule 5.552; Judicial Council form JV-570.)

8. The fact that charges are pending against the witness, even if not moral turpitude offenses. (*People v. Coyer* (1983) 142 Cal.App.3d 839; *People v. Hayes* (1992) 3 Cal.App.4th 1238.)

9. Probation or parole status of witnesses. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1245.)

10. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group. (Evid. Code § 780 (f); *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.) Gang membership of witness may demonstrate a bias. (*People v. Johnson* (2006) 142 Cal.App.4th 776.)

11. False report of crime by witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1245.)

12. Language in some cases suggests that habit or custom evidence (Evid. Code § 1105) might come within *Brady*. In *Sons v. Superior Court* (2004) 125 Cal.App.4th 110, defendant was convicted of murder of CHP officer. Issue was self-defense. Prosecution stipulated to *Brady* error in failing to disclose that officer had been disciplined for developing an unacceptable pattern of drawing his weapon on civilians in inappropriate circumstances. See *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 59 (allegation that incidents in personnel file demonstrated "habit and custom of dishonesty" met the "relatively low" threshold showing of good cause to authorize in camera examination of personnel files in hybrid *Pitchess/Brady* motion).

13. Inaccuracies by officer in prior cases probably NOT *Brady*, unless perhaps a pattern is shown. An **unpublished** opinion of the local division of the Court of Appeal upheld the firing of a sheriff's deputy based on a "large number of inaccuracies, misrepresentations and misinterpretations" in his reports demonstrating "a **pattern** of misrepresenting or mischaracterizing witness statements. . . . At best, this pattern is the result of gross negligence and/or incompetence." There had been "numerous errors and misstatements in his investigative reports in at least six cases." "If appellant were called as a witness in a future prosecution, the numerous inaccuracies in his reports would be admissible impeachment evidence. . . . The prosecution would be required to

disclose this impeachment evidence to the defendant." (*Adlof v. Civil Service Commission* (B156159, Feb. 26, 2003) 2003 Cal.App.Unpub.LEXIS 1809.)

D. Evidence that reduces degree of culpability or may mitigate sentence. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.)

1. In a capital case, the prosecution must disclose evidence that mitigates the impact of the prosecution evidence regarding the charged crimes or regarding other crimes the prosecution proves at the penalty phase or weakens the strength of other aggravating evidence the prosecution presents. **No** *Brady* duty as to evidence regarding the defendant personally that he may present at the penalty phase, but may be discoverable if exculpatory nature obvious or apparent, or if defendant requests it. (*In re Steele* (2004) 32 Cal.4th 682, 698, 400 [absent request, prosecution was not obligated to provide evidence of defendant's behavior in prison where crime unrelated to prison].)

2. In *Banks v. Dretke, supra,* 540 U.S. 668, the prosecution failed to disclose that a trip the witness and the defendant took to retrieve a gun was instigated by the witness rather than by the defendant, thereby creating the false impression at the penalty phase that the defendant planned and acquired the gun to commit a robbery, demonstrating a "risk of future violence."

III.

DISCLOSURE IS REQUIRED WITHOUT DEFENSE REQUEST

A. The requirement of a defense request has been eliminated in both California and United States Supreme Court cases. (*In re Ferguson* (1971) 5 Cal.3d 525, 532-533; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1379.)

B. The prosecution has a duty to *provide* the information. (*In re Brown* (1998) 17 Cal.4th 873, 878, holding that the fact that presumptive crime lab results favorable to defense would have been "freely available" from the lab to the defense on request did not absolve the prosecution from its duty of providing the information.)

C. "*Brady* does not require the prosecution to spell out *why* disclosed information is helpful to the defense." (*Atkins v. County of Riverside* (9th Cir. 2005) 151 Fed. Appx. 501, 2005 U.S. App. LEXIS 19928, citing *United States v. Bracy* (9th Cir. 1995) 67 F.3d 1421, 1428-1429 (concluding that disclosed documents "provided all the information necessary for the defendants to discover the alleged *Brady* material on their own)".)

D. Some federal cases find no *Brady* error where the information is a matter of public record and available to the defense attorney through diligent discovery. (*Lugo v. Munoz* (1st Cir. 1982) 682 F.2d 7; but see *United States v. Isgro* (C.D. Cal. 1990) 751 F.Supp. 846, reversed, *United States v. Isgro* (9th Cir. 1992) 974 F.2d 1091; see *Williams v. Taylor*

(2000) 529 U.S. 420.) California law is inconsistent on this point. Compare *In re Brown*, *supra*, 17 Cal.4th 873, 878, with *People v. Morrison* (2004) 34 Cal.4th 698, 715 ("when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim"); *In re Sakarias* (2005) 35 Cal.4th 140, 172, fn. 1 (dissenting opn. of Baxter, J.) (arguing that no *Brady* obligation as to information included in "public transcript" of codefendant's trial).

E. *People v. Salazar* (2005) 35 Cal.4th 1031, 1049: If the evidence is in a defendant's possession *or is available to a defendant through the exercise of due diligence*, that is all that is necessary. But the court makes an apparently contradictory statement in footnote 6, declining to address whether the prosecution has "a duty to disclose material evidence even when the defense could reasonably obtain the evidence through independent means." The court declined to determine if the evidence was suppressed because it was unnecessary to do so in light of the court's conclusion that the evidence was not material.

F. The prosecution may submit materials to the court in camera to determine if disclosure is required. (*U.S. v. Agurs* (1976) 427 U.S. 97, 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502; *People v. Jackson* (2003) 110 Cal.App.4th 280.) However, one court has held that defense counsel and the public should have notice of the in camera proceedings and an opportunity to seek and argue for an open hearing. (*Application of Storer Communications, Inc.* (6th Cir. 1987) 828 F.2d 330, 335.)

G. The court has the inherent authority to issue a protective order limiting use of information disclosed to the case in question. (Code Civ. Proc., § 128 (a)(5) & (8); *Millaud v. Superior Court* (1986) 182 Cal.App.3d 471, 475-476 [information obtained by investigators employed by a supermarket where a homicide occurred]; *Vela v. Superior Court* (1989) 208 Cal.App.3d 141 [statements police special investigations team obtained for purposes of defending future civil lawsuits]; *Rubio v. Superior Court* (1988) 202 Cal.App.3d 1343, 1350 [privileged spousal communications in a video tape]; *Westerfield v. Superior Court* (2002) 99 Cal.App.4th 994, 998 [pornographic materials].)

H. The duty of disclosure applies even to completed cases. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.) Even "after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of . . . information that casts doubt upon the correctness of the conviction." (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25.) This is an ethical obligation rather than a due process *Brady* obligation. (*Grayson v. King* (11th Cir. 2006) 460 F.3d 1328, 1337; *Faulkner v. County of Kern* (E.D. Cal. June 28, 2006, 1:04-CV-05964) 2006 U.S. Dist. LEXIS 44151 (unpublished).) See *Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 749-750, holding that on habeas corpus "fairness requires" that the prosecution disclose exculpatory evidence regarding semen evidence in its possession, regardless of whether the evidence could have been available at trial.

1. See *People v. Johnson* (2006) 142 Cal.App.4th 776, reversing murder conviction after retrial, based on incident that occurred after first trial but before retrial that impeached credibility of prosecution witness. In the murder trial, there was evidence that the defendants were gang members, but the sole eyewitness claimed he had "never been gang related." In the undisclosed incident, there was evidence that the eyewitness participated in a gang shooting, wore gang clothing, and lied about his participation in the incident.

I. The duty of disclosure does not apply to impeachment evidence in which the defendant pled guilty or no contest. *(United States v. Ruiz* (2002) 536 U.S. 622.) But see *McCann v. Mangialardi* (7th Cir. 2003) 337 F.3d 782, 788; *Ferrara v. United States* (D. Mass. 2005) 384 F.Supp.2d 384, 408-409; and *State v. Harris* (2004) 272 Wis.2d 80, 105, 680 N.W.2d 737, 750, which suggest that under *Ruiz*, there is no *Brady* obligation as to impeachment evidence, but that exculpatory evidence of actual innocence must be disclosed before a guilty plea. For discussion of conflicting cases, see *Rhoades v. Paskett* (Dec. 29, 2005, D. Idaho, CV 97-170-S-EJL) 2005 U.S. Dist. LEXIS 39462. See also *People v. Ramirez* (2006) 141 Cal.App.4th 1501 in which prosecution failed to turn over evidence that a witness identified another as the carjacker; the court declined to rule on the *Brady* issue but held that the defendant should have been permitted to withdraw his no contest plea under PC 1018 because failure to disclose evidence made plea not free and voluntary.

J. Failure to provide discovery may be a violation of Rules of Professional Conduct, rule 5-220: "A member shall not suppress any evidence that the member of the member's client has a legal obligation to reveal or produce." See rule 5-110 (attorney in government service may not institute criminal charges unless supported by probable cause; must advise court if later learns charges not supported by probable cause).

K. If reversal or modification of a judgment is based in whole or in part on the misconduct of the prosecutor, this will trigger a report to the State Bar. (Bus. & Prof. Code, § 6068.7(a)(2).)

L. Potential civil rights liability for failing to disclose *Brady* information learned after conviction. Third parties confessed to crime after defendant was convicted but while case still on appeal. Prosecutor who failed to disclose confessions entitled to only qualified immunity since he was not handling the appeal. No absolute prosecutorial immunity here because conduct part of investigatory or administrative function, not intimately associated with the judicial phase of the criminal process. (*Houston v. Partee* (D. Ill. 1991) 758 F. Supp. 1228, affirmed by *Houston v. Partee* (7th Cir. 1992) 978 F.2d 362.) See *Broam v. Bogan* (9th Cir. 2003) 320 F.3d 1023 (potential civil liability of prosecutor if conduct occurred before probable cause to arrest).

M. There is some authority that police officers have a civil rights (42 USC 1983) duty to disclose exculpatory information to the prosecution. (*Manning v. Miller* (7th Cir. 2004) 355 F.3d 1028.) *Jean v. Collins* (4th Cir. 2000) 221 F.3d 656 was a 6-to-6 en banc

decision on this issue, which was described in *Newsome v. McCabe* (7th Cir. 2001) 256 F.3d 747, 752 as follows: "all 12 judges concluded that police who deliberately withhold exculpatory evidence, and thus prevent the prosecutors from complying with *Brady*, violate the due process clause." In *Pierce v. Gilchrist* (10th Cir. 2004) 359 F.3d 1279, the court declined to dismiss a lawsuit alleging that a police forensic chemist fabricated inculpatory evidence and disregarded exculpatory evidence. In *Tennison v. City and County of San Francisco* (N.D. Cal. Mar. 22, 2006, No. C 04-0574) 2006 U.S. Dist. LEXIS 25202, the court held that police inspectors may be liable for deliberately withholding exculpatory evidence from prosecutors, regardless of whether it was in bad faith. Accord, *Atkins v. County of Riverside* (9th Cir. 2005) 151 Fed. Appx. 501, 2005 U.S. App. LEXIS 19928. But see *Villasana v. Wilhoit* (8th Cir. 2004) 368 F.3d 976, declining to extend *Brady* liability to law enforcement officers other than prosecutors for failing to disclose exculpatory evidence absent a showing of bad faith.

IV.

EXPERT OPINIONS

A. *Brady* obligation may include conflicting expert opinions. In *People v. Johnson* (1974) 38 Cal.App.3d 228, two prosecution experts identified a bloody palm print as that of defendant. Four defense experts testified that he was not the maker of the print. The prosecution violated *Brady* by not providing the identities of additional experts who were of the opinion that the maker could not be identified one way or the other.

B. Erroneous conclusions of CHP accident reconstruction expert in two or more prior cases based on faulty methodology in computations constitutes *Brady* information. (*People v. Garcia* (1993) 17 Cal.App.4th 1169.) The qualifications and special knowledge of an expert are relevant to the weight to be given to the expert's testimony. (See Evid. Code §§ 801, 802; CALJIC 2.80, 2.83; CALCRIM 332.)

C. *People v. Seaton* (2001) 26 Cal.4th 598, 647-648: Prosecutor's doubts as to validity of testimony of prosecution expert (pathologist's testimony that blood flowing from dead body does not clot) not *Brady*. Attorneys need not reveal their personal assessment of credibility of witnesses. Prosecutor need not reveal doubts as to validity of testimony of prosecution expert when based solely on the evidence presented at trial. Memos that the expert was a careless and ill-prepared witness in earlier cases when testifying to his recollection of factual observations he had made were not material because the only issue in *Seaton* was the correctness of the scientific theory, not the expert's observations. See *Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735, 742 (prosecutor's opinions regarding trial are "opinion work product" and not discoverable under *Brady*).

D. *People v. Salazar* (2005) 35 Cal.4th 1031: Time of death was crucial issue. In several prior cases, forensic pathologist Dr. James Ribe had given inconsistent testimony and/or had changed opinions regarding time of death and/or cause of death. The Supreme Court

focused on only one of the prior cases, finding the others were not material under *Brady*. (*Id.* at fn. 7.)

1. The court found that the evidence was **favorable to the accused**. The defense had an unusual theory as to the impeachment value of the Helms case: not that Dr. Ribe's earlier testimony was inconsistent with his testimony in *Salazar*, not that it suggested that he was incompetent, but that it showed a *bias* in favor of the prosecution to change his testimony to accommodate the prosecution's case. According to the court, whether Dr. Ribe had a legitimate reason to change his mind regarding his conclusions in the Helms murder goes to the "weight, not the character of the evidence as impeaching," i.e., "whether the evidence is *material*, not whether it is *favorable*."

2. The court found that the evidence was **not material** because Dr. Ribe's testimony was corroborated by other evidence, and because it was unlikely the information regarding the Helms murder would have been viewed as significant impeachment evidence. Dr. Ribe had originally estimated the time of death after the injuries as "very rapid, minutes to one hour," or "rapidly fatal—minutes to two hours maximum." He later made a more thorough examination of damage to the liver and concluded that the maximum period was 30 minutes. The court noted that Dr. Ribe's testimony was consistent, and he had merely shortened the long end of his estimate. The court found that the theory of bias on the part of Dr. Ribe "is neither the inevitable nor the most logical inference."

E. *Yates v. State of Texas* (Tex. App. 2005) 171 S.W.3d 215: Forensic psychiatrist Park Dietz testified in the sanity trial that Yates knew her conduct was wrong when she drowned her five children in a bathtub. He testified that he was a consultant on a "Law & Order" television episode in which a woman drowned her children in a bathtub and was found insane. The prosecution in *Yates* argued to the jury that the defendant saw the episode and saw it as a "way out" to kill her children and get away with it. In fact, there was no such episode; Dietz had confused several different cases with similar issues. The Texas Court of Appeals acknowledged that there was no evidence that he intentionally lied, but characterized his testimony as "false" and reversed. See *United States v. Purkey* (8th Cir. 2005) 428 F.3d 738, 758-759, holding that the defense should have been able to question Dr. Dietz regarding his error in *Yates* "to demonstrate the doctor's fallibility."

V.

RELATIONSHIP TO STATUTORY DISCOVERY OBLIGATIONS

A. Penal Code section 1054.1(e) requires disclosure of "[a]ny exculpatory evidence." Uncertain if this merely incorporates the *Brady* standard, or also includes information that is not reasonably probable to change the result of the proceeding.

B. Prosecutors must also comply with the ordinary statutory discovery requirements of Penal Code section 1054 et seq. (statements of defendants, statements of trial witnesses, results of scientific tests, etc.).

C. Discovery exception for "core work product" (attorney's impressions, conclusions, opinions, legal research, or theories). (Pen. Code § 1054.6; Code Civ. Proc. § 2018.030 (a).) The protection for core work product does not include statements of witnesses during an interview. (*People ex rel. Lockyer v. Superior Court* (2000) 83 Cal.App.4th 387, 389, overruled on other grounds, *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 719, fn. 5.)

D. Penal Code section 1127a, subdivision (c), requires the filing of a statement with the court regarding any consideration promised to or received by a trial witness who is an in-custody informant; this statement must be provided to the defense prior to trial. See also Penal Code sections 1127a(b) (required jury instruction regarding use of in-custody informants); 701.5 (limiting use of minors as informants); 4001.1 (limiting payments to and activities by in-custody informants); CALCRIM 336; Ventura Co. DA Legal Policies Manual pp. 5-3 et seq. (policy regarding grants of immunity and other forms of leniency).

E. The prosecution must inform the grand jury of the existence and nature of exculpatory evidence. (Penal Code §§ 939.7, 939.71; *Johnson v. Superior Court* (1975) 15 Cal.3d 248.)

VI.

RELATIONSHIP BETWEEN *PITCHESS* AND *BRADY*

When peace officer personnel files contain information that potentially may be used to impeach the officer (dishonesty, moral turpitude conduct, etc.), there is an interplay between *Brady* and *Pitchess* law. This was previously an issue of some controversy, with many assuming that "*Brady* trumps *Pitchess*" and that prosecutors had an obligation to provide negative information from officers' personnel files. There were a number of memos and meetings on this subject between prosecutors statewide in 1999. As discussed below, it now is relatively clear that unless the officer is a suspect, prosecutors have no obligation (or ability) to search officers' personnel files and that *Pitchess* requirements must be followed for either the prosecution or the defense to obtain such information.

A. Disclosure of citizen complaints and other information from peace officers' personnel files under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 is codified in Evidence Code §§ 1043-1047. See also Penal Code §§ 832.5, 832.7, 832.8; Gov. Code § 3300 et seq. (Public Safety Officers Procedural Bill of Rights Act).

B. Differences between *Pitchess* and *Brady*:

Pitchess	**vs.**	**Brady**
· Written motion and "good cause" showing required		· Prosecution must disclose with or without request
· 5 year limitation		· "Materiality" has no specific time limit
· Generally only dates and witness information is provided		· Disclosure of all material evidence required

C. Requirements for disclosure pursuant to *Pitchess* motions:

1. *Pitchess* motion requires **written notice** including showing of **materiality** and **good cause** for disclosure. If this showing is made, the court examines the records **in camera** with only the custodian of records present. (Evid. Code §§ 1043, 1045; *People v. Mooc* (2001) 26 Cal.4th 1216.)

   a. The declaration of good cause may be by the defendant's lawyer based on information and belief. (*People v. Johnson* (2004) 118 Cal.App.4th 292, 299.) Whether defendant's account of the incident is less believable than the officer's account does not bear on whether defendant established materiality. (*Id.* at p. 304.)

   b. A showing of "good cause" under Evidence Code §§ 1043 and 1045 requires a defendant to provide a "specific factual scenario" which establishes a "plausible factual foundation" for the allegations of officer misconduct. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 51.) The declaration must establish a "specific factual scenario" that establishes a "plausible factual foundation," but this does **not** mean a "reasonable probability that the defendant's version actually occurred" and does **not** allow the court to weigh the credibility of the claim. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016.) Under these "relatively relaxed standards for showing good cause," "to obtain in-chambers review a defendant need only demonstrate that the scenario of alleged officer misconduct *could* or *might* have occurred." (*Ibid.*) However, in camera review is not required based on a showing that is merely imaginable or conceivable in the sense that virtually anything is possible; courts may apply common sense in determining what is plausible and make reasonable and realistic assessments of the facts and allegations. (*People v. Thompson* (2006) 141 Cal. App. 4th 1312, 1318-1319.)

c. Issue now pending before California Supreme Court: Is a defendant entitled to file a declaration under seal in support of a *Pitchess* motion if the declaration contains information protected from disclosure by the attorney-client or work-product privilege, and, if so, may the trial court nonetheless grant counsel for the police department access to the sealed document so long as the access is accompanied by a protective order? (*Garcia v. Superior Court* (2004) 120 Cal.App.4th 1252, review granted (Sept. 22, 2004, S127432) NOT CITABLE.)

d. Code of Civil Procedure section 1005 requires 16 court days notice for a *Pitchess* motion (plus 5 days if service by mail or 2 days if service by FAX or overnight delivery service).

2. The court must exclude from disclosure complaints more than five years old, the conclusions of the investigating officer, and facts so remote as to make disclosure of little or no practical benefit. (Evid. Code § 1045(b).)

3. When disclosure is granted, "the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead... that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

a. However, if a showing is made that witness names, addresses, etc. are inadequate, the court can order disclosure of additional material such as citizen complaints and witness statements. (*Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 828-829; *People v. Matos* (1979) 92 Cal.App.3d 862.)

b. In *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, the court ordered disclosure of an internal affairs report of an excessive force complaint after in camera review and redacting the investigating officer's analysis and conclusions. The party seeking discovery (in that case, the plaintiff in a civil case) need not exhaust his own efforts to obtain the information first; plaintiff was seeking reports of the incident which was the subject of the lawsuit rather than complaints of third parties who would have privacy interests.

4. Court must enter protective order limiting use of information to particular case. (Evid. Code § 1045(e); *Alford v. Superior Court* (2003) 29 Cal.4th 1033.)

a. Unresolved issue: Where a *Pitchess* motion is granted and the defense investigator then interviews witnesses, is that derivative information subject to the same protective order as the information disclosed pursuant to the *Pitchess* motion, or can it be shared with other defendants? The

California Supreme Court was to resolve this issue in *Ebbert v. Superior Court* (2004) 115 Cal.App.4th 1012, review granted (May 19, 2004, S123713) NOT CITABLE, but dismissed review when the defendant died.

b. Officers have no right to examine Public Defender database which included information from client files, court files, civil service proceedings, peace officer reports and newspaper articles, used by public defender to impeach officers, where information from *Pitchess* motions was "coded" to prevent dissemination. (*Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001.)

c. When the defense provides the prosecution with information obtained through a *Pitchess* motion, does the DA have a *Brady* obligation to disclose the information in future cases? Footnote 6 of lead opinion in *Alford v. Superior Court, supra,* 29 Cal.4th 1033, 1046 (Werdegar/George/ Kennard) suggests "yes." Footnote 8 of concurring and dissenting opinion (Baxter/Chin/Brown) suggests "no." Justice Moreno's solo concurring and dissenting opinion does not address the issue but "join[s] in part C of the lead opinion," which contains footnote 6.

D. Disclosure of peace officer personnel records is prohibited without compliance with Evidence Code § 1045. (Penal Code § 832.7(a).)

1. *Garden Grove Police Department v. Superior Court (Reimann)* (2001) 89 Cal.App.4th 430: Superior Court was wrong to order police department to provide DA with officers' dates of birth (from their personnel files) so DA could run criminal records checks on officers. Requesting the officers' criminal records from DA made an impermissible "end run on the *Pitchess* process." Defense should have used *Pitchess* procedure.

2. Records of county's civil service commission reviewing discipline on peace officer are considered records of employing agency for purposes of Penal Code section 832.7. Such records cannot be obtained through Public Records Act but are subject to *Pitchess* procedures. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272.)

3. Prosecution has no right to information disclosed to the defense pursuant to a defense *Pitchess* motion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033.) Prosecution may make its own *Pitchess* motion. (*Id.* at p. 1046.) *Alford* assumes (but does not state) that peace officer personnel records are not in possession of the prosecution. The prosecution is not required to search the personnel files of peace officer witnesses, but can seek disclosure only by making its own *Pitchess* motion. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475.)

a. *Alford* has been applied to a defense subpoena duces tecum seeking jury commissioner records; DA has no right to participate in hearing, has no automatic right to materials defense receives pursuant to the SDT. (*Smith v. Superior Court* (June 19, 2007, D049852) 2007 Cal. App. LEXIS 1001 – not final; petition for review and request for depub. pending.)

4. When information regarding an officer is provided to the defense pursuant to *Pitchess*, the officer has a right to obtain the information from the employing agency and can share that information with the prosecution. (*Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409.) The court declines to address whether this would waive the officer's privacy rights. (*Id.* at fn. 4.)

5. In a "hybrid *Brady/Pitchess* motion," the court reviews personnel files in camera after a showing of materiality and plausible justification for discovery is made, and may disclose documents more than 5 years old. The court held that "counseling memos" in the officer's personnel file, which do not "rise to a disciplinary action" but "are memos addressing deficiencies," potentially could be disclosed. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39.)

E. The *Pitchess* process operates in parallel with *Brady*. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1.)

1. Each has a different standard of "materiality": *Pitchess* requires defendant to show the evidence is material "to the subject matter involved in the pending litigation." *Brady* requires a showing that the evidence will likely affect the outcome of the trial. Thus, the *Brady* standard is narrower than *Pitchess*: all evidence that meets the *Brady* standard will also meet the *Pitchess* standard, but not vice versa. (*Id.* at p. 14.)

2. The five-year limit for *Pitchess* discovery (Evid. Code § 1054(b)(1)) and the five-year cut-off for retention of citizen complaints (Penal Code § 832.5) "may well reflect legislative recognition that after five years a citizen's complaint of officer misconduct has lost considerable relevance." (*Id.* at p. 11.) The 5-year *Pitchess* limit is not contrary to *Brady* and is not unconstitutional on its face. (*Id.* at pp. 10-12.) Destruction of records after five years is not unconstitutional unless its exculpatory value to a particular criminal case is readily apparent prior to its destruction. (*Id.* at pp. 11-12.) Destruction of records does not relieve the prosecution from its disclosure obligations when the prosecution is aware of *Brady* information. Prosecutors still have a duty to **seek and disclose** *Brady* information if it is constitutionally material, regardless of whether the records have been destroyed. (*Id.* at p. 12.) The court may, after in chambers review, disclosure citizen complaints that are "exculpatory" under *Brady* even if more than 5 years old. (*Id.* at pp. 14-15.)

3. Footnote 2: "Because it is not presented here, we do not reach the question of whether Penal Code section 832.7, which precludes disclosure of officer records 'except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code,' would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*."

4. The defendant cannot require the trial court to search through the officer's personnel file to search for *Brady* information "without first establishing a basis for his claim that it contains material evidence...satisfying the materiality standard of *Brady*..." (*Id.* at p. 15 & fn. 3.)

5. The Ninth Circuit has held that *Brandon* is correctly decided; under *Brady*, defendant is not entitled to documents in personnel file more than 5 years old without making a showing that it contains information material to his defense. (*Harrison v. Lockyer* (9th Cir. 2003) 316 F.3d 1063, cert. denied, 538 U.S. 988.)

F. The *Pitchess* requirements do "not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office." (Penal Code § 832.7(a).) The district attorney may examine peace officer personnel records pursuant to this provision without a court order. (66 Ops. Cal. Atty. Gen. 128 (1993); *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607.) However, the DA may not reveal information so obtained without compliance with *Pitchess*. (*Fagan v. Superior Court, supra.*) The Ventura County District Attorney's Office will not seek access to peace officer personnel records except: (a) when the peace officer is a suspect in an investigation and is not merely a witness in a criminal case, or (b) as ordered by the court pursuant to in camera review as provided in our *Brady* policies.

VII.

VENTURA D.A. EXTERNAL *BRADY* POLICY

(Full policy available on the shared "S" drive, S:\Brady file)

A. How to deal with negative information in possession of law enforcement agencies, including in personnel files. All law enforcement agencies in Ventura County have agreed to this policy.

B. DA will not examine personnel files per PC 832.7(a). Rely on law enforcement agencies to advise DA. Single notification to DA rather than multiple requests for information.

C. Law enforcement agencies review personnel files for peace officers and others who are likely to testify (Sheriff's Service Technicians, Police Service Officers, criminologists, evidence technicians, dispatchers, others whose job duties include handling evidence, documenting incidents re criminal cases, or are likely to testify). Continuing obligation.

D. Agencies search for:

1. Any sustained finding of misconduct w/in previous 5 years that reflects on truthfulness or bias of witness. Considered final if either approved by agency head after *Skelly* hearing or discipline has been imposed. Provisions if administrative findings overturned on appeal.

2. Criminal conviction or pending criminal charge for felony or moral turpitude offense.

E. Agency advises Chief Asst. DA or Writs and Appeals Supervisor that there **may be** *Brady* material or that a complaint was sustained. No further information provided at this point.

F. DA puts officer's name on Brady List. DDAs must consult list during trial preparation.

G. When officer will be a witness, DA makes motion for in camera review pursuant to *Pitchess* and/or *Brady*.

H. If disclosure ordered, DA will seek protective order limiting use of information to that case. DA will not be a depository for law enforcement agency personnel records.

VIII.

VENTURA D.A. INTERNAL *BRADY* POLICY

(Full policy available on the shared "S" drive, S:\Brady file)

Not information from personnel files. Information in actual possession of DA's office, e.g., misstatements in reports or on witness stand, information from other law enforcement employees, etc.

A. If DDA or DAI learns of apparently credible information regarding a law enforcement employee that may be *Brady*, information is forwarded to supervisor.

1. Such allegations must be substantial and may not be limited to a simple conflict in testimony about an event.

2. Avoid carelessness in wording or premature conclusions. Memos intended for internal use may end up being discovered.

B. DDAs and DAIs shall also advise supervisors of:

1. Any information available regarding the disclosures made pursuant to a *Pitchess* motion, and the existence of any protective or limiting order regarding future dissemination of the information. (See Evid. Code § 1045 (d) & (e).)

2. Criminal convictions of law enforcement employees.

3. Prosecutions initiated against law enforcement employees.

4. Rejections of requests for initiation of prosecution against law enforcement employees.

5. Any administrative discipline imposed against a law enforcement employee that may have a bearing on credibility.

C. Supervisor obtains all available information, forwards to Writs and Appeals Supervisor.

D. Writs and Appeals reviews and analyzes materials. If necessary, obtains additional documents or has witnesses interviewed (not including employees of employing law enforcement agency).

E. "Substantial information" standard of proof for disclosure, i.e., facially credible information that might reasonably be deemed to have undermined confidence in a later conviction in which the law enforcement employee is a material witness, and is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event.

F. Writs and Appeals Supervisor recommends, and Chief Assistant DA decides, on one of three conclusions:

1. Materials do not constitute *Brady*. Matter is closed.

2. If it appears that *Brady* disclosures may be required, the officer and the head of the agency are given opportunity to comment before final decision made. Officer may appeal to Chief Assistant DA in writing or meeting.

3. If officer or other employees of employing agency should be interviewed in order to determine if information comes within *Brady*, DA's office refers to employing agency to investigate. If agency concludes complaint is unfounded, exonerated or not sustained, then it is not *Brady*. If complaint sustained, DA will make motion for in camera examination under *Brady* or *Pitchess* when officer is material witness.

G. Immediate disclosure without procedure described above if required in order to comply by time of trial. Need (a) express consent of Chief Assistant DA, DA, or, if neither can be contacted, Chief Deputy DA, or (b) submission to judge in camera. Officer given abbreviated opportunity to be heard if feasible.

H. If *Brady* disclosures required, may disclose in one case, do case search, have in camera determinations, or blanket notification.

I. Case-by-case determination of whether disclosure required. Consider in camera review in all cases. Shall use in camera review if: (1) personnel records, (2) pending internal investigation, (3) remote in time, questionable relevance, (4) potential privilege, or (5) unclear if law requires disclosures.

J. Administrative files of *Brady* reviews kept in DA executive office area, including *Brady* packet. Access for case-related purposes only, record of discovery provided.

K. Brady list (same list as for External Brady information).

L. DDAs must consult list during trial preparation, and when reviewing arrest warrants and search warrants. Do not approve arrest warrant or search warrant unless summary of *Brady* information included.

IX.

RESOURCES

CDAA, Professionalism: A Sourcebook of Ethics and Civil Liability Principles of Prosecutors, Chpt. V (Discovery Rules for Prosecutors), revised 3/9/04.

CEB, Calif. Criminal Law Procedure & Practice (2006 ed.), including Chpt. 11 (discovery) and §§ 35.45-35.52 (use of priors to impeach witnesses, list of moral turpitude offenses).

Pipes & Gagen, Calif. Criminal Discovery (3rd ed. 2003).