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## VENTURA COUNTY

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### OFFICE OF THE DISTRICT ATTORNEY COUNTY OF VENTURA

#### PITCHESS/BRADY PROCEDURE FOR DISCLOSURE OF MATERIAL FROM LAW ENFORCEMENT PERSONNEL RECORDS (EXTERNAL POLICY)

January 31, 2020

The following is a revised “external” policy that addresses confidential information contained in peace officer personnel files. This revised external policy reflects changes to California law, particularly 2018 Senate Bill 1421’s designation of certain peace officer personnel records as non-confidential. Litigation is pending in California to determine whether the non-confidential designation applies to conduct occurring before January 1, 2019. One Ventura County Superior Court judge ruled it does not apply to conduct occurring before January 1, 2019. This policy assumes the non-confidential designation applies only to conduct occurring on or after January 1, 2019, unless case law or the employing agency establishes otherwise. Non-confidential information contained in peace officer personnel files is addressed separately in an adopted policy known as the “Internal Policy.”

## I.

### PURPOSE

Confidential law enforcement personnel records are protected from disclosure by the statutory procedure for *Pitchess* motions. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evidence Code sections 1043-1047; Penal Code section 832.7.) Additional important protections regarding personnel records are contained in the Public Safety Officers Procedural Bill of Rights Act (Government Code section 3300 et seq.) and in the right to privacy under the California Constitution (Article I, section 1). Effective January 1, 2019, changes to Penal Code section 832.7 subject certain law enforcement personnel records to disclosure under the California Public Records Act (PRA). In particular, the changes allow the defense to obtain certain non-confidential peace officer personnel records directly from the law enforcement agency. Such non-confidential records relate to (1) officer involved shootings, (2) use of force resulting in death or great bodily injury, and (3) sustained findings of sexual assault involving a member of the public, or of dishonesty involving the reporting, investigation, or prosecution of a crime or the reporting or investigation of misconduct by another peace officer.

The District Attorney has a constitutional obligation under *Brady v. Maryland* (1963) 373 U.S. 83, to provide criminal defendants with exculpatory evidence, including substantial evidence bearing on the credibility of prosecution witnesses. In several respects under current law, the scope of the prosecution's obligations under *Brady* exceeds the information available to the defense under *Pitchess*. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 12, 14.)

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

addition, there is federal court authority that police have a due process obligation to disclose exculpatory evidence to the prosecution. (*Jean v. Collins* (4th Cir. 2000) 221 F.3d 656; *Newsome v. McCabe* (7th Cir. 2001) 256 F.3d 747, 752.) The California Supreme Court also noted in 2019 that the duty of disclosure is borne not only by the prosecutor's office, but also by the law enforcement agency and individual peace officers. (*Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) No. S243855, 2019 WL 4009133, 11-12, citing *Carrillo v. County of Los Angeles* (9<sup>th</sup> Cir. 2015) 798 F.3d 1210, 1219-1223 & fn. 12.)

The District Attorney and Ventura County law enforcement agencies are committed to full compliance with the rights of criminal defendants to a fair trial and due process of law. We recognize that effective enforcement and prosecution of crime are jeopardized by failure to comply with discovery law and that such violations may result in the reversal of convictions, sometimes years after the trial is concluded. More importantly, we recognize that the honesty of law enforcement employees is a cornerstone of our criminal justice system. On those rare occasions when a law enforcement employee has engaged in conduct that has a negative bearing upon his or her credibility, we are obligated to disclose this information as required by law.

Because of the small number of officers in Ventura County who have *Brady* material in their personnel files, we have determined that repetitive requests to check personnel files each time subpoenas are sent out in a case would create unnecessary paperwork and personnel costs upon law enforcement agencies and the District Attorney. The California Supreme Court held in 2015 that prosecutors may not inspect peace officer personnel records merely for purposes of *Brady* compliance (*People v. Superior Court (Johnson)* (2015) 61 Cal.4<sup>th</sup> 696, 713-714.) However, changes to section 832.7 and the PRA in 2019 expressly grant access to certain non-confidential records. As a result, we have adopted a procedure in which the law enforcement agencies advise the District Attorney's office of the names of officers who have information in their personnel files that may require disclosure under *Brady*. After such an advisement, the District Attorney's

Office will make a PRA request for non-confidential information. For information that remains confidential under the PRA, the advisement will be followed by a *Pitchess* motion, whereby potential impeachment or exculpatory material is gathered by the agency so it can be reviewed in-camera by a court. This utilizes an appropriate judicial forum to reconcile a defendant's constitutional right to a fair trial with a law enforcement employee's right to confidentiality. The procedures described herein shall also apply to personnel records of peace officers employed by the District Attorney's office.

These procedures were created after input from law enforcement agencies in Ventura County and after peace officer employee organizations were provided opportunities for input. The procedures were carefully drafted to protect the privacy interest of peace officers to the extent provided by law, while also ensuring that prosecutors are able to satisfy their constitutional responsibility to provide the defense with evidence favorable to the accused. It is anticipated that changes in this procedure will be necessary as developments occur in the case law interpreting *Brady*. Also, our experiences with the procedure may lead to the need to make modifications. Prosecutors, law enforcement agencies and peace officer associations will be kept apprised of any changes made.

## II.

### **BRADY MATERIAL DEFINED**

The District Attorney is obligated to provide the defense in criminal cases with exculpatory evidence that is material to either guilt or punishment. (*Brady v. Maryland, supra*, 373 U.S. 83, 87.) Reviewing courts define "material" as follows: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) "Exculpatory" means favorable to the accused. This obligation includes "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1

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 CalCrim 105. 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 witness’s testimony. (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 an expert witness's expertise. (*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.)

For purposes of this policy, "*Brady* material" in personnel files of law enforcement agency employees is defined to include:

- a) Any sustained finding of misconduct that relates to sexual assault involving a member of the public or reflects upon the truthfulness or bias of a witness. A complaint is considered sustained for purposes of this policy when it has been approved by the agency head after a hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, if applicable, or when the discipline has been imposed, whichever occurs first. If a sustained complaint has already been overturned by a reviewing body or court based on lack of evidence of misconduct, the incident will not be considered *Brady* material and need not be reported to the District Attorney's office. If a sustained complaint has been overturned based only upon the degree of discipline imposed, it shall still be considered a sustained complaint and shall be reported to the District Attorney's office. If the law enforcement agency has notified the District Attorney's office of *Brady* information and the officer later successfully appeals the sustained complaint to a reviewing body or court, the officer should provide the District Attorney's Office with a copy of the decision on appeal so that the District Attorney's Office may reevaluate the matter.

- b) Any past conviction or pending criminal charge for a felony or moral turpitude offense, or any conviction for which the peace officer is currently on probation or other court-ordered supervision.

Because of this procedure's delegation of part of the prosecutor's affirmative duty to seek out evidence of impeachment material subject to the *Brady* rule, it is essential that the responsibility be carried out by a qualified representative of the law enforcement agency. All parties may best be served when the representative conducting the initial screening process is an attorney employed by County Counsel, the City Attorney, or other qualified counsel with legal training in this specialized area.

### III.

#### PROCEDURE FOR JUDICIAL REVIEW

1. In order to meet constitutional *Brady* obligations and to ensure that law enforcement's statutory right to confidentiality is upheld, the District Attorney requests that each law enforcement agency search its records concerning employees of that agency. A personnel file review is requested for all peace officer employees, as well as for all Sheriff's Service Technicians, Police Services Officers, criminologists, evidence technicians, dispatchers, and other employees whose job duties may include handling evidence, documenting incidents relating to criminal cases, or who are likely to testify in criminal cases. In most instances this will have occurred already pursuant to long-standing policy.
2. Unless it has already done so, the law enforcement agency will designate a records custodian or other representative of the agency, such as the City Attorney or County Counsel, who will review the personnel records of the employees described above for sustained allegations of misconduct; convictions or pending criminal charges for felony or

moral turpitude offenses; or convictions for which the peace officer is currently on probation or other court-ordered supervision, that might require disclosure.

- a. If potential *Brady* materials exist, the agency representative will notify the Chief Assistant District Attorney or the Chief Deputy District Attorney overseeing *Brady* matters in writing of the existence of the materials. The notification to the District Attorney will state only that there may be *Brady* material regarding the employee (or that a sustained complaint was made against the employee) and the date the information was entered in the record. No actual materials from the file will be provided to the District Attorney's Office at that time.
  - b. The law enforcement agency shall provide the same written notification of its findings to the involved employee.
  - c. After a notification has been made, if the law enforcement agency learns of additional potential *Brady* material regarding an employee, the agency shall notify the District Attorney's Office of the existence of the additional information.
3. The Chief Deputy 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. This list will be accessible only to attorneys using a shared computer drive. Deputy district attorneys must review the list during trial preparation to determine whether a law enforcement employee who is subpoenaed by or who will testify on behalf of the prosecution is on the list. Upon the request of any employee or former employee of a law enforcement agency, the Chief Deputy District Attorney shall immediately advise the employee whether he or she is included on the list.



4. After notification from the law enforcement agency, the District Attorney's Office will make a PRA request for records that fall within the PRA. The law enforcement agency will notify currently employed, affected peace officer(s) that a PRA has been received for their personnel records prior to responding to the PRA. Records received pursuant to the PRA will be maintained by the District Attorney's Office and will be provided to the prosecutor and defense counsel in each case in which the officer is a potential witness. Disclosure to the defense does not mean the information is automatically admissible in court.
5. When the District Attorney's office subpoenas or intends to call a law enforcement officer for whom notification of possible *Brady* material has been given, the District Attorney shall apply to the court for in-camera review of the records. The request for in-camera review shall be made pursuant to *Pitchess* (see Evidence Code sections 1043, 1045; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046) and/or *Brady* (*United States v. Agurs, supra*, 427 U.S. at p. 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502; *Brandon, supra*, at p. 14). As to non-sworn employees, the request shall be made pursuant to Evidence Code sections 1040 and 915(b). (See *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526; *Johnson v. Winter* (1982) 127 Cal.App.3d 435.) At the time of application, the defense, the involved employee and the employing law enforcement agency will be notified of the request for in-camera review.
6. If, following in-camera review, the court orders disclosure under *Pitchess* and/or *Brady*, disclosure shall only be made to the defendant's attorney of record (or to defendant if not represented by counsel), to the involved employee, to the employing law

enforcement agency, to those members of the District Attorney's Office as needed for handling of the case, and to the court pursuant to law. The prosecuting attorney shall request that the court issue a protective order against disclosure of the material in other cases pursuant to Evidence Code section 1045, subdivisions (d) and (e). (See *Alford v. Superior Court, supra.*)

7. Under present law, court-ordered disclosure to the prosecution of material from peace officer personnel files does not obligate the prosecution to disclose the information in future cases pursuant to *Brady*. (Evidence Code section 1045(e).) 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. Instead, *Brady/Pitchess* motions shall be made in each future case in which the officer is a material witness.

#### IV.

#### **INVESTIGATIONS NOT COVERED BY THIS PROCEDURE**

1. California Penal Code section 832.7, subdivision (a), provides that investigations or proceedings concerning the conduct of police officers or a police agency conducted by a Grand Jury or District Attorney's Office or the Attorney General's Office are not subject to the Evidence Code disclosure procedures. A 1993 opinion of the California Attorney General states, "As long as the investigation of the officer's conduct is a part of the prosecutor's duties. . . a District Attorney need not follow the provisions of Evidence Code Section 1043 in obtaining access to the personnel records in question." (66 Ops. Cal. Atty. Gen. 128.) The California Supreme Court clarified in 2015 that the District Attorney's Office may access personnel records as part of a criminal investigation, but does not generally have access to personnel records merely because the peace officer is a

witness in a case. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4<sup>th</sup> 696, 713-714.) Modifications to the PRA and section 832.7 in 2019 expressly permit access to certain personnel records via PRA. The Ventura County District Attorney's Office will not seek to review peace officer personnel records pursuant to section 832.7(a) except: (a) when the peace officer is a suspect in an investigation and is not merely a witness in a criminal case, (b) as ordered by the court pursuant to the in-camera review procedure of this policy, or (c) via a PRA request.

2. The District Attorney's Office sometimes learns of potential law enforcement employee misconduct outside of the procedure described in Section III, above, or outside of an in-camera review procedure. For example, evidence of untruthfulness may come to light during a criminal trial, or from credible reports of other law enforcement employees based on sources other than personnel records. The procedure in such cases is described in a separate memorandum ("Internal Policy").
3. During court proceedings, the defense at times attempts to surprise witnesses and prosecutors with lines of questioning relating to the witnesses' prior actions. Often, if the prosecutor had advance knowledge of the line of questioning, the court would have granted a motion prohibiting the inquiry. Even if the motion were not granted, the witness could be alerted to the line of questioning to avoid surprise while testifying. Thus, to avoid unfair surprise at trial, law enforcement agencies will notify the District Attorney's Office's Chief Deputy District Attorney overseeing *Brady* matters when they provide information in response to a PRA regarding prior conduct by peace officer.

V.

**CONCLUSION**

The purpose of this policy is to ensure that prosecutors and the defense receive sufficient information to comply with the constitutional requirements of *Brady* while protecting the legitimate privacy rights of law enforcement witnesses. This policy is not intended to create or confer any rights, privileges, or benefits to defendants or prospective or actual witnesses.

Reviewed and adopted by the following Ventura County Law Enforcement Coordinating Committee members on this 19 day of FEBRUARY, 2020.



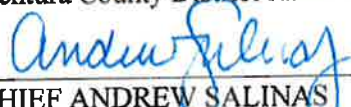
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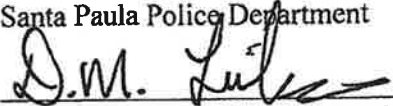
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