SPECIAL DIRECTIVE 13-01

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: JACKIE LACEY
District Attorney

SUBJECT: GENERAL POLICY REGARDING DISCLOSURE OF EXCULPATORY INFORMATION

DATE: JUNE 4, 2013

Subject to any future changes in the law, this Special Directive sets forth the office policy regarding disclosure of exculpatory information pursuant to *Brady v. Maryland* (1963) 373 U.S.83, its progeny, and Penal Code Section 1054.1(e). To the extent that this Special Directive conflicts with previous policies, this Special Directive controls.

It is imperative that deputy district attorneys understand and comply with their duty to disclose favorable evidence to the defense. In the event a deputy district attorney is unsure whether disclosure is warranted, the deputy district attorney shall consult with their Head Deputy or Deputy-in-Charge. If additional guidance is needed regarding whether information falls within a deputy district attorney's constitutional or statutory disclosure obligations, the Brady Compliance Unit should be consulted.

A reviewing court looking at a possible *Brady* violation is "dealing with an inevitably imprecise standard." [*United States v. Agurs (1976)* 427 U.S. 97, 108.] Because the "significance of an item of evidence can seldom be predicated accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." (*Id.*) It is the prosecutor's duty, since he or she is the only one aware of the possible impact of undisclosed evidence, to make the decision to disclose at the point when a "reasonable probability" is reached. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." (*Id.* At p. 439.) Making such a disclosure justifies the trust placed in prosecutors as individuals seeking justice. (*Ibid.)*

Deputy district attorneys should remain mindful that complying with our duties under *Brady* does not require the disclosure of preliminary, challenged, or speculative information (*United States v. Agurs, supra*, 427 U.S. at 108.). However, it is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is "the criminal trial, as distinct from the prosecutor's private deliberations," that is the "chosen forum for ascertaining the truth about criminal accusations."

(*United States v. Alvarez* (9th Cir. 1996) 86 F.3d 901, 905; *Kyles v. Whitley, supra,* 514 U.S. 419 at p. 440.)

Deputy district attorneys have individual disclosure obligations under both Penal Code Section 1054.1 and *Brady*. These differing disclosure obligations are discussed in turn.

I. WHAT IS REQUIRED UNDER PENAL CODE SECTION 1054.1(e)

Penal Code sections 1054 *et seq*. govern prosecution and defense discovery in criminal cases.

Penal Code Section 1054.1(e) provides that deputies "shall disclose" to a defendant or his or her attorney "[a]ny exculpatory evidence" in the deputy district attorney's possession or known to be in the possession of the investigating agencies. This statute "requires the prosecution to disclose '[a]ny exculpatory evidence,' not just material exculpatory evidence." *Barnett v. Superior Court*, 50 Cal. 4th 890, 901 (2010); *see also People v. Bowles*, 198 Cal. App. 4th 318, 326 (2011).

Absent good cause, these disclosures shall be made at least 30 days before trial. Because discovery is a continuing obligation, if new information becomes known to, or comes into the possession of, the deputy district attorney that was not turned over to the other party initially, disclosure of the new information shall be made as soon as possible. If the new information becomes known to, or comes into the possession of, the deputy district attorney within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. (Penal Code section 1054.7.)

II. WHAT IS REQUIRED UNDER *BRADY*

Prosecutors are required to disclose to the defense evidence favorable to a defendant that is either exculpatory or impeaching and is material to either guilt or punishment. Evidence is "favorable" to the defendant if it either helps the defendant or hurts the prosecution. (*In re Sassounian* (1995) 9 Ca1.4th 535, 543-544.) In *Strickler v. Greene* (1999) 527 U.S. 263, 280, the United States Supreme Court stated:

> In Brady this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, supra*, 373 U.S., at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, (*United States v. Agurs* , *supra,* 427 U.S. at p. 107.), and that the duty encompasses impeachment evidence as well as exculpatory evidence, [*United States v. Bagley* (1985) 473 U.S. 667,676]. Such evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also* [*Kyles v. Whitley, supra,* 514 U.S. at pp. 433-434].

In order to ensure compliance with these rules, the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to err on the side of disclosure. (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 440; *United States v. Agurs, supra*, 427 U.S. at p. 110.)

A. Material Evidence

The definition of "material evidence" is generally provided in the context of an appeal from a conviction. Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. A reasonable probability of a different outcome is shown where suppression undermines confidence in the outcome. Such evidence must have a specific, plausible connection to the case, and must demonstrate more than minor inaccuracies. (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 434; *United States v. Bagley*, *supra*, 473 U.S. at p.683; *People v. Padilla* (1995) 11 Cal. 4th 891, 929-932; *People v. Clark* (1992) 3 Cal. 4th 41, 133-34.) However, as prosecutors we must determine what *Brady* evidence there may be before trial. In making this assessment, the deputy district attorney shall utilize the above Guidelines.

B. Exculpatory Evidence

Exculpatory evidence under *Brady* is evidence favorable to the defendant and material to the issue of guilt or punishment.

C. Impeachment Evidence

Evidence Code section 780 states, in part, that:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to, any of the following:
> …
> (e) His character for honesty or veracity or their opposites.
> (f) The existence or nonexistence of a bias, interest or other motive.
> …
> (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(Emphasis added.)

CALJIC No. 2.20 (Spring ed. 2010) adds conviction of a felony and past criminal conduct of a witness amounting to a misdemeanor as considerations for determining witness credibility. CALCRIM No. 316 (Spring ed. 2010) adds conviction of a felony and criminal or other misconduct with or without a conviction as considerations. If impeachment evidence is based upon the prior commission of a crime, the crime must involve moral turpitude to be admissible. (*People v. Castro* (1985) 38 Cal.3d 301, 314 [felonies]; *People v. Wheeler* (1992) 4 Cal.4th

284,295-297 [misdemeanor conduct].) Additional examples of possible impeachment evidence of a material prosecution witness include:

1. False reports by a prosecution witness (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244);
2. Pending criminal charges against a prosecution witness (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842);
3. Parole or probation status of the witness (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486);
4. Evidence contradicting a prosecution witness' statements or reports (*People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569);
5. Evidence undermining a prosecution witness' expertise (e.g., inaccurate statements) (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179);
6. A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on the witness' truthfulness, bias or moral turpitude (cf. *People v. Wheeler*, *supra*, 4 Cal.4th at p. 293) (Note that the burden of proof in an administrative hearing is preponderance of the evidence.);
7. Evidence that a witness has a reputation for untruthfulness (3 Witkin Cal. Evidence (4th ed. 2000) §§ 288-290);
8. 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); or
9. Promises, offers or inducements to the witness, including a grant of immunity (*United States v. Bagley*, *supra*, 473 U.S. at pp. 676-677; *Giglio v. United States* (1972) 405 U.S. 150, 153-155).

A thorough review of all other types of available information must be made before a determination is reached that evidence concerning the credibility of a material prosecution witness is impeachment evidence.

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