

SPECIAL DIRECTIVE 10-05

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: *SLC* STEVE COOLEY
District Attorney

SUBJECT: **POSSIBLE BRADY MATERIAL IN THE POSSESSION
OF LAW ENFORCEMENT**

DATE: SEPTEMBER 20, 2010

On December 7, 2002, this office issued a comprehensive *Brady* policy set forth in Special Directive 02-07 and Special Directive 02-08. This Special Directive supersedes Special Directive 02-07.

Full compliance with constitutionally required discovery under *Brady v. Maryland* (1963) 373 U.S. 83, must include a method of identifying and accessing possible *Brady* material in the possession of law enforcement. Therefore, in conjunction with Special Directive 10-06, which sets forth office policy for identifying and accessing *Brady* material known within the Office of the District Attorney, this Special Directive sets forth office policy for identifying and accessing possible *Brady* material which may be in the possession of law enforcement. This policy fulfills prosecutorial obligations while protecting the statutory and privacy rights of peace officers.

Subject to any future changes in the law, this Special Directive sets forth the office policy for handling this component of *Brady* discovery obligations.

I. BRADY REQUESTS

It is the responsibility of each deputy district attorney to determine whether to request a law enforcement agency to review its personnel files for possible *Brady* documents concerning its employees. In order to make a request, the police report, statements provided in witness interviews, and/or written documentation or statements provided by the law enforcement agency must establish that a law enforcement employee is a material witness and that there may be evidence concerning that material witness which is favorable to the defendant to which the defense may be entitled. Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that may impeach the credibility of a government witness. (*Giglio v. United States* (1972) 405 U.S. 150 at 154.) A *Brady* violation occurs where the failure to disclose evidence to the defense deprives the defendant of a fair trial. (*United States v. Bagley* (1985) 473 U.S. 667, 675.) Thus, in the context of *Brady* requirements, a defendant is deprived of a fair trial when it is reasonably probable that the failure to provide evidence to the defense will

affect the outcome of the case (*United States v. Bagley, supra*, 473 U.S. at p. 682) or, stated another way, the failure to disclose the evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.)

A. THE PROSECUTION MUST MAKE A PRELIMINARY DETERMINATION OF POTENTIAL EXCULPATORY OR IMPEACHMENT MATERIAL AT ARRAIGNMENT ON A FELONY INFORMATION OR A MISDEMEANOR COMPLAINT

Potential exculpatory or impeachment material includes: (1) statements made by the defendant or potential defense witnesses which contradict statements made by a material law enforcement employee/witness; (2) statements made by the defendant or potential defense witness that a material law enforcement employee/witness used excessive force; (3) statements made by the defendant or potential defense witness that allege that a law enforcement employee/witness made racial, religious or other statements exhibiting bias; and/or (4) statements made by a law enforcement agency that evidence impacting the credibility of a material law enforcement employee/witness exists.

At arraignment on a felony information or misdemeanor complaint, a deputy district attorney must make a preliminary determination whether potential exculpatory or impeachment material exists. If the deputy district attorney determines, from police reports, witness interviews, or oral or written assertions provided by a law enforcement agency that such statements or evidence may exist and also determines that the information involves a material law enforcement employee or witness, a request shall be made to the law enforcement agency to review its personnel files for possible *Brady* information and/or documents. If the deputy is unsure whether to request that the law enforcement agency search for possible *Brady* material, the deputy shall consult with his or her Head Deputy or Deputy-in-Charge.

If the deputy requests that the law enforcement agency search its records for *Brady* information and/or documentation, he or she shall make a notation in the District Attorney file as to the reason for the request. A reference to the relevant part of the police report or other evidence supporting the request is sufficient. If no request to search personnel files is made, no entry is necessary.

B. PENAL CODE SECTION 1054.1

Penal Code section 1054.1 requires disclosure of names and addresses of persons the prosecutor intends to call as witnesses at trial, statements by the defendant, all relevant real evidence, the existence of felony convictions of material witnesses, exculpatory evidence, and relevant written or recorded statements of witnesses or reports of the statements of witnesses the prosecutor intends to call at trial. Penal Code section 1054.7 requires that those disclosures be made at least 30 days before trial. Therefore, the request that a law enforcement agency review its personnel files for potential *Brady* material should be made in sufficient time to comply with this 30-day rule.

C. THE BRADY FORM

A special *Brady* form shall be utilized whenever a deputy district attorney makes a request to a law enforcement agency to search its personnel files for possible *Brady* information and/or documentation. This form is the only form to be used by deputies when making such requests. The *Brady* form must be completed in its entirety and with sufficient specificity to enable the law enforcement agency to comply with the request. (See, e.g., *People v. Mooc* (2001) 26 Cal.4th 1216, 1230.)¹

All requests for a law enforcement agency to search its personnel files for potential *Brady* material shall be made in writing using the *Brady* form. An oral request shall never be made.

On August 26, 2002, the California Supreme Court in *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 12, fn. 2, noted that if Penal Code section 832.7 were used to defeat the right of a prosecutor to obtain access to officer personnel records in order to comply with *Brady*, it may be unconstitutional as applied.

D. RETURN OF FORM

Each law enforcement agency should designate a sworn officer who will receive each *Brady* request and respond to it in a timely fashion. The *Brady* form instructs the law enforcement agency designee to return the form to the appropriate Head Deputy or Deputy-in-Charge, who shall in turn give the original returned form to the deputy district attorney assigned to handle the case. A copy of the signed *Brady* form should be provided to the defense and so noted in the District Attorney file. This manner of processing should avoid misdirection of the form.

E. DEFENSE INITIATED REQUESTS

If a defense attorney, either orally or in writing, provides information to the assigned deputy district attorney that a material law enforcement witness's version of events may contain material misstatements or omissions, the deputy district attorney shall inform that defense attorney to either file a *Pitchess* motion or to provide the deputy district attorney

¹ "To the extent the Court of Appeal suggested the custodian of records must always produce the entire personnel file in response to a *Pitchess* motion, however, the appellate court overstated the custodian's obligation under *Pitchess* and Evidence Code sections 1043 and 1045. Pursuant to Evidence Code section 1043, subdivision (b)(2), the defendant in his or her *Pitchess* motion is required to identify the 'type of records or information sought.' (Italics added.) For example, in this case, defendant sought only documents, including disciplinary records or citizen complaints, pertaining to incidents of 'force, aggressive conduct or violence directed at persons detained, arrested, or in custody, and/or the giving of false testimony,' as well as 'the records of any statements of psychiatrists, psychologists, therapists or consultants contained in [the Department's] files for Officer Garcia. The custodian's obligation, therefore, was not to produce Officer Garcia's entire file, but only those documents in his file that were potentially responsive to defendant's specific request." (*People v. Mooc, supra*, 26 Cal.4th at p. 1230.)

with a declaration signed under penalty of perjury by the individual with personal knowledge of the material law enforcement witness's untruthfulness.

Upon receipt of such a declaration, the deputy district attorney shall request that the employing law enforcement agency review its personnel files for possible *Brady* material using the *Brady* form.

If the defense files a *Pitchess* motion in lieu of providing a declaration, the deputy district attorney shall not make a separate request of the employing law enforcement agency.

II. THE BRADY MOTION

If a *Brady* form is returned by the law enforcement agency indicating the existence of possible *Brady* information for a material witness, the assigned deputy district attorney shall file a motion, along with accompanying supporting documents, with the court, indicating that there is reason to believe that information about the credibility of a law enforcement witness to which the defense may be entitled exists. A copy of the motion shall be served upon the defense and the legal representative for the law enforcement agency. The law enforcement witness involved shall also be notified of the motion by the Head Deputy or Deputy-in-Charge.

The motion shall request that the court hold a hearing pursuant to all notice and statutory requirements under Code of Civil Procedure section 1005(b). The motion shall further request, pursuant to Evidence Code section 1043, that the court review the information provided by the agency's custodian of records in camera, ex parte, and determine whether to release any documents to both the defense and the prosecution. The deputy district attorney shall, pursuant to Evidence Code section 1045, request a protective order limiting the disclosure and use of the information provided to the prosecution and the defense to the specific case before the court.

Attachments

**DISTRICT ATTORNEY
REQUEST THAT LAW ENFORCEMENT CONDUCT
A REVIEW OF ITS FILES FOR
POSSIBLE *BRADY* INFORMATION**

The Office of the Los Angeles County District Attorney has determined that the following employees of your department may be material witnesses in:

People v. _____
Case # _____

Therefore, it is requested that _____ review any files in your agency in order to locate any possible *Brady* information or documents for:

Brady information or evidence is that which either (1) impeaches a prosecution witness or (2) tends to exonerate a defendant. Evidence of conduct involving dishonesty or improper use of force or tending to show bias, which occurs during the course of the exercise of peace officer powers pursuant to Penal Code section 830.1 et seq., while interacting with the public, or while engaging in investigatory functions, may be deemed *Brady* information.

The District Attorney's Office is NOT seeking unsubstantiated allegations of misconduct.

If no potential *Brady* information or documents are identified for any of the above-listed employees, please so indicate on this form and return it to:

Head Deputy or Deputy-in-Charge _____
at _____
on or before _____

If potential *Brady* information or documents may exist for any of the above-listed employees, please identify the name, identification number, and employment status of all such employees on this form and return it as indicated above.

ONLY INDICATE THE EXISTENCE OF POSSIBLE *BRADY* INFORMATION OR DOCUMENTS ON THIS FORM. DO NOT RETURN OR DISCLOSE ANY POTENTIAL *BRADY* INFORMATION OR DOCUMENTS WITH THIS FORM.

After the District Attorney's Office receives a returned form indicating that possible *Brady* information or documents may exist, it will file a motion requesting that your department bring any possible *Brady* information and documents to court. Procedures set forth in Evidence Code sections 1043-1047 will be followed. The court will review any documents in camera in order to decide whether to release any possible *Brady* documents to both the prosecution and defense.

_____ Date

_____ Deputy District Attorney

_____ No information or document reasonably foreseen as constituting *Brady* evidence exists for any of the above-named employees.

_____ Possible *Brady* information or documents may exist for the following employees:

_____ Date

_____ Name – Print

_____ Signature

_____ Identification Number

_____ Telephone Number

GUIDELINES

Examples of possible *Brady* impeachment evidence of a material witness include, but are not limited to, the following:

1. False reports by a prosecution witness.
2. Pending criminal charges against a prosecution witness.
3. Parole or probation status of a prosecution witness.
4. Evidence contradicting a prosecution witness's statements or reports.
5. Evidence undermining a prosecution witness's expertise.
6. A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on the witness's truthfulness, bias or moral turpitude.
7. Evidence that a prosecution witness has a reputation for untruthfulness.
8. Evidence that a prosecution witness has a racial, religious or personal bias against the defendant individually or as a member of a group.
9. Promises, offers or inducements to the prosecution witness, including a grant of immunity.
10. A prosecution witness presently under suspension.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES**

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	CASE NO. _____
Plaintiff,)	
)	NOTICE OF
v.)	MOTION RE
)	DISCOVERY
)	
)	DEPT: _____
Defendant.)	
_____)	

TO: THE CUSTODIAN OF RECORDS FOR (LAW ENFORCEMENT AGENCY)
AND/OR ITS REPRESENTATIVES; AND THE ABOVE NAMED DEFENDANT AND
ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on the ___ day of _____ 20__, at the hour of 8:30 a.m., or as soon thereafter as counsel can be heard in _____ of the above-entitled court, the People hereby request that you make available to the Court for an in camera review all records referenced in the *Brady* Request Form (attached herein and incorporated by reference) which states that possible *Brady* documents exist for employee(s) _____ . If the Court determines that any information contained within the aforementioned records be provided to defense counsel and the prosecutor in the above-entitled case, the People shall request that the Court issue a protective order restricting disclosure of any such information pursuant to Evidence Code section 1045(e).

This motion is based upon this Notice and the attached *Brady* Request Form and declaration.

In *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229, the California Supreme Court set forth procedures which must be followed in every case in which a trial court conducts an in camera review of police personnel records pursuant to a *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion:

The custodian of records must present to the court all “potentially relevant” documents. If the custodian has a question whether a particular document is relevant, it should be presented for the court’s review.

The trial court must make a record of all documents examined by the court.

- If the documents are not voluminous, the court may copy them and place them in a confidential file.
- The court may prepare a list, log or index of all the documents reviewed.
- The court may state for the record what documents have been examined.

Peace officer personnel records are confidential. (Penal Code section 832.7.)

Therefore, the questioning of the custodian of records should be done in camera and the transcript sealed. (Evidence Code section 1045.) The legal representatives of both the agency employing the employee(s) whose records are requested and the employee(s) whose records are requested must have the opportunity to be present during the in camera hearing to protect rights of confidentiality. (See Penal Code section 832.7; Evidence Code sections 1043, 1045).

Dated this _____ day of _____, 20__.

Respectfully submitted,

STEVE COOLEY
District Attorney

By

Deputy District Attorney

ORDER

TO (NAME AND ADDRESS OF CUSTODIAN OF RECORDS):

IT IS HEREBY ORDERED THAT you produce the following information:

to _____ in _____

of this Court, at _____ AM/PM on the _____ day of _____, 20__.

Judge of the Superior Court

DECLARATION IN SUPPORT OF MOTION

I, the undersigned, declare:

1. I am a Deputy District Attorney for the County of Los Angeles.
2. I believe that potential impeachment or exculpatory information involving a material law enforcement employee/witness may exist in the above-entitled case and, as a result, I completed a *Brady* Request Form. I requested that (law enforcement agency name) review its personnel files for possible *Brady* information and documents.
3. Thereafter, (law enforcement agency name) returned the *Brady* Request Form indicating that possible *Brady* information and/or documents exist for (name of employee). (The *Brady* Request Form is attached herein and incorporated by reference.)
4. This information and/or these documents are believed to be in the possession and under the control of the investigating agency.
5. This information and/or these documents are believed not to be known to the prosecution.
6. It may be necessary that these documents be made available to the defense pursuant to the requirements of *Brady v. Maryland* (1963) 373 U.S. 83.

I declare in good faith based on information and belief that the foregoing is true and correct.

Executed on this _____ day of _____, 200__, at _____,
California.

Deputy District Attorney