BRADY POLICY

It is the policy of the Santa Barbara District Attorney's Office to fully comply with the United States Supreme Court's decision in *Brady vs. Maryland* (1963) 373 U.S. 83. While the *Brady* obligation has historically been considered a trial right (*United States v. Ruiz* (2002) 536 U.S. 622.), recent appellate courts have held that *Brady* applies at preliminary hearing. (*People v. Gutierrez* (2013) 214 Cal.App.4th 343 and *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074).

It is the policy of the Santa Barbara County District Attorney's Office to provide *Brady* discovery prior to a preliminary hearing. To comply with this requirement, Deputy District Attorneys should run criminal histories and check the District Attorney Office's internal database on civilian witnesses who will be testifying or whose hearsay statements are being recounted at preliminary hearing, and disclose impeaching information, regardless of whether it is considered *Brady* information, before the preliminary hearing. Moreover, if a prosecutor receives material exculpatory information post-conviction, it is the responsibility of the prosecutor to disclose such information to the Court or the defense. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)

WHAT DOES THE *BRADY* RULE REQUIRE?

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. The prosecution's duty of disclosure extends to evidence in possession of the "prosecution team," which includes the investigating law enforcement agency and other agencies which are assisting the prosecution. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305.) The "prosecution team" includes any of the government's agents involved in the prosecution including any employed expert witnesses. (*United States v. Price* (9th Cir. 2009) 566 F.3d 900, 908 [records of arrests of prosecution witness in possession of investigative detective]; *People v. Whalen* (2013) 56 Cal.4th 1 [notes of DOJ criminalist who participated in the investigation and as employed by an investigating agency]; *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1476-1481 [medical personnel of Sexual Assault Response Team, with statutory duty to turn physical evidence to the proper law enforcement agency, are part of the "prosecution team"]).

One significant aspect of the "prosecution team" concept is that the prosecutor is **presumed** to know of any material evidence in a case that is favorable to a defendant, which is in fact known to or in the possession of any other prosecution team member, even if it is not actually known to the prosecution.

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.) This obligation includes impeachment evidence that consists of "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) 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.) Impeachment evidence must consist of 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.) However, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." (*Id.* at 108.)

WHAT CONSTITUTES *BRADY* MATERIAL?

"Favorable evidence" includes not only exculpatory evidence — i.e., evidence that might reasonably be expected to play a significant role in the suspect's defense on the issue of guilt or innocence — but also evidence that may impeach the credibility of a government witness, whether that witness is a law enforcement officer or a civilian.

"Exculpatory" means evidence favorable to the defendant and material to the issue of **guilt** or **punishment.**

"Impeachment evidence" is defined in Evidence Code section 780. If impeachment evidence is based upon the prior commission of a crime, whether a felony or a misdemeanor, the crime must involve moral turpitude to be admissible. Examples of impeachment evidence that may come within *Brady* are as follows:

1) The character or reputation of the witness for dishonesty. (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) The nonexistence of any fact testified to by the witness or a major contradiction between the witness' testimony and the other evidence. (Evid. Code § 780 (i).)

5) An admission of untruthfulness. (Evid. Code § 780 (k).)

6) 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.)

7) Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 292-297.) A conviction is not required. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 362; *United States v. Price* (9th Cir. 2009) 566 F.3d 900, 912-913 & fn. 14; *People v. Wheeler* (1992) 4 Cal.4th 284, 295-296. [Wheeler was superseded on another point as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459–1460.])

8) False reports by a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)

9) Pending criminal charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)

10) 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.)

11) Evidence undermining an expert witness's expertise, including inaccuracies and incompetence. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)

12) 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.)

Evidence will be deemed material under the *Brady* standard by a reviewing court exercising hindsight "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) We must exercise foresight and err on the side of providing discovery and providing it sufficiently in advance of trial that the defendant is enabled to make timely use of the disclosed evidence.

NOTE: *In addition to the constitutional disclosure obligations under Brady, Penal Code section 1054.1, subdivision (e) in the criminal discovery statute requires disclosure of "[a]ny exculpatory evidence," "not just material exculpatory evidence." (Barnett v. Superior Court (2010) 50 Cal.4th 890, 901.)*

BRADY DISCOVERY OF LAW ENFORCEMENT EMPLOYEE MISCONDUCT (INTERNAL BRADY POLICY)

The following is an "internal" policy that addresses information in the actual possession of the District Attorney's office as opposed to information contained in peace officer personnel files. In order to comply with our discovery obligations, procedures are necessary (1) to ensure that instances of law enforcement employee and expert witness misconduct and credibility issues that come to the attention of the District Attorney's office are reviewed to determine if disclosure is required under *Brady v. Maryland* (1963) 373 U.S. 83, (2) to maintain a depository for such information, and (3) to ensure that deputy district attorneys know of the existence of such information regarding potential witnesses so that disclosure can be provided to the defense.

This policy includes information that may bear on the credibility of peace officer witnesses, as well as other employees of law enforcement agencies and experts who may be witnesses in criminal cases. As explained below, some of the procedural protections contained in this policy are limited to peace officers and custodial officers, in light of the special legal obligations and

protections regarding peace officer and custodial officer personnel records. (Evid. Code §§ 1043-1047; Penal Code §§ 832.5, 832.7.)

I.
RELATIONSHIP BETWEEN *BRADY* AND *PITCHESS*

a) Criminal defendants may seek disclosure of peace officer and custodial officer personnel records and complaints from the law enforcement agency pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and Evidence Code sections 1043-1047. The Pitchess process operates in parallel with Brady. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.) Currently, the law does not require the prosecution to search *Pitchess* files for exculpatory information. (*Alford v. Superior Court* (2003) 29 Cal. 4th 1033, 1045; See also, *People v. Gutierrez* (2004) 112 Cal. App. 4th 1463, 1475.) However, the rules of *Pitchess* do not always satisfy the obligation of the prosecution to provide material exculpatory evidence that is already in the possession or constructive possession of the prosecution. For example, the District Attorney's office has a discovery obligation as to exculpatory information in its actual possession that may not be included in the officer's personnel file.

b) In *Pitchess* motions, the attorney for the officer should 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* (2003) 29 Cal.4th 1033.) The prosecuting attorney should ensure that the protective order is properly requested. The *Pitchess* procedure shall also apply to personnel records of peace officers employed by the District Attorney's office.

c) No discovery will be provided for any information in or from a law enforcement employee's personnel file without the court first examining the materials in camera. If a deputy district attorney is aware of information in a peace officer or custodial officer's personnel file that may qualify for disclosure under *Brady*, the district attorney's office may file a motion for in-camera examination under *Brady* or *Pitchess*, or defense counsel may be invited to file a *Pitchess* motion. The form attached to this policy as Exhibit "A" should be used for that purpose.

d) If the deputy district attorney is aware of potential *Brady* material that was disclosed through a *Pitchess* hearing that is more than five years old, the District Attorney's office may seek in-camera review of the materials to determine if disclosure is required.

e) At the present time, the District Attorney's office has no legal duty to examine a peace officer's personnel file. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033.)

II.
PROCEDURE FOR REVIEW OF POTENTIAL *BRADY* INFORMATION

a) Upon learning of any apparently credible allegation involving law enforcement employee or expert witness misconduct or credibility that may be subject to discovery under *Brady*, deputy district attorneys and district attorney investigators shall timely report this information to their immediate supervisor. For example, evidence of untruthfulness may come to light during a criminal trial, or from credible reports of other witnesses based on sources other than personnel records. Such allegations must be substantial and may not be limited to a simple conflict in testimony about an event. The notification itself ultimately might be examined in camera and/or be discovered, so carelessness in wording or premature conclusions is to be avoided. If and when such information is obtained, the District Attorney's office will conduct a thorough analysis pursuant to the procedures outlined herein to determine if it is required to disclose the information pursuant to *Brady*.

b) Deputy District Attorneys and District Attorney Investigators shall also advise their supervisors if they become aware of any of the following information regarding a law enforcement employee or expert witness:

   1) Any information available to the attorney 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) Investigations of law enforcement employees.

   6) Civil judgments against law enforcement employees

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

c) Following receipt of information mentioned in sections a and b above, the Deputy District Attorney or Investigator shall obtain all available information concerning the alleged misconduct, including the transcript of any testimony provided, and shall forward the materials and a memo, including summary of facts and law, to the Designated Chief Deputy District Attorney in North or South County.

d) The Designated Chief Deputy District Attorney in North and South County shall review and analyze the memo and any other materials in light of applicable law. In some cases,

it may be necessary and appropriate for the District Attorney's office to obtain copies of additional court documents or police reports, or interview witnesses.

e) The standard of proof for disclosure of information shall be the "substantial information" standard. Substantial information is defined as 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) Following the initial review and analysis described above, the Designated Chief Deputy District Attorney shall recommend, and the District Attorney shall decide, which of the following conclusions is appropriate:

    1) The materials do not constitute *Brady* material (see paragraph g, below);

    2) It appears that disclosure may be required under *Brady* (see paragraph h, below); or

    3) Further investigation, including interview of the officer in question or other employees of the employing law enforcement agency, should be undertaken by the employing law enforcement agency (see paragraph i, below).

g) If the District Attorney concludes that based on the initial review, it is clear that the materials do not constitute *Brady* material, the matter shall be closed.

h) If it appears after the initial review that disclosure regarding a peace officer may be required under *Brady*, the officer and the head of the employing law enforcement agency will be invited to provide written or oral comments, objections and/or additional information that may bear on the decision of what information, if any, shall be provided. Given the need to provide prompt discovery to the defense in criminal cases, the opportunity to comment, object or provide information may of necessity be brief.

    1) The peace officer and department head shall then have 30 days to respond in writing or request a meeting with the Designated Chief Deputy District Attorney (or his or her designee) to discuss the allegation and supporting materials. An attorney or any representative may accompany the officer to the meeting.

    2) In the event that the officer or department head requests further time and no urgency exists to complete the evaluation, the District Attorney may extend the time for a written response or meeting for a reasonable period of time. A reasonable period of time will not exceed 6 months.

    3) Oftentimes disclosure of the material to the department head for the law enforcement witness will trigger an internal investigation. The District Attorney's final decision will await the conclusion and findings of the internal investigation by the law enforcement agency. (See Section I below.)

i) In some cases, after the initial review, the Designated Chief Deputy District Attorney may conclude that the District Attorney's Office is not in possession of sufficient information to conclude that conduct coming within *Brady* has occurred, but that further investigation is appropriate.

1) The matter shall be referred to the employing law enforcement agency to conduct an investigation in accordance with the Public Safety Officers Procedural Bill of Rights.

2) If, after conducting this investigation, the employing law enforcement agency concludes that the complaint is unfounded, exonerated or not sustained (see Penal Code §§ 832.5, 832.7(c)), then disclosure will most likely be warranted because the information is "preliminary, challenged, or speculative." (*United States v. Agurs, supra.*) However, the District Attorney retains the right to reach a different conclusion.

3) If the employing law enforcement agency sustains the complaint, the District Attorney's Office shall, when the officer is a material witness in a case, direct the defense to make a motion under *Pitchess* or *Brady* for the court to examine the information in camera and determine whether disclosure must be made. (See section iv.)

4) This policy shall not limit the authority of the District Attorney's Office to conduct criminal investigations pursuant to P.C. 832.7.

j) The Designated Chief Deputy District Attorney (or his or her sub-designee) shall evaluate all information received and shall make a recommendation to the District Attorney and her Executive Staff.

1) Recommendations may include but are not limited to the following actions:

i. No further action based upon conclusion that no *Brady* material exists.

ii. Discovery is required in a specific case only.

iii. Discovery must be provided in additional cases in which the law enforcement employee is or was a material witness. In appropriate cases, a computer search of pending and/or past cases may be conducted so that counsel may be notified.

iv. In some cases, presenting the material to a judge for in-camera review may be an appropriate manner of resolving the discovery issue. (See Section IV, below.)

v. In rare cases, blanket notification to representatives of the Public Defender's Office, Conflict Defense Teams, and Santa Barbara County Bar Association may be appropriate as a back-up form of notification in situations in which we cannot be confident that we have identified all of the affected parties. Such blanket notification shall be limited to a

statement that Brady material may exist, with defense counsel to either contact the District Attorney's office and request information regarding a specific identified case, or make a motion for disclosure. Blanket notification shall not be made of information obtained from peace officer personnel files.

2) After receipt of the recommendation, the District Attorney or designee will make a final determination of what disclosure, if any, is appropriate. The peace officer witness and the department head will be notified of the final decision.

III.
MAINTENANCE OF INTERNAL *BRADY* FILES

a) The materials reviewed and memoranda of conclusions reached shall be maintained in a separate *Brady* administrative file that will be maintained in a **secure** location in the Designated Chief Deputy District Attorney's executive office area. In those cases where the review determined the misconduct allegations are subject to discovery under *Brady v. Maryland*, a discovery *Brady* packet shall be included in the file for purposes of complying with the discovery obligation in future cases.

b) The information contained in these administrative files shall only be accessed for case-related purposes, and a written record shall be maintained as to the name of each employee who accesses the information and the case for which access was obtained. The substance of the information in the administrative files shall not be included in any computerized database.

c) Upon written request, the District Attorney's Office shall inform any law enforcement employee and/or the employing law enforcement agency whether or not a *Brady* administrative file exists regarding that employee. The employing law enforcement agency, and the affected law enforcement employee and/or his or her attorney or other representative, shall have the right to inspect the officer's *Brady* administrative file at a time mutually convenient to the parties or within 15 days of receipt of a written request for inspection. The District Attorney's office retains the right to exclude from inspection materials protected by the attorney-client, deliberative process, or official information privileges.

d) The District Attorney's Office should not retain confidential personnel records from other agencies, and shall not provide such records to the defense absent an in-camera review and a court order. (See Penal Code § 832.7, subd. (a).) The employing law enforcement agency is the appropriate custodian of these records.

IV.
PROVIDING *BRADY* DISCOVERY TO THE DEFENSE

a) The District Attorney database shall highlight the law enforcement employees and expert witnesses for whom administrative files have been created based on possible *Brady* material, as described above. The system will be designed to ensure that the deputy district attorney is made aware of the *Brady* material at the time a subpoena is generated. The Designated Chief Deputy District Attorney shall maintain a separate file drawer ("*Brady* files") of law enforcement employees for whom, based upon the procedures and determinations discussed in this policy, discovery of *Brady* material may be required when the officer is a material witness in future cases. The "*Brady* files" will be accessible by request of the Designated Chief Deputy District Attorney.

b) Disclosure of law enforcement employee misconduct is not required in a particular case if the evidence would not impact the employee's credibility in that case. For example, if the misconduct relates to a bias against a particular racial group, discovery may not be required in cases that do not involve members of that group. The Designated Chief Deputy District Attorney shall be consulted on all Brady issues regarding the credibility of law enforcement employees. If the assigned Deputy District Attorney is of the opinion that the *Brady* packet shall not be provided in a particular case, after consultation with the Designated Chief Deputy District Attorney, this decision shall be documented in the administrative file for that officer. If it is not clear whether disclosure is required in a particular case, the matter shall be submitted to the court for in-camera review. (See Section V.)

c) Where discovery to defense counsel regarding law enforcement employee or expert witness misconduct or credibility is required, it shall be made by the deputy district attorney prosecuting the case by providing the *Brady* packet in discovery as soon as reasonably possible. Fulfillment of the prosecution's obligation to provide discovery of Brady material is the sole responsibility of the individual Deputy District Attorney assigned to the case and shall be done without a defense request.

d) Whenever *Brady* material is provided to the defense in a case, the Designated Chief Deputy District Attorney shall place in the administrative file for that witness a memo documenting that discovery was provided, including the name of the case, case number, name of defense counsel and the date the *Brady* packet was sent to the discovery unit. If appropriate, the prosecuting attorney shall discover the materials along with a protective order limiting the distribution of the materials to the case at hand.

e) Deputy District Attorneys reviewing declarations in support of arrest warrants and affidavits in support of search warrants need to mindful of the "*Brady* files." The attorney shall not approve the arrest warrant or search warrant unless it discloses a summary of the *Brady* material so that the magistrate may consider it in assessing the credibility of the individual. If in doubt, the Deputy District Attorney should check with his or her supervisor to see if the affiant is included in the *Brady* files.

V.
IN CAMERA REVIEW

a) The District Attorney's office may submit potential *Brady* evidence to a judge for in-camera review to determine if discovery to the defense is required. (*United States v. Agurs* (1976) 427 U.S. 97, 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502.) The option of submitting *Brady* material for in-camera review shall be considered in all cases, in consultation with the Designated Chief Deputy District Attorney.

b) If the District Attorney concludes that disclosure of material regarding a law enforcement officer may be required under *Brady*, the in-camera procedure shall be employed regarding the following:

1) Any materials contained in or obtained from a peace officer's personnel file, including information of which the District Attorney's office became aware through a *Pitchess* motion in a different case that was released without a protective order, or which is more than five years old.

2) Material regarding any incident that is the subject of a pending internal investigation by the employing law enforcement agency.

3) Material that is remote in time or has questionable relevance to the present case.

4) Any potentially privileged materials.

5) When it is unclear whether the law requires the information be disclosed.

c) Non-sworn employees of law employment agencies have a qualified right to privacy in their personnel files. (Cal. Const., art. I, § 1; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526.) Materials contained in the personnel file of a non-sworn employee shall be sought only with consent of the employee or when authorized by a court following in camera review. (Evid. Code §§ 1040, 915(b); see *Johnson v. Winter* (1982) 127 Cal.App.3d 435.)

d) The District Attorney's office shall, in appropriate cases, request that the court issue a protective order limiting or prohibiting the disclosure of the material in other cases.

e) If material regarding the credibility of a law enforcement employee is discovered to the defense pursuant to *Brady* after an in-camera review, the assigned deputy district attorney shall provide the Designated Chief Deputy District Attorney with a copy of the material ordered by the judge to be discovered. The Designated Chief Deputy District Attorney shall then include this material in the administrative file maintained for that law enforcement employee, unless the court has made a limiting order regarding disclosure of the material. If the materials to be disclosed include materials from an officer's personnel file, the fact that such materials were disclosed shall be noted, but neither the materials themselves nor the substance of those materials shall be retained in the administrative file.

VI.
IMMEDIATE DISCLOSURE REQUIREMENTS

a) The nature of the constitutional obligation created by the *Brady* doctrine and the statutory time limits for trial and for providing of discovery in criminal cases will, in certain instances, require immediate disclosure to the defense of information in the possession of or known to the District Attorney's office. In such instances, it may not be possible or feasible before the information is provided to the defense to conduct the full review procedure described above, to provide the law enforcement officer with advance notice or an opportunity to provide comments, objections, or additional information, or to provide a written response or meet with the Designated Chief Deputy District Attorney. In such cases, immediate disclosure may be made to the defense.

b) Immediate disclosure regarding peace officer information shall only be made under the following conditions:

    1) With the express consent of the District Attorney, obtained via a Chief Deputy District Attorney.

    2) After the information is submitted to a judge in camera, and the judge determines that disclosure is required.

c) In cases in which "immediate disclosure" is required, peace officers will be afforded a more abbreviated opportunity to be heard if it is feasible to do so. Once the decision to disclose has been made, both the department and the officer will be notified of the disclosure and will be provided with a copy of the materials disclosed.

VII.
ADMISSIBILITY OF EVIDENCE

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

Memorandum

Date: (Date)

Attn: (Defense Attorney)

From: (Deputy District Attorney)

RE: (People v. xxx)

The purpose of this memorandum is to advise you of the possibility that *Brady* material may exist in a law enforcement personnel file.

_____,

NAME OF OFFICER DEPARTMENT

Law enforcement personnel files are protected by statute and case law. You may wish to consider filing a *Pitchess* motion (see *Pitchess v. Superior Court* (1974) 11 C.3d 531) as no discovery will be provided for any information in a peace officer's personnel file without the defendant complying with Evidence Code sections §1043-1046.

[Exhibit "A"]