

SPECIAL DIRECTIVE 10-06

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: *SCC* STEVE COOLEY
District Attorney

SUBJECT: **BRADY PROTOCOL**

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 02-08. Subject to any future changes in the law, this Special Directive sets forth the office policy for complying with the prosecutor's constitutionally mandated discovery obligations pursuant to *Brady v. Maryland* (1963) 373 U.S. 83. This Special Directive was carefully drafted to ensure that deputy district attorneys fulfill their responsibility for *Brady* compliance while simultaneously being sensitive to, and mindful of, the statutory protections and privacy rights of peace officers.

In order to ensure uniformity and consistency in meeting the required *Brady* discovery obligations, the Brady Compliance Unit coordinates and makes available to deputy district attorneys known *Brady* information on peace officers and governmentally-employed expert witnesses who are part of the "prosecution team."¹ The Brady Compliance Unit is the central repository of known *Brady* information from 1997 to the present. In addition, the Unit is available to consult with deputy district attorneys in the discharge of their personal, individual *Brady* responsibilities.

I. WHAT IS REQUIRED UNDER BRADY

Prosecutors are required to disclose to the defense evidence favorable to a defendant which 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 Cal.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

¹ The policy regarding possible Brady material in the possession of law enforcement is set forth in Special Directive 10-05.

evidence is applicable even though there has been no request by the accused, [*United States v. Agurs* (1976) 427 U.S. 97, 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* (1995) 514 U.S. 419, 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 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:

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- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest or other motive.
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(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's statements or reports (*People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569);
5. Evidence undermining a prosecution witness's 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's 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 witnesses, 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 information must be made before a determination is reached that evidence concerning the credibility of a material prosecution witness is impeachment evidence.

D. What Is Not *Brady* Material

Allegations that cannot be substantiated, are not credible, or have been determined to be unfounded are not considered impeachment material and therefore will not be included in the Brady Alert System. (Refer to Section III., "The Brady Alert System," below.) The prosecution has no obligation to communicate preliminary, challenged or speculative information. (*United States v. Agurs, supra*, 427 U.S. at p. 109, fn. 16.) Pending criminal or administrative investigations are considered preliminary in nature and will not be included in the Brady Alert System.

If a deputy district attorney has any question whether information falls within his or her individual *Brady* obligations, the Brady Compliance Unit is available for consultation.

II. PROCEDURES FOR NOTIFYING THE BRADY COMPLIANCE UNIT OF POTENTIAL BRADY INFORMATION

If a deputy district attorney is aware or becomes aware of potential *Brady* information, the deputy shall inform his or her Head Deputy or Deputy-in-Charge. If the Head Deputy or Deputy-in-Charge concurs with the deputy that the information is potential *Brady* material, a memorandum shall be written summarizing the material and setting forth why the supervisor and the deputy believe that *Brady* material exists. (If the Head Deputy or Deputy-in-Charge does not agree with the deputy, refer to Section IV., "Standard of Review by the Brady Compliance Unit," subsection D., "Individual Responsibility," below.)

If it is believed that the conduct under scrutiny amounts to a crime, the memorandum and copies of all supporting evidence and relevant documentation (such as transcripts, disposition reports, police reports or expert reports) shall be forwarded to the Justice System Integrity Division (JSID). (See Special Directive 01-10, "Referral of Allegations of Criminal Misconduct to the Justice System Integrity Division.") In addition, copies of the memorandum and supporting evidence and documentation shall also be sent to the Brady Compliance Unit. JSID will either conduct an independent investigation or refer the matter to the employee's agency for investigation. JSID shall be responsible for monitoring the status of such investigation and encouraging a timely response from the agency.

If it is believed that the conduct under scrutiny is other than a potential crime, the memorandum and copies of all supporting evidence and relevant documentation shall be forwarded to the Brady Compliance Unit. The Brady Compliance Unit will refer the matter to the employee's agency for investigation.

III. THE BRADY ALERT SYSTEM

The Brady Compliance Unit maintains the "Brady Alert System," a secure computerized database which includes known *Brady* information from 1997 to the present. This system does not create secondary personnel files on police officers or governmentally-employed experts.

A. Access to the Brady Alert System

Every deputy district attorney can access the Brady Alert System to determine whether information on a particular witness exists. The system will confirm whether information exists regarding the witness, provide a brief summary of the *Brady* information, and, if appropriate, alert the deputy to contact the Brady Compliance Unit for further details.

Deputy district attorneys shall access the Brady Alert System at least 30 days before trial to determine whether impeachment information exists for any material law enforcement or governmentally-employed expert witness. Any information learned from accessing the Brady Alert System shall be noted in the District Attorney file. The deputy appearing in court on a case shall have the responsibility of notifying the defense of any information learned from the Brady Alert System. A notation shall be made in the District Attorney file indicating the date, a description of the information disclosed, and the manner by which notification was made (i.e., in writing or on the record). Any information learned from the Brady Alert System shall be conveyed to the defense only on the particular case being litigated before the court. Misuse of the Brady Alert System will subject a District Attorney employee to disciplinary action up to, and including, discharge.

B. Security Log

A security log, which is maintained by the District Attorney's Systems Division and which tracks every Brady Alert System inquiry made by a deputy district attorney, has been built into the Brady Alert System.

IV. STANDARD OF REVIEW BY THE BRADY COMPLIANCE UNIT

A. Post-Investigation

The Brady Compliance Unit will decide whether to include information concerning a peace officer or governmentally-employed expert witness in the Brady Alert System. Such a decision will be made after an investigation of the allegations by the employee's agency, another law enforcement agency, or by JSID has been completed.

The decision to include information in the Brady Alert System will be made using the standard of ***clear and convincing evidence***, a degree of proof which is higher than preponderance of the evidence but lower than beyond a reasonable doubt. In other words, without clear and convincing evidence that the potential *Brady* impeachment evidence is reliable and credible, it will not be included in the Brady Alert System.

If the Brady Compliance Unit determines that there is clear and convincing evidence that *Brady* material exists, it shall enter the employee's name and appropriate accompanying information into the Brady Alert System and inform Head Deputies and/or Deputies-in-Charge, who supervise cases which are affected by the determination, of the manner in which the defense is to be notified. (Refer to Section VI., "Notification of Defense Attorneys/Pro Per Defendants," below.) The Brady Compliance Unit shall also inform the head of the employee's agency in writing of the placement of the employee's name

and accompanying information into the Brady Alert System and of the attendant discovery consequences.

Only Brady Compliance Unit deputy district attorneys shall input or delete information into or from the Brady Alert System.

B. Pending Investigations

If, while a matter is under investigation, the Brady Compliance Unit determines that there is sufficient credible information that the potential *Brady* evidence is reliable and credible and that it is necessary to bring such evidence to a court's attention (such as where a trial has commenced), it will advise the Head Deputy or Deputy-in-Charge to notify the employee that the trial deputy district attorney will be requesting an ex parte, in camera hearing to present all relevant information to the court and will be asking the court to make a decision whether the evidence should be disclosed to the defense. If the court rules that there is *Brady* material, the trial deputy shall request that a protective order issue before the material is disclosed to the defense. The trial deputy shall send a memorandum through his or her Head Deputy or Deputy-in-Charge to the Brady Compliance Unit setting forth the court's reasoning.

C. Insufficient Time for an Investigation

In those unusual instances where alleged *Brady* material is discovered shortly before or during trial and there is insufficient time for an investigation, the trial deputy district attorney shall consult with his or her supervisor and the Brady Compliance Unit. If the Brady Compliance Unit determines that there exists sufficient credible information that the potential *Brady* evidence is reliable and credible, the Head Deputy or Deputy-in-Charge shall notify the employee that the trial deputy will be requesting an ex parte, in camera hearing to present all relevant information to the court and to ask the court to make a decision whether the evidence should be disclosed to the defense. If the court rules that there is *Brady* material, the trial deputy shall request that a protective order issue before the material is disclosed to the defense. The trial deputy shall send a memorandum through his or her Head Deputy or Deputy-in-Charge to the Brady Compliance Unit setting forth the court's reasoning.

In either situation described in section B., "Pending Investigations," or C., "Insufficient Time for an Investigation," above, if a court issues a protective order, the alleged *Brady* material will not be included in the Brady Alert System. If a court does not issue a protective order, the Brady Compliance Unit will wait for a full investigation of the alleged *Brady* material before making a decision to include such information in the Brady Alert System.

D. Individual Responsibility

It is the responsibility of each individual deputy district attorney to comply with the mandates of the *Brady* case and its progeny. The decision whether to use a witness whose name appears in the Brady Alert System will be left to the discretion of the

individual trial deputy after consultation with his or her Head Deputy or Deputy-in-Charge and the Brady Compliance Unit. If the situation should ever arise in which a witness's name does not appear in the Brady Alert System and an individual trial deputy learns of information that he or she believes triggers his or her individual *Brady* obligation, the trial deputy shall review the information with his or her Head Deputy or Deputy-in-Charge and the Brady Compliance Unit. If neither the trial deputy's Head Deputy or Deputy-in-Charge nor the Brady Compliance Unit agree, upon request by the trial deputy, the Brady Compliance Unit will refer the matter to the employee's agency for investigation.

V. **JSID AND OFFICEWIDE FILINGS, DECLINATIONS, AND NEWLY DISCOVERED *BRADY* MATERIAL**

A. **JSID and Officewise Filings**

Whenever JSID, any vertical prosecution division, unit, or section, any line operations division, unit, or office, or any branch or area office files a complaint against a law enforcement officer or governmentally-employed expert witness, a copy of the charging document, along with all supporting documentation, shall be forwarded to the Brady Compliance Unit, which shall follow the procedures set forth in Section IV., "Standard of Review by the Brady Compliance Unit," subsection A., "Post-Investigation," above.

B. **JSID and Officewise Declinations**

A copy of every JSID declination involving a member of the prosecution team shall be sent to the Brady Compliance Unit. The latter will review the declination and make a preliminary determination if potential *Brady* information exists. If there has not been an investigation concerning the potential *Brady* material, it will be the responsibility of the Brady Compliance Unit to ensure that such an investigation is completed before commencing a *Brady* review. After ensuring that an investigation of the potential *Brady* material has been completed, the Brady Compliance Unit shall follow the procedures set forth in Section IV., "Standard of Review by the Brady Compliance Unit," subsection A., "Post-Investigation," above.)

In all other vertical prosecution divisions, units, or sections, all line operations divisions, units, or offices, and all branch or area offices, if a case is rejected, but a deputy district attorney believes that potential *Brady* impeachment information concerning a peace officer or governmentally-employed expert witness is involved, it shall be brought to the attention of the Head Deputy or Deputy-in-Charge. If the Head Deputy or Deputy-in-Charge agrees that potential *Brady* material exists, the Head Deputy or Deputy-in-Charge shall send a copy of the charge evaluation worksheet, along with a cover memorandum summarizing and analyzing the *Brady* material, to the Brady Compliance Unit. After ensuring that the potential *Brady* information has been investigated, the Brady Compliance Unit shall follow the procedures set forth in Section IV., "Standard of Review by the Brady Compliance Unit," subsection A., "Post-Investigation," above.)

C. Newly Discovered *Brady* Material

If a deputy learns of "new" *Brady* material concerning any member of the prosecution team already identified in the Brady Alert System, the procedures described in Sections II., "Procedures for Notifying the Brady Compliance Unit of Potential Brady Information," and IV., "Standard of Review by the Brady Compliance Unit," above, shall be followed.

VI. NOTIFICATION OF DEFENSE ATTORNEYS/PRO PER DEFENDANTS

Because obligations under *Brady* continue even after a case has concluded (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260-1261), once the Brady Compliance Unit determines that *Brady* material exists for a particular law enforcement officer or expert witness, it shall obtain a computer run of all cases in which that officer or expert is listed as a witness. Head Deputies and Deputies-in-Charge of the offices, where open cases are being litigated, or where closed cases in which the witness testified at trial on or after the initial date of his or her alleged misconduct are located, will be notified to send letters to affected defense attorneys of record or, if appropriate, to affected pro per defendants, alerting them to the existence of the potential *Brady* material. Head Deputies and Deputies-in-Charge shall not send notification letters in closed cases where the defendant pled guilty or no contest. (See *U.S. v. Ruiz*, (2002) 536 U.S. 622.)

VII. PRIMARY RESPONSIBILITIES OF THE BRADY COMPLIANCE UNIT

1. Maintain the Brady Alert System;
2. Collect and maintain *Brady* material;
3. Consult with deputy district attorneys to determine whether *Brady* material exists in a particular case or against a particular witness;
4. Consult with deputy district attorneys to determine when it is appropriate to disclose potential *Brady* impeachment information to the defense;
5. Consult with deputy district attorneys to determine when it is appropriate to seek ex parte, in camera review by the court of potential *Brady* material, as well as to develop and maintain pleadings for this purpose; and
6. Advise deputy district attorneys on issues relating to the Brady Protocol and on relevant case law.

Compliance with this Special Directive will assist in fulfilling our primary mission of fairly prosecuting those who violate criminal laws in the County of Los Angeles.