SUPREME COURT
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Deputy

Case No.: S243855

In the Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, *et al.*,

Real Parties in Interest

On Review from the Court of Appeal for the Second Appellate District, Division 8
Civil No.: B280676

After a Writ Proceeding from the Superior Court of Los Angeles County
Judge James C. Chalfant
Case Number BS166063

REAL PARTIES IN INTEREST'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY BRIEF ON THE MERITS; [PROPOSED] ORDER

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Real Parties in Interest County of Los Angeles, Los Angeles County Sheriff's Department, and Sheriff Jim McDonnell ("Real Parties") hereby request this Court take judicial notice, pursuant to Evidence Code section 452 of the following documents in support of Real Parties' Reply Brief on the Merits:

1. Los Angeles County District Attorney's Office Legal Policies Manual, Chapter 14, "Disclosure of Exculpatory and Impeachment Information," dated January 19, 2018, a true and correct copy of which is attached hereto as Exhibit "A."

Under Evidence Code section 452, subdivisions (b) and (h), this Court may take judicial notice of the regulations issued by or under the authority of any public entity in the United States, and facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, respectively. Accordingly, judicial notice of a chapter from the Los Angeles County District Attorney's Office's ("LADA") legal policies manual is appropriate either as a regulation of a public entity, or a proposition not reasonably subject to dispute.

ALADS, in their Answer Brief on the Merits, has cited to the LADA's written policy regarding the handling and maintenance of impeachment information on police officers. (Answer Brief, p. 44.) ALADS further cites to a declaration which expresses one declarant's interpretation of LADA's prior written policy (Answer Brief, p. 64; ALADS' Supporting Documents in Support of Peremptory Writ of Mandate, Vol. 2, pp. 371-372.)

Real Parties request that this Court take judicial notice of the current version of LADA's written policy regarding disclosure of exculpatory and

impeachment information because ALADS repeatedly references LADA's written policy, but the policy itself has never been entered into the record. Furthermore, the written policy is relevant to this Court's understanding as to LADA's current treatment of impeachment evidence on police officers and *Brady* alerts from investigating agencies.

LADA's written policy was not previously presented to the trial court for judicial notice. This particular version of the policy was not adopted/implemented by the LADA until January 19, 2018, after the trial court and Court of Appeal proceedings.

For these reasons, Real Parties in Interest respectfully request that the Court take judicial notice of LADA's written policy manual chapter regarding disclosure of exculpatory and impeachment information, attached hereto as Exhibit "A."

Dated: April 3, 2018 LIEBERT CASSIDY WHITMORE

By: */s/ Alex Y. Wong*
Geoffrey S. Sheldon
Alex Y. Wong
Attorneys for Real Parties in Interest LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF JIM MCDONNELL and COUNTY OF LOS ANGELES

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GOOD CAUSE APPEARING HEREIN, Real Parties in Interest's Motion for Judicial Notice in support of reply brief is hereby GRANTED.

Dated:

____
Chief Justice

CHAPTER 14

DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION

14.01 INTRODUCTION

A California prosecutor's obligation to provide exculpatory and impeachment information arises from the federal Due Process Clause of the Fourteenth Amendment as applied by the United States Supreme Court in *Brady* v. *Maryland* (1963) 373 U.S. 83 (constitutionally-mandated discovery) and California's Criminal Discovery Statute as codified in Penal Code section 1054.1(e) (statutorily-based discovery). Both the federal and state rules require that the prosecution provide evidence favorable to the defendant on the issue of guilt or punishment. Favorable evidence may consist of exculpatory information factually specific to a case (exculpatory evidence) or impeachment information undermining the credibility of a prosecution witness (impeachment evidence).

In *Brady* v. *Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused 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."[1] A failure to disclose *material* favorable evidence to an accused (a *Brady* violation) can result in a dismissal or reversal or modification of a judgment. The rule established in *Brady* (*Brady* rule) is independent of the Criminal Discovery Statute.[2]

In Penal Code section 1054.1, the California legislature set forth a list of discovery materials and information which the prosecution is required to disclose to the defense before trial, including 1054.1(e) ("The prosecuting attorney shall disclose to the defendant . . . any exculpatory evidence.").[3] In enacting Penal Code section 1054.1(e), the legislature codified and expanded the *Brady* rule. In providing for the disclosure to the defense of "[a]ny exculpatory evidence," the legislature broadened the *Brady* rule to mandate California prosecutors to disclose exculpatory evidence to the defense *without regard to materiality.*[4] A failure to disclose *any* exculpatory evidence (a PC 1054.1(e) violation) can result in various discovery sanctions pursuant to Penal Code section 1054.5(b), but generally not in dismissal.[5]

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[1] *Brady* v. *Maryland* (1963) 373 U.S. 83, 87.
[2] *Izazaga* v. *Superior Court* (1991) 54 Cal.3d 356, 378.
[3] The term "exculpatory evidence" as used in Penal Code section 1054.1(e) is a symbolic term used to describe *Brady* evidence and includes impeachment evidence. See, e.g., *United States* v. *Bagley* (1985) 473 U.S. 667, 676 ("This Court has rejected any [constitutional] distinction between impeachment evidence and exculpatory evidence."); *Strickler* v. *Greene* (1999) 527 U.S. 263, 281 ("Thus the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence . . . ."); *People* v. *Kasim* (1997) 56 Cal.App.4th 1360, 1381 ("[L]aw enforcement agencies (1) possessed significant exculpatory evidence bearing on the credibility of the key prosecution witnesses."); *Snow* v. *Simmons* (2007) 474 F.3d 693, 711 ("Exculpatory evidence includes impeachment evidence.").
[4] *Barnett* v. *Superior Court* (2010) 50 Cal.4th 890, 901; see also *People* v. *Bowles* (2011) 198 Cal.App.4th 318, 326.
[5] Pen. Code, § 1054.5, subd. (c).

It is the policy of the Los Angeles County District Attorney's Office (LADA) to strictly adhere to the constitutional (*Brady*) and statutory (PC 1054.1(e)) disclosure obligations. A failure to reveal or produce exculpatory and impeachment information pursuant to the *Brady* rule and Penal Code section 1054.1(e) may violate Rules of Professional Conduct, Rule 5-220 ("A member shall not suppress any evidence that the member . . . has a legal obligation to reveal or produce.") and Penal Code section 141 (A prosecutor who intentionally withholds relevant, exculpatory information is guilty of a felony.). Reversal of a judgment based, in whole or in part, on the misconduct of a prosecutor will trigger a report to the State Bar.[6] Therefore, all Los Angeles County deputy district attorneys (DDAs) are required to comply with the law regarding disclosure obligations and to follow the policies and procedures set forth in this Chapter.

Commentary

While this Chapter is consistent with applicable state and federal law, DDAs must not utilize it as a substitute for research of specific legal issues which may arise in an individual case.[7]

14.02 THE *BRADY* RULE

A prosecutor has an affirmative due process duty to disclose to the defendant all favorable material evidence possessed by the prosecution team.[8] This *Brady* rule applies even though there has been no request.[9]

14.02.01 FAVORABLE

Evidence is "favorable" to a defendant if it either helps the defendant or hurts the prosecution.[10] Evidence is favorable to a defendant when it is exculpatory or can be used to impeach the testimony of a material prosecution witness.[11]

Exculpatory Evidence

"Exculpatory" evidence pursuant to *Brady* is information which, if true, could show that a defendant is innocent or less culpable for the crime charged and which must be disclosed to the defendant without request.

Examples of exculpatory evidence include evidence that:

Mitigates punishment;[12]

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[6] Bus. & Prof. Code, § 6068, subd. (o)(7).
[7] DDAs are encouraged to make frequent reference to Pipes & Gagen, *California Criminal Discovery* (4th ed. 2008), an excellent treatise in this area.
[8] *In re Brown* (1998) 17 Cal.4th 873, 879.
[9] *United States* v. *Agurs* (1976) 427 U.S. 97, 107.
[10] *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.
[11] *United States* v. *Bagley* (1985) 473 U.S. 667, 676.
[12] *In re Miranda* (2008) 43 Cal.4th 541, 567-577.

Directly opposes guilt;[13]
Negates an element of a charged offense;[14]

Supports defense testimony;[15]

Supports an affirmative defense;[16] and

Supports a defense motion.[17]

Impeachment Evidence

"Impeachment" evidence pursuant to *Brady* is information about a witness that a fact finder may consider in determining whether that witness is telling the truth.

> Evidence impeaching the credibility of a material prosecution witness is different conceptually from other kinds of evidence favorable to a criminal defendant, in that impeachment evidence generally does not concern itself with the question whether the defendant is guilty or not guilty of the charges against him or her. Yet impeachment evidence is subject to the same *Brady* rules of disclosure as any other kind of evidence favorable to the defendant.[18]

Examples of impeachment evidence include:

Felony convictions involving moral turpitude;[19]

Misdemeanor or other conduct that reflects on believability;[20]

Misconduct involving moral turpitude;[21]

False reports by a prosecution witness;[22]

Pending criminal charges against a prosecution witness;[23]

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[13] *Castleberry* v. *Brigano* (6th Cir. 2003) 349 F.3d 286, 293.
[14] *Youngblood* v. *West Virginia* (2006) 547 U.S. 867 (Suppressed note written by alleged sexual assault victims could have supported consensual-sex defense.).
[15] *People* v. *Collie* (1981) 30 Cal.3d 43, 54; *Hobbs* v. *Municipal Court* (1991) 233 Cal.App.3d 670, 688.
[16] *United States* v. *Ross* (9th Cir. 2004) 372 F.3d 1097, 1108-1109 (Evidence supporting entrapment defense is favorable to defendant.).
[17] *United States* v. *Gamez-Orduno* (9th Cir. 2000) 235 F.3d 453, 461; *United States* v. *Barton* (9th Cir. 1993) 995 F.2d 931, 935.
[18] Pipes & Gagen, *California Criminal Discovery* (4th Edition), sec. 1:23:1.
[19] *People* v. *Castro* (1985) 38 Cal.3d 301, 314.
[20] *People* v. *Wheeler* (1992) 4 Cal.4th 284, 295-297; California Criminal Jury Instructions No. 105.
[21] *People* v. *Wheeler* (1992) 4 Cal.4th 284, 297, fn. 7.
[22] *People* v. *Hayes* (1992) 3 Cal.App.4th 1238, 1244.
[23] *People* v. *Coyer* (1983) 142 Cal.App.3d 839, 842.

Parole or probation status of a prosecution witness;[24]

Evidence contradicting a prosecution witness's statements or reports;[25]

Evidence undermining a prosecution witness's expertise (e.g., inaccurate statements or expert opinions);[26]

A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on a prosecution witness's truthfulness, bias or moral turpitude;[27]

Evidence that a prosecution witness has a reputation for untruthfulness;[28]

Evidence that a prosecution witness has a racial, religious or personal bias against the defendant individually or as a member of a group;[29] and

Promises, offers or inducements to a prosecution witness, including a grant of immunity.[30]

Impeachment evidence is favorable to a defendant when it undermines the credibility of a prosecution witness.[31] Evidence impeaching the testimony of a material prosecution witness becomes favorable evidence pursuant to the *Brady* rule only when the witness *testifies* as a *prosecution witness*.[32] It is not evidence favorable to a defendant when the prosecution witness does not testify or when the witness testifies as a defense witness.

14.02.02 MATERIAL

Evidence is "material" if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed.[33]

Material Witness

A prosecution witness is a "material witness" when that witness's testimony is so important that there is a reasonable probability that its absence would affect the outcome of the prosecution's

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[24] *Davis* v. *Alaska* (1974) 415 U.S. 308, 319; *People* v. *Price* (1991) 1 Cal.4th 324, 486.
[25] *People* v. *Boyd* (1990) 222 Cal.App.3d 541, 568-569.
[26] *People* v. *Garcia* (1993) 17 Cal.App.4th 1169, 1179.
[27] Cf. *People* v. *Wheeler* (1992) 4 Cal.4th 284, 293.
[28] Evid. Code, § 780; see *Carriger* v. *Stewart* (9th Cir. 1997) 132 F.3d 463, 479 (Evidence that a prosecution witness has a reputation for manipulation and dishonesty is evidence tending to exculpate the defendant and must be disclosed to the defendant.).
[29] Evid. Code, § 780; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.
[30] *United States* v. *Bagley* (1985) 473 U.S. 667, 676-677; *Giglio* v. *United States* (1972) 405 U.S. 150, 153-155.
[31] *United States* v. *Bagley* (1985) 473 U.S. 667, 676; *People* v. *Morris* (1988) 46 Cal.3d 1, 30; *People* v. *Phillips* (1985) 41 Cal.3d 29, 46.
[32] See *United States* v. *Haskell* (8th Cir. 2006) 468 F.3d 1064, 1075; *People* v. *Cook* (2006) 39 Cal.4th 566, 589.
[33] *Strickler* v. *Greene* (1999) 527 U.S. 263, 289.

case.[34] Specifically, a "material witness" provides testimony at trial on an important issue which is not cumulative, i.e., testimony which no one else can give on a disputed issue.[35]

Reasonable Probability

A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial.[36] The term should not be confused with, or used interchangeably with, the term "reasonable possibility." "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[37]

Commentary

This constitutional interpretation of the term "materiality" sharply contrasts with the requirement of Penal Code section 1054.1(e) to disclose exculpatory evidence without regard to materiality,[38] as discussed post.

14.02.03 EVIDENCE

The materiality component requires limiting the *Brady* rule to "evidence."[39]

Commentary

Brady information may be either admissible evidence or information which is likely to lead to admissible evidence.[40] Therefore, DDAs should disclose evidence which is favorable to the defendant even though that evidence itself is inadmissible, because inadmissible evidence can lead to admissible exculpatory or impeachment evidence. In assessing such evidence, however, DDAs must be mindful that information, which is irrelevant, spurious, diversionary, or not probative of the issues before the court, do not advance the purpose of a trial and is not subject to disclosure.

14.02.04 DISCLOSURE

A prosecutor has a duty to disclose favorable material evidence to the defendant even if there has been no defense request.[41] If favorable material evidence is contained in the prosecution

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[34] E.g., *Strickler* v. *Greene* (1999) 527 U.S. 263, 291-296; *People* v. *Williams* (1997) 16 Cal.4th 635, 653; *People* v. *Ruthford* (1975) 14 Cal.3d 399, 406; *Giglio* v. *United States* (1972) 405 U.S. 150, 154-155; *In re Ferguson* (1971) 5 Cal.3d 525, 535.

[35] E.g., *People* v. *Salazar* (2005) 35 Cal.4th 1031, 1049-1051; *Banks* v. *Dretke* (2004) 540 U.S. 668, 700-701; *United States* v. *Fallon* (7th Cir. 2003) 348 F.3d 248, 252; *Bailey* v. *Rae* (9th Cir. 2003) 339 F.3d 1107, 1116-1119.

[36] *Kyles* v. *Whitley* (1995) 514 U.S. 419, 434.

[37] *People* v. *Hoyos* (2007) 41 Cal.4th 872, 917-918, 922, citing *United States* v. *Agurs* (1976) 427 U.S. 97.

[38] *Barnett* v. *Superior Court* (2010) 50 Cal.4th 890, 901; see also *People* v. *Bowles* (2011) 198 Cal.App.4th 318, 326.

[39] *Sledge* v. *Superior Court* (1974) 11 Cal.3d 70, 75.

[40] *People* v. *Gaines* (2009) 46 Cal.4th 172, 182 (A trial court's duty to disclose *Pitchess* discovery from police personnel files encompasses inadmissible evidence which may lead to admissible evidence.).

[41] *United States* v. *Agurs* (1976) 427 U.S. 97, 107; *People* v. *Ruthford* (1975) 14 Cal.3d 399, 406.

attorney's files or office, the prosecutor is in actual possession of it and has a duty to disclose it.[42] Moreover, if the favorable material evidence is contained in the files of an agency connected to the investigation of the case, the prosecutor is in constructive possession of it, and, if the prosecutor has reasonable access to it, the prosecutor has a duty to disclose it.[43] "Courts have . . . consistently decline[d] to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."[44]

Therefore, a prosecutor must disclose favorable material evidence in the possession of the "prosecution team,"[45] including "information possessed by others acting on the government's behalf that [was] gathered in connection with the investigation."[46] The prosecution team includes the prosecutor's office, the investigating agency, and assisting agencies or persons (for example, crime labs[47] and sexual assault response teams [SART][48]) connected to the investigation or the prosecution of the case.[49]

Examples of information possessed by a prosecution team member which must be disclosed include, but are not limited to, a crime lab report generated by a lab, that was part of the investigative team, which contained exculpatory test results;[50] a videotape of a SART examination, initiated by a law enforcement referral in the investigation of criminal conduct, which offered potential evidence impeaching a prosecution expert witness's testimony;[51] notes generated by a victim-witness advocate, who was employed by the prosecuting agency, which contained exculpatory statements;[52] and awareness by a law enforcement agency, which assisted the prosecution by housing a witness in a witness protection program, that the witness committed misconduct.[53] In contrast, a prosecutor has "'no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.'"[54]

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[42] See *Giglio* v. *United States* (1972) 405 U.S. 150, 154 ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.").
[43] See *People* v. *Lucas* (2014) 60 Cal.4th 153, 274.
[44] *In re Brown* (1998) 17 Cal.4th 873, 879; *People* v. *Prince* (2007) 40 Cal.4th 1179, 1234; *People* v. *Jordan* (2003) 108 Cal.App.4th 349, 358.
[45] However, prosecutors have no duty to search peace officer personnel records, because such records are not possessed by the "prosecution team." See discussion *post*, Section 14.06.
[46] *Strickler* v. *Greene* (1999) 527 U.S. 263, 281 ("In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'"); *Kyles* v. *Whitley* (1995) 514 U.S. 419, 437; *United States* v. *Price* (9th Cir. 2009) 566 F.3d 900, 908; *In re Brown* (1998) 17 Cal.4th 873, 879, 881 ("[T]he crime lab's failure to apprise the prosecution of the worksheet did not relieve the prosecutor of his obligation to review the lab's files for exculpatory evidence.").
[47] *In re Brown* (1998) 17 Cal.4th 873, 879.
[48] *People* v. *Uribe* (2008) 162 Cal.App.4th 1457.
[49] *In re Brown* (1998) 17 Cal.4th 873, 879; *In re Steele* (2004) 32 Cal.4th 682, 697.
[50] *In re Brown* (1998) 17 Cal.4th 873.
[51] *People* v. *Uribe* (2008) 162 Cal.App.4th 1457.
[52] *Commonwealth* v. *Liang* (2001) 434 Mass. 131 [747 N.E.2d 112].
[53] See *United States* v. *Wilson* (7th Cir. 2001) 237 F.3d 827, 832.
[54] *People* v. *Panah* (2005) 35 Cal.4th 395, 460, quoting *In re Littlefield* (1993) 5 Cal.4th 122, 135.

Commentary

Prior to trial, DDAs should meet with their investigating officer (IO) to review the IO's entire file to make certain that they are in possession of every document relevant to the case.

The *Brady* rule does not require the disclosure of impeachment evidence before a defendant pleads guilty or no contest.[55] In contrast, information establishing the factual innocence of a defendant or that is otherwise materially exculpatory must be disclosed when it becomes known. Plea waivers "cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'"[56]

Prosecutors need not reveal their personal assessment of the credibility of witnesses.[57] Their opinions regarding trial issues are "opinion work product" and not discoverable pursuant to *Brady*.[58]

In contrast, prosecutors have a duty to immediately correct any testimony of its own witnesses which they knew was false or misleading.[59] This duty applies not only to false or misleading testimony regarding substantive evidence, but also to false or misleading testimony regarding impeachment evidence.[60] Furthermore, this duty applies to testimony prosecutors later learn is false or misleading.[61]

14.03 PENAL CODE SECTION 1054.1(e)[62]

Penal Code section 1054.1 provides:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

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[55] *United States* v. *Ruiz* (2002) 536 U.S. 622. However, *Bridgeforth* v. *Superior Court* (2013) 214 Cal.App.4th 1074, *People* v. *Gutierrez* (2013) 214 Cal.App.4th 343, Penal Code section 1054.1(e), and the LADA policy may require disclosure of impeachment information before a defendant pleads guilty or no contest. See discussion *post*, Section 14.04.02.

[56] *Sanchez* v. *United States* (9th Cir. 1995) 50 F.3d 1448, 1453, quoting *Miller* v. *Angliker*, (2nd Cir. 1988) 848 F.2d 1312, 1319-20, *cert. den.*, (1988) 488 U.S. 890; see also *In re Miranda* (2008) 43 Cal.4th 541, 581-582.

[57] *People* v. *Seaton* (2001) 26 Cal.4th 598, 647-648.

[58] *Morris* v. *Ylst* (9th Cir. 2006) 447 F.3d 735, 742.

[59] *People* v. *Morales* (2003) 112 Cal.App.4th 1176, 1193, citing to *In re Jackson* (1992) 3 Cal.4th 578, 595 (The prosecution has the "basic duty . . . to correct any testimony of its own witnesses which it knew . . . was false or misleading."); *United States* v. *Alli* (9th Cir. 2003) 344 F.3d 1002, 1007, citing to *United States* v. *LaPage* (9th Cir. 2000) 231 F.3d 488, 492.

[60] *United States* v. *Alli* (9th Cir. 2003) 344 F.3d 1002, 1007, citing to *Napue* v. *Illinois* (1959) 360 U.S. 264, 269-270 (The government's obligation to immediately take steps to correct known misstatements of its witnesses applies regardless of whether the government solicited the false testimony or whether the false testimony only goes to the credibility of the witness, not to substantive evidence.).

[61] *United States* v. *Rodriguez* (9th Cir. 2014) 766 F.3d 970, 970; *United States* v. *Houston* (9th Cir. 2011) 648 F.3d 806, 814.

[62] General office policies for the management of discovery pursuant to Penal Code section 1054 et seq. are set forth in the LADA Legal Policies Manual (April 2005), sections 9.02 and 11.01.

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Subdivision (e) codifies the *Brady* rule. As used in that subdivision, the phrase "exculpatory evidence" includes both exculpatory and impeachment evidence.[63] Subdivision (e) also expands the *Brady* rule. Its language requires a prosecutor to disclose to the defendant *any* exculpatory evidence, not just *material* exculpatory evidence.[64] A failure to disclose *any* exculpatory evidence (PC 1054.1(e) violation) can result in various discovery sanctions pursuant to Penal Code section 1054.5(b), but generally not in dismissal.[65]

14.04 POLICIES REGARDING DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION, GENERALLY

14.04.01 ASSIGNED DDA RESPONSIBLE FOR DISCLOSURES

The fulfillment of the prosecution's obligation under the *Brady* rule and Penal Code section 1054.1(e) to provide exculpatory and impeachment evidence is the sole responsibility of the individual DDA assigned to a case and shall be done without a defense request.

To ensure compliance with the *Brady* rule, the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to err on the side of disclosure.[66] "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[67] It is the policy of the LADA that DDAs will resolve doubtful questions in favor of disclosing any potentially exculpatory or impeaching information:

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[63] The United States Supreme Court has rejected any constitutional distinction between exculpatory evidence and impeachment evidence and has specifically stated that "impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule" (*United States* v. *Bagley* (1985) 473 U.S. 667, 676). Similarly, the California Supreme Court has rejected any distinction between the phrase "exculpatory evidence" as utilized in Penal Code section 1054.1(e) and the prosecutor's *Brady* disclosure duty under the Due Process Clause (*Izazaga* v. *Superior Court* (1991) 54 Cal.3d 356, 372).

[64] *Barnett* v. *Superior Court (People)* (2010) 50 Cal.4th 890, 901.

[65] Pen. Code, § 1054.5, subd. (c).

[66] *Kyles* v. *Whitley* (1995) 514 U.S. 419, 440.

[67] *United States* v. *Agurs* (1976) 427 U.S. 97, 108; see also *Kyles* v. *Whitley* (1995) 514 U.S. 419, 439 (Warning prosecutors against "tacking too close to the wind" in withholding evidence.).

In the end, the trial judge, not the prosecutor, is the arbiter of admissibility, and the prosecutor's *Brady* disclosure obligations cannot turn on the prosecutor's view of whether or how defense counsel might employ particular items of evidence at trial. "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.'"[68]

Commentary
To ensure full compliance with the Brady rule and the LADA policy, DDAs must disclose facially exculpatory or impeaching information even when they believe that the information is inadmissible or false.

Disclosure of Impeachment Evidence from Criminal Offender Record Information

As referred to *ante*, the *Brady* rule imposes a constitutional duty upon a prosecutor to disclose to the defense evidence impeaching the credibility of a material prosecution witness. *Brady* impeachment evidence includes, inter alia, felony convictions involving moral turpitude, misdemeanor or other conduct that reflects on believability or involving moral turpitude, pending criminal charges, and parole or probationary status of a prosecution witness. At the same time, Penal Code section 1054.1(d) imposes a broader statutory duty upon a prosecutor to disclose to the defense, not just felony convictions which involve moral turpitude, but *all* felony convictions of a material witness. This duty to disclose felony convictions extends to those which have been expunged pursuant to Penal Code section 1203.4.[69]

Criminal offender record information, i.e., rap sheets, are records and data compiled by criminal justice agencies for the purpose of identifying criminal offenders and of maintaining as to each offender a summary of, inter alia, arrests, pretrial proceedings, disposition of criminal charges, and sentencing.[70] Although a criminal offender record itself is not discoverable,[71] impeachment information found therein about a prosecution witness's felony convictions, misdemeanor or other conduct that involve moral turpitude, pending criminal charges, and parole or probationary status, constitutes evidence to which the defendant is entitled. Since criminal offender records are "reasonably accessible" to prosecutors, DDAs are held to a duty to disclose information from those records which impeach the credibility of material prosecution witnesses.[72] In executing this duty, DDAs should never give a witness's criminal offender record itself to the defense.[73] Instead, DDAs should restrict the release of

[68] *In re Miranda* (2008) 43 Cal.4th 541, 577.
[69] *People* v. *Martinez* (2002) 103 Cal.App.4th 1071, 1079 ("Irrespective of the expungement's effect on the convictions' admissibility at trial, the prosecution still bore the burden of investigating and divulging the existence of such convictions."); Evid. Code, § 788, subd. (c) (Expunged convictions are inadmissible.).
[70] Pen. Code, § 13102.
[71] *People* v. *Roberts* (1992) 2 Cal.4th 271, 308.
[72] *People* v. *Little* (1997) 59 Cal.App.4th 426, 433.
[73] See General Office Memorandum (GOM) 09-03, "Disclosure of Rap Sheets," for a full discussion.

information to the name of the crime, the date and place of arrest and/or conviction,[74] and the case number, if available.

Practically speaking, however, peace officer witness criminal offender records are not "reasonably accessible" to the prosecution without the officer's date of birth, i.e., information contained in the peace officer's personnel files. Birth date information contained in a peace officer's personnel file is confidential and may be disclosed to the prosecution by the officer's employing agency only by means of a *Pitchess* motion.[75] To ensure compliance with the *Brady* rule and Penal Code section 1054.1(d) and to avoid the respective burdens placed on the law enforcement agencies' custodians of record, the courts, and the LADA by repetitive *Pitchess* motions, all law enforcement agencies in Los Angeles County have agreed to the following procedure:

- Whenever a law enforcement agency employee, e.g., peace officer or expert, who has testified for the prosecution in the past or who the agency reasonably and in good faith believes will testify as a witness for the prosecution in the future, is arrested for, or convicted of a crime, the employing agency shall provide the following information to the LADA Bureau of Investigation (BOI) on-duty personnel at the LADA Command Center:

    - Employee Name
    - Employee Number

  For arrests:
    - Arrest Date
    - Arresting Agency Name
    - Arresting Agency File Number (e.g., DR Number, URN Number)
    - Booking Number
    - Charge(s)

  For convictions:
    - Conviction Date
    - Court Case Number
    - Crime(s) Convicted of

- The Command Center on-duty personnel shall forward the information to the LADA BOI lieutenant assigned to the Justice System Integrity Division (JSID), who shall procure potential impeachment information therefrom.

- The JSID lieutenant shall forward the potential impeachment information, along with accompanying arrest reports, when available, to the Discovery Compliance Unit for evaluation and inclusion in the Officer and Recurrent Witness Information Tracking System (ORWITS). The ORWITS database and DDA disclosure of information therefrom are discussed in detail *post*.

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[74] GOM 09-03.

[75] *Garden Grove Police Department* v. *Superior Court* (2001) 89 Cal.App.4th 430; *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696.

14.04.02 TIMING OF DISCLOSURES

Felonies

Exculpatory and impeachment evidence, which is material to a probable cause determination, must be disclosed before preliminary hearing.[76] The appellate decisions which established this rule have expanded the prosecutor's obligations beyond the statutory requirements set forth in Penal Code section 1054.7, which allows the prosecution to provide any exculpatory and impeachment evidence 30 days before trial, well after the preliminary hearing. The materiality of exculpatory and impeachment evidence can seldom be predicted accurately early in the litigation process. Therefore, the LADA shall disclose *any* potentially exculpatory and/or impeachment evidence before preliminary hearing. This evidence includes impeachment evidence of a witness whose statements are being presented at a preliminary hearing pursuant to Proposition 115. The LADA shall also disclose any potentially exculpatory and/or impeachment evidence learned after the preliminary hearing as soon as it becomes known.

Commentary

In certain situations, DDAs may request that the court deny or restrict discovery disclosures. Penal Code section 1054.7 permits discovery disclosures to be denied, restricted, or deferred upon a showing of good cause, i.e., concerns for witness safety, for the possible loss or destruction of evidence, or for the possible compromise of other investigations by law enforcement.

Misdemeanors

The LADA will disclose any potentially exculpatory and/or impeachment evidence before any substantive hearing or at least 30 days before trial. If the evidence is not known or reasonably accessible until less than 30 days before trial, it is to be disclosed as soon as it becomes known or obtained. "Substantive hearing" means a hearing in which the granting of a defendant's motion would weaken the prosecution's case against the defendant or reduce the defendant's exposure to punishment, e.g., a Penal Code section 1538.5 hearing.

Continuing Duty Through Trial

A prosecutor must continue to comply with the *Brady* rule and Penal Code section 1054.1(e) during the trial, so any exculpatory and/or impeachment evidence discovered after the trial begins must be provided to the defense.[77] Therefore, the LADA will provide any potentially exculpatory and/or impeachment evidence discovered after the trial begins as soon as it becomes known.

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[76] *Bridgeforth* v. *Superior Court* (2013) 214 Cal.App.4th 1074; *People* v. *Gutierrez* (2013) 214 Cal.App.4th 343.

[77] See *United States* v. *Jordan* (11th Cir. 2003) 316 F.3d 1215; *In re Lawley* (2008) 42 Cal.4th 1231, 1246.

Post-Trial Duty

The *Brady* rule is based on due process and exists to ensure a defendant a fair trial.[78] However, if, after the trial ends, a prosecutor acquires information which casts doubt upon the correctness of a conviction, the ethical code of the legal profession requires the prosecutor to disclose the information.[79] Therefore, the LADA will promptly disclose to the defendant new, favorable evidence which is learned post-trial.

14.05 POLICIES REGARDING ACCESS TO POTENTIAL IMPEACHMENT INFORMATION ABOUT RECURRENT PEOPLE'S WITNESSES IN ACTUAL POSSESSION OF THE LADA

In no area has the prosecution's obligation to disclose impeachment evidence been more difficult in its application than in the analysis of information regarding peace officer conduct. Allegations of peace officer misconduct come to the attention of the LADA in a number of ways. For example, filing requests are submitted where a peace officer is a suspect in a crime. DDAs, during the course of case review or litigation, may develop concerns about whether certain observed, reported, or documented peace officer conduct constitutes potential impeachment information. Bench officers may issue findings of fact or comment that a peace officer's testimony was untruthful. Defendants also routinely allege peace officer misconduct as part of their efforts to avoid criminal liability.

A determination of whether allegations of peace officer misconduct constitute potential impeachment evidence can be challenging. This challenge is compounded by the fact that at stake are not only the legitimate due process rights of the defendant, but also the legitimate privacy rights of, and career consequences to, the involved peace officers. It is the intent of this policy to balance these interests, while simultaneously ensuring compliance with our constitutional duty pursuant to the *Brady* rule and our statutory duty pursuant to Penal Code section 1054.1(e).

14.05.01 DISCOVERY COMPLIANCE UNIT

The Discovery Compliance Unit (DCU) is responsible for ensuring consistency in the LADA's compliance with its *Brady* and statutory disclosure obligations of impeachment evidence known to the LADA regarding recurrent People's witnesses. The term "recurrent People's witnesses" includes peace officers, experts, and other witnesses who the People reasonably expect to testify in multiple independent prosecutions. DCU DDAs maintain the Officer and Recurrent Witness Information Tracking System (ORWITS) and notify individuals directly affected by an entry into that system, e.g., the peace officer whose name was entered into the ORWITS and the head

[78] *Weatherford* v. *Bursey* (1977) 429 U.S. 545, 559; *Brady* v. *Maryland* (1963) 373 U.S. 83, 87.
[79] *Imbler v. Pachtman* (1976) 424 U.S. 409, 427, n. 25; *In re Lawley* (2008) 42 Cal.4th 1231, 1246; Rules Prof. Conduct, rule 5-220 ("A member shall not suppress any evidence that the member . . . has a legal obligation to reveal or produce.").