

TRACKING POLICE MISCONDUCT

How Prosecutors Can Fulfill Their Ethical
Obligations and Hold the Police Accountable
Appendix | July 2021

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BERNALILLO COUNTY DISTRICT ATTORNEY'S OFFICE POLICY



Giglio Policy of the Second Judicial District Attorney's Office

- I. **SCOPE.** This policy governs the responsibility of prosecutors to determine whether there exists impeachment material for law enforcement witnesses that must be disclosed to the defense.
- II. **DURATION.** Permanent.
- III. **VERSION.** Issued October 16, 2020.
- IV. **OBJECTIVE.** The purpose of this policy is to provide guidance concerning the application of *Giglio* to case prosecutions and to set out the steps that must be taken in order to fulfill the constitutional responsibility of the State to disclose impeachment evidence for law enforcement witnesses.
- V. **DEFINITIONS.** [Section not used in this policy.]
- VI. **POLICY.**

A. What is *Giglio*?

Every prosecutor knows of the duty to disclose exculpatory or potentially exculpatory evidence to the defense. It is not as well known, however, that this duty also applies to impeachment evidence. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires state prosecutors to disclose to the defense all evidence favorable to an accused that is material to guilt or punishment. Later, the Court clarified that “favorable evidence” includes not only exculpatory evidence but “evidence affecting credibility.” *Giglio v. United States*, 405 U.S. 150, 154 (1972). The duty to disclose impeachment evidence is known as the *Giglio* rule. This rule guarantees a fair trial for the accused. The rule also fosters public trust by assuring that prosecutors honor their role as ministers of justice.

B. What does *Giglio* include?

Impeachment evidence can take many forms. It includes a witness's prior written or recorded statements, as well as a witness's criminal record, both of which must be disclosed under Rule 5-501(A)(5) NMRA. It also includes evidence of a witness's bias against the accused and evidence pertaining to a witness's truthfulness, whether in the form of opinion, reputation, or specific instances of conduct. For police officer witnesses, impeachment information may include disciplinary actions that are documented in personnel files maintained by the law enforcement agency. Potential impeachment information can include both on-duty and off-duty conduct.

C. What are my responsibilities?

A prosecutor's duty to disclose is not limited to information in the direct physical possession of the prosecuting authority. The disclosure requirements of *Giglio* and *Brady* apply to evidence "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). "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 [the] case, including the police.'" *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Kyles*, 514 U.S. at 437). Prosecutors have a responsibility to investigate police officer witnesses to determine whether a police officer or a law enforcement agency has favorable evidence that must be disclosed to the defense. This includes potential impeachment material in personnel files.

D. How do I recognize potential impeachment material?

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 16-308 committee cmt. [1] NMRA. In order to be "faithful to [the people's] overriding interest that 'justice shall be done,'" you should "resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108, 111 (1976). When in doubt about information relating to police officer witnesses, you should alert the *Giglio* Panel to any potential impeachment information. The *Giglio* Panel will make a final determination about the duty to disclose in light of the role of the police officer witness, the facts of the case, any known or anticipated defenses, and the law governing discovery as set out in court rules and judicial opinions.

Potential impeachment material includes substantiated findings of misconduct. As a general but not universal rule, unsubstantiated allegations, matters for which a police officer has been exonerated, and allegations that are not credible do not qualify as being

favorable to the accused and are therefore not considered to be potential impeachment information. The following list of substantiated findings is potential impeachment information:

- Misconduct that reflects bias:
 - Information that may be used to suggest that the investigative employee is biased for or against a defendant or witness in the case;
 - Information that may be used to suggest that an investigative employee is biased against a particular class of people, for example, based on a person's gender, gender identity, race, or ethnic group.

- Misconduct that reflects on truthfulness:
 - Filing a false report or submitting a false certification in any criminal, administrative, employment, financial, or insurance matter, whether professional or personal;
 - An instance of untruthfulness or lack of candor;
 - A finding of fact by a judicial authority or administrative tribunal that is known to the employee's agency, which results in a finding that the investigative employee was intentionally untruthful in a matter, either verbally or in writing;
 - Untruthfulness about educational achievements or qualifications as an expert witness;
 - Inappropriate or unauthorized use of government data.

- Criminal charges:
 - A pending criminal charge or conviction of any crime, including misdemeanors and driving while impaired by drugs or alcohol.

- Other misconduct in investigations:
 - Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
 - Any promises, offers, threats, or inducements, including the offer of immunity;
 - Intentionally mishandling or destroying evidence;
 - Misconduct that involves the use of force.

E. How do I fulfill my duty to investigate?

When you are assigned a case, you must determine which law enforcement officers you intend to call as witnesses. Within ten days of assignment, an email should be sent to each police officer witness with instructions to fill out a standard questionnaire available through a hyperlink, and the assigned prosecutor should confirm that the questionnaire has been sent to all police officer witnesses. The questionnaire poses a series of yes or no questions related to truthfulness, bias, and other impeachment matters.

F. What happens when an officer answers “no” to all questions?

You will send a pre-drafted letter to the law enforcement agency to determine whether the officer provided accurate information and whether there is any internal investigation about which the officer is unaware. If the law enforcement agency confirms the information provided by the officer, then your initial investigation is complete; however, both you and the police officer witness are under a continuing duty to disclose any impeachment material that may develop while the case is pending, and you should ask all officers whether any answer on their questionnaire has changed before they testify.

G. What happens when an officer answers “yes” to any question?

Begin by consulting your supervisor. You must continue your investigation by sending a pre-drafted letter to the law enforcement agency requesting all materials relevant to the “yes” answers, as well as asking the agency to determine whether any “no” answers were inaccurate and whether there is any internal investigation about which the officer is unaware. If the law enforcement agency chooses to provide access to personnel files rather than performing its own *Giglio* review, you must examine in person any relevant materials maintained by the law enforcement agency, including personnel

records. If the potential impeachment material is not something that is maintained by the law enforcement agency, you must discuss the answers to the questionnaire with the police officer witness and determine the source of the potential impeachment material.

H. Are personnel matters confidential?

Yes, personnel records containing matters of opinion are confidential and are not subject to public inspection. NMSA 1978, § 14-2-1(C) (2019). However, a defendant's right to a fair trial overrides the confidentiality of personnel records when they contain evidence that is favorable to an accused. *See State v. Pohl*, 1976-NMCA-089, ¶¶ 5-6, 89 N.M. 523. You should not disclose any confidential matters contained in a personnel file that are not required to be disclosed.

I. What is the *Giglio* Panel?

The District Attorney's Office has a *Giglio* Panel made up of senior staff members whose positions in the office do not require frequent interactions with investigating officers, thereby minimizing the opportunity for conflicts of interest in the review of personnel records. If you have not received a response to the questionnaire from any of your police officer witnesses, you will be notified electronically, and if an officer fails to respond after a second attempt, a member of the Panel will contact supervisory personnel with the law enforcement agency to assure that the questionnaire is completed. You should also notify the *Giglio* Panel if you find potential impeachment material for a police officer witness in a personnel file or from other sources. The *Giglio* Panel will review the material and disclose information that is favorable to the accused. If any member of the Panel has a question about whether information is subject to disclosure under *Giglio*, the information will be submitted to the court for in camera review.

The Panel will keep a list of *Giglio* disclosures. This list will be available for public inspection. In every case in which there is a *Giglio* disclosure, you must assess the nature of the *Giglio* materials and the individual circumstances of the case to decide whether to call an officer that is the subject of *Giglio* materials as a witness.

J. How do I protect the confidentiality of personnel records?

You should take special care to protect the confidentiality of personnel records and the privacy interests and reputations of police officer witnesses with respect to matters that are not subject to disclosure. Be careful not to transmit personnel records via electronic mail. If the *Giglio* Panel decides that the personnel file contains evidence that is favorable to the accused, the evidence will be provided to the defense. If the *Giglio*

Panel determines that there is a legitimate question about whether the personnel file contains evidence favorable to the accused, you will seek *in camera* review of the evidence by the court. Any records that are not disclosed to the defense because they do not contain evidence favorable to the accused should be returned to the law enforcement agency or securely maintained.

K. What do I need to file in court?

Depending on the decision of the *Giglio* Panel, you may need to file a motion for *in camera* review. When confidential material must be disclosed in order to protect an accused's right to a fair trial, either with or without *in camera* review, you must file a notice of compliance that informs the court that *Giglio* material has been provided to the defense and send a copy of the notice to the *Giglio* Panel for purposes of maintaining a list of *Giglio* disclosures.



***Giglio* Questionnaire: State v. _____**

Date:	LE Agency Case Number:	Court Case Number:
Officer Name:	Officer ID (Man#):	Officer Agency Issued Cell#:
Charges:		

Your completion of this questionnaire is necessary to fulfill the State's duty to disclose potential impeachment information about witnesses to the defense. It is estimated that you will be able to complete this questionnaire in less than five minutes.

Potential impeachment information includes on-duty or off-duty conduct that may reflect on your truthfulness or any bias you have against the defendant. Please answer each of the following questions concerning information that may be relevant to your credibility as a witness. It is important that you be truthful in answering these questions. A lack of honesty in answering these questions would itself be impeachment material that must be disclosed to the defendant. You are also under a duty to disclose to the prosecution any new information relevant to the questions below that develops while the case is pending.

1. Have you been the subject of an internal investigation within the last ten years that resulted in an administrative finding that you engaged in misconduct involving dishonesty or that resulted in your resignation or termination from a law enforcement agency? Examples of misconduct involving dishonesty include but are not limited to the filing of a false report, fraud in reporting hours worked, misrepresenting information on an application for employment or promotion, the intentional destruction, alteration, or false attribution of evidence of a crime, or the misuse of government data for personal or financial gain.
 Yes No

A. If you answered yes above, was the administrative finding appealed?
 Yes No

2. Have you been charged or convicted of any felony regardless of type or any misdemeanor crime of dishonesty, whether pending or resolved? Examples of crimes of dishonesty include theft, fraud, embezzlement, and perjury.

Yes No

3. By internal or administrative investigation, as far as you know, have you been found to have discriminated against or harassed a member of a protected class of persons, such as race, ethnicity, sex, religion, national origin, or sexual orientation?

Yes No

4. Most governmental and law enforcement agencies have social media policies that prohibit discriminatory practices. For example, the Albuquerque Police Department has a social media policy that prohibits “speech or content that ridicules, maligns, disparages or otherwise discriminates against a protected class of persons.” As far as you know, have you been the subject of an internal investigation for violating such a policy?

Yes No

5. With respect to the case for which you received this questionnaire, have you had a personal relationship with the defendant, civilian witnesses, the prosecutor, the defense attorney, or the assigned judge, or any previous professional dealings with any of those persons that could reasonably result in a bias for or against them?

Yes No

6. Answer this question only if you received this questionnaire for a case involving a charge of interference with law enforcement under Article 22 of the Criminal Code (NMSA 1978, §§ 30-22-1 to -27); otherwise, leave blank. Have you been the subject of an investigation within the last ten years that resulted in an administrative or judicial finding that you exercised excessive force or an unreasonable application of force resulting in physical injury?

Yes No

A. If you answered yes above, was the administrative or judicial finding appealed?

Yes No

7. Answer this question only if you received this questionnaire for a case involving a charge of vehicular homicide, great bodily harm by vehicle, or driving while under the influence of alcohol or drugs (NMSA 1978, §§ 66-8-101 to -02); otherwise, leave blank. Have you been convicted in the last five years of misdemeanor driving while under the influence of alcohol or drugs?

Yes No

8. Answer this question only if you received this questionnaire for a case involving a charge of domestic violence; otherwise, leave blank. Have you been convicted in the last five years of misdemeanor domestic violence?

Yes No

BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE POLICY



ETHICAL DISCLOSURE UNIT POLICY

EDU MISSION STATEMENT

The Ethical Disclosure Unit (EDU) seeks to fulfill the Bexar County Criminal District Attorney's constitutional and ethical obligations to disclose to criminal defendants information affecting the credibility of recurring government witnesses for the State. The specific objectives of the EDU are to (1) implement a system to effectively gather, assess, and maintain information that may affect recurring government witness credibility; (2) facilitate the appropriate disclosure of information and materials affecting recurring government witness credibility; and (3) work with local law enforcement and government agencies to ensure affirmative reporting of employee credibility issues to the Bexar County Criminal District Attorney's Office. In deciding whether any particular issue should be disclosed to the defense, the mandate of EDU is to err on the side of disclosure.

EDU TEAM

JOE D. GONZALES
Bexar County Criminal District Attorney

Ethical Disclosure Unit Attorney

Ethical Disclosure Unit Paralegal



DISCLOSURE MANDATE

Every Texas prosecutor has the legal, statutory, and ethical duty to timely disclose to the defense any and all favorable information, items, and evidence that the State possesses, under the tenets of *Brady v. Maryland* and its progeny; Texas Code of Criminal Procedure Article 39.14(h) and (k); and Texas Disciplinary Rules of Professional Conduct 3.04(a) and 3.09(d). Further, an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in a case, including members of law enforcement. The disclosure rule includes not only evidence directly related to the case, but also information that would affect the credibility of a prosecution witness in the case. *See Giglio v. United States*, 405 U.S. 150 (1972).

Information or evidence is favorable to the accused when it is: 1) exculpatory—tending to justify, excuse, or clear the defendant from guilt; 2) useful for impeachment—anything offered to dispute, disparage, deny, or contradict; or 3) mitigating—useful to the defense during punishment proceedings. *See Little v. State*, 991 S.W.2d 864, 866-67 (Tex. Crim. App. 1999). This mandate also requires the disclosure of impeachment conduct of all governmental witnesses. *Banks v. Dretke*, 540 U.S.668, 702 (2004)(explaining that prosecutors are obligated to disclose mitigating punishment evidence, such as a State's witness's status as an informant). A recurring government witness is defined as any person who may testify on behalf of the State of Texas such as a peace officers, lab personnel, jailers, and emergency responders.



The mere fact that a recurring government witness has been added to the Disclosure List is not an admission or comment by the Bexar County Criminal District Attorney’s Office about that individual’s credibility as a witness, on that individual’s reputation, or on that individual’s ability to serve in their current professional capacity. The government witness’s inclusion on the Disclosure List does not constitute a conclusion that the recurring government witness has committed misconduct.

CATEGORIES FOR DISCLOSURE

Disclosure will be made where the State possesses the following information:

1. CRIMINAL CASE: The government witness has a pending or disposed felony or misdemeanor offense, other than a Class C misdemeanor traffic violation, committed at any time that resulted in a final conviction, deferred adjudication, pretrial diversion or dismissal.
2. PENDING CRIMINAL MATTER: The government witness is the target of a pending criminal investigation and is aware of the investigation.
3. ADMINISTRATIVE FINDINGS: A government witness has a pending investigation or a law enforcement or government agency has made a substantiated administrative finding for the following:
 - a. Untruthfulness or deception regarding facts in a report, statement, hearing, or official proceeding.
 - b. Racial, religious or personal bias or prejudice of an individual or class.



ETHICAL DISCLOSURE UNIT – POLICY

- c. Improper use of force or any violation of a person’s constitutional rights.
- d. Altering, tampering, concealing, or improper use of evidence.
- e. Policy and procedure violations.

This category includes other potential *Brady* issues based on misconduct—either on- or off-duty—or performance deficiencies related to the witness.

- 4. RESIGNATION: The government witness resigned amid an investigation.
- 5. TRUTHFULNESS: The EDU received from any person potential *Brady* information regarding a recurring government witness’s truthfulness.

These criteria do not encompass every possible misdeed or policy infraction committed by the officer but shall be applied in a manner consistent with the concerns of credibility expressed in EDU’s Mission Statement. It is not the duty of the EDU Attorney to contemplate the admissibility of the impeachment evidence, but only to disclose said information. All Bexar County prosecutors are expected to protect potentially inadmissible and/or confidential information by using Motions for *In Camera* Inspection, Motions in Limine, Motions for Protective Orders, and argument.

DISCLOSURE LIST DATABASE

The database compiles information about recurring government witnesses that may be favorable to the defense and needs to be disclosed. The database administrator is the EDU



ETHICAL DISCLOSURE UNIT – POLICY

Paralegal. Only the database administrator has full access to the database and is authorized to make or delete entries at the direction of the EDU Attorney.

General access to the database is only accessible to employees of the Bexar County Criminal District Attorney's Office. The database is posted on the District Attorney's intranet. The list indicates the individual, employing agency, and badge number, if applicable. The database is not accessible by defense counsel, defendants, members of the public, or anyone else. The list is considered attorney work product and is not available for distribution.

MEMORANDUM OF DISCLOSURE

A Memorandum of Disclosure is generated for each government witness on the Disclosure List summarizing the matter and directing the defense attorney to contact EDU if additional materials are available. In cases in which the government witness can be identified as a witness by EDU through Judicial Dialog, proactive action is taken to place Memorandum of Disclosure in the files of such cases. Proactive action is only taken with new additions or status changes. Other disclosures rely on prosecutors and their staff to compare their witness lists to the Disclosure List and inform EDU when a Memorandum of Disclosure is needed.



DO NOT CALL LIST

Individuals whose general credibility is so impaired as to warrant special review of any case in which the individual may appear as a witness for the prosecution (i.e., the refusal of the State to sponsor the witness) may be placed on the “Do Not Call List”. Such government witnesses are notated in red on the database. The placement of a government witness on the “Do Not Call List” is made at the recommendation of the EDU Attorney and upon approval by Bexar County Criminal District Attorney Joe D. Gonzales, the First Assistant, and the Chief of Litigation. If the Administration decides to include the government witness on the “Do Not Call List”, the Administration will provide written notice to the witness’s Agency.

A handwritten signature in blue ink that reads "Joe D. Gonzales". The signature is written in a cursive style and is positioned above a horizontal line.

Joe D. Gonzales

Bexar County Criminal District Attorney

Approved May 5, 2021

GOVERNMENT WITNESS MISCONDUCT REPORTING FLOWCHART

ADA learns of possible reoccurring government witness misconduct

ADA writes a detailed memo on the incident and notifies Division Chief

Division Chief notifies Chief of Litigation

Chief of Litigation forwards to Civil Rights Division or Ethical Disclosure Unit based on the following criteria:

CIVIL RIGHTS DIVISION

- Excessive Use of Force
- Custodial Death
- Civil Rights Violation

Investigation into incident is completed within 30 days

Findings and recommendation reported to DA Administration

Within 72 hours, DA Administration may decide to:

- Add to Disclosure List (Notify EDU)
- Notify Agency PIU
- Refer to appropriate law enforcement agency
- Open a criminal complaint
- Take any other appropriate measures determined necessary
- Close the review

ETHICAL DISCLOSURE UNIT

- Untruthfulness
- General Misconduct
- Search Issues

Investigation into incident is completed within 30 days

Findings and recommendation reported to DA Administration

Within 72 hours, DA Administration may decide to:

- Add to Disclosure List
- Notify individual's supervisor of incident
- Notify Agency Internal Affairs
- Refer to appropriate law enforcement agency
- Take any other appropriate measures determined necessary
- Close the review

BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE POWERPOINT

Bexar County Criminal District Attorney Ethical Disclosure Unit



Ethical Disclosure Unit

- The Ethical Disclosure Unit (EDU) seeks to fulfill the Bexar County Criminal District Attorney's constitutional and ethical obligations to disclose to criminal defendants information affecting the credibility of recurring government witnesses for the State.
- In deciding whether any particular issue should be disclosed to the defense, the mandate of EDU is to err on the side of disclosure.



Brady v. Maryland

- Brady v. Maryland, 373 U.S. 83 (1963), was a landmark United States Supreme Court case that established that the prosecution must turn over all evidence that might exonerate the defendant (exculpatory evidence) to the defense. The Supreme Court held that withholding exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment."
- A defendant's request for "Brady disclosure" refers to the requirement that the prosecution disclose material exculpatory evidence to the defense. Exculpatory evidence is "material" if "there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed."



State of Texas v. Michael Morton



- On August 13, 1986 Christine Morton was murdered at her home in Williamson County, TX. From the very beginning the focus of the murder investigation was her husband, Michael Morton.
- In February 1987 Michael Morton was convicted of his wife's murder and sentenced to life in prison.
- In February 2005, Morton filed a motion for DNA testing. Williamson County District Attorney John Bradley vehemently fought against DNA testing for 6 years.
- A Judge finally ordered testing be performed in June 2011.



State of Texas v. Michael Morton



- The 2011 DNA testing linked another man, Mark Alan Norwood, to Christine's murder. On October 4, 2011 Morton was freed on bond after serving 24 years in prison and was formally acquitted by Bexar County District Judge Harle on December 19, 2011.
- The Michael Morton Act became law on September 1, 2013 and is codified in CCP 39.14.



Texas Code of Criminal Procedure Art. 39.14. Discovery

- (a) Subject to the restrictions provided by [Section 264.408, Family Code](#) , and [Article 39.15](#) of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of **any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers** but not including the work product of counsel for the state in the case and their investigators and their notes or report, or **any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.**



Texas Code of Criminal Procedure Art. 39.14. Discovery

- (h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any **exculpatory, impeachment, or mitigating** document, item, or information in the possession, custody, or control of the state that **tends to negate the guilt** of the defendant or would **tend to reduce the punishment** for the offense charged.
- (k) If at any time **before, during, or after trial** the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.





eloyravencos

Now what?



EDU Disclosure List and **DO NOT CALL** List

- EDU maintains two lists.
- The Disclosure List contains government witnesses about whom information exists that legally must be disclosed to the defense.
- The **DO NOT CALL** List contains government witnesses whose general credibility is so impaired as to warrant special review of the case due to the refusal of the State to sponsor the witness.



How Does The EDU Learn of Government Witness Issues?

- Criminal cases filed with our office
 - The Public Integrity/Computer Crimes database
 - Cases filed with other divisions
- Affirmative disclosures by Law Enforcement Agencies
 - Disciplinary matters not rising to criminal investigations
 - Out-of-county charges
 - Texas Commission on Law Enforcement (TCOLE) reports
- Reporting by Prosecutors/Investigators/DA Staff
- Any other source
 - News reports
 - Defense attorney allegations
 - Judicial referrals



EDU Policy: Categories for Disclosure List

CATEGORIES FOR DISCLOSURE

Disclosure will be made where the State possesses the following information:

1. CRIMINAL CASE: The government witness has a pending or disposed felony or misdemeanor offense, other than a Class C misdemeanor traffic violation, committed at any time that resulted in a final conviction, deferred adjudication, pretrial diversion or dismissal.
2. PENDING CRIMINAL MATTER: The government witness is the target of a pending criminal investigation and is aware of the investigation.
3. ADMINISTRATIVE FINDINGS: A government witness has a pending investigation or a law enforcement or government agency has made a substantiated administrative finding for the following:
 - a. Untruthfulness or deception regarding facts in a report, statement, hearing, or official proceeding.
 - b. Racial, religious or personal bias or prejudice of an individual or class.



EDU Policy: Categories for Disclosure List

- c. Improper use of force or any violation of a person's constitutional rights.
- d. Altering, tampering, concealing, or improper use of evidence.
- e. Policy and procedure violations.

This category includes other potential *Brady* issues based on misconduct—either on- or off-duty—or performance deficiencies related to the witness.

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EDU Policy



ETHICAL DISCLOSURE UNIT – POLICY

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EDU Policy: The **DO NOT CALL** List

DO NOT CALL LIST

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JOE D. GONZALES
BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY

Memorandum of Disclosure

Pursuant to Article 39.14 of the Texas Code of Criminal Procedure, Rule of Disciplinary Conduct 3.09(d), and our continuous reporting duty, the State hereby makes the following ethical disclosure pertinent to a witness for the State in this case. In making this disclosure, the State in no way concedes the materiality or evidentiary admissibility of the matters disclosed. Additionally, any information received from the State shall not be disclosed to any third party except as allowed for under Article 39.14(e).

- Pertinent information here.

Questions or concerns regarding this disclosure may be directed to the prosecutor handling this case or directly to the Ethical Disclosure Unit.

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JOE D. GONZALES
BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY

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Memo Prepared: Now What?

- Read the Memo of Disclosure and supporting documentation.
- Evaluate your case in light of this information.
- Talk to EDU or your supervising attorney if you have questions about how to, or if you should, proceed with your case.
- Prepare a Motion in Limine or Protective Order—an example of each can be found on the EDU intranet page below the Disclosure List.
- Prepare arguments and objections and make them to the Judge.



Pre-Trial of Government Witnesses

- Ask your witnesses if there is any suspension or disciplinary history you should know about.
- If they say yes—please get details and call/email EDU ASAP.
- Ask the Detective to bring their entire file to your pre-trial meeting. Review their file.
- If there is anything in their file that you don't have-make copies and disclose to defense counsel immediately.



BUNCOMBE COUNTY DISTRICT ATTORNEY'S OFFICE POLICY

Memorandum of Agreement

Uniform Policy and Procedure

Between

Buncombe County Office of the District Attorney

and

Asheville Police Department

I. Background and Purpose

This Memorandum of Understanding [MOU] sets forth the terms of understanding between the Buncombe County Office of the District Attorney [DA] and the Asheville Police Department regarding their respective obligations in all cases involving allegations of criminal and/or non-criminal officer misconduct, including investigatory procedure and compliance with the DA's statutory and constitutional discovery obligations.

Incidents involving allegations of officer misconduct are of heightened public interest. Investigations of these allegations are complex, and it is therefore critical that the parties to this agreement pledge to ensure that a thorough, fair, and impartial inquiry into the facts and circumstances of the alleged misconduct be obtained in every case to ensure maximum public confidence in both law enforcement and our local system of justice.

In addition, prosecutors have a constitutional obligation to disclose to a defendant, in a criminal case, evidence favorable to that defendant. While the source of this obligation is the United States Constitution, the prosecutor's duty to disclose this information is defined and explained in two seminal United States Supreme Court decisions: Brady and Giglio [hereinafter "Brady/Giglio"]. This information specifically includes conduct that affects the credibility of witnesses and could constitute impeachment material should the officer testify in a criminal case.

This disclosure obligation is not limited to materials in the hands of the prosecuting agency. It extends to information "known to the others acting on the government's behalf in the case, **including the police.**" Kyles v. Whitley, 514 U.S. at 437. Prosecutors are required to make a "**reasonably diligent inquiry**" into the existence of Brady/Giglio material that may be in possession of law enforcement.

This MOU ensures that prosecutors receive sufficient information to comply with the constitutional requirements of Brady and Giglio while protecting the legitimate privacy rights of law enforcement officers and other witnesses under NCGS §§ 153A-98, 160A-168, and 126-24.

II. Brady/Giglio Material Defined

The DA is obligated to disclose to the defense in criminal cases any **favorable evidence** that is **material** to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

"**Favorable evidence**" includes evidence that is **exculpatory (Brady)** as well as information that could be used to **impeach** the testimony of a prosecution witness (Giglio).

Materiality does not require a demonstration that the undisclosed evidence would have resulted in the defendant's acquittal. Rather, evidence is "**material**" when the undisclosed evidence would "undermine confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. at 434.

III. Standard of Proof Triggering Disclosure

The standard of proof for disclosure of information by the law enforcement agency to the DA shall be the "**substantial information**" standard.

"**Substantial information**," for purposes of this agreement, is defined as credible information that might reasonably be deemed to have undermined confidence in a later conviction in which the law enforcement employee is a witness, and is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event; "substantial information" excludes allegations that have been found to be unsubstantiated after due investigation.

The DA considers substantial information to be a lower evidentiary showing than what would ordinarily sustain a probable cause showing in a criminal prosecution. The DA further understands that preliminary investigations are often required to establish the existence of substantial information and agrees that the law enforcement agency should not make any disclosure pursuant to this MOU until any such preliminary investigation is complete.

The following types of incidents involving a sworn officer or non-sworn employee of a law enforcement agency will **always** trigger disclosure requirements:

1. Substantial information that the officer employed deadly or excessive force as defined by the law enforcement agency's Use of Force policy, regardless of whether the use of such deadly force resulted in injury or death to any person;
2. Substantial information that an officer or employee committed a felony or non-traffic misdemeanor criminal offense or was charged with such an offense while employed with the agency;
3. A sustained administrative finding of misconduct that comes within the definition of Brady/Giglio material set forth in this policy, regardless of any discipline imposed.

IV. Procedure in Cases of Potential Criminal Misconduct

After preliminary inquiry, if substantial information listed in Section III, subsections 1 or 2 above is found to exist, the law enforcement agency will not initiate an administrative investigation and will refer to **Addendum** to this **Memorandum of Understanding** and follow all policies and procedures referenced therein.

If the DA authorizes criminal charges resulting from the policy and procedures outlined in the **Addendum**, no further action is required under the terms of this MOU and any additional internal investigation is in the discretion of the law enforcement agency.

If the DA declines criminal charges, the law enforcement agency shall then conduct an administrative review subject to the procedures described in this document and make any required disclosures upon completion.

V. Procedure in Cases of Potential Non-Criminal Misconduct

Upon receipt of substantial information listed in Section III, subsection 3 above, the parties agree to the following procedure:

1. Disclosure Requirement

When there is no substantial information to believe that a criminal offense was committed, but other substantial information about a sworn officer or non-sworn employee exists as defined in Section III above, and that sworn officer or non-sworn employee is a potential witness in a prospective or pending criminal case in Buncombe County, that agency shall inform the DA of the matter.

2. Timing of Disclosure

The agency will disclose the matter to the DA within a reasonable time of this determination, but in no case may the officer or civilian employee testify in a criminal case after such determination until the information is disclosed to the DA and a determination is made pursuant to the terms of this MOU.

3. Manner of Disclosure

The head of the law enforcement agency or their designee, shall prepare a **summary memorandum** of the facts and findings constituting the substantial information. In providing such a summary memorandum, the head of the law enforcement agency agrees, pursuant to N.C.G.S. 160A-168, that the inspection of that summary memorandum by the DA is necessary and essential to the DA's legal obligations established by Brady and other law governing the disclosure of potentially exculpatory material. It is further understood that this information is not provided for the purpose of assisting in a criminal prosecution of the agency employee, and

that the DA will not use any information obtained from the summary memorandum for that purpose. If the DA determines that disclosure is required, the summary memorandum will be turned over to the defense in all cases in which the sworn officer or non-sworn employee is a witness.

The summary memorandum shall be delivered directly to the confidential attention of the DA without unnecessary delay.

VI. Annual Certification

The head of the law enforcement agency or their designee shall issue a certification to the DA by letter or e-mail that the agency is current and in compliance with the provisions of this MOU. This certification shall occur annually during the first quarter of each calendar year.

VII. District Attorney's Office

Upon receipt of the summary memorandum the DA shall, within a reasonable time, review the memorandum and contact the law enforcement agency if additional information is needed to determine whether disclosure to defendants is required. The DA will consider Brady information to be privileged and confidential and maintain the summary memorandum under lock and key.

Upon receipt of the summary memorandum the DA shall make one of the following findings:

1. No further action is required based upon a conclusion that no Brady/Giglio material exists.
2. Disclosure of the summary memorandum to defendants must be provided in cases in which the law enforcement employee is a witness, but the DA is willing to proceed with present and future cases, on a case by case basis, and call that person to testify. The DA will communicate with the officer or civilian employee and prepare to address any such matters when the person testifies at trial.
3. Disclosure is required, and, because of the nature of the information, the DA will not call that officer or civilian employee as a witness in any pending or prospective criminal proceedings.

The DA or designee shall send **written notification** of this finding to the head of the employing law enforcement agency and the agency's attorney within a reasonable time of making the determination.

If disclosure to a defendant in a criminal case is required, the DA will obtain a protective order to ensure that privileged and confidential personnel information will not become public record, that the use of the information is limited to the litigation of the matter before the court and that release of the information is limited to the parties before the court. After obtaining the

appropriate protective order, the DA will deliver a copy of the summary memorandum to the defendant and will do so within a reasonable time regardless of the procedural status of the case. However, if the disclosure is made at a time when the case is set for trial, the DA will not proceed to trial until the defendant has had sufficient opportunity to receive the summary memorandum and take any necessary and appropriate action. If the defendant requests additional information from the DA they will be instructed to follow the appropriate judicial and statutory procedures governing access to public employee personnel records.

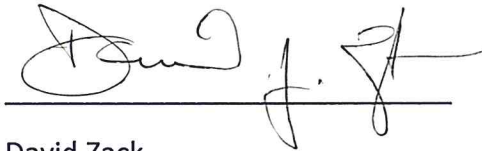
VIII. Duration

This MOU may be modified and amended by mutual consent of the parties. This MOU shall become effective upon signature by the head of the law enforcement agency and the elected District Attorney for Buncombe County and will remain in effect until terminated by mutual consent.

This is the 30 day of July, 2020.



Todd M. Williams
District Attorney
40th Prosecutorial District
Buncombe County, NC



David Zack
Chief
Asheville Police Department
Buncombe County, NC

ADDENDUM to Memorandum of Understanding
Specific Procedure for Cases Involving Potential Criminal Misconduct

I. Scope of Agreement

This Addendum memorializes the agreed procedure for handling the following:

1. All encounters where there is substantial information that an officer used lethal force as defined in the law enforcement agency's Use of Force policy, regardless of whether the use of force resulted in injury or death to any person.
2. Any death of a person while that person is in the custody of an officer or employee.
3. All instances in which substantial information exists that an officer or employee used excessive force in violation of the agency's Use of Force Policy.
4. All instances in which substantial information exists that an officer or employee committed any felony or non-traffic misdemeanor criminal offense or was charged with such an offense while employed with the agency.

II. Investigatory Procedure

1. Upon receipt of substantial information of any event listed in subsections 1 or 2 above, the head of the law enforcement agency, or his or her designee, will notify the DA as soon as possible in addition to requesting an SBI investigation into the event according to established protocol. When practicable, the DA will join in the request.
2. When a preliminary investigation finds that there is substantial information of an event listed in subsection 3 or 4 above, and the event occurred within the jurisdiction of the law enforcement agency, the head of the law enforcement agency will notify the DA before initiating any administrative or criminal investigation. If the DA concludes that the alleged misconduct, if true, would constitute a prosecutable criminal offense, the parties will then decide whether an independent SBI investigation of the matter is warranted. In cases involving potential criminal conduct occurring outside the jurisdiction of the law enforcement agency, the head of the law enforcement agency will notify the DA, but no further consultation is required. If the DA concludes that the alleged misconduct, if true, would not constitute a prosecutable criminal offense, the agency will conduct an appropriate administrative investigation.

3. If an independent criminal investigation is determined to be appropriate, the head of the law enforcement agency or their designee, and the DA, shall promptly contact the NC SBI to request investigative assistance pursuant to NCGS 143B-917. Whenever possible, both the agency and the DA will concurrently request NC SBI assistance. The NC SBI is presumed to be the appropriate agency to provide independent criminal investigative assistance in all incidents involving lethal force or an in-custody death.
4. Should it be appropriate for an investigative agency other than the NC SBI to investigate an incident governed by this MOU, the undersigned parties shall meet, confer and mutually agree whether to utilize the assistance of another agency and make the appropriate request or to have the law enforcement agency investigate the matter internally. Nothing in this MOU shall be interpreted to prevent the law enforcement agency from conducting a criminal investigation of its own personnel when appropriate.
5. Nothing in this MOU or addendum is intended to prevent the law enforcement agency from using the arrest powers listed in N.C. Gen. Stat. 15A-401 when required by the circumstances. In such an event, the arrest and charging of the involved party with all appropriate offenses should occur after consultation with the DA if permitted by the circumstances.
6. The DA will make reasonable efforts to communicate and coordinate with law enforcement agencies to ensure the integrity of the investigation and that any release of accurate information is done in compliance with ethical obligations and relevant North Carolina statutory and case law.
7. Nothing in this section prevents the DA from independently initiating a criminal investigation by the NC State Bureau of Investigation. Should that occur, the DA shall notify the head of the employing law enforcement agency at or before the time of the official request unless the subject of the investigation is the agency head.

III. Review Procedure

Upon receipt of the report of the SBI or other investigating agency, the DA shall, within a reasonable time, review the memorandum and contact the agency with any additional questions or requests for information.

Once in possession of sufficient information to make the determination the DA shall direct the investigating agency to take out appropriate criminal charges against the subject of the investigation or find that no criminal charges are appropriate in the case. The DA will notify the head of the law enforcement agency or designee of the decision as soon as is practicable. Absent unusual circumstances, the DA will provide the law enforcement agency access to any

investigative reports received from investigating agencies regarding law enforcement agency personnel.

IV. Brady/ Giglio Notification Procedure

After making the appropriate determination as to criminal charges, the DA will follow the notification procedure outlined in Section VII of the MOU.

FRANKLIN COUNTY DISTRICT ATTORNEY'S OFFICE POLICY

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February 3, 2020

FRANKLIN COUNTY DISTRICT ATTORNEY GIGLIO PROTOCOL

1. The criminal justice system relies upon the integrity of law enforcement officers (“officers”). Franklin County law enforcement has a long and proud history of upholding the highest standards of integrity, and intends to maintain those standards. The following protocol addresses the handling of potential impeachment information for law enforcement officers, which is called “Giglio material.”

In addressing Giglio issues, certain constitutional mandates govern prosecutors. The Commonwealth must disclose all potential exculpatory material to the defense under Brady v. Maryland, 373 U.S. 83 (1963). The Brady rule also applies to any impeachment evidence under Giglio v. United States, 405 U.S. 150 (1972). Exculpatory and impeachment evidence is material relevant to a finding of guilt, and thus must be disclosed, where there is a reasonable probability that the evidence would result in acquittal. United States v. Bagley, 475 U.S. 667 (1985). Regarding impeachment materials associated with a witness, a prosecutor has the discretion not to call a witness if the prosecutor deems the witness to be lacking in credibility. Commonwealth v. Palermo, 368 Pa. 28 (1951). All of these rules apply equally to civilian and law enforcement witnesses. Because the tracking and disclosure of Giglio material is constitutionally required, Giglio protocols must be followed by prosecutors.

Based on these constitutional mandates and to uphold the integrity of the criminal justice process, the Franklin County District Attorney’s Office (“DA’s Office”) has worked with Franklin County law enforcement to develop the following protocols for dealing with Giglio issues in Franklin County. This protocol is not a disciplinary measure for police departments. The determination, tracking, and disclosure of constitutionally required Giglio material are separate from any disciplinary measures taken by police departments.

2. Giglio material is any impeachment material as defined by Giglio and related cases, including but not limited to:
 - a. Dishonesty in the line of duty;
 - b. Misconduct that is relevant to a prosecution or investigation and negatively affects the integrity of a prosecution or investigation;
 - c. Pending criminal charges or a conviction that would result in loss of law enforcement privileges in Pennsylvania; and
 - d. Bias or prejudice toward any constitutionally-protected group.
3. Each law enforcement agency in Franklin County shall report to the DA's Office if they discover any potential Giglio issues for a law enforcement officer. The agencies should have an internal policy to address Giglio issues. Such reports should be made to the First Assistant District Attorney or other designee of the District Attorney.

Potential Giglio issues may also be directly observed by DA's Office prosecutors and/or detectives. DA's Office prosecutors and detectives shall report such issues to the First Assistant District Attorney or other designee of the District Attorney.

4. The DA's Office will review any potential Giglio material submitted for consideration. Depending on the nature of the information, this may involve an independent investigation by the DA's Office. The law enforcement officer who is being reviewed will be notified, absent exceptional circumstances. The officer who is being reviewed may be requested to submit to an interview, depending on the nature of the potential Giglio material. The officer may be accompanied by an attorney and/or union representative during that presentation. The officer's command supervisors (*e.g.*, Chief and/or designee) also will be notified of the review by the DA's Office.
5. After the DA's Office reviews the potential Giglio material, the DA's Office will make a determination regarding whether the information qualifies as Giglio material.

If the material does not constitute Giglio material, the investigation will be closed. If the material constitutes Giglio material, the DA's Office will use its discretion to exercise two possible options.

First, where there is an affirmative finding of Giglio material regarding a law enforcement officer, that officer may be placed on the DA's Office "Do Not Use List." This applies particularly to on-duty findings of dishonesty. An officer on the Do Not Use List will not be called by the DA's Office as a witness in any case, and will not be permitted to be the affiant on any search warrant or criminal complaint prosecuted by the DA's Office. In the DA's Office's discretion and judgment, allowing such officers to testify would irrevocably taint the criminal justice process, leading to a loss of public trust, potential acquittals of guilty defendants, and endangering the safety and welfare of victims.

Second, in a limited number of instances where there is an affirmative finding of Giglio material regarding an officer, that officer may be placed on the DA's Office "Disclosures List." An officer on the Disclosures List will be reviewed on a case-by-case basis to determine if the Giglio material applicable to that officer will still allow the officer to testify and/or be the affiant on search warrants or criminal complaints.

If an officer on either the Do Not Use List or Disclosures List is called as a witness by either the prosecution or the defense, the DA's Office will disclose the Giglio material regarding that officer to the defense.

6. Where the DA's Office finds that there is Giglio material regarding a law enforcement officer, the DA's Office will notify in writing: (a) the officer; and (b) the officer's command supervisors (*e.g.*, Chief and/or designee) so that the supervisors may take appropriate action regarding the officer's duties. The notification will include the status of the officer (*i.e.*, on the Do Not Use List or Disclosures List) and the procedures for reconsideration (see below). Background checks of any prospective law enforcement employees should include inquiries on the application forms regarding potential Giglio issues or prior determinations of Giglio materials. Any follow-up questions may be directed to the First Assistant District Attorney.

7. Any conclusions reached by the DA's Office regarding Giglio issues are separate and distinct from the internal affairs decisions of a law enforcement agency employing an officer. The DA's Office will not issue a final Giglio determination based on an administrative investigation or matter (*e.g.*, a grievance or arbitration) until after the final adjudication of that matter, although the DA's Office may make interim determinations pending the final administrative review. The DA's Office is not bound by any administrative findings, but may consider those findings in reaching an independent Giglio determination.

8. Where the DA's Office notifies an officer that there has been an affirmative finding regarding Giglio material, that officer has thirty (30) days to request reconsideration by the District Attorney. The officer may make an oral or written presentation to the District Attorney. The officer may be accompanied by an attorney and/or union representative during that presentation.

Where an officer is on the Do Not Use List or Disclosures List, that officer may request a review of his or her status once every two years.

The investigations regarding all officers on the Do Not Use List and Disclosures List are maintained as ongoing investigations by the DA's Office as long as the officer is employed in any law enforcement capacity.

9. The instant protocol is effective this date.

10. One Team, One Fight.

KING COUNTY PROSECUTING ATTORNEY'S OFFICE POLICY



King County Prosecuting Attorney's Office *Brady* Committee Protocol

I. Overview

In *Brady v. Maryland*, the United States 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." *Strickler v. Green*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady*, 373 U.S. 83, 87 (1963). It is the policy of the King County Prosecutor's Office to strictly adhere to our *Brady* obligations.

This written protocol is designed to achieve this goal, and to foster county-wide uniformity in the way *Brady* issues are resolved. *All King County deputy prosecuting attorneys are required to know and follow this protocol.*

It has always been the policy of this office to resolve questions related to *Brady* in favor of disclosure, and this protocol does not change that policy, or our interpretation of CrR 4.7. This protocol addresses only how this office will handle and retain *Brady* material regarding witnesses who, due to their profession, are likely to testify in future cases. This will most often occur with police officers or other government witnesses, such as employees of the crime lab or other experts who routinely testify for the State.

Allegations of misconduct by recurring government witnesses come to our attention in a number of ways. For example, cases are sometimes submitted to the Prosecuting Attorney in which the recurring government witness is a suspect in a crime. Or, a deputy prosecuting attorney may develop concerns about whether certain conduct -- observed, reported or documented by others -- falls within the purview of *Brady*. At other times, a court may enter a factual finding, or rule on a request to disclose disciplinary information, that implicates *Brady*.

Whether allegations of misconduct rise to the level of "evidence material to guilt or punishment" can be a difficult determination. This difficulty is compounded by the fact that there may be more at stake than the legitimate due process rights of the accused. Legitimate privacy interests of the recurring government witness may also be implicated. The Prosecuting Attorney has an obligation to be fair in the resolution of factual disputes having significant consequences for the witness's career. It is the intent of this protocol to balance these interests carefully, while still meeting our constitutional obligations under *Brady*.

This area of law is dynamic, so this protocol may be refined as further guidance is received from courts or the legislature.

II. Basics Of Brady

The United States Supreme Court's decision in *Brady v. Maryland* requires the prosecution to disclose to the defense any evidence that is "favorable to the accused" and "material" on the issue of guilt or punishment. *Brady*, 373 U.S. at 87. Failure to disclose violates the defendant's right to due process. *Id.* 86-87. The test is the same whether the issue arises before, during, or after trial. The prosecutor's duty to disclose applies even if the defense has not requested that piece of information.

"Exculpatory evidence" is evidence favorable to the defendant and likely to change the result on an issue of a defendant's guilt or his or her eventual punishment if convicted. "Favorable evidence" includes not only exculpatory evidence but also evidence that may impeach the credibility of a government witness, whether that witness is a law enforcement officer or a civilian. *Strickler v. Greene*, 527 U.S. at 281-82. "Impeachment evidence" is defined by Evidence Rules 607, 608, and 609. It generally includes any evidence that can be used to impeach the credibility of a witness.

Brady evidence regarding recurring government witnesses usually falls into one of several general categories: misconduct involving dishonesty; evidence of the improper use of force; evidence tending to show a bias or some motive to lie; and -- for expert witnesses -- a pattern of confirmed performance errors that could compromise the expert's conclusions.

The prosecution does not have an obligation to disclose preliminary, challenged or speculative information. *United States v. Agurs*, 427 U.S. 97, 109 n.16 (1976). Nevertheless, the United States Supreme Court has stated that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 108. Thus, we should err on the side of providing timely discovery.

Information that is disclosed is not necessarily admissible; these issues must be kept separate. *State v. Gregory*, 158 Wn.2d 821, 850-51 (2004). Thus, there will be many times when we disclose *Brady* material, but argue strenuously against its admissibility. The mere fact that a recurring government witness has been added to the *Brady* list is not necessarily a comment by the Committee on that individual's future viability as a witness, on his or her reputation, or on the person's ability to serve in his or her current capacity.

III. Brady Committee Composition

A *Brady* Committee will be established to implement this protocol. The Committee will be comprised of five Senior Deputy Prosecuting Attorneys, and led by an Assistant Chief of the Criminal Division. A quorum shall consist of three or more members; a majority vote of those present shall determine a given issue. The Committee will keep a record of all the decisions made in the review proceedings described in section VI.

IV. Information Submitted To Us By Law Enforcement And Government Agencies

Law enforcement agencies will be asked to provide the *Brady* Committee with information on sustained findings of misconduct involving officer dishonesty. This includes any sustained findings or violations of a false verbal or written statement. We will also request all criminal convictions pursuant to CrR 4.7 and *Brady*.

Officers with sustained findings of misconduct involving dishonesty, or criminal convictions pursuant to ER 609, will be added to the *Brady* list without additional review by the *Brady* Committee. If new evidence comes to light or if the finding of misconduct is later dismissed, the *Brady* Committee should be informed so it can decide whether the officer should be removed from the *Brady* list or if other modifications need to be made. In general, negotiated resolutions in lieu of discipline will not result in an officer being removed from the list. In general, dismissals of an allegation obtained through recognized due process procedures will result in the officer being removed from the list. In both scenarios, we reserve the right to keep or remove the officer from the list as necessary to comply with the *Brady* obligations.

Government agencies, such as crime labs, will also be asked to provide the *Brady* Committee with information on sustained findings of dishonesty, and criminal convictions pursuant to CrR 4.7. In addition, government agencies will be asked to provide the *Brady* Committee with information on a confirmed performance error that compromises the expert's final conclusions.

As with officers, State expert witnesses with sustained findings of misconduct involving dishonesty, criminal convictions pursuant to ER 609, or a pattern of confirmed performance errors that compromise the expert's conclusions, will be added to the *Brady* list without additional review by the *Brady* Committee. If new evidence comes to light or the finding is overturned, the *Brady* Committee should be informed so it can decide whether the employee should be removed from the *Brady* list.

The *Brady* Committee's conclusions will be limited to whether the recurring government witness will be added to the *Brady* list. The Committee will not give advisory opinions.

V. Deputy Prosecuting Attorney Responsibilities

1. If a DPA or any staff member becomes aware of potential *Brady* material regarding a recurring government witness, the deputy or staff member shall inform the appropriate Unit Chair or Vice Chair.
2. If the Unit Chair or Vice Chair believes that the information could constitute *Brady* material, he or she will direct the DPA to prepare a memorandum summarizing the material. The memo should focus only on facts and avoid conclusions or speculation.
3. The Unit Chair or Vice Chair shall present the memorandum and all related material/evidence to the *Brady* Committee.

VI. Brady Committee Review Procedure

1. When the Committee receives a notification form from a Unit Chair or Vice Chair, it will make an initial determination by asking the following question:

If proven true, does the allegation constitute *Brady* material?

- a. If the answer is no, the inquiry is finished.
 - b. If the answer is yes, the formal review will continue.
2. The Committee may conduct any additional investigation it deems necessary. The Committee will review the memorandum, related materials, and any additional evidence it has obtained, to answer the following question:

Is the Committee convinced by a preponderance of the evidence that the allegation is true?

- a. If the answer is no, the inquiry is finished.
 - b. If the answer is yes, the government witness and the relevant agency will be notified per section 3.
3. The Committee will notify the relevant agency that potential *Brady* material has been found. It will be left to the discretion of the relevant agency to notify the witness.

- a. The witness and the relevant agency will be allowed to submit a response, with additional evidence they would like the Committee to consider, in writing within 20 days.

1. Witnesses should be aware that if a trial date is pending, the Committee may decide that it is necessary to disclose the material in its possession before a response has been submitted.

- b. If no response is received, the government witness shall be added to the *Brady* list and notification should be sent to the witness and the relevant agency.
4. If a response is received, the Committee will review the additional evidence and again ask the following question:

Is the Committee convinced by a preponderance of the evidence that the allegation is true?

- a. If the answer is no, the inquiry is finished. The witness and the relevant agency should be informed of the decision.
- b. If the answer is yes, the witness shall be added to the *Brady* list and notification should be sent to the witness and the relevant agency.

If new evidence comes to light after the time period provided for a response under section 3(a) has expired, the witness may send that evidence to the Committee and ask it to reconsider its decision. Additionally, the Committee may reconsider a witness's placement on the *Brady* list based upon court rulings that help define or clarify the issue. The Committee may modify this procedure when necessary.

VII. Brady List

A secure electronic database shall be maintained by the Committee with copies of all *Brady* material. Hard copies of the *Brady* material will be kept in a single secure location. Access to the *Brady* materials will be monitored.

When a subpoena is issued, a DPA will automatically receive notice that a recurring government witness is associated with *Brady* material. The DPA will also be permitted to view the *Brady* list to determine if any witness has *Brady* material.

Witnesses on the *Brady* list will be classified as having either potential impeachment evidence (*Brady* material), or criminal convictions that do not encompass a crime of dishonesty or false statement.

VIII. Procedures To Follow When A Deputy Prosecuting Attorney Discovers That A Potential Trial Witness Is On The Brady List

When a DPA becomes aware that a subpoenaed witness is on the *Brady* list, the DPA should request more detail from the Committee about the nature of the *Brady* material. In some instances, it will immediately be apparent that the nature of the material would not mandate discovery in the specific case (e.g., evidence of improper use of force not discoverable in case where witness's potential testimony involves only packaging of narcotics.) If the Unit Chair or Vice Chair and the DPA determine that the potential *Brady* material is not discoverable, due to the specific facts of the case and the witness's anticipated testimony, the DPA shall notify the Chair of the *Brady* Committee.

In all other instances, the DPA should discuss with the Unit Chair or Vice Chair whether the material should be disclosed directly to the defense attorney, or if it should be submitted to the court for an *in camera* review. The DPA should also discuss with the Unit Chair or Vice Chair the need for a protective order. The DPA shall notify the *Brady* Committee if (1) they receive any new information about the *Brady* material and/or (2) if a judge in their case makes a ruling regarding the admissibility of the *Brady* material.

IX. When Potential Brady Material Is Discovered During Trial Or Under Time Constraints

The DPA should talk to the Unit Chair or Vice Chair and a member of the *Brady* Committee to determine an appropriate action. When time permits, the formal procedure should be utilized.

MARICOPA COUNTY ATTORNEY'S OFFICE POLICY

Maricopa County Attorney's Office Prosecution Policies and Procedures

CHAPTER TRIAL PREPARATION	EFFECTIVE DATE 12/24/03	PROCEDURE # 6.4
SECTION LAW ENFORCEMENT INTEGRITY RECORDS		
DISTRIBUTION TRIAL ATTORNEYS	REVISION DATE 01/12/18	REVISION # 5

In order to satisfy the disclosure obligations of Brady vs. Maryland, 373 U.S. 83 (1963), the Maricopa County Attorney's Office will maintain a Rule 15 Discovery Database ("the database") containing the names of officers and other law enforcement personnel who have engaged in conduct that is required to be disclosed by the prosecution. All cases will be reviewed against this database and the Maricopa County Attorney's Office shall provide notice to the court and/or all records to the defense attorney related to such a finding in all cases in which the law enforcement employee is a witness.

A. RULE 15 DISCOVERY DATABASE COMMITTEE

1. Committee Members and Meetings

The Rule 15 Discovery Database Committee shall consist of the Law Enforcement Liaison and the Criminal Division Chiefs. The Law Enforcement Liaison shall chair the Committee. The Committee shall convene at the request of the Chair to review referrals.

2. Review of Law Enforcement Referrals

- a. The Chair will receive all referrals from law enforcement regarding negative administrative determinations regarding a law enforcement employee's truthfulness, bias, moral turpitude, a court ruling or order implicating a *Brady* finding or any other information determined to constitute *Brady* material. Upon receipt of the referral, the Chair shall have the referral logged and a letter of receipt sent to the law enforcement employee who is the subject of the referral. The Chair will screen the law enforcement referrals and set Committee meetings to review all referrals that contain negative determinations regarding a law enforcement employee's truthfulness, bias, moral turpitude or any other information determined to constitute *Brady* material. The Chair will ensure that the law enforcement referral includes all of the material on the allegations that lead to the negative determination, as well as any exculpatory or mitigating information known to exist, and distribute that material to the Committee members prior to the meeting.

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b. The Committee will meet, as needed, to review the law enforcement material and determine whether a law enforcement employee's name shall be added to the Database. The committee will apply the standards set forth in *Brady v. Maryland* and its progeny. If the committee determines that the information could reasonably affect the outcome of any trial and/or any sentencing, the information shall be disclosed and the employee's name added to the database. Upon completion of the review, the Chair shall send a letter to the subject law enforcement employee and the agency that made the referral describing the Committee's findings.

3. Review of MCAO Referrals

Any DCA who observes or becomes aware of law enforcement conduct that may be related to a law enforcement employee's truthfulness, bias, moral turpitude, a court ruling or order implicating a *Brady* finding or any other information determined to constitute *Brady* material shall report the matter to the Law Enforcement Integrity Review Chair. The Maricopa County Attorney's Office may initiate an investigation that leads to a law enforcement employee's name being added to the database. The investigation shall include providing the subject law enforcement employee the opportunity to respond to the allegations. The results of the investigation will be reviewed by the Committee, including an evaluation of the law enforcement employee's response. The Committee will apply the standards set forth in *Brady v. Maryland* and its progeny. If the Committee determines that the information could reasonably affect the outcome of any trial and/or any sentencing, the information shall be disclosed and the employee's name added to the database. The disclosure material will be the investigation report and the Committee's written finding that the law enforcement employee should be included in the Rule 15 Discovery Database.

4. Review of Other Referrals

Other referrals shall be forwarded to the employee's agency for a complete and thorough administrative investigation. The results of the investigation will be reviewed by the Committee, including an evaluation of the law enforcement employee's response. The Committee will apply the standards set forth in *Brady v. Maryland* and its progeny. If the Committee determines that the information

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could reasonably affect the outcome of any trial and/or any sentencing, the information shall be disclosed and the employee's name added to the database. The disclosure material will be the investigation report and the Committee's written finding that the law enforcement employee should be included in the Rule 15 Discovery Database.

5. Redaction

Upon receipt of documentation from the database each DCA shall review the documentation and redact any privileged or statutorily confidential information (i.e. Identifying information of a crime victim or officer, such as address, telephone number, social security number, etc.) before the records are disclosed to the defendant.

6. Review of Administrative Hearing Rulings

If a law enforcement employee has been added to the database and a different external administrative body makes a conflicting decision about the law enforcement employee's conduct, the Committee shall review the later material and determine whether the law enforcement employee's name should be eliminated from the list. The Committee will apply the standards set forth in *Brady v. Maryland* and its progeny. If the Committee determines that the information could reasonably affect the outcome of any trial and/or any sentencing, the information shall be disclosed and the employee will remain in the database. The Committee has a duty to determine if any given investigation or administrative ruling constitutes *Brady* material.

B. DISCLOSURE OF LAW ENFORCEMENT INTEGRITY RECORDS

When a case is opened and again whenever transferred to another DCA, the DCA, paralegal or support staff shall check the names of the law enforcement employees in the case against the database and note in the PBK case notes if a law enforcement employee involved in the case is in the database. If any law enforcement employee involved in the case is in the database, the DCA, paralegal or support staff will contact the law enforcement liaison to obtain copies of the documentation supporting the law enforcement employee being in the database. The DCA shall do the following:

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1. The DCA shall disclose in writing to the defendant that the law enforcement employee is in the database.
2. The DCA shall disclose all documentation to the defendant except redactions made under section (A)(5) of this policy.
3. Material that must be disclosed is not always admissible evidence in trial. The DCA shall determine whether the law enforcement integrity information in a particular case is admissible and what arguments to make regarding admissibility. If a DCA requests preclusion of the documentation from trial, the DCA shall file a written motion with supporting factual and legal analysis justifying the state's motion to preclude.

C. CLOSEOUT

A copy of all documents disclosed to the defendant shall be retained in the documents tab of the case in PBK and a completed report regarding the court's ruling on any motion to preclude shall be returned to the law enforcement liaison before or upon disposition of the case. A DCA does not need to return any documentation provided electronically. The DCA shall note in the case log the existence of any protective orders issued by the court.

To ensure that DCAs receive complete and accurate information, no employee may establish or maintain a database or set of documents. A separate request for records from the law enforcement liaison shall be made for each case in which the law enforcement employee is involved.

D. APPEALS PROCESS

Any law enforcement employee placed in the Database will be provided written notice of their inclusion. The employee will be given the opportunity to appeal the decision within 20 days of the written notice. The Committee will review any written materials provided to the office but will not take testimony or conduct an independent investigation. If after the review the Committee determines that the information could reasonably affect the outcome of any trial and/or any sentencing, the employee will remain in the database.

PHILADELPHIA DISTRICT ATTORNEY'S OFFICE POLICY



DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

Effective Immediately

Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (*Giglio* Information)

During prior administrations, the Philadelphia District Attorney's Office (DAO) had arrangements with local law enforcement agencies regarding how each agency would disclose police officer misconduct to the DAO. Said arrangements and any resulting policies were developed in response to a prosecutor's constitutional obligations to disclose favorable evidence, no matter where in the government it is held, to the defense.

In recognition of a law enforcement officer's special status as a witness in a criminal case *and* as a prosecution-team member, the current administration has reviewed prior arrangements and has adopted a new police officer misconduct disclosure policy. As a consequence, **effective immediately**, the DAO issues this mission statement and request for compliance from each law enforcement agency filing criminal charges with the DAO.

Mission Statement

The DAO has an affirmative duty to critically inquire as to an officer's conduct, personnel history or information from a personnel file that might constitute exculpatory, impeachment or mitigating information in a particular criminal case (hereinafter referred to as misconduct). In the specific context of officer personnel files, *Brady* requires the DAO to direct the custodian of the files to inspect them for exculpatory evidence and inform the prosecution of the results of that inspection. *United States v. Dent*, 149 F.3d 180, 191 (3rd Cir. 1998) (citing *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963)). These types of inquiries and directives are only meaningful if the DAO then properly obtains and timely discloses necessary information regarding the identified misconduct to the defense. Pa.R.Crim.P. 573(B)(1)(a). *See also, US v. Bagley*, 473 U.S. 667 (1985).

All misconduct disclosure procedures apply to "officers," defined as peace officers, jailers, and civilian employees acting in a law enforcement capacity and employed by county or city law enforcement or any other law enforcement agency with jurisdiction in Philadelphia County, as well as arson investigators employed by county or city fire agencies within Philadelphia County.

The DAO is required to exercise due diligence in light of our statutory discovery obligations under Pa.R.Crim.P. 573(B)(1)(a) and our constitutional responsibilities under *Brady* and its progeny to ensure that all defendants receive a fair trial. Failure to disclose such evidence can result in the reversal of a conviction and, in extreme cases, prosecution of violators. *See Brady*, 373 U.S. at 87. It can also result in conviction of the innocent while the guilty go free. The United States Supreme Court has long held that evidence that could potentially assist in the

defense of an individual accused of a crime must be disclosed to the defense. The law also places the duty to disclose squarely on prosecuting attorneys; accordingly, information known to law enforcement agencies, even if not disclosed by those agencies to the prosecution, is still imputed to the prosecution. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Comm. v. Collins*, 957 A.2d 237, 254 (Pa. 2008). In furtherance of this stated mission, an internal office database has been created in the DAO to maintain all qualifying information.

These efforts by the DAO in no way reduce the independent *Brady* obligations of other law enforcement agencies, including where the DA fails to meet its *Brady* obligation. Officer privacy rights, to the extent that they may exist, will be safeguarded under circumstances that do not violate the law.

Reporting Policies and Procedures

1. Misconduct Defined and Law Enforcement Agency’s Obligation to Notify DAO

A. General Obligation to Disclose

- The DAO will rely on the professional policing practices of our partners in law enforcement to notify us of any potentially qualifying misconduct by officers that should be disclosed to the defense. Each respective law enforcement agency must determine whether there are any instances which fall into any of the categories listed below and, if so, make those instances known to the DAO.
- However, the enumerated definitions and categories provide a non-exclusive list of conduct, violations and offenses that implicate disclosure. Any list is not meant to be exhaustive, nor can it be exhaustive. Prosecutors, who are charged with the responsibility over “all criminal and other prosecutions, in the name of the Commonwealth,” are “forced to make judgement calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the potential evidentiary record.” *Kyles*, 514 U.S. at 438-39.

B. Specific Requests

With the above caveat in mind, the DAO is directing the custodian of records in each law enforcement agency to examine current and future officers’ personnel files and current and future officers’ conduct and notify the DAO as soon as possible when:

1. an officer is named in a criminal complaint or indictment, or is the subject of an ongoing criminal investigation for any crime by any agency other than a non-criminal traffic violation;
2. an officer has been charged with a felony or misdemeanor, other than a non-criminal traffic violation, resulting in a conviction or pretrial diversion;
3. an officer is the subject of a pending investigation, sustained finding, or conclusion by the law enforcement agency, at any administrative or disciplinary level, for any of the following:

- i. misrepresentation or failure to disclose a material fact on the officer’s employment application;
 - ii. untruthfulness or deception regarding facts in a report, statement, or testimony at a hearing or other official proceeding or investigation concerning conduct of the officer or others;
 - iii. conduct that would be a violation of an individual’s constitutional rights;
 - iv. bias or prejudice against an individual, class, or group of persons;
 - v. improper use of force against an individual; or
 - vi. altering, tampering, concealing, or misuse of evidence – with the exception of legitimate manipulation in the normal scope of law enforcement business (such as amending a report to correct a typographical error);
4. an employee resigns, receives a demotion, or is subject to other disciplinary or employment-related action when an investigation is imminent or pending involving any matter listed in subsection 1, 2, 3(a) – (f) above, or in relation to 5 below; or
 5. in the case of an expert witness, the law enforcement agency has information related to the expert’s performance deficiencies that affect the integrity of the expert’s conclusion or opinions.¹

2. Compliance Procedure

A. Law Enforcement Agency Process

- Furnish to the DAO the officer’s name, payroll number, badge number; date of birth; and
 - 1) a description of the misconduct if there is a pending investigation; or
 - 2) all relevant documents and information if there has been a sustained finding regarding the misconduct.
- State whether the disclosure is classified as a “pending investigation” or “sustained finding.” Pending investigation or sustained finding is defined in a manner consistent with the law enforcement agency’s individual rules and procedures.
- Update the DAO of any changes to classifications, including a notification of requested removal from the database where warranted as a result of the investigation.

¹ Performance deficiencies that affect the integrity of the expert’s conclusions or opinions include a reportable event required to be disclosed to the agency’s accrediting body. Any subsequent action by the accrediting body, or any subsequently required root-cause analysis, should also be disclosed to the DAO. A reportable event is one which 1) impacts the fundamental reliability of the overall laboratory/agency work product such that it poses a significant risk to processes, results, test/calibration items or judicial proceedings; or 2) does not impact the fundamental reliability of the overall laboratory/agency work product but does cast substantial doubt on the quality of the work product. A reportable event does not include nonconformity with applications of standards, procedures or policies that are limited and appropriately addressed during quality assurance or control protocols and attendant conducted root cause analysis, provided that such nonconformity is contained and disclosed within the bench notes of any affected case(s).

- Err on the side of transparency; contact the DAO if in doubt as to whether the conduct requires disclosure.

B. District Attorney Process

- a. Categorize the disclosure as either “pending” or “final,” as relayed by the law enforcement agency, and notify the law enforcement agency of inclusion in the database. The “pending” category will contain information submitted about pending formal investigations. If pending allegations are sustained, the inclusion will be re-categorized as final. If the allegations are not sustained, the case may be removed from the database.
- b. Update the appropriate law enforcement agency regarding any reclassification or removals.
- c. Classify any allegations that, if sustained would lead to a “final” classification, but in which the officer resigns or is terminated before the investigating body makes formal findings as “final.” Further, the DAO shall maintain this information in the database unless and until good cause is shown for its removal.
- d. Notify the law enforcement agency of information independently discovered by the DAO that may warrant inclusion in the database. If the independently discovered information is a claim of untruthfulness from conduct occurring during judicial proceedings, the individual prosecutor must immediately report such allegation to the prosecutor’s supervisor for the investigation and initiation of appropriate charges, if any.
- e. The DAO will require Assistant District Attorneys (ADAs) to check the database as soon as practicable (at charging and when officer subpoenas are issued) and notify defense counsel of inclusions. “Pending” notices should normally be made to the defense as a matter of course. Provided, however, in the rare circumstances where there is reason to believe that disclosure may unfairly prejudice the Commonwealth or the individual officer, the disclosure shall first be submitted to the court under seal with a request for a court ruling on the duty, if any, of the DAO to disclose to defense counsel. Notice shall be provided to defense counsel where this procedure is invoked.
- f. Disclosure information will be used to meet the Commonwealth’s obligation under the law with respect to cases that we prosecute.
- g. The decision as to whether an officer in the database will be called as a witness will be made on a case-by-case basis.
- h. There will be a rebuttable presumption not to call an officer who is included in the database for:
 - i. criminal conduct involving deceit or untruthfulness; and/or
 - ii. untruthfulness or deception regarding facts in a report, statement, or testimony at a hearing or other official proceeding or investigation concerning conduct of the officer or others.

- i. **Disclosure does not equal admissibility and, where appropriate, the ADA will object to the admissibility of the disclosed evidence through written motions. Where appropriate, the DAO will also seek protective orders to protect the privacy concerns of officers where determinations are not final.**
- j. Upon an officer's written inquiry as to whether the officer is in the database on the basis of a "final" disclosure, provide that information.
- k. Disclose an officer's inclusion in the database to a potential employer agency with an executed waiver by the applicant to the law enforcement agency.

SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE POLICY

**INTERNAL *BRADY* POLICY**

ISSUED: 4/21/2010

REVISED: 8/13/2010

REVISED: 9/30/2016

INTRODUCTION

The following is an “Internal” *Brady* Policy that addresses favorable information in the actual possession of the San Francisco District Attorney’s Office, as opposed to favorable information contained in confidential personnel files. This Internal *Brady* Policy covers peace officer witnesses, as well as civilian employees of law enforcement agencies and experts who may be witnesses in criminal cases.

In order to comply with our constitutional discovery obligations, the San Francisco District Attorney’s Office has implemented procedures: (1) to identify and review alleged misconduct by and/or evidence impacting the credibility of experts and employees of law enforcement agencies who may be witnesses in criminal cases to determine whether disclosure is required under *Brady v. Maryland* (1963) 373 U.S. 83; and (2) to ensure that prosecutors know of the existence of such information so that disclosure can be made to the defense.

To the extent that favorable information is contained within a confidential personnel file, that information is addressed in the “External” *Brady* Policy.



CHESA BOUDIN
District Attorney

I. WHAT CONSTITUTES *BRADY* MATERIAL

A. The District Attorney is obligated to provide favorable, exculpatory evidence that is material to either guilt or punishment to the defense in a criminal case. (*Brady, supra*, 373 U.S. at p. 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.) The evidence must raise “reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different [citation] – that is to say, a probability sufficient to undermine confidence in the outcome.” (*In re Sassounian* (1995) 9 Cal. 4th 535, 543-544, n. 6.)¹

B. “Exculpatory” means favorable to the accused. Favorable information includes “substantial material evidence bearing on the credibility of a key prosecution witness.” (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) Such impeachment evidence must disclose 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.)

C. 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.) However, “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” (*Id.* at p. 108; see also, *Kyles v. Whitley* (1995) 514 U.S. 419, 439 [warning prosecutors against “tacking too close to the wind” in withholding evidence].)

D. Examples of evidence that may constitute favorable *Brady* information

¹ As set forth in Section II.E., below, it is the policy of the San Francisco District Attorney’s Office to disclose favorable information to the defense, regardless of its materiality.



include, but are not limited to:

1. The character of the witness for honesty or veracity or their opposites. (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. Felony convictions involving moral turpitude. (Evid. Code § 788; *People v. Castro* (1985) 38 Cal.3d 301, 314.)²
5. Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.)
6. False reports by a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)
7. Pending criminal charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)
8. 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.)
9. Evidence undermining an expert witness's expertise. (*People v.*

² Discovery of all felony convictions is statutorily required for 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.)



Garcia (1993) 17 Cal.App.4th 1169, 1179.)

10. 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.)

11. Facts establishing criminal or non-criminal misconduct involving moral turpitude. (*People v. Rivera* (2003) 107 Cal.App.4th 1374; *People v. Houson* (2005) 130 Cal.App.4th 279; *People v. Lepolo* (1997) 55 Cal.App.4th 85.)

There is no statute of limitations placed upon conduct that qualifies as *Brady* information.

E. A prosecutor must disclose potential *Brady* information to the defense prior to a preliminary hearing. (*People v. Gutierrez* (2013) 214 Cal.App.4th 363; *Bridgforth v. Superior Court* (2013) 214 Cal.App.4th 1074.)

F. A prosecutor, however, need not disclose material impeachment evidence prior to entering a plea agreement with a defendant, unless it establishes factual innocence. (*United States v. Ruiz* (2002) 536 U.S. 622.)

G. The disclosure duty applies even to completed cases. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.) A prosecutor is “bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25; *In re Lawley* (2008) 42 Cal.4th 1231, 1246 [same].)



II. PROCEDURE FOR REVIEW OF POTENTIAL *BRADY* INFORMATION

A. Upon learning of any alleged misconduct by and/or evidence that impacts the credibility of an expert and/or an employee of a law enforcement agency who may be a witness in criminal case that may be subject to discovery under *Brady* (see Section I.D., above), all prosecutors, district attorney investigators, or other employees of the District Attorney shall provide this information to the Trial Integrity Unit of the San Francisco District Attorney's Office within two (2) business days, so that the material may then be distributed to and reviewed by its *Brady* Committee in a timely manner. This includes any Body Worn Camera footage that contains potential *Brady* material.

B. The *Brady* Committee will then conduct a thorough analysis pursuant to the procedures outlined herein to determine if it is required to disclose the information under *Brady*. All prosecutors, district attorney investigators, or other employees of the District Attorney shall also advise the Trial Integrity Unit if they become aware of any of the following information regarding any experts and/or employees of law enforcement agencies who may be witnesses in criminal cases:

1. Open criminal investigations;
2. Rejections of requests for initiation of prosecution;
3. Initiated prosecutions;
4. Criminal convictions; or
5. Any probationary status.

B. All available information concerning alleged misconduct by and/or



evidence impacting the credibility of experts and/or employees of law enforcement agencies who may be witnesses in criminal cases, including the transcript of any testimony provided, shall be forwarded to the Trial Integrity Unit for distribution to the *Brady* Committee.

C. The *Brady* Committee consists of eight (8) prosecutors trained regarding the applicable law. All eight (8) members of the *Brady* Committee serve at the will of the District Attorney. The minimum number of members of the *Brady* Committee to constitute a quorum is four (4). Committee members may submit their votes in advance of the meeting if they are unable to attend. Voting shall be determined by a simple majority.

D. The *Brady* Committee shall review and analyze the materials in light of current applicable law. Absent extraordinary circumstances, the District Attorney's Office will not seek to interview the expert and/or employee of the law enforcement agency.

E. The standard of proof for disclosure of information shall be the "substantial information" standard. Substantial information is defined as facially credible information that is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event.³

F. The *Brady* Committee shall evaluate all information received and determine

³ Recently, the Ninth Circuit suggested that prosecutors disclose favorable evidence in the pre-trial context, without assessing the materiality of the evidence. "A trial prosecutor's speculative prediction about the likely materiality of favorable evidence, however, should not limit the disclosure of such evidence, because it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be 'material' after trial." (*United States v. Olson* (9th Cir. 2013) 704 F.3d 1172, 1183, fn. 3.)



what disclosure, if any, is appropriate. Following the initial review, the *Brady* Committee shall decide which of the following conclusions is appropriate: (1) the materials do not constitute *Brady* material (see Section II.G., below); (2) it appears that disclosure may be required under *Brady* (see Section II.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 Section II.I., below).

G. If the *Brady* Committee concludes that based on the initial review it is clear that the information does not constitute *Brady*, the *Brady* inquiry shall be closed, subject to the approval of the District Attorney (see Section IV., below). The *Brady* Committee, however, may further analyze the information to determine whether disclosure is required under other discovery obligations, i.e., under *Engstrom*⁴ and/or under a standard less than substantial information for *Wheeler*⁵ purposes.

H. If the *Brady* Committee determines that disclosure is appropriate, it shall send written notification to the expert and/or employee of the law enforcement agency and the head of the employing agency describing the nature of the conduct.

1. This written notification may be sent via email directly to the expert and/or employee of the law enforcement agency and the head of the employing agency to ensure timely notification.

2. There might be instances where providing notice is not immediately practicable or possible and that decision will be made by the *Brady* Committee,

⁴ (*Engstrom v. Superior Court* (1971) 20 Cal.App.3d 240 [where a claim of self-defense is offered, and the alleged victim of an offense is claimed to have been the aggressor, information concerning arrests for specific acts of aggression by the alleged victim must be produced if available to the prosecutor].)

⁵ (*People v. Wheeler* (1992) 4 Cal.4th 284.)



the Chief of Operations, or the District Attorney.

3. The expert and/or employee of the law enforcement agency shall be entitled to review the information initially submitted to the *Brady* Committee, excepting any privileged materials.

4. The expert and/or employee of the law enforcement agency shall then have fifteen (15) days to submit a written response to address the allegation.

5. In the event that the expert and/or employee of the law enforcement agency requests further time and no urgency exists to complete the evaluation, the *Brady* Committee may extend the time for a written response for a reasonable period of time, not to exceed thirty (30) days from the time of the initial notice.

6. If the *Brady* information resulted in either criminal charges being filed against the expert and/or the employee of the law enforcement agency or being placed on a grant of probation, there will be no opportunity to provide written comments, objections and/or additional information. Under these circumstances, the expert and/or employee of the law enforcement agency will receive notification that their name will be added to the *Brady* list.

7. After reviewing all pertinent information, including the written response, if any, the *Brady* Committee's decision may include, but is not limited to:

a. The information still constitutes *Brady* and discovery must be provided in all cases in which the expert or employee of the law enforcement agency is or was a material witness. The *Brady* Committee will provide notice of this decision, which is subject to the approval of the District Attorney (see Section IV, below).



i. In appropriate cases, a computer or other search of pending and/or past cases may be conducted so that defense counsel may be notified;

ii. In order to ensure actual notice to the defendant, all notifications sent to defense counsel shall include a request that the San Francisco District Attorney's Office be notified if counsel no longer represents defendant or is no longer practicing law.

iii. Blanket notification to the defense bar may also be appropriate as a back-up form of notification in situations in which the San Francisco District Attorney's Office cannot be confident that it has identified and notified all of the affected parties.

b. The information does not constitute *Brady*. The *Brady* Committee will provide notice of this decision, which is subject to the approval of the District Attorney (see Section IV., below). Even if disclosure is not required under *Brady*, the Committee may consider whether disclosure may be required under other statutory or legal discovery obligations (see Section II.G., above).

c. In rare cases, the Committee may present information to a judge for in camera review. (See Section III, below.).

I. In some cases, after the initial review, the *Brady* Committee may conclude that the District Attorney's Office is not in possession of sufficient information to conclude whether the conduct falls within *Brady*, but that further investigation is appropriate.

1. Absent extraordinary circumstances, the District Attorney's Office



will not seek to interview the officer or other employees of the officer's agency. In such cases, 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. The employing law enforcement agency may reach the following conclusions:

a. 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 may not be warranted because the information is "preliminary, challenged, or speculative." (*Agurs, supra*, 427 U.S. at p. 109, fn. 16.)

b. If the employing law enforcement agency sustains the complaint, notification will be made to the District Attorney that the personnel file may contain *Brady* information. The District Attorney's Office may either:

i. Provide notification to defense counsel.

(*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696);

or

ii. Make a motion under Evidence Code §

1040/1043/*Brady* so that the court may examine the information in camera and determine whether disclosure must be made under *Brady*. (See section VI, below.)

3. This policy shall not limit the authority of the District Attorney's Office to conduct criminal investigations.



III. ABBREVIATED PROCEDURE FOR *BRADY* COMMITTEE REVIEW

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. In such instances, it may not be possible or feasible to conduct the full review procedure described above before the information is provided to the defense. In such cases, immediate disclosure may be made to the defense.

B. Immediate disclosure shall only be made under the following conditions:

1. With the express consent of the Chief of Operations or District Attorney or, if neither of them can be contacted within the time during which discovery is required, with the express consent of the Chief of the *Brady* Appellate and Training Division, the Chiefs of the Criminal Division, or the Chief of Special Operations, or

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, expert and/or the employee of the law enforcement agency will be afforded a more abbreviated opportunity to be heard if it is feasible to do so.

IV. DECISIONS OF THE *BRADY* COMMITTEE

A. Once the *Brady* Committee has completed its review, the Committee shall issue a written recommendation to the District Attorney for review.

B. Absent extraordinary circumstances, the written recommendation by the *Brady* Committee should be issued within forty-five (45) days of its receipt of the case.



CHESA BOUDIN
District Attorney

C. Review of the *Brady* Committee's recommendation by the District Attorney shall be completed within ten (10) days after its submission to the District Attorney. After 10 days, the decision of the *Brady* Committee becomes final.

D. Should the District Attorney reach a different conclusion from the *Brady* Committee, the law enforcement employee will have an additional fifteen (15) days to provide an additional written response to the District Attorney.

E. Conclusions of the *Brady* Committee ratified by the District Attorney represent the official position of the San Francisco District Attorney's Office on the issue of whether or not the information in question qualifies as *Brady*. The prosecuting attorney must treat the information accordingly. If, after meeting with the *Brady* Committee, the prosecutor trying the case disagrees with the decision, he or she may be re-assigned off of the case or may be recused from further prosecuting the case.

V. ADMINISTRATIVE FILES

A. The materials reviewed, the written recommendation of the *Brady* Committee, and the District Attorney's ratification, or lack thereof, shall be maintained in a separate *Brady* administrative file which will be stored in a secure location in the District Attorney's Office. Any digital version of the materials reviewed, the written recommendation, and the District Attorney's ratification, or lack thereof, shall be maintained on a restricted, secure database.

B. In those cases where a determination was made that the information is subject to discovery under *Brady*, the discoverable information shall be maintained in a separate file for purposes of complying with discovery obligations in future cases. The discoverable information shall also be uploaded to the secure SharePoint site maintained by the Trial Integrity Unit.



C. The discoverable information shall only be accessed for case-related purposes.

D. A written or secure digital record shall be maintained regarding the name of each employee who accessed the information and the case for which access was obtained. Only the *Brady* information relevant to the particular case will be disclosed or otherwise discovered.

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

VI. 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. (*Agurs, supra*, 427 U.S. at p. 106; *United States v. Dupuy* (9th Cir. 1985) 760 F2d 1492, 1502.) The option of submitting the *Brady* information in the actual possession of the District Attorney for in camera review should be considered in rare cases, after consultation with the *Brady* Committee.

B. If the *Brady* Committee concludes that disclosure of material regarding a law enforcement officer may be required under *Brady*, the in camera procedure shall be employed for the following:

1. Information regarding any incident that is also the subject of a pending internal investigation by the employing law enforcement agency.
2. Any potentially privileged materials.



3. When it is unclear whether the law requires the information to be disclosed. (See Section II.H.6.c., above.)

C. 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.

D. If information in the actual possession of the District Attorney regarding the credibility of a law enforcement employee is discovered to the defense pursuant to *Brady* after an in camera review, the assigned prosecutor shall provide the *Brady* Committee with a copy of the information ordered by the judge to be discovered. The *Brady* Committee shall then include this information in the administrative file maintained for that law enforcement employee, unless the court has made a limiting order regarding disclosure of the information. If the information to be disclosed includes materials from an officer's personnel file, the fact that such information was disclosed shall be noted, but the substance of the information shall be retained in the administrative file.

VII. PROVIDING *BRADY* DISCOVERY TO THE DEFENSE

A. A database list ("*Brady* List") has been created, which lists the names of expert and/or the employee of the law enforcement agency who have been identified as having potential *Brady* material, either under the Internal *Brady* Policy or the External *Brady* Policy.

B. At the time of rebooking, prosecutors must review the *Brady* list to determine if any logical, material witnesses has any potential *Brady* information, either in the actual or constructive possession of the prosecution ("*Internal Brady*") or in confidential personnel files ("*External Brady*"). The rebooking prosecutor shall note the



date and result of that review on the Work Product Sheet, commonly referred to as the Blue Sheet.

C. Within two (2) business days of arraignment, prosecutors must notify the defense if there is any External *Brady* information in the personnel file of any logical, material witness. See External *Brady* Policy for further instructions.

D. Prosecutors must also review the *Brady* list and disclose any Internal *Brady* information to the defense for any logical, material expert and/or employee of the law enforcement agency that is subpoenaed by or will testify on behalf of the prosecution.

E. The *Brady* list is accessible only to attorneys using a shared computer drive on a read-only basis and will only identify the individual by name, star number (if applicable), and employing agency.

F. A prosecutor must disclose Internal *Brady* information to the defense prior to a preliminary hearing. (*People v. Gutierrez* (2013) 214 Cal.App.4th 363; *Bridgforth v. Superior Court* (2013) 214 Cal.App.4th 1074.) It is the practice of the San Francisco District Attorney's Office to provide Internal *Brady* information to the defense prior to any other substantive hearing. Adoption of this practice for substantive hearings other than preliminary hearings in no way indicates that *Brady* disclosure is legally required. See External *Brady* Policy for instructions regarding disclosure of *Brady* information contained in confidential personnel files.

G. Fulfillment of the prosecution's obligation to provide discovery of *Brady* material is the sole responsibility of the individual prosecutor assigned to the case and shall be done without a defense request. In addition, the prosecutor shall note the date of disclosure on the Blue Sheet in the case file, and shall obtain a signed Acknowledgment of *Brady* Discovery describing with particularity the materials discovered. The



prosecutor shall retain a copy of the Acknowledgment of *Brady* Discovery in the case file and provide a copy to the Trial Integrity Unit for retention.

H. Prosecutors reviewing declarations in support of arrest warrants and affidavits in support of search warrants shall consult the *Brady* list to determine if the declarant or affiant is on the list. If the declarant or affiant is listed, the prosecutor must use another officer as the declarant or affiant. If that is not possible, the prosecutor must consult with a supervisor and/or the Trial Integrity Unit.

I. Prosecutors desiring to take cases to Grand Jury must first consult the *Brady* list for all proposed witnesses. Under no circumstances should a witness on the *Brady* list be presented to the Grand Jury. Any exceptions to this Policy must be approved by both the Chief of Operations and/or the Grand Jury Legal Advisor. All Grand Jury requests must indicate that all proposed witnesses have been checked against the *Brady* list.

VIII. ADMISSIBILITY OF EVIDENCE

Discovery and admissibility are different issues. The assigned prosecutor shall decide whether to challenge the admissibility of information discovered under this Policy.

SANTA CLARA DISTRICT ATTORNEY'S OFFICE POLICY

SANTA CLARA COUNTY

BRADY PROTOCOL

For

LAW ENFORCEMENT

2015

Police Chiefs' Association

of

Santa Clara County

Adopted January 2016

BRADY PROTOCOL
FOR
LAW ENFORCEMENT

**Police Chiefs' Association
Of
Santa Clara County**

MEMBERS

CALIFORNIA HIGHWAY PATROL
Captain Les Bishop

CAMPBELL POLICE DEPARTMENT
Chief David Carmichael

GILROY POLICE DEPARTMENT
Chief Denise Turner

LOS ALTOS POLICE DEPARTMENT
Chief Tuck Younis

LOS GATOS POLICE DEPARTMENT
Chief Matt Frisby

MILPITAS POLICE DEPARTMENT
Chief Steve Pangelinan

MORGAN HILL POLICE DEPARTMENT
Chief David Swing

MOUNTAIN VIEW POLICE DEPT.
Chief Max Bosel

PALO ALTO POLICE DEPARTMENT
Chief Dennis Burns

SAN JOSE POLICE DEPARTMENT
Chief Larry Esquivel


**SAN JOSE STATE UNIVERSITY
POLICE**
Chief Pete Decena

**SANTA CLARA COUNTY DISTRICT
ATTORNEY'S OFFICE**
D.A. Jeffrey Rosen

**SANTA CLARA COUNTY SHERIFF'S
DEPARTMENT**
Sheriff Laurie Smith

SANTA CLARA POLICE DEPARTMENT
Chief Michael Sellers

**SUNNYVALE DEPARTMENT OF
PUBLIC SAFETY**
Chief Frank Grgurina



Peter Decena
Chair, Police Chiefs' Association of Santa Clara County

02/22/16
Date

The Office of the District Attorney has a Constitutional and statutory obligation to disclose favorable, material evidence to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). This can include impeachment information. Law Enforcement Agencies have a corollary duty to disclose such evidence to the prosecution so that the prosecution may meet its obligation.

To help ensure the Santa Clara County District Attorney's Office (hereinafter "SCCDA") is able to comply with its *Brady* discovery obligation, the SCCDA has a "Brady Committee" consisting of senior members of the SCCDA and answerable to the District Attorney. The Brady Committee relies on Law Enforcement to alert the SCCDA to information about an employee of the Law Enforcement Agency that may potentially constitute *Brady* information.

Law Enforcement Agency and the SCCDA, agree as follows:

1. All departments will ensure that potential *Brady* information known to the department is conveyed to the SCCDA's Brady Committee. The information that may potentially constitute *Brady* information is listed in the following paragraphs.
2. If a Law Enforcement Agency becomes aware an officer was convicted in the past for any crime of moral turpitude this information should be conveyed to the SCCDA.
3. If an officer has a prior felony conviction, regardless of whether the conviction involves moral turpitude, this information should be conveyed to the SCCDA.
4. If an officer is currently on probation, parole, PRCS, mandatory supervision or any other form of court supervision for any crime, this information should be conveyed to the SCCDA. Absent unusual circumstances unless the crime is one of "moral turpitude", once court supervision is terminated, the officer or employee shall be removed from the *Brady* List.
5. If an officer has currently pending criminal charges of any nature, this information should be conveyed to the SCCDA.
6. To help ensure the information designated in paragraphs 2-5 is provided, all agencies should ensure that a member of the agency has a designated person to monitor and receive subsequent arrest reports from the Department of Justice pursuant to Penal Code section 11105.2 and/or monitor and review accessible Department of Justice or local criminal history records.
7. If the officer has been the subject of an investigation by the Department, irrespective if the investigation is conducted by Internal Affairs, and the investigation results in a finding that the officer engaged in conduct that potentially constitutes *Brady* information (i.e., information bearing on an officer's credibility or character that

could reasonably be deemed favorable, material evidence to the criminal defendant in a particular case), and the information is maintained in any agency file, including the officer's personnel file, the agency should alert the SCCDA to the name of the officer. It is not necessary to provide details – just sufficient information to allow the SCCDA to file a *Brady/Pitchess* motion for release of the information if the officer becomes a witness.

8. Upon receipt of the name of any sworn officer or other employee of the Law Enforcement Agency pursuant to paragraph 7, the Brady Committee will place the officer on a preliminary alert list. No further action will be taken towards moving the officer onto the Brady List until the officer is actually subpoenaed for a pending case - unless the officer wishes to preemptively challenge inclusion on the preliminary alert list. Once an officer is subpoenaed, the SCCDA will file a *Brady/Pitchess* motion asking the court to review the officer's personnel file for the existence of *Brady* information. The Brady Committee will then review any materials released from the officer's personnel files to determine whether the information may constitute *Brady* material and should be included in the Brady List. If the information is determined to be *Brady* material and there is a pending case where the officer is a witness, the People will only release the material pursuant to the *Pitchess* procedure.
9. Law Enforcement Agencies may consult with the Brady Committee members regarding *potential Brady* materials.
10. Law Enforcement Agencies shall retain any potential *Brady* material according to law.
11. The SCCDA will provide a list of officers to the employing agencies identifying officers who are eligible for and/or have been included in the Brady List.
12. Any officer wishing to challenge his or her or inclusion on the Brady List may do so at any time by contacting the Brady Committee. The officer may bring representation to this meeting.
13. *Brady* information that has not previously been conveyed to the SCCDA should be conveyed immediately by contacting either the District Attorney or the ADA in charge of the Brady Committee.
14. The name of any officer or Law Enforcement Agency employee who has potential *Brady* information contained in a personnel file (as described in paragraph 7) shall be disclosed as soon as practical following a sustained finding and issuance of the Notice of Intent to Discipline by the Law Enforcement Agency, but no later than 30 days following the finding. If the Law Enforcement Agency learns an officer or employee has been arrested or convicted of a crime as described in paragraphs 2-5, the agency should disclose that information to the SCCDA as soon as practical, but no later than 30 days after learning of the information.
15. If any officer or employee of the Law Enforcement Agency whose name is contained in the Brady List has subsequently been exonerated by way of

administrative or criminal proceedings, of the potential *Brady* conduct that initially resulted in the officer or employee being placed in the Brady List, the Law Enforcement Agency and/or the officer or employee shall notify the Brady Committee immediately. The Committee will review, and where appropriate, remove the officer or employee from the Brady List. The Law Enforcement Agency, Sheriff, Chief or Commander will be notified of the action of the Brady Committee.

16. To maintain the integrity of the Protocol, the SCCDA will send annual notifications to the Law Enforcement Agency requesting verification that the names of any officer and/or employee that have potential *Brady* information have been provided to the prosecution. By doing so, when the prosecution states to the defense and the Court that an officer and/or employee has nothing to be disclosed, the declaration of the prosecution will be accurate. Also, if an officer's or employee's name should be considered for removal from the *Brady* Bank, the annual notification shall prompt the Law Enforcement Agency to notify the Brady Committee
17. It is the statutory obligation of the prosecution to disclose *Brady* information at least 30 days before trial. The Law Enforcement Agency shall cooperate with the prosecution in meeting the legal mandate.

SNOHOMISH COUNTY PROSECUTING ATTORNEY'S OFFICE POLICY



Snohomish County

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MEMORANDUM

TO: Snohomish County Deputy Prosecuting Attorneys

FROM: Adam Cornell *AUC*
Snohomish County Prosecuting Attorney

DATE: April 2, 2019

RE: **Potential Impeachment Disclosure Protocols**

The attached Potential Impeachment Disclosure (hereinafter PID) Protocols assure compliance with our legal obligations and foster uniformity in our office's handling of PID issues. The Protocols and the related PID Guidelines were developed by myself, Chief Criminal Deputy Laura Twitchell, and many Senior Deputy Prosecuting Attorneys in both the Criminal and Civil Divisions over the course of the last three months. The Protocols are effective immediately.

Should questions arise, please contact your Division Chief, Assist Chief Criminal Deputy Seth Fine, Unit Lead, or myself. A CLE concerning the Protocols will occur in the next month or two.



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Potential Impeachment Disclosure Protocols

All Snohomish County Deputy Prosecuting Attorneys are required to know and follow this protocol and all relevant law concerning PID obligations.

I. Summary

Consistent with our ever present obligation to do justice, the Snohomish County Prosecuting Attorney's Office accepts the responsibility of safeguarding the integrity of the criminal justice system, and protecting the rights of both victims of crime and the criminally accused. Included among these obligations is the affirmative duty to disclose to a charged defendant potentially exculpatory and/or impeaching information concerning police officers and other recurring government witnesses. It is a constitutional and rule-based obligation that rests singularly with the Prosecuting Attorney and cannot be delegated to any other agency. A concomitant, broader duty regarding such disclosure obliges all prosecutors to observe and comply with the controlling decisional authority, statutes, and court rules that govern our work. These disclosure requirements, and their related legal obligations, will be referred to below as Potential Impeachment Disclosure (hereinafter PID).

The PID protocols established herein are designed to assure compliance with our legal obligations and to foster county-wide uniformity in the way PID issues are resolved. Broadly, the PID protocols establish a PID Committee, promulgate a review procedure for the Committee, set forth responsibilities for Deputy Prosecuting Attorneys upon independent discovery of possible PID information, and explain the time, manner, and form of the PID disclosure.

It has always been the policy and practice of this office to resolve questions related to PID in favor of disclosure, and this protocol does not change that policy. This protocol governs the handling and retention of PID material involving recurring government witnesses, including law enforcement officers and regularly testifying State experts who are likely to testify in our cases. This will most often occur with police officers or other recurring government witnesses, such as employees of the crime lab or other experts who routinely testify for the State.

The law in this area is dynamic. Accordingly, this protocol may be revised as further guidance is received from courts or the legislature. These protocols do not confer legal rights on any individual or entity.

II. Legal Background and Application

Prosecutors are subject to two different requirements for disclosure of potentially exculpatory or impeaching information. A constitutional Due Process requirement for disclosure is set out in *Brady v. Maryland*, 373 U.S. 83 (1983) and subsequent cases that follow its legal reasoning. A broader requirement is set out in Criminal Rule (CrR 4.7). By way of explanation, the broader requirements set forth in CrR 4.7 do not require the “materiality” component required in a *Brady* analysis. Rather, the court rule specifies disclosure that “tends to negate defendant’s guilt.” A nearly identical, concurrent duty to disclose such information is also placed upon prosecutors by the Rules of Professional Conduct (hereinafter RPC) including RPC 3.8(d).¹

Disclosure requirements pursuant to *Brady* have been explained and modified by several subsequent cases and applies to all information in the hands of governmental agencies. Prosecutors have “a duty to learn of any [exculpatory] information known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitely*, 514 U.S. 419, 437 (1995). Failure to comply with these requirements can lead to reversal, and possibly even dismissal, of criminal convictions.

The prosecution does not have an obligation to disclose preliminary, challenged or speculative information. *United States v. Agurs*, 427 U.S. 97, 109 n.16 (1976). Nevertheless, the United States Supreme Court has stated that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” *Id.* at 108. See *United States v. Acosta*, 357 F.Supp.2d 1228, 1233 (2005) (recognizing that because it is extremely difficult, if not impossible, to discern before trial what evidence will be deemed “material” after trial, the government should resolve doubts in favor of full disclosure). Thus, we should err on the side of disclosure.

As set forth in *Ames v. Pierce County*, 194 Wn. App. 93 (2016), the dispositive question concerning PID is not whether an officer’s conduct or statements are in fact dishonest or untruthful, or whether the evidence is actual impeachment evidence. Rather, the question is whether the information “might be used to impeach” – that is, whether a future judge or jury might consider the information to be probative of the officer’s credibility. When the answer is “yes,” the information will be disclosed in cases where the officer is named as a witness. See also, *Giglio v. United States*, 405 U.S. 150 (1972). Notably, credibility can relate to more than honesty. It may also relate to performance deficiencies.

The law also requires that this office receive notice and information regarding protracted, pending internal agency investigations involving allegations of dishonesty or false statements or biased policing. See *United States v. Olson*, 704 F.3d 1172 (9th Cir. 2013). In *Olson*, the Ninth Circuit Court of Appeals cited numerous cases in support of the proposition that, “materials from ongoing investigations [are] favorable under *Brady*.” In so ruling, the *Olson* Court emphasized that, “The prosecution must disclose materials that are *potentially* exculpatory or impeaching.” The obligation to disclose conduct defined broadly as biased policing is rooted in the reasoning in *Brady* and *Giglio*, as well as the Washington Pattern Jury Instructions, which direct jurors to assess the credibility of witnesses concerning, among other things, bias and prejudice. See *WPIC* 1.02.

¹ Pursuant to RPC 5.3(b), there is an obligation to ensure that non-lawyers’ conduct is “compatible with the professional obligations of the lawyer.”

Independent of the *Brady* requirements set forth above, prosecutors are additionally and more broadly required to disclose information pursuant to CrR 4.7(a)(1)(vi) and CrR 4.7(a)(3). CrR 4.7(a)(1)(vi) requires disclosure of, “any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.” CrR 4.7(a)(3) requires the prosecutor to “disclose any material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the offense charged.” This obligation is “limited to material and information within the knowledge, possession or control of members of the prosecuting attorney’s staff.” CrR 4.7(a)(4). *See also* CrR 4.7(d). Once, however, information is provided to our office by law enforcement agencies, that material becomes subject to disclosure under CrR 4.7(a)(3).

In making a PID determination, the authority set forth above compels a legal analysis that asks what a reasonable person could believe, not on what our office or a law enforcement agency does believe. Consequently, disclosure may be required in cases where our office and/or the law enforcement agency believe that no misconduct occurred, if a reasonable person could draw a different conclusion.

PID information that is disclosed is not necessarily admissible; these issues must be kept separate. *See State v. Gregory*, 158 Wn.2d 759, 797 (2006). Thus, there will be many times when we disclose PID material, but argue strenuously against its admissibility. The mere fact that a government witness has been added to the PID list is not necessarily a comment by our office on that individual’s future viability as a witness, on his or her reputation, or on the person’s ability to serve in his or her current capacity.

III. PID Committee Composition

A PID Committee will be established to implement this protocol. The Committee will be comprised of three Deputy Prosecuting Attorneys, and led by the Chief Criminal Deputy who will appoint Committee members. A majority vote of the Committee shall determine a given issue. The Committee will keep a record of all the decisions made in the review proceedings. The Committee’s determination will be forwarded to the Prosecuting Attorney who will make the final PID decision.

IV. PID Notification and Information Sharing Requirements for Law Enforcement Agencies

Pursuant to our office’s PID Guidelines (attached herein) law enforcement agencies have been requested to provide the PID Committee with timely notification and information concerning police officers and other recurring government witnesses (such as laboratory technicians and scientists) that fall under the following criteria:

- *Sustained findings or completed investigations* of misconduct involving dishonesty or false statements, either written or verbal.
- *Sustained findings or completed investigations* of biased policing, racial profiling, malicious harassment, or any other conduct that suggests bias against a class of people (e.g. race, ethnicity, age, sexual orientation, gender, disability, economic status, or other personal characteristics).
- *Pending investigations* of either misconduct involving dishonesty or false statements, or conduct that suggests bias against a class of people, that have remained open and undecided for 30 days or more beyond the agency’s customary

target time period for completion of such investigations, taking into account the nature of the complaint and the complexity of the inquiry.

- Criminal convictions.
- A pattern of confirmed performance errors that compromise the witness's conclusions where he or she is testifying as an expert.

V. PID Review, Internal Referral, and Determination Procedure

Officers with sustained agency findings of misconduct involving dishonesty, bias, or criminal convictions pursuant to ER 609, will be added to the PID list without additional review by the PID Committee. Similarly, State expert witnesses with sustained findings of misconduct involving dishonesty, bias, criminal convictions pursuant to ER 609, or a pattern of confirmed performance errors that compromise the expert's conclusions, will be added to the PID list without additional review by the PID Committee.

All other PID referrals will be reviewed by the PID Committee. The PID Committee does not function as an investigative body. Rather, the Committee's PID determination will be based on the information provided by the referring law enforcement/government agency, except as set forth in Section VI, below.

Completed investigations involving allegations of dishonesty, biased policing, or confirmed performance errors that result in non-sustained findings will be reviewed by the PID Committee. As set forth above, because the threshold inquiry in making a PID determination is whether a reasonable person could believe the officer's conduct is exculpatory or impeaching, and not what our office or the officer's employer does or does not believe, a PID disclosure may be required in cases where the referring agency chose not to sustain allegations of dishonesty or bias. When pending investigations are forwarded to our office consistent with our PID Guidelines, the PID Committee will designate the subject officer of the investigation as Temporary PID. A summary of the allegation will promptly be provided to the defense and the notification procedures set forth below will occur. A final PID Committee determination will be made at the conclusion of the agency investigation and notification made consistent with the Prosecuting Attorney's final determination.

If the PID Committee is informed of new, credible, and material evidence creating a reasonable likelihood of doubt in an initial PID determination or if the agency finding of misconduct is later dismissed based on substantive evidence related to the allegation itself, the PID Committee will convene to decide whether the officer should be removed from the PID list or if other modifications need to be made. Following review, the Committee reserves the right to keep or remove the officer from the PID list as necessary to comply with PID obligations. Negotiated resolutions in lieu of discipline will not result in an officer being removed from the list. That an agency may reach some sort of equitable settlement has no effect on whether the underlying incident could bear on a witness's credibility. Thus, it is not relevant to the PID list, and we have no reason to consider it.

The Committee will not give advisory opinions. The Committee's decision whether to add a witness to the PID list is not a comment on whether someone is a good officer or expert or whether the officer or expert should be fired or hired. The PID list is merely a means of flagging potential impeachment issues. It satisfies a notice obligation and in many cases, the prosecutor handling the file will argue that the information is not relevant and should not be admitted.

VI. Responsibilities of Deputy Prosecuting Attorneys Upon Independent Discovery of Potential PID Information

Allegations of misconduct by police officers and other recurring government witnesses (such as laboratory technicians and scientists) may come to our attention independent of law enforcement. For example, cases are sometimes submitted to the Prosecuting Attorney in which the law enforcement witness is a suspect in a crime. Or, a Deputy Prosecuting Attorney may develop concerns about whether certain conduct—observed, reported or documented by others—falls within the purview of PID. At other times, a court may enter a factual finding, or rule on a request to disclose disciplinary information, that implicates PID.

1. If a DPA or any staff member becomes aware of potential PID material regarding a recurring government witness, the deputy or staff member shall inform the appropriate Unit Lead.
2. If the Unit Lead believes that the information could constitute PID material, he or she will direct the DPA to prepare a memorandum summarizing the material. The memorandum should focus only on facts and avoid conclusions or speculation.
3. The Unit Lead shall present the memorandum and all related material/evidence to the PID Committee.

VII. PID Determination Procedure Following an Internal Referral

1. When the Committee receives a notification from a Unit Lead, it will make an initial determination by asking the following question:

If proven true, does the allegation constitute PID material?

- a. If the answer is no, the inquiry is finished.
- b. If the answer is yes, the formal review will continue.

2. The Committee may request additional information it deems necessary or may ask for investigation from law enforcement. The Committee will review the memorandum, related materials, and any additional material it has obtained, to answer the following question:

Is the Committee convinced by a preponderance of the evidence that the allegation is true?

- a. If the answer is no, the inquiry is finished.
- b. If the answer is yes, the government witness and the relevant agency will be notified per section 3.

3. The Committee will notify the relevant agency that potential PID material has been found. It will be left to the discretion of the relevant agency to notify the witness.
 - a. The witness and the relevant agency will be allowed to submit a response, with additional evidence they would like the Committee to consider, in writing within 20 days.

- i. Witnesses should be aware that if a trial date is pending, the Committee may decide that it is necessary to disclose the material in its possession before a response has been submitted.
 - b. If no response is received, the government witness shall be added to the PID list and notification should be sent to the witness and the relevant agency.
4. If a response is received, the Committee will review the additional material and again ask the following question:

Is the Committee convinced by a preponderance of the evidence that the allegation is true?

- a. If the answer is no, the inquiry is finished. The witness and the relevant agency should be informed of the decision.
 - b. If the answer is yes, the witness shall be added to the PID list and notification should be sent to the witness and the relevant agency.
-

If new evidence comes to light after the time period provided for a response under section 3(a) has expired, the witness may send that evidence to the Committee and ask it to reconsider its decision. Additionally, the Committee may reconsider a witness's placement on the PID list based upon court rulings that help define or clarify the issue. The Committee may modify this procedure when necessary.

VIII. PID Documentation

A secure electronic database shall be maintained by the Committee with copies of all PID material. Hard copies of the PID material will be kept in a single secure location. Access to the PID materials will be monitored.

A PID witness will be flagged by staff. When a witness list is generated, staff will automatically receive notice that the witness is associated with PID material. Staff will then include the material with discovery. Any time a case is reviewed in JustWare, after the case has been charged, an alert will pop up to notify any person opening the case that PID information related to that particular government witness is associated with the case. The assigned Deputy Prosecuting Attorney and staff will ensure that proper notifications and discovery disclosures are provided to the defense.

IX. When Potential PID Material is Discovered During Trial or Under Time Constraints

The DPA should talk to the Unit Lead and a member of the PID Committee to determine an appropriate action. When time permits, the formal procedure should be utilized.



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Potential Impeachment Disclosure Guidelines

I. Legal Background

Prosecutors are subject to two different requirements for disclosure of potentially exculpatory or impeaching information. A constitutional Due Process requirement for disclosure is set out in *Brady v. Maryland*, 373 U.S. 83 (1983) and subsequent cases that follow its legal reasoning. A broader requirement is set out in Criminal Rule (CrR 4.7). By way of explanation, the broader requirements set forth in CrR 4.7 do not require the “materiality” component required in a *Brady* analysis. Rather, the court rule specifies disclosure that “tends to negate defendant’s guilt.” A nearly identical, concurrent duty to disclose such information is also placed upon prosecutors by the Rules of Professional Conduct (hereinafter RPC) including RPC 3.8(d).

Disclosure requirements pursuant to *Brady* have been explained and modified by several subsequent cases and applies to all information in the hands of governmental agencies. Prosecutors have “a duty to learn of any [exculpatory] information known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitely*, 514 U.S. 419, 437 (1995). Failure to comply with these requirements can lead to reversal, and possibly even dismissal, of criminal convictions.

As set forth in *Ames v. Pierce County*, 194 Wn. App. 93 (2016), the dispositive question is not whether an officer’s conduct or statements are in fact dishonest or untruthful, or whether the evidence is actual impeachment evidence. Rather, the question is whether the information “*might* be used to impeach” – that is, whether a future judge or jury might consider the information to be probative of the officer’s credibility. When the answer is “yes,” the information will be disclosed in cases where the officer is named as a witness. *See also, Giglio v. United States*, 405 U.S. 150 (1972). Notably, credibility can relate to more than honesty. It may also relate to bias and performance deficiencies. It should be noted, however, that a decision by the Prosecuting Attorney that certain information is potentially exculpatory or impeaching is not the final or conclusive determination insofar as a future deputy prosecutor, defense counsel, and trial court will still have to determine whether the evidence at issue may be offered as potential impeachment evidence under the particular circumstances of that future case.

The requirement to send notice and information regarding protracted pending investigations is consistent with the Court’s holding in *United States v. Olsen*, 704 F.3d 1172 (9th Cir. 2013). In *Olsen*, the Ninth Circuit Court of Appeals cited numerous cases in support of the proposition that, “materials from ongoing investigations [are] favorable under *Brady*.” In so ruling, the Court in *Olsen* emphasized

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that, "The prosecution must disclose materials that are *potentially* exculpatory or impeaching." The obligation to disclose conduct defined broadly as biased policing is rooted in the reasoning in *Brady* and *Giglio*, as well as the Washington Pattern Jury Instructions, which direct jurors to assess the credibility of witnesses concerning, among other things, bias and prejudice. See *WPIC* 1.02.

Independent of the *Brady* requirements set forth above, prosecutors are additionally and more broadly required to disclose information pursuant to CrR 4.7(a)(1)(vi) and CrR 4.7(a)(3). CrR 4.7(a)(1)(vi) requires disclosure of, "any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." CrR 4.7(a)(3) requires the prosecutor to "disclose any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." This obligation is "limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). Once, however, information is provided to my office by law enforcement agencies, that material becomes subject to disclosure under CrR 4.7(a)(3).

In making a Potential Impeachment Disclosure (hereinafter PID) determination, the authority set forth above compels a legal analysis that asks what a reasonable person could believe, not on what this office or a law enforcement agency does believe. Consequently, disclosure may be required in cases where this office and/or the law enforcement agency believe that no misconduct occurred, if a reasonable person could draw a different conclusion. If this office concludes that an officer is subject to PID that does not necessarily reflect a conclusion that the officer committed misconduct or that the officer is not credible as a witness.

II. Request for Information

As required by the law and authority set forth herein, I request timely notification and information by your agency concerning police officers and other recurring government witnesses (such as laboratory technicians and scientists) that fall under the following criteria:

- Sustained findings or completed investigations of misconduct involving dishonesty or false statements, either written or verbal.
- Sustained findings or completed investigations of biased policing, racial profiling, malicious harassment, or any other conduct that suggests bias against a class of people (e.g. race, ethnicity, age, sexual orientation, gender, disability, economic status, or other personal characteristics).
- Pending investigations of either misconduct involving dishonesty or false statements, or conduct that suggests bias against a class of people, that have remained open and undecided for 30 days or more beyond your agency's customary target time period for completion of such investigations, taking into account the nature of the complaint and the complexity of the inquiry.
- Criminal convictions.
- A pattern of confirmed performance errors that compromise the witness's conclusions where he or she is testifying as an expert.

Notification of sustained findings or completed investigations should include all investigative materials and be in electronic/digital format. Notification of a pending investigation should include a brief, substantive summary of the allegations.

III. Application of PID Standard

The PID Standard requires consideration of all relevant circumstances. Because this office is not an investigatory agency, it lacks the ability to ascertain those circumstances. Consequently, this office relies on law enforcement agencies to conduct investigations into allegations of officer misconduct, and to advise this office of the results of those investigations and to provide information on certain pending investigations.

In relying on law enforcement agencies to conduct investigations into allegations of officer misconduct, this office acknowledges and respects the internal investigation (hereinafter IA) standards followed by law enforcement agencies. The IA process allows for thorough investigation of misconduct allegations and affords officers due process. This office neither seeks to expand nor replace that process or those rights. Accordingly, this office will typically base its PID determination solely upon the record developed during the IA process.

The PID Standard is likely to be satisfied by reliable information that an officer engaged in conduct that bears on his or her credibility. The term credibility as set forth in these guidelines encompass conduct relating to honesty, bias, or a pattern of confirmed performance errors that compromise an expert witnesses conclusions. It is less likely to be satisfied by dishonesty in connection with an officer's private affairs. Under unusual circumstances, information about private acts might be subject to review if the acts could be admissible at trial as evidence of untruthfulness.

IV. Process

1. Any law enforcement agency that receives information that meet the criteria set forth above is requested to investigate or arrange for the investigation of those allegations. Any law enforcement agency that employs individuals who routinely perform expert witness services in Snohomish County are additionally asked to investigate patterns of confirmed performance errors committed by those individuals, where those errors could compromise an expert witness's opinions.

2. Your agency is requested to notify the Prosecuting Attorney's Office of all relevant information as that term is discussed herein. Disclosure relates to pending or concluded investigations as set forth in these guidelines.

3. If this office obtains information about alleged misconduct by a law enforcement officer or agency expert witness that has not been fully investigated, it will ask the officer's agency to conduct an investigation. This may occur where, for example, an officer or expert witness employee has resigned from his or her agency in lieu of termination.

4. PID review will be conducted by the Prosecuting Attorney's Office PID Committee, and when necessary, the Prosecuting Attorney. The Committee will be comprised of the Chief Criminal Deputy and her designees. The PID Committee will make a determination regarding PID status and advise the Prosecuting Attorney.

In cases involving qualifying pending investigations set forth herein, the officer or agency expert will categorized as "temporary PID" until the investigation is concluded. This information, and the summary of the allegations, will be provided to the defense in cases in which the officer or agency expert is a witness. Upon receipt and review of the completed investigation, the "temporary PID" designation will be modified consistent with the final PID determination.

5. The Prosecuting Attorney's Office will notify the agency and the officer/employee whether or not the information satisfies the PID Standard.

6. If the Prosecuting Attorney's Office determines that disclosure is required, notice of the determination shall be provided to the defense in all pending or future cases in which the officer/employee is a potential witness. If appropriate, this office will seek protective orders covering such information.

7. If it is uncertain whether or not the information meets the PID standard, the information will be submitted to the court for an *in camera* inspection in a case in which the officer or expert witness is a listed witness.

8. The Prosecuting Attorney's Office will maintain a log of the information that was reviewed in making the determination, which would include a copy of the law enforcement agency's final IA determination, if any. Investigative documents received from the law enforcement agency that were used in making the PID determination will be retained in electronic format.

9. A PID decision may be reviewed after ten years from determination to disclose information, and every five years thereafter. Such a review will, however, only be made upon the written request of the referring agency or the affected officer/employee. The Prosecuting Attorney's Office will review the officer/employee's matter to determine whether the PID standard is still satisfied. This determination will consider, among other factors, whether the information has been used to impeach the officer/expert witness and, if so, whether that impeachment had any apparent effect on fact-finders' determination of the officer's/expert witness's credibility.

10. These guidelines are intended for the guidance of the Snohomish County Prosecuting Attorney's Office and law enforcement agencies. It may be modified or abrogated by the Prosecuting Attorney at any time. Exceptions may also be authorized by the Prosecuting Attorney or his designee. These guidelines do not confer legal rights on any individual or entity.