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Serving the Law Enforcement Community & the Citizens of Washington

MODEL POLICY FOR LAW ENFORCEMENT AGENCIES REGARDING *BRADY* EVIDENCE AND LAW ENFORCEMENT WITNESSES WHO ARE EMPLOYEES/OFFICERS

Approved November 19, 2009

I. PURPOSE

This Policy addresses *Brady* information that may be in the possession of law enforcement agencies. It sets forth law enforcement duties and procedures regarding disclosure of information about law enforcement employee/officer witnesses pursuant to the *Brady* rule. It is intended to meet prosecutorial obligations and preserve the constitutional due process rights of defendants, while permitting efficient and effective law enforcement investigation and prosecution of criminal cases. This policy is intended to function in conjunction with established *Brady* policies/procedures applicable to prosecutors. Law enforcement agencies should be familiar with the *Brady* policies of the prosecuting attorneys in their jurisdiction.

II. BACKGROUND

THE *BRADY* RULE

The prosecution must disclose to the defense evidence that is favorable to a defendant. *Brady v Maryland*, 373 U.S. 83 (1963). This duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*,427 U.S. 97, 107 (1976). The rule encompasses material exculpatory evidence including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different," i.e. prejudice to the defendant must have occurred as a result. *Kyles v. Whitley* 514 U.S. 419, 433-434 (1995). Suppression by the prosecution of material exculpatory evidence 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. Thus, violations can occur whether the State willfully or inadvertently suppressed the evidence. *Strickler v. Greene, 527 U.S. 263*, 280-281 (1999). In order to ensure compliance with these rules, the United States Supreme Court has urged the "careful prosecutor" to err on the side of disclosure. *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

III. DEFINITIONS—WHAT IS *BRADY* EVIDENCE

Recurring Government Witness

Recurring government witness are those law enforcement employees/officers for whom it is reasonable to believe will or may be called to testify more than once or on a regular basis.

Exculpatory Evidence

Evidence is exculpatory if it is evidence that is favorable to the defendant, is material to the guilt, innocence, or punishment of the defendant, and impeachment evidence that may impact the credibility of a government witness, including a police officer. Exculpatory evidence must be disclosed.

Materiality
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. A "reasonable probability" is established when the failure to disclose the evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Such evidence must have a specific, plausible connection to the case, and must demonstrate more than minor inaccuracies. Evidence is material if it is facially apparent as exculpatory.

Impeachment Evidence
Evidence that might be used to impeach a witness is exculpatory evidence and must be disclosed to the defense by the prosecutor. Impeachment evidence is evidence that demonstrates that a witness is biased or prejudiced against a party, has some other motive to fabricate testimony, has a poor reputation for truthfulness or has past specific incidents that are probative of the witness' truthfulness or untruthfulness. Prior inconsistent statements are impeachment evidence. Impeachment evidence that is merely cumulative (i.e. duplicative to evidence already provided or presented) or impeaches on a collateral issue need not be disclosed.

Admissibility of impeachment evidence is determined on a case by case basis by the courts. Therefore even evidence that is likely to be inadmissible can still be considered *Brady* information, and thus be required to be submitted to the prosecutor.

IV. LAW ENFORCEMENT AGENCY DUTIES

Generally
Law enforcement officers must collect and document exculpatory and impeachment information discovered pursuant to administrative and criminal investigations and provide the same to the prosecution. Law enforcement agencies with information that could impeach any non-law enforcement witness must provide that information to the prosecution as well.

Training
All employees must be properly trained on the department's obligation to disclose *Brady* information.
For the purposes of this model policy, employee means anyone employed by the agency who may be called to testify under oath. However, the existence of the policy and a copy should be made known and available to all employees.
Employer–Employee Agreements regarding Law Enforcement Conduct
Law enforcement agencies shall investigate all complaints regarding their officers in accordance with their established policies. If an agreement, settlement or other understanding is reached between an agency and an employee regarding a complaint, investigation or response, the agency should consider the impact of the subject matter of the complaint, investigation or response on the employee's ability to serve as a witness in any criminal proceeding for any jurisdiction.

V. LAW ENFORCEMENT AGENCY RESPONSE TO *BRADY* INFORMATION REQUEST—CATEGORIES OF EVIDENCE AND PROCEDURES

Agencies must review all their internal investigation files to determine if any possible *Brady* information exists on any of their employees who may be called as witnesses by the prosecution. If such information exists, they must submit the information to the prosecutor. The prosecution is under a continuing duty to disclose *Brady* information and therefore agencies must also notify the prosecutor any time they become aware of new *Brady* information.

If an agency receives a request from a prosecutor for possible *Brady* information on an employee/officer the law enforcement agency shall comply with the request as soon as practicable and
according to the policies and procedures below:

Substantiated/Sustained Findings of Misconduct Related to Dishonesty
Law enforcement shall disclose to the prosecution as *Brady* material information regarding any final determination by the Chief Law Enforcement Executive of a substantiated or sustained finding related to an employee's/officer's dishonesty or untruthfulness, regardless of whether or not discipline was given. Agencies should follow their current policies regarding document retention for substantiated/sustained/founded findings and disciplinary processes.

Criminal Convictions
Law enforcement shall disclose to the prosecution as *Brady* material information regarding criminal convictions of an employee/officer related to dishonesty or untruthfulness, if known. [1]

Unsubstantiated Finding
There is no requirement that law enforcement provide prosecutors with information concerning unsubstantiated findings about an employee.[2]

In-Lieu-of Actions/Agreements
Actions / agreements such as resignation, demotion, retirement or separation from service of an employee/officer in lieu of disciplinary action may be *Brady* information if it is relevant to the case at hand. Each law enforcement executive should consult with the appropriate legal counsel in making a determination if information not related to substantiated findings is potential *Brady* information or in cases where he or she is uncertain regarding what action to take.

Current or Ongoing Investigations
Pending criminal or administrative investigations are considered preliminary in nature, and the prosecution has no obligation to communicate preliminary, challenged or speculative information to the defense counsel, *U.S. v. Agurs*, 427 U.S. 97, 109, fn. 16 (1976). Each chief law

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[1] It should be noted that although it is not required by *Brady* per se, Washington CrR 4.7 (1)(iv) provides that the prosecutor shall provide the defendant with "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." Therefore it is best practice to provide the prosecutor with all known criminal conviction information of any agency recurring government witness in addition to that specifically reflecting on an employee's dishonesty or untruthfulness.

[2] This model policy addresses agency practice regarding *Brady* information and is intended to provide guidance for law enforcement in assisting prosecutors in complying with the requirements of *Brady*. It is not intended to address all situations regarding agency disclosure or nondisclosure of information regarding employees or officers which may raise questions of civil liability or other legal consequences. For example, failure to disclose relevant information may expose an employee or agency to 42 USC 1983 section IV civil rights violation claims. As discussed in the model policy, agencies should consult with legal counsel as necessary.

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Expert Witnesses
Law enforcement information regarding agency employee expert witnesses may be considered *Brady* evidence. Any final agency determination of a substantiated or sustained finding related to an expert witness's unsatisfactory employment performance that compromises the expert's conclusions or ability to serve as an expert witness, regardless of whether or not discipline was given, must be turned over to the prosecution.

Other Potential *Brady* or Relevant Information
Each law enforcement executive should consult with appropriate legal counsel in making a determination if evidence not related to substantiated or sustained findings of dishonesty or untruthfulness is potential *Brady* information. This may include evidence related to current or ongoing investigations, disciplinary actions, in-lieu-of actions, and employment agreements or when he or she is uncertain regarding what action to take. It is also best practice to consult with legal counsel in cases regarding potential disclosure of other evidence that may be relevant in a case (such as excessive use of force findings in current cases with allegations of excessive use of force, findings of bias etc.),

What is Not *Brady* Information

Allegations that are not substantiated, are not credible, without merit, false or have been determined to be unfounded are not *Brady* information.

Notification to Subject Employee/Officer
If potential *Brady* information is found in law enforcement agency files, the agency shall notify the employee/officer who is the subject of the potential *Brady* information, consistent with agency policy. The employee/officer notification shall include the opportunity to review the information that will be presented to the prosecutor. The notification shall comply with all policies and procedures, collective bargaining agreements and other regulations applicable to the agency and employee/officer. If the possible *Brady* information identifies any other individual who may have privacy rights to the information, the agency shall notify that person, consistent with agency policy, of the agency's intent to provide the information to the prosecutor and/or court.

Record Keeping
If the information is provided to the prosecutor and determined to be *Brady* information, the law enforcement agency should note in the employee/officer file that such information was subject to disclosure. In cases where a court determines that information must be disclosed to the prosecution and defense, the agency should note in the file that the information was subject to disclosure and maintain a copy of the court order with the information in the file. If the court determines that the information should not be disclosed to the prosecution and defense, the agency should note in the file that the information was not subject to disclosure and include a copy of the court's finding in the file.