I. INTRODUCTION

A. Purpose of the Document

This paper is designed to accompany the Model Policy on Brady Disclosure Requirements established by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their communities and their law enforcement agencies.

B. Background

Honesty and credibility have always been essential traits of a police officer. Under the U.S. Supreme Court’s Brady decision, an officer’s credibility can also determine whether he or she may face testimonial impeachment during court proceedings or even be subject to termination of employment. Subsequent rulings have extended Brady requirements for police and prosecutors.

In 1963, the Supreme Court of the United States held in the case of Brady v. Maryland\(^1\) that the prosecution in a criminal trial has a duty to disclose to the defense, upon request, material information that is exculpatory of the defendant. The Court declared in Brady 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.”

In a subsequent case, United States v. Agurs, the Supreme Court held that the Brady disclosure is required even if the defense has not specifically requested it,\(^2\) and in 1995 in Kyles v. Whitley, the Court further held that the prosecution has an affirmative duty to learn of, and disclose, any favorable evidence known to “others acting on the government’s behalf in the case, including the police.”\(^3\) Further, the disclosure rule includes not only evidence directly related to the crime involved, but also to information that would affect the credibility of a prosecution witness in the case.\(^4\) Thus, the prosecution is required not only to disclose what is already known to prosecutors, but also to learn of any such information that is known to law enforcement, including matters related to witness credibility—even that of police officers—and make that information available to the defense. Under Brady, there is no distinction between evidence that could serve to impeach a government witness and evidence that could be material to the guilt or punishment of a defendant.

While Brady and its subsequent decisions have been in play for many years, some law enforcement agencies do not fully observe its mandates and requirements through organizational policy or practice. Whether or not a department acts in good faith to fulfill these requirements is

\(^1\) Brady v. Maryland, 373 U.S. 83, 87 (1963).
\(^2\) United States v. Agurs, 427 U.S. 97 (1976). Notwithstanding the affirmative duty of the prosecution to disclose material and exculpatory matters to the defense, in many instances the disclosure process will be initiated by the defense through a specific request to the prosecutor’s office for disclosure. For example, in California in the past disclosure was sometimes sought by the defense through what was known as a “Pitchess motion,” based upon the case of Pitchess v. Superior Court, 11 Cal. 3d 531 (1974).
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By the state legislature.5 This organization simplifies the

principally from interpretation of federal case law require

ments. Additional guidance should be sought at the local

level for understanding of any state law requirements.

II. PROCEDURES

A. Duty of Law Enforcement under Brady

Although the Brady case referred only to the duty of

the prosecution to disclose evidence falling under the rule,

under subsequent cases that have flowed from Brady, law

enforcement agencies are required to inform the prose-

cution of any evidence known to them that could meet

the rule. This places a heavy burden on officers and their

departments due to the risk that a criminal conviction will

be dismissed or reversed if a Brady violation by the police

is found. There is also the risk of civil liability associated

with a failure to disclose, not to mention the difficulty in
determining what must be disclosed.

Many states have their own court decisions, statutes,

and discovery rules governing disclosure. For example, in

California, disclosure requirements have been organized

by the state legislature.5 This organization simplifies the

problem to some extent in those states, but such statutes

may also impose disclosure burdens upon a local police
department in excess of the requirements under Brady. In

states where there has been no such codification, and in

those states that have statutory requirements that require

interpretation, Brady6 and the long line of cases that have

followed must still be depended upon for guidance. Un-

fortunately, the case law requirements are still mixed and
difficult to follow.

For these reasons, it must be understood that the use of

the term "Brady rules" in the model policy and in this pa-
caper include not only the requirements of the original 1963

case of Brady v. Maryland, but also the federal

constitutional decisions rendered subsequent to Brady and
the disclosure rules found in state cases, statutes, and rules
of court. While the law is not totally defined on disclosure
requirements, there is enough information to provide offi-
cers and their departments with general guidance.

In order to fully understand the departmental and indi-

vidual officer requirements under Brady, it is necessary to

have a clear understanding of several key terms, to include,

material evidence and exculpatory evidence. The Supreme
Courteno defines “material” evidence as information that, had

it been disclosed to the defense, would have a “reasonable
probability of providing a different result in the trial or

sentencing” in the case.7 The model policy also notes that

exculpatory evidence is “material” if there is a reasonable
probability that disclosing it will change the outcome of a

criminal proceeding. Further, it notes, that a “reasonable
probability” is a probability sufficient to undermine con-

dence in the outcome of the trial or sentencing of a crimi-
nal case. So, the requirements of Brady relate not only to

the finding of the case but to the sentencing phase as well.

The term “exculpatory” is generally understood to refer
to virtually any kind of information that would cast
doubt on the guilt of the defendant. In its simplest form,

this would include any evidence pointing directly to the

innocence of the defendant or the guilt of another. For

example, if another person has confessed to committing the

crime with which the defendant is charged, this obviously

would be exculpatory information that would bear direct-
ly upon the issue of the defendant’s guilt or innocence

and, therefore must be disclosed to the defense.8 Like the
discussion of material evidence however, material that is

exculpatory can also be germane to sentencing. The model

policy states that “Brady violations are, by definition,
violations of an individual’s 14th Amendment right to due

process of law. Exculpatory evidence is evidence that is
favorable to the accused; is material to the guilt, innocence,
or punishment of the accused; and that may impact the

credibility of a government witness, including a police

officer. Impeachment material is included in the Brady

disclosure requirements.”

B. Affirmative Duty to Report

Law enforcement has what is called an “affirmative
duty” to report information that may impact the determi-
nation of a court or jury as to a defendant’s guilt or sen-
tencing. This means simply that a department must take

positive steps or demonstrable measures to uncover and

reveal Brady material. Failure to take such steps, or in the

worst-case scenario, suppression of any evidence or infor-
mation that is favorable to the accused, is a violation of due

process. Contrary to some common understandings, the

5 See, e.g., California Evidence Code §§1043–1047

6 As with any other federal constitutional issue, state constitutions,
cases, statutes, and so on, may not diminish the federal constitutional
requirements but may increase them.


8 See Brady v. Maryland, 373 U.S. 83.
burden is not on the defense to request such material; it is
the responsibility of involved law enforcement agencies to
provide such material to the prosecutor as soon as reason-
ably possible so that he or she can determine whether it
falls within Brady disclosure requirements. This require-
ment continues to be in effect from the point of indictment
through trial and sentencing.

C. Impeachment Evidence and Witness Credibility

As one can see, Brady disclosure requirements extend
far beyond matters that relate directly to the issue of guilt
or innocence. Several years before Brady, the Supreme
Court decided the case of Napue v. Illinois, in which it
was determined that a prosecution witness had testified
falsely regarding his receipt of consideration in exchange
for his testimony. The Court held that the government’s
use of the false testimony violated the defendant’s right of
due process.

Thus, with witness credibility identified as a due-pro-
cess issue, it was almost inevitable that the Supreme Court
would extend the Brady rule to require that the prosecution
disclose to the defense any information relevant to the
credibility of the government’s witnesses. The Court did
this definitively in 1972 in Giglio v. United States, which
held that any information that could serve to impeach the
credibility of a prosecution witness, including that of a
police officer, falls within the Brady rule. As will be discussed
later, the implication of this for police officers, as well as
other government witnesses, is significant.

As a result, police must disclose to the prosecutor
any information that may cast doubts on the credibility of
officers participating in the case. Obviously, such informa-
tion may be used by the defense to impeach the testimony
of any officer whose participation in the case is relevant to
the prosecution. There are, however, even broader implica-
tions. Once information damaging to an officer’s credi-

10 Giglio v. United States, 405 U.S. 150 (prosecution’s promise of leni-

cency to witness not disclosed to the defense).
11 See, for example, “Database to Let Attorneys See Conduct of Offi-
cers,” San Diego Union-Tribune, December 24, 2000, as reported in Lisa
A. Judge, “Disclosing Officer Untruthfulness to the Defense: Is a Liars
Squad Coming to Your Town?” Chief’s Counsel, The Police Chief 72

These overall disclosure requirements give rise to three
major questions:

- What information must be disclosed?
- How does the department determine whether such
  information exists?
- Once possible impeachment information has been
disclosed, to what extent will this adversely affect
the subject officer’s ability to perform his or her

duties in the future? (Could it impede his or her
usefulness to the department?)

D. What Information about an Officer Must Be
Disclosed?

Because of the diversity of circumstances surrounding
any given case, the determination of what does or does not
affect an officer’s credibility in a specific case can be diffi-
cult to determine. The following are examples of informa-
tion that may be “material” under Brady and, if material,
should be disclosed:

- Crimes committed by the officer. The issue here is
what crimes? Not every crime is commonly regarded as
affecting credibility. Crimes committed by an officer are
the subject of an internal investigation that involves discri-

plinary action up to and including termination of employ-
ment, or even prosecution. Reference must be made to the
most recent federal and state cases, with emphasis on the
cases and evidentiary rules of the department’s jurisdiction,
to determine what is considered to affect credibility in that
jurisdiction. Local legal advice is essential.

- Incidents involving untruthfulness by the officer. Here
again, there is a broad range of conduct that may be con-
sidered material. Lying under oath, whether or not subject
to a perjury conviction, is an obvious example of material
conduct. Filing a false report has also been included in this
category. Lying even about small matters raises questions
about the officer’s credibility and may be used by the
defense in certain circumstances. The issue of covering up
or failing to report serious violations of others within the
department can also reflect on an officer’s integrity.

- Incidents involving dishonesty by the officer. Acts
not involving untruthfulness but nevertheless bringing an
officer’s honesty into question may be within the disclo-
sure rule. Acts not considered sufficiently significant to
be treated as crimes may still show a lack of honesty or
integrity. This may be one of the most difficult categories

12 Reference to the jurisdiction’s rules of evidence, though not determi-
native, may be instructive. For example, the common law, still in effect
in many states, permits the impeachment of any witness in any case, civi-
il or criminal, by a showing that the witness has committed a felony or a
“misdemeanor involving moral turpitude.” See, for example, Charles E.
Co., 2003), chap. 4. The Federal Rules of Evidence, for example, Rules
608, 609, and 610, also give some indication of what is permissible
impeachment in a trial in federal court.
to handle, because of the variety of acts, large and small, that may be regarded as dishonest. Further, the dividing line between “crimes,” “untruthfulness,” and “dishonesty” may be indistinct, creating a further problem for a department trying to determine what does or does not fall within the Brady requirement. Whatever a department determines to be relevant may be less important than an officer’s understanding that truthfulness and honesty in all matters is essential if he or she is to avoid the potential career problems that can result from Brady disclosures.

**Matters indicating bias of the officer.** Matters revealing bias on the part of a witness are almost universally regarded as proper subjects for impeachment. Where the bias is related to some aspect of the current case, disclosure may be necessary, but bias reflected in past deeds can also have serious consequences. Possibly the most notorious example of this type were attempts to impeach the testimony of investigative officers during the 1995 murder trial of O.J. Simpson.

**Use of excessive force and other officer misconduct.** Instances of what is broadly termed “officer misconduct” not falling directly into one of the previous categories may nevertheless require disclosure under Brady. For example, any history of use of excessive force by an officer may be disclosable. Review of cases decided by the courts of the jurisdiction may be helpful in identifying such items.

Whether a matter is disclosable may also depend upon the degree to which the matter has been substantiated. Substantiated allegations falling into any of the aforementioned categories are almost certainly subject to disclosure. Allegations that cannot be substantiated, are not credible, or have resulted in an individual’s exoneration are generally not considered to be potential impeachment information. However, one source indicates that even these may be subject to the disclosure requirement under certain circumstances if they go to the truthfulness of the officer.

It appears that totally unsubstantiated rumors about an officer, and perhaps also matters not involving police business may not fall under the disclosure requirement. However, there is a distinct tendency on the part of the courts to expand the categories of information that must be disclosed, so that in the prevailing legal climate it is difficult to state with certainty that any particular matter is exempt from disclosure.

One of the most troubling questions about the *Brady* rules is the issue of whether or not matters that are unrelated to the officer’s official duties are subject to disclosure. It is obvious that incidents of untruthfulness related to police duties may be within *Brady*’s disclosure requirements, but what about incidents of untruthfulness that arise solely in the context of an officer’s private life? For example, if an officer is having an extramarital affair and lies about it, is this within *Brady*? Arguments have been made that it would, but there is presently little agreement on the issue.

Statements made by a defendant or defense witness that may affect officer credibility.

The broad reach of these categories concerning officer dishonesty, bias, and the like is illustrated by the fact that disclosable information includes not only statements or actions by the officer, but also statements made by a defendant or other person that, if true, could affect officer credibility. For example, the Los Angeles County District Attorney’s Office has included in this category statements made by a defendant or defense witness that (1) contradict statements made by a police officer or other material prosecution witness; (2) indicate that a material law enforcement employee or witness used excessive force; or (3) allege that a law enforcement employee made statements exhibiting racial, religious, or other bias. Such statements, although not made by a departmental employee, nevertheless may be material to officer credibility and must be considered when the department is determining what is to be disclosed.

**E. Disclosure Requirements**

The Federal Rules of Criminal Procedure, Rules 16 and 17, contain extensive coverage of the disclosure requirements applicable to the prosecution in a criminal trial in federal court. The *Brady* issue normally arises for local prosecutors and police in state criminal trials not subject to the federal rules. However, it is somewhat helpful to note the requirements of these federal rules since they give some indication of what the federal courts, and, by extension, perhaps a state court, may consider subject to disclosure.

It is clear that “under disclosure,” or a failure to disclose all the information mandated by the *Brady* rules, can lead to serious adverse consequences for the department. These include, but are not limited to, dismissal or reversal of a criminal case, civil liability, and even deterioration in the relationship between the department and local prosecutors.

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15. Perjury committed in a civil trial, for example, a divorce action, would presumably be within *Brady*; lesser instances of untruthfulness fall into a grayer area.

16. Los Angeles County District Attorney’s Office, Special Directive 02-07, Possible Brady Material in the Possession of Law Enforcement.
However, it is also apparent that “overdisclosure,” or disclosure of material that is not required, can be damaging to a case or to an officer’s future. It appears that some departments (and prosecutors’ offices) have adopted an “open file” policy under which everything in departmental records is made available to the defense. Because of the complexity of the Brady rules and the risks associated with underdisclosure, this is an understandable reaction. However, because overdisclosure carries its own risks and potential adverse consequences, it seems prudent for departments to develop policies that satisfy disclosure requirements but do not involve revelations that would unnecessarily harm the criminal prosecution, the department, or individual officers. Here departmental policy becomes extremely important, and the advice and assistance of departments’ local legal counsel is essential if a proper balance is to be achieved.

Since the prosecution and the police department have an affirmative duty to discover disclosable matters, the question arises as to how a department can determine whether such information actually exists. Particularly in a large department, it may be difficult for managers to be aware of the array of actions and information that fall, or may fall, within the Brady rule.

American law enforcement agencies have approached this problem in a number of different ways. A common starting point is the establishment of a departmental policy that assigns responsibility for the internal reporting of conduct that may eventually need to be disclosed under Brady. The details of how such responsibility is assigned and fulfilled vary from department to department.

One approach requires that any departmental employee who is aware of a potential Brady matter must report it to his or her supervisor or other appropriate person or unit within the department. The policy may then impose upon supervisors the responsibility for forwarding any such information received from employees to the appropriate office or executive. A unit within the department may be established or, if already in existence, may be charged with the duty of maintaining records of matters that have the potential of falling within the Brady disclosure rules in an easily retrievable format. 17

Obviously, successful implementation of any policy related to the reporting of Brady matters requires training not only of those responsible for the maintenance of related records, but of all departmental personnel. Unless everyone in the department is aware of the Brady rules and understands fully their significance and the necessity and manner of reporting such matters, the policy cannot be effective.

This training should be designed to ensure not only a full understanding of the Brady rules, but also an awareness of the so-called “tunnel vision” phenomenon. This phenomenon tends to cause some investigators to ignore information that does not support their theory of a case. This type of information is often likely to be exculpatory as defined under the Brady rules. Unfortunately, it is also the type of evidence that, being considered “irrelevant” by investigators, is often discarded or even destroyed. 18

One of the problems associated with the affirmative duty imposed upon police agencies to disclose exculpatory information is that it includes the duty to find such information if it is in the agency’s possession. To implement the disclosure policy, departments must take steps to determine where Brady information may be located in the department’s records. For this purpose, it has been suggested that, as a first step, each agency conduct an audit of the various potential repositories of such information within the agency. In an increasingly technological age, disclosable information may find its way into many places other than traditional police reports, investigators’ notes, and personnel files. For example, computer records; dispatch center tapes; mobile data terminals and transmissions; and recordings by video cameras, including those installed in mobile units, may all be sources where exculpatory information may be found. 19 Once it is understood where such information may be located, the agency will be in a better position to comply with the disclosure requirement. The model policy notes some examples of materials that could be considered disclosable under Brady requirements. These include the following:

- Information that would directly negate the defendant’s guilt concerning a count in an indictment
- Information that would cast doubt on the admissibility of evidence that the government plans to offer that could be subject to a motion to suppress or exclude

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17 For a discussion of this subject and sample language, see Randy Means, “Brady Policy and Officer Credibility,” Law and Order 56, (February 2008): 12. It should be noted that material contained in such records may be accessible to defense lawyers even if not disclosed by the department. See Schott, “The Discovery Process and Personnel File Information.”

18 See Julie Risher, “Brady Is Middle-Aged—But Is Compliance in Its Infancy for Some Agencies?” The Police Chief 75 (June 2008) 12–13. Destruction of evidence and the issues of good faith and bad faith in such destruction were addressed by the U.S. Supreme Court in Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988), in which the Court stated that “The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But ... unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.”

19 See Risher, “Brady Is Middle-Aged.” This same article notes that it is imperative that a system be devised to link these various sources so that the information they contain can be accessed properly.
• Failure of a proposed witness to make a positive identification of a defendant
• An inconsistent statement made orally or in writing by any proposed witness
• Information that tends to diminish the degree of the defendant’s culpability or the defendant’s offense level under state guidelines
• Statements made by any person that are inconsistent with statements made by any governmental witness regarding the alleged criminal conduct

F. Officer Credibility and Departmental Response

If a matter affecting an officer’s credibility has been identified, the question often becomes to what extent will this adversely affect that officer’s ability to perform his or her duties in the future and, in turn, the officer’s usefulness to the department? The difficulty is twofold.

In the context of the present investigation, the officer (a) may not be called by the prosecution as a witness in the case or (b) if called, may be subjected to impeachment by the defense using the Brady material.20

Of ongoing significance to both the officer and the department is the question of whether, after the Brady revelations, the officer can ever again be an effective witness in any case. As noted earlier, the establishment of Brady computer databases or other repositories of information by defense attorneys will likely make the same information available to defense attorneys in all subsequent trials.

Even if the officer’s untruthfulness, dishonesty, or integrity has not been subject to Brady disclosure in a criminal case, existence of defense databases mentioned earlier make it entirely possible that these matters will be raised in some later case.

There is also the basic question of whether a department wishes to retain an officer who has been shown to be untruthful, dishonest, or otherwise subject to doubts about his or her integrity since such behavior is generally considered unacceptable to a department, regardless of whether this has been the subject of a Brady inquiry.

Departments have varied in their response to the issue of an officer’s future effectiveness following Brady revelations. There are a number of courses of action available. The first and possibly the most common response is taking no action at all. This is the course most likely to be chosen by departments that are unaware or ill-informed about the true scope of the Brady issue.

Another response is the permanent transfer of the officer to solely administrative duties. This solution has been the choice in some departments, but its limitations are obvious. There are only a certain number of administrative positions available in any department, however large it may be, and budget considerations may make it impossible to expand the availability of such positions beyond a certain point. If an officer maintains his or her pay grade in such a transfer, the matter of pay equity between sworn and non-sworn personnel who are subject to distinctly different work demands and risks can be an issue. Whatever the case, many departments that select this approach do so in an attempt to freeze the affected individual’s pay and chances for promotion.

Termination has been employed not only in cases where the Brady rule has been invoked but also in many situations where, even in the absence of a Brady disclosure issue, incidents of dishonesty or untruthfulness by an officer have come to the attention of the department. Many court cases have arisen due to termination based upon incidents of officer dishonesty, untruthfulness, or other misconduct. A complete survey of these cases is beyond the scope of this paper. However, in general, termination due to untruthfulness not related to official duties has not been looked upon with favor by many courts. Even matters that relate only to what the courts have called “internal police administration” have been considered inadequate to justify termination.21 Where the untruthful statement or other misconduct relates directly to police duties, the act of termination has received greater support from the courts. This is especially true where the untruthfulness has occurred under oath or in connection with an official investigation.22 Useful reviews of the termination issue and associated case law may be found in the Police Chief Magazine23 and the publications of Americans for Effective Law Enforcement.24

20 Even if not called as a prosecution witness, any officer affiliated with the case may find that he or she will be subject at the trial to a public attack by the defense on the grounds that the officer’s actions in the case were tainted by dishonesty, bias, and so on, thus strengthening the defense’s case for acquittal.

21 See, for example, Harder v. Village of Forest Park, 05-C-5800, Lexis 36892 (N.D. Ill. 2008) (key factor is the subject matter of the falsehood and how it relates to an officer’s duties to the public).

22 For example, in LaChance v. Erickson, 522 U.S. 262 (1998), a case involving several federal employees including a police officer who reportedly lied to his or her superiors during an official investigation, the U.S. Supreme Court held unanimously that “a government agency may take adverse action against an employee because the employee because the employee made false statements in response to an underlying charge of misconduct.” Id., at 268. A number of lower federal courts and state courts have reached similar conclusions. See, for example, City of Boston v. Boston Police Patrolmen’s Ass’n, 443 Mass. 813, 820 (2005) (officer who “shrouds his own misconduct in an extended web of lies and perjured testimony corrodes the public’s confidence in its police force”).


As with any type of employee misconduct, other forms of discipline may be invoked, such as suspension, demotion, or related actions. However, these measures do not resolve the basic problem posed by *Brady*—that the officer’s value to the department and indeed to the public as a police officer—may be permanently damaged once the officer’s misconduct becomes known to defense attorneys.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no “model” policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

This project was supported by a grant awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice or the IACP.

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