# THE SPECIAL RESPONSIBILITIES OF A PROSECUTOR: A GUIDE TO UNDERSTANDING AND IMPLEMENTING *BRADY*

PREPARED BY THE LOUISIANA DISTRICT ATTORNEYS ASSOCIATION

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## INTRODUCTION

This document, The Special Responsibilities of a Prosecutor: Understanding and Implementing *Brady*," has been developed by the Louisiana District Attorneys Association for voluntary use by all District Attorneys and their offices in the State of Louisiana. The Association recommends that the District Attorneys include as part of their office's training curriculum two hours of orientation and guidance annually to their assistants on their special responsibilities as prosecutors. New prosecutors are recommended to receive in an initial orientation to their responsibilities of three hours of training.

Special appreciation is given to District Attorneys Paul Connick, Hillar Moore, Robert Levy, and Ricky Babin for the work of their staff in preparing Special recognition is also given to Deputy Attorney General David W. Ogden for the work of his staff in developing and issuing to all United States Attorneys on January 4, 2010 his "Guidance for Prosecutors Regarding Criminal Discovery."

The purpose of this document is to serve as a reference for the disclosure practices of the District Attorney's and their assistants. It is not, however, meant to serve as a substitute for sound research regarding the particular issues that may arise in any individual case.

This document may be copied, modified, and changed in any manner appropriate for use in training by any member of the Louisiana District Attorneys Association. Improvements and recommendations for future versions of this document should be sent to the Association for inclusion in future editions.

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LDAA
November 12, 2012

# THE SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Every prosecutor in Louisiana must recognize that in addition to their professional obligations as attorneys under the state bar rules of professional conduct, they are held to an even higher standard as a prosecutor.

## The Prosecutor's Creed

As prosecutors, each attorney should be familiar with the Prosecutor's Creed, as articulated in *Berger v. U.S. (1935):*

> The District Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffers. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction, as it is to use very legitimate means to bring about a just one.

These concepts have also been embodied in **Rule 3.8 of the Louisiana Rules of Professional Conduct**, entitled Special Responsibilities of A Prosecutor:

> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to preliminary hearing;
>
> *(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;*
>
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
>
> (1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extra-judicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

This document will focus on the legal and ethical disclosure obligations that prosecutors have to ensure a defendant is fully apprised of the existence of any exculpatory and impeachment evidence available to the State.

## I. *BRADY* AND CONSTITUTIONAL DISCLOSURE

### A. The Constitutional Obligation to Disclose Material Exculpatory and Impeachment Evidence

The United States Supreme Court in *Brady v. Maryland* held that the suppression, after a request, of any evidence favorable to a defendant, where the evidence is material either to guilt or to punishment, regardless of the prosecutor's good faith or bad faith, violates Due Process. *Brady v. Maryland, 373 U.S. 83 (U.S.Md. 1963).* In *Giglio v. U.S.,* the court held that where the reliability of a witness may well be determinative of guilt or innocence, any material impeachment evidence must be disclosed as well. *Giglio v. U.S., 405 U.S. 150 (U.S. 1972).*

These Constitutional obligations have now been held to be present with or without a request by a defendant. *Kyles v. Whitley, 514 U.S. 419, 432-33 (1995).* Thus, there is often no distinction between a broad request for anything exculpatory and no request at all. *U.S. v. Agurs, 427 U.S. 97 (U.S. Dist.Col., 1976).*

NOTE: While the *Brady* decision has been expounded upon and does create extensive duties for prosecutors, it has been held that those duties are in place to ensure fairness of trial, not plea negotiations. Thus, because the right to *Brady* material stems from the guarantee of a fair trial, when a plea of guilty is entered, the defendant waives, along with the right to a fair trial, rights to impeachment evidence under *Brady*. ". . . the Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *U.S. v. Ruiz,* 536 U.S. 622 (U.S. 2002). The U.S. Fifth Circuit has held that prosecutors have no duty to disclose exculpatory evidence prior to a guilty plea. *U.S. v. Conroy,* 567 F.3d 174, 179 (5th Cir. 2009). Two federal Circuit courts have reasoned that *Brady* may be applicable to exculpatory evidence.

The Seventh Circuit has stated "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7thCir. 2003). In an unpublished opinion the 10th Circuit agreed. *U.S. v. Ohiri,* 133 F. App'x 555, 562 (10th Cir. 2005). Courts have held that *Brady* obligations are not triggered during grand jury proceedings. *U.S. v. Williams,* 504 U.S. 36, 112 S.Ct. 1735 (1992).

**1. Materiality and Admissibility**

There are three components of a true *Brady* claim: "(1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).* The third prong is often the crux of a *Brady* violation and hinges on the materiality of the evidence. In *U.S. v. Bagley*, the Supreme Court defined the materiality standard, holding that "evidence is material only where there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *U.S. v. Bagley, 473 U.S. 667 (U.S. Wash., 1985).* Louisiana has since adopted this standard of materiality. *See, State v. Marshall, 94-0461 (La. 9/5/95), 660 So.2d 819*.

NOTE: Louisiana courts have held that while the potential admissibility of evidence at trial is a factor to be considered when determining the materiality of evidence, it is not alone determinative of materiality. *See, State v. May, 339 So.2d 764 (La. 1976).* Thus, as the court in *Kyles v. Whitley, supra* suggested, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles, 514 U.S. at 439.*

**a. Impeachment Issues: Rap Sheets, Witness Remuneration, and Witness Protection**

*Giglio* held that when the reliability of a witness may be determinative of guilt or innocence, evidence of a witness's credibility may fall under the general *Brady* disclosure obligation. It follows then, that evidence of a witness's prior convictions could form an important source of information for impeachment. *State v. Bright, 02-2793 (La. 5/25/04), 875 So.2d 37.* Thus, courts in Louisiana have held that witness's rap sheets are subject to disclosure. In *State v. Bowie, 00-3344 (La. 4/3/02), 813 So.2d 377,* the court stated that Louisiana has long enforced the right of a defendant to see rap sheets of "principal" state witnesses for impeachment purposes. The court defined principal as those present at the crime and therefore essential to the prosecution. Be aware that the court has also determined that municipal offenses may also be used for impeachment and should, therefore, also be considered for inclusion as part of rap sheet production.

*State v. Tolbert, 03-0330 (La. 6/27/03), 849 So.2d 32.* Under the terms of the NCIC contract with each office, rap sheets are confidential and you are not permitted to "share" them with the defense. This contradicts the case law, and there is no clear remedy to the issue. It is recommended that prior to releasing a rap sheet you obtain an order of the court directing you to do so. While this is not a guaranteed protection, it is the current best practice in Louisiana (see Appendix A).

In addition, where convictions are not present but a witness has had arrests or pending charges, that information could become discoverable for the purposes of *Brady* if it can be used to show the witness has a bias, prejudice, or a motive to cooperate with the investigation. Thus, plea bargains and other inducements to testify must be disclosed to the defense under *Brady*. *State v. Bowie, supra.* Additionally, even where there can be no showing of an actual deal or inducement between the prosecution and a witness, when a witness has an arrest or is otherwise a prospect of prosecution, that information is subject to disclosure if the witness could still be seen as attempting to gain the state's favor by testifying. *State v. Williams, 02-1406 (4/9/03), 844 So.2d 832.*

Also, where witnesses received protective services, the provision of those services, but not the security details, are subject to disclosure as potential bargains and other inducements to testify. See R.S. 15:1606.

**b. Confidential Informants and Internal Police Files**

While the state has an obvious interest in keeping certain files and identities confidential and has recognized that interest by enacting statutory provisions establishing privileges of confidentiality, courts have held that the defendant's right to a fair trial can supersede these interests. Thus, the court in *Roviaro v. U.S., 353 U.S. 53 (1957)* held that when either an informant's identity or his communications are relevant and helpful to a defendant, the privilege of confidentiality must give way. Likewise, *in Davis v. Alaska, 415 U.S. 308 (U.S.Alaska, 1974),* a 17 year-old witness's juvenile record was allowed to be given to the defense under *Brady* because the defense wanted to argue that the witness's probationary status was motivating him to testify. The court reasoned the right to a fair trial outweighed the strong government interest in keeping juvenile records confidential.

This does not, however, create a means for a defendant to get around confidentiality barriers by simply asking for all *Brady* material. The court in *People v. Gissendanner, 48 N.Y.2d 543 (N.Y., 1979)* held that when a request for confidential material is aimed at revealing specific biases, privileges, or motives or contains information that may affect the outcome of the trial if known by the trier of fact, those privileged records may be compelled, but, "there is no such compulsion when requests to examine records are motivated by nothing more than impeachment of witnesses' general credibility." In that case, the court held that the prosecution did

not have to produce the personnel records of police witnesses subsequent to a general request for *Brady* material by the defendant.

These principles are also applicable to confidential internal police files, as held by *Gissendanner*, *supra*. When the defendant can show that a police witness's confidential disciplinary record could give rise to a motive for his testimony, the record could become *Brady* material subject to disclosure. Additionally, when the content of the confidential police record has specific relevance to the case or testimony, the discovery of the records has been allowed. Thus, in *State v. Black, 786 So.2d 289 (La.App.2 Cir., 5/9/01)*, where an identification police witness had made misidentifications in the past, non-disclosure of that information violated *Brady*. Additionally, when a police witness had violated general police orders in the arrest of the defendant, that portion of the officer's record were subject to disclosure, since it could be used to impeach a key witness. *N.Y. v. Cimino, 750 N.Y.S.2d 733 (N.Y.Sup., 2002).*

*Brady* requests, however, for internal police material must conform to the same rules that govern all impeachment material requests. Thus, when a defendant hopes to attack the general credibility of a police witness, only disclosures of convictions will be required. *In State v. Hollins, 97-627 (La.App.5 Cir., 11/25/97), 704 So.2d 307*, when the defendant made a general request and a testifying police officer's suspension was not disclosed, the court held there was no *Brady* violation since the suspension was not a conviction. The court did suggest that the defense would have a right to the information to impeach based on bias or interest caused by the suspension, but not simply to attack his general credibility. In *People v. Oglesby, 676 N.Y.S.2d 430 (N.Y.Sup., 1998),* the court made a similar decision, holding no violation occurred when previous allegations of abuse by a testifying police officer were withheld. The allegations were not convictions and the request for the confidential police file did not state the information would be used to impeach based on bias or personal interest, but rather sought to attack the officer's general credibility. Therefore, confidential police files are not all subject to general disclosure, but the grounds for non-disclosure spring from the content of the file and the purpose for which it is sought, not its confidential nature.

Consequently, information contained in internal police files, in addition to convictions and pending arrests, should be disclosed if it:

- provides a motive to falsely testify
- bears a particular relevance to the defendant's case
- shows that the police officer has misidentified a suspect in another case
- sustains claims of excessive force if that is an issue in this defendant's case
- is evidence of police misconduct in handling in this defendant's case

### 2. The Prosecution Team and the "Duty to Know"

While *Bagley* held that the materiality standard did not require a prosecutor to turn over the prosecution's entire file, courts have long held that the prosecutor's duty to search for exculpatory and impeachment evidence extends beyond the prosecutor's own files. A 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. *Kyles, 514 U.S. at 437.*

The prosecutor's duty also extends to the police department's homicide and internal affairs division files. *U.S. v. Brooks, 966 F.2d 1500 (C.A.D.C., 1992).* To require anything less, *Brooks* reasoned, would induce prosecutors to embrace policies which would put themselves in a constant state of ignorance. The possibility of constructive knowledge provides an incentive to prosecutors to communicate with law enforcement and maintain information about each case.

This duty to discover exculpatory evidence does have its limits. Courts have held that when law enforcement files are so removed from the case at trial and only involves speculation that relevant information exists therein, the duty to investigate those files lessens. *People v. Shakur, 648 N.Y.S.2d 200 (N.Y.Sup., 1996).* The *Shakur* court stated, "a prosecutor is not constructively aware of police files unrelated to the case on trial unless there exists some reason to believe a file contains relevant information." *Id.,* at 206. Similarly, in *State v. Louviere*, the Louisiana Supreme Court held that when a prosecutor has asked all government agencies to send all documents prepared in the case, and reasonably believed he had received them, he was relieved of his duty to disclose and no *Brady* violation occurred even though exculpatory documents surfaced after the defendant was sentenced. *State v. Louviere, 00-2085 (La. 9/4/02), 833 So.2d 885.*

In order to guide you in fulfilling your "duty to know," a list of types of *Brady* material for law enforcement has been developed as part of a broader letter to law enforcement on *Brady*. Note that this is not an exhaustive list, and each case must be reviewed independently (See Appendix B).

## B. Timing of Disclosure

Generally, *Brady* disclosures will be made in advance of trial. A timely disclosure of *Brady* material must provide the defense with an opportunity to properly prepare for trial. A late or untimely disclosure may constitute a violation of Due Process. *State v. Prudholm, 446 So.2d 729 (La., 1984).* The timeliness of a disclosure may vary based on the confidentiality concerns of exculpatory evidence, the protection of witnesses implicated in certain impeachment disclosures, and whether the evidence is useful only during the sentencing stages of a trial. In any event, a defendant must have a meaningful opportunity to either use the *Brady* material to cross-examine a state witness or use the material as evidence in his or her case. *State v. Prudholm, 446 So.2d 729, 738 (La. 1984).*

Additionally, *Brady* disclosure obligations are ongoing, so duties to learn of and disclose *Brady* and *Giglio* material continue after an initial disclosure of information.

## II. RULE 3.8 AND ETHICAL DISCLOSURE

A prosecutor should also bear in mind the ethical obligations imposed by the Rules of Professional Conduct. In Rule 3.8, particularly 3.8(d), the rules provide:

The prosecutor in a criminal case shall:

* * * * *

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, **either tends to negate the guilt of the accused** or **mitigates the offense**, and, **in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor**, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Recently, there is a growing body of jurisprudence in other states that suggests this obligation is broader than the constitutional obligation imposed by *Brady* and its progeny and the statutory obligations imposed in the Code of Criminal Procedure. Specifically, the argument is that Rule 3.8(d) does not have a materiality component. In other words, a prosecutor would have an ethical obligation to disclose even *non-material exculpatory evidence* where there may be no constitutional *Brady* duty to do so, because the prosecutor believes the evidence to be immaterial.

The Louisiana Office of Disciplinary Counsel and the American Bar Association take the position that prosecutors are in violation of Rule 3.8 by failing to disclose "information that tends to negate or reduce the guilt of the defendant," even if such information is not "material" evidence. The following definition of "material" is found in *U.S. v. Bagley*:

> 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. A '**reasonable probability`** is a probability sufficient to undermine confidence in the outcome.
>
> *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481.

In the recent case of *Smith v. Cain,* --- U.S. ---, 132 S.Ct. 627 (2010), the ABA made the following argument in the ABA Amicus brief:

> The present case involves numerous substantial allegations of non-disclosure that fit squarely within the requirements of Louisiana Rule 3.8(d) and Model Rule 3.8(d). For example, Petitioner contends that the prosecution failed to disclose pre-trial statements by its key

> eyewitness -- who was also the only witness to identify Petitioner -- that he was unable to identify any of the perpetrators. These statements would contradict his trial identification of Petitioner. The prosecution also allegedly failed to provide statements from other witnesses that the men who entered the house were all wearing masks, which would contradict the one eyewitness' testimony that he could see Petitioner's face. *Compare* ABA Formal Ethics Opinion 09-454 at 14a (Model Rule 3.8(d) (requires disclosure of statements from eyewitnesses who claim the defendant is not the culprit, even if the prosecutor believes the eyewitness lacked the opportunity to make an accurate identification, and even if other witnesses identify the defendant.

A prosecutor's ethical duty to make disclosures such as these, however, does not depend on their materiality. Louisiana Rule 3.8(d), like Model Rule 3.8(d), does not consider the materiality of the evidence or information. ABA Formal Opinion 09-454 at 11a explains:

> Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.

As ABA Formal Opinion 09-454 notes, the constitutional materiality limitation under the *Brady* jurisprudence also is absent from the National District Attorneys Association's disclosure standard. *Id.* at n.22, quoting NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged.")

By requiring prosecutors to disclose more than material exculpatory evidence, the ABA Model Rules seek to avoid pitfalls that might arise if a prosecutor attempts to determine materiality before making a disclosure. As commentators have highlighted, assessing materiality pre-trial requires prosecutors to "anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place 'the whole case' in a different light." Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 WM. & MARY L. REV. 1587, 1609 (2006).* In addition, "compared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality

where it might in fact exist." Burke, *id. at 1612; see also* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence,* 6 OHIO ST. J. GRIM. L. 467, 488 (2009) ("Tunnel vision has had an obvious impact in the pretrial stage: having formed an initial judgment that a particular defendant is guilty of a crime, prosecutors and police will tend to discredit or discount the significance of new exculpatory evidence or fit it into their preexisting theory.")

The Supreme Court of the United States has repeatedly referred to this proposition, but has never ruled on the matter directly, presumably because the ethical rules are enforced by the state bar associations. In *Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, (2009), the Court discussed this obligation in footnote 15, as follows:

> FN15. Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. See *Kyles*, 514 U.S., at 437, 115 S.Ct. 1555 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3–3.11(a) (3d ed.1993)"). See also ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. See *Kyles*, 514 U.S., at 439, 115 S.Ct. 1555; *United States v. Bagley*, 473 U.S. 667, 711, n. 4, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (STEVENS, J., dissenting); *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Although no United States Supreme Court case has determined the limits of Rule 3.8(d), it is clear that the Court believes the Rule might exceed the materiality limits imposed by *Brady* and its progeny. To date, no Louisiana case has tested the limits of the rule either. However, as noted by the Supreme Court, "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."

In the Louisiana case of *In Re Jordan*, 2004-2397 (La. 6/29/05), 913 So.2d 775, 784, the Louisiana Supreme Court considered the *res nova* question of disciplinary action against a prosecutor for violation of Rule 3.8. The prosecutor had disclosed two of the three statements by

an eyewitness to the defense. He did not disclosed the second of the witness' three statements, because the prosecutor did not consider the statement to be material under *Brady* and its progeny. The Court did not discuss the finer distinctions between Rule 3.8(d) and *Brady.* It ruled that the statement was clearly impeachment evidence that was material to the eyewitness identification. The Court did state, "[w]hile the definition of materiality set forth in *Kyles* and its progeny may be seen as leaving a prosecutor with a degree of discretion, it does not. *Kyles,* 514 U.S. at 438, 115 S.Ct. 1555." *In re Jordan*, 2004-2397 (La. 6/29/05), 913 So.2d 775, 782. Thus, the Louisiana Supreme Court left prosecutors with the following, oft-cited advice:

> As we noted in our decision overruling Mr. Cousin's conviction, citing Justice Souter's eloquent statement in *Kyles,* **a prosecutor anxious about "tacking too close to the wind will disclose a favorable piece of evidence" and "will resolve doubtful questions in favor of disclosure.**" *Cousin,* 96–2973 p. 17 n. 8, 710 So.2d at 1073 n. 8, *citing Kyles,* 514 U.S. at 439, 115 S.Ct. 1555. Respondent failed to produce evidence which was clearly exculpatory and should have resolved this issue in favor of disclosure.

*In re Jordan*, 04-2397 (La. 6/29/05), 913 So.2d 775, 782 [Emphasis added].

## III. DISCLOSURE PROCEDURES

### A. Step 1 - Gathering *Brady* and *Giglio* Information

#### 1. Where to Look - The Prosecution Team

As discussed above, prosecutors have a duty to know of exculpatory evidence in the possession of anyone on the prosecution team. Usually, the prosecution team will include the law enforcement officers in the relevant parish working on the case. The team, however, also includes any officers (state, federal, and local) who have participated in the investigation and/or prosecution of the defendant. If the investigation or prosecution involves multiple law enforcement agencies or District Attorneys' offices, the prosecution team will necessarily be expanded. In these cases, a prosecutor will be required to review information in another office or agency's possession. Some factors to consider when determining whether to review information possessed by an outside office are:

- whether the prosecutor and the outside office participated in a joint investigation
- whether the office played a central role in the case by conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, or participating in targeting discussions
- whether the prosecutor has obtained other information or evidence from the office in the past

- the degree to which information gathered by the prosecutor has been shared with the office

**2. What to Review**

**a. Physical and Documentary Evidence**

Generally, all evidence and information gathered during the investigation should be reviewed. This will include investigators' files and notes, as well as any files and documents that other law enforcement agencies may possess. Additionally, the review should cover all lab results stemming from physical testing, including inconclusive and negative test results as they may also be subject to disclosure. Checklists have been developed to assist prosecutors in identifying potential *Brady* material at the screening and pre-trial levels (see Appendix C).

**b. Documents from Parallel Proceedings**

If it has been determined that any member of the prosecution team is in possession of documents concerning a parallel civil proceeding such as depositions or case files, the review for *Brady* material should extend to those files to ensure compliance with disclosure obligations.

**c. Substantive Case-related Communications**

Case-related communications maintained by prosecutors or investigators, including those with witnesses or victims, could contain *Brady* information where the communications are "substantive." These communications could be contained in emails, memoranda, notes, and files.

Usually, "substantive" communications will involve:

- factual discussions about investigative activity
- factual discussions about the relative merits of evidence
- factual information gathered during interviews or other interactions witnesses or victims
- factual issues relating to credibility

Generally, communications about investigative or prosecutorial strategies alone are not subject to *Brady* obligations, but these communications should be subject to the reviewing process for thoroughness.

**d. Impeachment Information for Non-Law Enforcement Witnesses**

It is important that reviews of civilian witnesses' criminal history do not rely exclusively on NCIC reports or rap sheets. While these documents are important and possibly subject to disclosure, a careful interview of all

witnesses is necessary to discover other potentially discoverable information. For instance, whether the witness has engaged in criminal conduct that has not been charged, may provide bias or an incentive for the witness to cooperate with prosecutors. Additionally, aside from convictions and arrests themselves, one should consider prosecutor refusals, plea reductions, diversion referrals, outstanding attachments, and expungements, and determine whether these actions are subject to disclosure. Thus, pre-trial witness interviews are essential and the content of those meetings should be reviewed for any potential *Brady* material.

In addition to the criminal histories of civilian witnesses, the following issues should also be considered for potential disclosure:

- prior inconsistent statements
- benefits provided to the witness, including:
  - Dropped or reduced charges
  - Immunity
  - Monetary benefits
  - Relocation assistance
- letters to other law enforcement officials setting forth the extent of a witness's assistance, or making substantive recommendations on the witness's behalf
- animosity toward the defendant
- animosity toward a group to which the defendant belongs or with which the defendant affiliates
- relationship with the victim
- any known substance abuse or mental health issues that could affect the witness's ability to perceive and recall events

**e. Impeachment Information for Law Enforcement Witnesses**

While many of the issues addressed above will apply to law enforcement witnesses, law enforcement witness present a few additional considerations. A prosecutor should consider whether the witness has ever been the target of any investigation, including investigations by an Internal Affairs Division. The nature of the allegations and the results of any investigations should be reviewed as well. Special guidelines are set forth below, for disclosures of this kind. Of particular concern are any comments made by law-enforcement witnesses regarding the guilt or innocence of the accused.

**B. Step 2 - Conducting the Review**

Once the prosecutor has gathered all of this pertinent information, the prosecutor must next ensure that this material is thoroughly reviewed to identify information that must be disclosed. In cases involving voluminous evidence obtained from third parties, prosecutors may consider simply providing the defense access to the voluminous documents themselves to avoid the possibility that a well-intentioned review process nonetheless fails to identify *Brady* evidence. The prosecutor should maintain documentation about how this

access was granted and utilized by the defense should future claims concerning this material arise. Obviously, such a broad disclosure may not be appropriate where confidential or classified information is contained.

## C. Step 3 - Making the Disclosures

### 1. Timing

As discussed above, the timing of a *Brady* disclosure will vary based on the nature of the disclosure. Generally, the disclosure should be made reasonably promptly after discovery of the information. Confidentiality concerns, the protection of witnesses, and whether the evidence is useful only during the sentencing stages of a trial, are considerations which may necessarily change the timing of a disclosure. *Brady* disclosure obligations are ongoing, so a prosecutor's duties to know and disclose *Brady* and *Giglio* material continue well beyond the initial disclosure of information and may require multiple disclosures.

### 2. Form and Documentation of the Disclosures

When the original form of discoverable information could give rise to confidentiality or other issues, it may be appropriate to alter the original form for disclosure. For example, if discoverable information is found among an investigator's notes, not all of which are discoverable, it may be proper to extract the discoverable information and make the disclosure in the form of a letter to defense counsel. In such a case, however, one must take serious precaution to ensure all pertinent information is provided.

### 3. Open File Disclosure

No court can require the State to provide open file discovery. However, many offices have embraced "open file" disclosure and now invite defense access to its files using words similar to: "open file discovery provided." This open-ended language will be interpreted by the courts literally to mean that there is nothing in the possession of the state concerning this file that the defendant cannot have access to. Specifically, "if a prosecutor adopts an open file policy by which he or she makes the prosecution file available to the defense to satisfy the state's discovery obligation as a matter of La. C.Cr.P. arts. 7171-72, and its duty to disclose material exculpatory evidence as a matter of Due Process, defense counsel may reasonably rely on that file to contain all materials the state is obligated to disclose. *Garrick, 03-0137 (La. 4/14/04 quoting from Strickler v. Green, 527 U.S. 263, 283, n. 23, 119 S.Ct. 1936, 1949 (1999).* In all but the most insignificant of cases, a prosecutor would better protect the case by denoting exactly what is being provided, as in "all police reports provided" or providing an itemized list of what has been pro-vided as below described.

At the time open file discovery or a supplemental disclosure is given to defense counsel, an itemized disclosure form should be attached to the documents (see Appendix D). To preserve the record on appeal, all discovery responses should be

filed into the court's record contemporaneously with delivery to the defense. If the records cannot be filed into the record contemporaneously, the prosecutor should, at the very least, file the itemized list of what has been provided, and later supplement the record with a receipt signed by defense. In cases where the records are voluminous, it is always a good practice to have the defense counsel accept the records from the prosecutor and sign the itemized receipt at the time the records are received.

A specific section of the case jacket (file) should be designated for copies of the disclosure documents, including the disclosure forms. By designating this area in the file, the assigned prosecutor, supervisors, and appellate attorneys will be able to key in on the relevant documents should a challenge to disclosure arise.

Providing the court with an index of all discovery and disclosure motions and answers provided is another way to assist the court and counsel with their efforts to ensure all requests have been addressed.

**4. Confidential Information and Protective Orders**

As discussed above, sometimes a disclosure is required despite the confidential nature of the information contained. In some cases, the information may be so sensitive that it requires a petition to the court to protect that information from dissemination (see Appendix E). This information may include, but is not limited to a witness's medical records, identifying contact numbers, and social security numbers. This information must be protected by a court order which should limit access to only the information to the defendant and counsel for the limited purpose of preparing for trial. When privacy interests arise in the disclosure process, a prosecutor should consult a supervising attorney to determine the best method to protect the information required by disclosure.

In cases where a witness's safety is at issue or where threats or intimidation could be directed at witnesses, an exception to the general office policy of open file discovery may be warranted. Again, supervisors should be consulted to determine if such an exception exists. If an exception to open file discovery does exist, a blind review may be conducted by office supervisors to be sure that discovery obligations under *Brady* have been satisfied.

**5. Special Procedures for Disclosing Police Officer Witnesses/Potential Witnesses under Investigation**

When allegations of police misconduct have been made against an officer, evidence of such allegations may become a prosecutor's *Brady* obligation to disclose. These disclosures should be made even when the prosecution is not necessarily planning to call the police witness to testify.

The recommended method for such a disclosure is to provide a sealed envelope to defense counsel and to the court. The sealed envelope should contain a cover letter explaining the disclosure along with an attached motion and rule for the

court to order the maintenance of this information under seal by all parties, including the court, and prohibiting all parties from re-disclosure of the information. The cover letter should set forth the substance and nature of the allegations or investigation concerning the officer. The prosecutor should request the court to acknowledge receipt of this information by defense counsel on the record of the court along with the Court's admonition to maintain such information under seal and prohibit all parties from re-disclosure.

## IV. RESPONDING TO ALLEGATIONS OF PROSECUTOR MISCONDUCT

### A. Prosecutor Misconduct

The Louisiana District Attorneys Association defines prosecutor misconduct as follows: "Prosecutor misconduct occurs when a prosecutor deliberately engages in dishonest or fraudulent conduct calculated to produce an unjust result."

### B. Duty to Report Misconduct

A prosecutor is obligated to respond to a complaint of prosecutor misconduct, as above defined, that has, will, or has the potential to interfere with the proper administration of justice. A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth. Justice is not complete without the truth always being the primary goal in all criminal proceedings. A prosecutor is not a mere advocate and unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole. In that capacity, a prosecutor must exercise independent judgment in reaching decisions while taking into account the interest of victims, witnesses, law enforcement officers, suspects, defendants and those members of society who have no direct interest in a particular case, but who are nonetheless affected by its outcome. NDAA National Prosecution Standard 1-1.6.

Furthermore, all attorneys, including prosecutors, have a duty to report professional misconduct to the bar disciplinary counsel: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel." Rule 8.3.

Today's prosecutors may think that they are under attack given the wide media coverage reporting of prosecutor misconduct nationwide. In Louisiana, it seems common practice for members of the defense bar to raise unsubstantiated complaints of prosecutor misconduct during the course of a criminal proceeding. In an effort to respond to and negate this appearance of widespread misconduct, representatives from the Louisiana District Attorneys Association met with bar disciplinary counsel in 2011 to learn about the number of complaints actually lodged with disciplinary counsel over the course of the last 20 years. They were advised that the actual number of complaints received by bar disciplinary counsel was less than six during the past twenty years. In addition, they learned that no complaint to date has resulted in an actual finding of prosecutor

misconduct in the State of Louisiana. With this factual background, it appears that a strong offense may the prosecutor's best defense.

## C. Procedure for Responding

The procedures below are recommended to prosecutors subject to allegations of misconduct:

### 1. Allegations occurring in court

Allegations of violations of prosecutor misconduct, as defined in Section III(A), occurring in court, in the presence of the court, court staff, and members of the public require an immediate response to protect the public's perception of the integrity of our criminal justice system. Prosecutors should ensure that any allegation, whether formal or informal, whether substantive or not, is answered with an immediate request to take the matter promptly up on the court's record. The request should require the complaining party be ordered to put their complaint in writing to provide the prosecutor with particularized notice of the allegation. A hearing date should be set for all parties to provide evidence supporting or negating the complaint. In this manner, the allegation can be responded to and made a part of the case record.

Following the hearing and the court's ruling, prosecutors are encouraged to report the complaint and the court's finding to bar disciplinary council for follow-up within the professional disciplinary system. It is important to remember that all attorneys are obligated by their professional duties to cooperate with bar disciplinary investigations.

At all steps of this process, the prosecutor's District Attorney should be kept informed so that the District Attorney can respond knowledgably to inquiries from bar disciplinary counsel, the media, or other members of the criminal justice system, including local Public Defenders. Each District Attorney's office should keep a log and file of these prosecutor misconduct complaints and the status of their eventual resolutions to negate charges that any prosecutor in the office is engaged in prosecutor misconduct.

### 2. Allegations occurring outside of court

In a manner very similar to the process described above, all prosecutors should be attuned to allegations of prosecutor misconduct that are alleged outside of court. Again, the recommended process is to confront the complainant and request that the complainant make the substance of the complaint known in writing to the prosecutor, or affirmatively withdraw the complaint. In the event the complainer chooses to do neither, the matter then falls to the prosecutor to document the alleged complaint. Included in that documentation should be all discussions held with the complainant. As previously noted, any action taken should be shared and

logged with the prosecutor's District Attorney so that the District Attorney can respond to any relevant inquiries.

**THE SPECIAL RESPONSIBILITIES OF A PROSECUTOR: UNDERSTANDING *BRADY***

Receipt Form

I, _____, have received and read the document **THE SPECIAL RESPONSIBILITIES OF A PROSECUTOR: UNDERSTANDING AND IMPLEMENTING *BRADY*** .

By signing below, I agree to follow the information outlined in this document.

_____ _____

Signature Date

# APPENDIX A

# SAMPLE ORDER REGARDING THE USE AND DISCLOSURE OF NCIC CRIMINAL HISTORY REPORTS

## IN PROGRESS

# APPENDIX B

# EXAMPLE LETTERS TO LAW ENFORCEMENT RE: *BRADY*

**(DATE)**

**(SHERIFF/CHIEF NAME)**
**DEPARTMENT**
**ADDRESS**
**ADDRESS**

RE: "BRADY MATERIAL"

Dear **(SHERIFF/CHIEF NAME)**:

This letter is to confirm **(OFFICER'S NAME)** as our liaison to handle possible Brady material in your department's possession, control, or knowledge. As a reminder, Brady material is information or evidence that: impeaches a prosecution witness; tends to exonerate a defendant; involves dishonesty; shows improper use of force; or tends to show bias.

Examples of possible impeachment evidence of a material witness include but are not limited to:

(1) False reports by a prosecution witness
(2) Pending criminal charges against a prosecution witness
(3) Parole or probation status of the witness;
(4) Evidence contradicting a prosecution witness
(3) Parole or probation status of the witness
(4) Evidence contradicting a prosecution witness' statements or reports
(5) Evidence undermining a prosecution witness' expertise
(6) A finding of misconduct that reflects on the witness' truthfulness, bias or moral turpitude
(7) Evidence that a witness has a reputation of untruthfulness
(8) Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group
(9) Promises, offers, inducements or payments to a witness, including an implied grant of Immunity, and
(10) An employee presently under suspension.

Any such material in your department's possession should be turned over by **(OFFICER'S NAME)** to Assistant District Attorney, **(ADA NAME)**, for review. He is available to discuss any concerns or answer any questions you may have about Brady issues. As Brady and its progeny are a complex and ever evolving area of the law, he is also available to offer training to your officers in this field.

It is also important to note that all allegations, whether substantiated or not, should be turned over immediately to our office. The allegations will be reviewed to determine whether or not they need to be disclosed to the defense. All unsubstantiated allegations will remain confidential until such time as a determination is made that a disclosure is necessary. Prior to such disclosure, your agency will be notified of our intention to disclose any information.

Thank you for your cooperation in this matter, and as always, contact me if you have any questions or concerns.

Sincerely,

_____
**(DISTRICT ATTORNEY NAME)**

**(DATE)**

**(SHERIFF/CHIEF NAME)**
**DEPARTMENT**
**ADDRESS**
**ADDRESS**

RE: *Brady* Information in the Possession of Law Enforcement

Dear **(SHERIFF/CHIEF NAME)**:

This letter 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 letter is intended to function in conjunction with established *Brady* policies/procedures applicable to prosecutors and law enforcement.

## I. 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).

## II. 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 law enforcement officers. 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.

## III. 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 chapter, employee means anyone employed by the agency who may be called to testify under oath. However, the existence of this letter 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.

## IV. 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/office, 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 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.

---

[1] It should be noted that although it is not required by Brady *per se*, Louisiana CCrP art. 717 provides that the prosecutor or law enforcement shall provide the defendant upon motion with "any record of his criminal arrests and convictions that is their possession or custody." Also, the courts in Louisiana have held that witnesses' rap sheets are subject to disclosure. In *State v. Bowie*, 00-3344 (La. 4/3/02), 813 So.2d 377, the court stated that Louisiana has long enforced the right of a defendant to see rap sheets of "principal" state witnesses for impeachment purposes. 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 letter 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 letter, agencies should consult with legal counsel as necessary.

**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.

I appreciate your ongoing cooperation regarding this issue. If you have any questions or need additional information, please contact _____ at (xxx) xxx-xxxx or email.

Sincerely,

District Attorney
___ Judicial District

# APPENDIX C

# DISCLOSURE REVIEW CHECKLISTS FOR PROSECUTORS

**Disclosure Obligation Review – Screening Level**

**THE LIST CONTAINED HEREIN IS NON-EXHAUSTIVE. THE PURPOSE OF THIS FORM IS TO ASSIST ADAs IN THEIR DUTY TO COMPLY WITH THEIR DISCLOSURE OBLIGATIONS. ADHERENCE TO THE STEPS CONTAINED IN THIS FORM DOES NOT GUARANTEE THAT AN ADA IS IN FULL COMPLAINCE WITH HIS OR HER DISCLOSURE OBLIGATIONS. ALL ADAs ARE OBLIGATED TO FAMILIARIZE THEMSEVLES WITH THE RELEVANT CASE LAW IN ORDER TO ENSURE FULL COMPLIANCE WITH THEIR DUTIES TO INVESTIGATE AND DISCLOSE EXCULPATORY MATERIAL, EVIDENCE FAVORABLE TO THE DEFENSE OR FOR IMPEACHMENT.**

**WHEN IN DOUBT, ADAs SHOULD ALWAYS ERR ON THE SIDE OF FULL DISCLOSURE.**

1. **Kyles Efforts** – I have obtained any and all additional materials that are known to me, and have made them part of the D.A. case file. I have made a diligent inquiry for all available information including consulting with the lead detective and inquiring as to the existence of any additional reports, recordings, and information pertaining to this case. (If such information is known, but not yet received, check the box and list it in a memorandum).

2. **DA File** – I have received all notes, reports, recordings and materials included in the D.A. case file.

3. **Witness Statements** – I have prepared a Notice of Disclosure, to be filed by the trial A.D.A., identifying any inconsistent statements or information provided by a victim or witness and learned during my review of the case. (A Notice of Disclosure is not required for any statement previously documented in a discoverable format such as an audio recording or police report).

4. **Victim and Witness Assistance** – Answer the following questions to the best of your knowledge and diligent inquiry (any answer of "yes" must be explained, in detail, on the reverse or via memorandum).

    a) Does any victim or witness have any open arrests; any open cases, any pending charges or is any victim or witness currently incarcerated?
    Yes _____ No _____

    b) If the answer to part "a" was yes, have any reductions in charge, sentence or bill status been offered? Does the victim or witness have any belief that a reduction might be discussed in the future?
    Yes _____ No _____

    c) Was any victim or witness offered a grant of immunity or anything of value in exchange for his or her cooperation with the instant case?
    Yes _____ No _____

    d) Has any victim or witness received material assistance from the Victim/Witness Division, including but not limited to food, clothing, lodging, travel or financial assistance? Has any victim or witness received or expect to receive compensation from an award program as a result of his or her cooperation?
    Yes _____ No _____

5. I am not aware of any evidence that is exculpatory, favorable to the defendant, or may be used to impeach a witness that is not accounted for in a Notice of Disclosure or in discoverable material.

Law Enforcement Item No. _____ Sign & Dated _____

**Disclosure Obligation Review – Pre-Trial**

**THE LIST CONTAINED HEREIN IS NON-EXHAUSTIVE. THE PURPOSE OF THIS FORM IS TO *ASSIST* ADAs IN THEIR DUTY TO COMPLY WITH THEIR DISCLOSURE OBLIGATIONS. ADHERENCE TO THE STEPS CONTAINED IN THISFORM DOES NOT GUARANTEE THAT AN ADA IS IN FULL COMPLAINCE WITH HIS OR HER DISCLOSURE OBLIGATIONS. ALL ADAs ARE OBLIGATED TO FAMILIARIZE THEMSEVLES WITH THE RELEVANT CASE LAW IN ORDER TO ENSURE FULL COMPLIANCE WITH THEIR DUTIES TO INVESTIGATE AND DISCLOSE EXCULPATORY MATERIAL, EVIDENCE FAVORABLE TO THE DEFENSE OR FOR IMPEACHMENT.**

**WHEN IN DOUBT, ADAs SHOULD ALWAYS ERR ON THE SIDE OF FULL DISCLOSURE.**

1. **DA File** – I have received all notes, reports, recordings and materials included in the D.A. case file.

2. **Kyles Review** – I have obtained any and all additional materials that are known to me, and have made them part of the D.A. case file. I have made a diligent inquiry for all available information including consulting with the lead detective and inquiring as to the existence of any additional reports, recordings, and information pertaining to this case. All discovery has been tendered to defendant's counsel of record.

3. **Witness Statements** – I have received all statements of the victim(s) and witnesses, which are known to me, including any interviews conducted after the institution of prosecution for statements that are inconsistent with previous statements given. A Notice of Disclosure of statements containing any material inconsistencies has been prepared.

4. **Victim and Witness Impeachment Evidence** - Answer the following questions to the best of your knowledge and diligent inquiry (any answer of "yes" must be explained, in detail vial memorandum) and a disclosure notice to defense counsel is required.
    a. Does any victim or witness have any open arrests; any open cases, any pending charges or is any victim or witness currently incarcerated?
    Yes _____ No _____

    b. If the answer to part "a" was yes, have any reductions in charge, sentence or bill status been offered by any member of this office or by law enforcement? Does the victim or witness have any belief that a reduction might be discussed in the future?
    Yes _____ No _____

    c. Was any victim or witness offered a grant of immunity or anything of value in exchange for his or her cooperation with the instant case?
    Yes _____ No _____

    d. Has any victim or witness received material assistance from the Victim/Witness Division, including but not limited to food, clothing, lodging, travel or financial assistance? Has any victim or witness received or expect to receive compensation from an award program as a result of his or her cooperation?
    Yes _____ No _____

5. After a review of all reports, recordings, and other documents and materials associated with this case, of which I am aware, I have determined that:
    a. No additional disclosures are necessary □(Check here) OR
    b. A disclosure is necessary and I have attached a copy of 'State's Notice of Disclosure' that has been served upon defendant's counsel of record and filed in open court. □ (Check here)

CDC Case No. _____ _____

ADA, Trial Division Date

# APPENDIX D

# ITEMIZED DISCOVERY RECEIPT

# ITEMIZED DISCOVERY RECEIPT

Defendant _____

D.A. #_____ ADA NAME: _____

CLERK #_____ DIVISION_____

This is to acknowledge the receipt of discovery on the above named defendant.

| | | | |
|---|---|---|---|
| Advise of Rights | _____ | Property Receipt | _____ |
| Affidavit | _____ | Property Seized | _____ |
| Arrest Register | _____ | Rap Sheet and Criminal | |
| Arrest Report and | | History Report (Defendant) | _____ |
| Probable Cause Affidavit | _____ | Rap Sheet and Criminal | |
| Autopsy Report | _____ | History Report (Victim) | _____ |
| Bill of Information | _____ | Rap Sheet and Criminal | |
| Bond Processing Receipt | _____ | History Report (Witness) | _____ |
| Cert. Convictions | _____ | Return on Search Warrant | _____ |
| Chain of Custody | _____ | Rights of an Arrestee | _____ |
| Consent Search Form | _____ | Scientific Analysis Report | _____ |
| Crime Lab Report | _____ | Search & Seizure Warrant | _____ |
| Drug Evidence Report | _____ | Search Warrant | _____ |
| DWI Report | _____ | Seizure Warrant | _____ |
| Fingerprint Report | _____ | Statement of Defendant | _____ |
| Firearms Trace Report | _____ | Statement of Victim | _____ |
| Investigator's Report | _____ | Statement of Witness | _____ |
| Medical Records | _____ | Supplemental Report | _____ |
| Misdemeanor Summons | _____ | Ticket | _____ |
| Notice Pending Forfeiture | _____ | Vehicle Tow/Impound | _____ |
| Photos | _____ | Inventory Record | _____ |
| Police Report | _____ | Warrant of Arrest | _____ |
| PC for Seizure of Assets | _____ | Other | _____ |

_____

_____

_____

Defendant agrees to Open File Discovery in lieu of Preliminary Examination and Bill of Particulars.

In the event that you withdraw as counsel, please forward all Discovery to new attorney.

_____ _____

ATTORNEY FOR DEFENSE DATE

# APPENDIX E

# MOTION TO SEAL WITH COVER LETTER

**(DATE)**

**(DEFENDANT'S ATTORNEY)**
**ADDRESS**
**ADDRESS**
**VIA HAND DELIVERY**

RE: STATE OF LOUISIANA VS. **(DEFENDANT'S NAME)**
CASE NO. **( )**

In accordance with the State's obligations pursuant to ***Brady vs. Maryland***, 373 U.S. 83 (1963), as well as the Louisiana Rules of Professional Conduct, and as previously disclosed on the record orally, please be advised that State's witness, **(WITNESS NAME)**, was arrested on **(DATE OF ARREST)** on charge of **_____.** Additionally, State's witness, **(WITNESS NAME)**, resigned from the **(DEPARTMENT NAME)** on **(DATE)** amid an investigation into his role in the **(CHARGE)**.

While this information was previously provided in fulfillment of the State's ethical obligation to the court and **(DEFENDANT'S NAME)**, we have a concern in preserving the integrity of a criminal investigation completely unrelated to the case at bar. Respecting the rights of a State's witness who has not yet been convicted of any criminal offense is also an issue of great significance. For these reasons, the State hereby requests that this notice be used only for the purpose for which it has been provided and that it not be disseminated to any third party. In conjunction with this request, the State has filed a Motion to Seal this notification.

Sincerely,

_____
**(ADA NAME)**

_____
RECEIVED BY – **(ATTORNEY NAME)**

| | | |
|---|---|---|
| STATE OF LOUISIANA | * | ____JUDICIAL DISTRICT COURT |
| VERSUS | * | PARISH OF _____ |
| **(DEFENDANT'S NAME)** | * | STATE OF LOUISIANA |
| DIVISION "____" | * | CASE NO. _____ |

FILED: _____ BY: _____
DEPUTY CLERK

## MOTION TO SEAL

NOW INTO COURT comes **(DISTRICT ATTORNEY'S NAME)**, District Attorney in and for the Parish of _____, State of Louisiana, through the undersigned Assistant District Attorney, who respectfully moves this Honorable Court as follows:

I.

In conjunction with this Motion the State has provided to the defense, and to this Honorable Court, a letter noticing certain exculpatory evidence relative to State's witnesses. The stated purpose of the notification and this motion is to enable the State to fulfill its obligations to this Court and **(DEFENDANT'S NAME)**, under ***Brady,*** and the Louisiana Professional Rules of Responsibility, while at the same time preserving the integrity of a potential criminal investigation completely unrelated to the case at bar. Respecting the rights of State's witnesses who have not yet been convicted of any criminal offense is also an issue of great significance. To achieve this goal the State hereby moves this Honorable Court to receive and file their letter and motion under seal, and to prohibit their dissemination and exhibition for public view.

II.

The Court has the inherent power to grant the relief prayed for pursuant to C.Cr.P. art. 17, which states in part that judges have "…… the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner…".

WHEREFORE, the State prays that its Motion to Seal be granted and that this motion be filed and kept under seal. The State further prays that its Notice of Exculpatory Evidence also be filed and kept under seal, and that these documents shall not be disseminated or made available for public view.

Respectfully Submitted,

_____
(ADA NAME)
PARISH OF _____
ADDRESS
PHONE #

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

**ORDER**

Considering the State's Motion,

IT IS HEREBY ORDERED, that the Motion to Seal is GRANTED;

IT IS FURTHER ORDERED that the State's Motion to Seal and Notice of Exculpatory Evidence shall be filed and kept under seal and shall not be disseminated or made available for public view.

(TOWN), Louisiana this _____ day of _____ 20_____.

_____

JUDGE

## CERTICIATE OF SERVICE

This is to certify that a copy of the above named motion has been served on all interested parties by hand delivery this _____ day of _____, 20____.

_____

(ADA NAME)