



State of New Jersey

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ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2019-6

TO: All County Prosecutors

FROM: Gurbir S. Grewal, Attorney General

DATE: December 4, 2019

SUBJECT: **Directive Establishing County Policies to Comply with *Brady v. Maryland* and *Giglio v. United States***

Federal and State precedent require prosecutors disclose exculpatory and impeachment evidence to defense counsel. The United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held “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.” Thereafter, the Supreme Court in *Giglio v. United States*, 405 U.S. 150 (1972), further clarified that exculpatory evidence (or “*Brady* material”) includes evidence that may be used to impeach the credibility of a prosecution witness. “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*].” *Giglio*, 405 U.S. at 154 (internal quotations omitted).

Our State Supreme Court followed *Brady* and *Giglio* in *State v. Carter*, 91 N.J. 86, 111 (1982), holding “evidence impeaching testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of a criminal defendant’s guilt or innocence.” Whether *Giglio* information is determinative of the defendant’s guilt or innocence requires analysis of that information by the prosecutor in light of the circumstances of the case. This is important to note because the failure to disclose *Brady* and *Giglio* material could result in reversal of a defendant’s convictions.

While prosecutors across the State are well aware of their obligations under *Brady* and *Giglio*, there is a great deal of variation among the County Prosecutors’ Offices regarding specific *Brady-Giglio* policies. While some have written policies, others employ a more informal



approach. To ensure compliance and the integrity of criminal prosecutions, however, written guidelines, incorporating the best practices and procedures discussed below, are required.

Therefore, pursuant to the authority granted to me under the New Jersey Constitution and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, I hereby direct all County Prosecutors to implement a policy within their respective counties consistent with this Directive to ensure compliance with *Brady* and *Giglio*.

It is understood that the procedures established for complying with *Brady* and *Giglio* may vary among the counties to accommodate the specific volume and available resources. However, each county's *Brady-Giglio* policy shall fully comply with the law and Rules of Professional Conduct.

I. Definitions

- A. **“Civilian witness”** refers to an individual who is not employed by a law enforcement agency or entity.
- B. **“Giglio liaison”** refers to the individual appointed by the County Prosecutor to serve as a primary point of contact within the County Prosecutor's Office concerning potential impeachment information.
- C. **“Investigative employee”** refers to an individual who is a sworn law enforcement officer, analyst, civil investigator, or civilian employee working for a law enforcement agency or entity.
- D. When used without a modifier, **“Prosecutor”** refers to the attorney(s) assigned to prosecute a particular case. In a County Prosecutor's Office, this will typically be an Assistant Prosecutor; in the Division of Criminal Justice, the Office of Public Integrity & Accountability, and the Office of the Insurance Fraud Prosecutor, this will typically be a Deputy Attorney General or Assistant Attorney General. The term **“County Prosecutor”** refers specifically to the acting or confirmed County Prosecutor who oversees a County Prosecutor's Office.
- E. **“Sustained¹ finding”** refers to any finding where a preponderance of the evidence shows an officer violated any law, regulation, directive, guideline policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating

¹ For purposes of this policy, “sustained” is the equivalent of “substantiated” as it pertains to New Jersey State Police policies.

procedure, rule or training, following the last supervisory review of the incident(s) during the internal affairs process or a ruling by a hearing office, arbitrator, Administrative Law Judge, or the Superior Court. Allegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee, including where the previous *Giglio* finding has either been vacated, or overturned on the merits in any subsequent action, generally are not considered to be potential impeachment information, subject to the requirements herein. On the other hand, if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the *Giglio*-related charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, or the Superior Court. In reviewing dispositions reached before the issuance of this Directive, prosecutors must be mindful that officers may not have had an incentive to challenge *Giglio*-related charges or findings when the overall negotiated disposition of the matter was acceptable to the officer. Therefore, in such cases, prosecutors must thoroughly review the entire investigative file before making determinations on the disclosure of *Giglio*-related charges that were ultimately dismissed as part of an administrative or civil settlement.

II. Implementation of Countywide Brady-Giglio Policies

- A. ***Prosecutors' Responsibilities.*** It is the prosecutor's responsibility to gather and disclose relevant *Brady* and *Giglio* material to the defense. The obligation to turn over exculpatory material is embedded in New Jersey's discovery rules, Rule 3:13-3(a), (b), and (f). In addition to disclosing exculpatory information pre-trial, exculpatory information must also be disclosed prior to a plea offer when offered during the pre-indictment phase. *R.* 3:13-3(a). Prosecutors are also bound by the Rules of Professional Conduct. Rule 3.8(d) requires prosecutors to make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate guilt or mitigate the offense.

It is also the prosecutor's responsibility to decide, based on their professional judgment, what evidence is covered by *Brady* and *Giglio* and must be disclosed to the defendant. Because knowledge of *Brady* and *Giglio* material is imputed to the prosecutor, it is imperative that the prosecutor request that information of testifying State witnesses. Ultimately, it is the prosecutor's decision whether to disclose potentially exculpatory evidence.

1. ***Brady Material.*** In developing its policy, each County Prosecutor's Office shall use the following non-exhaustive list of *Brady* material as examples for guidance:
 - a. Evidence linking a State witness to the crime for which defendant is being charged. *State v. Landano*, 271 N.J. Super. 1 (App. Div.), *certif. denied* 137 N.J. 164 (1994);

- b. Evidence related to defendant's theory of third-party guilt. *State v. Smith*, 224 N.J. 36, 50 (2016);
 - c. Potentially exculpatory polygraph test of State's witness. *State v. Carter*, 85 N.J. 300 (1981); and
 - d. Prior inconsistent and exculpatory statements made by a State's witness. *State v. Cahill*, 125 N.J. Super. 492 (Law Div. 1973).
2. **Giglio Material.** "Evidence impeaching the testimony of a government witness *falls within the Brady rule* when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence." *State v. Carter*, 91 N.J. at 111 (citing *Giglio* at 150) (emphasis added). The New Jersey Supreme Court in *Carter* held that "the State's obligation to disclose is not limited to evidence that affirmatively tends to establish a defendant's innocence but would include any information material and favorable to a defendant's cause even where the evidence concerns only the credibility of a State's witness." *Id.* This includes *Giglio* material on civilian and investigative State witnesses.

Thus, in developing its *Brady* and *Giglio* policy, each County Prosecutor's Office shall use the following non-exhaustive list of potential *Giglio* material as it relates to civilian and investigative State witnesses for guidance on the type of material that must be gathered. Again, this does not necessarily mean the information will be disclosed.

- a. Civilian Witnesses
 - i. Bias. A witness can be impeached with evidence that he or she has a bias against the defendant or in favor of the State (actual or potential exposure to criminal penalties, leniency/plea agreement, payments, immigration benefits, etc.);
 - ii. Specific instances of dishonesty. A witness can be impeached with evidence of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction. This includes lying and falsifying records;
 - iii. Criminal convictions, N.J.R.E. 609; and
 - iv. Prior inconsistent statements, N.J.R.E. 613.

b. Investigative Employees

- i. A sustained finding that an investigative employee has filed a false report or submitted a false certification in any criminal, administrative, employment, financial, or insurance matter in their professional or personal life;
- ii. A sustained finding that an investigative employee was untruthful or has demonstrated a lack of candor;
- iii. A pending criminal charge or conviction of any crime, disorderly persons, petty disorderly persons, or driving while intoxicated matter, noting that any such charges or convictions will be reviewed for disclosure under N.J.R.E. 609;
- iv. A sustained finding that undermines or contradicts an investigative employee's educational achievements or qualifications as an expert witness;
- v. A finding of fact by a judicial authority or administrative tribunal that is known to the employee's agency, which includes a finding that the investigative employee was *intentionally* untruthful in a matter, either verbally or in writing;
- vi. A sustained finding, or judicial finding, that an investigative employee intentionally mishandled or destroyed evidence. Generally, law enforcement agencies and investigative employees should disclose findings or allegations that relate to substantive violations concerning: (1) the intentional failure to follow legal or departmental requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications; (2) the intentional failure to comply with agency procedures for supervising the activities of a cooperating person; and (3) the intentional failure to follow mandatory protocols with regard to the forensic analysis of evidence;²
- vii. Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
- viii. Information that may be used to suggest that the investigative employee is biased for or against a defendant. *See United States v. Abel*, 469 U.S. 45, 52

² This category does not include incidents deemed by a supervisory authority to be a mistake or done in error without intention, even in cases where the incident was sustained. For example, if an officer failed to follow a mandatory protocol due to a misunderstanding, and that mistake resulted in a sustained finding, that would not be considered *Giglio* information for purposes of disclosure.

(1984). The Supreme Court has stated, “bias is a term used in the ‘common law of evidence’ to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness’ like, dislike, or fear of a party, or by the witness’ self-interest.”); and

- ix. A sustained finding, or judicial finding, that an investigative employee is biased against a particular class of people, for example, based on a person’s gender, gender identity, race, or ethnic group.

B. ***Procedures for Gathering Brady and Giglio Information.*** It is important to note that there are three separate and distinct processes: gathering *Brady* and *Giglio* material; disclosing *Brady* and *Giglio* material to the defense or the court; and admitting *Brady* and *Giglio* material at a defendant’s trial. This section of the Directive applies only to the gathering process. Gathering such material occurs when the prosecutor collects the information for the *prosecutor’s review only*. Gathering does not mean that the information will be disclosed to the defense or the court, and it does not mean that it will be admitted at trial.

Each county’s policy shall establish and maintain procedures for prosecutors to gather and review potential *Brady* and *Giglio* information prior to any plea offer, testimonial hearing, or trial. These procedures are important because often there are times when a law enforcement officer or other investigative employee knows of *Brady* or *Giglio* information yet the prosecutor does not. The United States and New Jersey Supreme Courts have made clear that even under these circumstances, knowledge of potential *Brady* or *Giglio* information is imputed to the prosecutor, and, therefore, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *see also Giglio*, 405 U.S. at 154; *State v. Womack*, 145 N.J. 576, 589, *cert. denied*, 519 U.S. 101 (1996); *Carter*, 91 N.J. at 110; *State v. Mustaro*, 411 N.J. Super. 91, 102 (App. Div. 2009) (finding even if prosecutor was unaware of existence of impeachment material on videotape, arresting officer was aware; consequently, officer’s knowledge was imputed to State).

The United States Supreme Court has held that the federal “Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” *United States v. Ruiz*, 536 U.S. 622, 633 (2002). However, New Jersey Court Rule 3:13-3 requires that in a pre-indictment context “the prosecutor shall provide defense counsel with any exculpatory information or material.” While gathering information prior to a plea may often times be difficult, it is important for the prosecutor to conduct a thorough analysis of the case to determine the State witnesses whose testimony would be determinative of defendant’s guilt or innocence and make available such impeachment material that would seriously undermine the credibility

of such a witness. *See Carter*, 91 N.J. at 111. *Brady* and *Giglio* material related to those State witnesses must be gathered and disclosed if appropriate. *See State v. Parsons*, 341 N.J. Super. 448 (2001). Court Rule 3:13-3(a) permits a prosecutor, upon notice to the defendant, to provide more limited discovery in a pre-indictment plea context and should be used if appropriate.

Thus, each county's policy must, at a minimum, include the following:

1. **Process for Employee's Proactive Participation.** A process for the investigative employee to proactively participate in the *Brady* and *Giglio* gathering phase. As part of that process, the investigative employee involved in a case must notify the prosecuting authority (or confirm that the prosecuting authority is aware) or any potential *Brady* or *Giglio* material known to the investigative employee.
2. **Process for Prosecutor's Gathering of Information.** A process for the prosecutor and/or *Giglio* liaison to affirmatively gather *Brady* and *Giglio* information from the investigative employee and the investigative employee's agency. This can be done, for example, both formally in writing to the investigative agency and/or informally through a candid conversation between the investigative employee and the prosecutor. This type of process can occur multiple times as the underlying investigation progresses.
3. **Mechanism for Identification of *Brady* and *Giglio* Material.** A mechanism or system that allows, on a case-by-case basis, for the identification of officers with potential *Brady* or *Giglio* material, taking into account that this mechanism or system must be amenable to update and modification, as material that is considered *Brady* and *Giglio* may change under different circumstances and over time.

Therefore, each county's policy must establish procedures for gathering and reviewing *Brady* and *Giglio* material that complies with the above parameters.

C. ***Procedures for Reviewing and Disclosing Brady and Giglio Information.*** Each county's policy shall establish the following procedures for review and disclosure of *Brady* and *Giglio* material.

1. **Procedures for Review.** The prosecutor assigned to a case, in consultation with the prosecutor's designee or *Giglio* liaison, shall review the potential *Brady* and *Giglio* material and any other information found to be relevant and material to the particular case. This shall be done in accordance with all relevant case law and court rules. The prosecutor is to review the material and determine whether it should be disclosed to the court for an *ex parte*, *in camera* review or whether it should be disclosed to the defense. It is the prosecutor's duty to recommend whether, to what extent, and/or in

what manner disclosure to the defense and/or the court shall occur. This shall be done in accordance with the approval process set out in each county's policy.

2. **Procedures for Disclosure.** After review of the potential *Brady* and *Giglio* material, there are three possible outcomes: (1) no disclosure; (2) disclosure will be made to the defense; or (3) disclosure will be made to the court for an *ex parte, in camera*, judicial review. Each county's policy shall establish and maintain a procedure for notifying the investigative employee and/or the employee's agency prior to disclosure. This will serve as notice to the investigative employee and agency and as an opportunity for the agency and employee to verify the accuracy of the noted *Brady* and *Giglio* material.

For all disclosures, whether made to the defense directly or after the court orders disclosure, the prosecutor shall notify the investigative employee and agency of the disclosure. The prosecutor shall also provide the investigative employee and agency with copies of all disclosed material.

With respect to the disclosed material, the prosecutor shall seek redactions to protect the privacy interests of third-parties and investigative personnel. The prosecutor shall also seek protective orders to limit the use and further dissemination of the material. Finally, each county's policy shall incorporate a procedure for informing the investigative employee, as well as that person's agency, of decisions made by the court as to the disclosure and/or admissibility at trial of any disclosed *Brady* and/or *Giglio* information.

A decision to disclose in one case does not dictate the decision to disclose in subsequent cases. The prosecutor, in consultation with the prosecutor's designee or *Giglio* liaison, must evaluate each piece of potential *Giglio* information on a case-by-case basis to determine whether the material must be disclosed under the law or submitted to the court for an *ex parte, in camera* review.

Importantly, if the prosecutor makes the decision not to use an investigative employee because of *Brady* or *Giglio* concerns, or if the relevant *Brady* or *Giglio* information substantially affected the case in any way, the County Prosecutor's Office shall notify the appropriate individual in that agency of the decision. The procedure for such notification shall be set by the County Prosecutor. After the required disclosures are made, the investigative employee may seek review of that determination from the County Prosecutor or their designee, or from the Office of Attorney General. This review shall not interrupt or interfere with the prosecutor's obligation to disclose information in the ongoing case.

Because a *Giglio* determination requires a case-by-case determination, promulgating a "do-not-call" list of individuals who can never be called as witnesses is not a

preferred means of complying with *Brady* and *Giglio* obligations and should be avoided. Such lists are also potentially misleading. For example, if an investigative employee who has *Giglio* that must be turned over happens to be the sole witness to a serious crime, it may be necessary to call the employee as a witness notwithstanding any *Giglio* the employee may have. For these reasons, alternatives to a do-not-call list should be considered. A do-not-call list is different than a system to identify investigative employees who have potential *Giglio*, which is permissible.

This Directive does not address remedial or consequential action on the part of the law enforcement agency.

3. **Confidentiality.** Obtaining and disclosing potential *Brady* and *Giglio* material is a confidential process. As such, all documents requested and obtained shall be kept confidential and secured in a manner to be determined by each County Prosecutor's Office and should not be shared with any person who does not have a need to know. Personnel and internal affairs files are confidential materials and will not be released except as pursuant to each county's policy.

III. Other Provisions

- A. ***Non-enforceability by third parties.*** This Directive is issued pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party.
- B. ***Severability.*** The provisions of this Directive shall be severable. If any phrase, clause, sentence or provision of this Directive is declared by a court of competent jurisdiction to be invalid, the validity of the remainder of the Directive shall not be affected.
- C. ***Questions.*** Any questions concerning the interpretation or implementation of this Directive shall be addressed to the Director of the Division of Criminal Justice, or their designee.

D. ***Effective date.*** This Directive shall take effect March 1, 2020, and shall remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Gurbir S. Grewal
Attorney General

ATTEST:



Jennifer Davenport
First Assistant Attorney General
Dated: December 4, 2019