

TO: Director, Division of Criminal Justice
Director, Office of Public Integrity & Accountability
Insurance Fraud Prosecutor
Superintendent, New Jersey State Police
All Department of Law & Public Safety Personnel

FROM: Gurbir S. Grewal, Attorney General

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SUBJECT: Disclosure of Exculpatory and Impeachment Evidence in Criminal Cases

Prosecutors are required to disclose exculpatory and impeachment evidence to defense counsel. This memorandum establishes a policy to assist Department of Law & Public Safety (the “Department”) personnel in complying with those obligations and applies to prosecutors and trial witnesses employed by the Department.

I. THE LAW

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court announced:

We now hold that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Thereafter, in Giglio v. United States, 405 U.S. 150, 154 (1972), the United States Supreme Court held that Brady material includes material that might be used to impeach key government witnesses, stating:

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].

Ten years later, the New Jersey Supreme Court in State v. Carter, 91 N.J. 86, 111 (1982), held:

[E]vidence 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.

In addition, prosecutors are bound by the Rules of Professional Conduct and Rule 3.8(d) states:

The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate guilt of the accused or mitigates the offense

Thus, prosecutors are obligated to disclose Brady and Giglio material whether or not defense counsel has requested the material. United States v. Bagley, 473 U.S. 667 (1985).

II. THE "PROSECUTION TEAM"

There may be cases when a law enforcement officer or other investigative employee¹ (the "investigative employee") knows about Brady and/or Giglio material and the prosecutor does not. In Kyles v. Whitley, 514 U.S. 419, 437-38 (1995), the United States Supreme Court made clear that "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." Knowledge of potential Brady and/or Giglio material is imputed to the prosecutor, and therefore, it is the prosecutor's responsibility to gather and disclose such relevant material. Giglio, 405 U.S. at 154; State v. Womack, 145 N.J. 576, 589, cert. denied, 519 U.S. 101 (1996); State v. Russo, 333 N.J. Super. 119, 133-35 (App. Div. 2000).

Citing the Tenth Circuit, the New Jersey Supreme Court has held that "the 'prosecution' for Brady purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office . . . , as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." State v. Nelson, 155 N.J. 487 (1998) (quoting Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 824 (10th Cir. 1995)); State v. Mustaro, 411 N.J. Super. 91, 102 (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 "prosecution team," therefore, consists of everyone working on the State's behalf in a case. This includes all federal, state and local government officials, prosecutors, and investigative and law enforcement personnel directly involved in the investigation or prosecution of the criminal case.

III. BRADY AND GIGLIO: PRACTICAL APPLICATION

A. Responsibilities Under Brady

The obligation to turn over exculpatory and material information is embedded in New Jersey's discovery rules. See Rule 3:13-3(a), (b), and (f). Beyond that, it is the prosecutor who decides, based on his or her professional judgment, what evidence is covered by Brady and must,

¹ This includes sworn law enforcement officers, analysts, civil investigators, and civilian employees working for a law enforcement agency.

therefore, be disclosed to the defendant. Further, because knowledge of Brady material is imputed to the prosecutor, it is imperative that the prosecutor request and obtain any Brady material in the prosecution team's possession. The prosecutor must ask the investigative employees with whom he or she works if they, or any other member of the prosecution team, know of any Brady material related to the case.

Investigative employees must turn over Brady material to the prosecutors, which in turn means that investigative employees must make sure that every member of the prosecution team knows the Brady rule, and if unsure about the rule or what is covered by Brady, the investigative employee should consult with the prosecutor.

Ultimately, it is the prosecutor's decision whether to disclose or not disclose potentially exculpatory evidence. Evidence may be identified by the investigative employee as Brady material, and the prosecutor may conclude that the evidence is not exculpatory. Once the prosecutor determines evidence is exculpatory or meets the definition of Brady, it must be turned over to the defense during the normal course of discovery pursuant to Rule 3:13-3. If a prosecutor is uncertain on the decision to disclose, he or she should consult with his or her supervisor.

B. Examples of Brady Material

The following is a non-exhaustive list, meant to provide general guidance only:

1. 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);
2. Evidence related to defendant's theory of third-party guilt. State v. Smith, N.J. 36, 50 (2016);
3. Potentially exculpatory polygraph test of State's witness. State v. Carter, 85 N.J. 30 (1981); and
4. Prior inconsistent and exculpatory statements made by a State's witness. State v. Cahill, 125 N.J. Super. 492 (Law Div. 1973)

C. Responsibilities Under Giglio

As with Brady material, there is a constitutional requirement to disclose all 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 v. United States, 405 U.S. 150 (1972)). The New Jersey Supreme Court in Carter went on to hold 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." Ibid. (internal quotations omitted).

D. Civilian Witnesses² and Potential Giglio Material

With respect to civilian witnesses, investigative employees must turn over Giglio material to the prosecutors, which in turn means that investigative employees must make sure that every member of the prosecution team knows the Giglio rule, and if unsure about the rule or what is covered by Giglio, the investigative employee should consult with the prosecutor.

The decision to disclose or not disclose impeachment evidence on a civilian witness ultimately rests with the prosecutor; evidence identified as Giglio material by the investigative employee and provided to the prosecutor will not necessarily be disclosed to the court or to the defendant. If a prosecutor is uncertain, he or she should consult with his or her supervisor.

E. Examples of Giglio Material with Respect to Civilian Witnesses

In order to determine what evidence is covered by Giglio, it is important to look to the ways in which a witness can be impeached. The following is a non-exhaustive list, meant to provide general guidance only:

1. 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.);
2. 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;
3. Criminal Conviction. N.J.R.E. 609; and
4. Prior Inconsistent Statements. N.J.R.E. 613.

F. Investigative Employees and Potential Giglio Material

It is imperative that investigative personnel assist with the prosecuting agency's legal duty to review and, if necessary, disclose evidence that may impact the credibility of potential

² For purposes of this Policy, a civilian witness is defined as a witness who is not employed by a law enforcement agency or entity. Non-law enforcement officer witnesses, such as civilians who are employed by the New Jersey State Police, are not considered civilian witnesses, but rather are defined as investigative employee witnesses under this Policy.

investigative State witnesses. To help investigative employees meet this burden, the Internal Affairs Unit or Professional Standards Unit of the employee's agency shall prepare a notice letter to the employee when that employee may have Giglio-related material in the employee's file or other potential Giglio-related information. The letter shall inform the employee that possible Giglio material may exist and that further discussions may be warranted. The Internal Affairs Unit or Professional Standards Unit of the employee's agency shall ensure that the employee receives a copy and that this Policy is attached thereto. A copy of the letter shall be kept in the employee's personnel file and is to remain confidential. If a letter is issued, the investigative employee shall disclose a copy of the letter to the prosecuting agency as early as practical in any investigation in which the employee is involved. A supplemental letter may be issued, if appropriate, under circumstances in which the employee has been exonerated, including where the previous Giglio finding has either been vacated, dismissed, or overturned in any subsequent action.

G. Examples of Giglio Material with Respect to Investigative Employees

Potential impeachment information relating to investigative employees may include, but is not limited to, the following³:

1. A sustained finding⁴ that an investigative employee has filed a false report or submitted a false certification in any criminal, administrative,

³ The following list is modeled after the matters listed in the Attorney General Internal Affairs Policy & Procedures regarding the credibility of police officers. Attorney General Law Enforcement Directive No. 2019-5 at 62-63.

⁴ For purposes of this Policy, a "sustained 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 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. Further, for purposes of this policy, "sustained" is the equivalent of "substantiated" as it pertains to New Jersey State Police policies.

- employment, financial, or insurance matter in his or her professional or personal life;
2. A sustained finding that an investigative employee was untruthful or has demonstrated a lack of candor;
 3. 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.
 4. A sustained finding that undermines or contradicts an investigative employee's educational achievements or qualifications as an expert witness;
 5. A finding of fact by a judicial authority or administrative tribunal that is known to the employee's agency, which concludes a finding that the investigative employee was *intentionally* untruthful in a matter, either verbally or in writing;
 6. 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) 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) failure to comply with agency procedures for supervising the activities of a cooperating person; and (3) failure to follow mandatory protocols with regard to the forensic analysis of evidence;⁵
 7. Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
 8. 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 (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

⁵ 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.

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

9. 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.

Other information or material may exist that, depending on the circumstances of the case and the crimes charged, may need to be disclosed even though the information or material does not fall under one of the categories listed above.

IV. DUTY TO GATHER POTENTIAL GIGLIO MATERIAL

A. Points of Contact

All potential Giglio information obtained from an investigative employee or the employee's agency should be carefully protected and kept confidential within a separate file and only disclosed to those with a need to know.

Agency Official. Each investigative agency within the Department of Law and Public Safety shall designate an appropriate official(s) to serve as the point(s) of contact concerning their investigative employees' potential Giglio information.

Liaison. The Director of the Division of Criminal Justice, the Insurance Fraud Prosecutor, and the Director of the Office of Public Integrity and Accountability shall appoint a Giglio Liaison to serve as the point of contact for prosecutors concerning potential impeachment information. The Liaison shall also be the custodian of all investigative personnel files, internal affairs files, requests, responses, files and other related documentation received in response to Giglio requests. The Liaison will maintain all of this material in a tracking system in which all Giglio materials will be kept separate, but related to the criminal file.

The Liaison and the Agency Official, or other law enforcement agency's appropriate point of contact, should consult periodically about the relevant Supreme Court case law, New Jersey case law, court rulings, and practice governing the definition and disclosure of impeachment information.

B. Duty to Disclose

1. Investigative Employee's Role

It is the Department's policy to establish and maintain a system so that prosecutors may obtain and review potential Giglio material related to investigative employee witnesses prior to any plea offer — Rule 3:13-3(a) — testimonial hearing, or trial. Under this policy, investigative

employees must disclose all potential Giglio material to the prosecuting agency (1) when that individual may be a testifying witness, or (2) at the request of the prosecuting agency. Each investigative employee is obligated to inform prosecutors with whom they work of potential impeachment information *as early as possible*. Each investigative agency should ensure that its employees fulfill this obligation.

2. Prosecutor's Role

a. The "Candid Conversation" Guide

New Jersey's discovery rules are broad. To ensure compliance with the rules, the prosecutor shall, at the inception of the criminal case or as soon as practical, have a "candid conversation" with the investigative employee. (See Form A, the Candid Conversation Guide). The purpose of the candid conversation is to determine the following: 1) whether potential Giglio material exists related to that individual that may not be captured in the employee's personnel file; and 2) whether other information exists in the internal affairs file that may be material and relevant to the current case. The prosecutor should immediately inform the Liaison of potential Giglio information learned from the candid conversation. The information shared with the Liaison shall be kept confidential.

b. Formal Written Request

Prosecutors have a continuing duty to exercise due diligence in discovering and disclosing both Brady and Giglio material. There are times when an investigative employee will be unaware that he or she is the subject of a pending investigation or adverse finding, therefore, prosecutors will receive the most comprehensive potential impeachment information by having both the candid conversation with the investigative employee **and** by submitting a written request for potential Giglio information to the investigative agency.

Prior to any plea offer – Rule 3:13-3(a) – testimonial hearing, or trial, the prosecutor shall, through the Liaison, formally request Giglio material from the Agency Official, or other law enforcement agency's appropriate point of contact. To do so, the prosecutor shall forward the completed Form B to the Liaison for each potential testifying investigative employee. (See Form B attached). The prosecutor may make supplemental requests through the Liaison, if necessary, as the investigation progresses. Once the Liaison receives Form B from the prosecutor, the Liaison will contact the Agency Official, or other law enforcement agency's appropriate point of contact, of the respective investigative employee's agency to request the responsive material. The Agency Official, or other law enforcement agency's appropriate point of contact, shall notify the Liaison of the existence of responsive records, and make the responsive records available through the Liaison, as needed. The Liaison shall subsequently make such information available to the prosecutor to review. Any physical records subsequently supplied shall be stored with the Liaison.

The Liaison will not make any determination as to the admissibility or discoverability of the potential impeachment material.

V. DISCLOSURE OF POTENTIAL GIGLIO INFORMATION TO THE COURT OR DEFENSE COUNSEL

A. Independent Review

Similar to the responsibilities under Brady, it shall be the responsibility of the prosecutor assigned to a case to independently review the potential Giglio material and any other information found to be relevant and material to the particular case. This is to be done prior to a plea offer — Rule 3:13-3(a) — testimonial hearing, and trial. If the assigned prosecutor determines that no potential Giglio material exists, the prosecutor shall advise his or her immediate supervisor of such a determination.

The prosecutor will review the material to determine whether it should be disclosed to the court for an *ex parte, in camera* review or whether it should be disclosed to defense counsel. 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.

If the prosecutor determines that potential impeachment material exists and may have to be disclosed either to the court or the defense, the prosecutor shall submit a memorandum to his or her supervisor summarizing the case, with a recommendation for disclosure or non-disclosure. All final decisions regarding the disclosure of impeachment material shall be made by the director of the respective division or his or her designee.

B. Disclosure Following Approval

1. Process

After review by the director of the respective division or his or her designee, there are three possible outcomes: (1) no disclosure will be made; (2) disclosure will be made to defense counsel; or (3) a question exists whether the material must be turned over to defense and the prosecutor will seek an *in camera, ex parte*, judicial review of the potential Giglio information.

If it is determined that disclosure should occur (scenarios (2) and (3) immediately above), the Liaison should notify the Agency Officer, or other law enforcement agency's appropriate contact, before disclosure occurs. The Agency Officer, or other law enforcement agency's contact, should have the opportunity to brief the relevant parties at the investigative agency, and notify the Liaison if they wish to be heard on the matter. There may be some cases when an investigative employee is unaware that there is a pending investigation or substantiated or sustained finding of alleged misconduct. In those cases, all involved should exercise caution when discussing the matter.

2. Redactions and Protective Orders

For any disclosures made, whether to defense counsel directly, or after a court determines that disclosure is warranted, the prosecutor shall seek redactions to protect the privacy interests of third-parties and investigative personnel. The prosecutor also should seek protective orders to limit the use and further dissemination of the material.

3. Copies of Court Filings and Other Information

At the earliest time possible after a disclosure to the defense or a determination has been made by the court to disclose, the prosecutor shall notify the Liaison and provide the Liaison with any pleadings or documents that are filed with the court regarding an investigative employee witness's potential impeachment information. The Liaison shall provide a copy of any pleadings or documents to the Agency Official and investigative employee. If this information is not captured in documents or pleadings filed with the court, the prosecutor should send a letter informing the investigative employee and the Agency Official, or other law enforcement agency's appropriate point of contact, that disclosure to the defense was made and what information was disclosed. The letter shall also inform the investigative employee and Agency Official, or other law enforcement agency's appropriate point of contact, whether a decision was made by the court as to the admissibility of such information at trial. If a decision has not been made by the court at the time of the initial letter, a supplemental letter shall be sent informing the investigative employee and Agency Official, or other law enforcement agency's appropriate point of contact, of the admissibility of the material.

As noted above, the Liaison should receive a copy of all pleadings or documents filed with the court regarding the Giglio information, as well as any court rulings on the information. The prosecutor is responsible for adhering to the candid conversation guide and the formal written Giglio request. Any and all information or material received should be evaluated by the prosecutor in each individual case.

If the prosecutor or supervising attorney makes the decision not to use the investigative employee because of Giglio concerns, or the Giglio material substantially affected the case in any way, the Liaison shall notify the Agency Official, or other law enforcement agency's appropriate point of contact, of that decision.

VI. CONFIDENTIALITY

Obtaining and disclosing potential 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 Division and should not be shared with any person who does not have a need to know. Giglio material shall be released to the defense and the court only as provided

herein. **Personnel and internal affairs files are confidential materials and will not be released except as pursuant to this Policy.**

VII. NON-ENFORCEABILITY BY THIRD PARTIES

Nothing in this policy shall be construed in any way to create any substantive right that may be enforced by any third party.

VIII. EFFECTIVE DATE

The Policy is effective immediately.