


UNION COUNTY PROSECUTOR'S OFFICE			
STANDARD OPERATING PROCEDURES			
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SUBJECT: <i>Brady / Giglio</i> Compliance			
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ISSUED BY: Derek Nececkas, Deputy First Assistant & David Hummel, Legal Chief of the Investigative Division			
UNDER THE AUTHORITY OF: LYNDSAY V. RUOTOLO ACTING PROSECUTOR			

PURPOSE:

The purpose of this policy is to formally establish a process to ensure compliance with the State’s obligation to disclose exculpatory and impeachment evidence to defense counsel in the course of a criminal prosecution, under what is known as the *Brady/Giglio* doctrine. Although the law in this area is well-established and has not significantly changed, now more than ever it is imperative that law enforcement comply fully and promptly with the law’s requirements. Doing so is not only required by law, but serves to build trust in law enforcement and the legal system with the people that system serves and protects.

This policy does not define the scope of the State’s discovery obligations. The State’s discovery obligations are as they are established by law, and this policy neither expands nor contracts those obligations.

The purpose of this policy is, rather, purely procedural. The intent of establishing this policy is to ensure that police agencies operating in Union County are able to effectively communicate potential *Brady/Giglio* material to this office for review and ensure that the members of this office responsible for disclosing material under *Brady/Giglio* are able to obtain all information in the State’s custody necessary to that decision, so that the State may collectively meet its *Brady/Giglio* obligations.

APPLICABILITY:

This policy is effective immediately and supersedes the Interim Policy Regarding the Identification of *Brady/Giglio* Material, issued on December 6, 2019.

THE LAW:

This policy deals with the State's duty to disclose exculpatory evidence as discussed in *Brady v. Maryland* and *Giglio v. United States*. In *Brady v. Maryland*, 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.

[373 U.S. 83, 87 (1963).]

In *Giglio v. United States*, 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*].

[405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959) .]

Ten years later, the New Jersey Supreme Court in *State v. Carter* 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.

[91 N.J. 86, 111 (1982).]

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).

COLLECTIVE RESPONSIBILITY FOR COMPLIANCE — THE “PROSECUTION TEAM”:

The *Brady/Giglio* obligation does not rest on one person or entity. Rather, the State as a whole is charged with compliance. Accordingly, the persons and agencies involved in an investigation must work together to ensure that the obligation is satisfied in each case.

There may, for instance, be cases when a law enforcement officer or other investigative employee knows about *Brady* and/or *Giglio* material and the assistant prosecutor does not. In *Kvles 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 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 assistant prosecutor, and therefore, it is the assistant 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 (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 "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.

POLICY:

As it has always been, it is the policy of this Office to fully and promptly comply with the discovery obligations imposed on it by Court Rule, the New Jersey Rules of Evidence, Statute, the New Jersey and federal constitutions, and case law interpreting those sources of law. In particular, it is the policy of this Office to disclose to defense counsel any material that is in the State's possession that may be used to impeach the State's witnesses, in a complete and timely fashion, as required by the *Brady/Giglio* doctrine. To ensure compliance the following provisions are made.

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

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

Ultimately, it is the assistant 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 an assistant prosecutor is uncertain on the decision to disclose, he or she should consult with his or her supervisor.

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*, 224 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).

THE STATE'S 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).

The obligation to disclose *Giglio* material extends to information pertaining to both civilian witnesses and investigative employees.

Civilian Witnesses and Potential *Giglio* Material

Investigative employees must turn over to the assistant prosecutor any *Giglio* material in their possession pertaining to civilian witnesses in a case. Accordingly, 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 assistant prosecutor assigned to the matter. The decision to disclose or not disclose impeachment evidence relating to a civilian witness ultimately rests with the assistant prosecutor; evidence identified as *Giglio* material by the investigative employee and provided to the assistant prosecutor will not necessarily be disclosed to the court or to the defendant. If an assistant prosecutor is uncertain as to the appropriateness of disclosure in a case, he/she/they should consult with his/her/their supervisor.

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*. Traditionally, it has not been permissible to impeach the credibility of a witness with specific instances of dishonesty, except in certain limited circumstances. *N.J.R.E.* 608. However, *N.J.R.E.* 608 was amended effective July 1, 2020, bringing it in line with the Federal Rules of Evidence and expanding the permissible use of such evidence. Accordingly, it may be possible for witnesses to 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. The State's discovery obligations should be assessed relative to the expanded *N.J.R.E.* 608;
3. *Criminal Conviction*. *N.J.R.E.* 609; and
4. *Prior Inconsistent Statements*. *N.J.R.E.* 613.

Investigative Employees and Potential Giglio Material

The *Giglio* obligation extends to all State witnesses, including investigative employees. Accordingly, each investigative employee is under an obligation to disclose evidence that may impact his/her/their credibility in a case, or the credibility of any other potential State witness, to the assistant prosecutor on the case, or to a *Giglio* Liaison if the identity of the assigned assistant prosecutor is unknown. Investigative employees must also engage in the "Candid Conversation" process, when called upon to do so.

Examples of Giglio Material with Respect to Investigative Employees

Potential impeachment information relating to investigative employees may include, but is not limited to, the following¹:

1. A sustained or substantiated² 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 his or her professional or personal life;

¹ The following list is modeled after the matters listed in the Attorney General Internal Affairs Guidelines with respect to credibility of police officers. Internal Affairs Policy & Procedures at 43-44.

² For the purposes of this policy, a sustained finding is any finding where a preponderance of the evidence shows an officer violated any law, regulatory 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 officer, arbitrator, Administrative Union County Prosecutor's Office – *Brady/Giglio Compliance* – July 21, 2020 – Page 5 of 10

2. A sustained or substantiated 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 or substantiated 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 or substantiated 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;³
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,

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, assistant 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, assistant 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. Prosecutors should review the underlying facts of any sustained charge, rather than rely on the abbreviated title or top-level characterization of the charge in making *Giglio* determinations.

³ 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.

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

9. A sustained or substantiated 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.

GATHERING AND DISCLOSING POTENTIAL *GIGLIO* MATERIAL

Giglio Liaisons

Union County Law Enforcement Agencies — Each law enforcement agency within Union County shall designate an appropriate official to serve as the point of contact concerning potential *Giglio* information pertaining to any of their employees.

The Union County Prosecutor's Office — The Legal Chief of the Investigative Division is established as the *Giglio* Liaison for the Office. The *Giglio* Liaison shall serve as a point of contact for assistant prosecutors and local police agencies concerning potential impeachment information. The Liaison shall also be the custodian of all investigative personnel files, internal affairs files, or other pertinent information received from local police agencies in fulfillment of their *Giglio* obligations, as well as all such similar information originated within this Office. The Liaison will confidentially maintain this material in a secured storage location.

The UCPO and Agency liaisons shall 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.

Duty to Provide *Giglio* Information to the Union County Prosecutor's Office

Whenever a law enforcement agency operating in Union County obtains information pertaining to any of its employees which could implicate *Giglio*, the agency must immediately deliver a copy of the personnel file, internal affairs file, or other material capturing that information, to this Office's *Giglio* Liaison, or a member of the Professional Standards Unit, where it will be securely maintained and reviewed.

The *Giglio* Liaison will review all such material received to determine whether it in fact contains information that could implicate *Giglio* in a future case. If possible *Giglio* material is identified, the *Giglio* Liaison will maintain it for future disclosure. The *Giglio* Liaison shall notify the investigative employee to whom the information relates and the employing agency of the fact that potential *Giglio* information has been identified and provide the employee an opportunity to review the material for accuracy. If the information pertains to a pending matter, notification shall be made only as appropriate in light of the pending matter. The *Giglio* Liaison of each Union County Prosecutor's Office – *Brady/Giglio Compliance* – July 21, 2020 – Page 7 of 10

department shall notify the Prosecutor's Office's *Giglio* Liaison in writing, every 30 days, as to the existence or non-existence of any new *Giglio* information pertaining to that department's employees.

IDENTIFYING POTENTIAL *GIGLIO* INFORMATION FOR POSSIBLE DISCLOSURE IN AN INDIVIDUAL CASE

The assistant prosecutor assigned to each case has the primary obligation of identifying and disclosing all necessary *Brady/Giglio* material. In order that each assistant prosecutor may be certain that they are aware of all known *Giglio* material as it applies to their case, the following two procedures must be followed in every case.

I. Performing a *Giglio* Check

The purpose of a *Giglio* check is to determine whether *Giglio* material exists in the personnel or internal affairs records of law enforcement personnel. Such a check must be performed in each case, before a plea is offered.

1. A designated member of the prosecution team must identify the names of any police officer or other law enforcement employee who:
 - a. Has written a report;
 - b. Has signed an affidavit or certification;
 - c. Has testified under oath; or
 - d. Will reasonably be expected to testify at a future grand jury proceeding, motion, or trial of the matter.
2. In cooperation with their unit supervisor and the *Giglio* liaison, the case assistant prosecutor will determine whether potential *Giglio* material may exist for each of the identified individuals.
3. If potential *Giglio* information is determined to exist, the case assistant prosecutor will work with their supervisor and the *Giglio* Liaison to identify the effect on the State's discovery obligations and shall refrain from offering a plea or taking any other substantive action in the case until those discovery obligations have been addressed.

II. Conducting the "Candid Conversation"

The "candid conversation" process, now used by both the Department of Justice and the New Jersey Attorney General's Office, recognizes that not all exculpatory material will be recorded in an officer's internal affairs or personnel records. Indeed, the vast majority of exculpatory information is case and situation specific. For example, a particular officer may have a personal history with a defendant or a defendant's family. That history may have been in no way improper, yet may have led to negative feelings that could be probative of bias — e.g. where an Union County Prosecutor's Office – *Brady/Giglio Compliance* – July 21, 2020 – Page 8 of 10

officer was previously involved in a business arrangement with a defendant's family that has since gone bad. Such information must be turned over to the defense in a case involving that defendant.

Therefore, before an officer testifies before the grand jury or at a trial or motion, the case assistant prosecutor must engage the officer in a "candid conversation" designed to elicit potential *Brady/Giglio* material. The conversation may be conducted by telephone or in person, allowing sufficient time for the disclosure of any exculpatory material that may be identified. The "candid conversation" should be conducted as follows:

1. The case assistant prosecutor should make contact with each officer reasonably expected to testify at any proceeding in the case.
2. On making contact, the case assistant prosecutor should ask the officer each of the questions in the attached "Candid Conversation Guide" and record the answer given on the form.
3. The case assistant prosecutor should then read the officer the advisement at the bottom of the guide and fill out the information required.
4. The completed Candid Conversation Guide should then be incorporated into the case file as non-discoverable attorney work product.
5. If the answer to each of the listed questions is NO, the candid conversation process is complete.
6. If the officer answers YES or UNCERTAIN to any of the questions, the case assistant prosecutor should contact their unit supervisor or the *Giglio* liaison to determine how to proceed.

Determinations as to whether certain information is discoverable under *Giglio* is case-specific. As such, though we often work with the same officers, a candid conversation should be conducted anew in each case.

DISCLOSURE OF POTENTIAL *GIGLIO* INFORMATION TO THE COURT OR DEFENSE COUNSEL

The ultimate discoverability of potential *Giglio* material is governed by established law and no portion of this policy should be construed to expand or limit the State's discovery obligations. It is ultimately the responsibility of the assistant prosecutor assigned to a case to assess all potential *Giglio* information identified through the above processes for possible disclosure.

Together with the unit supervisor, and with assistance from the *Giglio* Liaison if needed, the assistant prosecutor will determine whether disclosable information exists and, if so, the manner in which it should be disclosed. If, after a thorough review, a legitimate question exists as to whether certain material should be turned over to defense counsel, the assistant prosecutor shall seek an *in camera*, judicial review of the potential *Giglio* information.

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

NOTIFICATION MADE TO INVESTIGATIVE EMPLOYEE AND AGENCY

The investigative employee and their agency shall be notified prior to disclosure by either the *Giglio* Liaison or the case assistant prosecutor and shall be provided copies of the material to be disclosed. After the required disclosures are made, the investigative employee may seek review of that determination from the County Prosecutor or his/her/their designee. This review shall not interrupt or interfere with the assistant prosecutor's obligation to disclose information in the ongoing case. The case assistant prosecutor shall also notify the employee and agency of any court orders issued regarding the disclosure or admissibility of potential *Giglio* material.

If the case assistant 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 case assistant prosecutor shall notify UCPO's *Giglio* Liaison who shall notify the employee's agency through the department's *Giglio* Liaison of that fact.

CONTINUING OBLIGATION TO SCREEN POTENTIAL WITNESSES

As with all discovery obligations, the obligation to disclose *Brady/Giglio* material is an ongoing one. Accordingly, any time that an assistant prosecutor working on a file identifies another employee of a law enforcement agency likely to testify at any proceeding in the matter the procedures described herein must be applied to that person.

Additionally, potential witnesses who have already undergone the candid conversation should be reminded of their continuing obligation to advise the assistant prosecutors of any changes to their original answers prior to every phase of the prosecution that might require their sworn testimony.

CONFIDENTIALITY

Obtaining and disclosing potential *Giglio* material is a confidential process. As such, all documents requested and obtained shall be kept confidential and secured manner 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.

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.



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Acting Union County Prosecutor