BRADY DISCLOSURES: OBLIGATIONS AND ETHICS IN CRIMINAL LAW

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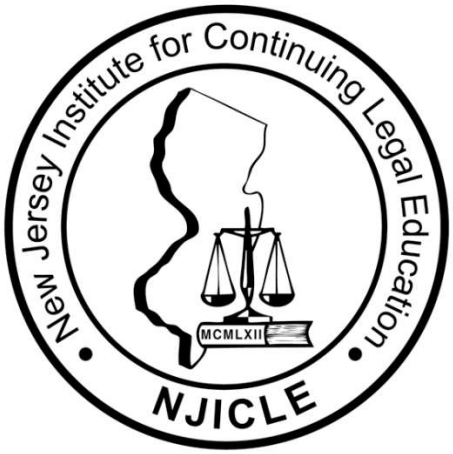

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BRADY DISCLOSURES: OBLIGATIONS AND ETHICS IN CRIMINAL LAW

Moderator

Danica Rue, Esq.
Office of the Public Defender
(Newark)

Speakers

Honorable Siobhan A. Teare, J.S.C. (Ret.)
Essex County Superior Court
(Newark)

MI1538.24

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Speakers:

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Siobhan A. Teare, J.S.C. (Ret.)
Essex County Vicinate

Siobhan A. Teare was a Superior Court Judge for the State of New Jersey. She sat in the Criminal Division of the Essex County Vicinage just before her retirement earlier this year. She previously served in the Family and Civil Divisions.

Before joining the bench, she was a Director of Legal Management for the University of Medicine & Dentistry of New Jersey (currently Rutgers Medical School).

Before joining UMDNJ, she served as the Deputy First Assistant Prosecutor of Administration for the Essex County Prosecutor's Office. Among her duties there, she oversaw all labor and employment matters involving ECPO employees. Additionally, she was the liaison to all outside counsel representing ECPO in civil lawsuits.

Prior to joining ECPO, she practiced law in New Jersey in various capacities. She has served as Corporation Counsel for the Cities of East Orange and Plainfield. She was an Associate with the firm of Weiner Lesniak and Legal Counsel/Assistant Corporation Counsel for the Police Department of the City of Newark. In addition, Judge Tear served as Assistant Deputy Public Defender in the Essex County Adult Trial Region. She started her legal career as a Law Clerk for the Honorable Harry H. Hazelwood, Jr., J.S.C., Essex County.

Active in a number of professional organizations, Judge Teare is a past president of the Garden State Bar Association, a past Treasurer and Trustee of the Essex County Bar Association, a past member of the Supreme Court Committee on the Americans with Disabilities Act, the Supreme Court Arbitration Advisory Committee and the Criminal Practice Committee. She is active in various Bar Associations, including the Essex County Bar Association, New Jersey State Bar Association, National Bar Association, and the American Bar Association. She is a past recipient of the Professional Lawyer of the Year Award (NJSBA) and the Criminal Trial Attorney Achievement Award (ECBA).

Judge Teare has been a frequent panelist for Continuing Education courses. She has served as a panelist for the Essex County Bar, the Association of Black Women Lawyers, the New Jersey State Bar Association, the National Bar Association, the Hispanic Bar Association of New Jersey and the National Association of Women Judges. Judge Teare has served as an active board member of various non-profit organizations including: The Carter G. Woodson Foundation, The Aisha Shakir Liver Foundation and the Hirambee Community Development Organization. She served as a member of the Boad of Trustees for her high school alma mater, the Morristown-Beard School and received the Distinguished Alumni Award in 2012. She is a founding member and past president of the HAET Inn of Court (currently the MWB Inn of Court).

Judge Teare received a B.A. degree in history and political science from Tufts University and earned her J.D. from Rutgers Law School in Newark.

Robert A. Bianchi, Esq.
The Bianchi Law Group, LLC
Former Morris County Prosecutor
(A full copy of Mr. Bianchi's bio is here)

Robert A.Bianchi is a regular national TV legal analyst having appeared on numerous national and local television outlets including CNN, ABC, Fox News, NBC, CBS and MSNBC. Bob is a partner in The Bianchi Law Group.

From 2007 to 2013, Bob was the Morris County Prosecutor during which time he also served as one of the vice presidents of the County Prosecutor's Association of New Jersey.

Bob began his career as an Assistant Prosecutor with the Hudson County Prosecutor's office in 1989 during which time he served in numerous divisions within the office and ultimately as Senior Trial Attorney. He tried numerous felony cases and high-profile murder cases and was assigned the responsibility of training other Assistant Prosecutors in the art of trial advocacy due to his many successes in the courtroom.

He later left the Hudson County Prosecutor's Office to become a law partner with his father, Angelo (Buddy) Bianchi where he practiced for the next 11 years. While practicing with his father, he expanded his representation to other areas of the law including civil rights cases, complex personal injury cases and employment litigation matters.

Bob is a member of the Morris County Bar Association and the New Jersey State Bar Association, the New Jersey Association for Justice, the National Italian American Bar Association , and is the President and founder of the Italian American Bar Association of New Jersey.

He is a graduate of Providence College where he earned a B.A., Manga Cum Laude, in American Studies/History. He earned his J.D. from Seton Hall University School of Law.

James J. Gerrow, Jr., Esq.
Of Counsel, Law Office of Mario J. Persiano

James Gerrow graduated from Temple University School of Law, Philadelphia, Pennsylvania having received his undergraduate education at Saint Joseph's University, Philadelphia, Pennsylvania.

He was admitted to the bar of the State of New Jersey in 1974, and the United States Supreme Court in 1978.

From September 1975 until August 1982 he was an Associate Attorney and Member of Hartman, Schlesinger, Schlosser, Faxon & Foy, P.C. in Mount Holly, primarily engaged in criminal defense litigation. He served as a municipal prosecutor in five Burlington County municipalities during this time.

He then served in the Burlington County Prosecutor's Office from 1982 until 2008 as Executive Assistant Prosecutor. He previously served as Acting Burlington County Prosecutor (11/98 – 6/99).

He has lectured for the New Jersey State Bar Association, New Jersey's Institute for Continuing Legal Education, and at the New Jersey State Judicial College.

He served as the Special Prosecutor in the investigation and prosecution of the April 23, 1998 New Jersey Turnpike Trooper Shooting Case that confirmed the use of racial profiling by the New Jersey State Police patrolling the New Jersey Turnpike.

He was also a member of the Attorney General's Committee that developed the Megan's Law Registrant Risk Assessment Scale.

He is a former President of the Burlington County Bar Association. He served as the Burlington County Trustee, New Jersey State Bar Association. He is a Past Chair of the Criminal Law Section, New Jersey State Bar Association. He served as the South Jersey Vice-Chair of the Judicial & Prosecutorial Appointments Committee as well as a member of the Association's Nominating Committee, Judicial Administration Committee, and currently its Legislative Committee. He has served on a number of special committees of the Association. He also serves on the New Jersey State Bar Foundation's Mock Trial Committee.

He was selected as the 1997 Professional Lawyer of the Year – New Jersey Commission on Professionalism int eh Law and Burlington County Bar Association. In 2021, he received the Burlington County Bar Association's highest honor the Matin L. Haines Award which recognizes personal and professional integrity, devotion to the legal profession and legal scholarship, and dedication to the justice system and the people of Burlington County. At the 2024 New Jersey State Bar Annual Meeting, he received the Criminal Law Practitioner of the Year Award from his Criminal Section colleagues.

Danica L. Rue, Esq.
Director of Investigations and Police Accountability,
Office of the Public Defender

Danica L. Rue joined the Essex County Public Defender's office in 2009 and became a managing attorney there in 2022. Recently, she was appointed the first Director of Investigations and Police Accountability in the agency. Ms. Rue graduated from Colorado College while living and training full time as an Olympic Weightlifter at the United States Olympic Training Center in Colorado Springs. She then went on to New York Law School where she worked as an assistant to Nadine Strossen, then the president of the American Civil Liberties Union. After law school, she clerked for the Honorable Denise A. Cobham in Essex County. Ms. Rue is an accomplished trial attorney, including trying the state's first gay male battered person syndrome case, a homicide that resulted in a not guilty verdict, and in 2020 conducted a five- day Frye challenge to the science of shaken baby/ abusive head trauma. This was the first successful Frye challenge to shaken baby syndrome in the country and is currently before the New Jersey Supreme Court, after having been upheld by the Appellate Division.

RPC 3.8-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 post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence 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;

(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) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) 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 extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (c) and (d) amended and new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.

THE BOTTOM LINE

The United States Supreme Court observed in 1935:

The United States 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 suffer. 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 every legitimate means to bring about a just one.

Berger v. United States, 295 *U.S.* 78, 88 (1935)

ALWAYS DO WHAT IS RIGHT.

5-501 NMRA

Archived code versions

Court rules current with updates received by the publisher as of July 25, 2024.

5-501. Disclosure by the state.

A. Information subject to disclosure. Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the defendant:

(1) any statement made by the defendant, or codefendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney;

(2) the defendant's prior criminal record, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;

(5) a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and

(6) any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

B. Examination by defendant. The defendant may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. Depositions. The state may move the court to perpetuate the testimony of any such witness by taking the witness' deposition pursuant to Rule 5-503 NMRA.

D. Certificate of compliance. The prosecutor shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgement of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the prosecutor to the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the defendant.

E. Disclosures for enhanced sentences. If the state intends to use a prior criminal conviction to enhance a sentence, the state shall provide or make available to the defendant certified copies or other proof of any prior conviction to be offered during the sentencing hearing.

F. Information not subject to disclosure. The prosecutor shall not be required to disclose any material required to be disclosed by this rule if:

(1) the disclosure will expose a confidential informer;

(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

G. Statement defined. As used in this rule, and Rules 5-502 and 5-503 NMRA, "statement" means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) any written, stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

H. Failure to comply. If the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the prosecutor in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.

History

[As amended, effective December 1, 1998; March 15, 2007; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.].

Notes

Amendment Notes.

The 2007 amendment, effective March 15, 2007, rewrote the definition of "statement" in Paragraph G.

The 2013 amendment, effective May 13, 2013, amended the committee commentary as amended by Supreme Court Order 13-8300-008, effective for all cases pending or filed on or after May 13, 2013.

The 2015 amendment, effective December 31, 2015, added "identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify" in A(5); deleted "or" at the end of F(1); and added the fourth paragraph of the Committee commentary.

Commentary

OFFICIAL COMMENT

Committee commentary. —

Section 14 of Article 2 of the New Mexico Constitution gives the defendant a right to "demand the nature and cause of the accusation." This rule provides procedures for the exercise of the right to determine the "cause of the accusation" to obtain discovery of relevant evidence that may tend to prove or disprove the factual allegations of a criminal charge. A motion for discovery of evidence should not be confused with a motion for statement of facts pursuant to Rule 5-205 NMRA, which is intended to obtain more specificity regarding the factual manner in which the defendant is alleged to have committed his or her criminal acts.

This rule was derived from Rule 16(a) of the Federal Rules of Criminal Procedure. *See generally*, 62 F.R.D. 271, 304-313 (1974); 48 F.R.D. 553, 587-606 (1970).

5-501 NMRA, Disclosure by the state.

This rule and Rule 5-502 require the prosecution and the defense to exchange certain information. Judicial involvement should be in the rare case.

Under Subparagraph (4) of Paragraph A of this rule, the state has a duty to disclose to the defense any reports prepared by experts in connection with the defendant's case.

Subparagraph (6) of Paragraph A of this rule was added in 1979 to make it clear that the state has a duty to provide the defense with exculpatory material evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963) and *Giles v. Maryland*, 386 U.S. 66 (1967). Failure to produce such evidence may result in the entry of an order pursuant to Rule 5-505 or if discovered after trial in a new trial unless the nondisclosure constitutes harmless error. *See* Paragraph A of Rule 5-113 and *United States v. Agurs*, 427 U.S. 97 (1976).

There are a number of supreme court decisions recognizing the duty of the prosecutor to produce evidence which is material and exculpatory. See for example: *Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965) (loss of certain letters and erasure of parts of tape held violation of due process of law); *State v. Gomez*, 75 N.M. 545, 408 P.2d 48 (1965) (failure, upon request, to disclose contents of supplemental police report held reversible error); *State v. Morris*, 69 N.M. 244, 365 P.2d 668 (1961) (failure to produce letter prior to trial held not suppression of material evidence requiring reversal); *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975) (negligent nondisclosure of supplemental police report and statement of a witness misfiled in the district attorney's office found to be material evidence and reversible error); *State v. Vigil*, 79 N.M. 80, 439 P.2d 729 (Ct. App. 1968) (nondisclosure of evidence held not reversible error when defendant knew the evidence was in possession of the state and made no demand for its production); and *State v. Turner*, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970) (there must be particularized need for materials not produced for there to be reversible error).

Some of the appellate court decisions announced since the adoption of Subparagraph (5) of Paragraph A of this rule have not always indicated that the rule was being construed. Relying on a prerule decision, *State v. Herrera*, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972) holds that the defendant is entitled to statements of the witness, in that case a police report. *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975) holds that, once the witness has testified at trial the defendant is entitled to a copy of a written statement submitted by the witness to the grand jury. Subparagraph (5) of Paragraph A of this rule may require the statement of the witness to be disclosed prior to his testifying. (*See* Rule 5-506.)

In *State v. Sparks*, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), the court noted that this rule did not give the defendant a right to testimony of a witness before the grand jury. However, the court then held that the constitutional right to confrontation gave the defendant the right to the transcribed testimony for use in cross examination of the witness once the witness had testified. In *State v. Felter*, 85 N.M. 619, 515 P.2d 138 (1973), the supreme court made it clear that, absent some showing of particularized need, the defendant is not entitled to a copy of the grand jury testimony before the witness has testified at trial.

In *State v. Quintana*, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974), the court held that the failure of the state to "strictly comply" with Subparagraph (5) of Paragraph A of this rule was not reversible error without a showing that substantial rights of the defendant had been prejudiced. In *State v. Billington*, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974), the court held that failure of the state to comply with the rule was grounds for continuance of the trial as a matter of law. The cases might be reconciled on the basis of the importance of the witnesses whose names were not disclosed by the state in each case.

Paragraph D of this rule (prior to the 1980 amendment) was derived from Rule 34(b) of the Federal Rules of Civil Procedure, the procedure for production of documents and things and entry upon land for inspection. Paragraph E of this rule was derived from American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 2.5 (Approved Draft 1970).

On the privilege of the state to refuse to disclose the identity of an informer, *see* Rule 11-510. *See also*, *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

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Research: Whether evidence effecting the credibility of a prosecution witness must be turned over to the defense under Brady v. Maryland, 373 U.S. 83, 87 (1963).

A. Rule 3:13-3(b)(1) provides that discovery "shall include exculpatory information or material." The rule codifies the standards set forth by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). State v. Higgs, 253 N.J. 333, 354-355 (2023).

B. The United States Supreme Court in Giglio v. United States, 405 U.S. 150 (1972), clarified that Brady material (exculpatory evidence) 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. Our Supreme Court followed Brady and Giglio in State v. Carter, 91 N.J. 86, 111 (1982).

C. Attorney General Law Enforcement Directive No. 2019-6 (Dec. 4, 2019), "Directive Establishing County Policies to Comply with Brady v. Maryland and Giglio v. United States," establishes guidelines, incorporating the best practices and procedures, to ensure compliance and the integrity of criminal prosecutions.

D. Attorney General Directive No. 2019-6 provides that:

> "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, 405 U.S. at 150). 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." This includes Giglio material on civilian and investigative State witnesses.

E. With regard to Civilian Witnesses, Attorney General Directive No. 2019-6 provides that:

> 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.

F. With regard to Investigative Employees, Attorney General Directive No. 2019-6 provides that:

> 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;

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 (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.

G. Cases

State v. Higgs, 253 N.J. 333, 355 (2023) (disclosure of police internal affairs records to a criminal defendant in pretrial discovery).

State v. Hernandez, 225 N.J. 451, 463 (2016) (State must disclose any promise of favorable treatment or leniency offered to a witness, including any plea or cooperation agreement setting forth the benefits to the witness).

State v. Landano, 271 N.J. Super. 1 (App. Div. 1994) (prosecutor required to disclose evidence linking two State witnesses to the crime for which defendant was being tried and evidence impeaching the credibility of a third witness).

The State's disclosure obligations under Brady v. Maryland, 373 U.S. 83 (1963), do not extend to documents in a private third-party's possession, such as medical, mental health, and rehabilitation records. State v. Kane, 449 N.J. Super. 119, 133 (App. Div. 2017).

Recordings from a patrol car's dashboard camera that depict the interactions between a DWI suspect and police officers, or the sobriety tests performed by the suspect are clearly relevant, and if the recordings contradict an officer's testimony, such evidence has vital impeachment value to the defense. State v. Stein, 225 N.J. 582, 596 (2016).

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GURBIR S. GREWAL
Attorney General

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. ***"Sustained[1] 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

The relevant evidence rules are N.J.R.E. 401 (Definition of Relevancy), N.J.R.E. 403 (Exclusion of Relevant Evidence), N.J.R.E. 607(a) (Witness Impeachment, Support and Neutralization) and N.J.R.E. 608 (Evidence of Character for Truthfulness or Untruthfulness).

N.J.R.E. 607(a) (emphasis added) provides that:

> For the purpose of attacking or supporting the credibility of a witness, any party including **the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility**, subject to the exceptions in (a)(1) and (2).
> (1) This provision is subject to Rules 405 and 608.
> (2) The party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under Rule 803(a)(1) or the court finds that the party calling the witness was surprised.

Some Interesting Cases

"N.J.R.E. 607 permits the introduction of extrinsic evidence affecting a witness' credibility regardless of whether that evidence is relevant to any other issue in the case." State v. Parker, 216 N.J. 408, 418 (2014) (citing Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 494-95 (1999)).

When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the Brady rule." State v. Carter, 85 N.J. 300, 311 (1981).

The Confrontation Clause protects a defendant's right to cross-examination and a defendant's right to attack the credibility of a witness. See State v. P.H., 178 N.J. 378, 390 (2204) (the constitutional guarantee of procedural fairness requires that a defendant be allowed to conduct cross-examination or present impeaching evidence concerning a child witness's belated disclosure of alleged abuse as one of the factors relevant to credibility).