

ATLANTIC COUNTY PROSECUTOR'S OFFICE

PROSECUTOR'S DIRECTIVE

PD-00986-16

DISCLOSURE OF EXCULPATORY & IMPEACHMENT EVIDENCE

(BRADY & GIGLIO DISCLOSURE REQUIREMENTS)

BY ORDER OF: Damon G. Tyner, Atlantic County Prosecutor

DISTRIBUTION: Atlantic County Prosecutor's Office Employees
All Municipal, County and State Law Enforcement Agencies

REISSUE DATE: March 30, 2020

Revision History:

03/30/20 [MM-00986-16 converted to PD-00986-16, appendices AX-01387-19, AX-01404-19 & FM-01384-19 added]

03/09/16 [Created as MM-00986-16, Brady Cop Directive]

I. PURPOSE

It is the purpose of this policy to provide the information necessary to properly fulfill the reporting and testimonial requirements mandated under U.S. Supreme Court decisions including Brady v. Maryland 373 U.S. 83 (1963), Giglio v. U.S. 405 U.S. 150 (1972) and State v. Carter, 91 N.J. 86,111 (1982).

II. POLICY

It is the policy of the Atlantic County Prosecutor's Office to follow Brady / Giglio disclosure requirements consistent with the law and Rules of Professional Conduct, Rule 3.8(d). Effective immediately, I adopt and mandate compliance by all Atlantic County law enforcement agencies with New Jersey Attorney General's Law Enforcement Directive 2019-06, (refer to ACPO AX-01387-19), concerning the required disclosure of exculpatory and impeachment evidence.

The Brady decision and subsequent rulings have made it a duty of all law enforcement agencies to (1) identify and provide to the prosecution any exculpatory material that would have a reasonable probability of altering the results in a trial, or any material that could reasonably mitigate the sentencing of a defendant and (2) any material relevant to the credibility of government witnesses, including, but not limited to, police officers.

III. DEFINITIONS

A. Brady Material

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.), cert. 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).

B. 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." *Ibid*. This includes Giglio material on civilian and investigative State witnesses.

1. Examples of Giglio Material for Civilian Witnesses (non-exhaustive list, for general guidance only):

a. 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.)

b. 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. N.J.R.E 609, refer to AX-01404-19.

c. Criminal Conviction. N.J.R.E 609, refer to ACPO [AX-01404-19](#).

d. Prior Inconsistent Statements, N.J.R.E 613, refer to ACPO [AX-01404-19](#).

2. Investigative Employees and Potential Giglio Material

a. A sustained or substantiated 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.

b. A sustained or substantiated finding that an investigative employee was untruthful or has demonstrated a lack of candor.

c. A pending criminal charge or conviction of any crime, disorderly persons, petty disorderly persons, municipal ordinance, or driving while intoxicated matter, noting that any such charges or convictions will be reviewed for disclosure the New Jersey Rules of Evidence (N.J.R.E 609).

d. A sustained or substantiated finding that undermines or contradicts an investigative employee's educational achievements or qualifications as an expert witness.

e. A sustained or substantiated 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.

f. A sustained or substantiated finding, or judicial finding, that an investigative employee intentionally mishandled or destroyed evidence.

g. A sustained or substantiated finding, or judicial finding, that an investigative employee is biased against a particular class of people. To include but not limited to; race, ethnicity, gender, gender identity, etc.

h. Information that the investigative employee is biased for or against a defendant.

IV. PROCEDURES

A. Agencies' Duty to Report

1. Effectively immediately, the Internal Affairs Unit or Professional Standards Unit (or another person designated by the Agency Chief / Executive) will research their active duty employee's (all investigative employees, refer to A.G. Directive 2019-06) personnel, internal affairs and/or disciplinary files and report to this office on a form designated by the Prosecutor any of the criteria listed in Section III, paragraphs A or B inclusive. The Internal Affairs Unit or Professional Standards Unit will subsequently serve as the designated "Agency Official" for future contacts concerning their investigative employees' potential *Brady/Giglio* information.

2. Post reporting requirements, the Internal Affairs Unit or Professional Standards Unit of the employee's agency shall ensure that the identified employees whose name and information that was disclosed to this office receives notification (on a format designated by the Chief or Law Enforcement Executive) that their information was released.

3. Supplemental notification to this office will be made when circumstances in which the named employee(s) has been exonerated, including where the previous Giglio finding has been vacated, dismissed, or overturned in any subsequent action

4. Agency's Continuing Duty to Disclose - Once a request for potential impeachment information has been made; it is the investigative agency's responsibility to keep this office aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. Law Enforcement agencies have an ongoing responsibility to report to this office anytime an employee designated "investigative employee" meets the criteria listed in Section III, paragraphs A or B inclusive.

B. Prosecutor's Office General Responsibilities Under Brady

1. Prosecutors must request and obtain any Brady materials in the prosecution team's possession. To achieve this goal, prosecutors must ask the investigative employees if they, or any other members of the prosecution team, know of any Brady materials related to the case. Investigative employees must turn over Brady materials to the prosecutors. Investigative employees must make sure that they know the Brady rule, and if unsure about the rule or what is covered by Brady, should consult with the prosecutor.

a. It is important to note that gathering Brady and Giglio material, disclosing Brady and Giglio material to the defense or the court, and admitting Brady and Giglio material at defendant's trial are all separate and distinct processes.

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.

2. It is the prosecutor's decision who decides, based on his or her professional judgement, what evidence is covered by Brady and ultimately disclosed to the defendant. To that end, evidence identified by the investigative employee as Brady material is not necessarily Brady material or exculpatory until a determination is made by the prosecutor. 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 rules governing the courts of the State of New Jersey, Rule 3:13. Depositions; Discovery

3. Affirmative Duty to Report - In criminal matters prosecuted by the Atlantic County Prosecutor's Office, it will be the assistant prosecutors, in consultation with Chief Assistant Prosecutors, who decide what evidence is covered by Brady and must be disclosed to the defendant. To that end, all law enforcement agencies in Atlantic County shall exercise due diligence to ensure that material(s) of possible Brady relevance is made available to the Atlantic County Prosecutor's Office in a timely fashion.

4. *Brady/Giglio* materials and information may change under different circumstances or time. For this reason, the Atlantic County Prosecutor's Office will continually review the *Brady/Giglio* repository of information on a case-by-case basis to fulfill the disclosure requirements consistent with the law and Rules of Professional Conduct, Rule 3.8(d). In addition, a candid *Brady/Giglio* conversation shall occur with respect to every individual case.

C. Duty to Disclose - Investigative Employee

1. 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.

a. To complete this task, when an investigative employee is involved in an investigation, the investigative employee shall disclose to the assigned prosecutor (or confirm that the prosecuting authority is aware) as early as practical in any investigation in which the employee is involved that they have been notified by their respective agency of having potential *Brady/Giglio* information.

D. Prosecuting Attorney Responsibilities

1. The prosecuting attorney shall, at the inception of the criminal case or an associated motion check the Atlantic County Prosecutor's Office *Brady/Giglio* repository to determine whether potential *Brady/Giglio* information/material exists involving personnel associated with the investigation/motion. Access to the repository will be completed by contacting via email the, Captain, Lieutenant and Chief Assistant Prosecutor of the agency's Internal Affairs Unit. If such information exists, the attorney shall meet with Chief Assistant Prosecutor (CAP) of the Internal Affairs Unit or designee to review the information/materials.

a. An involved person includes but is not limited to a police officer or law enforcement employee who:

- 1) Has written a report;
- 2) Has signed an affidavit, certification, or criminal complaint;
- 3) Has testified under oath; or
- 4) Will reasonably be expected to testify at a future grand jury proceeding, motion, or trial of the matter.

2. Prosecuting attorneys need to recognize that not all exculpatory material will be recorded in an agency's repository. Since a vast majority of exculpatory information is case and situation specific, 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 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.

3. To expand upon this notion, before an officer testifies before the grand jury, a trial or a 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:

- a. The case assistant prosecutor should make contact with each officer reasonably expected to testify at any proceeding in the case.
- b. 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. Refer to ACPO [FM-01384-19](#).
- c. The completed Candid Conversation Guide should then be incorporated into the case file as non-discoverable attorney work product.
- d. If the answer to each of the listed questions is NO, the candid conversation process is complete.
- e. If the officer answers YES or UNCERTAIN to any of the questions, the case assistant prosecutor should immediately contact CAP assigned to Internal Affairs or First Assistant Prosecutor to discuss moving forward with the witness.

4. Since 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, adverse finding, or the prosecutor requires more information learned from prior information released to this agency. Therefore, prosecutors will receive the most comprehensive potential impeachment information by routing a request for probative information discussed through this agency's Internal Affairs Unit Supervisor(s) to the investigative employee's agency.

5. It is responsibility of the reviewing AP to make a determination as to the admissibility or discoverability of the potential impeachment materials and all potential Giglio information not the agency official. Information obtained from an investigative employee or the employee's agency should be protected and kept confidential within a separate file and only disclosed to those with a need to know.

V. BRADY /GIGLIO MATERIAL & CIVILIAN WITNESSES

A. This policy primarily focuses on our obligations as they relate to law enforcement witnesses, but we of course still have obligations to disclose *Brady/Giglio* material relating to civilian witnesses. Accordingly, the State is obligated to disclose known evidence of general or specific bias, past instance of dishonesty, prior criminal convictions, under N.J.R.E. 609, prior inconsistent statements, under N.J.R.E. 613, and any other exculpatory evidence.

B. Civilian witnesses are not simply an extension of the State, in order to ensure that every case prosecuted by this Office is handled fairly, openly, and in accordance with all applicable law, the following procedures will be followed for all civilian witnesses:

1. In preparing to elicit sworn testimony of any kind from a civilian witness, the assistant prosecutor will question the witness to determine whether potentially exculpatory evidence exists. If the procedures described above identify potentially exculpatory evidence, the assistant prosecutor will consult with the CAP of Internal Affairs or Chief First Assistant Prosecutor to determine what information is subject to disclosure and whether an in camera review or protective order will be sought.

2. Working with the assigned assistant prosecutor as necessary, the assigned investigative staff will generate a criminal history report at the request of the defense counsel on a civilian witness who gave a statement during the investigation or who is reasonably likely to testify at a future proceeding in the matter, for review by the assistant prosecutor. If the procedures described above identify potentially exculpatory evidence, the assistant prosecutor will consult with the CAP of Internal Affairs or First Assistant Prosecutor to determine what information is subject to disclosure and whether an in camera review or protective order will be sought.

VI. DISCLOSURE OF POTENTIAL GIGLIO INFORMATION TO THE COURT OR DEFENSE

A. Procedures for Review. The prosecutor assigned to a case shall independently 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.

B. 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.

C. It will be the policy of the Atlantic County Prosecutor's Office to notify the investigative employee and/or the employee's agency, in writing, prior to disclosure of any *Brady/Giglio* material. The notice to the investigative employee and agency will serve as an opportunity for the agency and employee to check the accuracy of the noted *Brady* and *Giglio* material.

1. The procedure to refute or question the accuracy of proposed *Brady/Giglio* material(s) is as follows:

a. The investigative employee and/or agency, in a timely fashion, must contact the Assistant Prosecutor (AP) preparing to make to disclosure and provide, preferably in writing, the disputed material.

b. In response to the inquiry made by the investigative employee and/or agency, the AP may choose to proceed with the disclosure, redact information or seek a second opinion from a supervising attorney, but in any case, the AP will provide the results of their decision to the investigative employee and/or agency.

D. 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.

1. 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.

2. Once the disclosures are made, the Atlantic County Prosecutor's Office shall inform the employee and /or investigative employee's agency, in writing or by other means approved the Prosecutor, of decisions made by the court as to the admissibility at trial of any disclosed *Brady* and/or *Giglio* information.

E. If the prosecutor makes the decision not to use an investigative employee because of *Brady* or *Giglio* concerns, or the information substantially affected the case in any way, the Atlantic County Prosecutor's Office shall notify, in writing or by means approved by the Prosecutor, the appropriate individual in that agency of that decision.

F. A decision to disclose information in one case does not dictate the decision to disclose in subsequent cases. Prosecutors' must evaluate each piece of *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.

VI. CONFIDENTIALLY

A. Obtaining and disclosing potential *Giglio* material is a confidential process. All documents requested and obtained shall be kept confidential and secured by this office and should not be shared with any person who does not have a need to know.

B. *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 directive and any related policies.

APPENDICES

[FM-01384-19](#)

Form A – Candid Conversation Form

[AX-01387-19](#)

N.J. Attorney General – L.E Directive 2019-06 Establishing County Policies to Comply with Brady v. Maryland and Giglio v. United States

[AX-01404-19](#)

N.J. Rules of Evidence, Article IV, Witnesses, #601- #615 & Rules Governing the Courts of the State of N.J. – Rule 3:13. Dispositions / Discovery