

DISCLOSURE OF EXCULPATORY AND IMPEACHMENT EVIDENCE

Prosecutors are required to disclose exculpatory and impeachment evidence to defense counsel. See Attorney General Law Enforcement Directive No. 2019-6; Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972); State v. Carter, 91 N.J. 86, 111 (1982). The purpose of this policy is to assist Essex County Prosecutor's Office (ECPO) personnel in complying with those obligations and applies to assistant prosecutors (AP) and investigative employees¹.

I. BRADY AND GIGLIO: PRACTICAL APPLICATION

A. Responsibilities Under Brady

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

Ultimately, it is the AP's decision whether to disclose or not disclose potentially exculpatory evidence. Evidence may be identified by the investigative employee as Brady material, and the AP may conclude that the evidence is not exculpatory. Once the AP 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 AP is uncertain on the decision to disclose, they should consult with their immediate supervisor.

B. Examples of Brady Material

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

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 124 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).

¹ "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.

C. Responsibilities Under Giglio

As with Brady material, there is a constitutional requirement to disclose all Giglio material. “Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence.” State v. Carter, 91 N.J. at 111 (citing Giglio v. United States, 405 U.S. 150 (1972)). The New Jersey Supreme Court in Carter went on to hold that “the State’s obligation to disclose is not limited to evidence that affirmatively tends to establish a defendant’s innocence but would include any information material and favorable to a defendant’s cause even where the evidence concerns only the credibility of a State’s witness.” Ibid. (internal quotations omitted). This includes Giglio material on civilian and investigative State’s witnesses. Investigative employees must turn over Giglio material to APs.

D. Civilian Witnesses² and Potential Giglio Material

The decision to disclose or not disclose impeachment evidence on a civilian witness ultimately rests with the AP. If an AP is uncertain on the decision to disclose, they should consult with their immediate supervisor.

E. Examples of Giglio Material with Respect to Civilian Witnesses

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

1. Bias. A witness can be impeached with evidence that he or she has a bias against the defendant or in favor of the State (actual or potential exposure to criminal penalties, leniency/plea agreement, payments, immigration benefits, etc.);
2. Specific Instances of Dishonesty. A witness can be impeached with evidence of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction. This includes lying and falsifying records. N.J.R.E. 608;
3. Criminal Conviction. N.J.R.E. 609; and
4. Prior Inconsistent Statements. N.J.R.E. 613.

F. Examples of Giglio Material with Respect to Investigative Employees

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

² “Civilian witness” refers to an individual who is not employed by a law enforcement agency or entity.

1. A sustained³ 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;
2. A sustained finding that an investigative employee was untruthful or has demonstrated a lack of candor;
3. A pending criminal charge or conviction of any crime, disorderly persons, petty disorderly persons, municipal ordinance, or driving while intoxicated matter, noting that any such charges or convictions will be reviewed for disclosure under N.J.R.E. 609.
4. A sustained finding that undermines or contradicts an investigative employee's educational achievements or qualifications as an expert witness;
5. A finding of fact by a judicial authority or administrative tribunal that is known to the employee's agency, which includes a finding that the investigative employee was *intentionally* untruthful in a matter, either verbally or in writing;
6. A sustained finding, or judicial finding, that an investigative employee intentionally mishandled or destroyed evidence. Generally, law enforcement agencies and investigative employees should disclose findings or allegations that relate to substantive violations concerning: (1) 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;⁴
7. Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
8. Information that may be used to suggest that the investigative employee is biased for or against a defendant. See United States v. Abel, 469 U.S. 45, 52 (1984). The Supreme Court has stated, "bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his 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

³ Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee, including where the previous Giglio finding has either been vacated, dismissed, or overturned in any subsequent action, generally are not considered to be potential impeachment information, subject to the requirements herein.

⁴ 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.

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.

II. BRADY AND GIGLIO PROCEDURE

Civilians. The investigative employee assigned to the prosecution shall take all investigative measures necessary to confirm whether there is any Brady and/or Giglio information that must be brought to the AP's attention. Any such information shall be reviewed by the AP to determine if disclosure to the defense is appropriate under the law.

Investigative Employees. All Essex County law enforcement agencies shall advise the ECPO Professional Standards Bureau (PSB) immediately regarding any officers who are subject to the Giglio categories set forth in Section I.F. In addition, all agencies shall perform a monthly Giglio review regarding their officers. If an officer falls under one of the Giglio categories set forth in Section I.F., the following procedure shall be followed:

1. A notation will be entered in each AP's file in which the subject officer is involved. This notation shall require that the AP contact PSB to ascertain the nature of the potential Giglio material. It is therefore imperative that upon receipt of a file, APs review the names of all involved officers to determine if PSB needs to be contacted. This ensures that any appropriate information is released to the defense as soon as necessary. In addition, APs shall confirm with witness officers that the Giglio disclosure provided by their department is accurate and complete.
2. After contacting PSB, the AP will confer with his or her supervisor to determine if disclosure is required under the law.
3. If it is determined that disclosure is required, PSB will generate a letter for the AP setting forth the nature of the Giglio material, which the AP will send to the defense.
4. If the defense files a motion to compel the production of the subject officer's internal affairs file, the AP shall contact PSB to determine whether it should be disclosed to the court for an *ex parte*, *in camera* review or whether it should be disclosed directly to the defense.
5. Prior to any disclosure, PSB shall notify the officer's agency, affording them an opportunity to verify the accuracy of the noted Brady and/or Giglio material.
6. With respect to the disclosed material, the AP shall seek redactions to protect the privacy interests of third-parties and investigative personnel. As a matter of course, the AP shall also seek protective orders to limit the use and further dissemination of the material.
7. The AP shall notify PSB regarding what, if anything, was disclosed. PSB shall inform the officer and his or her agency of decisions made by the court as to the

disclosure and/or admissibility at trial of any disclosed Brady and/or Giglio information.

8. Once there has been a disclosure, whether made to the defense directly or after the court orders disclosure, PSB shall notify the officer and agency of the disclosure. PSB shall also provide the officer and agency with copies of all disclosed material.
9. If the AP makes the decision not to use an officer because of Brady or Giglio concerns, or if the relevant Brady or Giglio information substantially affected the case in any way, PSB shall notify the appropriate individual in that agency of the decision.

III. CASE SPECIFIC ANALYSIS

A decision to disclose in one case does not dictate the decision to disclose in subsequent cases. The AP must evaluate each piece of potential Giglio information on a case-by-case basis to determine whether the material must be disclosed.

IV. CONFIDENTIALITY

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

V. 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.

VI. EFFECTIVE DATE

The Policy is effective March 1, 2020.