

## Appendix A

### (Formal Comment and Response: *Vermont Association of Chiefs of Police*)

# VERMONT ASSOCIATION OF CHIEFS OF POLICE



**President**  
**Chief Brian Peete**  
Montpelier P.D.  
802-223-3445

**1st Vice President**  
**Chief Doug Allen**  
Colchester P.D.  
802-264-5541

**2nd Vice President**  
**Chief George Merkel**  
Vergennes P.D.  
802-877-2201

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**Chief Ronald Hoague**  
Essex P.D.  
802-878-8331

**Northern Directors**  
**Chief Travis Bingham**  
Newport P.D.  
802-334-6733

**Chief Steve Laroche**  
Milton P.D.  
802-893-6171

**Chief Thomas Hanley**  
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802-388-3191

**Southern Directors**  
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Woodstock P.D.  
802-457-1420

**Chief Paul Doucette**  
Bennington P.D.  
802-442-1067

**Chief Randall Johnson**  
Dover P.D.  
802-464-5981

**Past President**  
**Chief Jennifer Frank**  
Windsor P.D.  
802-674-9042

**Treasurer/Secretary**  
**Nicole Dernier**  
Winhall P.D.  
802-688-3895

TO: Timothy Lueders-Dumont November 16, 2022  
Legislative and Assistant Appellate Attorney  
Department of State's Attorneys and Sheriffs

FROM: Chief Brian R. Peete  
President, Vermont Association of Chiefs of Police

SUBJECT: RE: Vermont Giglio Database Study Committee, Act 161 (2022) Sec 2(c)

Act 161 (S.250) created the Giglio Database Study Committee, directed to study the creation and administration of a law enforcement officer information database designed to facilitate the disclosure of potential impeachment information by prosecutors pursuant to legal obligations.

As the Study Committee finalizes its report, the Vermont Association of Chiefs of Police (VACOP) would like to present the Committee with information and recommendations that we ask both the Committee and Legislation consider. This information is presented based on the specific subsections as listed in the Act. Foremost, VACOP wishes to note that “Giglio” is a legal requirement for officers of the court, specifically prosecutors, to disclose any evidence that may call into question the credibility of any individual testifying in trial or impediment of an investigation to ensure a defendant’s right to a fair trial. This is information that potentially pertains to impeachment of a witness, and not a definite finding of misconduct committed by an officer or witness. Therefore, a “Giglio Database,” by definition cannot be an official documentation where there is a formal process that has found an officer (or otherwise witness) is not credible and therefore not able to necessarily fulfill their role as a law enforcement officer. Any potential records regarding a department’s findings to an officer’s misconduct are housed with the department and not the State’s Attorney’s office. Act 161 was only intended for how any such database could be used by the Prosecutors to fulfill their Brady/Giglio duties.

Dover P.D.  
802-464-5981

**Past President**  
**Chief Jennifer Frank**  
Windsor P.D.  
802-674-9042

**Treasurer/Secretary**  
**Nicole Dernier**  
Winhall P.D.  
802-688-3895

a. The appropriate department or agency to manage and administer the database; *VACOP has no position as to which agency should be tasked to maintain such a database. VACOP believes the spirit and intent of this legislation is to improve police legitimacy by ensuring the public has ready unfettered access of information related to the credibility of a law enforcement officer, especially if such information impacts an officer's ability to honorably serve. It is VACOP's position that this documentation be simplified into two categories within a public facing system: Officers who have been de-certified (something Vermont already provides, see <https://www.iadlest.org/our-services/ndi/about-ndi>), and law enforcement professionals who are the subject of an existing "Giglio" letter. Ultimately, we strongly caution for the state to be mindful of the time, effort, and costs necessary to maintain such systems. Should such a system be implemented, the state must provide ample funding to whichever agency is deemed as responsible to manage it.*

**P.O. Box 139  
Bondville, Vermont 05340**  
*Founded in 1966*

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b. The type and scope of information maintained in the database;

*Foremost, Legislators could consider adding any “Giglio” letters to Category B or Category C reportable as outlined in Title 20 VSA 2403. The Criminal Justice Council’s process is a viable solution which can be incorporated within this framework. Other options could include incorporating a system which has two categories: A De-certification List could contain the names of officers who were de-certified, the agency (agencies) the officer worked for, Date of de-certification, and brief summarization as to why the officer was de-certified. This summary could be listed in three classifications: 1) Commission of any crime defined by Vermont statute or federal law as a felony or misdemeanor, 2) Any act or conduct which is prejudicial to the policy or rule or regulations of the department or city personnel plan, 3) Any act which affects the employee’s credibility and thereby their ability to work within a law enforcement capacity. A “Giglio” list could contain the name of the law enforcement professional (NOTE: there may be non-sworn personnel employed by a department who may have “Giglio” letters), the date the letter was issued by the State’s Attorney, and a PDF document of said letter. Should a member of the public want additional information, they can easily contact the applicable agency for public records. These systems should not be encompassing disciplinary clearing houses as the judicial system, which already shares all relevant information to Defense (see “Brady”), is the primary branch which can act on issues related to officer credibility.*

c. Any gatekeeping functions used to review information before it is entered into the database;

*In addition to any other offices as determined by the state, the department of the individual of whom the letter was issued should be allowed to review the information prior to it being entered into any system.*

d. Any due process procedures to dispute information entered into the database;

*No “Giglio” letter should be made public until all due process has been completed. VACOP recommends the individual alleged to have violated an issue impacting credibility be a) informed of notice that they are being investigated regarding their credibility, b) be supplied with the applicable State Attorney’s decision, c) be allowed to appeal that decision to small panel or legal-based court to determine if the infraction indeed affects an officer’s credibility and warrants a career-ending letter. If the appeal is denied, the “Giglio” letter should be fully expunged. VACOP recommends the model Internal Affairs policy (Section II.3) to be updated to include “Giglio” letters as an area of concern addressed by the IA process. This would allow for the applicable agency to fully investigate, to include an interview of the subject employee, and come to findings. Findings can then be appealed through the normal/applicable labor process. VACOP acknowledges the generation of a “Giglio” letter is based on prosecutorial discretion, but it strongly recommends the state defines acts which affect credibility to be used as guidance for State’s Attorneys, as well as adopting a statewide, universal policy which clarifies the standards of which a Giglio letter should be written. There must be reasonable uniformity.*

*Currently, only one county has a “Giglio” policy, and there is no statewide consistency as to what behavior or action constitutes generation of a letter. VACOP also recommends law enforcement professionals with existing “Giglio” letters issued by a Vermont State’s Attorney be allowed to pursue an appeal should an appeals process be implemented. It should be defined and noted by this study group in its end product that an officer with a “Giglio” letter can still file criminal charges in a case, especially in cases where they are not witnesses through a gathering of facts. “Giglio” letters may be a cause for termination in some agencies, it may not be a cause in others, and the state has no specific guidance in this area.*

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- e. How to securely maintain the database; *VACOP has no position as to which agency should maintain this database. VACOP strongly cautions for the state to be mindful of the time, effort, and costs necessary to maintain such systems. Should such a system be implemented, the state must provide ample funding to whichever agency is deemed as responsible to manage it.*
  - f. The appropriate access to the database; *VACOP does not recommend such a system be a final clearing house for derogatory or disciplinary information on all law enforcement officers and staff in the state. VACOP also notes that any information deemed potentially exculpatory by a State's Attorney (at the Attorney's discretion) be provided to the defense in accordance with federal law (Brady). Such materials could remain within systems accessible only for officers of the court, as the judicial system is tasked with taking action with exculpatory or impeachable information. Access to any "Giglio" database could be limited to end-result information (see para b), once any appeals process has been exhausted.*
  - g. The confidentiality of the information maintained in, or accessed from, the database; *Any redactions should be in accordance with public records request laws. Only summarized information could be released once any appeals process has been exhausted (see para b).*
  - h. The resources necessary to effectively administer and maintain the database; *VACOP strongly cautions for the state to be mindful of the time, effort, and costs necessary to maintain such systems. Should such a system be implemented, the state must provide ample funding to whichever agency is deemed as responsible to manage it. Whichever agency is tasked with administration and maintenance of the system would be in the best position to inform the legislature as to what resources are necessary. Furthermore, VACOP strongly and unapologetically believes the demand for transparency, equity, and accountability is system-wide and should not just be limited to law enforcement. For true legitimacy and public confidence, issues potentially relating the credibility of any persons within the justice system should be readily available for public consumption. As such, any credibility-related list should include ALL officers of the court, defense attorneys, and potentially law makers as legislators have passed laws that have historically contributed to decades of oppression and inequality. VACOP believes an impartial entity, such as a truly independent Inspector General is an option that should be explored by the legislature.*

VACOP also wishes to highlight the current professional regulation systems recently adopted by the Legislature have recently gone into effect, and will have a strong impact on the discussions surrounding transparency and accountable of those working within the law enforcement profession. VACOP strongly urges for the Legislature to pause the adoption of any new processes and/or methodically structure and stagger any new additional laws so to gauge the effectiveness of the oversight laws and measures that have already been passed within the last three years.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brian R. Peete".

Brian R. Peete  
President, Vermont Association of Chiefs of Police

**P.O. Box 139  
Bondville, Vermont 05340**  
*Founded in 1966*



**Appendix B**  
**(Formal Comment and Response:**  
***Vermont Criminal Justice***  
***Council*)**

**Criminal Justice Council**  
**Vermont Police Academy**  
317 Academy Road  
Pittsford, VT 05763  
[www.vcjc.vermont.gov](http://www.vcjc.vermont.gov)

[phone] 802-483-6228  
[fax] 802-483-2343

*Office of the Executive Director*

Timothy Lueders-Dumont

Nov. 17, 2022

Department of State's Attorneys and Sheriffs  
110 State Street  
Montpelier, VT. 05602

Re: Response to S.250 Brady / Giglio Database study committee

The Vermont Criminal Justice Council appreciates being offered the ability to work through the process of meeting the mandate of Act 161 and having the ability to have input from multiple stakeholders.

With that in mind we have participated in the discussion of Act 161 to determine what information is provided, who it is for, and public availability of the disclosure of Brady / Giglio letters or "database". As this information is to ensure prosecutors meet their discovery obligations, we recognize partial information already exists within the Department of State's Attorneys and Sheriffs. This system as we understand it exists in the context of a folder containing Brady/Giglio letters that could be accessed publicly. This material is not however a comprehensive collection of all Brady/Giglio material. Additionally there is a desire by the legislature to study several key points; appropriate access to the database, confidentiality, gatekeeping functions, and resources.

As an entity that houses a database regarding material related to the professional regulation of law enforcement officers, it would appear as a good fit to house such information. Should the proper agency for housing of Brady/Giglio letters rest within the VCJC, we can easily receive and post letters sent to us for public transparency. Should a database be desired, we would have concerns over the content required for the database, gatekeeping functions, due process for those reported to us, and a clear understanding of what Brady/Giglio letters contain, and equally as important what they do not. Discussion also involved the potential of utilizing the National Decertification Index, a national registry that houses information related to certificate or license revocation actions relating to officer misconduct. There is no current standard process utilized by NDI.

Discussion of the site [data.vermont.gov](http://data.vermont.gov) was reported to have significant structure and functionality with the ability to perform analytics. This is an option of an already existing database that would also serve the need of public transparency, once standards for inclusion were in place.

We will continue to work as partners to find the best solutions for the location and standardization of how material is collected and shared, but are mindful of the legitimate resources needed to successfully implement the needed gatekeeping functions and ongoing maintenance of such information.

Respectfully,

Christopher Brickell

Deputy Director

Vermont Criminal Justice Council



**Appendix B**  
**(Formal Comment and Response to  
Act 161's 8 questions: Vermont  
Criminal Justice Council)**

Act 161 (S.250) created the Giglio Database Study Committee, directed to study the creation and administration of a law enforcement officer information database designed to facilitate the disclosure of potential impeachment information by prosecutors pursuant to legal obligations.

As the Study Committee finalizes its report, the Vermont Criminal Justice Council would like to present the Committee with information and recommendations. that we ask both the Committee and Legislation consider. This information is presented based on the specific subsections as listed in the Act.

- i. The appropriate department or agency to manage and administer the database; *the content of such Brady / Giglio information does not constitute a database as such. While the Department of State's Attorneys and Sheriffs has a list of "letters", it is not an all inclusive list. Material other than letters may also constitute Brady/Giglio content shared by attorneys. The state of Vermont also owns data.vermont.gov which is a robust site that houses much data for public consumption. The VCJC could host the database on our website, however resources would need to be allocated for gatekeeping functions related to the database to consider redactions, receiving updates on cases of expungements etc.*
- ii. The type and scope of information maintained in the database; *This concern has continued throughout these meetings. Brady/Giglio letters should be maintained in the database. Other such information leading to question an officers credibility are also available by means other than a public letter from a prosecutor. The material provided is currently at the discretion of the attorney.*
- iii. Any gatekeeping functions used to review information before it is entered into the database; *Notification to the officer and a process to challenge or review before it is entered into a "database" should one be created.*
- iv. Any due process procedures to dispute information entered into the database; *Officers should be afforded an opportunity to appeal or respond to an attorneys decision, if such a process is implemented. A guide by which attorneys follow with uniformity as to what information classifies as Brady/Giglio worthy.*

VCJC Response

- v. How to securely maintain the database; *Again as a “database” does not currently exist, the collected information would need to meet the needs of security of and access to the information. Costs associated with that security would require resources and the staff time to devote to understand those costs.*
- vi. The appropriate access to the database; *Again if access is to remain for prosecutors to meet their legal obligations of disclosure, the process of sharing the information already exists. If it is to become a database for public transparency and consumption, it will involve many other obligations for redactions, expungements, appeals, and other related concerns. It will also need to be a true “database”.*
- vii. The confidentiality of the information maintained in, or accessed from, the database; *After completion of any redaction process, access should conform with the public records request laws, after an appeals process by an officer who is the subject of a Brady/Giglio letter.*
- viii. The resources necessary to effectively administer and maintain the database.” *Appropriate funding must be made available if locating the database at a location other than where it currently exists, or on the data.vermont.gov site. A mandate to house the database other than in its current form must include the additional resources for maintaining it.*



## **Appendix C** **(Formal Comment and Response: Vermont Department of Public Safety)**

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**State of Vermont  
Department of Public Safety**  
45 State Drive  
Waterbury, Vermont 05671-2101

To: Giglio Database Study Committee  
From: Commissioner Jennifer Morrison, Department of Public Safety  
Date: 11/16/2022  
Re: Memorandum for inclusion in Giglio Database Study Committee report

In the spring of 2022, the Senate and House Committees on Government Operations considered establishing a law enforcement officer information database that “catalogues potential impeachment information” and “enables a prosecutor to disclose such information consistently and appropriately . . . .” See [S. 250 as passed by the Senate](#), § 2. The Department of Public Safety sent two memorandums to the House Committee on Government Operations concerning this proposal on [April 21](#) and [April 28](#). The Department identified several concerns with the bill, including the categories of potential impeachment information, the gatekeeping process, and the lack of due process mechanisms to challenge the information in the database. For these reasons, the Department recommended that the matter be studied further, and the final bill established a Giglio Database Study Committee to do so. See [2022, No. 161](#), § 2.

The basic charge for the Study Committee was to “study the appropriate structure and process to administer a database designed to catalogue potential impeachment information concerning law enforcement agency witnesses or affiants to enable a prosecutor to disclose such information consistently and appropriately . . . .” [2022, No. 161, § 2\(a\)](#). This charge and prior drafts of S. 250 appear to focus more on the law enforcement-to-prosecutor disclosure process, and less on the prosecutor-to-defense disclosure process. A threshold issue is whether this focus is correct. The Department is not aware of any identified concerns with the law enforcement-to-prosecutor disclosure process for impeachment information.<sup>1</sup> Rather, the Department is aware of concerns regarding the consistency and inter-county sharing of “Brady letters” disclosed by prosecutors to defense attorneys.<sup>2</sup> These letters are typically issued by prosecutors to all defense

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<sup>1</sup> Law enforcement witness impeachment information often arises from discovery information (affidavits, videos, etc.) provided by law enforcement officers to prosecutors in the normal course of a criminal case. Additionally, the Executive Director of the Vermont Criminal Justice Council is obligated by law to report to the Attorney General and the State’s Attorney of jurisdiction any allegations that an officer committed Category A criminal conduct. See 20 V.S.A. § 2403(c). Finally, the Vermont State Police must immediately report all allegations of misconduct involving a violation of a criminal statute to the State’s Attorney of the county in which the incident took place. See *id.* § 1923(b)(2).

<sup>2</sup> See the 2020 VT Digger series, “[Tarnished Badge](#),” and a 2022 VPR article, “[Prosecutors flagged 13 Vermont cops for potential credibility issues last year](#).”

attorneys in a particular county when the prosecutor identifies a credibility concern about a law enforcement officer that transcends a particular case. These letters are a historical practice in Vermont derived from a prosecutor's constitutional and ethical obligations to disclose witness impeachment information. In the Department's view, any inquiry into a potential database relating to the prosecutorial disclosure of law enforcement impeachment information should address the role of Brady letters in practice today.

The Tarnished Badge series in VTDigger [listed the following “surprises”](#) about these letters:

- “No one is tracking these credibility issues across Vermont’s 14 counties.”
- “There are no requirements for maintaining Brady letters as years go by.”
- “When an elected county prosecutor leaves office, there is no system for relaying those letters to the next prosecutor.”
- “Vermont has no centralized database where all the lists and letters are stored. That prompts questions about what information may follow an officer who’s moving from one department to another.”
- “The degree to which prosecutors write such letters and include officers’ names on lists is inconsistent. The numbers are higher in Rutland, Chittenden and Washington counties, while others, such as Franklin County, report no such letters or any officers appearing on a list.”

Since S. 250 was passed in 2022, the ACLU of Vermont [created a database of all Vermont “Brady letters.”](#)<sup>3</sup> Additionally, the Department of State’s Attorneys and Sheriffs now collects these letters in a central server for access by State’s Attorney prosecutors and, upon request, by the public. These actions have addressed the first four “surprises” in the VTDigger series, including the “centralized database” concern. These letters are now available to the public and to State’s Attorney prosecutors across counties. Defense attorneys may receive the letters directly from prosecutors, or they may request them from the State’s Attorneys’ central office.

This development is a significant step toward addressing the concerns that likely prompted the database proposal in S. 250. The Department supports the centralized collection of these letters, and this task has been completed. The Department does not otherwise recommend creating an “intermediary” database between law enforcement officers and prosecutors because no need for such a database has been identified, and because establishing such a database creates unnecessarily complex issues addressed in the Department’s April 21 and 28 memorandums to the House Committee on Government Operations.

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<sup>3</sup> Separately, in May 2022, President Biden issued an [Executive Order](#), which in part instructs the United States Attorney General to create a “National Law Enforcement Accountability Database” by early 2023. State and local law enforcement agencies are encouraged to “contribute to and use” the database.

Finally, the Department notes that Brady letters can have the effect of ending an officer's career and there are no due process mechanisms to challenge the letters, let alone any statewide standards or criteria for issuing them. The Department recommends that state prosecutors consider and adopt a model statewide policy regarding the issuance of Brady letters that addresses these concerns in a manner that acknowledges the independent constitutional offices of the State's Attorneys as well as their ethical and constitutional disclosure obligations.

**Appendix D**  
**(Formal Comment and  
Response: Vermont Office  
of Racial Equity)**



**State of Vermont**  
**Agency of Administration**  
**Office of the Secretary**  
Pavilion Office Building  
109 State Street, 5<sup>th</sup> Floor  
Montpelier, VT 05609-0201  
[www.finance.vermont.gov](http://www.finance.vermont.gov)

[phone] 802-828-3322  
[fax] 802-828-3320

*Kristin L. Clouser, Secretary*

**TO:** Chair of the Act 142 Giglio Database Study Committee  
**FROM:** Xusana Davis, Executive Director of Racial Equity  
Prepared by Jay Greene, Policy & Research Analyst  
**DATE:** Wednesday November 28, 2022  
**RE:** Comments for inclusion in Committee report

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The Office of Racial Equity submits the following comments for inclusion in the Act 142 Giglio Database Study Committee's forthcoming report. They are arranged based on the eight questions presented in the Committee's mandate.

**i. The appropriate department or agency to manage and administer the database;**

The Vermont Criminal Justice Council was created to "maintain statewide standards of law enforcement officer professional conduct by accepting and tracking complaints alleging officer unprofessional conduct, adjudicating charges of unprofessional conduct, and imposing sanctions on the certification of an officer who the Council finds has committed unprofessional conduct" pursuant to 20 V.S.A. §2351.(Vermont Statutes Online) Furthermore, an earlier draft of the enabling legislation which passed the Vermont Senate, S.250, assigned the responsibility for maintaining the database to the Vermont Criminal Justice Council.(Vermont Senate)

**ii. The type and scope of information maintained in the database;**

According to an early draft of the Act 161 Giglio Committee's enabling legislation, S.250, the information the Vermont Senate intended to be collected included:

- “(1) any finding of misconduct that reflects upon the truthfulness or possible bias of the law enforcement officer, including a finding of a lack of candor during a criminal, civil, or administrative inquiry or proceeding;  
(2) any past or pending criminal charge brought against the law enforcement officer;  
(3) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;  
(4) any prior findings by a judge that a law enforcement officer testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;  
(5) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of a law enforcement officer as a witness, including testimony, that a prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of

prosecution evidence;  
(6) information that may be used to suggest that the law enforcement officer is biased for or against a defendant; or  
(7) information that reflects that the law enforcement officer's ability to perceive and recall truth is impaired"

The earlier version of S.250 as passed by the Vermont Senate did not specify the format under which the information listed above was to be maintained. That lack of specificity in the original bill about the format of information to be disclosed has been a key source of discussion among the members of the Act 161 Giglio Study Committee.

ACLU Vermont already maintains a publicly available database of Giglio/Brady letters that they have collected via public records request to the Department of State's Attorneys and Sheriffs. (ACLU Vermont 2020) The question is not whether the public should have access to Giglio letters, but how much other material besides the letters themselves should be maintained within the database. The Office of Racial Equity is of the opinion that the maximum amount of information that is already publicly available by public records request should be made available with the fewest possible barriers to access for the general public. People have the right to know whether the officers serving their communities have been accused of misconduct that rises to the level of meriting a Giglio/Brady disclosure letter.

The information currently available to the public via the ACLU Vermont's online Brady Letter Database includes:

- the date the letter was issued
- the name of the officer
- the law enforcement agency for which the officer worked at when the letter was issued
- the name of the State's Attorney in whose office the letter was created,
- the county in which the State's Attorney serves
- a copy of the publicly available Brady letter

That is the minimum amount of information available via public records request that must be held in a publicly available format in the proposed Giglio/Brady database.

**iii. Any gatekeeping functions used to review information before it is entered into the database;** Giglio/Brady letters should not be published in a database until after law enforcement officers are given a chance to appeal the decision to give the officers an opportunity to respond to any potential inaccuracies in the information contained within the Giglio/Brady letter (that is, due process protections).

**iv. Any due process procedures to dispute information entered into the database;** All members of the Giglio Database Committee have thus far agreed that there should be a process through which officers who have letters in the database should be allowed to dispute the information entered into the database. Housing the database within the Vermont Criminal Justice Council would allow officers to rely on VCJC procedures for a fair dispute process. VCJC procedures include oversight by members of communities most impacted by law enforcement misconduct.

v. **How to securely maintain the database;**

Experts in the Agency of Digital Services must be entrusted with determining the specifics of how to securely maintain the database once it is constructed.

vi. **The appropriate access to the database;**

We propose two levels of access to the database. The first level is the publicly available information, which has already been published by ACLU Vermont. The second level would be information that would be required to be disclosed under the Vermont Rules of Criminal Procedure, but would not be available via public records request. The second level of access would only be available to prosecutors and law enforcement agencies to facilitate disclosure to defense attorneys. Defense attorneys would be invited to access only the relevant information that would need to be disclosed to them by prosecutors under the Vermont Rules of Criminal Procedure.

vii. **The confidentiality of the information maintained in, or accessed from, the database;**

Only material that is publicly available via records request should be housed within the publicly accessible portion of the database. Additional materials could be housed in the database that are only accessible to prosecutors and law enforcement agencies to facilitate disclosure to defense attorneys under the Vermont Rules of Criminal Procedure. See answer to vi. for details.

viii. **The resources necessary to effectively administer and maintain the database**

It is vital that the legislature give the VCJC sufficient resources to administer and maintain the database. This may include the addition of administrative staff, staff with the applicable knowledge of database security, and technical assistance from the Agency of Digital Services as requested by the VCJC. The resources could include the temporary assistance of a project manager from the Agency of Digital Services Enterprise Portfolio Management Office to assist the VCJC with setting up the database.

### Sources Cited:

§2351.Creation and purpose of Council, The Vermont Statutes Online (2020).  
<https://legislature.vermont.gov/statutes/section/20/151/02351>

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<https://airtable.com/shrJ4eNWJ1ROMWtBR/tblnbyRpnRt03Mfl8/viwCU2PIH3MXP4nzo>

*Bill as Introduced and Passed by Senate: S.250*, (2022) (testimony of Vermont Senate).  
<https://legislature.vermont.gov/Documents/2022/Docs/BILLS/S-0250/S-0250%20As%20passed%20by%20the%20Senate%20Official.pdf>

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Comparison of S.250/Act 161 Giglio Database Requirements LEG Session 2022

(Prepared by Jay Greene, Racial Equity Policy and Research Analyst, Office of Racial Equity, August 24, 2022, for Act 161 Giglio Database Study Committee)

Green = generally stays the same as the previous version

Lavender = different from previous version

Concept\Version	S.250 as introduced	S.250 as passed by Senate	S.250 House draft 1.6	S.250/Act 161 As Enacted
Database structure/parties responsible for maintaining the database	Law enforcement information database that catalogs potential impeachment information considering law enforcement agency witnesses or affiants and enables a prosecutor to disclose such information consistently and appropriately under the obligations of <i>Giglio v. United States</i> and its progeny Vermont Criminal Justice Council maintains the database	p.3 Same as S.250 As Introduced Law enforcement information database that catalogs potential impeachment information considering law enforcement agency witnesses or affiants and enables a prosecutor to disclose such information consistently and appropriately under the obligations of <i>Giglio v. United States</i> and its progeny Vermont Criminal Justice Council maintains the database	pp.3-6 Removed in favor of Giglio Database Study Committee	p.4 contents of Giglio Database Study Committee report: (1) the appropriate department or agency to manage and administer the database; (2) the type and scope of information maintained in the database; (3) any gatekeeping functions used to review information before it is entered into the database; (4) any due process procedures to dispute information entered into the database; (5) how to securely maintain the database; (6) the appropriate access to the database; (7) the confidentiality of the information maintained in, or accessed from, the database; and (8) the resources necessary to effectively administer and maintain the database

**Cont. Appendix D**  
*Vermont Office of Racial Equity*

Comparison of S.250/Act 161 Giglio Database Requirements LEG Session 2022

(Prepared by Jay Greene, Racial Equity Policy and Research Analyst, Office of Racial Equity, August 24, 2022, for Act 161 Giglio Database Study Committee)

Green = generally stays the same as the previous version

Lavender = different from previous version

Concept\Version	S.250 as introduced	S.250 as passed by Senate	S.250 House draft 1.6	S.250/Act 161 As Enacted
Information to be included in database	Pp.13-14 (1) any finding of misconduct that reflects upon the truthfulness or possible bias of the law enforcement officer, including a finding of a lack of candor during a criminal, civil, or administrative inquiry or proceeding; (2) any past or pending criminal charge brought against the law enforcement officer; (3) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation; (4) any prior findings by a judge that a law enforcement officer testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct; (5) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any witness, including witness	p.3-4 (same as S.250 As Introduced) (1) any finding of misconduct that reflects upon the truthfulness or possible bias of the law enforcement officer, including a finding of a lack of candor during a criminal, civil, or administrative inquiry or proceeding; (2) any past or pending criminal charge brought against the law enforcement officer; (3) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation; (4) any prior findings by a judge that a law enforcement officer testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct; (5) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of a law enforcement officer as a witness, including testimony,	pp.3-6 Removed in favor of Giglio Database Study Committee	

Comparison of S.250/Act 161 Giglio Database Requirements LEG Session 2022

(Prepared by Jay Greene, Racial Equity Policy and Research Analyst, Office of Racial Equity, August 24, 2022, for Act 161 Giglio Database Study Committee)

Green = generally stays the same as the previous version

Lavender = different from previous version

Concept\Version	S.250 as introduced	S.250 as passed by Senate	S.250 House draft 1.6	S.250/Act 161 As Enacted
	<p>testimony, that a prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence;</p> <p>(6) information that may be used to suggest that the law enforcement officer is biased for or against a defendant; or</p> <p>(7) information that reflects that the law enforcement officer's ability to perceive and recall truth is impaired.</p>	<p>that a prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence;</p> <p>(6) information that may be used to suggest that the law enforcement officer is biased for or against a defendant; or</p> <p>(7) information that reflects that the law enforcement officer's ability to perceive and recall truth is impaired.</p>		
Duty to report impeachable LEO conduct under <i>Giglio</i> etc.	<p>P.14</p> <p>c) Duty to report. A law enforcement agency's executive officer or designee shall report any information required to be catalogued under this section to the Council within 10 business days after discovering the information.</p>	<p>p.5 Same as S.250 As Introduced</p> <p>c) Duty to report. A law enforcement agency's executive officer or designee shall report any information required to be catalogued under this section to the Council within 10 business days after discovering the information.</p>	<p>pp.3-6</p> <p>Removed in favor of Giglio Database Study Committee</p>	
Who has access to the database	<p>p.15</p> <p>d) Database shall be accessible only to the States Attorney of</p>	<p>p.5 Same as S.250 As Introduced</p>	<p>pp.3-6</p> <p>Removed in favor of Giglio Database Study Committee</p>	

Comparison of S.250/Act 161 Giglio Database Requirements LEG Session 2022

(Prepared by Jay Greene, Racial Equity Policy and Research Analyst, Office of Racial Equity, August 24, 2022, for Act 161 Giglio Database Study Committee)

Green = generally stays the same as the previous version

Lavender = different from previous version

Concept\Version	S.250 as introduced	S.250 as passed by Senate	S.250 House draft 1.6	S.250/Act 161 As Enacted
	any county of the State of Vermont or a designee or the Atty. Gen. of the State or designee for the purpose of complying with the disclosure obligations of <i>Giglio v. United States</i> and its progeny	d) Database shall be accessible only to the States Attorney of any county of the State of Vermont or a designee or the Atty. Gen. of the State or designee for the purpose of complying with the disclosure obligations of <i>Giglio v. United States</i> and its progeny		
Confidentiality/Public Records Disclosure	Info contained in the <i>Giglio</i> database is confidential and privileged, not subject to subpoena, not subject to discovery or admissible in evidence in any private civil action  VCJC may use the database in furtherance of the Council's official duties.  No disclosures of info contained in the database to the public without prior written consent of the law enforcement agency and the law enforcement officer the Council shall not be required to testify in private civil actions concerning the information/materials in the database	p.5-6, same as S.250 As Introduced  Info contained in the <i>Giglio</i> database is confidential and privileged, not subject to subpoena, not subject to discovery or admissible in evidence in any private civil action  VCJC may use the database in furtherance of the Council's official duties.  No disclosures of info contained in the database to the public without prior written consent of the law enforcement agency and the law enforcement officer the Council shall not be required to testify in private civil actions concerning the information/materials in the database	pp.3-6  Removed in favor of Giglio Database Study Committee	

Comparison of S.250/Act 161 Giglio Database Requirements LEG Session 2022

(Prepared by Jay Greene, Racial Equity Policy and Research Analyst, Office of Racial Equity, August 24, 2022, for Act 161 Giglio Database Study Committee)

Green = generally stays the same as the previous version

Lavender = different from previous version

Concept\Version	S.250 as introduced	S.250 as passed by Senate	S.250 House draft 1.6	S.250/Act 161 As Enacted
Increasing LEO training on fair and impartial policing policy	Requires an increase to 10 hours of training instead of a minimum of four hours of training plus an additional 10 hours every odd-numbered year to maintain certification as a law enforcement officer	Removed from S.250 As Passed By Senate		
Independent investigation of officer involved death or serious bodily injury	12-13, 16-17 Requires independent investigation of law enforcement officer conduct whenever law enforcement officers use physical force upon another person that results in death or serious bodily injury to the person. A 3-member council from the VT Criminal Justice Council is tasked with conducting the independent investigation. The funding for the investigation comes out of the budget of the law enforcement agency that employs the officer subject to the investigation.	Removed from S.250 As Passed By Senate		
Other		p.2 Clarifies what data is required to be reported annually from all law enforcement agencies in the	p.5 Establishes the Dec 1, 2022 due date of the committee report on <i>Giglio</i> database p.5 Clarifies that the committee on deceptive and coercive	pp.1-2 changes data reporting requirements from law enforcement agencies to a DPS study committee report on law enforcement data collection

Comparison of S.250/Act 161 Giglio Database Requirements LEG Session 2022

(Prepared by Jay Greene, Racial Equity Policy and Research Analyst, Office of Racial Equity, August 24, 2022, for Act 161 Giglio Database Study Committee)

Green = generally stays the same as the previous version

Lavender = different from previous version

Concept\Version	S.250 as introduced	S.250 as passed by Senate	S.250 House draft 1.6	S.250/Act 161 As Enacted
		<p>state to EDRE and VCJC or vendor</p> <p>Pp.6-7 changes instances of "his or her" to "the person's" in 13 V.S.A. § 5585 Electronic Recording of a Custodial Interrogation</p> <p>Pp.7-8 Adds study on deceptive and coercive methods of law enforcement interrogation</p>	<p>methods of law enforcement interrogation shall have the administrative and technical assistance of the Office of Legislative Counsel</p> <p>p.7 adds to regulations relating to recording of custodial interrogations</p> <p>p.10 Adds US Dept of Veterans Affairs inspectors to list of law enforcement officers in VT</p>	<p>DPS report includes (1) the data currently collected, including law enforcement's capabilities and methods of collection; (2) any suggested data collection criteria; (3) any impediments to collecting data; (4) proposed remedies to resolve any impediments; and (5) a recommended definition of "law enforcement encounter."</p> <p>Pp.5-7 keeps the changes to regulations relating to recording of custodial interrogations from House draft 1.6</p> <p>p.9 keeps the addition of the US Dept of Veterans Affairs inspectors to list of law enforcement officers in VT from House Draft 1.6</p>



**Appendix E**  
**(Public Comment: Office of Professional Regulation, Office  
of the Vermont Secretary of State)**

**State of Vermont**

**Office of the Secretary of State**

**Office of Professional Regulation**

89 Main Street, 3<sup>rd</sup> Floor  
Montpelier, VT 05620-3402  
sos.vermont.gov

James C. Condos, Secretary of State  
Christopher D. Winters, Deputy Secretary  
S. Lauren Hibbert, Director

November 10, 2022

Giglio Database Study Committee

C/O Timothy Lueders-Dumont, Legislative & Asst Appellate Attorney  
Vermont Department of State's Attorneys and Sheriffs  
110 State Street  
Montpelier, VT 05633

Dear Members of the Giglio Database Study Committee,

Thank you for inviting the Secretary of State's participation in your Committee's meetings as you discuss the important charge set out in Act 161 (2022). The Secretary of State's Office, and in particular, the Office of Professional Regulation (OPR), has been involved in the Committee's discussion for the purpose of determining if OPR is the appropriate governmental body to host, manage, and administer the Giglio database.

Our Office could be an appropriate location for the Giglio Database; however, the entire project is largely outside of our Office's mission. Additionally, the appropriateness of that assignment is dependent on several factors which, to our knowledge, are yet to be determined.

1. The Office needs a clearer understanding about the type and scope of information maintained in the database. We are confident that we have a secure IT structure that is scalable to the needs of the database. However, implementation, costs, and exact placement within the Secretary of State's Office is difficult for us to ascertain without details. Particularly relevant to this consideration is the policy decision on whether there is a private side of the database versus an entirely public database.
2. We need clarity on any gatekeeping functions used to review information before it is entered into the database and relatedly the confidentiality of information maintained in the database. Our Office asks this critical question because it determines the associated staffing levels to maintain the database and to respond to public inquiries.
3. Until the due process procedures for disputing information on the database are solidified it is very difficult to determine what, if any, OPR staff resources will be required. If there is due process with anticipated OPR staff participating in that process, it would understandably add to the demand on OPR resources.

Until the three above policy questions are understood and answered we cannot wholeheartedly say we are the correct governmental body for the database.

Equally importantly, and as discussed before the Committee, OPR depends on a special fund funded only by our licensees. It would be inappropriate to transfer the cost of this database onto our licensees. A General Fund appropriation would be necessary to implement, maintain, and sustain this database. Given the open questions, it is impossible to assess the appropriate General Fund allocation necessary.

We look forward to continuing the conversation.

Sincerely,

  
Jim C. Condos  
Secretary of State



S. Lauren Hibbert  
Director, Office of Professional Regulation

**Appendix F**  
**(Resource Material: Minutes of the Committee)**      06-Jul-22 Meeting Minutes

## Giglio Database Study Committee—Meeting Minutes

**Meeting Subject:** Giglio Database Study Committee

**Meeting Date:** 06-Jul-22 15:00

**Location:** Microsoft Teams Meeting

### **Participants**

- |                         |                   |
|-------------------------|-------------------|
| • Anderson, Mark        | • Jones, Tucker   |
| • Baruth, Philip        | • Meenan, Evan    |
| • Brickell, Christopher | • Pahl, Marshall  |
| • Burditt, Thomas       | • Parent, Corey   |
| • Davis, Xusana         | • Peete, Brian    |
| • Frank, Jennifer       | • Simons, Heather |
| • Greene, Jay           | • Smith, Arthur   |
| • Jacobsen, Erin        |                   |

### Action Items

Action	On Point	Due
Send Doodle poll to schedule remaining 5 meetings	MEENAN	Jul 6
Send background reading for next meeting (Giglio & Brady decisions, RCP 16, RPR 3.8)	MEENAN	Before next meeting
Complete the Doodle poll ASAP to begin scheduling remaining meetings	ALL	By Jul 13
Review the background reading for next meeting	ALL	Before next meeting
Identify tech support to assist with joining Teams meetings	BURDITT, DAVIS	Before next meeting

### Discussion Notes

#### Meeting details

- This is meeting 1 of 6, as prescribed by statute [[Act 161 of 2022](#)]. Meeting is recorded and transcribed.
- This meeting is considered "organizational," meaning we will discuss matters related to standing up the Committee and setting our initial agenda.

#### Roles and Process

- Designation of Chair: Executive Director of Racial Equity Xusana DAVIS is statutorily required to designate a Chair. DAVIS designates Evan MEENAN of the Department of State's Attorneys and Sheriffs
- The Committee has the administrative and technical assistance of the VT Criminal Justice Council.
- Procedures:

- How often will we meet?
  - MEENAN will send a Doodle poll to determine meeting dates.
- Who will take minutes?
  - DAVIS will take minutes and will record and transcribe meetings.
- Who will warn meetings and post minutes?
  - The Criminal Justice Council will publicly warn meetings and post meeting documents.
- Who will create agendas?
  - MEENAN will create agendas.
- Who will process per diem payments?
  - The Criminal Justice Council will process per diem payments for legislator members.

#### **Committee Purpose**

- Study the following questions
  1. What is the appropriate department to manage and administer the database;
  2. The type and scope of information maintained in the database;
  3. Any gatekeeping functions used to review information prior to entry in the database;
  4. Any due process procedures to dispute information entered into the database;
  5. How to securely maintain the database;
  6. Appropriate access to the database;
  7. The confidentiality of the information in or from the database; and
  8. Any resources necessary to effectively administer and maintain the database.
- Deliverables: Report deadline is December 1st, 2022.

#### **Relevant references**

- *Giglio* decision
- *Brady* decision
- VT Rules of Criminal Procedure: Rule 16
- VT Rules of Professional Responsibility: Rule 3.8

Act 161 Giglio Database Study Commission Work Group Draft Meeting Notes  
Tuesday, August 9, 2022

**Remote Meeting Location:** Microsoft Teams.

**Physical Meeting Location:** Vermont Department of State's Attorneys and Sheriff's, 110 State Street, 2<sup>nd</sup> Floor, Montpelier, VT 05633-6401.

**Agenda:**

1. Call to order.

Meeting called to order at 11:07AM

Sufficient participation to meet, not sufficient to approve minutes from July 6, will approve once we have a quorum of those present at July 6 meeting.

In attendance:

Evan Meenan, State's Attorneys and Sheriffs designee, Chair

Jay Greene (they/them), Racial Equity Policy and Research Analyst, Office of Racial Equity (taking minutes and recording on behalf of Executive Director of Racial Equity Xusana Davis)

Rep. Karen N. Dolan, Essex Junction, House Corrections and Institutions Committee

Sen. Corey Parent, Franklin County

Christopher Brickell, Deputy Director of Vermont Criminal Justice Council (VCJC)

Tucker Jones, Department of Public Safety (DPS) Attorney

Erin Jacobson, Office of the Attorney General (AGO) Designee (Co-Director of AGO Community Justice program)

Jason Humbert (he/him), Assistant AG, sitting in on behalf of VCJC

Marshall Pahl (he/him), Deputy Defender General and Chief Juvenile Defender

Sheriff Mark Anderson, VT Sheriff's Association designee

Joined later in the meeting: Chief Brian Peete

2. Approval of the Minutes from the Committee's July 6, 2022 organizational meeting.

Sheriff Mark Anderson: motion to approve the minutes, Evan Meenan seconds.

All approved July 6, 2022 minutes with verbal "aye" vote

3. Review of Committee's charge from Act 161 (2022) Sec. 2(c): "The Giglio Database Study Committee shall study the appropriate structure and process to administer a law enforcement officer information database designed to facilitate the disclosure of potential information by prosecutors pursuant to legal obligations."

Evan Meenan shared his screen to show S.250/Act 161 as passed.

Two important takeaways from Committee's charge:

1. Purpose of the database will be the same as earlier versions-assist prosecutors in satisfying discovery obligations (there was some conversation about whether there should be a publicly available database, but the immediate ask is to focus on helping prosecutors meet discovery)
2. "Legal obligations" for prosecutors to disclose evidence to defendants-will be discussed next

Erin Jacobsen: It sounds like the statutory charge assumes that we will be recommending a database of some kind, not whether to recommend a database.

Act 161 Giglio Database Study Commission Work Group Draft Meeting Notes  
Tuesday, August 9, 2022

Evan Meenan: Yes, the language of the statute does imply that. Implicit questions we could answer as well but need to stick to the core questions first.

Marshall Pahl: need to answer question of whether it's accessible to the public before we can answer the other questions-the answers to the questions asked in statute will be totally different depending on whether this is a public vs. non-public database.

Evan Meenan: we have 2 directions-could jump right into the question of public vs. non-public, or we could say to the legislature that we'll answer the questions narrowly and let the legislature make final decisions.

Marshall Pahl: where does the assumption come in that it's not a public database?

Evan Meenan: Subsection C—"to facilitate the disclosure of potential impeachment information by prosecutors pursuant to legal obligations". Legislative discussions about the formation of a database before the bill was turned into a study commission sparked debates over the location and function of the database, whether there should be a database at all.

Marshall Pahl: if this was just supposed to be by/for prosecutors, the prosecutors could set it up themselves-this is something bigger than by or for prosecutors (what would be the point of this committee if not by/for prosecutors?)

Evan Meenan: the earlier versions of the bill set up this structure-if you are a Law Enforcement Agency (LEA), and your officer engages in conduct that falls within an enumerated list of dishonest behaviors, then you must report that conduct to the VCJC. The VCJC will put that info into a Giglio database, then prosecutors could access the database and find out whether or not there is any info about the officers testifying relevant to their case and figure out whether to disclose it. There were conversations about whether or not the database SHOULD be publicly accessible during the legislative process.

Rep. Dolan: remembering conversations in the legislature-her understanding is that all attorneys do not have uniform access to this conversation. If something happens in one area, attorneys across the state will know what is happening. Having a database ensures uniform access across the state. Getting the database is the first step, then make recommendations about public access. Curious to hear about attorney's perspective-how are they accessing the info if it's not in a database right now.

Erin Jacobsen: Public transparency is key to public trust of government. If we're not contending with the question of public access from the beginning and the outcome is a non-public database, there will be years of litigation and the outcome could be public disclosure

Sheriff Mark Anderson: important given diversity of people representing the committee that we have an objective review of what currently exists. VT Digger has a public database of Giglio letters. The Office of Professional Regulation registry managed by the VCJC also exists, which not a lot of people understand or fully understand how to access (issues with VCJC rulemaking processes due to reorganization of VCJC.) NH has an Attorney General's Office database that was confidential to New Hampshire State Attorneys up until recently, now there is a "bizarre" public accountability system in New Hampshire. Next question: do we recommend that the database be public, not public, or a hybrid thereof where certain information is public, and some information is not public?

Tuesday, August 9, 2022

Sheriff Anderson, continued: Final comment-local state's attorney has access to all the letters but may not be aware of officers with Giglio letters in other counties in Vermont (lack of due diligence in reporting from prior jurisdictions where an officer has served when an officer changes location.)

Jay Greene: speaking for myself, not sure if Executive Director of Racial Equity Xusana Davis agrees with me-it is my understanding that one of the functions that a public facing Giglio database could serve is enhancing law enforcement officer (LEO) accountability through fear of publicity acting as a deterrent to LEO misconduct.

4. Overview of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), V.R.Cr.P. 16, V.R.Cr.P. 16.2, and V.R.P.C. 3.8. (Presentation by Chair Evan Meenan)

- Brady Case: 1963
  - Vermont prosecutors bound by this Supreme Court decision
  - Defendant asked for key witness statements from the government, but one key witness statement where co-defendant admitted to committing the offense was not given to Brady so he could help defend himself
  - "...the suppression by the prosecution of evidence favorable to an accused upon request violates due process...irrespective of the good faith or bad faith of the prosecution"
  - Evan Meenan had a case where a LEO did not disclose a report, even though the report existed at the beginning of the case, and the report documented the defendant's confession
  - Judge said that Evan Meenan could not use the report, despite the report existing, because it was withheld from the defense. Trial proceeded without the report.
- Giglio case: 1972
  - Info about a witness was not provided to a defendant
  - Information indicated key witness got a plea deal for testifying against the defendant
  - Gave the Supreme Court the opportunity to clarify the Brady ruling-suppression of material evidence is a violation of due process, clarified that when we're talking about info that may assist the defendant, that info also includes info that can affect the credibility of a witness (this is where the connection to LEO dishonesty is made-prosecutors have a responsibility to disclose when a LEO has a history of dishonesty that could impact their testimony if they were involved in the defendant's case)
  - Brady/Giglio decisions inform VT rules of practice
- Rule 16-State providing information TO a defendant
  - As soon as there is a not guilty plea, upon request
  - Anything that might help a defendant defend themselves, they are entitled to receive from the prosecution
  - If there is no request, prosecutors must provide the information as soon as possible after the not guilty plea
  - Includes "any information which tends to negate the guilt of the defendant" (including Giglio evidence related to witness character, includes any information held by LEAs)
- Rule 16.2-expands on Rule 16
  - The requirement of disclosure is a continuing obligation, prosecutors must continuously turn over any evidence that is discovered
  - If the information is not turned over to the defense, the evidence may be suppressed, or the case could be dismissed
- Rule 3.8 Special responsibilities of prosecutors

## Act 161 Giglio Database Study Commission Work Group Draft Meeting Notes

Tuesday, August 9, 2022

- Criminal prosecutors must make timely disclosures of ALL information that tends to mitigate an offense or negate the guilt of a defendant
- That includes any evidence that impacts witness credibility, including LEO credibility
- Sanctions for failing to do so could include losing license to practice law

Evan Meenan: Any feedback or thoughts from others with experience practicing law?

Sheriff Mark Anderson: do these letters apply just to law enforcement?

Evan Meenan: one of the things to address is type and scope of information to put in the database. Technically, prosecutors must disclose underlying info related to witness' credibility

Example: you can't just give the defendant a letter that states that an officer tampered with evidence-need the actual evidence of misconduct to fulfill Rule 16 (example: body worn camera footage of LEO tampering with evidence)

Brady/Giglio letters are a permanent reminder of LEO misconduct, letter was sent to defense attorneys of the county in which the LEO serves

If for some reason this LEO becomes a witness, the prosecutor knows that they need to get the original evidence of misconduct to fulfill the disclosure rules

Frequently Brady letters are fatal to a LEO's career because they won't be called to testify on cases if they have a known history of past misconduct

Letters given to ACLU Vermont as part of Public Records Request, ACLU Vermont now has public-facing database where people can request info on Brady/Giglio letters in Vermont

Rep. Karen Dolan: how are you going to track and access this info if it's just communicated by email. Also, how is this being implemented elsewhere-how can we learn from other jurisdictions?

Evan Meenan: How do we make sure every prosecutor has access to what they're required to disclose to defendants? Answer is that you send the actual evidence of misconduct to the database, not just the letters.

Chris Brickell: is there a time limit to how long this info stays in the database-do the letters cease to exist once the specific case where misconduct occurred is over?

Evan Meenan: if any witness has a prior conviction, the rules of evidence only look back a certain amount of time (depends on whether something may be admissible to evidence-different question from discovery obligations.) Under the rules of discovery, prosecutors arguably still have to notify a defendant of a (theoretical) expungement for tampering with evidence.

Questions came up during legislative process about appeal process for inaccurate accusations, what about protected health information, other sensitive information?

Sheriff Mark Anderson: how much investigation is performed by a prosecutor once they believe they need to issue a Giglio/Brady letter-is the process fair? What about unproven allegations? If the officer is ultimately exonerated, are they exonerated from a Giglio/Brady letter?

Evan Meenan: agrees, this database might be a great resource for prosecutors and for the public, but it itself will not dictate what a prosecutor's discovery obligations are (can't use "it wasn't in the database" as an excuse) You might end up in situations where the prosecutor discloses information not contained in the database to the defendant in a case.

Act 161 Giglio Database Study Commission Work Group Draft Meeting Notes  
Tuesday, August 9, 2022

Sheriff Mark Anderson: Suggests we contemplate the database as a non-public for the purpose of serving the prosecutors, when this tool serves both purposes it presents due process issues for officers who get Giglio/Brady letters when evidence exists to the contrary.

Evan Meenan: public vs. non-public is something that folks can give some thought to and discuss at next meeting.

Chief Brian Peete: need a recommendation of uniformity as to what offenses/behaviors mean that a Giglio/Brady letter is needed. Now there is no uniformity, depends on the prosecutor. Standardization of level of expectations for Giglio letter is needed.

Evan Meenan: prior versions of bill included list of behaviors, would like to get a look at prior versions of S250/Act 161 to see the list of behaviors originally suggested by the bill.

5. Discussion of decision points in Act 161 (2022) Sec. 2(c): (to be continued at next meeting, did not have sufficient time today)

- a. *The appropriate department or agency to manage the administer the database;*
- b. *The type and scope of information maintained in the database;*
- c. *Any gatekeeping functions used to review information before it is entered into the database;*
- d. *Any due process procedures to dispute information entered into the database;*
- e. *How to securely maintain the database;*
- f. *The appropriate access to the database;*
- g. *The confidentiality of the information maintained in, or accessed from, the database; and*
- h. *The resources necessary to effectively administer and maintain the database.*

6. Opportunity for Public Comment.

No members of the public attended the meeting.

7. Set agenda for next meeting(s).

Evan Meenan will make 8/24 agenda-start with public/private question, hope that helps with the discussion, but please email Evan Meenan if anyone has agenda items to add

8. Motion to Adjourn.

Movement to Adjourn: Sheriff Mark Anderson, motion passed with verbal "aye" votes all around at 12:02PM.

**Next Meeting Date(s):** August 24, 2022 (9 a.m. to 10 a.m.); September 22, 2022 (1 p.m. to 2 p.m.); October 19, 2022 (2 p.m. to 3 p.m.); and November 17, 2022 (1 p.m. to 2 p.m.).



# Vermont Giglio Database Study Committee

## Meeting Agenda

August 24, 2022 (9 a.m. – 10 a.m.)

**Remote Meeting Location:** Microsoft Teams.

**Physical Meeting Location:** Vermont Department of State's Attorneys and Sheriff's, 110 State Street, 2<sup>nd</sup> Floor, Montpelier, VT 05633-6401.

### Agenda:

1. Call to order.
2. Approval of the Minutes from the Committee's August 9, 2022 meeting.
3. Discussion of decision points in Act 161 (2022) Sec. 2(c):
  - a. The appropriate department or agency to manage the administer the database;
  - b. The type and scope of information maintained in the database;
  - c. Any gatekeeping functions used to review information before it is entered into the database;
  - d. Any due process procedures to dispute information entered into the database;
  - e. How to securely maintain the database;
  - f. The appropriate access to the database;
  - g. The confidentiality of the information maintained in, or accessed from, the database; and
  - h. The resources necessary to effectively administer and maintain the database.
4. Opportunity for Public Comment.
5. Set agenda for next meeting(s).
6. Motion to Adjourn.

**Next Meeting Date(s):** September 22, 2022 (1 p.m. to 2 p.m.); October 19, 2022 (2 p.m. to 3 p.m.); and November 17, 2022 (1 p.m. to 2 p.m.).

### Participants present:

John Campbell, Executive Director of Department of State's Attorneys and Sheriffs (temporary substitute Chair for Evan Meenan, Chair of Committee)  
Chief Jennifer Frank, President, Vermont Association of Chiefs of Police  
Tucker Jones, Department of Public Safety Designee/Attorney  
Erin Jacobsen, Vermont Attorney General's Office Designee/Co-Director of AGO Community Justice program  
Sheriff Mark Anderson, Windham County Sheriff, Vermont Sheriff's Association Designee



# Vermont Giglio Database Study Committee

## Meeting Agenda

August 24, 2022 (9 a.m. – 10 a.m.)

Rep. Karen N. Dolan, Essex Junction, Clerk, House Corrections and Institutions Committee

Sen. Philip Baruth, Chittenden District, Vice Chair of Senate Committee on Judiciary, Member of Joint Legislative Justice Oversight Committee

Rep. Tom Burditt, Rutland District, Vice Chair, House Committee on Judiciary

Xusana Davis, Executive Director of Racial Equity

Jay Greene, Racial Equity Policy and Research Analyst, Office of Racial Equity (taking minutes)

### Detailed Minutes of Meeting:

- Jay Greene shared S250/Act 161 version comparison document with Giglio Study participants just before meeting
  - Jay Greene functioning as notetaker for the meeting; **action steps highlighted in yellow, consensus recommendation highlighted in green**
- John Campbell is subbing for Evan Meenan as Chair at Giglio meeting today as Evan is sick (Executive Director of Department of State's Attorneys and Sheriffs, appointed Evan Meenan to the Committee)
- Meeting officially convened at 9:02AM, Wednesday, August 24, 2022
  - Approval of minutes: motion to approve, by Sen. Philip Baruth, verbal aye vote
- Tucker Jones, Department of Public Safety: giving background on testimony that DPS gave once S250 crossed over to House, suggests that we list the information necessary to hold in the database before deciding on questions of confidentiality
  - Article series on VT digger: Tarnished Badge-lays out exploration of how Brady letters are inconsistently distributed between county prosecutor's attorney's offices in Vermont, background to legislative action
  - TJ unsure of level of discussion around Giglio database during bill's time in the Senate-didn't testify on the bill until it crossed over to the House Government Operations committee, then the questions of the Giglio database were discussed
  - Department of Public Safety sent out letters of testimony raising concerns to House Gov Ops-advised that more discussion needed to be had before setting up a database
  - June 2022-ACLU Vermont created database of existing Brady letters on their website
  - Executive order on policing reform-will be creating national registry of law enforcement officer (LEO) misconduct, for Federal agents but local/state Law enforcement agencies (LEAs) encouraged to follow suit
- Erin Jacobsen: Sheriff Anderson at last meeting mentioned that Vermont Criminal Justice Counsel's (VCJC) Professional Regulation subcommittee have a registry, but it's in flux and the public may not be aware of it and how to access it. Would be good to understand that document more.
- John Campbell: purpose of Giglio/Brady database was to help prosecutors uniformly access Giglio/Brady letters across county offices in VT
- Xusana Davis: don't think that Legislature committees ever came to a consensus around whether database should be public, how to allow for appeals of allegations



# Vermont Giglio Database Study Committee

## Meeting Agenda

August 24, 2022 (9 a.m. – 10 a.m.)

- Rep. Karen Dolan: discussion in House was about ensuring that there was adequate access across the State for all attorneys to have access to the Giglio/Brady letters-that should be the first question for the Committee to consider
  - Are we comfortable with ACLU version? [Vermont Brady Letter Database | ACLU of Vermont \(acluvt.org\)](#)
  - 2nd priority: recommendations for public-facing/confidentiality?
  - Christopher Brickell: VCJC already developing a professional regulation database-that database exists and is on VCJC website, but doesn't offer a lot of info (prohibited by statute from publicly making much of the info available)-VCJC Professional Regulation committee is just beginning to reconsider what information is made public
    - What are the things that put someone in the Giglio/Brady database?
    - What are the due process considerations for officers who are accused of misconduct to dispute those allegations or get their name removed from the database?
- John Campbell: explaining legal context-why reporting of Giglio/Brady letters is required
  - Wondering if Legislators wanted to include other info not required to be disclosed under Giglio/Brady reporting-general misconduct outside of job, etc.
  - Making sure due process is considered when adding or removing LEOs from database
- Chief. Jennifer Frank: other states have already answered these questions, such as NH DOJ
  - Comparing the efforts of other States could help us identify which agencies are most appropriate to be in charge of the database
- Rep. Karen Dolan: need to answer what info will be contained in the database before deciding what agency is responsible for it etc.
- Xusana Davis: want to move as a State away from transactional work and towards transformative work-need to do more than just answer the questions posed by the bill
  - Goal: transparency, accuracy, trust, reliability in Justice proceedings
  - Disincentivize lying under oath by LEOs
  - Protect people from bad actors in Law Enforcement Agencies
  - Lowest common denominator of just fulfilling legislative requirements may not be enough to address these concerns
- John Campbell: Starting point for discussion-where to house the database? Suggestions or recommendations?
  - Chief Jennifer Frank: AGO in NH is responsible
  - Xusana Davis: Defender General's Office? Jay Greene: seconded, would cut down on reporting steps if DGO was holder of the database
  - John Campbell: might be best to have database housed in a dept/agency that is not involved in prosecution
  - Mark Anderson: where to house or who is responsible for maintaining the database? What are we discussing?
    - John Campbell: assumes we're discussing both, the same agency will likely be responsible for housing and maintaining the database



# Vermont Giglio Database Study Committee

## Meeting Agenda

August 24, 2022 (9 a.m. – 10 a.m.)

- John Campbell: how is VCJC managing professional regulatory database?
  - Christopher Brickell: detailing issues with web access to regulatory database, choke point of having a single employee responsible for it
  - Tucker Jones: US Federal Attorney General's Office is creating a national database, supposed to get started in Jan 2023
    - Chief Jennifer Frank: will add other states' procedures to the chat [New Hampshire Giglio/Brady Database Memo 2017](#)
- John Campbell: other suggestions for location of database?
  - Mark Anderson: Agency of Digital Services-have public facing database systems already, more concerned about contents of database and what is the threshold for adding LEOs to the database
  - Xusana Davis: suggests taking a tiered approach to deciding what information should go in this database-what are absolutely critical that people need to know, what might raise concerns (maybe prosecutors are not required to share, but public would like to know)
    - When we think about where to house: think about the appearance of ethical impropriety, part of it matters on who has technical know-how, part of it is about public trust
    - Need to think about what we're communicating to the public based on the location of the database
  - John Campbell: agrees with Xusana's concerns, suggests independent location like Secretary of State's office
    - Erin Jacobsen: seconds public perception concerns, Secretary of State's office suggestion (mentioned public stakeholder input into VCJC)
    - Christopher Brickell: agree that SOS office is apolitical, but VCJC serves as oversight of law enforcement, but want to check with IT professionals before committing resources to this database
    - Mark Anderson: potentially creating more problems/unintended consequences by blending public accountability database functions at VCJC with Giglio/Brady database functions. Agrees with Secretary of State's Office as a neutral 3rd party and site of Office of Professional Regulation.
  - John Campbell: if a majority of the committee is comfortable, have Evan Meenan or another member contact Sec. Condos and check viability of housing Giglio/Brady Database with SOS office (also check with incoming new Sec of State)
    - Rep. Karen Dolan: would this just be the database of Brady/Giglio letters? Need to be specific with SOS office request. At this point, we would tell them that it would be a database of Giglio/Brady letters and maybe more in the future.
  - John Campbell: might want to change database name to LEO accountability vs. Giglio/Brady list name, so public is not confused if the database ends up containing more than just Giglio/Brady letters. What are we seeking from this database? Is it about police accountability generally, or just Brady/Giglio letters specifically?



# Vermont Giglio Database Study Committee

## Meeting Agenda

August 24, 2022 (9 a.m. – 10 a.m.)

- Sen. Philip Baruth: agrees so far with SOS as database holder, Xusana's suggestion of tiered database
- Chief Jennifer Frank: VCJC Professional Regs subcommittee currently evaluating accountability questions, meeting biweekly for 2.5 hours plus extra time reviewing evidence of reports of misconduct-will reach out to members of that subcommittee to confirm availability to discuss their work with Giglio committee [Professional Regulation Sub-Committee | Criminal Justice Council \(vermont.gov\)](#)
- John Campbell: important for us to not just worry about credibility, it's about LEO bias/violence/misconduct generally
  - Christopher Brickell: VCJC Professional Regs subcommittee reviews ALL internal affairs investigations-see the Giglio/Brady database as being separate from internal affairs investigations, internal affairs and subcommittee review doesn't help the prosecutorial disclosure requirements, so makes sense to keep the 2 separate
  - Mark Anderson: agrees with what Chris said, are beginning to see the fruits of Leg's discussions in the past 5 years in terms of being able to get info from past LEO's employers, would hate to create perception that the Giglio/Brady database supersedes or overrides other accountability systems, recommends reviewing totality of accountability systems
- 9:55AM Jay Greene: suggests we review comparison document of previous versions of S250/Act 161 I created for next meeting, since we're running out of time here-mentioned that Evan asked us to review past versions because they contain a list of the law enforcement conduct that would qualify someone to be added to the Giglio/Brady database
- Xusana Davis: having public input into this process is important, would like to have community engagement strategy to figure it out-as Sheriff Mark Anderson said "we talk about best practice but who gets to determine what is best practice?" Would like to get community input.
- John Campbell: would like to also have due process considerations for LEOs to appeal their addition to the database-concerns over potential for vendettas by individuals to result in LEOs added to the database
- Next meeting: Sept 22, any suggestions? Motion to adjourn?
  - Tucker Jones makes the motion to adjourn
  - Ayes for adjournment have it 9:59AM
- Questions for this committee to consider, from the agenda
  - The appropriate department or agency to manage the administer the database;
    - Committee reached consensus that appropriate location may be within the Secretary of State's Office, if they are comfortable housing it there. Neutral 3rd party, apolitical, not associated directly with law enforcement agencies like VCJC.
  - The type and scope of information maintained in the database;



## Vermont Giglio Database Study Committee

### Meeting Agenda

August 24, 2022 (9 a.m. – 10 a.m.)

- Will discuss this at next meeting using Jay Greene's S250/Act 161 version comparison document-please contact Jay at [Jay.Greene@vermont.gov](mailto:Jay.Greene@vermont.gov) if that document contains any inaccuracies.
- Any gatekeeping functions used to review information before it is entered into the database;
- Any due process procedures to dispute information entered into the database;
- How to securely maintain the database;
- The appropriate access to the database;
- The confidentiality of the information maintained in, or accessed from, the database; and
- The resources necessary to effectively administer and maintain the database.



# Vermont Giglio Database Study Committee

## Meeting Minutes

September 22, 2022 (1300 - 1400)

**Meeting Date:** 22-Sep-22 13:00

**Locations:** [1] Vermont Department of State's Attorneys and Sheriff's, 110 State Street, 2<sup>nd</sup> Floor, Montpelier, VT 05633-6401. [2] Microsoft Teams Meeting

### Participants

- [Meenan, Evan](#) (Meeting Organizer)
- [Davis, Xusana](#) (Accepted in Outlook)
- [Anderson, Mark](#) (Accepted in Outlook)
- [Brian Peete](#) (Accepted in Outlook)
- [Jones, Tucker](#)
- [Jacobsen, Erin](#) (Accepted in Outlook)
- [Pahl, Marshall](#)
- [Simons, Heather](#)
- [Karen N. Dolan](#) (Accepted in Outlook)
- [tburditt@leg.state.vt.us](#) (Accepted in Outlook)
- [Philip Baruth](#)
- [Corey Parent](#) (Accepted in Outlook)
- [Hibbert, S. Lauren](#) (Accepted in Outlook)
- [Brickell, Christopher](#) (Accepted in Outlook)
- [Greene, Jay \(they/them\)](#) (Declined in Outlook)
- [Morrison, Jennifer](#) (Tentative in Outlook)
- [Frank, Jennifer](#)

### Notes

Minutes taken by Xusana Davis.

Meeting called to order at 1:05.

### Agenda

1. Call to order.
2. Approval of the Minutes from the Committee's August 24, 2022 meeting.
3. Discussion with Lauren Hibbert from the Secretary of State's Office re: recommendation to house database in Secretary of State's Office.
4. Discussion of decision points in Act 161 (2022) Sec. 2(c).
5. Opportunity for Public Comment.
6. Set agenda for next meeting(s).
7. Adjourn.

### Approval of August 24, 2022 Minutes

- Motion to approve: Erin JACOBSEN



# Vermont Giglio Database Study Committee

## Meeting Minutes

September 22, 2022 (1300 – 1400)

- Second: Mark ANDERSON
- Vote Outcomes
  - Aye: Christopher BRICKELL, Tom BURDITT, Tucker JONES, Karen DOLAN, Jennifer FRANK, Mark ANDERSON, Erin JACOBSEN
  - Nay: [None]
  - Abstain: Evan MEENAN (was not present for the meeting in question)
  - Result: Minutes approved.

### Discussion with Secretary of State's Office

- At its August meeting, the Committee discussed the possibility of housing a *Giglio* database in the Secretary of State's office (SOS). Lauren Hibbert, Executive Director of the SOS Office of Professional Regulation (OPR), joins the Committee to discuss the implications of placing the database in the Secretary of State's Office.
  - Placement & Resources
    - Understands the desire for having an impartial place to house the database. Asks whether the Attorney General's Office might be a good alternative, but acknowledged they may not be widely viewed as being impartial enough.
    - Notes that SOS does have the physical/technological capacity to maintain the database.
    - Notes that funding is a potential barrier: The Office of Professional Regulation is a "special fund" funded by licensing fees. Would need a General Fund allocation for the work and would need to understand the full scope of the work to know what sort of staffing requests, if any, to make.
      - The SOS also has an office of State Records and Archives (VSRA) that might also be able to take this database. Placement in the SOS would require some potential re-allocation of General Fund dollars to accommodate that placement.
  - Process & Due Process
    - Asks what the protocol would be for handling cases in which the subject officer of the letter has challenges to their *Giglio/Brady* letter, or what rights the subject officer would have in this process.
    - Years ago, there were policy conversations among policymakers in VT about having law enforcement officers be licensed through OPR. That idea did not proceed at the time, but Lauren asks whether that discussion becomes relevant if a *Giglio* database is placed in SOS-OPR. Generally, when a complaint is lodged against a professional licensee, records of discipline are attached to that record held by SOS. Lauren asks if that is the intent with this sort of database as well.
    - Public records: A record can still be a public record even if it is only accessible on demand. What would be the public record demand for hosting these letters? These letters would be of high value to members of the public, so the work of responding to public record requests could be onerous.



# Vermont Giglio Database Study Committee

## Meeting Minutes

September 22, 2022 (1300 – 1400)

- MEENAN: Part of the question of public access will depend on whether the database is open to the public or only open to named users from specific agencies.

### **Decision Points**

- The Committee expresses concerns about timing: This committee was given six meetings to answer a complex list of questions. Some of these questions may not be answerable in that timeframe, so the Legislature may need to answer the question about whether the database should be public and determine how to allocate resources depending on the answer to that question.
- Question F: Appropriate access
  - FRANK: We should decide for whom this database is intended first. If it is for attorneys only, that tells us what kind of content to include and where to house it.
  - PAHL: The database should be public. This is easier and more transparent, which is what the public wants.
  - MEENAN: If it is public, the work involved with scrutinizing the information and cross-checking its accuracy will be high.
    - PAHL: That would be the same regardless of public access. Due process for named officers is important, so that high standard of accuracy will need to be met regardless.
      - MEENAN: Agree, but some of the work might be different depending on kinds of cases. For example, in cases related to abuse of juveniles, there needs to be redaction of supporting documents to protect the juvenile's identity before upload to database.
    - JACOBSEN: The database should be public.
    - BURDITT: Questions F and B are linked. Question B (type and scope of information in database) might dictate who has access to the database or to the record. Some details should not be in public databases, but perhaps in private ones. I worry this system could end up collecting too much information and micromanaging law enforcement agencies instead of allowing certain details to be handled internally.
  - DOLAN: Can we start with making sure prosecutors around the state have access? Perhaps start with the database being presumptively private, and then add access layers/categories of users as needed and see what level of publicity that leads us to.
    - MEENAN: Currently, all prosecutors working for the States Attorneys Department have access to a shared folder with all the Department's *Brady/Giglio* letters. This database is more current than the ACLU's database because new letters issued have been added since the ACLU's last public records request for letters. This folder is part of the computer's standard file browser and the contents of each file are not word searchable.



## Vermont Giglio Database Study Committee

### Meeting Minutes

September 22, 2022 (1300 – 1400)

- PAHL: Do we need to add supporting documentation to letters? Can we just include the letters in the database and let interested parties seek further detail on their own from there?
  - MEENAN: That would be less helpful to prosecutors to fulfill their discovery disclosure obligations. For example, an accused officer engaged in misconduct and the prosecutor does not know about it, then the agency would be required to report the misconduct to all prosecutors in the first instance. Perhaps DOLAN's suggestion might work to correct this, if we make access to the supporting documents limited to certain entities and access to the letters themselves more broad. Whether something is in the database or not does not impact prosecutors' discovery disclosure obligations.
- DAVIS: The database should be public. As HIBBERT said, the information is "high-value" for the public, and for good reason. Lives depend on it. To DOLAN and BURDITT's points, the content of the information might help us determine access levels in a layered approach, but there should be very strong justification for why some entities have access to more detailed information and others do not, especially if those details can be gained publicly through other means/agencies anyway.
- ANDERSON: The enabling statute for this Committee discusses the purpose of the database being to facilitate disclosure of impeachable information in cases. This suggests the intended audience is prosecutors. For that reason, several of our decision points/questions are already answered: The letters are already public if they are offered as evidence in cases that are publicly adjudicated. The content of the database is directed by the constitutional mandate already established. Security and confidentiality are not major questions if the information is already public.
- JACOBSEN: Given the last several comments, it appears there is *already* a Giglio database in a sense, but it just needs to be made more public/central.
- JONES: Can the States Attorneys Department just add a page on its website and upload its letters?
- MEENAN: Perhaps we can have a database with two levels of access:
  - One level of access open to the public with details like
    - Officer name
    - Department they were working for at the time of the alleged misconduct
    - General description of the alleged misconduct
    - Date of the alleged misconduct
    - *Giglio/Brady* letter
  - Second level of access for attorneys/prosecutors with supporting documents like case files, police reports.
  - At that point, the supporting documents that are part of the second level of access would still be publicly accessible through a public record request to the appropriate agency that generated the records.



## Vermont Giglio Database Study Committee

### Meeting Minutes

September 22, 2022 (1300 – 1400)

- The Committee will consider this suggestion and discuss it at the next meeting.

#### Adjourn

- Motion to adjourn: MEENAN
- Second: ANDERSON
- Vote Outcomes: All vote aye.
- Meeting adjourned at 2:03 p.m.
- Next Meeting Dates: October 19, 2022 (2:00-3:00 p.m.); and November 17, 2022 (1:00-2:00 p.m.)

#### Materials Shared/Discussed

- Vermont Open Data Portal: <https://data.vermont.gov/>
- Screenshot of part of States Attorneys folder of letters (not all letters fit on the screen at once):

*Next page*



# Vermont Giglio Database Study Committee

## Meeting Minutes

### September 22, 2022 (1300 – 1400)

Name	Date modified	Type
2018-03-16 Morris Orleans County	8/22/2022 3:56 PM	File folder
2019-1-04 Southward Orleans County	8/22/2022 4:02 PM	File folder
Sean Wilson Letters	6/28/2022 9:36 AM	File folder
2007-04-18 Reed Washington County	1/18/2022 8:11 AM	Adobe Acrobat Docum...
2011-08-25 Hoyt Caledonia County	1/6/2022 10:45 AM	Adobe Acrobat Docum...
2011-12-05 Hubacz Washington County	1/18/2022 8:13 AM	Adobe Acrobat Docum...
2016-04-13 Silver Windsor County	1/4/2022 1:55 PM	Adobe Acrobat Docum...
2016-09-29 Satterfield Washington County	1/18/2022 8:12 AM	Adobe Acrobat Docum...
2017-02-16 Lopez Chittenden County	1/4/2022 1:43 PM	Adobe Acrobat Docum...
2017-09-22 Breault Windsor County	1/4/2022 1:55 PM	Adobe Acrobat Docum...
2017-11-20 Carriiveau Washington County	1/18/2022 8:14 AM	Adobe Acrobat Docum...
2018-10-24 Patenaude Caledonia County	1/4/2022 1:54 PM	Adobe Acrobat Docum...
2018-12-11 Hamel Orleans County	1/7/2019 2:00 PM	Adobe Acrobat Docum...
2019-01-07 Roos Orleans County	1/7/2019 1:44 PM	Adobe Acrobat Docum...
2019-01-07 Roos Orleans County	1/4/2022 1:53 PM	Adobe Acrobat Docum...
2019-01-15 Fredholm Washington County	1/4/2022 1:56 PM	Adobe Acrobat Docum...
2019-01-25 Helfant Washington County	1/4/2022 1:42 PM	Adobe Acrobat Docum...
2019-02-26 Lucia Rutland County	1/4/2022 1:51 PM	Adobe Acrobat Docum...
2019-02-26 Platkas Rutland County	1/4/2022 1:41 PM	Adobe Acrobat Docum...
2019-02-26 Warfile Rutland County	1/4/2022 1:44 PM	Adobe Acrobat Docum...
2019-02-27 Maxfield Addison County	1/4/2022 1:56 PM	Adobe Acrobat Docum...
2019-03-01 Wilson Chittenden County	1/4/2022 1:45 PM	Adobe Acrobat Docum...
2019-12-05 Olmsted Windsor County	1/4/2022 1:58 PM	Adobe Acrobat Docum...
2020-01-22 Dukette Orleans County (2)	1/22/2020 2:10 PM	Adobe Acrobat Docum...
2020-01-22 Dukette Orleans County	1/4/2022 1:54 PM	Adobe Acrobat Docum...
2020-01-23 Ellison Chittenden County	1/4/2022 1:48 PM	Adobe Acrobat Docum...
2020-02-03 Devito Windham County	1/4/2022 1:52 PM	Adobe Acrobat Docum...
2020-02-05 Paulette Windham County	1/4/2022 1:57 PM	Adobe Acrobat Docum...
2020-02-13 Adams Windsor County	1/4/2022 1:56 PM	Adobe Acrobat Docum...
2020-02-24 Kennedy Washington County	1/4/2022 1:40 PM	Adobe Acrobat Docum...
2020-02-26 Matott Chittenden County	1/4/2022 1:44 PM	Adobe Acrobat Docum...
2020-03-19 Bunnell Caledonia County	1/6/2022 10:44 AM	Adobe Acrobat Docum...
2020-05-27 Noyes Essex County	1/4/2022 1:47 PM	Adobe Acrobat Docum...
2020-06-14 Cicio Washington County	1/19/2022 9:40 AM	Adobe Acrobat Docum...
2020-09-01 Rosario Rutland County	1/4/2022 1:40 PM	Adobe Acrobat Docum...
2020-09-23 Angelo Rutland County	1/4/2022 1:49 PM	Adobe Acrobat Docum...
2020-09-23 Dumas Rutland County	1/4/2022 1:50 PM	Adobe Acrobat Docum...
2020-09-23 Humphries Rutland County	1/4/2022 1:58 PM	Adobe Acrobat Docum...
2020-09-23 Kerber Rutland County	1/4/2022 1:59 PM	Adobe Acrobat Docum...
2020-09-23 Nguyen Rutland County	1/4/2022 1:49 PM	Adobe Acrobat Docum...
2020-09-28 Oliver Chittenden County	1/5/2022 9:21 AM	Adobe Acrobat Docum...



## Vermont Giglio Database Study Committee

### Meeting Minutes

October 19, 2022

# Giglio Database Study Committee Meeting

**Meeting Date:** 19-Oct-22 14:00

**Location:** Microsoft Teams Meeting

#### Invitation Message

#### Participants

- [Meenan, Evan](#) (Meeting Organizer)
- [Davis, Xusana](#) (Accepted in Outlook)
- [Anderson, Mark](#) (Accepted in Outlook)
- [Brian Peete](#) (Accepted in Outlook)
- [Jones, Tucker](#)
- [Jacobsen, Erin](#) (Accepted in Outlook)
- [Pahl, Marshall](#)
- [Simons, Heather](#)
- [Karen N. Dolan](#) (Accepted in Outlook)
- [tburditt@leg.state.vt.us](#) (Accepted in Outlook)
- [Philip Baruth](#)
- [Corey Parent](#) (Accepted in Outlook)
- [Hibbert, S. Lauren](#) (Accepted in Outlook)
- [Brickell, Christopher](#) (Accepted in Outlook)
- [Greene, Jay \(they/them\)](#)
- [Morrison, Jennifer](#) (Tentative in Outlook)
- [Frank, Jennifer](#)
- [Thivierge, Lindsay](#) (Accepted in Outlook)
- [Lueders-Dumont, Timothy](#)

#### Introduction:

- Minutes taken by Xusana Davis.
- Meeting called to order at 2:04 p.m.
- The group will be chaired by Timothy Lueders-Dumont going forward, due to a staffing transition in the Office of the State's Attorneys and Sheriffs. Timothy is present today to lead the meeting and exiting Chair Evan Meenan is present to assist.
- This is the penultimate meeting of the group: per statute, the group is only to meet six times total, and this is meeting number five.



# Vermont Giglio Database Study Committee

## Meeting Minutes

October 19, 2022

### Agenda

1. Call to order.
2. Approval of the Minutes from the Committee's September 22, 2022 meeting.
3. Continued discussion of decision points in Act 161 (2022) Sec. 2(c).
4. Opportunity for Public Comment.
5. Set agenda for next meeting(s).
6. Adjourn.

### Approval of September 22, 2022 Minutes

- Motion to approve: Erin JACOBSEN
- Second: Marshall PAHL
- Vote Outcomes
  - Aye: Philip BARUTH, Tom BURDITT, Tucker JONES, Karen DOLAN, Jennifer FRANK, Mark ANDERSON, Erin JACOBSEN, Karen DOLAN, Brian PEETE, Marshall PAHL, Xusana DAVIS
  - Nay: [None]
  - Abstain: [None]
  - Result: Minutes approved.

### Decision Points

- BARUTH: Missed the last meeting. Based on the minutes, it appears this group generated strong support for the database being publicly accessible. Is this accurate?
  - FRANK: Yes, depending on the extent of the information contained in the database.
    - BARUTH: If that's the case, and if people would already be able to access the information through public records requests, then why would we make them go through that extra step instead of just providing the information in the database?
    - DOLAN: Another issue that is presented is the potential need to have to review and redact documents prior to upload, to protect confidential information.
    - PEETE: This can be an opportunity to look to the future of this database so that in the future, it may include judges, prosecutors, and others who are in relevant roles. This would contribute to better transparency across government, not just for law enforcement.
  - MEENAN: This question depends on what we see as the goal of a database. If what we're trying to accomplish is having a tool to help prosecutors satisfy discovery requirements, that's a different goal than having a database to inform the public of alleged officer misconduct. The database could accomplish both, but these different goals require different approaches or considerations. For example, if there are documents included in the database that require review and redaction before being posted, that's fine, but would require appropriate staffing/resources to manage that



# Vermont Giglio Database Study Committee

## Meeting Minutes

October 19, 2022

continuous undertaking. It would basically be like doing an upfront public records review for each instance of alleged misconduct.

- ANDERSON: Some of the decision points we are expected to answer are already answered for us. For example, there is an existing database that contains much of the information we're contemplating. Therefore, we can just make that existing database available to the public, which answers questions about scope and gatekeeping.
- Timothy LUEDERS-DUMONT: *Brady* material isn't always a letter. Sometimes it is some other form of documentation. Part of the duty of this committee is to educate the public about what is or is not considered *Brady* material.
- PAHL: It's concerning that the group is hesitant to include information in a public database that is already publicly accessible through other means. An exception is when there is highly detailed and compromising information about parties, such as the details of a domestic violence case or a juvenile justice case. If we think we need to redact and review documents, then will we have to change statute to modify the kinds of documentation that can be made public? For example, is there revision needed to the juvenile justice code to allow certain court decisions to be disclosable?
  - LUEDERS-DUMONT: Possibly. That is an option.
  - MEENAN: This is why the question about who will be able to access the database is so important. Expungements and sealings are also a potential hurdle: If an officer's misconduct is expunged, then members of the public wouldn't have access to it in a database. Doesn't that compromise the utility and purpose of a database?
    - LUEDERS-DUMONT: Further, *Brady* material isn't always about officers. This is why we need to be able to educate others about what these materials encompass.
- LUEDERS-DUMONT: Let's agree to put our concerns and considerations in writing and send to LUEDERS-DUMONT by November 04 to compile and draft an outline of a report for the group to react to. We can make our last meeting a two-hour meeting instead of a one-hour meeting to accommodate extra discussion on the draft.
  - BARUTH: I won't be able to attend that day because of a scheduling conflict.
    - LUEDERS-DUMONT: I can contact you directly to receive and incorporate your feedback.
  - Lauren HIBBERT: The Secretary of State's Office is concerned about the impact that redaction and gatekeeping would have on the Office's operations and workload. The Office is open to having the conversation, but cannot yet commit to be the keeper of a database unless and until these details are confirmed and proper resourcing is committed.
  - Christopher BRICKELL: The Criminal Justice Council echoes HIBBERT's comment. The Council believes this work falls within its mission and is willing to consider hosting the data in question, but would need to see the details about expectations and support.



## Vermont Giglio Database Study Committee

### Meeting Minutes

October 19, 2022

- JACOBSEN: In addition to the database being publicly accessible, it must also be easy to use. Part of this process is ensuring the public has an easy way to access information without complicated request forms or complicated technology.
- PEETE: Vermont is part of the Decertification Index. Also, the question about impeachable evidence is broader than just whether it is disclosed; it also begs questions about what will be done about each case. Is State's Attorney's Office going to allow that officer to testify? Second, will there be decertification? Third, what protocols will individual departments undertake when confronted with a candidate who bears a *Giglio* letter.
  - JACOBSEN: Given this, we should also acknowledge the public perception that the existence of a *Giglio* letter means the officer is a "bad cop," which is not necessarily true. After all, there is a difference between not rendering aid on the roadside and lying under oath. At our last meeting, we discussed the kind of information that may be included in the database, and one item was a general description of the misconduct. If this general description of misconduct were public-facing, could that alleviate this problem of automatic assumptions of officers being "bad cops?"
    - PEETE: Perhaps, but any such process should be uniform.
    - LUEDERS-DUMONT: This is where prosecutors have discretion and leeway, and the duty of prosecutors is important to examine.
- ANDERSON: Did this group ever contact Agency of Digital Services to discuss the Open Data Portal? If not, we should, because the tool is centralized, robust, and allows for data analysis.

### Public Comment

There were no members of the public present to provide comment.

### Adjourn

- Motion to adjourn: ANDERSON
- Second: BARUTH
- Vote Outcomes: All vote aye.
- Meeting adjourned at 3:00 p.m.
- Next Meeting Dates: November 17, 2022 (1:00-2:00 p.m.)

### Materials Shared/Presented

- Giglio Database Study Committee enabling statute:  
<https://legislature.vermont.gov/Documents/2022/Docs/ACTS/ACT161/ACT161%20As%20Enacted.pdf>
- National Decertification Index: <https://www.iadlest.org/our-services/ndi/about-ndi>
- Office of the Washington County State's Attorney, Rory Thibault, [2021-03-15\\_brady-giglio\\_policy\\_and\\_guidance.pdf \(acluvt.org\)](https://acluvt.org/2021-03-15_brady-giglio_policy_and_guidance.pdf).

# DRAFT Minutes Giglio Database Study Committee Meeting

**Meeting Date:** 17-Nov-22 13:00

**Location:** Microsoft Teams Meeting

## Participants

- [Brickell, Christopher](#) (Accepted in Outlook)
- [Greene, Jay \(they/them\)](#) (Accepted in Outlook)
- [Morrison, Jennifer](#) (Tentative in Outlook)
- [Frank, Jennifer](#)
- [Davis, Xusana](#) (Accepted in Outlook)
- [Brian Peete](#) (Accepted in Outlook)
- [Jones, Tucker](#)
- [Jacobsen, Erin](#) (Accepted in Outlook)
- [Pahl, Marshall](#)
- [Karen N. Dolan](#) (Accepted in Outlook)
- [Thomas Burditt](#) (Accepted in Outlook)
- [Corey Parent](#) (Accepted in Outlook)
- [Lueders-Dumont, Timothy](#)
- [Hibbert, S. Lauren](#) (Accepted in Outlook)

## Notes

Minutes taken by Xusana Davis.

Meeting called to order at 1:04 p.m.

This is intended to be the last meeting of the group: per statute, the group is only to meet six times total, and this is meeting number six. However, the group decided to meet again on 11/29/22 to finalized a report.

## Agenda

1. Call to order.
2. Approval of the Minutes from the Committee's October 19, 2022 meeting.
3. Review of Report Outline.
4. Opportunity for Public Comment.
5. Set agenda for next meeting(s) if needed.
6. Adjourn.

## Approval of October 19, 2022 Minutes

- Motion to approve: Brian PEETE
- Second: Marshall PAHL
- Vote Outcomes: All vote aye.
- Result: Minutes approved.

## Review of Draft Outline and Committee Feedback

- Group members discuss the feedback previously provided, including their respective stances on where the database should sit, the process for entering letters into the database, and how the work should be resourced. This feedback will be included as an Appendix in the study group's report to the legislature, with the following exceptions:

- Feedback from the Office of the Attorney General is not included in the Appendix.
- The following entities did not provide their feedback in writing: Office of Racial Equity (drafted feedback, but did not send before deadline);
- Several members of the group note the importance of public information being made accessible to the public, and that the feedback provided appears to take a different tone than the general dialogue the group has had to date.
- To allow members to amend their comments (or to submit them if they previously did not), LUEDERS-DUMONT will give members until Monday November 28th to add feedback.
- The group will also meet for 15 minutes on Tuesday November 29th for a final meeting after LUEDERS-DUMONT circulates an updated draft.

### **Public Comment**

There were no members of the public present to provide comment.

### **Adjourn**

- Motion to adjourn: PEETE
- Second: BURDITT
- Vote Outcomes: All vote aye.
- Meeting adjourned at 2:08 p.m.
- Next Meeting Date: Tuesday November 29, 2022 (12:30-12:45)

### **Materials Shared/Presented**

- New Hampshire's Lori's List (discussed but not shared)
- Draft outline for study group report and comments submitted by members

# DRAFT November 29, 2022

## Giglio Database Study Committee Meeting

**Meeting Subject:** Giglio Database Study Committee Meeting

**Meeting Date:** 29-Nov-22 12:30

**Remote Meeting Location:** Microsoft Teams.

**Physical Meeting Location:** Vermont Department of State's Attorneys and Sheriff's, 110 State Street, 2<sup>nd</sup> Floor, Montpelier, VT 05633-6401.

### **Participants**

- [Lueders-Dumont, Timothy](#) (Meeting Organizer)
- [Greene, Jay \(they/them\)](#) (Accepted in Outlook)
- [Davis, Xusana](#) (Accepted in Outlook)
- [Anderson, Mark](#) (Tentative in Outlook)
- [Brian Peete](#) (Accepted in Outlook)
- [Jones, Tucker](#)
- [Jacobsen, Erin](#) (Accepted in Outlook)
- [Pahl, Marshall](#)
- [Simons, Heather](#)
- [Frank, Jennifer](#) (Accepted in Outlook)
- [Hibbert, S. Lauren](#) (Accepted in Outlook)
- [Karen N. Dolan](#) (Accepted in Outlook)
- [tburditt@leg.state.vt.us](mailto:tburditt@leg.state.vt.us)
- [Philip Baruth](#)
- [Corey Parent](#) (Accepted in Outlook)
- [Brickell, Christopher](#) (Accepted in Outlook)
- [Thivierge, Lindsay](#)

Minutes taken by Xusana Davis.

Meeting called to order at 12:35 p.m.

This is the last meeting of the group.

### **Agenda**

1. Call to order.
2. Approval of the Minutes from the Committee's November 17, 2022 meeting.
3. Review of Report Draft.
4. Opportunity for Public Comment.
5. Adjourn.

### **Approval of November 17, 2022 Minutes**

- Motion to approve: Erin JACOBSEN
- Second: Tucker JONES
- Vote Outcomes: All vote aye.

- Result: Minutes approved.

#### **Review of Report Draft Committee Feedback**

- The report draft was sent to group members after the remaining members/consulting offices provided feedback.
- The group reviews the draft report and notes any grammatical, stylistic, and technical changes needed.
- Report Approval
  - Motion to approve report: JONES
  - Second: Christopher BRICKELL
  - Vote Outcomes: All vote aye. Draft report is approved to be sent to Legislature.
- Timothy LUEDERS-DUMONT will send the report with appendices to the Legislature and ensure it is posted online for public accessibility.

#### **Public Comment**

- There were no members of the public present to provide comment.

#### **Adjourn**

- Motion to adjourn: JONES
- Second: BRICKELL
- Vote Outcomes: All vote aye.
- Meeting adjourned at 12:56 p.m.

#### **Materials Shared/Presented**

- Draft report of the Giglio Database Study Committee Meeting

**Appendix G**  
**(Resource Material: *Copy of Enabling  
Legislation, 2022, Act 161, Sec. 2.*)**

No. 161  
2022

Page 1 of 9

**No. 161. An act relating to law enforcement data collection and  
interrogation.**

(S.250)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 20 V.S.A. § 2366 is amended to read:

**§ 2366. LAW ENFORCEMENT AGENCIES; FAIR AND IMPARTIAL  
POLICING POLICY; RACE DATA COLLECTION**

\* \* \*

(4) The data provided pursuant to subdivision (3) of this subsection shall be posted electronically in a manner that is analyzable and accessible to the public on the receiving agency's website and clear and understandable. The receiving agency shall also report the data annually ~~to the General Assembly,~~ on or before December 1, to the House and Senate Committees on Government Operations and on Judiciary and the Executive Director of Racial Equity. The report shall detail how the data is collected, how the data is accessible, how the data is used by the law enforcement agency, a review of the data to determine if additional data criteria is needed, and any recommendations to improve data collection and use.

\* \* \*

Sec. 1a. DEPARTMENT OF PUBLIC SAFETY; LAW ENFORCEMENT

DATA COLLECTION; REPORT

- (a) On or before November 1, 2023, the Department of Public Safety shall submit a report concerning the ability of law enforcement agencies to collect data during law enforcement encounters. The report shall specify:
- (1) the data currently collected, including law enforcement's capabilities and methods of collection;
  - (2) any suggested data collection criteria;
  - (3) any impediments to collecting data;
  - (4) proposed remedies to resolve any impediments; and
  - (5) a recommended definition of "law enforcement encounter."

(b) The report shall be submitted to the House and Senate Committees on Government Operations and on Judiciary and the Executive Director of Racial Equity.

(c) It is the intent of the General Assembly that the report's definition of "law enforcement encounter" and data criteria suggestions should be considered for codification into law by the General Assembly during the 2024 legislative session.

Sec. 2. GIGLIO DATABASE; STUDY COMMITTEE; REPORT

- (a) Creation. There is created the Giglio Database Study Committee to study the appropriate structure and process to administer a database designed to catalogue potential impeachment information concerning law enforcement

agency witnesses or affiants to enable a prosecutor to disclose such information consistently and appropriately under the obligations of Giglio v. United States, 405 U.S. 150 (1972), and its progeny.

(b) Membership. The Giglio Database Study Committee shall be composed of the following members:

- (1) two current members of the House of Representatives, not from the same political party, who shall be appointed by the Speaker of the House;
- (2) two current members of the Senate, not from the same political party, who shall be appointed by the President Pro Tempore;
- (3) the Commissioner of the Department of Public Safety or designee;
- (4) the Executive Director of the Vermont Criminal Justice Council or designee;
- (5) the President of the Vermont Sheriffs' Association or designee;
- (6) the President of the Vermont Association of Chiefs of Police or designee;
- (7) the Executive Director of the Vermont Office of Racial Equity;
- (8) the Attorney General or designee;
- (9) the Executive Director of the Department of State's Attorneys and Sheriffs or designee; and
- (10) the Defender General or designee.

(c) Powers and duties. The Giglio Database Study Committee shall study the appropriate structure and process to administer a law enforcement officer

information database designed to facilitate the disclosure of potential impeachment information by prosecutors pursuant to legal obligations. The Committee shall study the following:

- (1) the appropriate department or agency to manage and administer the database;
- (2) the type and scope of information maintained in the database;
- (3) any gatekeeping functions used to review information before it is entered into the database;
- (4) any due process procedures to dispute information entered into the database;
- (5) how to securely maintain the database;
- (6) the appropriate access to the database;
- (7) the confidentiality of the information maintained in, or accessed from, the database; and
- (8) the resources necessary to effectively administer and maintain the database.

(d) Report. On or before December 1, 2022, the Giglio Database Study Committee shall submit a written report with legislative recommendations to the House and Senate Committees on Government Operations.

(e) Assistance. The Giglio Database Study Committee shall have the administrative, technical, and legal assistance of the Vermont Criminal Justice Council and any other stakeholders interested in assisting with the report.

(f) Meetings.

(1) The Executive Director of the Office of Racial Equity or designee shall call the first meeting of the Committee to occur on or before July 15, 2022.

(2) The Executive Director of the Office of Racial Equity shall select a chair from among its members at the first meeting.

(3) The Committee shall meet six times.

(4) A majority of the membership shall constitute a quorum.

(5) The Giglio Database Study Committee shall cease to exist on December 15, 2022.

(g) Compensation and reimbursement. For attendance at meetings during adjournment of the General Assembly, a legislative member of the Giglio Database Study Committee shall be entitled to per diem compensation pursuant to 2 V.S.A. § 23 for not more than six meetings. These payments shall be made from monies appropriated to the General Assembly.

Sec. 3. 13 V.S.A. § 5585 is amended to read as follows:

**§ 5585. ELECTRONIC RECORDING OF A CUSTODIAL**

**INTERROGATION**

(a) As used in this section:

(1) “Custodial interrogation” means any interrogation:

(A) involving questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject; and

 KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [District Attorney's Office for Third Judicial Dist.](#) v.

Osborne, U.S., June 18, 2009

83 S.Ct. 1194

Supreme Court of the United States

John L. BRADY, Petitioner,  
v.  
STATE OF MARYLAND.

No. 490.

|

Argued March 18 and 19, 1963.

|

Decided May 13, 1963.

### Synopsis

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the [Maryland Court of Appeals](#), 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

West Headnotes (6)

### [1] Federal Courts ➔ Review of state courts

Decision of Maryland Court of Appeals on petitioner's appeal in post-conviction proceeding, remanding case for retrial on question of punishment but not on question of guilt was "final judgment" within statute relating to federal Supreme Court review of final

## Appendix H

### (Resource Material:

#### *Copy of Applicable Caselaw, Brady/ Giglio)*

judgments by certiorari. Code Md.1957, art. 27, § 413; Code Supp. Md. art. 27, § 645A et seq.; [28 U.S.C.A. § 1257\(3\); U.S.C.A.Const Amend. 14.](#)

879 Cases that cite this headnote

[2]

### Constitutional Law ➔ Witnesses

#### Criminal Law ➔ Evidence incriminating others

Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. [U.S.C.A.Const. Amend. 14.](#)

10679 Cases that cite this headnote

[3]

### Constitutional Law ➔ Evidence

#### Constitutional Law ➔ Notice; disclosure and discovery

Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. [U.S.C.A.Const. Amend. 14.](#)

20806 Cases that cite this headnote

[4]

### Criminal Law ➔ Questions of Law or of Fact

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. [Const.Md. art. 15, § 5.](#)

321 Cases that cite this headnote

[5]

### Federal Courts ➔ Sources of Authority

State courts, state agencies and state legislatures are final expositors of state law under our federal regime. [Const. Md. art 15, § 5.](#)

28 Cases that cite this headnote

[6] **Constitutional Law** ↗ Determination and disposition

**Criminal Law** ↗ Sentence

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; [Const.Md. art. 15, § 5](#); [U.S.C.A.Const. Amend. 14](#).

8257 Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*1195 \*84** E. Clinton Bamberger, Jr., Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for respondent.

**Opinion**

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. [220 Md. 454, 154 A.2d 434](#). Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one

dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

[1] Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland \*85 Post Conviction Procedure Act. [222 Md. 442, 160 A.2d 912](#). The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. [226 Md. 422, 174 A.2d 167](#). The case is here on certiorari, [371 U.S. 812, 83 S.Ct. 56, 9 L.Ed.2d 54](#).<sup>1</sup>

**\*\*1196** The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words 'without capital punishment.' [3 Md. Ann.Code, 1957, Art. 27, s 413](#). In Maryland, by reason of the state constitution, the jury in a criminal case are 'the Judges of Law, as well as of fact.' [Art. XV, s 5](#). The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

**\*86 [2]** We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—[United States ex rel. Almeida v. Baldi, 195 F.2d 815, 33 A.L.R.2d 1407](#), and [United States ex rel. Thompson v. Dye, 221 F.2d 763](#)—which, we agree, state the correct constitutional rule.

This ruling is an extension of [Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791](#), where the Court ruled on what nondisclosure by a prosecutor violates due process:

'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state

to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.'

In *Pyle v. Kansas*, 317 U.S. 213, 215—216, 63 S.Ct. 177, 178, 87 L.Ed. 214, we phrased the rule in broader terms:

'Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.'

\*87 The Third Circuit in the Baldi case construed that statement in *Pyle v. Kansas* to mean that the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, we extended the test formulated in *Mooney v. Holohan* when we said: 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' And see *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; *Wilde v. Wyoming*, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985. Cf. *Durley v. Mayo*, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).

[3] We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates \*\*1197 due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'<sup>2</sup> A prosecution that withholds evidence on demand of an accused which, if made available, \*88 would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a

proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

'There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. \* \* \* (I)t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.'

'Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. \* \* \*

'The appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree. We, therefore, see no occasion to retry that issue.' 226 Md., at 429—430, 174 A.2d, at 171. (Italics added.)

\*89 If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense 'below murder in the first degree'? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

[4] [5] [6] But Maryland's constitutional provision making the jury in criminal \*\*1198 cases 'the Judges of Law' does not mean precisely what it seems to say.<sup>3</sup> The present status of that provision was reviewed recently in *Giles v. State*, 229 Md. 370, 183 A.2d 359, appeal dismissed, 372 U.S. 767, 83 S.Ct. 1102, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that 'Trial courts

have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused.' 229 Md., at 383, 183 A.2d, at p. 365. The cases cited make up a long line going back nearly a century. *Wheeler v. State*, 42 Md. 563, 570, stated that instructions to the jury were advisory only, 'except in regard to questions as to what shall be considered as evidence.' And the court 'having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction.' *Bell v. State*, 57 Md. 108, 120. And see *Beard v. State*, 71 Md. 275, 280, 17 A. 1044, 1045, 4 L.R.A. 675; *Dick v. State*, 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel v. State*, 163 Md. 267, 162 A. 705.

\*90 We usually walk on treacherous ground when we explore state law,<sup>4</sup> for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the 'admissibility of evidence' pertinent to 'the issue of the innocence or guilt of the accused.' *Giles v. State*, supra. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession 'could have reduced the appellant Brady's offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record.<sup>5</sup> But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a \*91 bifurcated trial (cf. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, 'The suppression or withholding by the State of material evidence exculpatory to an accused is a violation \*\*1199 of due process' without citing the United States Constitution or the Maryland Constitution which also has a due process clause.\* We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only

party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See *New York City v. Central Savings Bank*, 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058; *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, \*92 wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, 'The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.' After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: 'The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment.'

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Mr. Justice HARLAN, whom Mr. Justice BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection?<sup>1</sup> In my

opinion an affirmative answer would \*93 be required if the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases 'the Judges of Law, as \*\*1200 well as of fact,' as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under s 645G of the Maryland Post Conviction Procedure Act, Md.Code, Art. 27 (1960 Cum.Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case,<sup>2</sup> rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. [226 Md., at 430, 174 A.2d, at 171](#). This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is dispositive \*94 of the crucial issue here. [226 Md., at 427—429, 174 A.2d, at 170.<sup>3</sup>](#)

Nor do I find anything in any of the other Maryland cases cited by the Court (ante, p. 1197) which bears on the admissibility

## Footnotes

**1** Neither party suggests that the decision below is not a 'final judgment' within the meaning of [28 U.S.C. s 1257\(3\)](#), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that 'Final judgment in a criminal case means sentence. The sentence is the judgment' ([Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204](#)) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt 'that presents a serious and unsettled question' ([Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528](#)) that 'is fundamental to the further conduct of the case' ([United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311](#)). This question is 'independent of, and unaffected by' ([Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092](#)) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See [Largent v. Texas, 318 U.S. 418, 421—422, 63 S.Ct. 667, 668—669, 87 L.Ed. 873](#). Cf. [Local No. 438 Const. and General Laborers' Union v. Curry, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514](#).

**2** Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:

vel non of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not 'overrule' the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that 'in the final analysis the jury are the judges of both the law and the facts, and the verdict in this case is entirely the jury's responsibility.' (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement would have been admissible at the trial on the issue of guilt.<sup>4</sup>

In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms \*95 address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. [Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920](#).

## All Citations

373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215

'The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.'

3 See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md.St.Bar Assn.Rept. 246, 253—254.

4 For one unhappy incident of recent vintage see [Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.](#), 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 447, 537, that replaced an earlier opinion in the same case, [309 U.S. 703](#).

5 'In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?' Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39. See also [Bell v. State, supra](#), 57 Md. at 120; [Vogel v. State](#), 163 Md., at 272, 162 A., at 706—707.

\* Md.Const., Art. 23; [Home Utilities Co., Inc., v. Revere Copper & Brass, Inc.](#), 209 Md. 610, 122 A.2d 109; [Raymond v. State ex rel. Szydlouski](#), 192 Md. 602, 65 A.2d 285; [County Com'rs of Anne Arundel County v. English](#), 182 Md. 514, 35 A.2d 135, 150 A.L.R. 842; [Oursler v. Tawes](#), 178 Md. 471, 13 A.2d 763.

1 I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 1196—1197 of its opinion.

2 Section 645G provides in part: 'If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.' Rule 870 provides that the Court of Appeals 'will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended.'

3 It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of [Day v. State](#), 196 Md. 384, 76 A.2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

4 In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: 'It would have been, yes.'

 KeyCite Yellow Flag - Negative Treatment

Declined to Extend by *Hooper v. Shinn*, 9th Cir.(Ariz.), January 8, 2021  
92 S.Ct. 763

Supreme Court of the United States

John GIGLIO, Petitioner,

v.

UNITED STATES.

No. 70—29.

|

Argued Oct. 12, 1971.

|

Decided Feb. 24, 1972.

**Synopsis**

While appeal from a judgment of conviction was pending in the Court of Appeals, defense counsel filed a motion for new trial on basis of newly discovered evidence. The District Court denied the motion. On certiorari to the Court of Appeals, the Supreme Court, Mr. Chief Justice Burger, held that if assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process requiring a new trial.

Reversed and remanded.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of case.

West Headnotes (5)

[1] **Criminal Law**  Use of False or Perjured Testimony

Deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice.

1265 Cases that cite this headnote

[2] **Criminal Law**  Misconduct of Counsel for Prosecution

When reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution.

1906 Cases that cite this headnote

[3] **Criminal Law**  Misconduct of Counsel for Prosecution

**Criminal Law**  Hearing and rehearing in general

A new trial is not automatically required whenever the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict; a finding of materiality of the evidence is required; a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury.

2540 Cases that cite this headnote

[4] **Attorney General**  Bringing and prosecution of actions

**Constitutional Law**  Agreements

**Criminal Law**  Impeaching evidence

If assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process.

2255 Cases that cite this headnote

[5] **Witnesses** ➔ Interest in Event of Witness Not Party to Record

Where Government's case depended almost entirely on testimony of a witness who was named as a coconspirator but was not indicted, and without it there could have been no indictment and no evidence to carry case to jury, such witness' credibility was important issue in case, and evidence of any understanding or agreement as to future prosecution would be relevant to such witness' credibility and jury was entitled to know of it.

1028 Cases that cite this headnote

\*\*764 Syllabus \*

\*150 Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. Held: Neither the Assistant's lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution's duty to present all material evidence to the jury was not fulfilled and constitutes a violation of due process requiring a new trial. Pp. 765—766.

Reversed and remanded.

**Attorneys and Law Firms**

James M. LaRossa, New York City, for petitioner.

Harry R. Sachse, New Orleans, La., for respondent.

**Opinion**

Mr. Chief Justice BURGER delivered the opinion of the Court.

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was

pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government \*151 had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge \$2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and petitioner was indicted; thereafter, he was named as a coconspirator with petitioner but was not indicted.

Trial commenced two years after indictment. Taliento testified, identifying petitioner as the instigator of the \*\*765 scheme. Defense counsel vigorously cross-examined, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency:

'(Counsel.) Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

'(Taliento.) Nobody told me I wouldn't be prosecuted.

'Q. They told you you might not be prosecuted?

'A. I believe I still could be prosecuted.

\*152 'Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

'A. Not at that particular time.

'Q. To this date, have you been charged with any crime?

'A. Not that I know of, unless they are still going to prosecute.'

In summation, the Government attorney stated, '(Taliento) received no promises that he would not be indicted.'

The issue now before the Court arose on petitioner's motion for new trial based on newly discovered evidence. An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola,<sup>1</sup> that if he testified before the grand jury and at trial he would not be prosecuted.<sup>2</sup> DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to Taliento.<sup>3</sup> The United States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted.<sup>4</sup>

The District Court did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys, DiPaola and Golden, but proceeded on the theory that even if a promise had been made by DiPaola it was not authorized and its disclosure to the jury would not have affected its verdict. We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney—the first one who dealt with Taliento—now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

\*\*766 [1] [2] [3] As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, '(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id.*, at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American

\*154 Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . .' *United States v. Keogh*, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra*, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' *Napue, supra*, at 271, 79 S.Ct., at 1178.

[4] In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency s 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial s 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

[5] Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore \*155 an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due process requirements enunciated in Napue and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

[All Citations](#)

405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104

Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 During oral argument in this Court it was stated that DiPaola was on the staff of the United States Attorney when he made the affidavit in 1969 and remained on that staff until recently.
- 2 DiPaola's affidavit reads, in part, as follows:

'It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted. . . . It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted.'
- 3 Golden's affidavit reads, in part, as follows:

'Mr. DiPaola . . . advised that Mr. Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant Giglio.'
- 4 The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

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**Appendix I**  
**(Resource Material: *Brady-Giglio Guide*  
for Prosecutors, American College of  
Trial Lawyers)**



# **Brady-Giglio Guide for Prosecutors**

**Federal Criminal Procedure Committee**

*Approved by the Board of Regents September, 2021*

# American College of Trial Lawyers

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

## Federal Criminal Procedure Committee

*Committee Mandate: To monitor the operations of the Federal Rules of Criminal Procedure and other federal criminal procedural developments generally, to determine the adequacy of the operation of the rules and procedures in federal criminal cases, to evaluate proposed changes, and to make recommendations with regards to these matters.*

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## I. Introduction

The Federal Criminal Procedure Committee of the American College of Trial Lawyers offers this guide for state and federal prosecutors to help them comply with their Brady and Giglio obligations (“Brady/Giglio”) to ensure a fair trial and to help them avoid uncomfortable and unnecessary problems and accusations. This guide is the joint product of experienced prosecutors, former prosecutors, and defense attorneys who serve on the committee, with input from state prosecutors who are College members. It is intended to be used by prosecutors to assist them in identifying and adopting best practices to guard against Brady/Giglio violations.

Any prosecutor who has ever faced an accusation of a Brady/Giglio violation knows the uncomfortable emotions that go along with it. Suddenly it is not the defendant who is on trial but the prosecutor. While the law is clear that a Brady/Giglio issue does not necessarily involve a prosecutor’s good faith,<sup>1</sup> any prosecutor who has ever been accused of violating disclosure obligations knows that their good faith is being challenged. Also, depending upon the violation, a prosecutor may be subject to an internal investigation or a state bar investigation.<sup>2</sup> This guide offers advice on approaching Brady/Giglio issues to minimize failures to make appropriate disclosures and, consequently, to minimize accusations of misconduct. This is good for the prosecutor, fair to the defendant, and crucial for the proper administration of justice.

While some prosecutors have committed intentional Brady/Giglio violations, most violations are unintentional. Instead, they arise from poor management of evidence, a failure to see that a particular bit of evidence might have exculpatory value, or the failure of the investigating agency to provide information to the prosecutor. This guide suggests ways of managing evidence to avoid losing track of it. It also recommends ways of reviewing evidence that make it more likely that prosecutors will appreciate the exculpatory value of evidence and disclose it appropriately.

This guide has three sections. The first discusses intake discovery management (the investigation); the second covers production discovery management (production to the defense); the final section contains a list of items that should trigger specific Giglio concerns for a prosecutor.

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<sup>1</sup> “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request 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.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis supplied).

<sup>2</sup> A prosecutor may be exonerated if his violation was not intentional, but the misery of being the subject of such an investigation is not something to which anyone would willingly submit.

## II. Management of the intake of evidence<sup>3</sup>

### A. Documents

This section addresses practices involved in larger paper cases. Smaller cases may have other issues, some of which are discussed below. However, if one is handling a complex investigation with many documents, logging them in when they arrive, reviewing them, and keeping track of their contents, can be a significant challenge. It is easy to forget a document reviewed at the earliest stages of a long-term investigation. However, such a document may prove to be critical to an investigation, or it may be a crucial piece of exculpatory evidence that must be disclosed. Forgetting about this document, or losing track of it, is a recipe for disaster.

Tracking of documents can be done in many different ways, depending upon the complexity of the case. Less document-intensive cases may warrant only a simple spreadsheet that identifies the document, its location, and the crucial facts that it contains. As long as a prosecutor's notes are good and the spreadsheet is readily searchable, a spreadsheet serves as a tool to keep track of things. It is a good practice to have a column in the spreadsheet to mark if a document contains exculpatory evidence. This spreadsheet will make it easy to locate the document when it is time to produce discovery, especially if discovery is produced months or even years after the initial review. This will also save prosecutors who join the prosecution team later on from having to start document review from scratch and will ensure that previously-identified exculpatory evidence is not lost in a personnel transition. There are also software programs, depending upon the particular office's budget, that can be helpful. CaseMap® is a relational database that allows an attorney to keep track of documents, link them to a case chronology, and tie them to the persons who are the subjects of the investigation. The database can be customized to mark documents that contain discoverable evidence. When it comes time to produce discovery materials, the database will be useful in ensuring that the prosecutor discloses everything that she should. For more extensive collections of data, there are database software programs that incorporate the contents of the documents, keep them in a searchable platform, and permit the prosecutor to take notes to mark them. These notes or tags could include marking documents for discovery. Two examples are Relativity® and Eclipse®.

### B. Other kinds of evidence

Today, many cases involve video evidence from police video cameras mounted on the dashboards of police cars or worn on the officer's uniform. Video evidence can also come from public and private security cameras. Prosecutors need to be sure that they have collected all the relevant videos that the police have. If the case involves a dashcam and a

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<sup>3</sup> We recognize that most prosecutor's offices are small. The recommendations throughout this paper are general, suggesting considerations and practices, but each office will have to consider how to create and adapt practices to meet its own circumstances.

body cam, or body cams of two different officers, prosecutors need to be sure that they have all of them and can keep track of them. There may be other forms of evidence that prosecutors need to keep track of, and these are only examples.

### III. Managing Discovery

#### A. Discovery Standards

Each jurisdiction has its own rules regarding what the prosecution must produce in discovery. In addition, there will always be variations among offices in the same state and with federal prosecutors across districts. Some jurisdictions require open file discovery; others have more restrictive rules. However, discovery practice within the rules is often left to the discretion of the prosecutor. Having a more generous discovery practice can have significant benefits for the prosecution and can avoid some of the disasters that follow the failure to disclose exculpatory evidence. While the prosecutor does not need to have a completely open file, there are many benefits to working with a presumption of discoverability. More generous discovery reduces the chance that the prosecutor will fail to disclose evidence that turns out to be exculpatory. Generous discovery practices at the outset also avoid complaints about late disclosure of evidence. This does not mean that a prosecutor must ignore concerns about security for witnesses or other similar issues. Nor does it mean that a prosecutor needs to turn over work product. When concerns arise about witness security, a prosecutor may decide to delay disclosing certain evidence, seek *in camera* review, or move the court for a protective order. However, working with a presumption of discoverability helps focus a prosecutor's thinking on the real concerns about generous discovery practices – risks of witness or evidence tampering. If there is no good reason not to disclose evidence, making disclosure the norm will have significant benefits for most prosecutors and their cases.<sup>4</sup>

Although the U.S. Department of Justice does not have “open file” discovery, it does encourage broad discovery beyond the requirements of the rules. “Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor’s good faith determination of the scope of appropriate discovery is in error.” (Justice Manual [JM] § 9-5.002)<sup>5</sup>

The Department of Justice also advises prosecutors to turn over exculpatory information, not just evidence. (“Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible

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<sup>4</sup> Another benefit of more generous disclosure is that a prosecutor may be better able to convince the defense that a guilty plea is the best option for the defendant. When a defendant understands the case against him, he is more likely to decide to plead guilty.

<sup>5</sup> <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>

evidence.” JM § 9-5.001.)<sup>6</sup> For federal prosecutors, an example of “information” would be agent reports of witness interviews. Such reports are rarely verbatim transcripts of the witness’s statement. Thus, unless the prosecutor shows the report to the witness and she in some way adopts it, the report is not a statement of that witness under the Jencks Act. (18 U.S.C. § 3500). *Palermo v. United States*, 360 U.S. 343 (1959).<sup>7</sup> The local rules in some districts require production of such reports.

However, that report might be inconsistent with the testimony that the witness gives in court. Turning the report over in advance allows the prosecutor to avoid scrambling mid-trial to review the reports to see if there is some inconsistency. By turning over the report in advance, the prosecutor has disclosed potential impeachment material without having to review it in great detail to determine its impeaching value. “Information” has been disclosed, which the defense can now use to determine its course in the trial. If the report is Giglio material, the prosecutor has met her obligations.<sup>8</sup>

It is fairly easy to manage cases with only a few police reports and other documents. However, it is never safe to assume that a law enforcement agency has provided everything relevant to the case. Law enforcement officers make judgments about matters that they deem irrelevant and often exclude them from reports. While these judgments are often accurate, there are times when officers fail to recognize exculpatory, and even inculpatory, evidence. A prosecutor should consider reviewing documents deemed “non-pertinent” by the agency to ensure that she does not overlook relevant materials when providing discovery.

In cases in which several law enforcement agencies played a role, the prosecutor’s obligation to look for relevant and exculpatory evidence extends to any agency whose role was large enough to make it part of the prosecution team.<sup>9</sup> This is a natural extension of

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<sup>6</sup> <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>

<sup>7</sup> Remember that using an agent’s report to refresh a witness’s recollection before trial may result in mandated production of the report. First, the witness may “otherwise adopt[] or approve[]” (18 U.S.C. § 3500(e)(1)) the agent’s report by telling you that it is an accurate report of what she said. Second, Rule of Evidence 612 gives the court discretion to order the production of any writing used to refresh a witness’s recollection before she testifies and to permit the defense to cross examine the witness about it. (We refer to the Federal Rules of Evidence, because as of this writing all states have evidence codes or guides modeled on the Federal Rules of Evidence, except for California, Kansas, Missouri, and New York. There may be variations between the Federal Rules and the rules of the state in which you practice.).

<sup>8</sup> Some states require the production of all law enforcement reports of testifying witness interviews. In those jurisdictions, this will not be an issue.

<sup>9</sup> A complete discussion of when an agency is part of the prosecution team is beyond the scope of this paper. For some guidance compare *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006) (where state and federal agents have pooled their investigative efforts and formed a team, federal prosecutors charged with constructive knowledge of impeaching information regarding a witness in possession of the state; court looks to whether the party with knowledge is acting on government’s behalf or is under its control,

(Footnote continued on following page)

*Kyles v. Whitley*, 514 U.S. 419 (1995), which makes it clear that prosecutors have “a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”<sup>10</sup> The U.S. Department of Justice provides the following guidance for its prosecutors.” (JM § 9-5.002):<sup>11</sup>

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

#### B. Production standards

Digital evidence can present challenges in production. It is important that prosecutors produce documents in a format that the defense can view. If metadata is important, the prosecutor needs to be aware of that and find ways to ensure its production, too. To the extent possible, digital evidence should be searchable to make defense review easier.

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whether there was a joint investigation, and whether the entity charge with constructive possession has ready access to the information), with *United States v. Reyeros*, 537 F.3d 270 (3d Cir. 2008) (where witness was serving a sentence in Colombia, actions of Colombian government in permitting American law enforcement agents to interview him in Colombia and acting on U.S. extradition request for him did not make the Colombian government part of the prosecution team and there was no constructive possession of information known to the government of Colombia).

<sup>10</sup> *Kyles v. Whitley*, 514 U.S. at 437.

<sup>11</sup> <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>

### C. Using An Evidence-Based Definition of Materiality To Make Brady Decisions

The *Brady* decision requires prosecutors to disclose evidence that “is material either to guilt or to punishment.”<sup>12</sup> In 1963, materiality was a doctrine of evidence – tied to the question of relevance. The distinction between materiality and relevance was a subtle one. The drafters of the Federal Rules of Evidence eliminated the term and embodied the concept of materiality in Rule 401(b) as a “fact of consequence.” A fact of consequence is any fact that is important for deciding the case. It does not have to be an element of the crime. As the Advisory Committee Note explains, “The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.” In 1963, under any standard of materiality, the fact that someone else had done the killing was certainly material to whether Brady deserved to be put to death.

In *United States v. Bagley*, 473 U.S. 667 (1985), the Court shifted the meaning of materiality to mean evidence that could have affected the outcome. As the Second Circuit has recognized, the Supreme Court has shifted the prosecutor’s duty from an easy, evidence-based test of materiality to a difficult result-affecting test. *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001). The Supreme Court in *Kyles v. Whitley* gave some general guidance when it wrote, “This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.” 540 U.S. 419, 439 (1995). However, that hardly provides much guidance at all. *Bagley* and *Kyles* create a nearly impossible standard to apply pretrial. In most cases, it is difficult to say in advance what might affect the outcome of a trial. That revelation often only appears mid-trial. Disclosure then may be too late, and, in any event, it will shift the entire focus to the prosecutor’s failure to disclose earlier instead of the defendant’s conduct.

The safer course is for prosecutors to use evidence-based materiality as the standard. That means examining evidence pretrial and deciding if it has any impact on any issue in the case. In making this decision, a prosecutor should not try to determine the impact of the evidence on the trial’s outcome; the only question is: could the defense use it?<sup>13</sup> In most

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<sup>12</sup> *Brady v. Maryland*, 373 U.S. at 87.

<sup>13</sup> Some courts have mandated this approach:

The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of “materiality” discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether

(Footnote continued on following page)

federal circuits, the prosecutor's disclosure duty is not limited to admissible evidence. For *Brady* purposes, inadmissible evidence may be material if it could have led to the discovery of admissible evidence.<sup>14</sup>

This means that prosecutors need to analyze their evidence in light of the Rules of Evidence and consider the various ways that evidence can be used. For example, affirmatively exculpatory evidence is relevant under Rule 401.<sup>15</sup> However, the law of impeachment must also be considered.<sup>16</sup> Rules 608 and 609 provide methods of impeaching witnesses by using a witness's reputation and prior acts of dishonesty and certain types of convictions. Sometimes Rule 404(b) (evidence of other wrongful acts) may be relevant. For example, in a prosecution for assaulting a police officer or resisting arrest, allegations of prior misconduct by the officer, particularly involving the misuse of force, may be evidence that the defense could present. In addition to the rules themselves, most states continue to permit many common law forms of impeachment, such as prior inconsistent statements<sup>17</sup> and bias, as well as evidence that relates to questions of competence – the ability to observe, recall, and relate. Bias can relate to the particular defendant or to a class to which she belongs. It can also mean bias in favor of the prosecution, as was true in *Giglio*. Witnesses who have hearing and vision problems or drug and alcohol problems may present "competence" questions about their ability to observe, recall, and relate.<sup>18</sup>

Using evidence-based materiality is a more effective means of avoiding *Brady* problems because the focus is not on a harmless error standard. The harmless error standard may be useful to defend a conviction on appeal but is likely to lead to poor choices before

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the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

*United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005).

<sup>14</sup> *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991). *But see Hoke v. Netherland*, 92 F.3d 1350, 1356 n. 3 (4th Cir. 1996); *Jardine v. Dittmann*, 658 F.3d 772, 777 (7th Cir. 2011). In *United States v. Morales*, 746 F.3d 310, 315 (7th Cir. 2014), the court questioned the validity of the *Jardine* rule, but did not reconsider the issue.

<sup>15</sup> This would include evidence that might show that someone else committed the crime. *Kyles v. Whitley*, *supra*; *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (*Brady* violation found where eyewitness described how murder occurred, but the description of the crime by another witness, who made no identification, cast doubt on the factual description of the eyewitness. The evidence from the non-identifying witness suggested that the defendant was not the perpetrator.) *Leka* presents a perfect example of how a prosecutor could view evidence as merely impeaching – a failure to make an identification that only seems relevant if the witness testifies – while it can also be viewed as affirmatively exculpatory.

<sup>16</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>17</sup> *Kyles, supra*, requires disclosure of such evidence.

<sup>18</sup> These issues can involve sensitive questions regarding the personal privacy of a witness. A witness who successfully completed drug rehabilitation is one such example. These may be cases for *in camera* disclosure to the court first. *United States v. Agurs*, 427 U.S. 97 (1975); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). However, prosecutors should be alert to these questions and not ignore them.

trial. Instead, using a forward-looking approach, prosecutors should ask themselves, “could the defense use this evidence?” Remember that disclosing evidence or information does not mean conceding its admissibility. One can disclose facts to the defense and argue against their admissibility before the judge. Not only does this avoid failure to disclose problems, but a judge’s decision to admit evidence is generally reviewed on appeal under an abuse of discretion standard. That is an easier standard to meet than the *Bagley* standard, which inevitably puts a prosecutor’s character on the line.<sup>19</sup>

#### D. Discovery Tracking

If the defense claims that they are seeing evidence for the first time in the middle of trial, how can the prosecutor respond? Having a system that inventories the items produced in discovery can be crucial. This is directly related to the prosecutor’s ability to keep track of evidence as it is collected. If the prosecutor uses a collection system that itemizes everything received, it should not be hard to record everything that has been produced. If this information can be kept in a single file (spreadsheet or a table in a word processing document), then also it is easy to keep track of items that have not been produced. This can be useful in the pretrial phases of a case. As the prosecutor learns more about the defense theories, it will be easy to review what has not been produced and revisit production decisions.

A cover letter with the discovery that enumerates the materials produced (even if only by category) can be useful. It serves as a written record at the time of production of what the prosecutor turned over. Defense claims months later that they never got something are less persuasive if the prosecutor’s cover letter itemized the production and there was no defense complaint about missing items at the time.

If the prosecutor’s office budget permits, digital production has many advantages. Producing all discovery on a single CD or DVD (or a few of them, or in massive cases, on a hard drive) allows the prosecutor to disclose evidence in an organized and searchable format.<sup>20</sup> One benefit of digital discovery is that the prosecutor can make a second copy of the items produced at the same time. This provides a concise record of production.

#### E. An Object Lesson

Two recent opinions in a criminal case illustrate the wisdom of this guidance. In *United States v. Nejad*, 2020 WL 5549931 (S.D.N.Y. September 16, 2020), and 2021 WL

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<sup>19</sup> As discussed above, having a presumption in favor of production obviates the need even to make these relevance assessments.

<sup>20</sup> This means that PDF files should be in OCR (optical character recognition) format. Organized means that the files have some logical organizational structure. This can include all files from a common source in a folder with subfolders, or files of a particular format grouped together. The organization structure will depend upon the case. The beauty of electronic discovery is that the defense can organize it in a different way if they so choose, but they will have received the discovery in a usable format.

681427 (S.D.N.Y. February 22, 2021), prosecutors did not turn over a particular document to the defense until the trial was underway. The investigation had started in the Manhattan District Attorney's Office and was taken over by the U.S. Attorney's Office. One Assistant D.A. was appointed as a Special AUSA to serve on the prosecution team. The DA's office had obtained the document in question, designated as GX 411, early in the investigation, and the ADA reviewed it in March 2015. Four years later, in the run up to trial, the ADA was reviewing files when he came across GX 411 again. He thought it was *inculpatory*, notified the AUSAs with whom he was working, and sent them a copy. The prosecutors decided not to offer it. Five days into the trial, based upon defense cross examination of a witness, the prosecutors decided that they should offer the document. It was then that they realized that they had not produced it and did so. The defense immediately saw GX 411's exculpatory value and objected. The prosecutors apparently did not recognize its exculpatory nature until that moment.<sup>21</sup>

While there is no guarantee that the suggestions above would have prevented this disaster,<sup>22</sup> had the prosecutors logged the document at intake, created an index of discovery production, kept track of what they had not produced, and used a presumption of disclosure, the odds are high that they would have produced it. Furthermore, prosecutors are advocates. All advocates develop tunnel vision – they tend to see the facts through the perspective of their particular side. An evidence-based analysis of materiality for GX 411 (does this document have any bearing on the issues in this case?) rather than a result-based analysis (will the failure to disclose this undermine confidence in any conviction?) may have ensured prompt disclosure.

#### IV. Giglio Checklist

Because every case is different, the items listed here are things that a prosecutor needs to consider. There may be cases in which the prosecutor must disclose such material; there may be other cases in which disclosure is a closer call. The purpose of this section is to alert prosecutors to issues they should consider in making disclosure decisions.

As discussed above, it is vital to consider the many ways to attack the credibility of a witness by reviewing the appropriate rules of evidence. A witness can be impeached in two

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<sup>21</sup> The district court found that the prosecutors did not intentionally withhold the exhibit and that they did not appreciate its exculpatory value. Nevertheless, the opinions convey the judge's level of outrage at the systemic failure of the prosecution. In addition, the judge put the names of the prosecutors in her opinion. If any of these prosecutors is appearing before a judge for the first time, these opinions may well be the initial impression that the judge will have of them. Moreover, if any of them apply for jobs outside the office, any potential employer doing a basic investigation will learn of their conduct in the case.

Not for discussion here, but efforts by the prosecutors to "bury" GX 411 with other documents when they did disclose it are also an object lesson on how the cover up can be as bad as (or worse than) the Brady/Giglio violation.

<sup>22</sup> After the conviction, the government agreed to a new trial and dismissed the indictment with prejudice.

general ways. The first is specific to the case, such as prior inconsistent statements, contradictions, or evidence that the witness could not have observed the matters to which she testifies. The second is not specific to the case but deals with traits of the witness, such as bias, defects of competency (challenges to the ability of the witness to observe, recall, and relate), or a disposition for dishonesty. The first category is easier to spot because it is directly related to the proof of the facts in the case. An eyewitness's failure to make an identification earlier or evidence that the witness was not at the scene are examples that are not hard to identify. Evidence in the second category – traits of the witness not related to the case – range in difficulty from easy to very hard. For the hard ones, the point of this paper is to alert prosecutors to the issues.

#### A. Prior convictions/prior acts of dishonesty

Evidence of prior convictions is the easiest Giglio issue. If the rules of evidence permit impeachment using a particular type of conviction, prosecutors must disclose them. On the other hand, prior acts of dishonesty will always involve questions of judgment. No one expects a prosecutor to ask a witness if he ever lied to his mother and, if so, to catalogue those lies. However, acts of stealing, cheating, and lying may be a proper basis for cross examination in a particular jurisdiction. Even if they are not (compare Federal Rule of Evidence 608(b) with Pennsylvania Rule of Evidence 608(b), which does not permit cross examination about prior acts of dishonesty), knowledge of these facts may allow the defense to search for character witnesses about the witness's reputation for honesty, which would be admissible under Rule 404(a)(3).

#### B. Bias

Bias questions also range from easy to extremely hard. A witness who has a plea agreement has a potential bias to favor the prosecution.<sup>23</sup> Bias can also be inferred from any favors granted by the prosecution to the witness, such as help with a case in another jurisdiction or with a parole board, immunity and non-prosecution agreements, expectations of sentence reductions, consideration concerning asset forfeiture, relocation assistance, and similar benefits offered to a third party who is close to the witness and which act as an inducement to the witness to cooperate.

Cooperating witnesses who have served as informants can present problems. Such witnesses may have worked for more than one law enforcement agency. The "rewards" that they have received can reflect on their biases as witnesses. Every prosecutor should be in the practice of making requests to the law enforcement agency to determine whether the witness worked with other agencies and if so, to learn what benefits those agencies have given the witness.

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<sup>23</sup> *Giglio v. United States*, *supra*

Personal bias against the defendant and racial bias of a witness, when the bias is against the defendant's race, are easy cases. For example, if a witness who freely uses pejorative terms when speaking about someone of a different race or culture testifies against someone from that race or culture, the bias is clear. However, using those pejorative terms can be complicated if the defendant is not a member of the class against which the witness has exhibited such prejudice.

### C. Giglio issues involving law enforcement officers

Many of these issues become more important and more complex when the witness is a law enforcement officer. They are challenging for many reasons. First, prosecutors tend to have a bias in favor of law enforcement. Prosecutors regularly work with law enforcement agencies and need to maintain a good working relationship with them. Second, Giglio issues for law enforcement officers can effectively end their careers by barring them from testifying. For blatant lying in court, such punishment is well-deserved. However, lying in administrative matters or personal issues may present some challenges.<sup>24</sup> What about things that happened a long time ago? Rule 609(b) bars the use of convictions that are more than ten years old. Should there be a similar presumption for Giglio disclosure? Prosecutors who have confronted these issues have found them difficult to navigate. This section is not written to tell prosecutors what to do, but to help prosecutors identify and analyze the problems, each of which is fact-bound. Few have easy answers. Our purpose here is to open more prosecutors' eyes to the problems.

Dishonesty in the line of duty can often present problems. A judge may find that a law enforcement officer is not credible. Such findings can range from a clear statement that the judge disbelieves the officer to the judge finding the testimony of another witness more worthy of belief based upon factors such as the opportunity to observe. These situations require an analysis of the facts of the prior testimony and that court's determination.<sup>25</sup> Difficult issues can also arise with misrepresentations made by a law enforcement officer to superiors. These can range from relatively trivial matters (reporting facts honestly, but miscoding the entry in the system) to serious (lying about the facts of a criminal investigation).<sup>26</sup>

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<sup>24</sup> Issues of dishonesty by a law enforcement officer outside of the line of duty are similar to those of any other witness and probably should be judged by the same standards. Acts of stealing and cheating, as well as lying to one's mother as a child are easy. Dishonesty in other areas, such as with one's spouse, may not be.

<sup>25</sup> The Supreme Court has not disapproved the use of dishonest statements to a suspect during interrogation. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969). Misrepresentations during an investigation are quite different from false testimony in court. The former are probably not Giglio material; the latter clearly are.

<sup>26</sup> These, and other difficult questions, may be the ideal situation for making an *ex parte* disclosure to the court for a ruling as permitted by *United States v. Agurs*, *supra*, and *Pennsylvania v. Ritchie*, *supra*. See footnote 18 above.

In some places, officers who are involved in misconduct are allowed to resign in lieu of discipline. Problems arise when they obtain police work in another jurisdiction, which either has not checked their backgrounds or ignores the prior misconduct. Depending upon the prior misconduct, Giglio issues can lurk in these situations, and learning about them is not easy.

Where police unions are strong, prosecutors also need to consider how to handle cases of police officers whose disciplinary charges have been sustained through the police department only to be overturned in arbitration. If the arbitration system has a history of reversing discipline regardless of the underlying facts, prosecutors might want to take this into account.<sup>27</sup>

Prosecutors' offices should consider establishing procedures for requesting information about allegations of an officer's misconduct that are contained in the employing law enforcement agency's personnel files. The procedures should include the designation of a person to make requests from the law enforcement agencies, standards for review, and general rules regarding circumstances for disclosure.<sup>28</sup> It is helpful to have a single person in each law enforcement agency designated to receive such requests and to be in charge of production. Not only does this allow for a clear chain of responsibility, but it also permits the designated people to develop expertise. In rural counties, prosecutors may know every officer and everything there is to know about them, making the inquiry fairly easy. In most places, this will not be true.

There are several resources one can review for guidance in this area: JM § 9-5.100(5)(c),<sup>29</sup> the Model Policy for Brady Disclosure Requirements of the International Association of Chiefs of Police,<sup>30</sup> Illinois Association of Chiefs of Police Brady Material Disclosure Policy,<sup>31</sup> the Baltimore Police Department Exculpatory Evidence Disclosure Requirements,<sup>32</sup> the Pennsylvania District Attorney's Association Suggested Giglio Protocols for Law Enforcement,<sup>33</sup> the New Jersey Attorney General's Memo on Disclosure of Exculpatory and Impeachment Evidence in Criminal Cases.<sup>34</sup> None of these is perfect. Indeed, some of them may contradict others. Nonetheless, they are helpful to get an idea of various problems and potential resolutions.

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<sup>27</sup> The U.S. Department of Justice position is that "Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information," but it does contain exceptions. See [JM § 9-5.100](#).

<sup>28</sup> The U.S. Department of Justice policy and procedure for this can be found in [JM § 9-5.100](#).

<sup>29</sup> <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings - 9-5.100>

<sup>30</sup> <https://www.theiacp.org/sites/default/files/all/b/BradyPolicy.pdf>

<sup>31</sup> [https://www.ilchiefs.org/assets/docs/draft\\_brady-policy- ILACP\(00366068-5xC010D\).pdf](https://www.ilchiefs.org/assets/docs/draft_brady-policy- ILACP(00366068-5xC010D).pdf)

<sup>32</sup> <https://www.powerdms.com/public/BALTIMOREMD/documents/568218>

<sup>33</sup> <https://www.pdaa.org/wp-content/uploads/2019/12/Giglio-Protocols-PDAA.pdf>

<sup>34</sup> [https://www.nj.gov/oag/dcj/pdfs/policies/LPS\\_Brady-Giglio-Policy\\_June-2019.pdf](https://www.nj.gov/oag/dcj/pdfs/policies/LPS_Brady-Giglio-Policy_June-2019.pdf)

#### D. Other considerations

As discussed above concerning Rule 404(b) (other crimes evidence), when an important issue in the case is the use of force, evidence of the previous misuse of force by an officer is potential Giglio material. This issue could arise in a case involving charges of an assault on an officer or in a hearing in which the defendant claims that the officer coerced a confession by violence or threats of violence.<sup>35</sup>

Issues related to witness competence can present sensitive questions when dealing with any witness and particularly with police officers. Police work is stressful, and anyone who has worked with police knows that alcoholism can be a problem. If these problems can have an impact on an officer's ability to observe or recall, prosecutors face difficult issues balancing the defendant's right to a fair trial with a witness's right to privacy.

#### V. Conclusion

Brady/Giglio issues can be difficult even for prosecutors alert to them. For unaware prosecutors, they are an unmarked minefield. A prosecutor's failure to comply with his or her disclosure obligations undermines the prosecution's cases and is harmful to the administration of justice. The American College of Trial Lawyers hopes that this guide will help prosecutors throughout the United States meet these challenges with integrity.

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<sup>35</sup> New Jersey has recently established a public database of officers accused of abuse of force. <https://www.njoag.gov/force/>. Such a database will eliminate a prosecutor's need to conduct an investigation to find such information. It will also make such information readily available to all defense counsel.

West's Vermont Statutes Annotated  
West's Vermont Court Rules  
Rules of Criminal Procedure  
**IV. Arraignment and Preparation for Trial**

Vermont Rules of Criminal Procedure, Rule 16

**RULE 16. DISCOVERY BY DEFENDANT**

**Currentness**

**(a) Prosecutor's Obligations.** Except as provided in subdivision (d) of this rule for matters not subject to disclosure and in Rule 16.2(d) for protective orders, upon a plea of not guilty the prosecuting attorney shall upon request of the defendant made in writing or in open court at his appearance under Rule 5 or at any time thereafter

(1) Disclose to defendant's attorney as soon as possible the names and addresses of all witnesses then known to him, and permit defendant's attorney to inspect and copy or photograph their relevant written or recorded statements, within the prosecuting attorney's possession or control.

(2) Disclose to defendant's attorney and permit him to inspect and copy or photograph within a reasonable time the following material or information within the prosecuting attorney's possession, custody, or control:

(A) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a co-defendant if the trial is to be a joint one;

(B) the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant;

(C) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(D) any books, papers, documents, photographs (including motion pictures and video tapes), or tangible objects, buildings or places or copies or portions thereof, which are material to the preparation of the defense or which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the defendant;

(E) the names and addresses of all witnesses whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any record of prior criminal convictions of any such witness;

(F) any record of prior criminal convictions of the defendant; and

(G) any other material or information not protected from disclosure under subdivision (d) of this rule that is necessary to the preparation of the defense.

The fact that a witness' name is on a list furnished under subparagraph (2)(E) of this subdivision and that he is not called shall not be commented upon at trial.

If no request is made, the prosecuting attorney shall, at or before the status conference, disclose in writing the foregoing items or state in writing that they do not exist.

**(b) Same: Collateral or Exculpatory Matter.** The prosecuting attorney shall, as soon as possible, after a plea of not guilty,

(1) Inform defendant's attorney,

(A) if he has any relevant material or information which has been provided by an informant;

(B) if there are any grand jury or inquest proceedings which have not been transcribed; and

(C) if there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or of his premises.

(2) Disclose to defendant's attorney any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

**(c) Same: Scope.** The prosecuting attorney's obligations under subdivisions (a) and (b) of this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office.

**(d) Matters Not Subject to Disclosure.**

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the prosecuting attorney, members of his legal staff, or other agents of the prosecution, including investigators and police officers.

(2) *Informants.* Disclosure of an informant's identity shall not be required except as provided in [Rule 509\(c\)](#) of the Vermont Rules of Evidence.

(3) *Victim's Residential Address or Place of Employment.* Disclosure shall not be required of a victim's residential address or place of employment unless the court finds, based upon a preponderance of the evidence, that nondisclosure of the information will prejudice the defendant.

**(e) Videotapes.** A copy of a videotape made of the alleged offense and subsequent processing shall be available for purchase by the defendant directly from the law enforcement agency responsible for initiating the action upon written request and advance payment of a \$45.00 fee, except that no fee shall be charged to a defendant whom the court has determined to be indigent. A municipal or county law enforcement agency shall be entitled to all fees it collects for videotapes sold pursuant to this rule. Fees collected by the state for videotapes sold pursuant to this rule shall be deposited in the DUI enforcement special fund created under section 1220a of Title 23. The original videotape may be erased 90 days after:

- (1) the entry of final judgment; or
- (2) the date the videotape was made, if no civil or criminal action is filed.

#### Credits

[Amended by [1999, Adj. Sess., No. 160](#), § 32, eff. July 1, 2000; [2007, Adj. Sess., No. 153](#), § 2a, eff. July 1, 2008. Amended eff. July 21, 2008. Amended May 10, 2016, eff. July 11, 2016.]

#### Editors' Notes

##### REPORTER'S NOTES--2016 AMENDMENT

New subdivision 16(d)(3) provides that the prosecuting attorney is not required to disclose to the defendant information as to the residential address or place of employment of the victim, unless the court finds, based upon a preponderance of the evidence, that nondisclosure of the information will prejudice the defendant. The amendment serves to implement the provisions of [13 V.S.A. § 5310](#), while expressly reserving the court's authority to order that the state disclose the information where necessary to preserve a defendant's due process and confrontation guarantees. In contrast to Vermont Rule 16, Federal Rule 16 makes no provision for disclosure of the addresses or places of employment of witnesses; the Jencks Act, [18 U.S.C. § 3500](#), provides for disclosure of certain prior statements of witnesses to the defendant after they have testified, for purposes of cross-examination.

##### REPORTER'S NOTES--2008 EMERGENCY AMENDMENT

This emergency amendment to Rule 16(e) is made to conform with an amendment [23 V.S.A. § 1203\(k\)](#). See, 2007, No. 153, (Adj. Sess.), § 2a.

##### REPORTER'S NOTES--1983 AMENDMENT

Rule 16(d)(2) is amended for conformity with [Evidence Rule 509](#) which creates an informant's privilege. The privilege, like the present rule, applies only to matters that are prosecution secrets and does not apply to informants who are to be called as witnesses by the state. The most important exception to the privilege, however, is somewhat broader in scope than the rule, extending under Rule 509(c)(2) to "any issue" in a criminal case. Rule 16(d)(2) was limited to issues where disclosure was compelled by the Constitution--i.e., those essential to the determination of guilt or innocence--or where the informant's identity was itself in issue--e.g., entrapment. See Reporter's Notes to [Evidence Rule 509](#), Criminal Rule 16(d)(2).

##### REPORTER'S NOTES--1982 AMENDMENT

Rule 16(a) is amended as part of the change from the omnibus hearing to the status conference. See Reporter's Notes--1982 Amendments to Rule 12. The rule formerly required the prosecutor to make certain disclosures at the omnibus hearing unless a request is made earlier. It now requires the disclosures to be in writing and to be made at or before the status conference. Oral disclosures formerly were made in response to the omnibus checklist, a practice that has been eliminated with the shift to the status conference.

**REPORTER'S NOTES--1977 AMENDMENT**

This amendment is intended to make clear that the list of items which the defendant may discover under Rule 16(a) is not exclusive. For example, defendant should be able to inquire as to any arrangements between the prosecution and its witnesses or any information about the background of prospective jurors which prosecution investigators may have uncovered. The amendment does not specify the matters that are discoverable, but requires that they be outside the protections for work product and informants contained in Rule 16(d) and that they be "necessary to the defense." If the prosecution wishes to resist disclosure of a particular item under this provision, it should move for a protective order under Rule 16.2(d). On that motion the court will decide the question of necessity. Conversely, the defendant can compel compliance with a request under this provision either by a motion for sanctions under Rule 16.2(g) or by successfully resisting a motion for a protective order. Since the amendment applies to either "material or information," it is in effect similar to the interrogatory procedure of civil Rule 33, without the formality and detail of that rule.

**REPORTER'S NOTES**

This rule must be read with Rules 16.1 and 16.2, which form with it a system of reciprocal discovery. The three rules are in general similar to the ABA Minimum Standards (Discovery and Procedure before Trial) §§ 2.1-4.7 and to the currently proposed amendments to Federal Rule 16, first presented in [January 1970, 48 F.R.D. 553, 587 \(1970\)](#), and transmitted to the Supreme Court with important revisions in November 1972 Proposed Amendments to the Federal Rules of Criminal Procedure (Mimeograph, Admin. Ofc. U.S. Courts, 1972). The rules go further than either source in the breadth of discovery accorded the defendant, however, and extend considerably the defendant's rights under former 13 V.S.A. § 6727, repealed by Act No. 118 of 1973, § 25. The rules also alter Vermont practice significantly by allowing discovery by the prosecution. See Rule 16.1.

Rule 16(a) is based on ABA Minimum Standards § 2.1(a). It provides for disclosure to the defendant of stated matters upon request, which may be made in writing or orally in open court at any time. Under the last sentence of the subdivision, if no request is made, the prosecutor must in any event disclose the items, or state that they do not exist, at the omnibus hearing. The request procedure, adapted from the proposed Federal Rule, is designed to avoid loss of time in needless motions. At the same time the prosecutor is relieved at the burden of automatic disclosure, unnecessary in many routine cases, that ABA Minimum Standards § 2.2 requires. If the prosecution wishes to oppose or limit disclosure, its remedy is a motion for a protective order under Rule 16.2(d). This self-operating feature of discovery practice under the rules, like the deposition procedure under Rule 15(a), is similar to civil practice, where it has worked effectively. See Reporter's Notes to Rule 15(a). Cf. ABA Minimum Standards § 2.2, Commentary.

Rule 16(a)(1), requiring disclosure of all witnesses known to the prosecution and access to their statements, whether the witnesses are to be used at trial or not, is broader than either ABA Minimum Standards § 2.1 or the proposed Federal Rule. The Vermont rule in effect makes available to the defendant the prosecution's full investigative resources on the theory that justice is best served and speedy disposition of cases is encouraged if both sides have equal access to sources of potential evidence. Because knowledge of the existence of witnesses is essential in the preparation of defendant's case this disclosure must be made "as soon as possible" after request, rather than "within a reasonable time," as is provided for disclosures under Rule 16(a)(2). The breadth of disclosure required under this rule is, of course, subject to the limitations as to work product and informants provided by Rule 16(d). The prosecution may resist disclosure on such grounds by motion for protective order under Rule 16.2(d). Although disclosure under Rule 16(a)(1) is required only upon request, the obligation of the prosecution to reveal the existence of informant's evidence and to disclose exculpatory evidence without request under Rule 16(b) will, where applicable, supersede the procedure of Rule 16(a)(1).

The items enumerated in Rule 16(a)(2) are essentially those as to which disclosure is required under ABA Minimum Standards § 2.1(a). See Commentary to that section. The provision of subparagraph (A) for inspection of codefendants' statements goes beyond the discovery allowed under former 13 V.S.A. § 6727, *supra*. See [State v. Anair, 123 Vt. 80, 181 A.2d 61 \(1962\)](#). Such

disclosure is desirable to give defendant advance notice of possible grounds for severance in a joint trial situation under Rule 14(b)(2)(B). See Reporter's Notes to that rule and ABA Minimum Standards § 2.1(a)(ii), Commentary.

Subparagraph (B) goes beyond ABA Minimum Standards § 2.1(a)(iii), which requires disclosure only of the defendant's own grand jury testimony and relevant testimony of witnesses to be called at trial. Proposed [Federal Rules 16\(a\)\(1\)\(A\), \(3\)](#), apply only to testimony of the defendant and officers of a corporate defendant, except as further disclosure may be permitted under Federal Rule 6(e). Cf. Reporter's Notes to Rule 6. The Vermont rule is also a significant departure from prior Vermont practice under which disclosure of grand jury and inquest testimony was allowed in the court's discretion only upon a showing of genuine need. See [State v. Alexander](#), 130 Vt. 54, 286 A.2d 262 (1971); [State v. Oakes](#), 129 Vt. 241, 276 A.2d 18, cert. denied [404 U.S. 965](#) [92 S.Ct. 340] (1971); [State v. Miner](#), 128 Vt. 55, 258 A.2d 815 (1969). The complete disclosure required under the rule is intended to equalize the investigative advantage which the grand jury and inquest procedures give the prosecution and to eliminate time-consuming disputes over questions of relevance and need. The prosecution must seek a protective order if disclosure will imperil the secrecy of the grand jury or inquest.

Subparagraphs (C)-(F) require disclosure that would presumably have been permissible under former 13 V.S.A. § 6727, *supra*. See [State v. Miner](#), *supra*, 128 Vt. at 71-73 [258 A.2d at 824-26]. Those provisions all are consistent with the general goal of equalizing investigative advantages and eliminating surprise at trial, and all are of course subject to the prosecution's right to a protective order. See ABA Minimum Standards § 2.1(a)(i), (iv)-(vi), Commentary. Proposed Federal Rule 16(a)(1)(B)-(E) provides for similar disclosure. The requirement of subparagraph (E) that witnesses to be used at trial be disclosed must be complied with even after a general disclosure of witnesses is made under Rule 16(a)(1). Disclosure of trial witnesses is an aid in planning trial strategy. The broader disclosure is for investigative purposes. Statements of trial witnesses are not specifically referred to in subparagraph (E), but such statements either will have been made available under Rule 16(a)(1) or must be disclosed under the continuing duty to implement that rule imposed by Rule 16.2(b). The provision prohibiting comment on the prosecution's failure to call a listed witness is intended to protect the prosecution from an unfair implication that might be drawn from a tactical step. The prohibition is only against commenting upon the fact that the witness was previously listed; it does not bar comment generally upon the prosecution's failure to call the witness. See Federal Advisory Committee's Note, [48 F.R.D. 553](#), 606.

Rule 16(b) is taken from ABA Minimum Standards § 2.1(b), (c). It imposes an absolute obligation upon the prosecution to disclose matters pertaining to certain collateral procedural and constitutional issues susceptible of preliminary determination, as well as exculpatory matters. The provision as to informants in subparagraph (A) was eliminated in an amendment to ABA Minimum Standards § 2.1(b) (Supp.1970) on the theory that the point was adequately covered by the provision for exculpatory matter and by other procedural devices. The informant clause has been retained in the rule, however, because of issues, such as search and seizure, to which such matter may pertain, that are not strictly speaking within the exculpatory clause, and because of the desirability of giving the defendant prompt access to matter pertaining to preliminary issues. Subparagraph (B) implements Rule 16(a)(2)(B) by making routine transcription of grand jury and inquest proceedings unnecessary. If fully apprised of the contents of such proceedings, defendant presumably will not request transcripts of no value to him. Rule 16(b)(2) is intended to implement the constitutional requirement of disclosure of exculpatory material imposed by [Brady v. Maryland](#), 373 U.S. 83 [83 S.Ct. 1194] (1963). See ABA Minimum Standards § 2.1(c), Commentary.

Rule 16(c), taken from ABA Minimum Standards § 2.1(d), makes clear that the prosecution's obligations extend not only to material in the hands of the prosecutor's immediate staff but to that possessed or controlled by others, such as police officers, involved in the investigation of the case under the prosecutor's direction. Excluded from the obligations of Rule 16 are employees or officers of other governmental agencies who may be involved with the matter in question but have no working connection with the prosecution. Although the rules do not require it, as a matter of good practice prosecutors should follow the guidelines of ABA Minimum Standards § 2.4 in seeking to make available upon defendant's request material that is under the control of other agencies of the State. If the prosecution fails in such efforts, the defendant has available the subpoena duces tecum under Rule 17(c) to compel production of such material. See Reporter's Notes to Rule 17(c).

The standard of “possession, custody or control” found in Rule 16(a) is further defined by Rule 16(c). The same language in Federal Rule 16 and Civil Rule 34 may be looked to for interpretive guidance. “Control” should be so construed that the prosecution will not be able to avoid discovery by declining possession or custody of material which normally should be in its files. Moreover, although the rule does not contain the language of Federal Rule 16(a), which applies to matter “the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government,” such a due diligence requirement should be read into the rule, consistent with the continuing duty to disclose imposed by Rule 16.2(b). The better practice is that delineated in ABA Minimum Standards § 2.2(c): “The prosecuting Attorney should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged.” See *id.*, Commentary.

Rule 16(d) is taken from ABA Minimum Standards § 2.6(a), (b). Objections to disclosure based upon it should be made by motion for protective order under Rule 16.2(d). Rule 16(d)(1) is similar in language and effect to Civil Rule 26(b)(3). The limitation in the rule to work product provides a narrower protection than that accorded government agents under Federal Rule 16(a). The Vermont rule is more protective than ABA Minimum Standards § 2.6(a), however. That section only covers members of the prosecutor's “legal staff.” In view of the broad protection accorded by the rule, the courts should interpret “mental impressions, conclusions, opinions, or legal theories” narrowly to achieve the basic purpose of the rule to protect the adversary process from intrusion. See ABA Minimum Standards § 2.6(a), Commentary. Such a narrow interpretation is particularly called for where reports of nonlawyers are involved, if the general purpose of Rule 16 to give the defendant access to the basic information concerning the case in the prosecution's hands is not to be defeated. Of course, even the work product exception may give way where there is a constitutional duty to disclose, as in the case of exculpatory matter. See discussion of Rule 16(b)(2) above. Where a work product objection is legitimately made, its impact upon the defendant's right of access may be limited by the excision of the challenged matter under Rule 16.2(e).

Rule 16(d)(2) bars disclosure of an informer's identity over prosecution objection unless constitutionally compelled, unless shown by the defendant to be a fact essential to a defense such as entrapment, or unless the informer's identity will in any event be revealed by his testifying at trial. The essential-fact exception may also express a constitutional compulsion. See *Roviaro v. United States*, 353 U.S. 53 [77 S.Ct. 623] (1957). Revelation may also be constitutionally compelled when the basis of an arrest or search is challenged on Fourth Amendment grounds and there is doubt as to the credibility of the affiant or the informant. See *McCray v. Illinois*, 386 U.S. 300 [87 S.Ct. 1056] (1967); *People v. Verrecchio*, 23 N.Y.2d 489, [297 N.Y.S.2d 573] 245 N.E.2d 222 (1969).

Rules Crim. Proc., Rule 16, VT R RCRP Rule 16

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[Rules of Criminal Procedure](#)

[IV. Arraignment and Preparation for Trial](#)

Vermont Rules of Criminal Procedure, Rule 16.2

**RULE 16.2. REGULATION OF DISCOVERY**

[Currentness](#)

**(a) Investigations Not To Be Impeded.** Except as is otherwise provided as to matters not subject to disclosure and protective orders, neither the attorneys for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

**(b) Continuing Duty To Disclose.** If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or that party's attorney of the existence of such additional material, and if the additional material or information is discovered during the trial, the court shall also be notified.

**(c) Custody of Materials.** Any materials furnished to an attorney pursuant to these rules shall be used only for the purposes relating to the preparation and trial of the case, and shall be subject to such other terms and conditions as the court may provide.

**(d) Protective Orders.** Upon a showing of cause, the court may at any time order that specified disclosures be denied, restricted, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's attorney to make beneficial use thereof.

**(e) Excision.** When some parts of certain material are discoverable under these rules, and other parts are not discoverable, the nondiscoverable parts may be excised by order under subdivision (d) of this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the Supreme Court in the event of an appeal.

**(f) In Camera Proceedings.** Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the Supreme Court in the event of an appeal.

**(g) Sanctions.**

(1) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery

of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel of an applicable discovery rule or order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

**Credits**

[Amended March 12, 2013, eff. May 13, 2013.]

**Editors' Notes**

**REPORTER'S NOTES--2013 AMENDMENT**

Subsection (c) is amended to remove the limitation that materials furnished pursuant to these rules remain in the attorney's exclusive custody and control. An attorney may disclose such materials to third parties as long as such disclosure is in furtherance of the preparation of the defense. Under subsection (d) of this rule, the prosecution may seek a protective order for good cause as to any materials whose disclosure to or possession by third parties would create a risk of harm to other persons, other prosecutions or the public. As provided for in Rule 54, a pro se defendant is treated as an attorney for purposes of receiving discovery and complying with discovery restrictions.

This amendment follows the revision to the ABA Standards for Criminal Justice Discovery, Third Edition. Former ABA Standard 4.3 has been replaced by Standard 11-6.4, which is consistent with this amendment. The court retains authority under subsection (d) to limit disclosure of material produced in discovery or to authorize broader disclosure as may be requested.

**REPORTER'S NOTES**

This rule is taken from ABA Minimum Standards §§ 4.1-4.7. It is in general similar to [Federal Rule 16 and the January 1970 proposed amendments thereto, 48 F.R.D. 553, 587 \(1970\)](#), submitted to the Supreme Court in November 1972 Proposed Amendments to the Federal Rules (Mimeograph, Admin. Ofc. U.S. Courts, 1972). The rule has no precise equivalent in prior Vermont law, although many of its provisions were probably within the inherent power of the Vermont courts in their application of [13 V.S.A. § 6727](#), repealed by Act No. 118 of 1973, § 25. See [State v. Miner, 128 Vt. 55, 72-73, 258 A.2d 815, 825-26 \(1969\)](#).

Rule 16.2(a), taken from ABA Minimum Standards § 4.1, is primarily hortatory in nature but it is enforceable against counsel under Rule 16.2(g)(2) and as a matter of professional responsibility. See ABA Code of Professional Responsibility, rules 7-104, 7-109. A warning to defense witnesses to consult with prosecution personnel only as provided in Rule 16.1(c) should be considered an exception to this provision.

Rule 16.2(b), taken from ABA Minimum Standards § 4.2, is similar to Federal Rule 16(g) [Rule 16(c) in November 1972 Proposed Amendments, *supra*]. See also Civil Rule 26(e). The continuing duty to disclose applies to any matter required to be disclosed by any provision of Rules 16 and 16.1. The duty operates automatically in order to minimize paperwork and hearings. Failure to comply with the duty may be remedied under Rule 16.2(g).

Rule 16.2(c), taken from ABA Minimum Standards § 4.3, is intended primarily to assure prosecutors that defense counsel will not make improper use of materials furnished to them pursuant to these rules. The rule also applies to prosecutors, however. See ABA Minimum Standards § 4.3, Commentary.

Rule 16.2(d), taken from ABA Minimum Standards § 4.4, is similar to Federal Rule 16(e) [Rule 16(d)(1) in November 1972 Proposed Amendments, *supra*]. The provision is critical to the operation of the discovery rules, because all disclosures under Rules 16 and 16.1 should be made as specified in those rules without court intervention unless the disclosing party moves for

a protective order. This is in sharp contrast to practice under [13 V.S.A. § 6727](#), repealed by Act No. 118 of 1973, § 25, which required a court order for any discovery and which permitted the court to include any necessary protective provisions in its order.

The grounds for limitation of discovery will frequently be violations of constitutional right, evidentiary privilege, or provisions of these rules limiting disclosure, discussed in the Reporter's Notes to Rules 16 and 16.1. Rule 16.2(d) may also apply, however, where a disclosure would result in intimidation of or harm to witnesses, would thwart a continuing investigation being carried on by the prosecution, or would lead to expense that would be unnecessary if no trial were held. The final proviso requiring disclosure in time for beneficial use is meant to convey a flexible power to the court to adjust the time of discovery to accommodate such situations. See ABA Minimum Standards § 4.4, Commentary. That proviso does not apply where the ground of the protective order is a constitutional or other right, the result of which is that the opposing party is not "entitled" to the disclosure sought. Similarly, disclosures may be absolutely denied where discovery requests are plainly intended to harass a party or burden him with completely unnecessary expense. Cf. Civil Rule 26(c). Note that, as in the Civil Rule, a protective order may be sought on behalf of a nonparty whose rights or interests are invaded by a proposed disclosure. See ABA Minimum Standards § 4.4, Commentary. Protective orders under Rule 16.2(d) should be carefully drawn to allow the maximum disclosure consistent with the interest sought to be protected. For this purpose excision under Rule 16.2(e) and in camera proceedings under Rule 16.2(f) should be relied upon.

Rule 16.2(e) is based on ABA Minimum Standards § 4.5 and is similar to a provision of the federal Jencks Act, [18 U.S.C. § 3500\(c\)](#), permitting excision of portions of a witness' prior statements. The rule should be applied in accordance with guidelines suggested in the Standards and omitted from the rule for drafting reasons. Section 4.5 provides that when some portions of certain material are not discoverable, "as much of the materials should be disclosed as is consistent with the standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole." Excision on grounds of constitutional or other right ordinarily should be sought in proceedings for a protective order under Rule 16.2(d). The materials to be excised may be presented to the court for in camera inspection under Rule 16.2(f). While this is the better practice, the rules permit a disclosing party to excise matter on his own without court order under this subdivision, a practice that might be followed where it is likely that the excision will not be contested. The disclosing party in such a case should describe the excised portions in a statement accompanying his disclosure, so that the other party may move for an order compelling disclosure of some or all of the excised matter under Rule 16.2(g)(1). Failure to supply such a descriptive statement would subject the disclosing party or his counsel to more serious sanctions under Rule 16.2(g)(1) or (2).

Rule 16.2(f) is taken from ABA Minimum Standards § 4.6 and is similar to Federal Rule 16(e) [Rule 16(d)(1) in November 1972 Proposed Amendments, *supra*]. The provision is an essential aid in implementing the protective order and excision provisions of Rule 16.2(d), (e). See, generally, ABA Minimum Standards § 4.6, Commentary.

Rule 16.2(g) is taken from ABA Minimum Standards § 4.7 and is similar to Federal Rule 16(g) [Rule 16(d)(2) in November 1972 Proposed Amendments, *supra*]. The provision in large measure carries forward the discretion as to sanctions recognized by the Vermont court in *State v. Miner*, *supra*. A motion for an order that disclosure be made under Rule 16.2(g)(1) is a means of testing the validity of a refusal to allow automatic disclosure under one of the provisions of Rules 16 and 16.1. Such a motion is the equivalent of a motion to allow discovery under [13 V.S.A. § 6727](#), repealed by Act No. 118 of 1973, § 25. Under the rules, however, the disclosing party should ordinarily assume the burden of seeking a protective order under Rule 16.2(d), rather than simply refusing to disclose. Routine or willful refusals should lead to serious sanctions against the party or counsel under Rule 16.2(g)(1) or (2), especially if the ground of refusal is frivolous.

A difficult problem exists as to the appropriateness of other sanctions upon a defendant, whether to be applied because of willful noncompliance with the rules or because of noncompliance with an order to disclose issued under this subdivision. The constitutionality of sanctions was left open in [Williams v. Florida](#), [399 U.S. 78 \[90 S.Ct. 1893\] \(1970\)](#), because the defendant in that case had complied. See Reporter's Notes to Rules 12.1, 16, 16.1. The constitutional problems arise with regard to exclusion of evidence, including testimony, that has not been disclosed and particularly with regard to exclusion of defendant's own testimony. To avoid such problems, the courts should look to expedites such as granting a continuance to permit the prosecution

to have time to meet undisclosed evidence and, in an extreme case, placing penal sanctions upon counsel. Only where such sanctions would be ineffective to give the prosecution a fair trial should the court resort to the exclusion of evidence. In any event, the defendant's own testimony should not be limited or excluded, in order to avoid possible due process questions. See Reporter's Notes to Rule 12.1.

Rules Crim. Proc., Rule 16.2, VT R RCRP Rule 16.2

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Vermont Rules of Professional Conduct, Rule 3.8

**RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

[Currentness](#)

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 unfairly from an unrepresented accused a waiver of important pretrial rights;
- (d) make timely disclosure to the defense of all evidence or information 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, inquest, or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) 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 who are in the employment or under the control of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under [Rule 3.6](#) or this rule.

**Credits**

[Amended June 17, 2009, effective Sept. 1, 2009.]

**Comment**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence. Nor does it forbid appropriate plea negotiations with an unrepresented accused.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

<*The Vermont Rules of Professional Conduct, adopted March 9, 1999, effective September 1, 1999, replace the Vermont Code of Professional Responsibility, and apply to lawyer conduct after September 1, 1999. The Code of Professional Responsibility continues to apply to conduct prior to September 1, 1999.*>

**Editors' Notes**

**REPORTER'S NOTES--2009 AMENDMENT**

V.R.P.C. 3.8 is amended to conform to the changes in the Model Rule while retaining certain variations in the Vermont rule as originally adopted. V.R.P.C. 3.8(c) adds “unfairly” to modify the nature of the prosecutor’s obligation and deletes “such as the right to a preliminary hearing” at the end of the paragraph as inapplicable in Vermont. Language is added in former V.R.P.C. 3.8(e) [now (f)] concerning the prosecutor’s employment of nonlawyer assistants for consistency with Rule 5.3. Former Model Rule 3.8(g) [now (f)], forbidding unnecessary statements that would heighten public condemnation of the accused, was omitted as superfluous. See Reporter’s Notes to V.R.P.C. 3.8 (1999). These variations are carried forward, except that former Model Rule 3.8(g) has been incorporated in V.R.P.C. 3.8(f) both for uniformity with the Model Rules and because it is a salutary provision.

The ABA Reporter’s Explanation of other changes in the rule is as follows:

TEXT:

1. Paragraph (f): Relocate [former] paragraph (e)

The text of [former] paragraph (e) has not been modified but has been moved here to consolidate in a single paragraph the prosecutor’s obligations regarding extrajudicial publicity.

COMMENT:

[1] The Commission recommends deleting the cross-reference to Rule 3.3(d) in the context of grand jury proceedings, on the ground that grand jury proceedings are not ex parte adjudicatory proceedings.

[2] The proposed modifications provide a rationale for the Rule and clarify the distinctions between an unrepresented accused, an accused who is appearing pro se with the approval of the tribunal and an uncharged suspect. No change in substance is intended.

[6] This is a new Comment explaining the material relocated from [former] paragraph (e). It provides that the reasonable-care standard will be satisfied if the prosecutor issues appropriate cautions to law-enforcement personnel and other individuals assisting or associated with the prosecutor but not under the prosecutor’s direct supervision. No change in substance is intended.

Rules Prof. Cond., Rule 3.8, VT R PROF COND Rule 3.8

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RORY T. THIBAULT  
STATE'S ATTORNEY

KRISTIN GOZZI  
SR. DEPUTY STATE'S ATTORNEY

BRIDGET GRACE  
JENNIFER NEYENHOUSE  
ALFONSO VILLEGRAS  
DEPUTY STATE'S ATTORNEYS

**Appendix K**  
*(Resource Material: Washington County Policy Memorandum on the "Assessment, management, and disclosure of exculpatory and impeachment information in criminal prosecutions (with special emphasis on law enforcement).")*



STATE OF VERMONT  
OFFICE OF THE  
WASHINGTON COUNTY STATE'S ATTORNEY

255 NORTH MAIN STREET, SUITE 9  
BARRE, VT 05641-4163  
TELEPHONE: (802) 479-4220  
FAX: (802) 479-4408

SUSAN SABENS  
ELIZABETH HEBERT  
ADMINISTRATION & SUPPORT

HOLLY LEACH  
MELISSA BICKELMAN  
VICTIM ADVOCATES

TODD PROTZMAN  
INVESTIGATOR

### POLICY MEMORANDUM

Assessment, management, and disclosure of exculpatory and impeachment information in criminal prosecutions (with special emphasis on law enforcement)

#### *Purpose*

This policy establishes a framework for the assessment, management, and disclosure of exculpatory and impeachment information in prosecutions handled by the Office of the Washington County State's Attorney. This policy is intended to encourage consistency in practice with the goal of ensuring transparency and fairness in trial processes in accord with statute, rules, and professional responsibility obligations.

Special emphasis is placed on the handling of exculpatory or impeachment material as it relates to law enforcement witnesses, or other agents of the State.<sup>1</sup>

#### *General References*

- U.S. CONST. amend VI
- VT. Const. article 10
- 20 V.S.A. ch. 151
- V.R.Cr.P. 16
- V.R.Prof.Cond. 3.8
- V.R.E. 403
- V.R.E. 404(b)
- V.R.E. 608
- V.R.E. 609
- U.S. Dep't of Justice, Justice Manual (Title 9 – Criminal)

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<sup>1</sup> Nothing in this policy shall excuse the obligation of a prosecuting attorney to exercise due diligence with respect to the disclosure of evidence in a criminal matter, based on the particular circumstances and legal considerations applicable thereto. This guide serves as a starting point for compliance, and is not meant to definitively resolve every situation where disclosure may be required to ensure a fair, just, and transparent process that instills confidence in the integrity of the criminal justice system.

## SECTION I: BACKGROUND & TERMINOLOGY

“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” - Justice William O. Douglas

The modern foundation for disclosure requirements of exculpatory evidence to the defense was established in the 1963 case of *Brady v. Maryland*, 373 U.S. 83 (1963). The United States Supreme Court clearly identified the obligation of prosecutors under the Constitution to provide the defense with favorable evidence that is material either to guilt or to punishment of the accused. Suppression of such evidence constitutes a due process violation.

While *Brady* provided a reasonable foundation for disclosure practice it left many unanswered questions such as providing a legal definition for the terms “suppression,” “favorable,” and “material, as they relate to evidentiary disclosure. *Brady* also focused on exculpatory evidence, not the broader concept of impeachment evidence that must be disclosed. Accordingly, a body of caselaw, referred to as *Brady progeny*, has further specified the Constitutional obligations of prosecutors to disclose both exculpatory and impeachment evidence in the criminal court process.

In *Brady*, the Supreme Court noted:

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.

Nine years later, in *Giglio v. United States*, 405 U.S. 150 (1972), the 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 [the witness’s] credibility falls within th[e] general rule [of *Brady*].

Thus, the now well-known descriptor of *Brady/Giglio* material was born. Generally:

- The term “**Brady material**” refers to evidence or information — other than *Giglio* material — that could be used by a defendant to make his conviction less likely or a lower sentence more likely;
- The term “**Giglio material**” refers to evidence or information that could be used by a defendant to impeach a key government witness.

- The term “***Brady*** violation” applies to situations where:
  - (1) the evidence at issue is favorable to the defendant, either as exculpatory or impeachment evidence;
  - (2) the state has suppressed the evidence, either willfully or inadvertently; and
  - (3) prejudice has ensued.

## DEFINTIONS

**SUPPRESSION:** For *Brady* purposes, it does not matter whether suppression was intentional or inadvertent.

“Under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.” *Strickler v. Greene* 527 U.S. 263 (1999)

**MATERIALITY:** Evidence is material, for *Brady* purposes, if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

“Prosecutors should take a broad view of materiality and err on the side of disclosing exculpatory and impeachment evidence.” *Kyles v. Whitley*, 514 U.S. 419 (1995).

**PREJUDICE:** “To establish the prejudice element the defendant must prove that there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *United States v. Hano*, 922 F.3d 1272 (2019).

**REASONABLE PROBABILITY:** “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667 (1985).

In situations where it is unclear whether disclosure is necessary, “...the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.” - *Cone v. Bell*, 555 US 449 (2009).

In addition to case law, and criminal rules of procedure, V.R.Prof.Cond. 3.8.(d) provides that the prosecutor in a criminal case shall: ...

[M]ake timely disclosure to the defense of all evidence or information 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;

Accordingly, there are both legal and ethical bases upon which prosecutors must disclose exculpatory information to the defense. The ethical basis requires that each prosecutor must exercise his or her own judgment and discretion in determining whether disclosure is necessary. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the

defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

### *Exculpatory Evidence*

Consistent with *Brady*, the term exculpatory evidence includes information that, if true, could demonstrate a defendant's innocence, or less culpability for the crime charged whereby she may be eligible for a lesser sentence. For example: Evidence inconsistent with the defendant's guilt;

- Evidence that negates, or is inconsistent with an element of the crime;
- Failure of a witness of the crime to identify the defendant;
- Information that supports an affirmative defense;
- Information casting doubt on the accuracy of other evidence;
- Information linking another as the perpetrator of the crime; and,
- Information favorable and material to the sentencing phase.

In some cases, these inconsistencies may render a key witness so unreliable as to require dismissal of a case. In other situations, the evidence may be contradicted by other testimony or evidence and will not trigger dismissal or abandonment of the prosecution. Nevertheless, the need to disclose such evidence is critical in circumstances where the case will proceed to disposition by plea agreement or by trial.

### *Impeachment Evidence*

Consistent with *Giglio*, impeachment evidence entails information about a witness that a fact finder may consider in determining the credibility or reliability of a prosecution witness. For example:

- Evidence/information that negates, or is inconsistent with a prosecution witness's statements or reports;
- Plea agreements between a prosecution witness and the prosecution in the immediate or related case;
- Favorable disposition of criminal charges pending against a prosecution witness;
- Offers or promises made or other benefits provided to prosecution witness in exchange for cooperation;
- Prior convictions of the prosecution witness;
- Pending charges against the prosecution witness;
- Evidence or information that a prosecution witness has a racial, religious or personal bias against the defendant—individually or as a member of a group; or,

- Evidence or information that would undermine a prosecution witness's claim of expertise (e.g. previous inaccurate statements or expert opinions.)

*Giglio Material & Law Enforcement Personnel (U.S. Dep't Justice Policy):*

Broadly construed, the Department of Justice has recognized *Giglio* material to include “[a]ny finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding.” Other materials include:

- Any past or pending criminal charge brought against the employee;
- Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
- Prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;
- Information that may be used to suggest that the agency employee is biased for or against a defendant (*See United States v. Abel*, 469 U.S. 45, 52 (1984): “[b]ias 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.”);
- Any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence. Accordingly, agencies and employees should disclose findings or allegations that relate to substantive violations concerning:
- Failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications;
- Failure to comply with agency procedures for supervising the activities of a cooperating person (e.g. CI);
- Failure to follow mandatory protocols with regard to the forensic analysis of evidence;
- Information that reflects that the agency employee's ability to perceive/recall truth is impaired.

*Unprofessional Conduct by Vermont Law Enforcement Officers*

20 V.S.A. ch. 151 provides for the Vermont Law Enforcement Training Council to administer certain investigatory and disciplinary actions with respect to law

enforcement misconduct. 20 V.S.A. § 2401 defines three categories of unprofessional conduct:

- “Category A conduct” means a felony or a misdemeanor that is committed while on duty and did not involve the legitimate performance of duty. Additionally, certain misdemeanor offenses, generally listed offenses, when committed off duty are also construed as Category A conduct (e.g. domestic assault,
- “Category B conduct” means gross professional misconduct amounting to actions on duty or under color of authority, or both, that involve willful failure to comply with a State-required policy or substantial deviation from professional conduct as defined by the law enforcement agency's policy or if not defined by the agency's policy, then as defined by Council policy, such as:
  - (A) sexual harassment involving physical contact or misuse of position;
  - (B) misuse of official position for personal or economic gain;
  - (C) excessive use of force under color of authority, second offense;
  - (D) biased enforcement; or
  - (E) use of electronic criminal records database for personal, political, or economic gain.
- “Category C conduct” means any allegation of misconduct pertaining to Council processes or operations, namely involving making of false statements, interfering with investigations, or failing to investigate covered matters.

## SECTION II: ASSESSMENT & DISCOVERY OF MATERIALS

V.R.Cr.P. 16(b)(2) requires disclosure “to defendant's attorney any material or information within his [or her] possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.” V.R.Cr.P. 16(c) further provides that “[t]he prosecuting attorney's obligations under … this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office.”

Thus, prosecutors are charged with a broad and affirmative responsibility to collect and disclose such information. This requires communication and coordination with law enforcement agencies or laboratories participating in the investigation of the matter under prosecution.

### *Collecting & Assessing Materials*

First, it is critical to appreciate that the existence of exculpatory or impeachment information, especially the latter, does not per se necessitate dismissal or abandonment of a prosecution or use utilization of a witness. To the contrary, such information, taken in conjunction with other facts or evidence, may do little to impact the viability of a case. The particulars of each case will dictate the impact of such information, however, the discovery obligation should never be neglected for fear of consequence on the prosecution. To the contrary, fair and complete disclosure will ensure a fair process and instill confidence in the justice system.

Second, while some exculpatory or impeachment information will be readily apparent (set forth in the affidavit of probable cause, or the witness record checks provided in the due course of discovery), other information may require a directed inquiry or search within agency records. To ensure broad disclosures of potential impeachment information, early disclosure of the entire case file from law enforcement is appropriate, and setting the requirement that local agencies make timely disclosures to the prosecutor when the credibility or truthfulness of a law enforcement officer is in issue. As these agencies fall under the scope of V.R.Cr.P. 16(c), a prosecutor must take steps to discover whether any information exists – thereby necessitating clear communication and expectations with law enforcement agencies.

Third, when collecting information, the investigating agency and other stakeholders (including the Office of the Attorney General or other State's Attorney's offices) may have relevant information that is subject to disclosure. At a minimum, a prosecutor should assess whether any of the following is known by or in the possession of the prosecution team relating to non-law enforcement witnesses and be reviewed for disclosure:

- Statements or reports reflecting witness statement variations, or inconsistent statements;
- Benefits provided to witnesses including: (1) dropped or reduced charges, (2) testimonial or transactional immunity; (3) reductions in sentence for cooperation; (4) other consideration with respect to outcome of pending charges; (5) declination/non-prosecution agreements by state or federal authorities relating to involvement in the matter; (6) letters to other law enforcement officials (e.g. federal prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf; (7) consideration or benefits to culpable or at risk third-parties.
- Other known conditions that could affect the witness's bias such as: (1) animosity toward defendant or a group/protected class of which the defendant is a member or affiliated with; (2) relationship with victim; (3) known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor);
- Prior acts subject to admissibility under V.R.E. 608;
- Prior convictions under V.R.E. 609;
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events (e.g. prior findings of incompetency to stand trial, or prior false reports based on disordered thought or perception).

Statements of witnesses and victims made during the course of trial preparation, or to the non-confidential victim advocates employed within State's Attorneys' offices may prompt disclosures up to and including during trial.<sup>2</sup> Further, statements made after trial that cast doubt on the credibility or reliability of a witness' testimony may also need to be required, thereby prompting further discovery, requests for post-trial relief, or post-conviction relief.

Finally, the disclosure of information for purposes of discovery does not mean that such evidence will actually prove to be useful to a defendant in his or her defense, and even if such information is relevant, generally, it may be excluded from trial based on limited probative value versus the prejudicial effect. Even if a witness is impeached, it does not mean that a fact finder will inherently find the testimony of the witness to be unreliable or incredible on the issue in controversy.

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<sup>2</sup> Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present.

## *Assessing Unsubstantiated Claims/Information*

Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of a witness or law enforcement officer may or may not be considered potential impeachment information. Information which reflects upon the truthfulness or bias of the witness, to the extent known or maintained by the agency, should be disclosed when:

- An allegation was made by a prosecutor, judge, or other public body (e.g. Vermont Law Enforcement Training Council, local oversight committee, select board, etc.);
- When the allegation received publicity; or
- When the prosecutor and agency agree that such disclosure is appropriate, based upon circumstances involving the nature of the case or the role of the agency witness.

Internal affairs processes, collective bargaining agreements, and other agreements in place may limit the extent to which agencies are willing or able to disclose unsubstantiated misconduct or adverse information. Under such circumstances, the use of protective orders or other limitations on the use and public disclosure of such information may be appropriate – thereby ensuring a balance of a defendant’s right to explore defenses and prepare for trial, along with consideration of the privacy and employment rights of law enforcement agency employees.

## *Considering Disclosure beyond that which is Constitutionally Required*

A fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy strongly recommends disclosure by prosecutors of information beyond that which is “material” to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).<sup>3</sup> Accordingly, the following must also be disclosed:

- Information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal;
- Information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a

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<sup>3</sup> The policy recognizes, however, that a trial should not involve the consideration of information which is not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime;

- Unlike the requirements of *Brady* and its progeny, which focus on evidence, information, regardless of whether the information subject to disclosure would itself constitute admissible evidence; and
- Multiple pieces of information, where the cumulative impact of such may satisfy the considerations noted above, including situations where the information viewed in isolation may not reasonably be seen as meeting the standards above.

In summary, prosecutors must engage in the broad assessment of information available and ensure that defendants and their counsel have the opportunity to assess and consider such evidence in preparation of a defense – what may seem incongruous or inconsequential to a prosecutor may be vital to an argument or theory a defendant intends to rely upon at trial: "...the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." - *Cone v. Bell*, 555 US 449 (2009).

### SECTION III. MANAGEMENT & DISCLOSURE OF MATERIALS

Applicable case law does not generally prescribe a specific form by which information is disclosed. The critical element is that the information is received and available to the defendant, through counsel, for preparation of a defense or confrontation of witnesses at trial. Nevertheless, consistency in the handling of disclosures promotes transparency and predictability in the handling of such information.

#### *Timing of Disclosures*

Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.

- **Exculpatory information.** Exculpatory information must be **disclosed reasonably promptly** after it is discovered.
- **Impeachment information.** Impeachment information, which depends on the prosecutor's decision on who is or may be called as a state witness, will typically be **disclosed at a reasonable time before trial** to allow the trial to proceed efficiently.

Other information, relevant to sentencing or the outcome of pretrial motions must also be disclosed in a timely manner that provides fair notice and opportunity of a defendant to conduct his or her own inquiry into such matters. Pretrial scheduling orders or other orders of the court may dictate when such disclosures must be made. As a cardinal rule, earlier is better – ensuring the timely litigation of issues, making of decisions, and in some cases, hastening case disposition.

#### *Contents of Disclosure & Retention of Records*

When information is disclosed pursuant to this policy, the following information should be retained in the case file/docket, and should also be maintained or referenced within the JustWare system of records under the individuals “filing cabinet” tab. This will ensure the availability of information, or at least, reference to the existence of such information by successor State’s Attorneys or other offices in the future. The retained information should include:

- The potential impeachment information itself;
- Written analysis or substantive communications, including legal advice, relating to that disclosure or decision;

- Protective orders relating to the handling or disclosure of the information; and
- Any related pleadings or court orders.

In other circumstances, written legal analysis and substantive communications integral to the analysis, including legal advice relating to the decision, and a summary of the potential impeachment information should be retained with the office's filing system (in hard copy, or electronically). In either circumstance, a clear and accessible system of records should be maintained to ensure the availability of information for future disclosure. The files should be routinely updated and actively managed.

Due care must be given to differentiate work product, privileged information, or information that is non-public/protected by court order within such systems. The increased press and public interest in *Brady/Giglio* information and the existence of lists relating thereto, particularly with respect to law enforcement officers, creates a high likelihood of public records requests. Clear and consistent processing and handling of materials will ensure the public interests in records is balanced with the countervailing legal or privacy limitations that are applicable.

For law enforcement witnesses, a general disclosure letter, with other discovery to be produced at a defendant's request through the criminal discovery process may be appropriate to ensure a publicly available records exists, describing the information or conclusions concerning credibility or truthfulness, that does not incorporate information subject to protective orders, or other legal limitations on dissemination.

## SECTION IV. RESPONSES TO LAW ENFORCEMENT UNPROFESSIONAL CONDUCT

The existence of impeachment evidence or issues with credibility carry greater consequence when involving a law enforcement witness. Vermont's criminal justice system relies nearly exclusively on officer affidavits to enable the court's finding of probable cause on an information filed by a State's Attorney. Though not technically defunct, the grand jury is seldom used in practice. Thus, the credibility and reliability of law enforcement affidavits is integral to the threshold decision to prosecute, and for the court to find probable cause.

Impeachment evidence, or issues of credibility, relating to law enforcement officers exists in a continuum – from inadvertent or negligent lapses that impact evidence to clearly egregious and intentional behavior such as committing perjury. Some matters will not require disclosure, some will require disclosure only in certain cases or circumstances, and in more extreme settings, disclosure will also be accompanied by a prosecutor's decision that an officer should not testify or serve as an affiant because of potential impeachment information.

### *Assessing Deceptive or Untruthful Behavior*

Conceptualizing *Brady/Giglio* information among several categories is helpful in gauging the response to and the impact of unprofessional conduct or untruthfulness on criminal cases.

It is up to individual State's Attorneys and prosecutors to assess the severity of actions or omissions by law enforcement officers – taking into account intent, experience, past history, circumstances of the statement or discrepancy between statements, and impact on the rights of a defendant. As discussed in the following sub-section, more severe conduct (i.e. "Conduct of Substantial Concern") will frequently result in non-prosecution decisions, while lesser conduct may result in non-prosecution decisions or limitations/pre-conditions on accepting cases referred for prosecution. Some conduct may or may not result in any limitations beyond making legally or ethically required disclosures, or require no action at all beyond clarification or correction.

### **Conduct of Substantial Concern**

*Intentional or malicious unprofessional conduct by a law enforcement officer that creates a substantial risk of undermining credibility before a tribunal and would cause a reasonable person to doubt the reliability of statements made in other matters.*

This type of unprofessional conduct will frequently result in a State's Attorney's consideration of categorical non-prosecution of cases, or classes of cases, based on substantial doubts of officer integrity and credibility. This is based on a determination that an officer engaged in a purposeful or calculated course of action

to influence a case or criminal matter. Such actions may be directed toward a particular defendant, or designed to protect the officer or another from sanction for substantial errors or deviations from acceptable law enforcement practices. A non-exhaustive list of situations that may be encountered include:

- Criminal conduct resulting in conviction that is fraudulent in nature or constitutes Category A unprofessional conduct as defined under 20 V.S.A. § 4201;
- Deceptive statements or omissions in a formal setting, including testimony, affidavits, incident reports, official statements, or internal affairs investigations;
- Tampering with or fabricating evidence;
- Deliberate failure to report criminal conduct by other officers;
- Willfully making a false statement to another officer on which the other officer relies upon in official setting;
- Repeated, habitual or a pattern of dishonesty, however minor, during internal affairs investigation;
- Persistent dishonesty following *Garrity* warnings or following administrative action;
- Engaging in a pattern of biased enforcement or disparate treatment of any protected class or category of persons defined under 13 V.S.A. § 1458(6); or
- Other deceitful acts that demonstrate disregard for Constitutional rights of others or the laws, policies and standards applicable to the officer's conduct.

### **Conduct of Significant Concern**

*Unprofessional conduct by a law enforcement officer that may be intentional, though not necessarily malicious, that creates a significant risk of undermining credibility before a tribunal and would cause a reasonable person to question the reliability of statements made in other matters.*

While not condoned, this type of dishonesty or behavior may be explained or mitigated when considering the context or circumstances. This type of conduct covers situations where an officer's acts, omissions, or statements are found to be deceptive or untruthful, without clearly corresponding prejudice to a criminal defendant or pending matter. Frequently, these are situations where a law enforcement officer engages in conduct to benefit or protect him or herself, to include concealing administrative or personal conduct that does not directly prejudice or impact a defendant.

- A simple exculpatory 'no' when faced with an allegation of misconduct;
- A deceptive statement made in an effort to conceal minor unintentional misconduct (such as negligent loss of equipment);

- A purely private, off-duty statement intended to deceive another about private matters;
- An isolated dishonest act that occurred years prior (e.g. cheating on a college exam);
- Isolated ‘Administrative Deception’ related to minor employment matters (e.g. a call in sick when not really ill, a misleading claim of unavailability for a shift); or
- Other Category B or C unprofessional conduct as defined under 20 V.S.A. § 4201 that is not otherwise covered under the preceding section.

## **Conduct of Concern**

*Careless or negligent conduct that is not malicious, but nevertheless creates a risk of undermining the credibility of a law enforcement officer, at least in a particular case, and could cause a reasonable person to question the reliability of statements made in other matters.*

Some conduct within this tier may require a *Brady/Giglio* disclosure in the affected case, but may not require persistent disclosure depending on the attendant circumstances. Some of situations may not even provide grounds for impeachment, even if some form of disciplinary or corrective action is imposed. Examples of Tier 3 conduct includes:

- Failure to follow proper procedure or protocol for the handling of evidence or reports, where no prejudice ensues to a defendant;
- Negligence in reporting facts or providing information to the public that later turns out to be false;
- A spontaneous, thoughtless statement made under stressful circumstances that is later recognized as misleading and is corrected;
- Negligence to turn on body worn camera or preserve video of an incident, where there is no intent by the officer to prejudice a defendant or obscure misconduct;
- Mistake of law based on genuine misapprehension or misunderstanding of rule or requirement; or
- Omission of non-substantive information in reports of CAD systems (e.g. failing to check boxes in traffic tickets, or leaving portions of Valcour/Spillman case entry system blank, without an intent to deceive or prejudice a defendant.

Some matters that generally not constituting conduct of concern, includes:

- Investigatory tactics that are deceptive but lawful (e.g. lies/ruses during an interrogation or interview);

- Lies told in jest concerning trivial matters or to spare another's feelings; or
- Nonmaterial exaggerations, boasting or embellishments in descriptions of events or behaviors of others.

Further, minor inconsistencies, variances in recall between statements made close in time to an event (or recorded contemporaneously to an event) with deposition or in court testimony will rarely require disclosure beyond the case at hand.

Prosecutors should be mindful that the human mind and ability to recall is imperfect. Lapses in memory frequently occur and the rules of evidence provide for appropriate means to refresh recollection. As noted above, a consistent pattern of memory lapses or inability to recall may be problematic, but infrequent gaps of memory are common. Some factors to consider concerning credibility include:

- The circumstances under which the statement is made, e.g. was it made under intense pressure or a situation where the stress or excitement of situation influenced perception? Traumatic situations such as officer involved shootings, response to an active shooter situation, or circumstances where an officer is assaulted may all trigger a heightened stress response that impacts immediate recall and perception. Memories or perceptions may be different upon reflection or when away from the stress inducing situation.
- Are present perceptions different from initial ones based on the presentation of new information, e.g. an officer believed an offender was wearing a black shirt, but upon seeing the shirt in evidence acknowledges it was actually blue.
- Whether there acknowledgement of a flawed perception at the time of the event or incident, e.g. after reviewing body camera footage acknowledging that he or she did not notice something or misapprehended information initially reported.
- Whether the officer made an effort to correct the record, or acknowledged the error made, e.g. swearing to an affidavit that states a traffic stop was at the wrong mile marker or in the wrong town.

These lists are non-exhaustive, and are provided for explanatory purposes only.

#### *Declination of Cases & de Facto Disqualification of Officers as Witnesses*

Among the decisions a State's Attorney must make when considering and responding to law enforcement misconduct or unprofessional conduct is whether to take action beyond the disclosure of the matter. Dismissal of charges may be an appropriate and necessary remedy in some cases, but the more challenging decision is whether to take action with respect to the law enforcement officer him or herself.

In extreme situations, criminal investigation and prosecution may be appropriate. However, the purpose of this policy is not to prescribe or predict the potential criminal justice response to such issues. Rather, this policy addresses the relevant considerations and process to make decisions of whether to decline cases submitted by a law enforcement officer on the basis of unprofessional conduct or credibility issues. A range of options is available:

- Total declination all cases, resulting in functional disqualification of law enforcement officer (frequently when there is “conduct of substantial concern”);
- Declination of certain cases or classes of cases referred for prosecution by a law enforcement officer;
- Imposition of requirements for supplemental/additional review prior to filing by supervisory officers or prosecutors, or production of body worn camera footage or other materials prior to filing to allow for full prosecutorial review; or
- General practice of case-by-case prosecutorial discretion, with disclosures made as appropriate with legal and ethical standards.

The decision to categorically decline cases should not be reached in an arbitrary or capricious manner, rather, substantial evidence or investigation, and careful analysis, should underlie such a decision. Prosecutors enjoy immunity in terms of decision making in this regard, however, law enforcement agencies or municipalities may face employment law challenges. *See e.g., Hubacz v. Vill. of Waterbury*, 207 Vt. 399, 413 (2018) (termination “requires a finding that the officer in question cannot fulfill the duties associated with his employment and cannot be reassigned in such a way as to accommodate the nonprosecution decision.”). A number of considerations should guide the response, beyond making legal or ethically required disclosures in pending matters. These considerations include, but are not limited to:

- Impact of impeachment material, particularly admissible evidence, on trial proceedings;
- Impact, if any, of public confidence and trust in the criminal justice system based on continued reliance of a law enforcement officer who has engaged in unprofessional conduct or is subject to a continuing disclosure under V.R.Cr.P. 16;
- Whether the deficiency or behavior lends itself to rehabilitation;
- Whether risk of future unprofessional conduct may be mitigated through use of body worn cameras, heightened supervisory review, or other measures to reduce or eliminate the risk of impeachment at trial or pretrial proceedings;
- Age, experience, level of training/certification, and past performance of the law enforcement officer compared with the nature/extent of the unprofessional or deceptive conduct; and

- Impact of decertification proceedings, other actions by the Vermont Law Enforcement Training Council, or internal affairs/employment response by the law enforcement officer's agency.

Non-prosecution decisions or other limitations on acceptance of a law enforcement officers cases are likely to trigger significant interest from media, oversight organizations, and local municipal governments. Ensuring a clear and concise rationale for the decision to non-prosecute or limit acceptance of case referrals for a law enforcement officer should be maintained. The decision to disqualify or refuse acceptance of a law enforcement officers cases is reserved to the State's Attorney.

APPROVED March 15, 2021

Encls.

Model Letter – Officer *Brady/Giglio* Material

**APPENDIX A – MODEL BRADY/GIGLIO LETTER (LAW ENFORCEMENT)**

**In re: Trooper John Q. Smith, Vermont State Police**

Dear Counsel:

It has come to my attention that Trooper John Q. Smith, of the Vermont State Police, was the subject of a criminal and an internal affairs investigation.

In reviewing the matter, I concluded that there is credible evidence that Trooper Smith engaged in conduct that risks undermining his credibility before a fact finder, or cause a reasonable person to question the reliability of his statements.

In this case, Trooper Smith improperly claimed sick time and over time on several occasions where he was not in fact ill and did not actually respond to after hours calls for service. Criminal charges were not pursued, however, the Vermont State Police took administrative actions in response to this incident. I concluded that this conduct creates a cognizable basis to challenge the credibility and accuracy of representations made by Trooper Smith.

Although there is no evidence to suggest that Trooper Smith's reports filed in your client's cases are not accurate, this information is disclosed consistent with the State's Constitutional and ethical requirements, including V.R.Cr.P. 16(a)(2)(G) and (b)(2) to ensure awareness of this matter for purposes of discovery planning and disposition of pending cases where Trooper Smith was the investigating officer. Thank you.

*Letters should include: (1) a brief introduction; (2) a characterization of the investigation and reference to the appropriate description of conduct, with explanation; (3) a short summary of the substantive facts/basis of impeachment; and (4) a conclusion that notes rationale for the disclosure and whether there is indication that the law enforcement officer's reports are inaccurate or compromised.*

*The final paragraph may also be used to indicate other actions (e.g. "Based on this information other matters Trooper Smith investigated have been dismissed" or "based on this information, my office has declined to prosecute future matters referred by Trooper Smith.") Additionally, pertinent documents or reports critical to discovery should be included as enclosures to such letter.*



Glenn R. Milner, Esq.

John S. Krupski, Esq.

Marc G. Beaudoin, Esq.

### **VERMONT TROOPERS ASSOCIATION**

November 4, 2022

#### **Brady/Giglio List**

1. A Brady/Giglio issue is ultimately for the judiciary to decide because it is an evidentiary issue. A simple way to review Brady/Giglio issues is to submit the personnel file and/or internal investigation to the Court for an in-camera review. A judge can then review the applicable documents and then make a determination if the misconduct is severe enough to impact the police officer's general credibility. For the purposes of inclusion in a Brady/Giglio database ("database"), a police officer's general credibility would be impacted if the misconduct would be considered exculpatory evidence in most criminal cases that he/she would testify at as a police officer. For those minor misconduct issues that do not rise to the level of affecting a police officer's general credibility, but may be potentially exculpatory in few, if any, specific criminal cases, the prosecutor could still provide the information to the court if he/she believes that the misconduct rises to exculpatory evidence in that specific case<sup>1</sup>.

However, in the alternative, the appropriate department or agency to manage and administer a Brady/Giglio database should be neutral and impartial. For economical purposes, the agency should already have a hearing/appeals board in place, which could be used to adjudicate a Brady/Giglio complaint. This board would not be retrying the underlying misconduct. Its sole purpose would be to determine if the misconduct/incident meets the pre-established criteria that would necessitate the inclusion of the police officer's name in the database.

An ideal hearings board would consist of: (1) a neutral member (usually an attorney); (2) a member of management (Chief, Command Staff Member, or civilian member); (3) a member of labor (Union President, Labor Attorney, civilian). Suggested agencies that may be ideal to review Brady/Giglio complaints

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<sup>1</sup> In this instance, the police officer's name would not be included in the Brady/Giglio database.

and maintain the database are the Vermont Secretary of State's Office and the Office of Professional Conduct.

2. The type and scope of information maintained in the database should include: (1) the name of the police officer; (2) the law enforcement agency; (3) the date of the Brandy/Giglio incident and/or the date of inclusion in the database; (4) a brief summary of the incident, which should be no longer than a sentence<sup>2</sup>. The information in the database would all be available to the public, but any further information<sup>3</sup> would be confidential pursuant to any applicable rules and/or statutes.
3. We recommend the following gatekeeping functions used to review information before it is entered into the database. Entry of a police officer's name in the database would only occur after the police officer has exhausted all his/her administrative and appellate rights. While the police officer is exercising his/her administrative and/or appellate rights, then his/her name would not be available in the public database. The police officer should also be notified that his/her name is being added to the database.
4. The following due process procedures should be utilized when considering the inclusion of a police officer's name in the database. For example, the law enforcement agency either receives a complaint or generates a complaint on a police officer for alleged violations of policies, rules, and/or laws. The agency investigates the allegations, and the investigator makes a recommendation to the head of the agency on whether the complaint is sustained, not sustained, exonerated, or unfounded. If the complaint is sustained, the officer is to be notified, and the officer should be notified if any of the sustained allegations are potentially Brady/Giglio, which may necessitate the placement of the police officer's name in the database.

The police officer is then afforded the opportunity to meet with the head of the agency<sup>4</sup> to provide an argument and/or evidence as to why the allegation should not be sustained and his/her name should not be included in the database. If the head of the agency sustains the allegations in the complaint and recommends that the police officer's name should be included in the database, then the police officer may challenge that determination either through a Town or City's appellate policy or through the discipline procedure as outlined in the collective bargaining agreement.

Once the police officer has exhausted his/her administrative appellate process then he/she could appeal the Brady/Giglio decision to either the court or the appropriate

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<sup>2</sup> The brief summary would be consistent with whatever predetermined placement criteria for the Brady/Giglio database that the police officer violated. This criteria would need to be developed prior to the implementation of a Brady/Giglio database.

<sup>3</sup> Police personnel file and/or internal investigation file.

<sup>4</sup> This meeting is often referred to as a *Loudermill* hearing. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

hearing's examiner/board to determine if the sustained misconduct is the type of misconduct that would necessitate the placement of the officer's name in the database. Once the court or hearing's board makes the determination that the police officer's name should be included in the Brady/Giglio database then the police officer's last form of appeal would be to the Supreme Court.

5. The security and maintenance of the database would be through the State of Vermont. The Vermont Troopers Association takes no position on how the state would accomplish maintaining and securing the database.
6. The Brady/Giglio database would be available to the public. However, a prosecutor could access the underlying police officer's personnel and/or internal investigation file for the sole purposes of reviewing it for trial preparations and/or releasing any exculpatory evidence to the defense pursuant to any applicable federal and state laws.
7. The confidentiality of the information maintained in, or accessed from, the database would be pursuant to current Vermont state law. Therefore, the information as outlined in question #2 would be available to the public. However, the underlying misconduct that would be memorialized in a police officer's personnel file and/or internal investigation file would remain confidential subject to any applicable federal and state laws that would allow for dissemination.
8. As for the resources necessary to effectively administer and maintain the database, we recommend the following: As stated earlier, the database should be administered and maintained by an agency that is neutral and impartial, but also already has the infrastructure to easily incorporate a Brady/Giglio hearing. This would reduce cost, time, and effort, and prevent the proverbial reinventing of the wheel. Whatever agency is ultimately chosen to administer and maintain the database should be adequately funded so as to not cause any further undue burdens on said agency.

It should be noted that the Brady/Giglio database would not be a list of bad police officers. Just because a police officer's name is on the list does not mean that he/she cannot testify in court. This is simply an evidentiary issue, and the fact finder may provide whatever weight to the evidence that he/she/they determine is appropriate.

Furthermore, prosecutors should not be allowed to *nolle prosequi* or dismiss cases for the sole reason that a police officer witness is listed in the database.

It is important to remember that the purpose of a Brady/Giglio database is to provide prosecutors with a way to easily prepare for a criminal trial when they are determining which witnesses will be called forward to testify. Prosecutors still need to do their due diligence in preparing witnesses for trial and for providing exculpatory evidence to the defense pursuant to Brady, Giglio, and its progeny.

There needs to be a balance between the constitutional rights of criminal defendants with the constitutional property rights of police officers. Therefore, a Brady/Giglio database should include only the names of those police officers whose misconduct would be more probable than not to be exculpatory in most criminal cases. Just because a police officer's name is not in the database does not relieve a prosecutor from conducting his/her due diligence when preparing for trial, nor does it mean that a prosecutor could not bring any concerns he/she may have about the testimony of a police officer that is not in the database to the court for an in-camera review.

On a final note, there should also be a mechanism for removal from the database, such examples may include, but are not limited to: a determination made by the court that the misconduct is now stale and is no longer material, relevant, or probative in value; a change in an applicable statute; death of the police officer in the database; and/or any other changes in circumstances that may affect the status of the misconduct and its exculpatory nature.

The law office of Milner & Krupski, PLLC is available to answer any further questions on this matter.

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109 North State Street, Suite 9  
Concord, NH 03301

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Tel. (603) 410-6011  
Fax (603) 505-4652

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