

“BRADY/GIGLIO” BACKGROUND

- In *Brady v. Maryland*,¹ the United States Supreme Court held that the prosecution’s failure to disclose “exculpatory” evidence to a defendant violates the defendant’s constitutional due process rights regardless of whether the prosecution acted in good faith or bad faith: “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.”²
- In *Giglio v. United States*, the United States Supreme Court held that the exculpatory evidence that prosecutors must disclose, per *Brady*, includes “impeachment” information indicating that a witness may not be credible or may be biased.³
- The two cases, *Brady* and *Giglio*, are viewed, in practice, as one doctrine. A reference to “*Brady*” is a reference to “*Giglio*” and vice versa.⁴
- It has become the practice of some prosecutors, in their exercise of discretion concerning their duty to disclose, around the country, including in Vermont, to issue what are sometimes referred to as *Brady/Giglio* letters when they learn of information indicating that a law enforcement officer has acted in a way that calls into question their credibility, which may include impeachment information as well as exculpatory information.⁵
- In Vermont, the discovery obligations established in *Brady* and *Giglio* are fully encapsulated by Rule 3.8 of the Vermont Rules of Professional Conduct⁶ and Rule 16 of the Vermont Rules of Criminal Procedure.⁷
- *Brady/Giglio* material, and the duty to disclose *Brady/Giglio* material, whether in the form of a letter or other means, is not a mechanism to highlight police misconduct publicly – nor is this the purpose of the doctrine. *Brady/Giglio* material, sometimes reduced to the form of a letter, is about a foundational *duty to disclose* information between *the government prosecuting the case* and *the accused*.

¹ V.R.Prof.Cond. 3.8; V.R.Cr.P. 16; *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

² *Brady v. Maryland*, 373 U.S. 83 (1963).

³ The legal principles established in *Brady* have expanded over the years in subsequent cases, most notably in *Giglio v. United States*, where the United States Supreme Court extended *Brady* to include the responsibility to disclose information that could impeach a witness.

⁴ In a strict reading, the term “*Brady* material” refers to *exculpatory* evidence or information that a defendant could use to make his conviction less likely or a lower sentence more likely. The term “*Giglio* material” refers to material that a defendant could use to *impeach* a key government witness.

⁵ The Department of State’s Attorneys and Sheriffs have asked, on an ongoing basis, that each State’s Attorney submit any *Brady/Giglio* letters in their possession to the Office of the Executive Director at the Department of State’s Attorneys and Sheriffs so that all letters authored by State’s Attorneys could be kept in a file for use by all State’s Attorneys and Deputy State’s Attorneys. It should be noted that the file maintained by the Department does not include any material or letters from the Office of the Vermont Attorney General, nor should the Department’s file be construed to summarize all *Brady/Giglio* letters or material. The Department only maintains, on file, what it has been sent by State’s Attorneys.

⁶ See V.R.Prof.Cond. 3.8 (“[A prosecutor in a criminal case] ... shall 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 ...”).

⁷ See V.R.Cr.P. 16. The law, as defined by the United States Supreme Court, and the laws and rules of Vermont, establish a prosecutor's duties and obligations to a criminal defendant.

- Not all acts of police misconduct would necessarily be included in *Brady/Giglio* disclosures by letter or other means—only those incidents that fall under the umbrella of the doctrine, related to impeachment and exculpatory material, requiring disclosure in a particular criminal case or cases.
 - For example: an officer is found to have routinely and purposely overreported the amount of overtime that the officer worked and lied about what was entered into the evidence locker—this is *Brady/Giglio* material and triggers disclosure to defendants where “that officer” was involved in “that defendant’s” case.
- Simply put, *Brady/Giglio* requires that prosecutors disclose impeachment and exculpatory information to defendants. *Brady/Giglio* does not require that prosecutors disclose impeachment and exculpatory information to the public.
- In practice, prosecutors may often send a letter to a specific defense attorney, or to the defense bar in a particular jurisdiction, noting that there is *Brady/Giglio* material related to a certain officer. Disclosures may also take the form of a criminal history record, emails, voicemails, text messages, videos, photographs, audio recordings etc. Further, *Brady/Giglio* disclosures may relate to non-officer involved conduct concerning other witnesses or involved persons.
- The purpose of a “*Brady/Giglio*” disclosure has, by definition, nothing to do with the employment or certification status of a particular law enforcement officer. The purpose of a “*Brady/Giglio*” disclosure is to ensure that defendants in those cases where certain officers are involved are aware of *Brady/Giglio* material relating to those officers.

2022 “BRADY/GIGLIO” DATABASE STUDY COMMITTEE

- The *Brady/Giglio Database Study Committee Report (2022, Act 161, Sec. 2)*,⁸ dated November 30, 2022, outlined, in general terms, the bounds of what the *Brady/Giglio* doctrine is and is not, and the unresolved nature of many of the issues surrounding record keeping and procedural steps associated with maintenance of *Brady/Giglio* material in a centralized manner.⁹
- The *Brady/Giglio Database Study Committee* (“the Committee”) discussed Act 161’s eight questions and agreed to collect separate written comments and responses from Committee members for inclusion in the report for each of the eight questions.¹⁰ The decision to collect the comments of individual Committee members was agreed upon by all members because there was a lack of consensus among all members as to the substance of each of the eight questions. There was also a lack of consensus as to whether a potential database should exist, and if such a database were to exist whether it should be designed for prosecutors or for the public, or both. If a database were to exist there was also a lack of consensus concerning where and how such a database would be maintained.
- Notably, Legislative members of the Committee noted a preference to review a compilation of separate responses of Committee members as the most helpful pathway for the Committee to proceed, especially if the General Assembly is to consider any legislative action or further study.

⁸ (2022 *Brady/Giglio* Study Committee Report: [FINALREPORTCOMBINED1.pdf \(vermont.gov\)](#)).

⁹ The Department of State’s Attorneys and Sheriffs notes that further study should include input from at least the following entities: the Vermont Association of Chiefs of Police, the Vermont Criminal Justice Council, the Vermont State Employees’ Association, the Vermont Troopers’ Association, any and all labor unions that represent any members of the Vermont law enforcement community, the Vermont League of Cities and Towns, Municipal Police Departments and Agencies, the Attorney General’s Office, the Office of Professional Regulation, the Vermont Department of Public Safety, the Vermont Department of State’s Attorneys and Sheriffs, and the Vermont Sheriff’s Association. Questions concerning employment law, labor law, constitutional due process, internet technology security and maintenance, rulemaking, resources, logistics, and staffing must be a part of any discussion of a public facing system.

¹⁰ The Committee also received substantive responses from stakeholders who were not appointed members of the Committee.

- The Committee discussed whether the Act’s eight questions would require further study by the General Assembly and stakeholders with expertise. For example, if a misconduct database is created and intended for use beyond what is required by *Brady/Giglio*, Committee members agreed that the eight questions might require further discussion, study, input, and expertise closely related to legal and public policy questions regarding labor and employment issues.
- In sum, the Committee could not come to a consensus but provided extensive resources and responses, noted in the report and in response to the Act in support of future discussion.¹¹

FURTHER COMMENTS CONCERNING LEGISLATIVE INTEREST¹² IN THE “BRADY/GIGLIO” DOCTRINE IN THE CONTEXT OF LAW ENFORCEMENT OVERSIGHT

- In the context of the regulation of the law enforcement profession, the fact that a *Brady/Giglio* letter exists is not what is important, nor the act of the disclosure to the defendant—what is important, unrelated to the *Brady/Giglio* duty, is the potential content and substance of conduct by a law enforcement officer that may overlap with what is captured in a *Brady/Giglio* disclosure (separate from the *Brady/Giglio* doctrine).
- In media reports and public perception alike, there is often a foundational misunderstanding of the purposes of a *Brady/Giglio* disclosure, a *Brady/Giglio* “letter,” *Brady/Giglio material*, and the *Brady/Giglio* “duty” in the context of a prosecutor’s constitutional and ethical obligations to disclose impeachment and exculpatory evidence relating to law enforcement officers.
- The disclosure of *Brady/Giglio* material or preparation of a letter by a prosecutor does not equate to a finding of misconduct as described within 20 V.S.A. § 2401, nor the universe of potential police misconduct.¹³
- It is important to remember that *Brady/Giglio* disclosures by prosecutors often involve *non-law-enforcement* related disclosure of material. For example, an eyewitness who is not a law enforcement officer has a prior conviction for *false-information-to-a-police-officer* (“FIPO”). The FIPO prior conviction of the eyewitness is *Brady/Giglio* material that must be disclosed but has nothing to do with a law enforcement officer.
- Conflation and entanglement of the *Brady/Giglio* doctrine and law enforcement oversight is predictable – yet it is critical to distinguish the two areas of law and policy.

¹¹ During Committee discussions the Department of State’s Attorneys and Sheriffs made clear to note that any expansion or conflation of statutory authority, concerning the *Brady/Giglio* doctrine, should not infringe upon, confuse, or undermine each prosecutor’s constitutional and ethical duties to assess and disclose information consistent with the constitutional standards set forth in *Brady*, *Giglio*, and their progeny. Caselaw clearly mandates a liberal or permissive approach to disclosure of *Brady/Giglio* material by prosecutors.

¹² See posted documents concerning related discussions regarding H.251 (2023): [H.251: Written Testimony - Discussion Memo](#) Tim Lueders-Dumont & [H.251: Written Testimony, 2019a-166-enr](#). Tim Lueders-Dumont.

¹³ There are multiple examples where negligence, rather than intentional acts or omissions, serves as the basis for a *Brady/Giglio* disclosure. Moreover, the issuance of a *Brady/Giglio* letter or disclosure of such material does not categorically result in declination of cases or prosecutorial refusal to utilize an officer as a witness. Some jurisdictions maintain so-called “do not call lists,” which are frequently conflated and confused with the existence of impeachment or exculpatory evidence on an officer.