

DISCUSSION MEMORANDUM

To: Representative Michael McCarthy, Chair, House Committee on Government Operations; Representative Matt Birong, Vice-Chair, House Committee on Government Operations

From: Tim Lueders-Dumont, Esq., Department of State’s Attorneys

Date: February 28, 2023

Re: **H.251 An act relating to the issuance of a *Brady* or *Giglio* letter as misconduct under jurisdiction of the Vermont Criminal Justice Council**

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*The following is submitted for educational, informational, and discussion purposes.*

**BRADY/GIGLIO BACKGROUND**

Unrelated directly to H.251, the [Brady/Giglio Database Study Committee Report \(2022, Act 161, Sec. 2\)](#),<sup>1</sup> dated November 30, 2022, outlines, 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.<sup>2</sup>

First, what is the *Brady/Giglio* doctrine? In *Brady v. Maryland*,<sup>3</sup> 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.”<sup>4</sup> In *Giglio v. United States*, the United States Supreme Court held that the exculpatory evidence that prosecutors must disclose includes “impeachment” information

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<sup>1</sup> (2022 *Brady/Giglio* Study Committee Report: [FINALREPORTCOMBINED1.pdf \(vermont.gov\)](#)).

<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

indicating that a witness may not be credible or may be biased.<sup>5</sup> 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.<sup>6</sup>

It has become the practice of some prosecutors, in their exercise discretion, 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.<sup>7</sup>

In Vermont, the discovery obligations established in *Brady* and *Giglio* are fully encapsulated by Rule 3.8 of the Vermont Rules of Professional<sup>8</sup> and Rule 16 of the Vermont Rules of Criminal Procedure.<sup>9</sup>

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. *Brady/Giglio* material, whether in the form of a letter or other means, is not mechanism to highlight all 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*.

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 they entered into the evidence locker—this is *Brady/Giglio* material and triggers disclosure to defendants

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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 ...”).

<sup>9</sup> See V.R.Cr.P. 16.

where “that officer” was involved in “that defendant’s” case. That said, even in this example, it is possible that the *Brady/Giglio* material that has been disclosed will not come into evidence at trial if it is deemed not admissible or not relevant under the rules of evidence by the court via a *motion in limine*.

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 the defense bar noting that there is *Brady/Giglio* material related to a certain officer. The purpose of this “*Brady/Giglio*” disclosure has nothing to do with the employment or certification status of the officer—the purpose of the disclosure is to ensure that the defendants in those cases where that officer has been involved is aware of the *Brady/Giglio* material.

In 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).

#### **COMMENTS AND DISCUSSION POINTS CONCERNING H.251**

As drafted and introduced, H.251 appears premised upon a misunderstanding of the purposes of 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.

**As a potential helpful reference point, in 2019, Colorado** adopted Senate Bill 19-166 which extended the Peace Officer Standards and Training Board’s jurisdiction to include de-certification for official findings of “untruthfulness.” **Colorado distinguished “untruthfulness” from *Brady/Giglio* matters** – and ultimately kept the issue of disclosures/information separate from the question of de-certification. The Colorado standard to decertify for untruthfulness requires that the officer knowingly made an untruthful statement concerning a material fact or omitted a material fact in:

- (1) an official criminal justice record,
- (2) while testifying under oath,
- (3) during an internal affairs investigation, or
- (4) during an administrative investigation and/or disciplinary process.

The Colorado law also requires (and relies upon) an effective internal affairs process at the local/agency level.

It is critical that all stakeholders understand that 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. There are multiple examples where the 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.

It is important to remember that *Brady/Giglio* disclosures by prosecutors often involves *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.

**The Department of State’s Attorneys and Sheriffs has a clear and compelling interest in assuring statutory authority does not infringe upon 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. The concept of an unelected board “rescinding” or overriding the authority of an elected State’s Attorney (or sworn deputy) or the Attorney General (or Assistant Attorney General) would be opposed by State’s Attorneys and would create a series of potential conflicts and issues. Caselaw clearly mandates a liberal or permissive approach to disclosure of impeachment information by prosecutors, with clear decisions indicating that suppression of potentially exculpatory or impeachment evidence may be an error of a constitutional dimension.**

### **POTENTIAL RECOMMENDATIONS FOR REVISION OF H.251**

#### **1. Revise Section 1.**

(H) bias, untruthfulness, or other potentially exculpatory ~~and or~~ impeachment evidence subject to disclosure resulting in the issuance of a Brady or Giglio letter by a prosecutor that significantly undermines the officer’s credibility before a court, board, or commission.<sup>10</sup>

In conformity therewith, revised Section 3 to provide:

or 2401(2)(H) (~~issuance of a *Brady* or *Giglio* letter~~ significantly compromised credibility) of this chapter.

The revised definition for the proposed 20 V.S.A. § 2401(2)(H) gives flexibility to the Vermont Criminal Justice Council in two ways. First, the Council could determine that the material is not in its view “subject to disclosure” without need to challenge or rescind the prosecutor’s discretion and decision to do so. Second, there is flexibility in whether such material or information constitutes a significant impact upon the officer’s credibility. In this regard, the Council would have substantial leeway through its rulemaking to define these standards consistent with established law and best practices.

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<sup>10</sup> This language noted above could be adapted to define “significantly undermining” credibility – e.g. “this includes situations where testimony of the officer would irrevocably taint the criminal justice process, leading to a loss of public trust, potential acquittals of guilty defendants, and endangering the safety and welfare of victims.”

**2. Strike Section 2 in its entirety.** For many of the reasons stated above what *Brady/Giglio* is and is not, Section 2 should be removed from consideration. The Vermont Criminal Justice Council, nor any other entity, absent a fundamental change to the United States Constitution and the Vermont Constitution, and Vermont rules, cannot rescind a *Brady/Giglio* letter issued by a prosecutor, even if Vermont were to pass a law, nor rescind the disclosure of any associated *Brady/Giglio* material because *Brady/Giglio* is a *duty to disclose certain important information to a defendant*. By definition, *Brady/Giglio* disclosures to a defendant are not an employment or certification action taken against a law enforcement officer.