

BRADY/GIGLIO AND OFFICER INTEGRITY

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Training Objectives

- Acquaint participants with *Brady/ Giglio and their application to peace officer integrity*
- Provide perspectives as the issues that surround *Brady/ Giglio*
- Identify issues that may present themselves in the future
- Give guidance/examples to developing *Brady/ Giglio disclosure procedures for LE agencies*

What the heck is “Brady”?

- Brady v Maryland, 373 U.S. 83 (1963)
- United States v. Giglio, 405 U.S. 150 (1972)
- U.S. v. Bagley, 473 U.S. 667 (1985)
- Kyles v. Whitley, 514 U.S. 419 (1995)
- Strickler v. Green, 527 U.S. 263 (1999)

Brady v. Maryland

- 1963 Capital Murder case
- Government had a duty to disclose material exculpatory evidence
- Failure to do so violated due process –where the evidence is material to either guilty, innocence of the accused or punishment
- There is no regard for good or bad faith of the prosecutor

Brady v. Maryland, USSCt 1963

Under the Constitution, due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment.

This requirement includes evidence that may be used to impeach the prosecution's witnesses, including police officers.

Brady v. Maryland, USSCt 1963

Police officers and police agencies are, for purposes of

Brady, considered to be part of the prosecution team.

They must therefore make the prosecutor aware of

any evidence that may be favorable to the accused.

United States v. Giglio

- Brady rule includes evidence that could be used to impeach a witness
- When the reliability of a given witness may be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the rule regardless of whether withheld in good faith

U.S. v. Bagley

- No legal distinction between exculpatory evidence and impeachment evidence for purposes of Brady rule
- Favorable evidence is material if there is a reasonable probability that the result would have been different if defense had known
- “harmless error” standard does not apply – issue is whether evidence is material

Kyles v. Whitley

- Knowledge imputed to the prosecution includes knowledge that the police may have
- Prosecutor has a duty to learn of any favorable evidence known to others acting on behalf of the government....this includes the police

Impeachment and Exculpatory Evidence

Examples:

- Government's obligation to disclose favorable evidence under Brady covers not only material exculpatory evidence but also information that could impeach government witnesses
- Agreements exchanging testimony for money or favorable treatment
- The fact the witness suffers from hallucinations
- Efforts by one witness to improperly influence the testimony of other witnesses
- History of untruthfulness
- Other conflicting statements made by witnesses

Material Exculpatory Evidence

Examples:

- Prior inconsistent statements of key witnesses
- Government witnesses had previously filed a false report
- Information undermining the credibility of witness identification of defendant
- Doctor's report following an autopsy which conflicts with later trial testimony

Brady Rule Examples – Exculpatory Evidence

Detective Jones is handling a rape investigation and develops information of a potential suspect who was seen leaving the scene in a white pick-up truck. The investigator displays a photo line-up to the victim and she identifies the suspect, who does own a white pick-up. No forensic evidence connecting the suspect to the crime is initially discovered.

Brady Rule Examples - Exculpatory Evidence

During the course of the investigation, a witness is located during the area canvass who claims to have seen a beige pick-up truck in the area driven by a dark skinned male in his 30's. The identified suspect is a light skinned male in his 20's. The investigator does not document this information in his report because it contradicts the probable cause he has developed in his case.

Brady Rule Examples – Exculpatory Evidence

Detective Smith is handling a murder investigation. He develops a suspect who is of limited intelligence and brings him to the station for questioning. After questioning him over a period of days, he informs the suspect that if he confesses, he will be allowed to go home. The suspect confesses and is taken into custody and charged with murder. Detective Smith fails to document his promise of allowing the suspect to go home in exchange for confessing, and does not inform the prosecutor.

Brady Rule Examples – Exculpatory Evidence

Detective White is handling a robbery investigation in which a victim is shot. He discovers a footprint near the scene, which he has photographed and lifted. He subsequently arrests a suspect who is wearing a size 9 shoe. The footprint is a size 11 sneaker and Detective White discards the footprint evidence believing it is unrelated to the crime. He fails to document this information.

Brady Rule Examples – Exculpatory Evidence

Detective Evans displays photo line-ups to three witnesses. Two of the witnesses identify a suspect; however, the third witness fails to identify anybody. Detective Evans documents the two positive identifications but does not document that the third witness failed to identify the suspect and Detective Evans never informs the prosecutor.

Brady Rule Examples – Officer Credibility Concerns

- Officer investigated, but no finding of violation
- I/A finding that officer had violated policy not relevant or unrelated to truthfulness
- I/A finding that officer made a false or misleading report or statement
- I/A finding that officer had violated policy touching on relevant trait or trial issue
- I/A finding that officer covered up or attempted to cover up

Strickler v. Green

The three essential components of a Brady claim are:

- Evidence favorable to the defendant because it is exculpatory or impeaching;
- The state willfully or inadvertently suppressed the evidence; and
- Prejudice resulted

Brady and Law Enforcement Organizations and their Employees

- ▣ Question – does Brady mean we have to disclose evidence that does not show the defendant to be innocent, but mere casts doubt on the testimony of the prosecuting witness?
- ▣ YES!

UNTRUTHFULNESS

The term “untruthfulness” refers to false statements, false reports, or intentionally incomplete statements and reports.

The

false statements involve all aspects of the job, not just enforcement and criminal investigations. See *Dreary v. Gloucester*, 9 F.3d 191 (1st Cir. 1993) (Ten-year-old disciplinary finding that an officer falsified overtime records admitted for impeachment purposes); *United States v. Williams*, 1997 WL 335794 (D.D.C. 1997) (New trial ordered because FBI failed to disclose that an agent who was a witness at trial had, fifteen years

earlier, received a letter of reprimand for forging an informant’s signature on a receipt and lying about the forgery under oath).

BIAS

Bias includes prior records allegedly showing an officer's bias against an identifiable group, i.e., African-Americans or gays. Bias could also be shown toward a particular person or family, based upon prior conduct or statements.

CRIMES

“Crimes” committed by officers which must be disclosed include any crimes other than motor vehicle misdemeanors, DV, or DUI. Even motor vehicle offenses must be disclosed to the prosecutor when the criminal case involves similar conduct.

Brady and Law Enforcement Organizations and Officers

- The belief that Internal Affairs files are confidential and not subject to closure is mistaken
- The adage that the “defendant is on trial, not the officer, has been substantially eroded
- In certain circumstances, the officer’s prior conduct is relevant in the criminal trial because that conduct reflects on the officer’s credibility

ARE PENDING INVESTIGATIONS OF AN OFFICER SUBJECT TO DISCLOSURE?

Disclosure will assure the integrity of a criminal conviction. The general rule is that unverified or speculative information is not subject to disclosure. However, the decision to disclose such information is best left to the prosecutor.

Potential Brady Material Affecting Officers

- Misconduct involving moral turpitude, untruthfulness
- Bias
- Moral turpitude
- Integrity
- Misdemeanor convictions involving moral turpitude
- Contrary statements about facts of the case
- Evidence undermining the officer's Expertise
- False reports by the Officer in other cases
- Evidence of drug or alcohol addition *

ULTIMATE USE OF THE INFORMATION

Brady information must be disclosed to the prosecutor. The prosecutor must then decide whether to disclose the information to the defense. It is very possible, however, that the information may not be admissible in court. Only that evidence which the court finds to be relevant for impeachment purposes can be used.

THE BOTTOM LINE

- The Department (Officers) should make sure the prosecutor is aware of any information about the officer that, if revealed, would be favorable to the defense.
- The Department (Officers) must disclose to the prosecutor anything in the officer's background that reflects bias, untruthfulness or criminal activity.

THE BOTTOM LINE

- The responsibility to disclose the information belongs to the prosecutor; let them make the decision. You do not want the agency/officer to be held responsible for the retrial of a case due to non-disclosure to the prosecutor.
- All of this applies to both felony and misdemeanor cases.

Prosecutor's Ultimate Role

Prosecution

- Obtain
- Review
- Disclose
- Argue

Non-traditional Sources of Brady Material

- Early Warning Systems –EWS
- Supervisor notes
- E-mails
- Inter-office communications or memorandums
- Annual employee reviews
- Judicial report

Now you know the law, how does it actually work?

- What is the “Brady List”?
- How does an officer get on the list?
- What does being on the list actually mean?
- Can an officer ever get off of the list?

“Brady List”

A Giglio or Brady list is a list compiled usually by a prosecutor's office or a police department containing the names and details of law enforcement officers who have had sustained incidents of untruthfulness, criminal convictions, candor issues, or some other type of issue placing their credibility into question.

Placement On The List

- Police Department/Agencies must disclose information regarding potential Brady/Giglio material to prosecutors
- Prosecutors will then review the information to determine what actions will be taken next

Placement On The List

- Both the law enforcement agency and the prosecutor's office should maintain the list of disclosures
- Prosecutors will then review the disclosures and make case by case determinations as to how to handle the information

What actual issues trigger a Brady Disclosure to Prosecutors?

- The following is not about exculpatory evidence
- Referring to acts/incidents involving law enforcement officers that could call their credibility into question.
- Not just acts of dishonesty.

Hamilton County, OH Prosecutors Request The Following:

- Any criminal record of any witness, or any criminal case pending against any witness, whom the prosecution anticipates calling.
- Information, known to the Department, that casts doubt on the credibility or accuracy of a witness or evidence.

Hamilton County, OH Prosecutors Request The Following:

- Information, known to the Department, regarding any mental or physical impairment of any governmental witness that would cast doubt on his or her ability to testify accurately and truthfully at trial.
- A finding of misconduct by the Civil Service Commission or a completed internal investigation that reflects on an officer or other member of this Department's truthfulness, bias, or moral turpitude. This includes employees under suspension.

Hamilton County, OH Prosecutors Request The Following:

- Evidence that a proposed witness has a racial, religious, or personal bias against a defendant individually or as a member of a group.
- Other information which may be considered as appropriately disclosable Brady material reflecting upon an officer's truthfulness, honesty, bias or misconduct includes, but is not limited to, the following developed from relevant case law:

Hamilton County, OH Prosecutors Request The Following:

- (i) lying to superiors during internal/administrative police investigations;
- (ii) falsifying police reports or making misleading reports;
- (iii) planting evidence;
- (iv) theft of evidence in police custody;
- (v) failed polygraphs;
- (vi) inappropriate records checks of detainees or witnesses;
- (vii) any history of lying in the process of testifying or preparing affidavits under oath

Maricopa County Review Process

- Established a review committee for Brady/Giglio disclosures
- Placement on the “Brady List” is not automatic after a disclosure from LE
- All LE disclosures (called referrals) are vetted through a committee made up of Criminal Chief Prosecutors and LE Liaison

Maricopa County Review Process

- Officers are placed on the “Brady List” after a preponderance of the evidence finding that the referral is Brady/Giglio material
- Once a finding is made, the officer is sent a letter describing the committee’s finding
- Will review future administrative findings to determine if placement on the list is still warranted

Cincinnati PD Policy

- Modeled closely to what the Hamilton County Prosecutors requested
- Went through the Cincinnati Police Department Manual or Rules and Regulations and matched specific rule violations with Brady/Giglio requested information
- Created a SOP whereas specific violations were deemed mandatory disclosures

Cincinnati PD Policy

- Other violations can trigger disclosure, but more investigation is warranted
- A database was created where specific violations automatically required additional tasks to close the investigation.
- Prior to closing, there must be an indication of whether disclosure was made to Prosecutors

Can anyone request the Brady List?

- Jurisdictions treat the information differently
- Some jurisdictions are able to send the information directly to the prosecutors office without any formal request
- Other jurisdictions protect personnel/disciplinary files and are only turned over after specific requests/court motions are filed


Can anyone request the Brady List?

- It is important to know and understand the laws procedures within your particular jurisdiction
- There are other groups that have sought Brady/Giglio material/lists other than the prosecutors office

Media Interest In Brady Lists

FOX 19 NOW
FOX19NOW.com

CRIME
Have officers patrolling your neighborhood been convicted of crimes, lied on job?



Raw interview with Butler Co. Prosecutor Mike Gmoser on the Brady List
By [Jennifer Edwards Baker](#) | October 10, 2019 at 9:56 AM EDT
Updated October 11 at 4:10 AM

CINCINNATI (FOX19) - Have the police who patrol your community lied on the job or been convicted of a crimes?

Do you know?

Do prosecutors?

They're supposed to.

Media Interest In Brady Lists

A more than 50-year-old Supreme Court ruling requires prosecutors to seek and disclose evidence to defense attorneys and the accused that is material to his or her guilt or punishment. This includes evidence about their untruthfulness; certain prior criminal convictions and evidence of bias; excessive use of force.

We asked prosecutors across the Tri-State – from Hamilton County to Warren County to Northern Kentucky – to give us their lists, or a copy of their “Brady List.”

Most said they do not keep an actual list and some told us they don’t have any issues so there simply is no need for one.

One prosecutor is even proud to say he keeps information from the public.

Media Interest In Brady Lists

“In Butler County, eggs are still cheaper in the country,” Prosecutor Mike Gmoser said. “I can still do it without a list. I can do it through the grand jury. It keeps it secret that way.”

The Hamilton County Prosecutor’s Office does keep a lengthy and detailed list, one that currently has more than 100 officers.

They promptly handed it over a few hours after we asked.

“We look for anything that a defense attorney might be able to use to impeach an officer’s testimony such as untruthfulness, being fired for using excessive force, making racial slurs, etc...” said Julie Wilson, a spokeswoman for the prosecutor’s office.

Media Interest in Brady List

“We rely on law enforcement agencies to send us the information and, after we review the information, we decide who goes on the list. Each police department/agency is responsible for notifying our office of officers in their employ who potentially have Brady issues. Prosecutor Deters periodically sends a letter to each department/agency reminding them of their obligation in this regard.”

Their list includes mostly officers from Cincinnati police and deputies or correction officers from the Hamilton County Sheriff’s Office, the two largest agencies in Hamilton County.

Some of the highest-ranking officers in the list include two who appear on their twice: the

Media Interest in Brady Lists



Incidents					
14.		Colerain Township	Terminated as of April 2015	<ul style="list-style-type: none"> • Departmental Finding of Dishonesty • Currently in arbitration. If he wins, we still disclose because his own agency made findings of dishonesty. 	05/13/2015, <u>MANDATORY DISCLOSURE</u> per Phil Cummings.

(**Below names/incidents added to list 7/6/2016 by Phil Cummings/Appellate Division*****)**

	Officer's Name & Badge No.	Municipality	Date(s) of Incidents	Findings	Date & Disclosed to Defense
15.		CPD	2/11/15	Plead Guilty to Deer Regulation - Section 1533.11 of OAC - Minor Misdemeanor - Fined \$240 - Violation of CPD Rule 1.02 (Criminal Conviction)	<u>MANDATORY DISCLOSURE:</u> Criminal Conviction of State's Witness. Prosecutor to Argue Minimal Relevance/Lack of Impeachment Value at Trials
16.		CPD	6/30/2014	Plead No Contest to Attempted Tampering with Evidence - R.C. 2923.02 and Illegal Use of a Minor in Nudity Oriented Material - R.C. 2907.323. Sentence: 1 Year ODC - Violation of CPD Rule 1.02 (Criminal Conviction)	<u>MANDATORY DISCLOSURE:</u> Criminal Conviction of State's Witness. Terminated by CPD

Media Interest in Brady List



MANDATORY DISCLOSURE OF IMPEACHING EVIDENCE TO PROSECUTORS

Per Brady and Giglio, this information must be disclosed to defense counsel in discovery

	Officer's Name & Badge No.	Municipality	Date(s) of Incidents	Findings	Date & Disclosed to Defense
1.	[REDACTED]	CPD	11/18/2009	IIS of CPD found Kinney used Excessive Force (against Dewayne White) and Kinney also sustained a Rule 5.01 Dishonesty Violation	<u>DISCLOSURE:</u> Beginning Feb. 2013. Bill Breyer prepared a brief write up for Prosecutors to use. See doc. #00416319. *Media articles (Fox 19 & Cinti Enquirer) also written about this.
2.	[REDACTED]	CPD	11/18/2009	Rule 5.01 Dishonesty Violation	<u>DISCLOSURE</u> (As of Feb. 2013) See doc #00416319
3.	[REDACTED]	Springfield Twp. PO	Prior to 3/26/2012	*Internal Investigation Report of Acts of Dishonesty dated 3/26/2012 *Terminated by Springfield Township effective 4/4/2012	<u>DISCLOSURE:</u> HCPROS Memo sent 4/12/12 to all criminal prosecutors informing them of violation and officer's termination.
4.	[REDACTED]	North College Hill Police (formerly)	8/21/2012	P.O. Roos indicted federally in August 2012 for his involvement in Marijuana trafficking conspiracy/money laundering scheme (11 total charged)	<u>DISCLOSURE:</u> *HCPROS Memo sent 8/23/2012 to all prosecutors alerting them to possible discovery issues with this officer. *In October 2013 Roos sentenced to probation in federal court (No. 1:12-CR-080-11) to Ct. 14 of indictment, and agreed to resign his position as a police officer and not seek reinstatement.

Brady Websites

- Bradycops.org
- Website attempting to compile a national list of officers placed on Brady lists

Consequences of Placement on the “Brady List”

- Stigma or damage to officer’s reputation
- Limit job assignments
- Limit advancement through the agency
- Possibly termination if the officer is no longer credible to give testimony and no other administrative assignment is available in the department

- If you are a Chief or Sheriff, what do you do?

Can An Officer Be Removed From the List?

- An original disclosure that is later determined to be unfounded or not sustained could be a basis to remove the officer from the list
- Some courts have required a removal from the list after an arbitrator has exonerated the officer
- That Depends (the great Lawyer answer)

Trends

- ▣ Legislative Intervention
- ▣ 13 States have passed legislation specific to “Brady Lists”
 - Check your state and prosecutor
- ▣ Legislate
 - Notice
 - Ability to appeal
 - Restorative Justice (ability to get off list)
 - Personnel actions

Questions?